Dialectical tensions in the jurisprudence of the International Criminal Court: Fair process, the demands for justice and the expectations of the international community

by

Anthea van der Burg

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Supervisor: Prof Gerhard Kemp

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DECLARATION

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ABSTRACT

The fundamental question, which the notion of fair trial rights imposes is to what extent can a trial be fair to those accused of the most heinous crimes affecting the whole of humanity?

In attempting to find an answer, this dissertation explores the general human rights instruments, the Rome Statute and the selected case law at the ICC; including six judgments *Lubanga, Katanga, Bemba, Gbagbo, Ble Goude and Ntaganda.* The dissertation therefore sought, on the one hand, to assess the extent to which fair trial principles have been applied in case law and secondly, to assess in light of the growing jurisprudence of the ICC, to what extent one can say that fair trial rights are protected at the ICC, given the competing demands of the international community, the victims of the most serious crimes under international law, and the accused.

The dissertation is testing a proposition: The International Criminal Court, as a *criminal* court, should have the realistic but defensible focus of ending impunity via an accused-centred procedural regime that also, but not primarily, gives content and effect to the other competing interests of victim's rights and the demands of the international community.

The dialectical tensions between the rights of the accused, the participation of victims and the interests of the international community are explored through the case law analysis.

The Rome Statute as the founding instrument of the ICC projects the ICC (wrongly) as primarily a *human rights court* with a broad mandate to end impunity and enhance world peace. In reality, the ICC is, of course, a *criminal court* with one paramount task: to determine, via fair criminal trials, whether accused persons are guilty of crimes within the jurisdiction of the ICC.

It is argued that more emphasis or at least a balanced approach should be applied between the interests of victims and those of the accused. In many instances (as illustrated in this dissertation) the court has unfortunately not succeeded in protecting the fair trial rights of the accused nor ensured that there is equality of arms within trial proceedings.

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I dedicate this dissertation and the achievement of this degree to my late father, Anthony van der Burg, who I know would be very proud. I am eternally grateful to my mother for her constant encouragement throughout this process.

I particularly wish to thank my children, Taryn and Ethan, for their patience, encouragement and love and I hope that in some way, I have inspired them to work hard to accomplish everything they set their hearts on achieving in life.

I thank my family, my sisters and my friends as well as my manager and colleagues whose invaluable encouragement served to sustain me through this journey.

Lastly, I dedicate this to all women who have been through tough times, come from very little and who doubt their abilities, to believe that all things are possible, with patience and perseverance…if you believe in yourself…you can do anything!

LIST OF ABBREVIATIONS

Amended DCC	Corrected Revised Second Amended Document Containing the Charges
API	Additional Protocol I
APII	Additional Protocol II
CAR	Central African Republic
DCC	Document containing the charges
DRC	Democratic Republic of the Congo
ECHR	European Court of Human Rights
EEC	Elements-based chart
FNI	*Front des Nationalistes et Intégrationnistes*
FPLC	*Forces patriotiques pour la libération du Congo*
ICC	International Criminal Court
ICTR	Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International humanitarian law
Nuremburg Charter	Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis
OTP	Office of the prosecutor
PFLC	Patriotic Forces for the Liberation of Congo
Rome Statute	Rome Statute of the International Criminal Court
RPE	ICC Rules of Procedure and Evidence
TFV	Trust Fund for Victims
UCP	Union of Congolese Patriots
UNGA	United Nations General Assembly

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CHAPTER 1: INTRODUCTION

> "In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you [...] to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished."[1]

1 1 Introduction and background

The States that are parties to the Rome Statute of the International Criminal Court ("Rome Statute") are those sovereign States that have ratified or acceded to this treaty that established the International Criminal Court ("ICC"). The ICC is the first permanent, treaty-based international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community. On 17 July 1998, the international community reached a historic milestone when 120 States adopted the Rome Statute, which forms the legal basis for establishing the permanent ICC.[2]

The Rome Statute was adopted at a diplomatic conference in Rome on 17 July 1998 and entered into force on 1 July 2002. Currently, the Rome Statute has 139 signatories and 122 states are states parties thereto, including all of South America, nearly all of Europe, most of Oceania and roughly half the countries in Africa.[3] South Africa signed the Rome Statute on 17 July 1998 and ratified it on 27 November 2000.[4]

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[1] The statement of Secretary-General Kofi Annan to the International Bar Association in New York on 11 June 1997. See United Nations: Meetings, Coverage and Press Releases "International Criminal Court Promises Universal Justice, Secretary-General tells International Bar Association (12 June 1997) *Office of Legal Affairs – United Nations* Press Release SG/SM/6257 <http://legal.un.org/icc/general/overview.htm> (accessed 25-07-2017).

[2] ICC "About the ICC" (2002) *International Criminal Court* <http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx> (accessed 25-07-2017).

[3] Rome Statute of the International Criminal Court (last amended 2010) 2187 UNTS 90.

[4] ICC "State Parties to the Rome Statute" (undated) *International Criminal Court* <https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> (accessed 25-07-2017).

The ICC has jurisdiction to adjudicate over individuals accused of the international crimes of genocide, crimes against humanity, war crimes and aggression. The temporal jurisdiction of the Court is also limited by Article 11 to crimes occurring after the entry into force of the Statute, namely 1 July 2002.[5] With respect to states that become party to the Statute after 1 July 2002, the ICC has jurisdiction only over crimes committed after the entry into force of the Statute with respect to that state.

The ICC is set apart from similar tribunals by virtue of the complementarity regime between national and ICC jurisdictions. Complementarity allows states to take ownership of the international criminal justice process by performing the investigations and prosecutions themselves unless they are unwilling or genuinely unable to do so. Therefore, the ICC gives preference to domestic courts if these are willing and capable of conducting fair trials.[6]

Due to the broad authority of the ICC, many expectations were created by the establishment and implementation of this court, as it offered the promise of a leveller international playing field for justice.[7] In the pursuit of the promise of justice, particularly universal justice, it is imperative to ensure that adequate protection of the rights of the accused as enumerated in the Rome Statute is realised together with the expectations of victims and the international community.

1 2 Research problem and rationale

In understanding the establishment and significance of the ICC, it is important to understand the history that gave rise to the establishment of this court. The history is also important for understanding the development of international criminal law. In 1945, the International Military Tribunals for Nuremberg and Tokyo were established to prosecute high-ranking German and Japanese officials accused of crimes under

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[5] A different temporal jurisdictional regime applies to the crime of aggression, as defined in art 8*bis* of the Rome Statute. This is so because the crime of aggression only became part of the effective jurisdiction of the ICC on 17 July 2018, when the package of amendments to the Rome Statute adopted at the Kampala Review Conference of 2010, entered into force. See Res ICC-ASP/16/res.5 <https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf>.

[6] M du Plessis & L Stone *The Implementation of the Rome Statute of the International Criminal Court in African Countries* (2008) 4.

[7] Human Rights Watch "The Court of Last Resort" (29 June 2012) *Human Rights Watch* <http://m.hrw.org/news/2012/06/29/icc-court-last-resort> (accessed 25-07-2017).

international law.[8] In 1950, The United Nations General Assembly ("UNGA") unanimously affirmed the so-called Nuremberg Principles that emanated from the legal frameworks and jurisprudence of the post-war tribunals.[9] The Nuremberg legacy extended beyond the jurisprudence of the Tribunal and the adoption of the Principles. For instance, the Nuremberg jurisprudence on persecution as a crime against humanity, and the tireless efforts of the Polish lawyer Raphael Lemkin to have included "genocide" as a discrete crime against humanity in the indictments of the major accused persons at Nuremberg eventually led to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948.[10] Further, the criminalisation of violations of international humanitarian law as war crimes in the Nuremberg Charter was codified and further developed in the four Geneva Conventions of1949.[11] The Geneva Conventions require State parties to bring persons alleged to have committed or ordered to commit "grave breaches" of humanitarian law, regardless of their nationality, to trial before a national court or, if possible, before an international tribunal.[12]

In response to massive human rights violations in the Balkans, an International Criminal Tribunal for the Former Yugoslavia ("ICTY") was created in 1993. A similar tribunal, the International Criminal Tribunal for Rwanda ("ICTR"), was created the following year and in response to the genocide and massive human rights violations in that country. The United Nations Security Council created these tribunals.[13]

In 1994, the UNGA created an *ad hoc* committee to investigate the establishment of a permanent international criminal court. It was through this process that the ICC was created.[14] The ICC and the *ad hoc* tribunals are comparable as they are all created by a Statute and have very similar processes as well as, so a significant extent, the

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[8] M Caianiello & G Illuminati "From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court" (2000) 26 *NC J Int'l L & Com Reg* 407 413.

[9] Nuremberg Principles, UNGAOR, 5th session, Supp No 12, UN Doc. A/1316 (1950).

[10] 78 UNTS 277.

[11] 75 UNTS 31 (GCI); 75 UNTS 85 (GCII); 75 UNTS 135 (GCIII); 75 UNTS 287 (GCIV).

[12] Caianiello & Illuminati (2000) *NC J Int'l L & Com Reg* 416-417.

[13] J Norton "The International Criminal Court, An informal overview Loyola University Chicago" (2011) 8 *International Law Review* 84.

[14] R Blattmann & K Bowman "A View from Within, Achievements and problems of the ICC*"* 6 *J, International Criminal Justice* (2008) 711 712-713.

same substantive jurisdiction (with the crime of aggression added to the ICC's jurisdiction, thus making this court different from the *ad hoc* tribunals).[15]

The Rome Statute[16] in its preamble states that: "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation". Key fair trial principles are contained in Article 67 of the Statute, which means that even though the nature of the crime is serious and affects communities instead of merely one person or persons, the accused is still entitled to the fairness of proceedings, which has to be adhered to from arrest to conviction within the ICC. Hence, the human rights of the accused person are of paramount importance, even though the Preamble of the Rome Statute is not explicit about this (compared to the emphasis which the Preamble put on the quest to end impunity and the rights of victims).[17]

A challenge when prosecuting the most serious crimes of international concern; notably war crimes, crimes against humanity, genocide, and aggression, is the extent to which human rights of the accused are factored into the equation. A general point of departure is that every human being should always be treated fairly and humanely and with dignity. Within the context of the Rome Statute and its application to the trials at the ICC, the concept of fairness, particularly in relation to the rights of the accused, will be investigated in this study to establish the extent to which human rights have been afforded to the accused. The assumption is that the Rome Statute not only represents one of the boldest attempts by the international community to end impunity for the most serious crimes under international law but also serves as a normative roadmap for an emerging system of international criminal justice that is inclusive of fair trial rights.

In this regard, Article 21 of the Rome Statute lays down the different sources of applicable law. In addition to the rules of evidence, procedure and the elements of crimes, the ICC can have recourse to the applicable treaties, principles and rules of international law. The ICC can apply human rights treaties, customary international

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[15] Caianiello & Illuminati (2000) *NC J Int'l L & Com Reg* 433.

[16] Entered into force 1 July 2002.

[17] For the full text of the Rome Statute of the ICC, see UN Doc.A/CONF. 183/9, *International Legal Materials*, 1998, 999.

human rights law and general principles found in various legal systems. Moreover, Article 21(3) demands that the interpretation and application of the law, pursuant to this article, must be consistent with "internationally recognized human rights".[18]

The guarantee of the right to a free and fair trial is recognised in a number of international and regional human rights treaties. Human rights must, therefore, be weighed against the rights contained in the Rome Statute and the manner in which trials are conducted at the ICC.

This study essentially deals with the challenges of individual responsibility within collective atrocities. The ICC was established to deal with the worst crimes under international law, but with individual responsibility as a means to achieve justice. The primary aim is, therefore, to analyse the dialectics inherent in the structure of the Rome Statute and evidenced by the emerging jurisprudence of the ICC. The dissertation will analyse some of the early cases and subsequent judgments that illustrates the tensions and contradictions flowing from demands by the international community for justice, expectations of fairness, and the relative novelty of a rather formalised role for victims in the ICC processes.

While the crimes, by their nature, are often at the forefront of discussions about the role and function of the ICC, individual (fair trial) rights also come into play. The fair trial rights as enunciated in the Rome Statute includes the following: the right to legal advice, right to pre-trial disclosure, right to a speedy trial, right to silence and presumption of innocence. Fair trial rights further include the right to an independent and impartial tribunal, right to a fair hearing, right to public hearing, right to a hearing within a reasonable time, and the right to reasoned judgment.[19]

In measuring fairness, the principle of equality of arms must be observed throughout the trial process. This means that both parties (principally the prosecution and the defence) are treated in a manner ensuring that they have a procedurally equal position during the course of the trial and are in an equal position to make their case. It means that each party must be afforded a reasonable opportunity to present its case, under

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[18] M Fedorova, S Verhoeven & J Wouters "Working Paper No. 27: Safeguarding the Rights of Suspects and Accused Persons in International Criminal Proceedings" (June 2009) *Katholieke Universiteit Leuven* <http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp27.pdf> (accessed 25-07-2017).

[19] Article 67 of the Rome Statute.

conditions that do not place it at a substantial disadvantage *vis-à-vis* the opposing party.[20]

In domestic criminal trials, where the prosecution has all the machinery of the state behind it, the principle of equality of arms is an essential guarantee of the right to defend oneself. This principle would be violated, for example, if the accused was not given access to the information necessary for the preparation of the defence, if the accused was denied access to expert witnesses, or if the accused was excluded from an appeal hearing where the prosecutor was present. The dissertation will investigate the application of the principle of equality of arms by the ICC.

The right to a fair trial has gained international recognition via various instruments, for instance:

- The International Covenant on Civil and Political Rights ("ICCPR"): Article 14 (fair trial) and Article 15 (no retroactive penal laws).
- The European Convention on Human Rights ("ECHR"): Article 6 (fair trial), Article 7 (no punishment without law) and Protocol No. 7 (rights of accused persons). Another regional standard in Europe is the European Social Charter (fair trial rights under Articles 47 to 50).
- The African Charter on Human and People's Rights ("ACHPR"): Article 7 (fair trial). Article 26 imposes a duty on state parties to guarantee the independence of the courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the African Charter.

Various articles contained in the Rome Statute will also be analysed in great detail, specifically Articles 64, 66 and 67, which focus on the rights of the accused. Article 64(2) gives the accused the right to a fair and expeditious trial. Article 66 particularly emphasises the principle that an accused person shall be presumed innocent until proved guilty. Article 67 guarantees various rights pertaining to an accused person and protecting the rights of the accused.

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[20] Icelandic Human Rights Centre "Substantive Human Rights" *Icelandic Human Rights Centre* <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/substantivehumanrights/therighttodueprocess/> (accessed 26-07-2017).

The dissertation analyses the jurisprudence of the ICC by using the fair trial and international human rights framework of analysis. At the time of writing, the ICC has delivered only a small number of final judgments. There have thus far been 28 cases before the Court, with some cases having more than one suspect. ICC judges have issued 34 arrest warrants. Thanks to cooperation from states, sixteen people have been detained in the ICC detention centre and have appeared before the Court. Fifteen people remain at large. Charges have been dropped against three people due to their deaths. ICC judges have also issued 9 summonses to appear. The judges have issued 8 convictions and three acquittals.[21]

The dissertation will analyse not only the judgments on the merits but also relevant preliminary and pre-trial decisions and processes as set out in the theoretical framework espoused later in this chapter. Particular attention will also be paid to the important role of the Prosecutor in terms of the protection of the integrity and fairness of processes before the ICC.

1 2 1 Victim's rights

In the same vein as the accused's rights are contained in various international human rights instruments, so too are the rights of victims as set out below.

The plight of victims is often described as the shock by the international community to crimes committed against victims often in the context of scenes of atrocities against civilian populations for example in countries like Syria or the Central African Republic. It is these scenes which leave us believing that those responsible should be held to account but on the other hand it also leaves us wondering about the rights of the victims and the impact of these atrocities on victims, their families and loved ones.[22]

Victim's rights became more prominent as early as WWII when the human rights of victims (in times of war *and* peace) were codified in numerous international instruments. These conventions, as listed hereunder impose a duty on the violating party to provide compensation for violations:

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[21] ICC "About the ICC" (2002) *International Criminal Court* <http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx> <https://www.icc-cpi.int/about> (accessed 28-02-2019).

[22] L Moffett "Elaborating Justice for Victims at the International Criminal Court" (2015) 13 *J Int'l Crim Just* 281 282.

In the context of armed conflict:

(1) the Geneva Convention Relative to the Treatment of Prisoners of War;

(2) the Geneva Convention Relative to the Protection of Civilian Persons in Time of War; and

(3) Protocol I Additional to the Geneva Convention.[23]

And in peacetime, the ICCPR expanded victims' rights. To this end, Article 2(3) provides that each State Party to the ICCPR undertakes to:

> (a) ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) ensure that the competent authorities shall enforce such remedies when granted.

While the ICCPR does not mandate a state party to pursue a specific course of action to remedy the violation of protected rights, the language of this provision clearly envisages that the remedy is effective, of a legal nature and enforceable. Significantly, the ICCPR renders the “act of State” defence inapplicable by ensuring the duty to provide a remedy regardless of whether the violations were committed by persons acting in an official capacity. This limitation is fundamental to ensuring that human rights and international humanitarian law violations are remedied since these acts are often committed only by states.[24]

The European Court on Human Rights has interpreted two articles of the European Convention for the protection on Human Rights and Fundamental Freedoms as prescribing victims’ rights in the criminal process: as found in Article 2, right to life, and Article 13, right to an effective remedy. The European Court has granted ownership of victims' rights in the criminal process to the direct victim of the violation. Furthermore,

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[23] M Cherif Bassiouni “International Recognition of Victims' Rights” (2006) 6 *Hum Rts L Rev* 203 213-214.

[24] Cherif Bassiouni (2006) *Hum Rts L Rev* 214.

if the victim is dead or has consented to being, represented, the victim's next of kin may assert the victim's rights.[25]

Further, The International Convention on the Elimination of All Forms of Racial Discrimination 1965 ("ICERD") also exemplifies an explicit requirement that States provide a remedy. This convention requires States Parties to:

> "assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."[26]

Since the 1980s, international human rights norms related to the prosecution of certain grave crimes have emerged as more victim-focused[27]. Despite the fact that many domestic legal systems in the world already prescribed victim participation in the criminal process, international human rights law initially conceived of prosecutions solely as a state duty to the public and not as a private right. These victim-focused prosecution norms establish that prosecutions are an essential component of the remedy states owe victims of certain grave crimes. Moreover, these norms began to recognise certain participatory rights of victims in criminal proceedings, other than as witnesses.[28]

Since its inception, the United Nations has adopted two General Assembly resolutions dealing with the rights of victims:

(i) the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; and

(ii) the 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

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[25] R Aldana-Pindell "In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes" (2002) 35 *Vand J Transnat'l L* 1399 1419.

[26] Article 6 of the ICERD.

[27] Aldana-Pindell (2002) *Vand J Transnat'l L* 1412.

[28] 1413-1414.

The focus of the former was on victims of domestic crimes, while that of the latter is on victims of international crimes; more particularly, gross violations of international human rights law and serious violations of international humanitarian law. The Victims' Declaration has been described as "a reflection of the collective will of the international community to restore the balance between the fundamental rights of suspects and offenders, and the rights and interest of victims. The Victims' Declaration has also become known as the Magna Carta for victims.[29]

The Victims Declaration begins by offering a succinct definition of what it means to be a victim and then proposes four avenues of redress for victims: access to justice and fair treatment, restitution, compensation, and assistance. Bachrach opines that access to justice and fair treatment means that victims should be treated with "compassion and respect for their dignity" and furthermore, that they be entitled to "access to the mechanisms of justice and to prompt redress" for the harm that they have undergone.[30]

Building from the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the United Nations Commission on Human Rights, requested its Special Rapporteur, Theo Van Boven, to provide a set of proposed basic principles relating to reparations for victims under international law. These became known as 'The Van Boven Principles' and were continuously referred to during the numerous meetings that led to creating the ICC and primarily concerned the duty of every state under international law "to respect and to ensure respect for human rights and humanitarian law."[31]

The International Criminal Tribunals (ICTs) were created with the Victims Declaration partly in mind. Instead of creating *ad hoc* courts that would once again only concern themselves with the prosecution, the ICTY and ICTR were expected to fulfil their mandate while, to some extent, bearing in mind the victims' rights and concerns during the judicial process.[32]

Specifically, Article 20 of the Statute of the ICTY ("ICTY Statute") concerns the commencement and conduct of trial proceedings and affirms that "[t]he Trial

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[29] Aldana-Pindell (2002) *Vand J Transnat'l L* 1425.

[30] M Bachrach "The Protection and Rights of Victims under International Criminal Law" (2000) 34 *Int'l L* 7 9.

[31] 10.

[32] 12.

Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused *and due regard for the protection of victims and witnesses.*" The ICTY Statute also included a provision governing the conduct of criminal prosecutions in Article 22 which provided that the ICTY include "in its rules of procedure and evidence for the protection of victims and witnesses."[33]

1 2 2 The Rome Statute and the ICC – victim's rights

With this background to the development of victim's rights in mind, The Preamble of the Rome Statute states that:

> "Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity"
>
> "Recognizing that such grave crimes threaten the peace, security and well-being of the world,
>
> Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."

The Rome Statute, therefore, states its support for the rights of victims which are mainly contained in Article 68 of the Statute and reparations are contained in Article 75. The Rome Statute of the ICC allows for victims to participate in a legal capacity, not merely as witnesses or recipients of reparations throughout most stages of the accountability process, from the investigation stage through to the trial itself.[34]

Article 15(3) of the Statute initiates the victim's participation with their referring information to the prosecutor with the aim of initiating a preliminary examination of a certain situation, but they are not entitled to do this by themselves, which means that they cannot directly open an examination. The second stage of their participation involves making statements on the prosecutor's request to authorise the investigation.

Article 19(3) stipulates that in the pre-trial stage, the victims can submit observations on jurisdiction and admissibility, but they may not challenge the latter. In

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[33] 12.

[34] K Hon "Bringing Cultural Genocide in by the Backdoor: Victim Participation at the ICC" (2013) 43 *Seton Hall L Rev* 359 381.

terms of Article 61 victims are allowed to attend the confirmation of charges hearing, make opening and closing statements, produce and participate in the examination of evidence, but they cannot press charges.

In the trial stage, the victims may participate in a similar way as in the confirmation of charges hearing, but they cannot appeal against the judgment in terms of Article 81. Article 68 sets out the victim's rights to participate in proceedings and therefore to exercise these rights, the victims need to ask permission from the Court, proving that their interests are affected by the concrete procedural act in which they would like to intervene. The Court shall only grant their participation if it is satisfied, not only that the victims' interests are affected, but also that their intervention does not undermine the right of the accused to a fair trial. The Chamber also prescribes how their participation is to take place at each stage pursuant to article. 68(3). For instance, in order to question witnesses, the victim's legal representative has to submit in advance the questions they want to ask, and the Chamber will decide whether or not such questions are appropriate according to rule 91(2).[35]

In this regard, Hon opines that:

> "the overwhelming function of the ICC is truth-finding, and victims, having experienced first-hand the crimes at issue, are in a good position to help the ICC accomplish that mission. Granting victim's, a larger participatory role also ensures that the ICC will address their concerns-not only for accountability but also for justice (both communal and individual) and reconciliation. As with much at the ICC, one of the drawbacks of this scheme is that the jurisprudence assessing and analysing the boundaries, scope, and modalities of victim participation is still developing and is therefore quite fluid."[36]

Therefore, through the case law chapters of this dissertation, the participation rights of victims and the development thereof will be reviewed against the fair trial rights of the accused.

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[35] S Guerrerdo Palomares "Common and Civil Law Traditions on Victims' Participation at the ICC" (2014) 4 *IJPL* 217 234.

[36] 382.

1 3 Research question

The fundamental question, which the notion of fair trial rights imposes, is to what extent can a trial be fair to those accused of the most heinous crimes affecting the whole of humanity? How does one even begin to seek an answer to such a question? In attempting to find an answer, this dissertation will look at the general human rights instruments, the Rome Statute and the selected case law.

This dissertation seeks, on the one hand, to assess the extent to which fair trial principles have been applied in case law. Secondly, to assess in light of the growing jurisprudence of the ICC, to what extent one can say that fair trial rights are protected at the ICC, given the competing demands of the international community, the victims of the most serious crimes under international law, and the accused.

In order to do so, the theoretical framework which will be employed will contain an analysis of the fair trial rights contained in human rights instruments as well as in the Rome Statute and its application in case law. In addition, the dissertation seeks to review how the court has addressed its balancing role of ensuring that the fair trial rights of the accused are justified and applied, given the often competing demands of the victims, prosecutor and the international community.

1 4 Research methodology

At the outset an explanation of the "dialectical tensions" in the title of the dissertation needs to be addressed in understanding the methodology employed herein**.**

Dialectics considers all phenomena as being in movement, in the process of perpetual change. Generally speaking, dialectic is a mode of thought, or a philosophic medium, through which contradiction becomes a starting point for contemplation. As such, dialectic is the medium that helps us comprehend a world that is racked by paradox[37]. Dialectic has long been a rhetorical method of finding and presenting arguments to conduct and resolve disagreements. The late eighteenth century, however, saw a new use of the term: it became the theory of speculative antagonisms *within things and concepts* as well as the theory of finding and handling these contradictions. The main aim of modern metaphysical dialectics is being able to think

[37] Social Research Glossary "Dialectic" <https://www.qualityresearchinternational.com/socialresearch/dialectic.htm> (accessed 29-11-2019).

and sustain the logic of contradictions and develop means for their productive logical use.[38]

Therefore, at the outset, the dissertation seeks to explore the assumed dialectical tensions between the rights of the accused, the rights of victims and the expectations of the international community on the decisions undertaken by the ICC. The focus of the dissertation is primarily on the rights of the accused, which does not discount the tensions inherent within the Rome Statute of affording rights to victims or the potential influence of the international community on the decisions of the court. The focus on the rights of the accused has largely been due to the fact that the ICC was initially set up to be seen as an international *criminal* court taking into account the human rights of all parties as well as satisfying the demands of the international community (states parties and civil society organisations). *Textually* (that is, a reading of the Rome Statute) as well as *contextually* (public opinion, activists' expectations, the politics of the Assembly of States Parties and so on) one can note that the ICC is struggling to attend to all the legal positive and legal normative, aspirational and perceptional demands.

The dissertation is testing a proposition: The International Criminal Court, as a *criminal* court, should have the realistic but defensible focus of ending impunity via an accused-centred procedural regime that also, but not primarily, gives content and effect to the other competing interests of victim's rights and the demands of the international community. I am hesitant to label the interests and rights of victims as secondary, but the dissertation will test the proposition that important though they are, victims' rights and the diverse interests of the international community could potentially detract from the primary purpose of the ICC, namely to prosecute those accused of the most heinous crimes and to end impunity. This being said, due to the many expectations placed on the ICC, the rights of the accused are in some instances compromised as the court itself is not adequately equipped to address all the competing interests within the appropriate human rights framework in a systematic way as was intended in the drafting of the Rome Statute and as set out in the rights

[38] Oxford Handbooks Online "Dialectic" <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199696543.001.0001/oxfordhb-9780199696543-e-33> (accessed 29-11-2019).

contained in the Statute. Taking into account the dialectic lens, the dissertation reviews the tensions through the case law, focusing mainly on the rights of the accused, in order to propose a potential solution to the "paradox" of the competing interests confronting the ICC.

The research methodology employed is a combination of doctrinal and theoretical research methodology**.** Doctrinal research focuses on determining what the law is on a particular point. It involves locating and interpreting relevant primary and secondary sources of law and synthesising those sources to form a rule or rules of law. As part of this process, an evaluation and critique of competing or inconsistent sources may be required. Doctrinal research may also suggest ways in which the law should develop.[39] The study will utilise a range of primary and secondary sources including legal research publications, being international resources that are available in print and/or digital format. Primary sources will include relevant legislation, statutes, conventions, resolutions and case law. Secondary sources will include law journal and review articles, case commentary as well as relevant books and web-based publications.

All the information received is based on research and reports already published and no empirical research is foreseen in the conduct of this study and therefore the study relies solely on primary and secondary data. This is a normative, qualitative study utilising a human rights framework of analysis of the fair trial rights of the accused. The theoretical framework will elaborate on the human rights framework, the concept and understanding of a fair trial and the relevant Articles related to a fair trial as contained in the Rome Statute.

In addition to the doctrinal approach, the research will consider whether an area of law is in need of reform or whether a proposed reform is necessary and/or desirable. The dissertation will ultimately utilise a theoretical framework on fair trial rights as human rights. This framework will serve to demonstrate how the dissertation is related to the work of others. The theoretical framework will, therefore, seek to locate the dissertation within the different approaches taken by various authors on the subject of fair trials and will therefore serve as a conceptual framework, by providing a set of

[39] L Taylor *Legal Writing: A Complete Guide for a Career in Law* (2014).

concepts that can be used for the dissertation.[40] In this regard, the essence of the dissertation will analyse case law by applying the fair trial principles and human rights principles related to fair trial to five cases that have been tried at the ICC. The (sometimes contentious) interpretation and application of the fair trial rights in these selected cases will then be problematised and contextualised with reference to the central research question.

Six judgments – *Lubanga, Katanga, Bemba, Gbagbo, Ble Goude and Ntaganda* – will form the core of the case studies for purposes of the dissertation. The dissertation will analyse not only the judgments on the merits, but also all the preliminary and pre-trial decisions and processes, in terms of the theoretical framework espoused in the dissertation. Particular attention will also be paid to the important role of the Prosecutor in terms of the protection of the integrity and fairness of processes before the ICC. It should be noted that the cases are discussed as they were available at the time of writing and conclusion of this dissertation. Subsequent developments (for instance appeals and sentencing decisions and so forth) are not reflected in this reworked submission of the dissertation. It is also important to note that the cases were selected to illustrate the tensions that inform the central research question. The dissertation should therefore not be read as a comprehensive commentary on the selected cases.

1 5 Theoretical framework

The fair trial paradigm of this study is informed by a deliberate choice, namely to investigate the position of the individual accused, given the epochal context: The ICC as a symbol and as a practical, operational part of a project to end impunity for the worst atrocities and to advance the rights of victims.

The Preamble to the Rome Statute encapsulates and incorporates the many different claims and interests informing the international criminal justice system, of which it is assumed that the ICC is perhaps the pre-eminent role player. This study assumes that there are obvious, and some less obvious tensions embedded in the plethora of demands and interests in the Rome Statute and as evidenced by the

[40] S Taekema “Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice” (2018) *Law and Method* <https://ssrn.com/abstract=3123667> (accessed 28-12-2018).

emerging jurisprudence of the ICC. The study asserts that fair trial rights of the accused are not only one of the dialectical tension points, but indeed at the heart of the (international) criminal justice system and therefore of vital importance.

The following section serves to set out an understanding of the functioning of the ICC, including the role of victims, as well as unpacking fair trial rights and legal principles which will be used as the basis for the dissertation in respect of the accused and the international legal framework for the rights of victims and the demands of the international community in order to give the reader a firm grounding in the principles which will be applied within the dissertation.

1 5 1 Overall explanation of the ICC, its functions and responsibilities

The ICC is an independent international organisation which was set up by an international multilateral treaty, the Rome Statute of 1998. It is located in the city of The Hague in the Netherlands, and it has set up temporary field offices in places where the ICC Prosecutor is conducting investigations.[41]

The ICC has been established to try and punish individuals accused of committing crimes so serious that they are considered to affect the entire world. These crimes are genocide, crimes against humanity, war crimes and the crime of aggression.[42] It is important to mention that the ICC can investigate and prosecute crimes that are not necessarily linked to conflict, but that are affecting vulnerable persons and communities. For instance, rape and other crimes of sexual violence such as sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and enslavement, including trafficking of women and girls can constitute crimes against humanity, war crimes and even genocide.[43]

The ICC has criminal jurisdiction over individuals (natural persons older than 18 years of age); not groups, corporate entities or States. The ICC does not have universal or global jurisdiction, so any individual who is alleged to have committed crimes within the jurisdiction of the ICC must be brought before the ICC having regard to the jurisdictional regime which is essentially based on the territoriality and

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[41] ICC *Victim's booklet victims before the international criminal court a guide for the participation of victims in the proceedings of the ICC* (undated) 5.

[42] Articles 6, 7, 8 of the Rome Statute.

[43] ICC *Victim's booklet* 6.

personality principles via states parties and within the meaning of the principle of complementarity. Jurisdiction based on a referral by the UN Security Council is also a possibility.

The Office of the Prosecutor's prosecutorial policy is to focus on those who, having regard to the evidence gathered, bear the greatest responsibility for the crimes, and does not take into account any official position that may be held by the alleged perpetrators.[44]

The ICC is composed of four organs: The Presidency, the Chambers, the Office of the Prosecutor and the Registry:

The Presidency consists of three judges (the President and two Vice-Presidents) elected by an absolute majority of the eighteen judges of the Court for a maximum of two, three-year terms. The Presidency oversees the administration of the Court, with the exception of the Office of the Prosecutor. It represents the Court to the outside world and helps with the organisation of the work of the judges. The Presidency is also responsible for carrying out other tasks, such as ensuring the enforcement of sentences imposed by the Court.[45]

There are eighteen judges, including the three judges of the Presidency, are assigned to the Court's three judicial divisions:

(i) the Pre-Trial Division (composed of seven judges),
(ii) the Trial Division (composed of six judges), and
(iii) the Appeals Division (composed of five judges).[46]

The judges are persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices. All have extensive experience relevant to the Court's judicial activity. The judges are elected by the Assembly of States Parties on the basis of their established competence in criminal law and procedure and in relevant areas of international law such as international humanitarian law and the law of human rights.

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[44] ICC "Understanding the ICC" 5 <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (accessed 28-12-2018).
[45] ICC "Understanding the ICC" 9 and Art 38 of the Rome Statute.
[46] ICC "Understanding the ICC" 9.

They have extensive expertise on specific issues, such as violence against women or children. The election of the judges takes into account the need for the representation of the principal legal systems of the world, a fair representation of men and women, and equitable geographical distribution. The judges ensure the fairness of proceedings and the proper administration of justice.[47]

The Office of the Prosecutor is an independent organ of the Court. Its mandate is to receive and analyse information on situations or alleged crimes within the jurisdiction of the ICC, to analyse situations referred to it in order to determine whether there is a reasonable basis to initiate an investigation into a crime of genocide, crimes against humanity, war crimes or the crime of aggression, and to bring the perpetrators of these crimes before the Court.[48]

In order to fulfil its mandate, the Office of the Prosecutor is composed of three divisions:

(i) The Investigation Division, which is responsible for conducting investigations (including gathering and examining evidence, questioning persons under investigation as well as victims and witnesses). The Statute requires the Office of the Prosecutor to investigate incriminating and exonerating circumstances equally.

(ii) The Prosecution Division has a role in the investigative process, but its principal responsibility is litigating cases before the various Chambers of the Court.[49]

(iii) The Jurisdiction, Complementarity and Cooperation Division, which, with the support of the Investigation Division, assesses information received and situations referred to the Court, analyses situations and cases to determine their admissibility and helps secure the cooperation required by the Office of the Prosecutor in order to fulfil its mandate.[50]

The Registry helps the Court to conduct fair, impartial and public trials. The core function of the Registry is to provide administrative and operational support to the

[47] ICC “Understanding the ICC” 9 and Art 40 of the Rome Statute.
[48] Article 15 of the Rome Statute.
[49] ICC “Understanding the ICC” 10-11.
[50] 10-11

Chambers and the Office of the Prosecutor. It also supports the Registrar's activities in relation to defence, victims, communication and security matters. It ensures that the Court is properly serviced and develops effective mechanisms for assisting victims, witnesses and the defence in order to safeguard their rights under the Rome Statute and the Rules of Procedure and Evidence. As the Court's official channel of communication, the Registry also has primary responsibility for the ICC's public information and outreach activities.[51] The registry plays an important role in facilitating the participation of victims in proceedings at the ICC as will be articulated more clearly herein.

The ICC assumes jurisdiction over specified crimes in the following ways:

1. Referral by a State Party (including self–referral) - Article 14 of the Rome Statute.
2. Referral by the Security Council in the exercise of its powers under Article 14 of the Rome Statute
3. An investigation initiated by the Prosecutor of the ICC of his own accord – Article 15 of the Rome Statute.

The purpose of criminal proceedings before the ICC is to ensure that allegations of serious crimes are investigated, prosecuted, and if the accused is proved guilty, punished in accordance with the Rome Statute.

1 5 2 The stages of proceedings at the ICC

Preliminary Examination Stage: This stage is focused on deciding whether the ICC Prosecutor will investigate a particular situation in which crimes within the jurisdiction of the Court may have been committed.

Investigation Stage: This stage is initiated when the Prosecutor decides to formally open an investigation into a situation following the preliminary examination, in order to collect evidence and find out what crimes have been committed and who is responsible.[52]

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[51] Article 43 of the Rome Statute.

[52] Articles 53 and 54 of the Rome Statute.

Pre-Trial Stage: This stage is the period in which the Court decides whether or not to issue a warrant of arrest or an order to appear before the Pre-Trial Chamber against one or several individuals, and, once a person has been arrested and brought before the judges of the Chamber, whether or not to confirm the charges put forward by the Prosecutor.[53]

Trial Stage: This stage comprises the trial of individuals accused of having committed crimes within the jurisdiction of the ICC, at the end of which the accused is either found guilty and sentenced, or acquitted of the crime(s), if based on the evidence brought forward the judges are not convinced beyond reasonable doubt of the guilt of the accused.[54]

Appeal Stage: If the parties challenge the outcome of the trial, this is the stage in which the final judgment is given. It is possible for the Appeals Chamber to reverse a conviction or acquittal issued by the Trial Chamber if, for instance, the Appeals Chamber judges determine that the Trial Chamber judges misapplied the law or made substantial factual errors.[55]

Reparations Stage: In the event of a conviction, the Trial Chamber may issue an **order for reparations** to victims against the convicted person. If the convicted person does not have any means to afford reparations ("indigent"), the **Trust Fund for Victims** may be requested to compliment the order for reparations so that the victims may receive some form of redress.[56] At this stage, depending on the type of reparations ordered (individual or collective) the victims may be called to provide some proof to the Chamber that they are legitimate beneficiaries of reparations. Even if indigent at the time of conviction, the convicted person may be asked to reimburse the Trust Fund for Victims should that person become non-indigent at any later stage in life.[57]

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[53] Article 57.
[54] Part 6.
[55] Part 8.
[56] ICC *Victims booklet* 11 and Art 75 of the Rome Statute.
[57] ICC *Victims booklet* 10-11.

1 5 3 The role of victims

Victims participate in proceedings in the courtroom through their legal representative. Victims may send information to the Prosecutor informing about crimes they believe have been committed. During a trial, a victim may testify before the ICC if he or she is called as a witness for the Prosecution, defence, or the victims' legal representative. If a case proceeds to trial and an accused person is convicted by the ICC, victims may request reparations.[58]

Within the Registry, the Court has established the **Victims Participation and Reparations Section** ("VPRS"), the **Victims and Witnesses Section** ("VWS") and two independent offices, the **Office of Public Counsel for Victims** ("OPCV") and the **Trust Fund for Victims** ("TFV").[59]

The VPRS informs victims of their rights relating to participation and reparations at the ICC and enables them to submit applications to the Court if they wish to do so. The VPRS also assists victims to organise their legal representation.

The VWS has been established to provide support and protection to witnesses and to victims who appear before the Court. They may also assist others, such as family members, who are in danger as a result of a witness's testimony. When victims testify as witnesses, the VWS provides administrative and logistical support to enable them to appear before the Court. The VWS also provides psychosocial care and other appropriate assistance as required.[60]

At the end of a trial, if a person accused before the ICC is found guilty, ICC judges may decide to order that person to make reparations to the victims for the harm they have suffered as the result of the crimes committed. Victims can use the standard application forms for reparations to make their request to the ICC judges. It is important to note that the judges of the Court will decide whether an applicant is entitled to reparations or not after careful review of the application. Such a process can take a long time.[61]

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[58] 13.

[59] 14.

[60] 14.

[61] Article 75 of the Rome Statute.

This section provided an overview of the ICC, its functions and roles and the next section will focus primarily on fairness, equality of arms and the main rights of the accused, victims and the demands of the international community.

1 5 4 Fairness, fair trial rights and equality of arms

In determining what fairness is Cogan[62] puts forward two approaches in answering this question; first, are the substantive rights accorded to the accused adequate? This question, he argues, can be answered by reviewing the rights contained in the Rome Statute, rules of procedure, rules of evidence and case law. The second approach that he advances is whether these courts have the independence and powers to ensure fair trials? Cogan explains this as to whether or not the judges have the power to withstand political or international pressure to make the right decisions.[63] Both these questions are vitally important to the current study and therefore the dissertation reviews the legal framework as well as the case law in determining whether fair trial standards are being adequately upheld by the ICC. In particular, it would be important to look into the role of the prosecutor and the manner in which judges arrive at their decisions. In assessing which fair trial standards should apply, it is necessary to look at the international human rights framework as well as the relevant provisions of the Rome Statute.

In this regard, Article 21[64] of the Rome Statute lays down the different sources of applicable law. In addition to the rules of evidence and procedure, as well as the

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[62] JK Cogan "International Criminal Courts and Fair Trials: Difficulties and Prospects" (2002) 27 *Yale J Int'l L* 114.

[63] 115.

[64] Article 21 of the Applicable Law.

1. The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on

elements of crimes, the ICC can have recourse to the applicable treaties and the principles and rules of international law. The ICC can apply human rights treaties, customary international human rights law and general principles found in various legal systems. Moreover, Article 21(3) demands that the interpretation and application of the law must be consistent with "internationally recognized human rights."[65]

In this regard, Degan[66] established a hierarchy of sources of law contained in Article 21. Article 21(1)(b) states that the relevant treaties may include the following: The ICCPR or regional conventions, such as the 1950 ECHR with the attached protocols. Article 21(3) also includes the non-discrimination and equality clauses that judges are obligated to apply in criminal proceedings.[67]

Young[68] goes on to opine that Article 21(3) juxtaposes the related fields of international human rights law and international criminal law. She goes further and concludes that the jurisprudence indicates that Article 21(3) is most important in respect of fair trial rights.[69] This dissertation supports the view that Article 21 reaffirms that international criminal law is subject to an internationally accepted human rights framework and refers to the international human rights treaties that will be unpacked hereunder.

This Article of the Statute, therefore, permits judges to utilise international human rights law in making their decisions. Hence the importance of utilising the international human rights framework together with the relevant provisions of the Rome Statute. In the substantive chapters of the dissertation, which will focus on the different cases, we will see the varying degrees of application of this Article of the Statute by the judges. The interpretation of this Article will be particularly prevalent in Chapter 6, which will review the *Ntaganda* case at the ICC.

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grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

[65] Fedorova et al (2009) *Katholieke Universiteit Leuven*.

[66] V Degan "On the Sources of International Criminal Law" (2005) 4 *Chinese Journal of International Law* 79.

[67] 82.

[68] R Young "Internationally recognised human rights before the international criminal court" (2011) 60 *International and Comparative Law Quarterly* 189-208, 190.

[69] 200.

In order to critically assess the fair trial rights within the case law of the ICC, it would be important to understand the key concepts of fair trials within the legal framework and as discussed by various authors which is being undertaken hereunder.

In understanding the concept of fairness, Fedorova[70] suggests that fair trial standards encompass both individual rights and procedural guarantees. Further, to ensure effective defence, he argues, places an autonomous obligation on states. Conversely, Klamberg[71] argues that the objective of a fair trial may be attained by attributing a set of rights upon the parties, primarily the defence. Klamberg[72] is of the view that the key provisions of the right to a fair trial in human rights instruments are very similar. Further, that the right to a fair trial is a set of distinct rights which, "taken together, make up a single right not specifically defined". He distinguishes between two aspects to the right, the judicial procedure (fair hearing) on the one hand, and the organisation of the judiciary (independent and impartial tribunal) on the other. This point regarding the independence of the judiciary seems to be vitally important in ensuring that fair trial rights are upheld by the ICC. The role of judges and their inconsistent approaches will become evident in most of the cases that are referred to in this dissertation through the many different, varied dissenting and separate opinions given in the respective cases.[73]

Shaw[74] argues that there are certain rights within international human rights law that cannot be derogated from; in particular, he mentions the right to life in the ECHR and Article 4 of the ICCPR. These instruments are therefore important in framing the rights of an accused person in an international court and will, therefore, be utilised as the basis for this study.

Arguably, one of the most important rights for the purposes of this study is "Equality of arms". The term equality of arms originated in modern European procedure in the context of Article 6 of the ECHR. It is an expression of the principle of *audi alteram*

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[70] M Fedorova "The Principle of Equality of Arms in International Criminal Proceedings*"* (2012) 55 *School of Human Rights Research Series* 36.

[71] M Klamberg "What are the Objectives of International Criminal Procedure? – Reflections on the Fragmentation of a Legal Regime" (2010) 79 *Nordic Journal of International Law* 286-287.

[72] 287.

[73] See Chaps 3-6 of this dissertation.

[74] M Shaw *International Law* Cambridge 8 ed (2017) 216.

partem or "hearing the other side."[75] The principle of "equality of arms" is a fundamental element of a fair trial. In essence, it means that there should be equity between the parties to present their own case and that each party to the proceedings should be on an even footing. Stahn,[76] however, argues that in practice this may not be the case as often times the prosecutor has more resources at his or her disposal than the defence. This means that the defence in most cases would not receive equality of arms in criminal proceedings.

In the mid-twentieth century, the former European Commission of Human Rights ("the European Commission") introduced the term 'equality of arms' into Strasbourg case law[77] for the first time in the criminal cases of *Ofner and Hopfinger v Austria* and *Pataki and Dunshirn v Austria.*[78] The unifying point in these cases was that the accused had not been given an opportunity to be heard, unlike the opposing side. The Commission determined that "the equality of arms, that is the procedural equality of the accused with the public prosecutor, is an inherent element of 'fair trial'". Equality of arms therefore guarantees the defence participation in the criminal process and such participation is considered procedurally equivalent to that of the public prosecutor. Because of these judgments, the principle of equality of arms is now an established principle in domestic and international human rights case law.[79]

Fedorova cites Cassese in understanding the equality of arms as follows:

> "the principle of equality of arms has two distinct notions; firstly as a concept developed in the case law of the ECHR whereby the accused may not be put at a serious procedural disadvantage with respect to the prosecutor; and secondly as an essential element of the adversarial structure of proceedings which means that equality of parties is an essential

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[75] Fedorova *School of Human Rights Research Series* 1.

[76] C Stahn "A Critical Introduction to International Criminal Law" (2019) *Cambridge* 284 <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/EFEDBED0B84359DFA281A9079047846F/9781108423205AR.pdf/A_Critical_Introduction_to_International_Criminal_Law.pdf?event-type=FTLA> (accessed 12-07-2019).

[77] Refers to case law of the European Court of Human Rights.

[78] *Ofner and Hopfinger v Austria*, App No 524/59 and 617/59 report of 23 November 1962 Yearbook, volume 6 1963, 680. *Pataki and Dunshirn v Austria* App No 596/59 and 789/60, report of 28 March 1963, Yearbook, volume 6, 718.

[79] Fedorova (2012) *School of Human Rights Research Series* 2.

ingredient of the adversarial structure of proceedings, based on the notion of the trial as a contest between two parties".[80]

Fedorova further opines that there are two types of equality; namely formal equality by ensuring equality between two equally situated parties; and material equality being the idea that a state should ensure some level of equality between the stronger and a weaker party, for example, a legal aid system.[81]

Negri[82] opines that equality of arms means that both parties should be treated in a manner that ensures they are in a procedurally equal position to make their case during the whole course of the trial. Therefore, equality of arms substantively requires that equality of treatment be ensured during the whole course of the proceedings and, procedurally, it is meant to secure enjoyment of the same procedural rights and guarantees between both parties.[83] The authors seemingly agree that equality of arms is vitally important in international criminal proceedings and that there is an obligation on the State or institution to ensure that proceedings are both substantively and procedurally fair.

Croquet[84] discusses the right to a fair trial in terms of the way both the ECHR and the ICC have interpreted it. He argues that both institutions have had difficulties in defining procedural fairness and have instead referred to a broad standard of "fairness". He further asserts that the ICC has defined the right to a fair trial as a "fundamental right" which mirrors the ECHR's understanding of the right to a fair trial.

Croquet makes an important point, similar to another author,[85] by asserting that in reference to the ECHR's case law, the ICC has also recognised that the right to a fair trial benefits not only the accused but "all participants in the proceedings" thereby encompassing the prosecutor and the victims. It is submitted that this dissertation

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[80] 11.

[81] 11.

[82] S Negri "The Principle of Equality of Arms and the evolving law of international criminal procedure" (2005) 5 *International Criminal Law Review* 513.

[83] 523.

[84] NAJ Croquet "The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence" (2011) 11 *Hum Rts L Rev* 91 99.

[85] See argument on this point below by Y Mcdermott "Rights in Reverse: A Critical Analysis of Fair Trial Rights under international criminal law" (November 2011).

supports the view that, even though the courts have interpreted that fair trial rights apply to all parties to proceedings, this dissertation will be based on the premise that fair trial rights apply solely to the accused.

For the purposes of this dissertation, a few selected cases of the ICTY and ICTR, as they pertain to the subject matter of the discussions in the case law chapters of the dissertation, have been selected. The importance of reviewing and understanding the case law at the Tribunals is that the work of the tribunals reflects core elements of fair trials in respect of the international criminal law discourse. It serves to influence and shape the discourse of the ICC going forward. It is with this in mind that a reflection of their view of fair trial rights is being discussed hereunder, as this will have a bearing on the analysis of the case law chapters in the dissertation.

In *The Prosecutor v Dusko Tadic*[86] in order to decide on the scope of application of the principle of equality of arms, the ICTY Appeals Chamber carried out a review of the international case law and stated as follows:

> "the Appeals Chamber is of the view that under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case. The Trial Chambers are mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia where some States have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal. Provisions under the Statute and the Rules exist to alleviate the difficulties faced by the parties so that each side may have equal access to witnesses."[87]

This decision demonstrates the tribunal's willingness to admit that the parties may be unequal particularly in securing evidence and it shows the court's willingness to ensure that the disparities that may exist between the parties are addressed to ensure a fair trial. The importance of this decision is the court's willingness to ensure equity between the parties.

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[86] *The Prosecutor v Dusko Tadic* ICTY Appeals Chamber (1999) IT-94-1-A <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> (accessed 12-07-2019).
[87] Para 52.

In *The Prosecutor v Clement Kayishema and The Prosecutor v Clement Kayishema & Obed Ruzindana*,[88] the tribunal had the following to say:

> "The Appeals Chamber observes in this regard that equality of arms between the Defence and the Prosecution does not necessarily amount to the material equality of possessing the same financial and/or personal resources. In deciding on the scope of the principle of equality of arms, ICTY Appeals Chamber in *Tadić* held that 'equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case'."[89]

This reference to equality of arms is important as it recognises the potential disadvantages that may exist between the parties and the court emphasises the need of the court to ensure that equality of arms is upheld.

It is, however, important to note that some court decisions refer to equality of arms or fairness in respect of "all parties" not only in respect of the rights of the defendant. This became apparent at the tribunals, particularly in *The Prosecutor v Kvocka:*[90]

> "Procedural equality requires that the concept of a fair trial be applied taking into account the interests of both parties. The Prosecution acts on behalf of and in the interests of the international community. Thus, as the international community has an interest in the enforcement of such guarantee, it cannot be deprived of it by the mere circumstance that the Appellant would like to waive his own entitlement to a fair trial."[91]

The ICC held a similar view regarding the fact that fair trial rights apply equally to all parties:

> "The term 'fairness' (*equite*) from the Latin '*equus*' means equilibrium, or balance. As a legal concept, equity or fairness 'is a direct emanation of the idea of justice.' Equity of the proceedings entails equilibrium between the parties, which assumes both respect for the principle of equality and the principle of adversarial proceedings. In the view of the

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[88] *The Prosecutor v Clement Kayishema & Obed Ruzindana* ICTR Appeals Chamber (2001) Case No ICTR-95-1-A <https://www.refworld.org/cases, ICTR, 48abd5a31a.html> (accessed 12-07-2019).

[89] Para 69.

[90] *The Prosecutor v Kvocka et al* (IT-98-30-1-AR 73.5) (25 May 2001) Decision on Interlocutory Appeal <http://www.icty.org/x/cases/kvocka/acdec/en/10525JN315907.htm> (accessed 12-07-2019).

[91] Para 21.

> Chamber, fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes (in systems which provide for victim participation in criminal proceedings)."[92]

Mcdermott[93] opines that the reference to equality of all parties or to both the accused and the prosecution is simply incorrect when considering the fair trial rights accorded to the accused. Under the *chapeau* of the rights of the accused, Article 67 of the Rome Statute consists of two subsections – the first holding that "the accused shall be entitled to a public hearing …, to a fair hearing conducted impartially … and to a list of nine minimum guarantees in full equality", while the second deals with the prosecutorial obligation to disclose exculpatory material to the accused. To emphasise: the ICC has extended fair trial rights to other actors on a number of occasions, stating that fairness can also extend to other parties, such as the prosecution in the proceedings.

However, Mcdermott[94] firmly argues against the fact that fair trial rights apply equally to the defendant, prosecutor and victims. It is within this argument that lies the critical tension, which this dissertation seeks to present. The underlying argument is therefore that even though fair trial rights apply to all parties, given the current functioning of the court, this may not always be possible.

Further, Mcdermott asserts that the tribunals, as well as the ICC, have adopted the approach that the onus is on the defence to prove that inequality has occurred before the court decides on such inequality. Mcdermott states that there are a number of factors hindering international criminal procedure from reaching its standard-setting potential for the fairness of trials; first, there is a lack of coherence between decisions, between individual judges and broadly between tribunals. Secondly, there is a failure to evince international best practice in achieving the highest standards of fairness

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[92] Situation in the Democratic Republic of Congo, *Decision on the Prosecutor's Application for Leave to Appeal the Chamber's Decision of 17 January 2006* on the Application for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS5 and VPRS6 ICC-01/04-135-Teng (31-03-2006) <https://www.icc-cpi.int/pages/record.aspx?uri=183511> (accessed 28-12-2018) para 38.

[93] Y Mcdermott "Rights in Reverse: A Critical Analysis of Fair Trial Rights under international criminal law" (November 2011) 4-5.

[94] 4-5.

which is evidenced by the number of hurdles that an accused person must jump before motions on his or her rights can succeed.[95]

In contrast, Gutierrez[96] asserts that the principle of due process is mostly addressed to the judicial authorities and that fair and equitable treatment should be afforded to all participants at all stages of the criminal process. Guitierrez further touches on the model of justice and the ICC has generally been described as employing a *sui generis* model of justice employing both adversarial and inquisitorial elements. Duprez[97] distinguishes between these two systems as follows:

> "While in the adversarial system [the] search for the (procedural) truth lies, if at all, in the hand of the parties and therefore their conflict is at the center of the proceedings ('two cases approach'), in an 'inquisitorial' system it is the responsibility of the State agencies in charge of criminal prosecution ('one case approach'). In this sense, the civil law model can be more accurately described as 'judge-led' (…) while the common law model is adversarial – prosecution and defences being 'adversaries'."

Put simply, in an adversarial model, the parties are equal opponents each possessing equal standing to fight each other in the court. Duprez asserts therefore that the accusatorial system is traditionally inclined to provide better protection of individual rights and that the two systems do not operate similarly which may lead to inconsistencies in the application of human rights protections to the accused.[98] This distinction, coupled with the knowledge that the ICC employs components of each model, may contribute to the difficulty in ensuring fairness for accused persons at the ICC.

From the foregoing discussion, it is clear that in determining fairness, equality of arms is of the utmost importance in assessing whether or not trials are fair. Further, it is clear that there are inconsistencies in the application of fair trial standards at the tribunals and ICC.

In addition, there seem to be differences in interpretation and application in respect of to whom fair trial standards should be afforded and there are two different schools

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[95] 17.

[96] J Gutierrez *New Journal of European Criminal Law* 92.

[97] C Deprez "Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court: On Possible Reductive Factors" (2012) 12 *International Criminal Law Review* 721–741 725.

[98] 725.

of thought; one being that these standards apply to all parties and two that fair trial standards should solely apply to the accused. Finally, it is apparent that due to the combination of accusatorial and inquisitorial justice that is being employed at the ICC, the accused's fair trial rights may not be applied clearly or consistently and this will inform the basis through which the case law will be analysed.

1 5 5 Fair trial rights as human rights

Fair trial rights of the accused are most prominently articulated in Articles 6, 9(3) and 14 of the ICCPR as well as in Article 6 of the ECHR.

In his report to the Security Council on the establishment of the ICTY, the Secretary-General of the United Nations emphasised the following:

> "It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights".[99]

General principles governing fair trial proceedings include universal international human rights standards designed to protect defendants in criminal proceedings, the essence of which is contained in Article 14 of the ICCPR. For the purposes of this dissertation and in order to set the framework for further discussions in the case law chapters (Chapters 3 to 6), Articles 6, 9 and 14 of the ICCPR bears relevance. The ECHR also bears relevance as the Right to a fair trial is encompassed in Article 6 of the Convention, all of which will be discussed hereunder in order to provide a firm basis upon which the fair trial rights of the accused are reviewed against.

[99] W Schomburg "The Role of International Criminal Tribunals in promoting respect for fair trial rights" (2008) 8 *North Western Journal of International Human Rights* 2.

1 5 5 1 Pronouncements by the Human Rights Committee and the European Court on Human Rights on the content of the fair trial rights of the accused

1 5 5 1 1 Article 14(1): The requirement that the accused be tried by an independent and impartial court or tribunal

This right is based in Article 14(1) of the ICCPR and Article 6(1) of the ECHR. The Human Rights Committee expressed itself on this aspect by stating that "the right to equality before courts and tribunals guarantees those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination."[100]

Conversely, the guideline to Article 6 of the ECHR states: "The right to a fair trial in Article 6 requires that a case be heard by an "independent and impartial tribunal" established by law. There is a close link between the concepts of independence and objective impartiality. For this reason, the Court commonly considers the two requirements together." This applies equally to professional judges, lay judges and jurors.[101] Therefore equality and independence are the guiding principles in accessing courts or tribunals in relation to human rights treaties.

1 5 5 1 2 Article 14(2): The presumption of innocence

This right is also contained in Article 6(2) of the ECHR and requires that every person accused of a criminal offence has a right to be presumed innocent until proven guilty. Article 66 of the Rome Statute affords this right to everyone. The burden of proof is therefore on the prosecution who must prove guilt beyond reasonable doubt. Article 67(1)(i) of the Rome Statute provides that no reversal of the burden of proof is allowed nor any onus of rebuttal.

According to the Human Rights Committee, "everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to

[100] International Covenant on Civil and Political Rights UN Doc CCPR/C/GC/32 23 August 2007 Original: ENGLISH HUMAN RIGHTS COMMITTEE Ninetieth session Geneva, 9 to 27 July 2007 General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial para 8.

[101] Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb) Updated on 31 August 2019 <https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf> para 76.

law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused."[102] This is an interesting point particularly as it relates to the potential impact which the media may have on the proceedings before the court, particularly in the cases before the ICC which often involve persons holding senior positions in government.

Similarly, the Guideline on Article 6 of the ECHR holds a similar view in respect of the presumption of innocence "Article 6 embodies the principle of the presumption of innocence. It requires, inter alia, that: (1) when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; (2) the burden of proof is on the prosecution, and (3) any doubt should benefit the accused."[103] In fact, the ECHR goes further and refers to the presumption as" a procedural guarantee within the context of a criminal trial."[104]

1 5 5 1 3 Article 14 (3)(a): To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him

The same right is contained in Article 6 of the ECHR and Article 67(1)(a) of the Rome Statute.

The Human rights committee explained this right to mean "The right to be informed of the charge "promptly" requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law, or the individual is publicly named as such."[105] The ECHR goes further in their assessment of this right "In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the

[102] General Comment 32 para 30.
[103] Guideline on Article 6 ECHR para 303.
[104] Para 304.
[105] General Comment 32 para 31.

proceedings are fair."[106] This input is of particular importance in this dissertation, as the case law chapters will reveal that accused persons were often severely prejudiced as a result of the re-characterisation of the facts.

1 5 5 1 4 Article 14(3)(b): Everyone shall be entitled to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing

The same right is contained in Article 67(1)(b) of the Rome Statute. It encompasses two elements:

(i) The first element is the right of an accused to have adequate time and facilities for the preparation of his or her defence during all stages of the trial; and
(ii) The second element is the right of an accused to communicate with counsel of his own choosing, which is particularly relevant to the preparation for trial. Language and translation are important considerations when assessing the amount of time that is adequate for the preparation of a defence.

The Human Rights Committee states that:

> "What counts as "adequate time" depends on the circumstances of each case. If counsel reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial."[107]

On the other hand, "[a]dequate facilities" must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that is exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence."[108] This is an important point to note as it demonstrates that all evidence which may assist the defence needs to be disclosed in order to allow the defendant to adequately defend him or herself.

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[106] Guideline on Article 6 ECHR para 353.
[107] General Comment 32 para 32.
[108] Para 33.

Interestingly, the ECHR includes the re-characterisation as part of what constitutes the accused's right to prepare a proper defence "[s]ub-paragraphs (a) and (b) of Article 6 (3) are connected in that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him."[109] The ECHR's explanation goes further:

> "Article 6 3 (a) affords the defendant the right to be informed not only of the "cause" of the accusation, that is to say, the acts he is alleged to have committed and on which the accusation is based, but also of the "nature" of the accusation, that is, the legal characterisation given to those acts."[110]

The legal characterisation is therefore of vital importance in ensuring the accused is able to prepare an adequate defence and the legal characterisation is an aspect which is of particular concern in the case law chapters of this dissertation (Chapters 3 to 6).

1 5 5 1 5 Article 14(3)(c): The right to be tried without undue delay

This right is also contained in Article 64(2) and Article 67(1)(c) to be tried without undue delay of the Rome Statute.[111] In the course of the dissertation, it will be highlighted that this right has been infringed in almost every case which will be examined, as the accused persons have in all instances been in detention for lengthy periods of time and the ICC has taken many years to conclude the cases often resulting in accused persons being in detention in excess of 5 years.

The Human Rights committee expounds on this principle as follows:

> "The right of the accused to be tried without undue delay, provided for by article 14, paragraph 3 (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of

[109] Guideline on Article 6 ECHR para 354.

[110] Para 356.

[111] 13.

the specific case, but also to serve the interests of justice. What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities…. This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal. All stages, whether in first instance or on appeal must take place "without undue delay."[112]

The ECHR holds a similar view:

"The reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case, which call for an overall assessment. Where certain stages of the proceedings are in themselves conducted at an acceptable speed, the total length of the proceedings may nevertheless exceed a "reasonable time" Article 6 requires judicial proceedings to be expeditious, but it also lays down the more general principle of the proper administration of justice. A fair balance has to be struck between the various aspects of this fundamental requirement. When determining whether the duration of criminal proceedings has been reasonable, the Court has had regard to factors such as the complexity of the case, the applicant's conduct and the conduct of the relevant administrative and judicial authorities."[113]

This reflects an important perspective which bears relevance in this dissertation, particularly in respect of the conduct of investigations and the length of time taken by the prosecutor in concluding these investigations, often while the accused is already in detention.

1 5 5 1 6 Article 14 (d): To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing

Further, to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it. This right is also contained in Article 67(1)(d) of the Rome Statute.

The Human rights committee distinguishes three key features to this right:

[112] General Comment 32 para 35.

[113] Guideline Article 6 ECHR paras 291-293

> "First, the provision requires that accused persons are entitled to be present during their trial. Proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with article 14, paragraph 3 (d) if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance."[114]
> "Secondly, the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing and to be informed of this right, as provided for by article 14, paragraph 3(d), refers to two types of defence which are not mutually exclusive. Persons assisted by a lawyer have the right to instruct their lawyer on the conduct of their case, within the limits of professional responsibility, and to testify on their own behalf. At the same time, the wording of the Covenant is clear in all official languages, in that it provides for a defence to be conducted in person "or" with legal assistance of one's own choosing, thus providing the possibility for the accused to reject being assisted by any counsel. This right to defend oneself without a lawyer is, however not absolute. The interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused. However, any restriction of the wish of accused persons to defend themselves must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice. Therefore, domestic law should avoid any absolute bar against the right to defend oneself in criminal proceedings without the assistance of counsel."[115]

Within the context of this general comment, the tensions between the rights of the accused and victims or witnesses becomes apparent as the court has to take into account the rights of the accused but also ensure the protection of victims during all proceedings before it, particularly when the accused is facing grave charges which may have impacted victims in a profound manner. This tension or rather sensitivity is necessary in all cases before international criminal courts in particular, as they often involve charges against the accused concerning grave human rights abuses which significantly impacts on victims. The sensitivity to the rights of victims in these instances are of particular importance in balancing the rights before the ICC during the course of trials.

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[114] General Comment 32 para 36.

[115] Para 37.

The Human Rights Committee extrapolates on this right further as follows:

> "Third, article 14, paragraph 3 (d) guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it."[116]

The ECHR holds the view that:

> "The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial. As a rule, a suspect should be granted access to legal assistance from the moment there is a "criminal charge" against him or her within the autonomous meaning of the Convention."[117]

1 5 5 1 7 Article 14(e): To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him

This right is also contained in Article 67(1)(e) of the Rome Statute. Here, the Human Rights Committee expands on this as follows:

> "Paragraph 3 (e) of article 14 guarantees the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them."[118]

The ECHR states that before an accused can be convicted "all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument."[119] More importantly, the ECHR provides the following proviso which relates to the balance of the rights between the accused and victims:

> "While Article 6 does not explicitly require the interests of witnesses to be taken into consideration, their life, liberty or security of person may be at stake, as with interests coming generally within the ambit of Article 8 of the Convention. Contracting States should

[116] General Comment 32 para 38.
[117] Guideline Article 6 ECHR para 407.
[118] General Comment 32 para 39.
[119] Guideline to Article 6 ECHR para 455.

> organise their criminal proceedings so that those interests are not unjustifiably impaired. The principles of a fair trial therefore require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify."[120]

In the instance of victims and witnesses, the balance between the fair trial rights of the accused and victims needs to be balanced and the courts are encouraged to employ a level of sensitivity to the specific circumstances of the case and the protection of witnesses.

1 5 5 1 8 Article 14 (f): To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

This right is further contained in Article 67(1)(f) of the Rome Statute. The Human Rights Committee links the rights of an accused to an interpreter as enshrining another aspect of the principles of fairness and equality of arms in criminal proceedings.[121] The ECHR similarly agrees that translation services should also be provided to an accused particularly in order for the accused to properly understand the charges put to him/her.[122]

1 5 5 1 9 Article 14(3)(g): The right to remain silent

This right is also contained in Articles 55(2)(b) and 67(1)(g) of Rome Statute that states that the accused has the right to remain silent, without his silence being a consideration in the determination of guilt or innocence.

The Human Rights Committee states emphatically that:

> "Finally, article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt."[123]

The ECHR also agrees that this right is absolute:

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[120] Guideline to Article 6 ECHR para 481.
[121] General Comment 32 para 40
[122]Guideline to Article 6 ECHR Para 373
[123] General Comment 32 para 41

> "Anyone accused of a criminal offence has the right to remain silent and not to contribute to incriminating himself. Although not specifically mentioned in Article 6, the right to remain silent and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6."[124]

In the chapter analysing *Katanga* (chapter 4), it will be seen that this right had been infringed.

Article 14 of the ICCPR and Article 6 of the ECHR, therefore, sets out internationally recognised fair trial rights insofar as these are applicable to the rights of the accused at the ICC. Similar rights are also contained in the Rome Statute and therefore it is evident that the fair trial rights of the accused as contained in the Rome Statute are founded on these critical fair trial rights contained in the ICCPR.

In addition to these rights the Rome Statute under Article 67 (containing the rights of the accused) sets out additional rights as follows:

> "(h) To make an unsworn oral or written statement in his or her defence; and
> (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.
>
> 2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide."

These additional rights serve to demonstrate that the Rome Statute goes further to protect the rights of the accused particularly insofar as the disclosure of evidence is concerned. However, what is of importance is that the Rome Statute was premised on international human rights standards in respect of the fair trial rights of the accused. These are therefore the rights against which the measure of whether a trial is fair or not should be weighed.

1 5 5 1 10 Article 14(6): The right to compensation in the event of acquittal

A similar provision is also contained in Article 85 of the Rome Statute. The Human Rights Committee gives substance to this and emphasises that:

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[124] Guideline on Article 6 ECHR para 175.

> "It is necessary that States parties enact legislation ensuring that compensation as required by this provision can in fact be paid and that the payment is made within a reasonable period of time. This guarantee does not apply if it is proved that the non-disclosure of such a material fact in good time is wholly or partly attributable to the accused; in such cases, the burden of proof rests on the State. Furthermore, no compensation is due if the conviction is set aside upon appeal, i.e. before the judgement becomes final, or by a pardon that is humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice."[125]

This right is important particularly for the accused who have served long sentences at the ICC, lost contact with their families and who are only acquitted after several years in detention.

1 5 5 1 11 Article 14(7): No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

A similar provision is contained in Article 20 of the Rome Statute. The Human Rights Committee states that this procedure embraces the principle of *ne bis in idem.*

> "This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal.[126]"

The Human Rights committee further clarifies its understanding of this right as follows:

> "Furthermore, it does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more States. This understanding should not, however, undermine efforts by States to prevent retrial for the same criminal offence through international conventions."[127]

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[125] General Comment 32 paras 52-54.

[126] General Comment 32 para 32.

[127] Paras 115, 116.

In respect of the ECHR, Protocol No. 7 to the Convention was drafted in 1984. The aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision *(ne bis in idem).* The ECHR guideline went further than the Human Rights Committee in that it clarified the *ne bis in idem* principle in more detail in the following manner: "The *ne bis in idem* principle prohibits prosecution or trial for the "same offence". In *Sergey Zolotukhin v. Russia [GC]* the Court acknowledged that it had adopted a variety of approaches in the past, placing the emphasis either on identity of the facts irrespective of their legal characterisation), on the legal classification, accepting that the same facts could give rise to different offences, or on the existence or otherwise of "essential elements" common to both offences *(Franz Fischer v. Austria)*. After examining the scope of the right not to be tried and punished twice as set forth in other international instruments (ICCPR, Charter of Fundamental Rights of the European Union and American Convention on Human Rights) and noting that the approach which emphasised the legal characterisation of the two offences was too restrictive on the rights of the individual, the Court took the view that Article 4 of Protocol No. 7 should be understood as prohibiting the prosecution or trial of an individual for a second "offence" in so far as it arose from identical facts or facts which were "substantially" the same as those underlying the first offence.

The starting point for the determination of whether the facts in both proceedings were identical or substantially the same should be the statements of fact concerning both the offence for which the applicant had already been tried and the offence of which he or she stands accused. The Court emphasised that it was irrelevant which parts of the new charges were eventually upheld or dismissed in the subsequent proceedings because Article 4 of Protocol No. 7 contains a safeguard against being tried or being liable to be tried again in new proceedings rather than a prohibition on a second conviction or acquittal. It held that its inquiry should, therefore, focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings."[128] This is of particular importance in the *Katanga* case as the accused

[128] Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights Right not to be tried or punished twice Updated on 31 August 2019 para 23.

was sent back to his country of origin to be tried again by the military court. In addition, the right to life is of vital importance in the *Katanga* case as he was sent back to a country which imposes the death penalty. Hence the right to life is discussed hereunder.

In addition to Article 14, Article 6 (right to life), Article 2 of ECHR and Article 9 (Right to liberty and Security of person) of the ICCPR are of particular importance in reviewing fair trial rights as human rights.

1 5 5 1 12 Article 6: The right to life; Article 9: Right to Liberty and security

The Human Rights Committee and the ECHR expressed itself quite strongly on these two rights and indicated that they often overlap. In this regard, the Human Rights Committee stated that:

> "The right to life guaranteed by article 6 of the Covenant, including the right to protection of life under article 6, paragraph 1, may overlap with the right to security of person guaranteed by article 9, paragraph 1. The right to personal security may be considered broader to the extent that it also addresses injuries that are not life-threatening. Extreme forms of arbitrary detention that are themselves life-threatening violate the rights to personal liberty and personal security as well as the right to protection of life, in particular enforced disappearances."[129]

The Human rights committee also emphasised that arbitrary detentions for long periods of time could be detrimental to a person's liberty and security of person.[130] Of more importance, is the Human Rights Committee's pronouncement on the following which is particularly relevant in the *Katanga* case chapter:

> "Returning an individual to a country where there are substantial grounds for believing that the individual faces a real risk of a severe violation of liberty or security of person such as prolonged arbitrary detention may amount to inhuman treatment prohibited by article 7 of the Covenant."[131]

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[129] General Comment No. 35 International Covenant on Civil and Political Rights Distr.: General 16 December 2014 Original: English Human Rights Committee General Comment No. 35 Article 9 (Liberty and security of person) para 55.

[130] Para 56.

[131] Para 57.

The Human Rights Committee recently (2018),[132] published another general comment on the right to life which specifically addresses some of the concerns raised in the *Katanga* chapter. More specifically it states emphatically that:

> "Paragraphs 2, 4, 5 and 6 of article 6 of the Covenant set out specific safeguards for ensuring that in States parties which have not yet abolished the death penalty, it must not be applied except for the most serious crimes, and then only in the most exceptional cases and under the strictest limits."[133]

The Human Rights Committee stated:

> "Furthermore, States which have not abolished the death penalty and which are not parties to the Second Optional Protocol or other treaties providing for the abolition of the death penalty can only apply the death penalty in a non-arbitrary manner, with regard to the most serious crimes and subject to a number of strict conditions."[134]

The Human Rights Committee also takes a strong standpoint that:

> "States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6 of the Covenant would be violated … . In cases involving allegations of risk to the life of the removed individual emanating from the authorities of the receiving State, the situation of the removed individual and the conditions in the receiving States need to be assessed inter alia, based on the intent of the authorities of the receiving State, the pattern of conduct they have shown in similar cases, and the availability of credible and effective assurances about their intentions. When the alleged risk to life emanates from non-state actors or foreign States operating in the territory of the receiving State, credible and effective assurances for protection by the authorities of the receiving State may be sought and internal flight options could be explored. When relying upon assurances from the receiving State of treatment upon removal, the removing State should put in place adequate mechanisms for ensuring compliance with the issued assurances from the moment of removal onwards."[135]

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[132] Right to Life General Comment 36: Advance unedited version Distr.: General 30 October 2018 Original: English Human Rights Committee General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life.

[133] Para 5.

[134] Para 10.

[135] Para 30.

The Human Rights Committee once again took a strong viewpoint on the risks involved in returning individuals to states where they face the risk of the death penalty: "Returning individuals to countries where there are substantial grounds for believing that they face a real risk to their lives violates articles 6 and 7 of the Covenant."[136]

The ECHR expressed itself on the liberty and security of persons as follows:

> "The Court has emphasised the right of all prisoners to conditions of detention which are compatible with human dignity, so as to ensure that the manner and method of execution of the measures imposed do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention; in addition, besides the health of prisoners, their well-being also has to be adequately secured given the practical demands of imprisonment."[137]

In respect to the Right to Life, the ECHR expressed the following:

> "In cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life (article 6 of the Covenant)."[138]

Further the ECHR stated explicitly that:

> "Article 2 of the Convention prohibits the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there."[139]

[136] Para 55.

[137] Guide on Article 2 of the Convention – Right to life para 49.

[138] Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights – Right not to be tried or punished twice Updated on 31 August 2019 para 59.

[139] ECHR Guideline: Right to life para 69.

1 5 6 General Principles of Criminal Law

1 5 6 1 Principles of Legality and Legal Certainty

Article 22 contains an important principle in ensuring whether a trial is fair, encapsulated by the maxim *nullum crimen sine lege, nulla poena sine lege,* which is called the principle of legality.[140]

> *Nullum crimen sine lege*
> 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
> 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Closely linked to this principle is Article 23 which is *nulla poena sine lege*

> "Article 23 Nulla poena sine lege
> A person convicted by the Court may be punished only in accordance with this Statute."

The principles embodied here are those of legality and legal certainty which are critical in ensuring fairness in criminal proceedings. The ECHR is clear that Article 7 is concerned with substantive criminal law and embodies the principle of legality, which stipulates that no one should be convicted or punished except in respect of a breach of a pre-existing rule of law otherwise referred to in Latin as *Nullum crimen*, *nulla poena sine lege* defined as only a law can define a crime and prescribe a penalty.[141]

There are two main aspects to the principle:

First, Article 7 prohibits legislatures and courts from creating or extending the law so as to criminalise acts or omissions which were not illegal at the time of commission or omission, or to increase a penalty retroactively.

Secondly, it requires that the criminal law should be clearly defined. The ECHR has stated definitively that the principle of legal certainty:

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[140] Degan (2005) *Chinese Journal of International Law* 50.

[141] B Rainey, ELM Wicks & C Ovey *Jacobs, White and Ovey: The European Convention on Human Rights* 7 ed (2017) 328.

> "requires domestic authorities to respect the binding nature of a final judicial decision. The protection against duplication of criminal proceedings is one of the specific safeguards associated with the general guarantee of a fair hearing in criminal proceedings under Article 6."[142]

Further, that the principle of legality:

> "guarantees certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law."[143]

In the case analysis, the importance of the principle of legal certainty will become evident, particularly in light of the application of Regulation 55, which allows for the re-characterisation of crimes at the ICC. This principle will also be shown to be of particular importance in Chapter 6 of the dissertation, which analyses the *Ntaganda* decision and the manner in which the court decided on its jurisdiction in respect of war crimes. The principle is of the utmost importance in terms of ensuring equality of arms, ensuring that the accused is able to properly defend him/herself and to ensure a fair and expeditious trial.

1 5 6 2 Other general legal principles applicable to the dissertation

Article 25 Individual criminal responsibility

> "Article 25(2). A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute."

The International Criminal Court is concerned with trying and punishing individuals, not States. However, most of the persons tried at the ICC are usually not the actual perpetrators but, in most instances, would be those who organise, plan and incite genocide, crimes against humanity and war crimes.[144]

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[142] ECHR Guideline on Article 6 para 231.

[143] Para 234.

[144] W Schabas *An introduction to the international criminal court* 3 ed (2007) 211.

If we review the concept of common purpose complicity, those who participate in a criminal enterprise are liable for acts committed by their colleagues. Paragraph (3)(d) of Article 25 describes this as contributing 'to the commission or attempted commission of such a crime by a group of persons acting with a common purpose'. In other words, a person can be held responsible for contributing to the commission of a crime within the jurisdiction of the Court to the extent it is made with the aim of furthering the criminal activity or criminal purpose of the group, "where such activity or purpose involves the commission of a crime within the jurisdiction of the Court".[145] In the case law chapters, we will see that although the prosecution tried to rely on these Articles to secure convictions against senior persons in positions of power, it struggled to succeed in securing these convictions.

Article 28: Responsibility of commanders and other superiors which provides that military commanders will be held responsible for the crimes committed by their subordinates, however the Article provides that the prosecution must prove that the commander knew and failed to take reasonable steps to prevent this from taking place. This discussion is prevalent in chapter 5 which reviews the acquittals of *Bemba, Gbagbo and Ble Goude.* One of the dilemmas of war crimes prosecution is the difficulty of linking commanders to the crimes committed by their subordinates.[146]

The dissertation will therefore critically analyse the manner in which fair trial principles have been applied by the ICC in the selected case law and the manner in which judges have arrived at their respective decisions in respect of fair trial rights. In the course of the dissertation, it becomes evident that there are certain judges in particular who have written separate or dissenting opinions giving direction on the application of fair trial rights of the accused. These decisions are of particular importance in defining the manner in which the ICC will address the fair trial rights of the accused in all its cases. However, it must be noted that to date, there has been a largely inconsistent approach to the rights of the accused as will be evidenced in the various chapters analysing the specific and selected case law.

While the selected case law represents snapshots of approaches to procedural and substantive fairness at the international level; this dissertation will argue that a radical insistence on fair trial rights, even in the face of demands for accountability for the

[145] 215.

[146] 219.

worst crimes that shock the international community as a whole, is the appropriate synthesis emanating from the dialectical tensions in the Rome Statute and the broader community of interested and affected stakeholders. Hereunder, a framework for the discussion on victim's rights as human rights and the demands of the international community.

1 5 7 Victim's international human rights

Within the framework of international law and discourse, the rights of victims also play a prominent role. The alluded tensions were evident in the previous section, particularly in relation to the rights of the accused in respect of witnesses and the ECHR discussion of the sensitivity that should be employed in addressing the concerns of victims.

The Universal Declaration of Human Rights ("UDHR") plainly articulates

that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[147]

The ECHR also affords rights to victims as contained in Article 2, right to life, and Article 13, right to an effective remedy as well as Article 34 which grants the right of petition to anyone claiming to be a "victim" of a violation of the Convention. Article 13 of the ECHR[148] and Article 47[149] of the EU Charter of Fundamental Rights (the "Charter")[150] confirms that criminal proceedings assert the victims' rights as much as they preserve the identity of a community of law based on human dignity and human rights.

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[147] Article 8 of the UDHR.

[148] Article 13 Right to an effective remedy Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

[149] Article 47 Right to an effective remedy and to a fair trial Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

[150] Charter of Fundamental Rights of the European Union (2000/C 364/01).

Victims' rights to access to justice, as interpreted by the European Court of Human Rights ("ECtHR"), include the following elements: A right to proceedings that aim to identify, convict and punish offenders, a right to participate in the proceedings with full fair trial rights (Article 47(2) and (3) of the Charter, a right to be compensated within the framework of criminal justice whenever a victim of violent crime under substantive law is entitled to compensation Such understanding of victims' rights to access justice that includes elements of compensation is incorporated into EU law by the Charter via the 2012 Victims' Rights Directive and the 2004 Compensation Directive.

This human-rights approach to victims' rights is defined in the Victims' Rights Directive[151] which is currently the major EU instrument on victims' rights. It states that a crime is a wrong and a violation of the individual rights of the victim, and due to this fact, victims are to be recognised and treated respectfully. It means that EU policy has to start from the fact that the offender and, if the offender is unable to compensate, the state owes compensation to victims of crimes against the person for the damages incurred.[152]

The European Court of Human Rights has interpreted two articles of the European Convention[153] for the protection of Human Rights and Fundamental Freedoms as prescribing victims' rights in the criminal process: Article 2, right to life, and Article 13, right to an effective remedy. The European Court has granted ownership of victims' rights in the criminal process to the direct victim of the violation. Furthermore, if the victim is dead or has consented to being, represented, the victim's next of kin may assert the victim's rights.[154]

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[151] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

[152] Strengthening Victims' Rights: From Compensation to Reparation for a New EU Victims' Rights Strategy 2020-2025 Report of the Special Adviser, J. Milquet, to the President of the European Commission, Jean-Claude Juncker Strengthening Victims' Rights: From Compensation to Reparation March 2019 <https://ec.europa.eu/info/sites/info/files/strengthening_victims_rights_-_from_compensation_to_reparation_rev.pdf> 14.

[153] European Convention for the Protection on Human Rights and Fundamental Freedoms, 213 UNTS 221 (1995) (as amended through Nov. 1998) ["European Convention"].

[154] Aldana-Pindell (2002) *Vand J Transnat'l L* 1419.

The European Court specifically held that, given the importance of the rights to life and humane treatment, Article 13 requires the state to provide victims a thorough and effective investigation capable of leading to identification and punishment of those responsible, in addition to the payment of compensation where appropriate. Although victims' rights under Article 13 also coexist with the procedural duties to investigate violations of the right to life and personal integrity, the European Court has held that the requirements under Article 13 are broader than the procedural duties because Article 13 not only requires an effective investigation but also requires that the entire system securing the remedy be effective.[155]

The ICCPR contains a fundamental right to victims in Article 2(3):

> Each State Party to the present Covenant undertakes:(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

The Human Rights Committee has interpreted Article 2(3)[156] of the ICCPR[157] to require states to conduct an effective prosecution to remedy the harm caused to victims of the right to life and personal integrity violations.

Article 2(3) provides that states must accord an effective remedy to any person whose rights under the ICCPR have been violated. In cases involving arbitrary

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[155] 1421.

[156] Article 2.3 of the ICCPR reads:

"Each State Party to the present Covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming a such remedy shall have his right thereto determine by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; to ensure that the competent authorities shall enforce such remedies when granted."

[157] International Covenant on Civil and Political Rights 999 UNTS 171 (1967).

detentions, forced disappearances, torture, and extrajudicial executions, the Human Rights Committee has ruled victims' effective remedy under Article 2(3) of the ICCPR must include a criminal investigation that brings to justice those responsible. The Optional Protocol of the ICCPR allows the UN's Human Rights Committee to receive communications from victims of transgressions of the ICCPR[158].

In 2005, the UN developed basic principles and guidelines on the "right to a remedy and reparation for victims".[159] The guidelines provide that victims should be treated with humanity and respect for dignity and human rights and that appropriate measures should be undertaken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families.[160]

These guidelines provide for victims to have "equal access to an effective judicial remedy as provided for under international law."[161] Article 12 also provides for specific

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[158] Optional Protocol to the International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 9.

Article 1

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

Article 2

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

[159] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

[160] VI. Treatment of victims

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

[161] Article 12 of the Basic Principles.

remedies which are available to victims; including "access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access to justice and fair and impartial proceedings shall be reflected in domestic laws."[162]

These guidelines set out specific obligations placed on states to ensure that victims are adequately protected and receive the necessary assistance to their access to justice; including the relevant information about all available remedies; ensure their safety during and after judicial proceedings; provide proper assistance to victims seeking access to justice. The intention therefore to draft these guidelines was to ensure that victims are adequately protected and receive the necessary access to justice. However, Article 27 of these guidelines also provides a rider that:

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[162] 12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:
(*a*) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
(*b*) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
(*c*) Provide proper assistance to victims seeking access to justice;
(*d*) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.
18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

> "Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process."[163]

Herein lies some of the tensions alluded to in this dissertation, the balancing of the fair trial rights of the accused and those of the victims.

Article 5 of the African Charter on Human and People's Rights provides:

> "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

In 2017, a general comment was issued particularly to discuss the right to reparations and what that entails for victims:

> "The right to redress encompasses the right to an effective remedy and to adequate, effective and comprehensive reparation. The ultimate goal of redress is transformation. Redress must occasion changes in social, economic and political structures and relationships in a manner that deals effectively with the factors which allow for torture and other ill-treatment. This transformation envisages processes with long-term and sustainable perspectives that are responsive to the multiple justice needs of victims and therefore restore human dignity. It requires broad interpretation of State Parties' obligations to provide redress, including putting in place legal, administrative and institutional frameworks to give effect to the right to redress."[164]

It is clear that both African countries and the international community has recognised victim's rights both to access to justice as well as the right to effective

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[163] Article 27 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005.

[164] General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) Adopted at the 21st Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, held from 23 February to 4 March 2017 in Banjul, The Gambia para 8.

redress in the form of reparations but that such reparations need to take account of the broader context of the plight of victims.

The Rome Statute also reaffirms the rights of victims, in its Preamble to place justice for victims at the heart of its work. The Rome Statute, therefore, echoes the sentiments in the UDHR, it recalls that "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."

The Statute expressly recognises that measures to guarantee the safety, physical and psychological well-being, dignity and privacy of victims, witnesses and their families are essential to the work of the ICC. The participation of victims at the ICC will be discussed in more detail in Chapter 2 of the dissertation.

It is therefore evident that human rights law is based on a set of values that seeks to protect both the accused as well as victims and to provide access to justice for both the accused and the victim in international criminal law proceedings. It is, therefore, this tension which the dissertation seeks to explore in greater detail and the rights and participation of victims at the ICC will be discussed in greater detail in Chapter 2.

1 5 8 The international community

The interests of the international community can be summed up by the politicisation of international criminal law and the disappointment expressed by civil society in respect of the rights of victims, particularly when there have been acquittals at the ICC and victims are not afforded their rights to access to justice and reparations for the harms caused.

It must also be borne in mind that the States Parties to the Rome Statute provide management oversight for the court by establishing a budget and providing funding to the court,[165] there is an assumption of control and interest in the cases that are tried at the ICC.

In terms of Article 86 of the Rome Statute, States Parties to the Rome Statute have an obligation to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. Article 87 regulates the modalities and

[165] ICC "How the court works" <https://www.icc-cpi.int/about/how-the-court-works> (accessed 29-11-2019).

channels of cooperation between the Court and States as well as international organisations and provides for the consequences of non-cooperation for states. To facilitate such cooperation, States Parties are obligated to ensure that there are procedures available under their national law for all the forms of cooperation that may be required of them in terms of the Statute (article 88). If a state fails to cooperate effectively with the ICC, it can create delays in the effective workings of the ICC.

Arguably, the most contentious aspect of this arrangement is the role of the Security Council *vis-à-vis* the ICC and the complexities of implementing its referrals. Among the areas of controversy has been the failure to refer some situations in which mass crimes were allegedly committed. The Council has also been relatively indifferent towards states' non-cooperation with the ICC on existing referrals, refraining from taking action on the thirteen decisions of the court regarding the non-compliance of UN member states. Among the 2018 Council members, eight—Bolivia, Côte d'Ivoire, France, the Netherlands, Peru, Poland, Sweden and the UK—are parties to the Rome Statute.[166]

So far, the Council has referred only two situations to the court under Article 13(b): the situations in Darfur, in (2005), and in Libya, in (2011). These resolutions placed the financial burden of the investigations exclusively on the ICC and excluded from ICC jurisdiction foreign nationals operating under Council authorisation. While imposing an obligation on parties to the conflict to cooperate fully with the ICC, the resolutions merely urged states other than Sudan and Libya to cooperate with the ICC, noting that they were under no obligation to do so. More recently, China and Russia vetoed a resolution referring the situation in Syria to the ICC on 22 May 2014.

The biggest debate has been amongst African countries in respect of their criticism of the ICC targeting African countries. To this end, the African Union ("AU") has taken the position that the ICC is overly focused on African situations and should not prosecute incumbent heads of state, which has resulted in several African Council members adopting a more negative position towards the court.

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[166] In Hindsight: The Security Council and the International Criminal Court August 2018 Monthly Forecast Security Council Report <https://www.securitycouncilreport.org/monthly-forecast/2018-08/in_hindsight_the_security_council_and_the_international_criminal_court.php> (accessed 29-11-2019).

The ICC has made efforts to convince the United Nations Security Council (UNSC) to take more actions in demanding Sudan to cooperate fully with the ICC, yet the UNSC has only issued one presidential statement. This lack of support by the UNSC, also detected in the Libya case, undermines the authority of the ICC and has spilled over to some parties to the Rome Statute as they neglect to follow their obligation to cooperate with the ICC, especially in failing to execute arrest warrants – an obligation stated in article 87 of the Rome Statute.

The UNSC is, in its entirety, a political body. Thus, there is a strong likelihood that decisions to refer a situation to the ICC are influenced by its political nature. Moreover, three of its five permanent members are not parties to the Rome Statute, but the UNSC can still refer situations involving states that are not parties to the same Rome Statute. This can be perceived as damaging to the ICC's credibility, integrity and perception of legitimacy.[167]

The ICC's prosecutorial policy while guided by legal, objective criteria, necessarily also considers other factors, including political ones.[168]

Finally, we must also understand the profound disappointment of the victims and the civil society organisations acting on their behalf as victim's rights was proclaimed to be a central feature of the Rome Statute and the ICC. The Statute has indeed included the participation of victims in its proceedings, however as a result of some of these political influences and the international cooperation, some leaders who have been accused of gross human rights violations have been acquitted and left the victims without recourse and reparations as promised by the ICC.[169] This was particularly widely reported in respect of the acquittal of *Bemba, Gbagbo and Ble Goude*. This, in a nutshell, summarises some of the contentious issues surrounding the international

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[167] B Aregawi "The Politicisation of the International Criminal Court by United Nations Security Council Referrals" (21-07-2017) *Accord* <https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals/> (accessed 29-11-2019).

[168] GM Musila "Between rhetoric and action: The politics, processes and practice of the ICC's work in the DRC" (2009) 164 *ISS Monograph* 13.

[169] Amnesty International "Cote d'Ivoire: Acquittal of Gbagbo and Blé Goudé a crushing disappointment to victims of post-election violence" (15-01-2019) *Amnesty International* <https://www.amnesty.org/en/latest/news/2019/01/cote-acquittal-of-gbagbo-a-crushing-disappointment-to-victims/> (accessed 29-11-2019).

community and its expectations of the ICC as well as the politicisation of the ICC, although a more comprehensive discussion is contained in chapter 2 on this matter.

The former sections illustrated some of the tensions alluded to in the title of the dissertation and explained in the methodology section herein. It is evident that both the accused and victims enjoy the benefits of fair trial rights and realisation of rights in international human rights law.

It is further clear that the legitimacy of the ICC is questionable and the impact of politicisation on the functioning of the court may be a factor in the functioning of the court. These tensions in and of themselves contribute to a court which is struggling to define itself, by creating high expectations to the accused, victims and the international community. This begs the question, *is the ICC capable of addressing all these competing interests in respect of the human rights realisation that it sought to achieve and as enunciated in the Rome Statute,* or is it a court that should operate as an international criminal court in a narrower sense; focusing on ensuring that the fair trial rights of those accused of the most heinous crimes are upheld and also ensuring that the rights of victims are addressed through a comprehensive reparations regime?

1 6 Dissertation structure, chapter overview, and choice of case studies

Chapter 1 has set out the research question, the rationale, the theoretical framework in respect of the rights of the accused and the rights of victims. It has also sought to provide a context for the debate regarding the demands of the international community and the dialectics inherent herein.

Chapter 2, will focus on the rights of victims and their participation at the ICC, the inherent tensions between the rights of the accused, victims and the international community. The chapter will also discuss the importance of the roles of prosecutors and judges at the ICC.

Chapters 3, 4, 5, and 6 explore the research problem through the lens of various case studies. The reader may well wonder about the choice of case studies. A few observations: First, there are not many completed cases at the ICC. Not even after almost two decades of ICC investigative, prosecutorial and judicial activities – for the most part in Africa. The choice of cases was therefore informed by criteria that matched the research framework of this dissertation. That is to say, the first case before the ICC (*Lubanga*) had to be on the list because that could provide some hints

as to how the competing demands of victims, the international community and the fair trial rights of the accused were to be viewed by the ICC. Other cases were selected for the way in which their respective factual and legal matrixes could be helpful to analyse the research question. For instance, a case like *Bemba* can illustrate the expectations of (a) victims and (b) the broader regional and international community in a case concerning a leader (as opposed to an accused who is merely a direct but relatively unimportant perpetrator). Other cases, like *Katanga*, illustrates the difficulties contained in the interpretation and application of the relevant laws and rules pertaining to ICC cases. “Technical” issues like these are, however, not dry and without context, expectations and consequences; these issues are therefore explored within the framework of the dialectical tension(s) underlying this study. Finally, a case like *Ntaganda* illustrates the starkness; the vividness of gross human rights violations, notably sexual and gender based violence, on the one hand, and the fair trial rights of one man, the accused, and how these play out in the course of a criminal process that must somehow “end impunity” without sacrificing the fair trial rights of the accused.

Chapter 3, then, apply the general framework as explained in Chapters 1 and 2 to the case of *Lubanga* focusing on different decisions of the court in respect of the participation of victims as well as the application of Regulation 55 and the disclosure of evidence and its impact on the fair trial rights of *Lubanga.*

Chapter 4 will analyse the *Katanga* judgment focusing on victim participation and the application of Regulation 55, including the important principle of double jeopardy and the right to life and the right to silence as fair trial rights of *Katanga.*

Chapter 5 will analyse and provide a comparative analysis of the *Bemba, Gbagbo and Ble Goude* acquittals, with a particular focus on victim participation, Regulation 55 and the no case to answer discourse which arose out of these cases in respect of the fair trial rights of the accused.

Chapter 6 will analyse the *Ntaganda* judgment which dealt with the crimes of rape and sexual slavery as war crimes. The chapter will focus on international humanitarian law, victim participation as well as the principle of legality.

Chapter 7 will conclude and include key recommendations based on the analysis of case law in the preceding chapters. All of these selected cases will be analysed against the fair trial framework as set out in the current chapter, and with due regard to the tensions and contradictions informing the ICC’s judicial work.

CHAPTER 2: DIALECTICAL TENSIONS EXPLORED

2 1 Introduction

The previous chapter set out the theoretical framework for the discussion. The chapter focused on the dialectical tensions of the rights of the accused in relation to the rights and roles of other role-players within the institutional framework of the ICC.

In this chapter, the inherent tensions between the rights of the accused, victims' rights and the expectations of the international community, in lieu of the classification of the cases as the "most serious crimes under international law that affect the whole of humankind"[170] will be identified. This chapter, therefore, serves to explore the various opinions of authors on the inherent tensions between the rights of the accused and the roles of victims, prosecutors and judges and the international community in the ICC trial process.

As a result of the fact that the ICC has awarded a prominent role in court proceedings to the participation of victims, in particular, the chapter will extrapolate on this advancement in international criminal law as well as reviewing the roles of prosecutors, judges and the international community.

2 2 Victims' rights

The participation of victims is a unique feature of the ICC aimed at ensuring that victims are given the opportunity to be heard and for their truth of events to be told. The inclusion of the right of victims to participate in proceedings at the ICC has however been an immense challenge for the court as neither the Statute nor the rules of the court provide much guidance on the manner of such participation. However, for the purposes of understanding the role of victims in the international criminal law discourse, it is important to review how their role became more defined within the Rome Statute.

A great milestone for the rights of victims in international criminal law can be attributed to the UN Victims Declaration which was adopted by the UN General Assembly in 1985.[171] This was followed almost twenty years later, by the adoption by

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[170] Preamble to the Rome Statute.

[171] Declaration of Basic Principles for Victims of Crime and Abuse of Power, GA.Res.40/34 of 29 November 2005.

the General Assembly in 2005 of the Basic Principles and Guidelines on the Right to a remedy and reparations for victims of gross violations of international human rights law, as referred to in more detail in chapter 1. These guidelines significantly advanced victim's rights in the international criminal law arena by granting victims' rights to access to justice and reparations amongst other rights. Another important victory for victims was the adoption in 2005 of the *Guidelines on child victims and witnesses of crime*.[172] These guidelines acknowledge the particular vulnerabilities of children and witnesses of crime and afford protection to them and highlight their rights to dignity, non-discrimination and that the best interests of the child should always be taken into account. These guidelines were critical in the advancement of victim's rights within the international criminal context and served to solidify the protections which victims of gross human rights violations are entitled to.

2 2 1 The rights of victims in the statute and rules of procedure and evidence

A definition of the notion of victim cannot be found in the Rome Statute but rather in Rule 85 of the ICC Rules of Procedure and Evidence ("RPE"), which states as follows:

For the purposes of the Statute and the RPE:

1. 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
2. Victims may include organizations or institutions that have sustained direct harm to any of their property that is dedicated to religion, education, art, science, or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

Article 68 introduces the protection of victims and witnesses participating in ICC proceedings. It is interesting to note that the participation of victims is qualified by wording in the Statute to the effect that such participation should "not prejudice the fair trial rights of the accused":

Article 68(3) reads as follows:

[172] Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime of 22 July 2005.

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

Article 68(3) defines the scope of victim's participation into two processes; first, the court will decide at which stage of proceedings victims may participate and then this is qualified further by stating that the manner of such participation should not be prejudicial or inconsistent with the rights of the accused to a fair trial. Any reference to "the court" means the judges of the ICC. It is therefore evident that it is the responsibility of the judges to ensure a balance between the participation of victims and the rights of the accused.

For the purposes of this chapter, it is important to understand the manner in which victims are allowed to participate in proceedings as set out in the Rules of Procedure. Under Rule 89, victims wanting to participate in proceedings are directed to apply to the Registry, which then passes on the applications to the relevant chamber. The rule also mentions the possibility of victims making opening and closing statements. Rule 91(2) provides that legal representatives of victims may participate in proceedings and adds that the prosecution and defence shall be allowed to reply to any written or oral observation by a victims' representative. Rule 91(3)(a) specifies that legal representatives of victims may apply to put questions to a witness, the accused, or an expert witness.

The participation of victims in proceedings is best explained in the ICC booklet which was developed to guide victims on the manner in which they may participate in proceedings:

Victims' participation in proceedings is entirely different from a victim's possible role as a witness called to testify before the Court for the Prosecution, the defence or the victims' legal representative.

Victim as a participant:

(i) Participation is voluntary and involves communicating to the Court their own views and concerns It is up to the victims to decide what they want to say

(ii) Participation is possible at all stages of proceedings when considered appropriate by the judges
(iii) Always entitled to be represented before the ICC by a legal representative
(iv) Participates via a legal representative, and need not appear in person

Victim as a witness:
(i) Called by the Prosecution, the defence, the victims' legal representative or the Chamber
(ii) Serve the interests of the Court and the party that calls them
(iii) Give evidence by testifying and answering related questions
(iv) Called to testify at a specific time
(v) Does not normally have a legal representative
(vi) Normally testify in person in the courtroom

Victims may also participate as witnesses in ICC proceedings and in such cases, these individuals have a double status (as a victim on the one hand and witness on the other).[173]

In the case law discussion of this dissertation, it will be shown that there have been various problems related to the participation of victims in proceedings before the ICC. Some of these problems relate to the stage of proceedings at which victims are allowed to participate as well as the potential fair trial rights of the accused on which such participation may infringe.

To this end, various authors have weighed in on the debate. Zappala,[174] for example, elaborates on the various rights that victims enjoy including the right to justice, the right to the truth, the right to be heard as well as the right to obtain compensation. He clarifies that victims are unable to claim the same rights as those contained in the Statute for the accused. He goes on to note that the purpose of criminal procedure is to ensure that the individual is protected against any potential abuse or error by the public authorities conducting investigations, prosecutions and

[173] ICC *Victim's Book* 14.
[174] S Zappala "The Rights of Victims *v* the Rights of the Accused" (2010) 8 *J Int'l Crim Just* 137 149.

trials.[175] The purpose of victims participating by presenting their views and concerns must, therefore, not be confused by thinking that victims are parties to proceedings, he points out. It is clear that the accused is a party to proceedings and that there is a distinction between the participation of victims and the fair trial rights of the accused. There are, however, opposing views to this and many who support the role of victim participation at the ICC.

Hobbs[176] goes on to list the benefits of victim participation[177] and acknowledges that there may be difficulties both substantively and administratively between the participation of victims conflicting with the rights of the accused, but he is of the opinion that this will be ironed out over time by the court.

A further benefit is providing a role for victims within the criminal justice system that can promote knowledge, awareness, and understanding of the criminal proceedings that they may not otherwise be exposed to, Hobbs highlights.

In defining who the parties to proceedings before the ICC are, given the relatively new concept of victim participation within the court proceedings, one author, Palomares clarifies the position as follows:

> "According to the legal text which governs the international criminal process under the ICC, the victims have an important role to play, certainly not as a party, but as a participant. The difference is that the participants cannot do the same things that the parties to the proceeding (prosecutor and defence) can do. They are going to be significantly involved in the process, albeit not at the same level as the parties. Nevertheless, the ICC system is regarded as an enormous trend shift as regards victim participation."[178]

This author therefore clarifies that the prosecutor and the accused are parties to the proceedings in what is considered to be a mixed accusatorial and inquisitorial procedure at the ICC.

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[175] 149.

[176] H Hobbs "Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice" (2014) 49 *Tex Int'l LJ* 1 22.

[177] 10: "First, participation can promote individual 'healing and rehabilitation' by providing victims with a 'sense of agency', 'empowerment and closure.' Second, participation can contribute to reconciling a community by 'promoting truth-finding in criminal proceedings."

[178] Guerrerdo Palomares (2014) *IJPL* 233.

2 2 2 The tension between the rights of the accused and the rights of victims

While acknowledging the important reasons for the participation of victims, in matters of gross human rights violations which directly impact on their lives, the critical tension lies in ensuring that the participation of victims does not override the fair trial rights of the accused in proceedings before the ICC and vice versa. Equality of arms dictates that there should be equality between *parties* participating in criminal trials. And, as noted above, victims are participants, but not parties to the proceedings before the ICC.

In this regard, Damaska[179] points out that the inherent tensions exist because the desire to protect the defendant and victims generates conflicting demands which include the equality of arms *potentially* being compromised as well as the presumption of innocence of the accused.[180] Therefore, the rights of victims should never be allowed to infringe on the defendant's right to be deemed innocent until proven guilty. This, the author argues has far-reaching consequences, which are largely dependent on the discretion given to prosecutors, which will be discussed under the role of the prosecutor in this chapter.[181]

Damaska, further opines that human rights should be used as a guideline in addressing these tensions[182] – a view that supports the basis of the human rights framework of this dissertation in that when there is uncertainty or conflict, the court should revert to the international human rights framework as set out in the previous chapter.

Ling[183] argues that although there are competing rights and the participation of multiple actors, we have to distinguish between the rights and interests of role-players in the criminal trial to ensure that a fair trial takes place in international criminal courts. This point will be important in the analysis of case law in the next chapter,[184] particularly

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[179] M Damaska "The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals" (2010-2011) *North Carolina Journal of International Law* 365.

[180] 374.

[181] See part 3 1 of Chapter 3: The role of the Prosecutor.

[182] Damaska (2010-2011) *North Carolina Journal of International Law* 379.

[183] W Ling "Fair Treatment in Transnational and international criminal law" (2013) 25 *Singapore Academy of Law Journal* 783.

[184] See Chapter 3 of this dissertation (*Lubanga*).

regarding the conflict between the rights of the defendant and the participation of victims.

A fundamental concern and one that is discussed in more detail in Chapter 3 of the dissertation relates to the stage at which victims are allowed to participate in proceedings. One author, McAsey,[185] elaborated on this aspect by emphasising that the concern is that the participation of victims at the investigation stage of proceedings may influence the prosecutor's decision to prosecute an unidentified accused.[186]

In determining the timing or stage of proceedings for the participation of victims, Article 15(3)[187] allows victims to make representations and Article 19(3)[188] provides for the submission of "observations" on issues of jurisdiction and admissibility.

Mcdermott[189] recommends that the Chamber should examine whether Article 68(3) participation would be prejudicial to the rights of the accused to a fair and impartial trial when victims' personal interests are affected and at what stage participation would be most appropriate. Mcdermott[190] is of the view that the following modalities of participation are unacceptable: views and concerns, criteria, presentation of points of law, access to the prosecutor's documents and the introduction of evidence pertaining to the guilt or innocence of the accused.

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[185] B McAsey "Victim Participation at the international criminal court and its impact on procedural fairness" (2011) *Austl Int'l LJ* 109.

[186] 113.

[187] Article 15(3)(f) of the Rome Statute:

"The Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence."

[188] Article 19(3) of the Rome Statute:

"The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court."

[189] Y McDermott "Some are more equal than others: Victim Participation in the ICC Citation" (2009) 23 *Eyes on the ICC* 27.

[190] 47.

When considering the stage of proceedings at which victims are allowed to participate, De Beco[191] opines that the stage of participation was largely clarified by the Appeals Chamber judgment in *Lubanga*[192] in which it was concluded that victims are no longer allowed to participate in an investigation in general and that victims have to demonstrate that their personal interests are affected in order to participate in proceedings relating to an investigation. This decision will be discussed in more detail in Chapter 3.

Besides the stage of victim participation, other challenges related to the participation of victims in trial proceedings have been in relation to the presumption of innocence of the accused, the disclosure of evidence and the manner in which victims have been allowed to participate in proceedings.[193] If victims were allowed to participate in proceedings at such an early stage, particularly in respect of jurisdictional issues, this would negatively affect the presumption of innocence of the accused at a very early stage, prior to actual evidence being led during trial. It is submitted that the testimony of victims at different stages of proceedings, depending on how the judges manage their participation, could influence the views of the judges in situations when they are deciding on preliminary matters in the case. It is for the prosecutor to prove guilt beyond reasonable doubt and the participation of victims could have the effect of the accused having to defend his/her case both against the prosecutor and the victims. This is of particular importance in Chapter 6 of this dissertation. It will be described how the Court had to decide on the jurisdiction in respect of war crimes in the *Ntaganda* case.

In respect of the presumption of innocence of the accused, Zappala[194] opines that the participation of victims creates an underlying presumption that the events occurred in given circumstances and that certain people were there. In criminal trials, it is customary for the prosecutor to bear the onus, not the victims, of proving guilt beyond

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[191] G De Beco “Victim Participation in Proceedings before the International Criminal Court: Resolving Contentious Issues” (2009) 3 *Hum Rts & Int'l Legal Discourse* 95 109.

[192] *The Prosecutor v Lubanga* Appeals judgement of (19 December 2008) No.: ICC-01/04 OA4 OA5 OA6 <https://www.icc-cpi.int/CourtRecords/CR2008_07932.PDF> (accessed 14-06-2016).

[193] See Chapter 3.

[194] Zappala (2010) *J Int'l Crim Just* 147.

reasonable doubt. Zappala[195] argues therefore when victims are admitted to the proceedings on the basis of a preliminary finding that a crime was committed against them, there may be a presumption as to the unfolding of events and this may create a situation that the trial will only be limited to the legal characterisation of the events as presented by the victim. He confirms that irrespective of the victim's participation in the trial, the defendant has the right to be presumed innocent until proven guilty and the onus is on the prosecutor to prove the contrary.

These observations are of the utmost importance in assessing whether the accused enjoys the full extent of his/her fair trial rights at the ICC. The presumption of innocence is a fundamental right and the very existence and participation of victims pose the potential risk of influencing not only the prosecutor but also the judges at the ICC. The various interpretations related to the manner of such participation will become clearer in the chapters on case law. The ICC has tried to address some of these challenges by developing the booklet for victim's participation at the ICC as well as for their legal representatives.[196]

Van der Wyngaert J,[197] one of the judges at the ICC who also served in the Appeals Chamber, produced an academic paper on the role of victim participation at the ICC. The judge acknowledges that the judges at the ICC have given a broad interpretation of victims' rights, as is evidenced in the *Lubanga* and *Katanga* cases respectively (See Chapters 3 and 4). The judge[198] interprets Article 68(3) by emphasising that it makes it clear that victims' participation must not come at the expense of the defence. She highlights that the *Katanga* case gave victims the *right* to disclose potentially exonerating evidence, which begs the question as to why the victims did not have a corresponding *duty* to disclose exculpatory material. The judge[199] further asserts that in a criminal trial, victims do not appear in person but have legal representatives, which serves to slow down proceedings.

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[195] 147.

[196] ICC Representing victims before the International Criminal Court: A manual for legal representatives The Office of Public Counsel for Victims 2019 <https://www.icc-cpi.int/iccdocs/opcv/manual-victims-legal-representatives-fifth-edition.pdf> (accessed 29-11-2019).

[197] C van den Wyngaert "Victims before International Criminal Courts: Some views and concerns of an ICC Trial Judge Case" (2011) 44 *Case West Reserve J Int Law* 475.

[198] 488.

[199] 493.

Another author, Fedorova[200] particularly challenges the role of legal representatives for victims and argues that in both the *Lubanga* (Chapter 3) and *Bemba* decisions (Chapter 5) victim participation was approached from a broad perspective and legal representatives were allowed to ask questions going beyond the charges against the accused for the purpose of establishing the guilt of the accused, almost on the same footing as the prosecution.

On the flip side, arguments in favour of victim participation are equally compelling. The basic norms as discussed in the previous chapter were developed to ensure that victims are given equal access to justice and as such are entitled to participate in trials, particularly insofar as the prosecution of the crime has a direct bearing on their experience as a victim thereof.

For example, Aldana-Pindell argues that the purpose of these emerging norms has been to alleviate victims' exclusion from the criminal process. The norms establish that states must guarantee victims an effective prosecution as a remedy whenever violent crimes are committed against them. Furthermore, these norms grant victims certain participatory rights in criminal proceedings by establishing mechanisms by which victims may have input into the criminal process.[201] And, Aldana-Pindell points out, that surviving human rights victims, participate in prosecutions against those accused of gross human rights violations but that the level of participation has varied depending on the degree of risk, resources, and the parameters established by law in their respective countries.[202] She avers that International norms have been developed specifically to grant victims standing to participate in the criminal process and this participation allows victims to monitor the states actions and to advance their interests in truth and justice. An example of this is evident in the Rome Statute of the International Court and its Rules of Procedure and Evidence.[203]

A further argument advanced is that procedural justice for victims involves access to redress and fair treatment within proceedings. In this regard, Moffett emphasises the following measures which needs to be put in place to ensure the effective participation of victims in criminal trials; including a number of provisions including

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[200] Fedorova *School of Human Rights Research Series* 427.

[201] Aldana-Pindell (2002) *Vand J Transnat'l L* 1405.

[202] 1406.

[203] 1414.

protection measures, participation in proceedings which affect their interests, access to legal representation, assistance and support, and the ability to claim reparations.[204]

Conversely, Moffett argues that substantive justice comprises the outcomes of judicial processes and therefore redress for the harm they have suffered.[205] Therefore human rights law for victims includes truth, justice and reparations. And, importantly, that the right to truth involves determining what international crimes occurred, the context and consequences, as well as the fate and whereabouts of those who died.[206] It is furthermore argued that the right to justice entails victims' procedural access to redress as well as to seek prosecution of those responsible. However, the right to justice does not grant victims a particular outcome, such as a conviction, due to limitations in evidence or other public interest concerns rather it is confined to pursuing criminal redress against a responsible actor.

Lastly, the right to reparations allows victims the right to appropriate remedial measures to alleviate their harm. In comparison to the other two rights, reparations can provide more tangible measures to victims that can improve their quality of life but is limited by economic considerations.[207] Moffett, therefore, contextualises the rights afforded to victims and the meaning equated with their participation in criminal trials as well as the limitation that their participation does not always guarantee a conviction.

Garduno reviews the manner in which victim participation has occurred within the trials at the ICC and argues that various Chambers have held that victim participation needs to be “meaningful” rather than “purely symbolic.”[208]

She argues that Article 68(3) does not provide an “unfettered right for victims to participate”, nor is there an unqualified right for victims to participate individually in the proceedings.

She further goes on to note that the ICC has adopted an approach of deciding victim participation on a case-by-case basis in light of the evidence/issue at stake and considering the rights of the accused, the need to ensure that the proceedings are

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[204] Moffett (2015) *J Int'l Crim Just* 287.

[205] 287.

[206] 288.

[207] 288.

[208] D Contreras-Garduno & J Fraser “The Identification of Victims before the Inter-American Court of Human Rights and the International Criminal Court and Its Impact on Participation and Reparation: A Domino Effect” (2014) 7 *Inter-Am & Eur Hum Rts J* 174 190.

effective and expeditious, and the interests of the victims concerned.[209] To date, she argues that the ICC has demonstrated an interest in pursuing a collective approach to victim participation instead of the original highly individualised system. Since 2012, decisions of the ICC have indicated that certain judges also recognise the value of a more collective approach. It can therefore be argued that the collective approach can reduce the participation of individual victims and could mute or dilute the voices of victims, particularly vulnerable victims such as women, children, and minorities.[210]

The collective approach was adopted mainly to streamline the application process, as will be demonstrated in the case law pertaining to victim participation in Chapter 4 which is based on the *Katanga* case.

These arguments demonstrate that there are both benefits and potential challenges with victim participation particularly between the rights of the accused to a fair trial and the rights of victims to access to justice, redress and reparation for the harm suffered. The argument is not that victim's rights do not hold value, in fact, their rights are of the utmost concern in relation to the harm which they have suffered. The argument, however, is premised on the fact that the rights and participation of victims need to be clearly defined within the context of an international criminal trial, bearing in mind the competing interests of the accused and victims.

2 2 3 Proposals for addressing the challenges in victim participation

The fact that the Statute provides insufficient guidance on the manner of participation nor does it provide mechanisms for addressing the challenges related to the participation of victims at the ICC, requires the judges of the court to develop guidelines and direction in this matter. This is evidenced in Chapter 6 of the dissertation.

However, some recommendations have been made to address some of the challenges as is evidenced by Tonellato,[211] who, in considering the issue of victim participation and the stages at which such participation should occur, concluded that

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[209] 190.

[210] 191.

[211] M Tonellato "The Victims' Participation at a Crossroads: How the International Criminal Court Could Devise a Meaningful Victims' Participation while Respecting the Rights of the Defendant" (2012) 20 *European Journal of Crime, Criminal Law and Criminal Justice* 315 359.

the rules of the court in respect of victims should be interpreted narrowly, in light of the defendant's rights, while bearing in mind the restorative purpose of victim participation. Tonellato argues for a nuanced approach that takes into account the rights and interests of both the victim and the accused.

She furthermore stresses the wide discretion granted to judges in respect to victims' participation, which has left several gaps, and notes that the chamber has struggled to balance divergent interests.[212] In order to avoid general uncertainty, clear criteria and boundaries to victim's participation should be provided.[213]

Once again it becomes clear that the judges play a fundamental role in providing guidance on this matter and the dissertation will demonstrate that the decisions of the different chambers in different cases were often confusing, but over time there seems to be a clearer proposal for a way forward (as discussed in Chapter 6 regarding the *Ntaganda* judgment's further guidelines for the participation of victims as produced by the Chamber).

Zappala[214] supports the argument regarding the importance of the role of judges and opines that there is a lack of clarity regarding victim participation and this requires that judges provide direction on modes of participation on a case-by-case basis.[215] Zappala reiterates that victims should be given very limited powers to intervene in the trial process and that the general principle is that participation must be consistent with the rights of the accused, furthermore, judges are entrusted with ensuring the appropriate balance.[216]

Moffett argues that there have been concerns that state parties wish to see a more coherent victim participation regime emerge, but judges have defended such moves to protect their discretion in responding to the circumstances in each case. He recommends that as a compromise, judges should have some flexibility to determine exceptional rights for victims, such as anonymous participation, but that modalities of presenting evidence, etcetera, remain the same in each case. He furthermore agreed

[212] 323-324.
[213] 325-326.
[214] Zappala (2010) *J Int'l Crim Just* 139.
[215] 142
[216] 163, 164.

and supported the annex of the revised ICC Victim Strategy[217] which outlines the "rights or possibilities" of victim participation as a welcome step towards making participation more harmonised.[218]

Van den Wyngaert J[219] suggests that the Court needs to establish whether the participation of victims is meaningful and whether it justifies the number of resources and time expended. She suggests that a possible alternative may be to transform the TFV into a reparations commission that would deal directly with reparation claims. This, the judge argues would remove the victims from criminal proceedings and allow victims to take their claims directly to the TFV Reparations Commission.[220] This is a very valid recommendation as it does not discount the rights of victims to be heard, to tell their truths and to be compensated accordingly, it also provides a more contained environment for victims to express their views and to be heard. The value of Truth Commissions is clearly evident in the South African perspective in relation to apartheid crimes and how they were dealt with taking into account both the transgressors of the crimes as well as the victims.

Moffett holds a different view to Van den Wyngaert and, in fact, responds:

> "Judge Van den Wyngaert has suggested that 'it may be too much to expect from the ***ICC*** to be a retributive (fighting impunity) and a restorative mechanism at the same time. However, while Judge Van den Wyngaert is correct, the ICC cannot deliver justice to all

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[217] Assembly of States Parties ICC-ASP/11/38 Court's revised strategy in relation to victims 5 November 2012 Annex, 7.

[218] Moffett (2015) *J Int'l Crim Just* 292.

[219] Van den Wyngaert (2012) *Case West Reserve J Int Law* 495.

[220] "*The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation*" (Article 75 (1) of the Rome Statute). The reparations mandate allows the Trust Fund for Victims ("TFV") to collect fines or forfeitures from a convicted individual in a war crimes case, in order to provide reparations awards to victims. These reparations can be individual or collective, and can take many different forms, including restitution, compensation and rehabilitation. However, reparations are not limited to just individual, monetary compensation; they may also be awarded in more collective or symbolic forms, as measures that can help to promote reconciliation within divided communities. This broad mandate allows the Court to identify and award the most appropriate forms of reparation in light of the context of the case, and in light of the rights and wishes of the victims and their communities. Available at <https://www.trustfundforvictims.org/en/about/two-mandates-tfv/reparations> (accessed 12-07-2019).

victims, this does not mean sole resort to restorative justice or dissociating justice for victims from ending impunity."[221]

He argues that we should instead be focusing our efforts on how to improve justice for those victims before the ICC and concentrating attention on what states should be doing to redress international crimes.[222]

Notably, both views hold value in the discourse related to the participation of victims at the ICC and there seems to be an acknowledgement that the current system of victim participation at the ICC may not be sustainable in the long term. The view supported in this dissertation is not that the rights and participation of victims within international criminal law is not valid, the view instead is that the participation of victims may well not be fulfilled in the context of the international criminal court setting. This is based on the premise that even though, the Rome Statute proposes the inclusion of international human rights law and the participation of victims, the court itself may not have the capacity to implement such a noble notion and succeed in upholding the rights of both the victims and the accused.

2 3 The importance of the roles of the prosecutor, the judges and the international community

2 3 1 The prosecutor

Due to the significant role that victims play at the ICC, the role of the prosecutor in proceedings becomes vitally important explicitly so in relation to the fair trial rights of the accused person. Fedorova[223] observes that even though the prosecutor has to fulfil different roles, ultimately due to the complexity of the cases before international criminal courts, and the widespread victimisation, the prosecutor will focus his/her efforts on securing convictions. This issue was explored briefly in chapter 1 which discussed the role of the prosecutor both legally but also potentially as a political actor.

The duties and powers of the prosecutor is set out in Article 54 of the Statute as follows:

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[221] Moffett (2015) *J Int'l Crim Just* 296.

[222] 296.

[223] Fedorova (2012) *School of Human Rights Research Series* 151.

1. The Prosecutor shall:

"(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and
(c) Fully respect the rights of persons arising under this Statute."

Subsection (c) is of particular importance in this Article of the Statute as it places an obligation on the prosecutor to respect the rights of accused persons as well as in subsection (b) victims. Subsection (a) makes it clear that a critical role of the prosecutor is to establish the truth. In establishing such truth, it is submitted that part of the respect which the prosecutor should accord to the accused person in respect of fair trial rights is the right of the accused to be presumed innocent until proven guilty, the prosecutor should also ensure that the accused person understands the charges against him/her in order to adequately prepare a defence and most importantly the prosecutor has a duty to disclose relevant evidence to the accused person. Similarly, the prosecutor has to afford respect to the interests and personal circumstances of victims, taking into account the nature of the crime, particularly where it pertains to sexual violence, gender violence and violence against children. The prosecutor, therefore, has a duty to balance the rights of the accused and the rights of victims equally.

Fedorova[224] opines that the mandate of a prosecutor demands not only an active search for all the relevant evidence but also the presentation of such evidence to the court. This role, Fedorova explains, places the prosecutor in a position that obliges him to protect the accused as well as to fight his case against him. In the chapters on case law (Chapter 3) some of the difficulties encountered by the prosecutor, including the obligation to disclose evidence, particularly exculpatory evidence, will be

[224] 147.

discussed in greater detail.[225] In addition to such disclosure of evidence, the Prosecutor also has a duty to make available for inspection by the Defence, materials in the possession or control of the Prosecutor that are important to the preparation of the defence. This duty contributes to the fair trial right of the accused to ensure the adequate preparation of a defence. Stewart[226] opines that the ICC disclosure regime is fundamental to the guarantee of a fair trial and that disclosure has a significant impact upon the ability of the accused to make full answer and defence to the charges. Stewart further notes the dual role that the prosecutor plays by having to be sensitive to the interests and well-being of victims and witnesses but also being respectful of the rights of the accused.

Closely linked to the disclosure obligation, is the right of the accused to be informed promptly and in detail of the nature and content of the charges. This is a fundamental right as it ensures that the accused is able to present a proper defence. Stewart[227] is of the view that this right places an onus upon the prosecutor to draft the document containing the charges ("DCC") in clear language that informs the defence of the case he or she has to meet.

Another problem or concern that arises consistently in the case law chapters of the dissertation relates to the re-characterisation of charges contained in Regulation 55. Stewart[228] explains this further and states that the DCC does not preclude the possibility of changes in the legal characterisation of the facts in the course of the trial, without a formal amendment to the charges, as long as those underlying facts and circumstances remain unchanged. The case law will reveal the extreme difficulties encountered by the chambers at the ICC in respect of the application of this Regulation. As mentioned earlier in this chapter, the presumption of innocence is the right of the accused and the onus to prove the guilt of the accused beyond reasonable doubt rests with the prosecutor. A challenge as discussed earlier in this chapter is the

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[225] Exculpatory evidence is evidence in her possession or control which she believes shows or tends to show the innocence of the accused, or mitigate the accused's guilt, or which may affect the credibility of prosecution evidence.

[226] JK Stewart "Fair Trial Rights under the Rome Statute from a Prosecution Perspective" paper presented at the *ICTR Symposium* – Arusha, Tanzania – 7 November 2014 available at <http://unictr.irmct.org/sites/unictr.org/files/publications/compendium-documents/i-fair-trial-rights-rome-statute-prosecution-perspective-stewart.pdf (accessed 02-01-2019) 9.

[227] 11.

[228] 11.

influence that the participation of victims may have on the accused's fundamental right to be presumed innocent.

Another difficulty with the role of the prosecutor has been that the prosecutor has been criticised for having too wide discretionary power at the ICC, particularly in respect of his/her selection of cases to investigate and prosecute. At the ICC, situations for investigation may arise as a result of a Security Council referral (Article 13), State Party referral (Article 14) and prosecutorial initiative (Article 15). Article 15[229] contains the essence of the roles and duties of the prosecutor at the ICC particularly in respect of the initiation of investigations. Lepard[230] is of the view that Article 15 gives

[229] Article 15 of the Rome Statute:

Prosecutor:

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

[230] B Lepard "How should the ICC prosecutor exercise his or her discretion? The role of Fundamental Ethical Principles" (2009-2010) 43 *The John Marshall Law Review* 553 554.

the prosecutor the greatest degree of discretion in respect of launching investigations into situations. He states:

> "More broadly, many critics have observed that all of the situations under investigation to date have occurred on the continent of Africa. This lends support to suspicions that the Prosecutor is biased against developing countries and in favor of Western countries-that the ICC is, in the words of Professor Schabas's Article written for this symposium, a twenty-first century agent of "victor's justice." [231]

In addition, Aptel[232] highlights the following conflicts and discretionary powers granted to the prosecutor: the preliminary components in the decision to investigate or prosecute; determination of specific entities falling within the limits set by the applicable jurisdiction; individual targets to be investigated or prosecuted;[233] selection of the specific factual allegations to be listed in the charges; the legal characterisation of the offence;[234] and the discretionary choice of witnesses, including victims.[235] These authors allude to the wide range of potential challenges that the prosecutor may face.

In addressing these criticisms, the prosecutor published Regulations in 2009 and issued a policy paper on the "interests of justice" criteria.[236] Commenting on the aforesaid, Lepard[237] is of the view that the guidelines and policy paper demonstrates some progress, but that these could be more precise in respect of how the prosecutor selects cases and the author proposes the use of human rights as a guiding principle. However, the prosecutor has relied on the gravity threshold when selecting cases.[238] The key provisions related to the gravity threshold is contained in Articles 17(1)(d), 53(1)(b) and 53(2)(b) and Article 17(1)(d) of the Statute. These articles of the Statute

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[231] 557. Please see a more detailed discussion regarding the Africa/ICC debate under 5 3 3 1 below.

[232] C Aptel "Prosecutorial Discretion at the ICC and Victims' right to remedy" (2012) 10 *Journal of International Criminal Justice* 1361.

[233] 1362.

[234] 1362.

[235] 1363.

[236] Policy Paper on the Interests of Justice *ICC-OTP-2007* (2007) <https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf> (accessed 05-10-2016).

[237] Lepard (2009-2010) *The John Marshall Law Review* 558.

[238] See Policy Paper on the Interests of Justice *ICC-OTP-2007* (2007) 5.

require a case to be of sufficient gravity to justify further action by the Court; and Article 53[239] places an obligation on the prosecutor to consider the gravity of a situation or case when deciding whether to initiate an investigation or a prosecution.

A statement[240] made by the previous prosecutor, Luis Moreno-Ocampo, on the issue of gravity, reads, in part, as follows:

> "Among the most important of these criteria is gravity. We are currently in the process of refining our methodologies for assessing gravity. In particular, there are several factors that must be considered. The most obvious of these is the number of persons killed - as this tends to be the most reliably reported. However, we will not necessarily limit our investigations to situations where killing has been the predominant crime. We also look at number of victims of other crimes, especially crimes against physical integrity. The impact of the crimes is another important factor."

It is noteworthy that the office of the prosecutor ("OTP") has produced guidelines related to their selection of cases and decisions to prosecute crimes, however, it must be noted that to date, the cases that have been selected are still mainly from African states.

In addition to gravity, Aptel[241] argues that you cannot ignore the political pressure that prosecutors must face in making their decisions regarding cases. Aptel[242] argues

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[239] Article 53 of the Rome Statute: Initiation of an investigation:
1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) The case is or would be admissible under article 17; and (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

[240] Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court *Informal meeting of Legal Advisors of Ministries of Foreign Affairs* New York (2005) <https://www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO_20051024_English.pdf> (accessed 12-06-2016) 6.

[241] Aptel (2012) *Journal of International Criminal Justice* 1364.

[242] 1364.

that the crimes of genocide, crimes against humanity and widespread or systematic war crimes are usually perpetrated as the result of state-sponsored policies and is by their very nature political.

> "Therefore, prosecuting those accused of these crimes impact on the politics of a country and the discretionary powers afforded to prosecutors impact on politics, on the perception of individual and collective guilt and innocence, on the historical recognition of the crimes, and also on the victims."[243]

This is an important point that is also true for the role of judges and how it affects independence and impartiality at the ICC. However, the final decision regarding initiating and the pursuance of investigations rests with the decision of the pre-trial chamber. Therefore, the role of judges becomes extremely important in making any final decisions pertaining to the cases to be tried at the ICC.

The wide discretion given to the prosecutor in the selection of cases coupled with having to take into account both the victims' rights as well as the rights of the accused poses potential challenges at the ICC. It must also be borne in mind that the prosecutor has an immense amount of pressure placed on him/her from the international community to ensure successful convictions at the ICC. It is with this in mind that the obvious tensions related to the role of the prosecutor come into play particularly in light of ensuring that the fair trial rights of the accused are secured. Fedorova[244] encapsulates the tensions in the role of the prosecutor quite eloquently as follows:

> "As the representative of the international community in general, and the victims of the most serious crimes in particular, the prosecutor has a duty to vigorously pursue the institution's primary objective to prosecute those most responsible for international crimes and, thus, to end impunity."

Whether or not this is true can only be seen through the analysis of the case law that will extrapolate more clearly on how the prosecutor approaches conflicting rights and interests in the exercise of his or her duties. A further recommendation to the vast discretionary power granted to prosecutors as well as the conflicting roles have been

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[243] 1364.

[244] 151.

made by Markovic,[245] who is of the view that the prosecutor requires a code of conduct, which would provide a common framework for conceptualising the prosecutor's obligations under the Rome Statute. He asserts that such a code would serve to protect the rights of the defence, create a historical record and educate those affected by war crimes. This recommendation, as well as ensuring that prosecutors are held accountable for their actions and misconduct, is found in Chapter 3 of the dissertation.

2 3 2 The role of judges

Arguably, the most important role player in the international criminal trial is the judge as the final arbiter of proceedings and decisions. The role of the judge is important in ensuring fairness in trial processes, equity between the parties and ameliorating the contentious issues that may arise between the participation of victims and the fair trial rights of the accused. In addition, it is the judge and the chambers of the ICC who exercise judicial oversight over the conduct of the prosecutor.

Banach-Gutierrez,[246] in discussing the mandate of judges at the ICC, avers that criminal processes should achieve both substantive and procedural justice. Put simply this means that each due process must be fair and just, and he quotes Schomburg J as follows:

> "the mandate of each judge or chamber is to strike a proper balance, on a case-by-case basis, among the due process rights of the accused, the public interests in transparency and the safety and dignity of victims and witnesses".[247]

Therefore, in exercising their mandate, judges have the following duties as espoused in Article 64(3) of the Statute:

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[245] M Markovic "The ICC Prosecutor's Missing Code of Conduct" (2011) *Texas Int'l LJ* 208-209.

[246] J Banach-Guitierrez "Some Reflections on the Concept of due process: What kind of doing justice is emerging in contemporary criminal proceedings?" (2012) 3 *New Journal of European Criminal Law* 89.

[247] 6. See also, JB Banach-Gutierrez "Restorative Justice and the Status of Victims in Criminal Proceedings: 'the Past and Future of Victims' Rights" (2011) 6 *International Perspectives in Victimology*.

> "Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:
> (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
> (b) Determine the language or languages to be used at trial; and
> (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial."

And further, Article 64(8)(b):

> "At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute."

It is clear from the provisions of the Statute that the judges are primarily responsible for giving direction and further for protecting the fair trial rights of the accused and victims. More importantly, in weighing up and mediating various interests, Article 64(2) provides that the rights of the accused and the protection of victims are equally important when determining the role of judges. This article states as follows:

> "The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

The provisions of this article are twofold, first the Trial Chamber or judges should ensure that a trial is both fair and expeditious and secondly, such assurance provided by the chamber dictates that judges should have full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Zappala,[248] who supports the fair trial rights of the accused as of primary importance in international criminal trials, is of the view that the balance of rights between the victim and the accused should be attained by international criminal courts and that the primacy of the fair trial rights of the accused should be attained at three levels:

[248] Zappala (2010) *J Int'l Crim Just* 140.

> "Firstly, it must be recognised within the relevant normative instruments regulating the activities of each given court; secondly, it must be ensured by the judges in the proceedings on a case by case basis; thirdly, there should be some mechanism of redress in case of violations."

In terms of this view,[249] the importance of the role of judges in balancing the rights between the accused and the victims is reiterated. Nevertheless, Zappala acknowledges that the manner in which judges are currently dealing with the balancing of rights on a case-by-case basis may not be ideal because it allows room for different defendants in different cases being treated differently. He, therefore, suggests that some level of consistency should be applied but also that judges should ensure judicial management of court functions.

In the words of an international committee of experts of the Association Internationale de Droit Penal in 1982:

> "A fair and equitable system of administration of justice and the effective protection of human rights and fundamental freedoms depend as much on the independence of lawyers as on the independence and impartiality of the judiciary. The independence of lawyers and the judiciary mutually complement and support each other as integral parts of the same system of justice."[250]

Hence, one can conclude that the judges play a significant role in all proceedings before the court and that they should not be swayed by any external influences. The role of judges will be expanded on significantly in all the cases that are analysed in this dissertation. Particularly, the dissertation will demonstrate the inconsistencies of judges in the application of Regulation 55, in the participation of victims and finally in their decision making, as well as how many divergent, dissenting and separate opinions have arisen out of the case law (particularly evident in Chapter 5).

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[249] 142.

[250] E Groulx "Equality of Arms: Challenges confronting the legal profession in the emerging international criminal justice system" (2010) *Revue québécoise de droit international* 25. Original text: Association Internationale de Droit Pnal, *Draft principles on the independence of the judiciary and on the independence of the legal profession: prepared by a committee of experts at the International Institute of Higher Studies in Criminal Sciences (N.p.:* Eras, 1982) 68.

2 3 3 The role of the international community

In 1998, Kofi Annan stated:[251]

> "Some small States fear giving pretexts for more powerful ones to set aside their sovereignty. Others worry that the pursuit of justice may sometimes interfere with the vital work of making peace. But the overriding interest must be that of the victims, and of the international community as a whole. I trust you will not flinch from creating a court strong and independent enough to carry out its task. It must be an instrument of justice, not expediency. It must be able to protect the weak against the strong. We have before us an opportunity to take a monumental step in the name of human rights and the rule of law. We have an opportunity to create an institution that can save lives and serve as a bulwark against evil. So let us rise to this challenge. Let us give succeeding generations this gift of hope. They will not forgive us if we fail".

This statement clarifies the external expectation of the ICC in that it makes it emphatically clear that the prevailing interests are of the victims and the international community. As mentioned earlier in this chapter in respect of the political influence on prosecutors, one must remember that the international community, as well as State parties, are relying heavily on the ICC to convict those accused of the most heinous crimes against humanity. The impact of the ICC's judgments will have an impact on victims and communities within war-torn countries. However, in order to ensure legitimacy, in addition to convicting and sentencing offenders, the court should be seen as upholding the fair trial rights of the accused and ensuring some form of deterrence towards future criminals. In order to achieve legitimacy and respect for the rule of the law, the ICC needs to not only ensure that victims' interests are taken into account but also ensure that its trials are conducted in a fair manner.

2 3 3 1 Demands of the international community – African states

Many African states (and certainly the AU as a political collective) do not view the ICC as legitimate due to it being seen as targeting mainly African states.[252]This is

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[251] "UN Secretary General Declares Overriding Interest of International Criminal Court Conference must be that of Victims and World Community as a Whole" (15-06-1998) *United Nations Press Release* <http://www.un.org/icc/pressrel/lrom6ri.htm> (accessed 12-06-2016).

[252] In Hindsight: The Security Council and the International Criminal Court August 2018 Monthly Forecast Security Council Report.

evidenced by South Africa and some other African states wishing to withdraw from the ICC. This view is supported by Rothe and Collins[253] who argue that the ICC selectively enforces the law and, so far, it has mainly enforced its powers towards African situations and cases. The authors argue that the ICC has limited powers of enforcement and cite as example the re-election of (now former president) Al Bashir as president of Sudan while he was facing an international arrest warrant. The authors indirectly question the role of the prosecutor in the selection of cases and how this has affected the ICC's perceived ineffectiveness.

In understanding the underlying tensions inherent in the debate between Africa and the ICC, it is important to look at some viewpoints. In this regard, Benyera opines as follows:

> "In response, Africa stands almost united against the ICC particularly in light of the AU's refusal to cooperate with the court regarding the arresting of the ICC's most wanted war criminal, Sudanese President Omar Al Bashir. Bashir is still at large and enjoying the support of most African countries except Malawi, Botswana and Uganda. These countries reaffirmed their commitment to abide by their international legal obligation to arrest ICC suspects in the wake of the July 2009 AU summit's decisions calling for non-cooperation in the execution of such requests The AU's official position on the ICC issue was reached at their 17th summit held from 30 June to 1 July 2011 in Malabo, Equatorial Guinea where African leaders decided to withdraw their cooperation regarding the effecting of ICC warrants of arrest as outlined in paragraph 6 of the Decision on the Implementation of the Assembly Decisions on the International Criminal Court."[254]

He argues that part of the problem includes the mechanism of self-referrals that demonstrate Africa's problematic relationship with the ICC. The author avers that "at a glance, the role played by other African countries in these cases challenges the allegations that Africa is being unfairly targeted.[255] He presents an interesting counter argument by suggesting that:

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[253] DL Rothe & VE Collins "The International Criminal Court: A Pipe Dream to End Impunity?" (2013) 13 *International Criminal Law Review* 191 198.

[254] E Benyera "Is the International Criminal Court Unfairly Targeting Africa? Lessons for Latin America and the Caribbean States Department of Political Sciences" (2018) 37 *Politeia* 6.

[255] 7.

> "Africa is not being targeted but is rather being prioritised, a situation which must be celebrated by those who side with the victims of human rights abuses and desire to see despots held to account, the argument goes."[256]

The following facts support this counter argument:

Three of the seven situations under investigation by the ICC involving the DRC, Uganda and the CAR were self-referrals, thereby defeating the claim for victimisation. Only two situations, Kenya and Ivory Coast were opened at the insistence of the Prosecutor. Sudan (UNSC Resolution 1593 (2005)) and Libya (UNSC Resolution 1970 (2011)) were UNSC referrals.[257]

The author refers to the case of *Laurent Gbagbo* from the Ivory Coast, although it was then not a member of the ICC, it is the accused who accepted ICC jurisdiction in April 2003 when he was the leader of the country as provided under the provisions of Article 12 (3) of the Rome Statute.

The author concludes that:

> "[T]he number of African cases at the ICC can be taken as a manifestation of Africa's commitment to end impunity. This view takes the alleged targeting of Africa as a victory for victims of human rights violations in Africa."[258]

Nkansah, agrees that the problem began with the arrest of Bashir, but holds a slightly different viewpoint referring to the political contexts of the ICC's intervention as critical to its effectiveness of obtaining the indictees and also ensuring that its intervention supports the countries involved and does not aggravate the already fragile situation. The author avers that the ICC confronts major challenges in its interventions in situations of ongoing conflict and situations where the indictees have the upper hand or have not been subdued and that in these instances, the ICC is unsuccessful in obtaining the surrender of indictees to the ICC.[259]

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[256] 8.

[257] 8.

[258] 9.

[259] LA Nkansah "International Criminal Court in the Trenches of Africa" (2014) *African Journal of International Criminal Justice* 23.

The author concludes by recommending that a suitable way forward for the ICC is to take account of:

> "The sociocultural conditions of the African people, namely their literacy and economic status, cultural approaches to dispute resolution and their priority concerns *vis-à-vis* justice are critical factors to their interest, cooperation and support for the ICC."[260]

In presenting some recommendations to correct this perception of the ICC, Gegout,[261] however, argues that the legitimacy of the ICC rests on institutional autonomy that is dependent on the support and goodwill of State Parties and non-parties to the Rome Statute. She argues that the legitimacy and credibility of the ICC could increase if the ICC were able to:

i) act independently from states;
ii) investigate criminals on all continents, whether state officials or not;
iii) have the means to deliver justice in a fair way and in a short period of time; and
iv) where possible, defer prosecutions at the local level.

All the aforementioned authors provided a context for some of the challenges and criticisms faced by the ICC in respect of targeting African countries. The debates however also served to provide a platform for meaningful introspection in terms of concrete recommendations for the ICC moving forward with African states in respect of capacity-building initiatives.

2 4 Conclusion

This chapter has extrapolated on the rights of the victims and the accused, the roles of the prosecutor and judges and the international community, with a particular focus on African countries in the discourse related to the influence of international communities. The chapter further described the tensions between the rights of the accused and the victims at the ICC. It highlighted the challenges faced by the role-players within the ICC.

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[260] 36-37.

[261] C Gegout "The International Criminal Court: limits, potential and conditions for the promotion of justice and peace" (2013) 34 *Third World Quarterly* 800 801.

The next chapter will focus on the fair trial rights of Mr *Lubanga* who was the first accused convicted at the ICC. The Chapter will focus on Mr *Lubanga's* fair trial rights, specifically related to the implementation of Regulation 55 and the specificity of the charges against him, his rights to disclosure of evidence and the role of the prosecutor in disclosing evidence, the length of the trial and how the court interpreted victim participation.

CHAPTER 3: THE FIRST CASE TRIED AT THE ICC - THOMAS LUBANGA

3 1 Introduction

The previous chapter discussed the framework of the dialectical tensions in respect of the accused, victims as well as the international community (with a particular focus on African States), also focusing on the role of the prosecutor and judges within the framework of the ICC.

This chapter will explore these tensions in the context of the jurisprudence with a particular focus on the fair trial rights of Mr Lubanga. This chapter seeks to unpack the key issues which the ICC faced in respect of the *Lubanga* decisions which arose from the Democratic Republic of the Congo ("DRC") and which comprises the first decision of the court.

In respect of the application of fair trial rights to the *Lubanga* judgment, some key issues include the specificity of the charges, the re-characterisation of the facts, the disclosure of evidence, length of the trial and how the court interpreted victim participation. Of particular importance in this case is the manner in which the prosecutor handled the case, which informs my opinion that the trial was not conducted in a fair manner.

3 2 Introduction and background to the Thomas Lubanga case

As the alleged leader of the Union of Congolese Patriots ("UCP") and the commander in chief of its military wing, the *Forces patriotiques pour la libération du Congo* ("FPLC"), Lubanga was accused of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities, from September 2002 to 13 August 2003.[262]

He was found guilty, on 14 March 2012, of the war crimes of enlisting and conscripting of children under the age of fifteen years and using them to participate actively in hostilities. He was sentenced, on 10 July 2012, to a total of fourteen years imprisonment.[263]

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[262] *The Prosecutor v Thomas Lubanga Dyilo Case Information Sheet* ICC-01/04-01/06 (2017) <https://www.icc-cpi.int/CaseInformationSheets/LubangaEng.pdf> (accessed 20-03-2018).

[263] *The Prosecutor v Thomas Lubanga Dyilo Case Information Sheet* ICC-01/04-01/06.

The *Lubanga* judgment was the first conviction by the ICC and the case also highlights the gravity of recruitment, enlistment and conscription of child soldiers. The case was not only the first conviction of an accused before the ICC; in many respects, the case also tested the Rome Statute in an institutional, systematic and legal sense and highlighted the rights of victims and their participation in the trial, which also sets legal precedent in terms of their participation in trials in the future discourse of the Court.

3 3 The fair trial rights of the accused in various decisions of the Court

3 3 1 The function of the Pre-trial Chamber – Confirmation of charges

The ICC has introduced various phases in trial proceedings, one of which is the pre-trial phase, which is a new and innovative measure, introduced into international criminal proceedings.

The Pre-trial Chamber in terms of Article 57(2) of the Statute issues an arrest warrant if it is satisfied that "there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and if the person's arrest appears necessary for one or more of the grounds enumerated in subparagraph (b)."[264]

However, the confirmation of charges in terms of Article 60 of the Statute takes place only once the person has been surrendered to the court or has appeared before it on the basis of a summons to appear. Article 61[265] sets out the procedures to be followed in a confirmation of charges hearing. Article 61(1) therefore states:

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[264] (b) Risk of flight, risk of obstruction or endangerment of the investigation or court proceedings, or risk of continued commission of crimes.

[265] Article 61 (7.) The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

> "Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial."[266]

If one reviews the drafting history of the Rome Statute, it appears that Article 61 was initially adopted with two distinct goals in mind.

First, the confirmation of charges process was created as a check against the Prosecutor's authority to determine the appropriate charges in a case. By vesting the Presidency – and then later the Pre-Trial Chamber – with the authority to review the indictment against the suspect, the Chambers would be able to ensure prosecutorial fairness and effectiveness in investigations.

Second, the confirmation of charges process was created to protect the rights of the suspect, as it would allow a suspect to challenge the charges before proceeding to trial.[267] It is also self-evident, that this process would allow the accused the right to

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(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

[266] Article 61(1) of the Rome Statute.

[267] American University Washington College of Law "The Confirmation of Charges Process at the International Criminal Court: A Critical Assessment and Recommendations for Change" (2015) *War Crimes Research Office* 14 <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-19-the-confirmation-of-charges-process-at-the-icc-a-critical-assessment-and-recommendations-for-change/> (accessed 29-11-2019).

know the charges against him in order to adequately prepare his defence, which is a key fair trial right, hence this reflection of the process and charges.

At the confirmation hearing, the Prosecutor must support each charge with sufficient evidence to establish "substantial grounds to believe" that the suspect has committed the crimes charged. Article 74(2) is of importance to the charges confirmed at the pre-trial stage of proceedings as during a conviction decision, the Trial Chamber may "not exceed the facts and circumstances described in the charges."

According to one author, Lindsay[268] the Pre-trial Chamber has the power to take steps to preserve the rights of the Defence; it may act when unique investigative opportunities arise, the chamber may also appoint *ad hoc* defence counsel to represent the general interests of the Defence.

It is also important to note that the Pre-trial Chamber plays an important role in supervising the prosecutorial discretion in two ways; by reviewing the participation applications by victims and establishing the modalities of their participation. The Pre-trial Chamber is further responsible for determining if there is sufficient evidence to support an arrest warrant or a summons to appear. The Pre-trial Chamber may well have unique investigative powers as espoused by Lindsay, but the prosecutor also has too much discretion in respect of the selection of cases and the issuance of arrest warrants as well as his disclosure of evidence, which will be discussed further in this chapter.

According to Safferling[269] the rights of the defence is open to infringement in various ways; for instance, the Rome Statute does not protect the right to physical and mental integrity of a person or the right to privacy or data protection *vis-à-vis* prosecutorial measures such as search and seizure, interception of telecommunication or forensic testing.

He goes further to identify the following interests of the defence at the pre-trial phase of proceedings; adherence to procedural provisions, which means that defence counsel should be informed of the procedural steps being undertaken by the prosecutor and be given the opportunity to attend the taking of evidence and the

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[268] V Lindsay "A review of International Criminal Court Proceedings under Part V of the Rome Statute (investigation and prosecution) and proposals for amendments" (2010) 165 *Review Quebecoise De Droit International* 165-198 172.

[269] C Safferling "The Rights and Interests of the Defence in the Pre-Trial Phase" (2011) 9 *Journal of International Criminal Justice* 651-667 656.

questioning of witnesses; legitimacy of investigative measures, which refers to evidence that could potentially have been obtained in an illegal manner; examination of witnesses or expert witnesses, which may be problematic particularly in respect of the transporting of the results of evidence to the trial without an in-depth analysis of the testimony before declaring admissibility; and lastly coordination of different national legal systems and the Rome Statute, which means that defence counsel must ensure that despite the complexity of applying different legal systems there is no disadvantage to the defence.[270]

It is worthwhile to note that, in addition to the list of procedural rules, which the defence must comply with at the pre-trial phase, the defence often does not have the same resources at its disposal as the prosecutor. This situation worsens if charges against the accused lack specificity and the accused is, therefore, placed in the unfortunate position of not having legal certainty in respect of the case against him/her, which also affects his or her ability to prepare an adequate defence.

Therefore, the Pre-trial Chamber may be an innovative concept, but the application of the laws must be viewed with caution and applied with the rights of the accused in mind. Further, the discretion given to the prosecutor to select cases for investigation and to decide on the charges to be brought is quite broad within the context of the pre-trial Chamber, which could act contrary to the fair trial rights of the defendant. A balance must be struck between the discretion given to the prosecutor and the rights of the defendant to ensure that a fair and effective international trial runs smoothly.

3 3 2 Lubanga Confirmation of Charges hearing – The right to be informed promptly and in detail of the nature, cause and content of the charge

In *Lubanga*, the Pre-trial Chamber confirmed charges not only in respect of the war crime of recruitment and use of child soldiers in non-international armed conflict but also in respect of the war crime, committed in international armed conflict, without inviting the Prosecutor to first amend the charges.[271]

An important aspect to this part of the trial is that it defines the subject matter. In this regard, Article 74(2) of the Statute states that the Trial Chamber, in its decision, may "not exceed the facts and circumstances described in the charges." This was

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[270] 656.

[271] *Lubanga Pre Trial Chamber I* ICC-01/04-01/06-803-tEN (29 January 2007) para 204.

particularly significant in *Lubanga* where the charges against him were limited to the conscription, enlistment and use of child soldiers. During the trial, however, witnesses testified to the sexual abuse that they suffered as child soldiers.

The Pre-trial Chamber in the confirmation of charges hearing further characterised the conflict in Ituri as international because of Uganda's presence in the DRC.[272] It is important to understand the difference between the characterisation as national or international in relation to the charges brought against Lubanga. In an international context, child soldier crimes are listed as "[c]onscription or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities". In a non-national armed conflict, the crimes are listed as: "Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities."[273]

The Pre- Trial Chamber decided that: "Accordingly, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that from early September 2002 to 13 August 2003, Thomas Lubanga Dyilo incurred criminal responsibility as a co-perpetrator within the meaning of Article 25(3)(a) of the Statute for the crimes referred to in Section IV of this decision.[274] Mr Lubanga was therefore charged with three counts of war crimes including:

(i) enlistment of children under the age of fifteen,
(ii) conscription of children under the age of fifteen, and
(iii) use of children under the age of fifteen to actively participate in hostilities.[275]

The crimes and charges confirmed against Mr Lubanga were serious gender-based crimes which had a direct bearing on many children and victims.[276]

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[272] Para 204.

[273] S Kammer "Deconstructing Lubanga, The ICC's First Case: The Trial and Conviction of Thomas Lubanga Dyilo" (07-09-2012) *American Non-Governmental Organisations Coalition for the International Criminal Court* <https://www.scribd.com/document/274975434/Deconstructing-Lubanga> (accessed 28-02-2019) 11. The distinction and importance between crimes in an international or national context, will be explained in more detail in Chapter 6.

[274] Para 410.

[275] *Lubanga Pre Trial Chamber I* ICC-01/04-01/06-803-tEN (29 January 2007) section IV.

[276] The decisions on victim participation will be discussed under section 3 4 of this chapter.

3 4 The right to disclosure of evidence

3 4 1 Background to the disclosure of evidence:

Right to prepare an adequate defence and the Right to an expeditious trial

The principles of disclosure of exculpatory evidence received much attention in the Lubanga trial. It must be borne in mind that the disclosure of evidence is a fundamental right, which an accused has to a fair trial as contained in Article 67(2) of the Statute. A point of much debate in the Lubanga judgment was between the context of Article 67(2) and the prosecutor's use of "confidentiality" agreements under Article 54(3)(e) of the Rome Statute. The Article allows the prosecutor to "agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence unless the provider of the information consents." The failure to disclose exculpatory evidence also has a direct bearing on the accused's right to an expeditious trial. This is evidenced by the failure of the prosecutor to disclose the information timeously.

The background to this case is that the prosecutor obtained confidential information from the UN in respect of the *Lubanga* case and the evidence that the prosecutor obtained was exculpatory in nature. At various times, the prosecutor averred that he tried to obtain the consent of the UN to disclose the information, which consent was denied.[277]

3 4 2 Disclosure of evidence – Trial Chamber decision

On 9 November 2007 the Trial Chamber rendered its "Decision regarding the timing and manner of disclosure and the date of trial", wherein it held that "from the moment the prosecution entered into the agreements and was thereafter presented with exculpatory materials, it has been under an obligation to act in a timely manner to lift the agreements in order to ensure a fair trial without undue delay." The Trial Chamber

[277] For further background information, see Trial Chamber judgement, Situation in the Democratic Republic of the Congo in the case of *The Prosecutor v Thomas Lubanga Dyilo Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008* Trial Chamber I No.: ICC-01704-01/06 (13 June 2008) para 36.

ordered the disclosure of the information by 14 December 2007.[278] The Chamber held that the "prosecution would be under an obligation to withdraw any charges where non-disclosed exculpatory material has a material impact on the Chamber's determination of the guilt or innocence of the accused. If the prosecution were in doubt as to whether any material falls into this category, the Chamber directed that it should be put before the Trial Chamber for its determination."[279]

During the Status Conference of 10 June 2008, the prosecution provided information to the Chamber about the undisclosed material and its sources. The prosecutor informed the chamber that there were 156 documents provided by the UN under Article 54(3)(e) for which authorisation to disclose had been refused. Of those 156 documents, the prosecution advised that 112 documents fell under the heading of Rule 77 while the remaining 95 were considered potentially exculpatory or mitigating in nature.[280] The prosecution divided the evidence into two categories: evidence that would not materially affect the Chamber's determination of the guilt or innocence of the accused and evidence that had that potential.[281]

In respect of the evidence which could not impact upon the Chamber's decision as to the guilt or innocence of the accused, the prosecutor disclosed the following: "evidence which purported to establish that children voluntarily joined the UPC/FPLC or were sent by their parents; evidence which purported to establish the use of child soldiers by the Lendu or other armed groups in Ituri; reported benevolent acts by Thomas Lubanga Dyilo; material relating to the political nature of the UPC/FPLC and its aim of pacifying Ituri or references to it as an "all-inclusive" organisation[282] and information falling within the scope of Rule 77[283] (which, in the prosecution's

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[278] Para 5.

[279] Para 6.

[280] Para 19.

[281] *The Prosecutor v Thomas Lubanga Dyilo Decision on the consequences of non-disclosure of exculpatory materials* Para 20 referring to Prosecution submission on undisclosed documents containing potentially exculpatory information (28 March 2008) ICC-01/04-01/06-1248 para 8.

[282] Trial chamber para 21 referring to Prosecution submission on undisclosed documents containing potentially exculpatory information, 28 March 2008, ICC-01/04-01/06-1248, para 15.

[283] Para 21. Rule 77 Inspection of material in possession or control of the Prosecutor The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other

submission, did not go to the guilt or innocence of the accused but was material to the preparation of his defence)."[284]

In respect of the evidence which the prosecution submitted could materially impact on the Court's determination of the guilt or innocence of the accused, the following was included: "evidence indicating that Thomas Lubanga Dyilo suffered from a mental condition; that he was intoxicated thus impairing his capacity to control, or understand the unlawfulness of his conduct; that he was under duress or compulsion; that he acted in self-defence; that he made efforts to demobilise child soldiers; that he had insufficient command over people who committed the crimes with which he is charged; that the UPC/FPLC was under the control of Uganda, Rwanda and other countries."[285]

However, the prosecutor was of the view that none of the evidence contained in this list revealed control as regards the recruitment of children, and that these categories of evidence would only impact in principle on the Chamber's decision, but that it would not materially impact on the determination of the guilt or innocence of the accused.[286] The defence averred that the documents outlined in the prosecution's description of the categories of undisclosed potentially exculpatory materials were, in fact, exculpatory and should be disclosed.[287]

The length of time the prosecutor took to resolve this issue is of particular importance in respect to the accused's fair trial rights as well as the determination by the prosecutor that certain information as listed above would not impact on the guilt or innocence of the accused is of concern. In this case, the prosecutor also relied on an enormous amount of confidential information. The continuous failure on the part of the prosecutor to disclose the exculpatory evidence resulted in further decisions discussed hereunder.

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tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

[284] *The Prosecutor v Thomas Lubanga Dyilo Decision on the consequences of non-disclosure of exculpatory materials* Trial chamber para 21, referring to Prosecutions submission para 29.

[285] Para 22.

[286] Trial Chamber para 22, prosecution submission para 18.

[287] Para 23.

3 4 3 Trial chamber decision and Appeals Chamber judgment in respect of Disclosure of Exculpatory evidence

The Trial Chamber found that the Prosecutor had used Article 54(3)(e) of the Statute to obtain evidence to be used at trial, instead of using the material obtained to generate new evidence and that this constituted "a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances."[288]

The Trial Chamber concluded the matter as follows:

> "i) The disclosure of exculpatory evidence in the possession of the prosecution is a fundamental aspect of the accused's right to a fair trial; ii) The prosecution has incorrectly used Article 54(3)(e) when entering into agreements with information-providers, with the consequence that a significant body of exculpatory evidence which would otherwise have been disclosed to the accused is to be withheld from him, thereby improperly inhibiting the opportunities for the accused to prepare his defence; and iii) The Chamber has been prevented from exercising its jurisdiction under Articles 64(2), Article 64(3)(c)[289] and Article 67(2), in that it is unable to determine whether or not the non-disclosure of this potentially exculpatory material constitutes a breach of the accused's right to a fair trial."[290]

The Trial Chamber stated emphatically that:

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[288] *The Prosecutor v Thomas Lubanga Dyilo Decision on the consequences of non-disclosure of exculpatory materials* Trial chamber I (13 June 2008) para 73.

[289] Article 64(2):
The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. 3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall: (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings; (b) Determine the language or languages to be used at trial; and (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

[290] *The Prosecutor v Thomas Lubanga Dyilo Decision on the consequences of non-disclosure of exculpatory materials* para 92.

> "the consequence of the three factors set out in the preceding paragraph has been that the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial."[291]

Due to the prosecutor's non-disclosure of evidence, the Trial Chamber stayed the proceedings indefinitely in respect of Mr Lubanga and halted the trial process.[292]

Notably, even though the Trial Chamber found the failure on the part of the prosecutor to disclose the information contrary to the fair trial rights of the accused, particularly contained in Article 67(2) of the Statute, instead of taking decisive action to reprimand the prosecutor, the decision was made to stay the proceedings. The stay of proceedings negatively impacted the accused right to an expeditious trial as contained in Article 67(c) "to be tried with undue delay" and Article 64(2):

> "The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

The Court refers to the relevant Articles of the Statute and admits that it is unable to proceed with the trial because it is unable to guarantee a fair trial in the absence of the disclosure of the evidence and furthermore that the evidence was not made known to the Court by the prosecutor for the court to evaluate the evidence. In this regard, Rule 81(2) is relevant and reads as follows:

> "Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an ex parte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused."

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[291] *The Prosecutor v Thomas Lubanga Dyilo Decision on the consequences of non-disclosure of exculpatory materials* para 93.

[292] Para 94.

Arguably, the application of this Rule by the prosecutor may have assisted the court to understand the nature of the evidence and to decide on the disclosure of this evidence to the defence.

On appeal, the Prosecutor submitted that:

> "the realities of investigations in situations of ongoing conflict make it necessary that information may be provided on a confidential basis and that this ability 'actually serves as a safeguard to the fairness and integrity of the proceedings."[293]

On the contrary, Mr Lubanga argued that:

> "confidentiality agreements inhibit the Prosecutor from publicly establishing the truth and therefore should only be relied upon if there is no other opportunity to obtain the material. Given that recourse to Article 54(3)(e) of the Statute may also put in peril the right of the defence to disclosure of material pursuant to Article 67(2)[294] of the Statute and to Rule 77[295] of the Rules of Procedure and Evidence, even more caution is necessary."[296]

The Appeals Chamber, in arriving at its decision to uphold the decision of the Trial Chamber, considered that Article 54(3)(e) of the Statute indicates that the Prosecutor may only rely on the provision for the purpose of generating new evidence.[297] Further, that the use of Article 54(3)(e) of the Statute must not lead to breaches of the

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[293] *The Prosecutor v Lubanga Appeal Decision on the consequences of non-disclosure of exculpatory materials* (October 2008) para 25.

[294] Para 29. Article 67(2) In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

[295] Rule 77 Inspection of material in possession or control of the Prosecutor The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

[296] *The Prosecutor v Lubanga Appeal Decision on the consequences of non-disclosure of exculpatory materials* (October 2008) para 29.

[297] Para 41.

obligations of the Prosecutor *vis-à-vis* the accused person as Article 54(1)(c) of the Statute expressly provides that the Prosecutor shall "fully respect the rights of persons arising under this Statute."[298] The Appeals Chamber emphasised that a fundamental right of the accused person in proceedings before the Court is the right to disclosure of "evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence."[299] In this regard, the chamber referred to Article 67(2), first sentence, of the Statute.[300]

The Appeals Chamber cautioned the prosecutor that when he relies on Article 54(3)(e) of the Statute he should apply the provision in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial.[301]

The Appeals Chamber, therefore, took issue with the fact that the Prosecutor, by not disclosing the information to the chamber, prevented it from assessing whether a fair trial could be held in spite of the non-disclosure to the defence of certain documents.[302] The Appeals Chamber went further to explain its role in the process by quoting the last sentence of Article 67(2) of the Statute which provides that "[i]n case of doubt as to the application of [article 67(2) of the Statute], the Court shall decide."[303]

The Appeals chamber, therefore, decided as follows:

> "In sum, as of 13 June 2008, the Trial Chamber was faced with a situation in which a large number of documents containing potentially exculpatory information or information relevant to the preparation of the defence was in the possession of the Prosecutor, but could not be disclosed to Mr. Lubanga Dyilo. Nor could the Trial Chamber have access to the documents in order to assess whether a fair trial could be held even without the disclosure of the documents. As explained above, the Appeals Chamber has no reason to fault the assessment of the Trial Chamber on 13 June 2008 that this situation would continue. If the trial of Mr. Lubanga Dyilo had taken place in such circumstances, there would always have

[298] Para 42.
[299] Para 42.
[300] See footnote 33.
[301] Para 44.
[302] Para 45.
[303] Para 46.

been a lurking doubt as to whether the disclosure of the documents in question would have changed the course of the trial."[304]

Notably, both the Trial Chamber and the Appeals Chamber carefully considered the impact of the prosecutor's failure to disclose exculpatory evidence to the accused considering the rights of the accused to such disclosure. Both chambers upheld the accused's rights in relation to the fundamental fair trial right of disclosure of evidence.

3 4 3 1 Separate Appeal Chamber Opinion of Pikis J

The judge reinforced the fair trial rights of defendants in respect of the disclosure of information and stated that:

"the right to disclosure, more so to disclosure of exonerating evidence, is a fundamental right of the accused, denial of which makes trial according to law unattainable."[305]

The judge reprimanded the prosecutor for incorrectly applying Article 54(3)(e) and not allowing the Trial Chamber to make a determination in respect of the disclosure of evidence.[306] The judge also touched on the expeditiousness of trial proceedings and the manner in which the prosecutor dealt with the disclosure of evidence that caused the stays in proceedings and therefore the delays in the trial.[307]

The judge concluded by asking and answering the following question:

"The pertinent question in this appeal is whether the finding of impossibility to hold a fair trial and the sequential order to stay the proceedings are justified. The answer is in the affirmative. The finding of impossibility to hold a fair trial seals the end of the proceedings."[308]

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[304] Para 97.
[305] Para 16 per Pikis JA.
[306] Para 18.
[307] Para 30.
[308] Para 51.

On 18 November 2008, Trial Chamber I lifted the stay of proceedings against Mr Lubanga, considering that the reasons for the suspension had fallen away due to the exculpatory evidence being disclosed.[309]

One author, Kaoutzanis[310] puts it quite plainly that the disclosure of evidence to the defence has historically been a central precept of criminal procedural law throughout the world and is a key element of a fair trial. For international courts, disclosure of exculpatory evidence to the defence is important and has been enshrined in most human rights instruments.[311] The ECHR held that the obligation to disclose material that may assist the accused stems from the principle of the "equality of arms."[312] This aspect has a direct bearing on the rights of the defence in respect of ensuring that it adequately engages with the evidence put forward by the prosecutor. In terms of Article 67(2), the prosecutor is required to disclose exculpatory evidence as soon as practicable. The decisions discussed above reiterate that the prosecutor acted outside of the scope of his mandate. This is an important issue in ensuring that prosecutors do not overreach their roles and thereby infringe upon the fair trial rights of the accused.

It is undisputed that the courts upheld the fair trial rights of the accused in relation to the disclosure obligations placed on the prosecutor in these judgments. However, a key concern is to what extent the court will allow the prosecutor to continually act outside the scope of his/her duties to the detriment of the accused. It is apparent from both judgments that the judges were unhappy with the fact that the prosecutor refused to disclose the evidence timeously and further that the prosecutor did not afford the court the opportunity to intervene and determine the extent to which the evidence could or could not be disclosed and the potential impact on the fair trial rights of the accused.

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[309] *The Prosecutor v Lubanga Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused* Trial Chamber I (June 2008) ICC-01/04-01/06-1401 18 November 2008.

[310] C Kaoutzanis "A Turbulent Adolescence Ahead: The ICC's insistence on disclosure: In the Lubanga Trial" (2019) 12 *Washington University Global Studies Law Review* 263 270.

[311] The UDHR and the ICCPR.

[312] Kaoutzanic (2019) *Washington University Global Studies Law Review* 271.

In this regard, it is my considered view that the ICC should lean on the jurisprudence of the tribunals in relation to the misconduct of prosecutors.

3 4 4 Disclosure of evidence at the ICTY

The ICTY contains a similar rule to Article 54(3) of the Rome Statute, which is contained in Rule 68[313] dealing with the "Disclosure of Exculpatory and Other Relevant Material." However, the ICTY rules also include Rule 68 *bis*[314] which cover the sanctions imposed on prosecutors who refuse to disclose such evidence. The ICTR does not have a similar rule. At the ICC, a similar misconduct article is contained in Article 71[315] of the Statute. The difference is that Rule 68 bis specifically refers to the

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[313] Rule 68 Disclosure of Exculpatory and Other Relevant Material (adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 July 2001, amended 12 Dec 2003, amended 28 July 2004) Subject to the provisions of Rule 70, (i) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence: (ii) without prejudice to paragraph (i), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically; (iii) the Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (i) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused; (iv) the Prosecutor shall apply to the Chamber sitting in camera to be relieved from an obligation under paragraph (i) to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential; IT/32/Re *v* 50 66 8 July 2015 (v) notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (i) above.

[314] Rule 68 bis Failure to Comply with Disclosure Obligations (Adopted 13 Dec 2001) The pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules.

[315] Article 71 of the Sanctions for misconduct before the Court:

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent

misconduct of the prosecutor in relation to disclosure of evidence whereas Article 71 refers to misconduct generally referring to all misconduct.

However, it must be borne in mind that Article 67(2) bears relevance as both the Trial Chamber and the Appeals Chamber referred to this Article of the Statute, the relevant portion of the Article being: "In case of doubt as to the application of this paragraph, the Court shall decide." It was evident from both the Chambers, that the prosecutor did not refer the matter to the court to decide and it is for this reason that the argument is made that the ICC should learn from the tribunals in this regard.

At the tribunals, it was evident that the courts placed the onus on the accused to prove that a violation of Rule 68 *bis* occurred and the accused had to demonstrate how such non-disclosure affected the accused's fair trial rights. However, the importance of the tribunals' decisions is that the tribunals implemented mechanisms besides staying of proceedings, to ensure disclosure on the part of the prosecutor.

By way of example in the *Oric*[316] case at the ICTY, there had been continuous complaints of the prosecutor's failure to disclose exculpatory evidence and the Trial Chamber ordered the Prosecutor to conduct a comprehensive search for Rule 68 material and to provide the Trial Chamber with a declaration stating what searches had been made, where they had been made, and the results of such searches. In the *Krnojelac*[317] case, the ICTY ruled that because there had been a number of problems in trials with the obligations imposed by Rule 68 of the Rules of Procedure and Evidence ("RPE"), the judge proposed that a case manager takes responsibility to ensure that there had been a complete search for the material to which Rule 68 applies and that this would be similar to an affidavit of discovery as it is known in common law systems.

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removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

[316] *The Prosecutor v Oric*, ICTY, Decision on Urgent Defence Motion regarding the Prosecutorial non-compliance with Rule 68 IT-03-68-T, 27 October 2005 5.

[317] *The Prosecutor v Milorad Krnojelac* Decision on Motion by Prosecution to modify order for Compliance with Rule 68 in Trial Chamber II 1 November 1999 para 1.

In the *Krstic*[318] case, the tribunal came to an interesting conclusion in respect of the sanctions of the prosecutor. The court found that the right of an accused to a fair trial is a fundamental right and that even though the disclosure practices of the Prosecution fell short of its obligations under the applicable Rules, the Appeals Chamber could not conclude that the Prosecution deliberately breached its obligations.[319] As a result of the court being incapable of finding material prejudice to the Defence, the Appeals Chamber did not issue a formal sanction against the Prosecution for breaching its obligations under Rule 68.[320] However, the Appeals Chamber stated that it

> "will not tolerate anything short of strict compliance with disclosure obligations, and considers its discussion of this issue to be sufficient to put the OTP on notice for its conduct in future proceedings."[321]

This effectively amounts to a warning given by the tribunal to the prosecutor, which would serve as a preventative measure towards the prosecutor to desist from similar conduct in the future. Even though the Appeals Chamber found that the defendant suffered no prejudice, the tribunal was still very strict in its approach towards the importance of the disclosure of evidence.

Admittedly, these cases did not specifically deal with confidential evidence as the *Lubanga* decisions did, it still carries weight in respect of the approaches taken at the ICTY to the non-disclosure of evidence and demonstrates the value that the international tribunal placed on the disclosure of evidence. It is evident from these cited decisions, that despite the ICTY having Rule 68 bis, the tribunal was hesitant to impose proper sanctions against the prosecutor.

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[318] *The Prosecutor v Radislav Krstic*, Appeals Chamber Judgement, Case no: IT-98-33-A 19 April 2004 para 211.

[319] Para 211.

[320] Para 214.

[321] Para 215.

3 5 The implementation of Regulation 55 – Right to know and understand the charges and to prepare an adequate defence

Regulation 55[322] allows a Trial Chamber to change what crime is established by the facts in a case if those facts are more suitable to make out another crime under the Rome Statute. This is a very contentious regulation and has caused many problems and delays in the fair trial proceedings of the defence as will become evident in the case law chapters following this one (particularly in Chapter 4 – *Katanga*). This regulation effectively has the ability to change the charges against the accused and hence the course of the trial by affecting evidence being brought and is capable of hampering the accused's ability to defend him or herself appropriately in court. This regulation impacts the right of an accused to understand the charges against him, to adequately prepare a defence, particularly given the timing of the implementation of the regulation as well as impacting the length of proceedings.

In the *Lubanga* case, victims applied to have the facts in the case legally re-characterised to include charges of "inhumane treatment and sexual slavery". In this instance, the Trial Chamber gave notice to the parties in terms of Regulation 55 that

[322] Regulation 55 Authority of the Chamber to modify the legal characterisation of facts Regulations of the Court ICC-BD/01-01-04 32:

1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.
2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.
3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall: (a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and (b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).

the legal characterisation of the facts may be modified so as to include crimes of sexual violence.[323]

3 5 1 Trial chamber decision – Right to adequate time and facilities for the preparation of a defence and the Right to legal certainty

The Trial Chamber[324] discussed the interpretation of Regulation 55 and noted that a potential change in the legal characterisation of facts at that particular stage of proceedings is subject to a number of different and specific safeguards that are set out in Regulation 55(2) and (3). The purpose of the safeguards is to ensure that the modification is implemented in accordance with the right of the accused to a fair trial. The Trial Chamber then proceeded to make a distinction between the subsections of Regulation 55 by stating that "the powers conferred on the Chamber pursuant to Regulation 55(1) are distinct from the powers conferred by Regulation 55(2) and that as a result of such distinction the provision of adequate time and facilities for the effective preparation of the defence as well as an opportunity to examine witnesses or present evidence is mandatory only under Regulation 55(2)."[325] The Trial Chamber found that the limitations imposed by Regulation 55(1) to the "the facts and circumstances described in the charges" were not applicable to the procedural situation at the time of the judgment and that those limitations were governed by Regulation 55(2) and (3) respectively.[326] The Trial Chamber, therefore, concluded that the re-characterisation may occur because the submissions of the legal representatives of the victims and the evidence that the Trial Chamber had heard during the course of the trial were persuasive enough for the majority to conclude that the re-characterisation may go ahead.[327]

Notably, the Trial Chamber separated the subsections of Regulation 55 in this decision and interpreted the regulation in such a manner so as to undermine the fair

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[323] *The Prosecutor v Thomas Lubanga Dyilo Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court* No.: ICC-01/04-01/06 (14 July 2009) Trial Chamber I.

[324] Para 29.

[325] Para 29.

[326] Para 32.

[327] Para 33.

trial rights of the accused by in essence finding that the legal re-characterisation would not impact on Lubanga's fair trial rights. In fact, the court came to this conclusion without considering the possible safeguards which should be put in place to ensure that the accused was placed in a position to defend himself adequately in light of the modification of the charges. The possible safeguards, which could have been put in place, is to ensure that Lubanga properly understood how the re-characterisation would potentially alter his defence strategy and further to award him sufficient time to prepare for what effectively amounts to new charges being brought against him.

3 5 1 1 Dissenting Opinion Fulford J

In quite a damning dissent, Fulford J disagreed with the majority opinion. The judge stated that Article 61(9)[328] leaves the control over framing and effecting any changes to the charges exclusively to the Pre-trial Chamber. The judge reiterated that the manner of proceedings was devised in such a way as to ensure that once the trial has begun the charges are not subject to any further amendment, addition or substitution.[329]

Fulford J went further to state that in the event that sub-regulation 1 is separated from sub-regulations 2 and 3, the only material protection afforded to an accused is that the modification cannot exceed the facts and circumstances described in the charges and that in his view, unless the Chamber incorporates significant additional measures to protect the rights of the accused, changes to the legal characterisation of the facts made at the very end of the case will infringe the safeguards for the accused.[330]

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[328] Article 61(9) of the Rome Statute:
After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

[329] *The Prosecutor v Thomas Lubanga Dyilo Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court*: Dissenting opinion Fulford J para 16.

[330] Para 22.

The judge acknowledged that even by including such safeguards, the re-characterisation would still affect the rights of the accused to finality and certainty of the charges against him.[331] On the issue of the actual charges, the judge found quite strongly that the five "proposals" brought by the victims involve changes to the DCC to such a degree that they constitute additional charges. The judge stated as follows:

> "On the formulation advanced by the victims, the accused would be at risk of conviction on 11 (rather than 6) charges, because the Chamber may only convict on charges: under Article 74(2) '[...] [t]he decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges [...].' In these circumstances, in my view, each of these five 'proposals' amounts to an application to add an additional charge, which is unlawful."[332]

The judge raised the *locus standi* of parties to the proceedings and the role of victims in that, in his view, it is only the Prosecutor who is entitled to apply to amend, add or substitute charges and in each instance, it is only the Pre-trial Chamber that has jurisdiction to allow or refuse the application and then only before the commencement of the trial.[333] The judge therefore strongly voiced his objection by stating that the "application is made by the representatives of the victims, who do not have *locus standi* under Article 61(9), and it is addressed to the Chamber, which would be acting *ultra vires.*"[334]

The judge was emphatic about the role of the prosecutor and the Pre-trial chamber to amend charges. In this instance, the prosecutor did not object to any of these aspects and neither did the prosecutor protect his rights to amend the charges.

Of particular significance, is the judge's inference that the re-characterisation of the charges will infringe the accused's right to legal certainty which is contained in Article 22[335] of the Statute. The principle of legality seeks to protect accused persons from

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[331] *The Prosecutor v Thomas Lubanga Dyilo Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court* Dissenting opinion Fulford J para 28.

[332] Para 43.

[333] Para 45.

[334] Para 45.

[335] Article 22 of the Rome Statute: *Nullum crimen sine lege*:

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

being confronted by a case or charges that may be unforeseen. The very essence of the Article is to ensure that an accused can prepare a proper defence based on charges that he/she understands and knows.

3 5 2 Appeals Chamber

The appeals judgment[336] was Lubanga's saving grace as the chamber reversed the decision of the Trial Chamber. In respect of the participation of victims, the Appeals Chamber found[337] that the 27 applicants fulfilled all the criteria for participation in the appeals as they had been recognised as victims in the case. In addition, the Appeals Chamber considered that the victims' personal interests were affected insofar as they claim that they were children enlisted in a militia and that they had suffered sexual slavery, inhuman treatment and/or cruel treatment.[338]

3 5 2 1 The Right to be informed promptly and in detail of the nature, cause and content of the charge

In addressing Mr Lubanga's concern in respect of whether Regulation 55 is inconsistent with the rights of the accused, the Appeals Chamber held that Article 67(1)(a) of the Statute does not preclude the possibility that there may be a change in the legal characterisation of facts in the course of the trial.[339] The Appeals Chamber held that:

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2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

[336] *The Prosecutor v Thomas Lubanga Dyilo Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"* No. ICC-01/04-01/06 OA 15 OA (8 December 2009) The Appeals Chamber.

[337] Para 36.

[338] Para 36.

[339] *The Prosecutor v Thomas Lubanga Dyilo Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009* para 84.

> "this is supported by the jurisprudence of the ECtHR on Article 6(3)(a) of the Convention for the Protection of Human Rights and Fundamental Freedoms and of the Inter-American Court of Human Rights on Article 8(2)(b) of the American Convention on Human Rights."[340]

3 5 2 2 The Right to adequate time and facilities for the preparation of the defence

The Appeals Chamber did, however, acknowledge that human rights law demands that the legal characterisation of facts at the trial must not render that trial unfair. In this regard, the Appeals Chamber noted that Article 67(1)(b) of the Statute provides for the right of the accused person to "have adequate time and facilities for the preparation of the defence" and it is for this reason that Regulation 55(2) and (3) set out several stringent safeguards for the protection of the rights of the accused.[341] In respect of the accused's right to a trial without delay, the Appeals Chamber did not find that a change to the legal characterisation of the facts pursuant to Regulation 55 would automatically lead to undue delay of the trial.[342] This conclusion is quite concerning as any modification would lead to a delay in proceedings, as the accused would have to be given more time to review the evidence and prepare adequately for what effectively would amount to new charges being laid against him.

In reviewing Regulation 55 in light of Article 74(2),[343] the Appeals Chamber found that Article 74(2) of the Statute confines the scope of Regulation 55 to the facts and circumstances described in the charges and any amendment thereto and therefore Regulation 55 is consistent with Article 74(2) of the Statute. The Appeals Chamber also found that Regulation 55 is in fact in conflict with Article 61(9)[344] and the Appeals

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[340] Para 84.

[341] Para 85.

[342] Para 86.

[343] Article 74(2) of the Rome Statute:

> The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

[344] Article 61(9) 9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After

Chamber was persuaded by the arguments of Mr Lubanga and the Prosecutor that new facts and circumstances not described in the charges may only be added under the procedure of Article 61(9) of the Statute.[345] The Appeals Chamber, therefore, reversed the decision of the Trial Chamber and the legal re-characterisation of the facts was not allowed to proceed. This decision reinforces the importance of the role of the confirmation of charges stage as discussed at the beginning of the chapter in determining the scope of the charges against the accused.

3 6 Victim participation in the *Lubanga* trial

The rights and participation of victims have been referred to in Chapter 2 and this is the first case, which sought to define the extent of victim participation in ICC proceedings. The judgments and guidelines of the court are therefore important in terms of establishing the extent of the participation of victims in relation to the fair trial rights of the accused.

3 6 1 First Decision on victim participation at investigation stage of proceedings

The first decision on victim participation took place within the Pre-Trial Chamber in January 2006. In this decision victims required the chamber to consider the following issues pertaining to victim participation:[346]

i) whether, in the light of Article 68(3) of the Statute, proceedings may be considered to exist at the investigation stage;
ii) the conditions of application of Article 68(3) during the stage of investigation of a situation; and
(ii) the modalities of the participation of victims in the proceedings at the investigation stage.

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commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges

[345] *The Prosecutor v Thomas Lubanga Dyilo Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009* para 94.

[346] *The Prosecutor v Thomas Lubanga Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3 VPRS 4,VPRS 5 and VPRS 6 (Public Redacted Version)* ICC-01/04-101-tEN-Corr Pre-Trial Chamber I (19 January 2006) para 27.

The Trial Chamber in arriving at its decision to allow victims to participate at the investigation stage drew a distinction between “situations” and “cases” in terms of the different kinds of proceedings and defined the two as follows: Situations, “entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such. Cases comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects and entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear.”[347] The Trial Chamber therefore decided that in light of this distinction, during the stage of investigation of a situation, “the status of victim will be accorded to applicants who seem to meet the definition of victims set out in rule 85 of the Rules in relation to the situation in question. At the case stage, the status of the victim will be accorded only to applicants who seem to meet the definition of victims set out in rule 85 in relation to the relevant case”.[348] However, the discussion around victim participation at the investigation stage of proceedings is now moot given that on 19 December 2008, the Appeals Chamber overruled the decision for victim participation at the investigation stage of proceedings.[349]

3 6 2 Second Decision on victim participation: Trial Chamber decision

However, in January 2008,[350] the Trial Chamber made another decision concerning victim participation, which was later taken on appeal. The important aspects of the decision follow hereunder.

In summary, the court developed guidelines for the participation of victims in trial proceedings and also reflected on the following key issues:

In deciding on the manner of victim participation under Article 68(3), the court reiterated that the proceedings at the ICC are sui generis in nature and the court must,

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[347] *The Prosecutor v Thomas Lubanga Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public Redacted Version)* ICC-01/04-101-tEN-Corr Pre-Trial Chamber I (19 January 2006) para 65.

[348] Para 66.

[349] *The Prosecutor v Thomas Lubanga Appeals Chamber Investigation Phase Decision* Appeals Chamber Case No ICC-01/04-556 (19 December 2008).

[350] *The Prosecutor v Thomas Lubanga Decision on victims' participation* Trial Chamber I Case no.: ICC-01/04-01/06 (18 January 2008).

therefore, develop trial procedures that meet the criteria in this regard for international cases and that in applying such criteria, it will not give rise to unfair trial proceedings.[351] The Trial Chamber indicated that when making a decision regarding the participation of victims, the following criteria must be met:[352]

(i) first, whether the applicant is a victim of a crime under the jurisdiction of the Court, as provided for in Rule 85 of the Rules; and
(ii) second, whether the interests of the victim are affected in the proceedings in accordance with Article 68(3) of the Statute.

The Trial Chamber indicated that once the Chamber had determined that an applicant is a natural or legal person, it will consider if there is evidence that the applicant suffered any harm as a result of the commission of a crime within the jurisdiction of the Court.[353] The Trial Chamber also deliberated on the aspect of the causal link between the victim and the harm suffered and determined that Rule 85(b) of the Rules provide that legal persons must have "sustained direct harm." Rule 85(a) of the Rules does not include the stipulation for natural persons and the court therefore decided that people can be the direct or indirect victims of a crime within the jurisdiction of the Court.[354]

The significance of these decisions is that the Trial Chamber decided that victims were allowed to introduce evidence as the court has the right to request the presentation of evidence in order to establish the truth – thus victims may be allowed to tender and examine the evidence, if the court so allows.[355] The Trial Chamber further advised that Rule 91(3)[356] enables participating victims to question witnesses with the

[351] Para 85.
[352] Para 86.
[353] Para 90.
[354] Para 91.
[355] *Lubanga Decision on Victim's Participation* para 108.
[356] Rule 91(3) Of ICC Rules of Procedure and Evidence:
3(a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that

leave of the Chamber (including experts and the defendant). This decision is problematic, as an accused person at the ICC now has to face what amounts to two accusers; that being the prosecutor and the victims. In a normal criminal trial, in adversarial proceedings, the accused only must defend his case against the prosecutor. The effect of this decision could therefore seriously impact the manner in which the accused is able to prepare his defence.

The Trial Chamber indicated further that it will not restrict questioning by victims to reparation issues, but instead will allow appropriate questions to be put by victims whenever their personal interests are engaged by the evidence under consideration.[357] The Trial Chamber indicated that when they received requests from the victims' legal representatives to have the opportunity to challenge the admissibility or relevance of evidence when their interests were engaged, this would be allowed, as the Trial Chamber is not prohibited from doing so in terms of the Rome Statute.[358] The chamber decided that victim's participation included making opening and closing statements during trial proceedings.[359]

As has been discussed earlier in this dissertation, disclosure of evidence is a fundamental right which an accused has to a fair trial and the fact that victims are now allowed to challenge the admissibility of evidence may effectively subject the accused to a second prosecutor, as it is within the purview of the prosecutor to disclose and challenge the admissibility of evidence within a trial in order to prove the guilt of the accused beyond reasonable doubt.

3 6 2 1 Dissenting opinion of Blattman J

Blattman J provided an important dissenting opinion in the Trial Chamber decision, which is of significance to the fair trial rights of the accused.[360]

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case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.

[357] *The Prosecutor v Thomas Lubanga Decision on victims' participation* Trial Chamber I Case no.: icc-01/04-01/06 (18 January 2008) para 108.

[358] Para 109.

[359] Para 117.

[360] *The Prosecutor v Thomas Lubanga Decision on victims' participation* Trial Chamber I Case no.: icc-01/04-01/06 (18 January 2008): *Dissenting Opinion Judge Blattman.*

The judge disagreed with the chamber's view regarding which victims will have the right to participate and the judge recommended the following:[361]

> "I would suggest that in order to determine which victim applicants will have the right to participate in the proceedings before the Trial Chamber, the Chamber must:
> i) first, assess whether the applicant is a person who has suffered harm as a result of the commission of a crime within the jurisdiction of the Court related to the confirmation of the charges against the accused.
> ii) If found to meet the definition, the Chamber must then determine whether the victim applicant's interests are affected in the particular case.
> iii) If this element is met, the Trial Chamber should then assess whether participation by the victim is appropriate at the particular time and stage within the proceedings, and finally whether their manner of participation would prejudice the rights of the accused to a fair, impartial and efficient proceeding."

The judge stated further that:

> "By providing the possibility of victims' status to applicants who have suffered harm not linked to the charges in the present case, the rights of those victims who do fulfill the criteria of victim are compromised. The application process for victim applicants must not be over burdensome."[362]

The judge is therefore of the view that victims should not be allowed to participate in proceedings simply as a result of harm suffered but that such harm must have been suffered in relation to the particular case and that such participation should occur in relation to the time at which the court has decided on the confirmation of charges against a particular accused. The judge is also reinforcing the rights of victims and by implication saying that the court should not provide unrealistic expectations to victims who have actually suffered harm and that the application process should be simplified.

This is an important point; if victims were allowed to show an interest at any time, it could effectively disrupt proceedings and their participation should be linked to the crimes which have been confirmed and not those which are still being decided as they may then have an unfair advantage on influencing whether or not the potential charges against the accused are indeed confirmed or even potentially adding new charges.

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[361] Para 15.

[362] Para 15.

3 6 3 Appeals judgement on victim participation

On 11 July 2008, the decision of the Trial Chamber was taken on appeal and the court found the following: In respect of the harm suffered, the Appeals Chamber held that "the harm does not have to be direct but it must be of a personal nature. For the purposes of participation in the trial proceedings, the harm alleged by a victim and the concept of personal interests under Article 68(3) of the Statute must be linked with the charges confirmed against the accused."[363] On this aspect, the Appeals Chamber held the same view as Blattman J and confirmed that the harm and personal interests must be linked to charges, which have been confirmed and therefore overturned the Trial Chamber's decision on this point.

In respect of the Trial Chamber's decision that victims and their representatives may lead evidence, the Appeals Chamber stated that:

> "[T]he right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence lies primarily with the parties, namely, the Prosecutor and the Defence but this does not preclude the possibility for victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings."[364]

The Appeals Chamber agreed with the guidelines provided by the Trial Chamber in the examination and tendering of evidence by witnesses and lists these guidelines as follows:[365]

> "(i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial."

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[363] *Lubanga In the appeals of the Prosecutor and the Defence against the decision of Trial Chamber I entitled "Decision on Victims' Participation*" of 18 January 2008 (ICC-01/04-01/06-1119) No.: ICC-01/04-01/06 OA 9 OA 10 (11 July 2008) para 2.

[364] *Lubanga In the appeals of the Prosecutor and the Defence against the decision of Trial Chamber I entitled "Decision on Victims' Participation*" of 18 January 2008 (ICC-01/04-01/06-1119) No.: ICC-01/04-01/06 OA 9 OA 10 (11 July 2008) para 3.

[365] Para 3.

The Appeals Chamber found that the safeguards ensured that the participatory rights of victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence, is not inconsistent with the onus on the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused to a fair trial. The court confirmed that the Trial Chamber did not create an unfettered right for victims to lead or challenge evidence, instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis, whether or not to allow such participation.[366]

This decision is concerning, as on the one hand, the chamber acknowledges that the only parties to proceedings are the prosecutor and the defendant and that in essence, the defence should only face one accuser, that being the prosecutor. However, the court then confirms that victims may still be able to lead evidence pertaining to the guilt or innocence of the accused as well as to challenge the admissibility of evidence. This judgment truly reflects the confusion on the part of the judges in interpreting the participation of victims. It also illustrates a flagrant disregard for the accused's right to be presumed innocent until guilt is proven beyond reasonable doubt by the prosecutor.

3 6 3 1 Dissenting Opinions by Pikis J and Kirsch J

Two judges provided dissenting opinions to the appeal decision. Dissenting mainly on the majority finding that victims participating at trial may lead evidence pertaining to the guilt or innocence of the accused and challenge the admissibility or relevance of evidence.

The first partly dissenting opinion was by Pikis J who raised some key issues. The judge was of the view that victims can neither adduce evidence on the guilt or innocence of the accused nor challenge the admissibility or relevance of evidence.[367]

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[366] Para 4.

[367] *Lubanga In the appeals of the Prosecutor and the Defence against the decision of Trial Chamber I entitled "Decision on Victims' Participation*" of 18 January 2008 (ICC-01/04-01/06-1119) No: ICC-01/04-01/06 OA 9 OA 10 (11 July 2008): Dissenting opinion of Pikis JA para 5.

The judge's reasons were that the Statute does not permit the participation of anyone in the proof or disproof of the charges other than the prosecutor and the accused.[368]

The judge stated further that in an adversarial trial, the accused cannot have more than one accuser and that it is not for the accused to prove his innocence as he is already presumed to be innocent, however, it is for the prosecutor to prove the guilt of the accused beyond reasonable doubt.[369] The judge expressed the view that the participation of victims in proceedings should only be to express their views and concerns.[370] The judge raises very important points for the fair trial rights of the accused particularly in respect of Article 66, which encompasses the accused's right to be presumed innocent, and in respect of Article 67(2), which encompasses the accused's rights to disclosure of evidence.

Another dissenting opinion was provided by Kirsch J. The judge responded to the issue of evidence by stating that in his opinion it was not the intention of the drafters that victims should lead evidence on guilt or innocence. The judge opines that if victims were to lead evidence, the accused would be confronted by multiple accusers.[371] Similarly to Pikis J, Kirsch J reinforces the role of the prosecutor and refers to Article 66(2) of the Statute, making it clear that it is the prosecutor who bears the onus of proving guilt at the trial.[372]

Various authors have different opinions on the judgments of the court on victim participation. McAsey[373] extrapolates quite eloquently by stating that admitting victims to proceedings where guilt has not been established, presupposes that a crime has occurred which will affect the perception of the accused and his/her presumption of innocence. McAsey[374] also raises an important point as to the potential impact on procedural fairness, which this situation creates in that there are no disclosure obligations imposed upon victims by the Rome Statute or ICC Rules and therefore by allowing victims to lead evidence casts them as a second prosecutor, potentially to the

[368] Para 6.
[369] Para 14.
[370] Para 15.
[371] Para 23.
[372] Para 24.
[373] McAsey (2011) *Austl Int'l LJ* 118.
[374] 114.

detriment of the principle of equality of arms. McAsey[375] opines that the only manner to ensure that this does not happen is dependent on how the judges decide on victim participation in the cases before them.

Another important point, which was raised in the appeal judgment, was the right of victims to question the accused. In this regard, Friman[376] correctly asks whether victims are now third parties to proceedings before the court, given that they now have the rights to lead evidence and question witnesses. Friman[377] opines that it is a balancing act, which has been left for the court to decide. This view that the final decision is left for the court to decide is shared by McAsey[378] who argues that victim participation is now largely left to the chambers to decide and this has also created great uncertainty, largely due to the inconsistent approaches taken by the chambers.

In finding a solution to the problem of victim participation, Baumgartner[379] opines that the ICC needs to ensure that it defines the participation of victims more effectively and comprehensively as it is clear that due to capacity constraints, the ICC is already unable to manage the sheer volume of victim applications. She argues that solutions must therefore be found to allow the ICC to discharge its mandate to ‘‘put an end to impunity, while at the same time according due respect to the opposing interests of the accused, the prosecution, the public and the victims and complying with general standards of a fair, impartial and expeditious trial.”[380]

3 7 Conviction Decision and Appeals Judgment of Mr Lubanga and dissenting view *vis-à-vis* fair trial

On 14 March 2012, the Trial Chamber[381] convicted Thomas Lubanga and found him guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning

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[375] 115.

[376] H Friman “The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?” (2009) 22 *LJIL* 485 500.

[377] 500.

[378] McAsey (2011) *Austl Int'l LJ* 121.

[379] E Baumgartner “Aspects of victim participation in the proceedings of the International Criminal Court” (2008) 90 *International Review of the Red Cross* 439.

[380] 439.

[381] *The Prosecutor v Thomas Lubanga Dyilo Judgment Pursuant to Article 74 of the Statute* No.: ICC-01/04-01/06 (14 March 2012) Trial Chamber I para 42.

of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute from early September 2002 to 13 August 2003. This judgment is considered to be a victory for the rights of the victims as it particularly dealt with children and their protection. The judgment also set the tone for the manner in which the rights of victims were being dealt with comprehensively by the Court. Hence, the final judgment strongly upheld the rights of victims and their participation in the international trial of Mr Lubanga.

In *Lubanga*, the Appeals Chamber upheld his conviction and sentence in respect of war crimes related to child soldiers. Usacka J, however, issued a strong dissenting opinion in relation to the breach of fair trial rights of the accused.

3 7 1 Right to be informed in detail of the nature, cause and content of the charges

Lubanga's first ground of appeal related to his rights under Article 67 of the Rome Statute to be informed in detail of the nature, cause and content of the charges against him. He alleged that this right was violated because the charges were vague and general in nature.[382] Usacka J, in her dissenting opinion found that the charges lacked specificity and therefore did not afford Mr Lubanga sufficient notice to prepare a defence and that this violated his right to a fair trial.[383] The majority of the court found that the vagueness in the original arrest warrant was rectified by the provision of further information during the legal proceedings. However, Usacka J disagreed with this and further noted that "the range of dates provided by the prosecution was too broad, that the locations of the events were not clear and the identities of the alleged victims were not specific."[384] In the majority judgment, the argument of the prosecutor with regard to this was that the level of detail in the charges were sufficient and that, depending on the case, it may "neither be possible nor necessary to provide specific information on the identity of victims."[385] The majority of the Appeals Chamber found the following in this regard:

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[382] *The Prosecutor v Thomas Lubanga Judgement on the appeal of Mr Thomas Lubanga against his conviction* ICC-01`/04-01/06 A 5 (1 December 2014) The Appeal Chamber para 115.

[383] *The Prosecutor v Thomas Lubanga Judgement on the appeal of Mr Thomas Lubanga against his conviction* Dissenting opinion to the Appeal Decision Usacka J para 2.

[384] Para 2.

[385] *The Prosecutor v Thomas Lubanga Judgement on the appeal of Mr Thomas Lubanga against his conviction* Majority Judgement on Appeal paras 116 and 117.

The DCC submitted by the Prosecutor, prior to the confirmation of charges proceedings as well as the amended document submitted before the trial set out the factual allegations relevant to the underlying crimes in two parts; the first presenting a "pattern" of enlistment, conscription and use of individuals under the age of fifteen years to participate actively in hostilities, which was the same in both documents and the second set out factual allegations relevant to named alleged child soldiers.[386] The majority noted that the "pattern" in the DCC did not change.[387] The majority of the court therefore found that Mr Lubanga failed to substantiate his argument that the charges were insufficiently detailed and that he failed to substantiate the prejudice he suffered because of the allegedly missing detail.[388]

Usacka J[389] was of the view that "it was only at the end of the trial, when the Trial Chamber found that none of the individual cases had been established, that the focus shifted from the individual cases to the 'pattern section' of the charges, which was then unsupported by any reference to identified child soldiers." The judge found therefore that the Trial Chamber convicted Mr Lubanga based on vaguely formulated allegations that had previously played a peripheral and subsidiary role in the case. The judge went further and questioned the evidence relied upon in respect of what she considered to be vague charges. She was of the view that none of the evidence "identified a single child under the age of fifteen and much of the witness testimony relied upon did not specify the location where or the date when the person who allegedly appeared to be under the age of fifteen was encountered."[390] The judge was quite strong in her criticism of the majority decision and stated that Mr Lubanga's right to be informed of the charges against him had been violated and that during the course of the trial up until his conviction, he was unaware that the nine individual cases against him would be struck and he would only be convicted on "general charges". [391]

Usacka J in her dissenting opinion focused on the Trial Chamber's findings on the evidence relating to the age of the alleged child soldiers and expressed reservations

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[386] *The Prosecutor v Thomas Lubanga Judgement on the appeal of Mr Thomas Lubanga against his conviction* Majority Judgement on Appeal para 131.

[387] Para 135.

[388] Paras 135 and 136

[389] *Dissenting Opinion Usacka J* para 17.

[390] Para 19.

[391] Para 20.

with the method employed in identifying the age of the children via their physical appearance.[392] In the majority judgment, Lubanga had submitted that the Trial Chamber invited the Prosecutor to consider calling an expert on age determination, but that the prosecutor failed to do so.[393] The Trial Chamber disputed this by indicating that the Trial Chamber had invited both parties to consider calling expert witnesses. The Appeals Chamber found that the Trial Chamber did not exclude the possibility of assessing age based on physical appearance and dismissed Mr Lubanga's argument that he was led to believe that the Trial Chamber was of the view that age determination based on appearance was not possible.[394] In my view, the court erred in not calling an expert to determine the age of the children, particularly given that Mr Lubanga was charged with conscripting children. This was such a fundamental part of the trial in terms of Mr Lubanga's conviction and the fact that the court in various instances could not determine the age of the children, should have resulted in Mr Lubanga not having been found guilty.

3 7 2 Presumption of Innocence – Guilt beyond reasonable doubt

Usacka J further raises Article 66(3) of the Statute, which provides that to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt. She goes further to state that her understanding of the meaning of this Article means that conviction should not occur unless all reasonable hypotheses based on the evidence presented indicate guilt.[395] The judge states that in her view this standard should apply to the fact-finding stage, specifically to the facts necessary to establish the elements of the crimes charged and that the onus rests on the prosecutor to prove that the accused is guilty according to this standard.[396]

She points out that the Trial Chamber did no fulfil its obligations in establishing that the children conscripted, enlisted, and used in hostilities were under the age of fifteen and she states that the reasoning of the Trial Chamber in respect of evidence relied on to establish the age of children, was insufficient.[397]

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[392] Para 26.
[393] *Appeals Majority judgement* para 211.
[394] *Appeals Majority judgement* paras 213-215.
[395] *Dissenting Opinion Usacka J* para 27.
[396] Para 27.
[397] Para 28.

She records her disagreement with the Trial Chamber's lack of addressing the "burden of proof" and states that the Trial Chamber employed a lower standard in this case.[398] The judge is quite correct, in the Conviction decision, the Court referred to the "burden of proof" briefly and merely stated that for a conviction, each element of the particular offence charged must be established "beyond reasonable doubt."[399]

Usacka J concluded by stating the following:

> "It is my hope that future prosecutions of these crimes at the Court will adduce direct and more convincing evidence and preserve the fairness of proceedings, which lies at the heart of criminal prosecutions and should not be sacrificed in favour of putting historical events on the record."[400]

3 8 Reflection on the impact of the case on the rights of victims and the international community

In a statement released by the presiding judge, Adrian Fulford regarding the sentence of Mr Lubanga, the judge reflected on the following key aspects of the trial and its impact on the rights of victims and the international community:

> "He highlighted that the crimes for which Mr Lubanga has been convicted, comprising the crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities, are undoubtedly very serious crimes that affect the international community as a whole. The Presiding Judge added that the "vulnerability of children mean that they need to be afforded particular protection that does not apply to the general population, as recognised in various international treaties."[401]

As is evidenced by the review of the decisions on victims' participation, the *Lubanga* case determined a framework for victim participation. As we noted in chapters 1 and 2 of the dissertation reparations for victims is also important in ensuring that they

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[398] Para 32.

[399] *The Prosecutor v Lubanga Judgment pursuant to Article 74 of the Statute* No.: ICC-01/04-01/06 (14 March 2012) Trial Chamber I para 92.

[400] Para 79.

[401] ICC Press Release "Thomas Lubanga Dyilo sentenced to 14 years of imprisonment" (10-07-2012) *ICC* <**https://www.icc-cpi.int/Pages/item.aspx?name=pr824**> (accessed 29-11-2019).

receive justice for the crimes that had been committed against them. In this regard, in 2018, the ICC made important decisions in respect of victims as follows:

> "On 18 July 2018 In its decision, the Trial Chamber held Mr Lubanga liable for reparations to the sum of USD 10,000,000 in respect of 425 victims it found eligible for reparations and 'any other victims who may be identified'." [402]

The separate opinion of Ibáñez Carranza J, however, best characterises the experiences of victims and their rights in respect of reparations**.** In her view, the ultimate goal of reparations consists of restoring human dignity and restructuring the human being both in his or her individual and social dimensions. In the view of the judge:

> "the specific damage to the project of life of the former child soldiers must be adequately considered and repaired, restoring opportunities and capacities aimed at enabling them to reconstruct themselves as complete and fulfilled human beings."[403]

Finally, Ibáñez J observed that, given the extremely difficult situation in which victims are immersed (contexts of ongoing conflict or post-conflict environments) which often prevent them from obtaining evidence sufficient to prove their status as victims, the harm suffered and/or the link of causation, the burden of proof must be shared between the victims and the system established in the Rome Statute, and ought to be approached by the Court in an institutional and technical manner.[404]

The judge, therefore, contextualises the importance of reparations as not just monetary compensation for victims, but also in terms of restoring dignity and respect for the victims of the crimes being tried at the ICC.

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[402] ICC Press Release "Lubanga case: Appeals Chamber confirms Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'" (18-07-2019) *ICC* <https://www.icc-cpi.int/Pages/item.aspx?name=PR1473> (accessed 29-11-2019).

[403] ICC Press Release **"**Lubanga case: Appeals Chamber confirms Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'*"* (18-07-2019) *ICC.*

[404] ICC Press Release "Lubanga case: Appeals Chamber confirms Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'" (18-07-2019) *ICC.*

In respect of the focus of the prosecutor on the DRC itself, two authors, Kambale and Rotman reflect on the situation as follows:

> "Ituri is closer to Uganda and Rwanda than to Kinshasa. These two neighboring countries allegedly have created and controlled rebel militias that, though aspiring to exercise power at the national level, have exploited long-standing ethnic tensions between Ituri's local Hema and Lendu ethnic populations."[405]

The authors allude to the fact that international actors are motivated in part by their desire to control the region's rich mineral resources, including diamonds, gold, timber and cobalt; the national rebel militias hope to materially benefit from their relationships with the international actors and to gain political power at the national level; the local ethnic disputes are rooted in land ownership disagreements, among other things. Over time, this three-tiered conflict has produced a number of actors, each of whom has focused at some point or another on gaining administrative control of Bunia, Ituri's principal city.

The authors weigh up the pros and cons of the ICC's focus on the DRC in prosecuting crimes and recommend that it is necessary to be mindful of who would enjoy the benefits or endure the costs: the ICC, the donor countries, the DRC or the victims of the crimes. The authors argue that in the end, all advocates for international justice must recognise that the interests of the court, the donors, the state, and the victims are seldom perfectly aligned, and thus consider how their decisions impact different constituencies.[406]

Therefore, the current context of the DRC is imperative in understanding the potential impact of the conviction of Mr Lubanga. The conviction may not restore peace to the DRC, but we hope that the involvement of the ICC in prosecuting not only Mr Lubanga, but Messrs Katanga and Ntaganda will have an impact on procedural justice and restorative measures which the DRC will implement in the future to the benefit of all the people living in the DRC.

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[405] P Kambale & A Rotman "The International Criminal Court and Congo" (2004) *Global Policy Forum* <https://www.globalpolicy.org/component/content/article/164-icc/28474.html> (accessed 29-11-2019).

[406] Kambale & Rotman "The International Criminal Court and Congo" (2004) *Global Policy Forum.*

3 9 Conclusion

In this chapter, notably a lack of specificity of charges and Mr Lubanga's right to disclosure of evidence as well as the attempt by the victims to re-characterise the charges created uncertainty for Mr Lubanga in respect of the charges being brought against him and his ability to prepare an adequate defence.

The trial of Mr Lubanga took six years to complete, which meant that he was in detention for six years. In 2012, he was sentenced to a prison term of fourteen years of which the six years already served would be deducted.[407] In this regard, Mr Lubanga's right to an expeditious trial was infringed and he was kept in detention for this entire period which is in contravention of his rights to liberty and security as guaranteed by the ICCPR. The case analysis also raised critical concerns in relation to the burden of proof placed on the prosecutor to prove her/his case beyond reasonable doubt as well as the prosecutor's lack of adherence to the proper rules in respect of the disclosure of evidence.

The next chapter will review the proceedings in relation to Mr Katanga, also from the DRC. The chapter will review the relevant decisions of the court in relation to Mr Katanga's general fair trial rights, with a specific focus on the implementation of Regulation 55, his right to an expeditious trial, his right to silence and his fundamental right to life. The chapter will further review the decisions in respect of the participation of victims.

[407] ICC Press Release "Thomas Lubanga Dyilo sentenced to 14 years of imprisonment" (10-07-2012) *ICC*.

CHAPTER 4: GERMAIN KATANGA

4 1 Introduction

The previous chapter reviewed the case law pertaining to the fair trial rights of Mr Lubanga, who was the first accused convicted at the ICC. In particular, the chapter reviewed the implementation of Regulation 55, Mr Lubanga's right to legal certainty and raised concerns related to the manner in which the prosecutor approaches the right to disclosure of evidence.

This chapter will focus on Mr Katanga and his rights pertaining in particular, similarly to the previous chapter, to the implementation of Regulation 55 and its impact on his fair trial rights.

In particular, the following fair trial rights of the accused will be reviewed within the context of the relevant case law; the right to be informed of the nature, cause and content of the charges, his right to an expeditious trial, his right to silence and his fundamental right to life. The chapter will also explore the decisions in respect of the participation of victims.

4 2 Introduction and background to the Germain Katanga case

The DRC ratified the Rome Statute on 11 April 2002. On 3 March 2004, the Government of the DRC referred the situation (all events within the jurisdiction of the Court) to the ICC. After preliminary analysis, the Prosecutor initiated an investigation on 21 June 2004. In 2007, the ICC issued an arrest warrant for Germain Katanga (also known by the alias "Simba") accusing him of war crimes and crimes against humanity in relation to an attack on Bogoro, a village in the Ituri district of the eastern DRC, which took place in early February 2003.[408]

The Prosecutor alleged Germain Katanga's involvement in the attack in his capacity as the leader of the *Forces de Résistance Patriotique d'Ituri* (FRPI; Patriotic Resistance Force in Ituri). Katanga is alleged to have been the highest-ranking leader

[408] *The Prosecutor v Germain Katanga Case Information Sheet Situation in the Democratic Republic of the Congo* ICC-01/04-01/07 (20 March 2018) <https://www.icc-cpi.int/CaseInformationSheets/KatangaEng.pdf> (accessed 28-01-2019) 2-3.

of the FRPI since the beginning of 2003.[409] Between January 2002 and December 2003, over 8 000 civilians died and more than half a million persons were displaced from their homes in Ituri, as a consequence of the armed conflict between the FRPI and other armed militias in the region. Between January 2003 and March 2003, the FRPI and the *Front des Nationalistes et Intégrationnistes* (FNI; Nationalist and Integrationist Front) were reported to have conducted attacks, in a systematic or widespread manner, against the civilian population in various parts of Ituri. On 24 February 2003, members of Katanga's militia allegedly entered the village of Bogoro and launched an attack, targeting mainly civilian members of the Hema ethnic group.[410] It was alleged that the FRPI had children under the age of fifteen participate in the attack during which at least 200 civilians were killed. It was further alleged that women and young girls were abducted to be turned into sexual slaves.

4 2 1 Joinder of cases and confirmation of charges

This was the second case to be tried at the ICC arising out of the DRC. On 10 March 2008, Pre-Trial Chamber I joined *Katanga*'s case with that of *Mathieu Ngudjolo Chui* ("*Ngudjolo*"), based on the alleged sharing of responsibilities of crimes which had been committed in Bogoro.[411]

The Confirmation of the Charges hearing took place on 26 September 2008 and the following charges were confirmed against both *Katanga* and *Ngudjolo*:

The Chamber confirmed seven counts of war crimes under Article 25(3)(a) of the Statute (using children under the age of fifteen to take active part in hostilities, directing an attack against civilians, wilful killing, destruction of property, pillaging, sexual slavery, and rape) and three counts of crimes against humanity (murder, rape, and sexual slavery). However, it declined to confirm three charges on the grounds of

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[409] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui Public Redacted Version Decision on the confirmation of charges* No.: ICC-01/0401/07 (30 September 2008) Pre-Trial Chamber I para 12.

[410] Para 19.

[411] *The Prosecutor v Germain Katanga Decision on the joinder of the cases against Germain Katanga and Mathieu Ngudjolo Chui* no: ICC-01/04-01/07 (10 March 2008) Pre-Trial Chamber I 6.

insufficient evidence: the charges of inhumane treatment and outrages upon personal dignity (war crimes), and inhumane acts (a crime against humanity).[412]

The trial commenced on 24 November 2009 and the presentation of evidence began on 25 November 2009 and ended on 11 November 2011. The parties and participants then made oral submissions during hearings held between 15 and 23 May 2012. The two accused made an oral statement as provided for in article 67(1)(h)[413] of the Statute.[414]

Thereafter, the Chamber continued its examination of evidence on the record of the case and noted that both during his testimony and his defence, Germain Katanga emphasised his contribution as co-ordinator of preparations for the attack on Bogoro while maintaining that its aim was to dislodge the UPC and asserting that it had been carried out by a group of local combatants linked to the APC. A number of witnesses called by both the Prosecutor and the Defence teams also highlighted Germain Katanga's contribution to the attack, albeit in different terms.[415] It appeared to the Majority of the Chamber that Germain Katanga's mode of participation could be considered from a different perspective from that underlying the Confirmation Decision and it was, therefore, appropriate to implement Regulation 55, while ensuring that the Defence is able to exercise his rights effectively, in accordance with Regulation 55(2) and 55(3).[416]

On 21 November 2012, the two cases were severed and on 18 December 2012, Ngudjolo was acquitted of all charges against him.[417] However, the trial against Katanga continued. The reasons for the severance of the cases and other judgments pertaining to the fair trial rights of Katanga will, therefore, be discussed in detail in this chapter.

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[412] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui Public Redacted Version Decision on the confirmation of charges* 211 - 212.

[413] Article 67(1)(h) To make an unsworn oral or written statement in his or her defence

[414] *The Prosecutor v Germain Katanga and Mathieu Nngudjolo Chui Decision on the implementation of Regulation 55 of the Regulations of the court and severing the charges against the accused persons* No.: ICC-01/04-01/07 (21 November 2012) Trial Chamber II para 4.

[415] Para 5.

[416] Para 6.

[417] *The Prosecutor v Germain Katanga Case Information Sheet* 3.

4 3 The implementation of Regulation 55 – Right to know and understand the charges and to prepare an adequate defence and the right to an expeditious trial

4 3 1 Trial Chamber decision

On 21 November 2012,[418] the majority of Trial Chamber II informed the parties that it was considering a re-characterisation of the facts of the case concerning the mode of liability applicable to Katanga. The Chamber then severed the cases and announced the judgment for Katanga's co-accused, Ngudjolo, would take place as planned and he was acquitted in December 2012. It is evident that the joining and later severing of the two cases created an unnecessary delay in proceedings for Katanga as this process alone took four years. Further, it seems to be a very unfair manner in which the court implemented Regulation 55 at a stage of proceedings which coincided with the severance of the case with his counterpart. In the event that the prosecution had dealt with its investigation and charges effectively at the Pre-Trial stage, this situation may not have arisen and placed such strain on Katanga's defence at the end of his trial with the co-accused, Ngudjolo, who was acquitted and yet Katanga at the same time had to prepare for a new trial based on new facts.

On 21 November 2012, Trial Chamber II decided to re-characterise the facts against Katanga based on oral submissions which Katanga made during hearings held between 15 and 23 May 2012.[419] The majority confirmed that one of the modes of liability for Katanga alone would be:

> "on the basis of article 25(3)(d) of the Statute (complicity in the commission of a crime by a group of persons acting with a common purpose) and no longer solely on the basis of article 25(3)(a) of the Statute (commission of a crime in the form of indirect co-perpetration)."[420]

The Majority confirmed that it would not examine the crime of using children under the age of fifteen years to participate actively in hostilities (direct co-perpetration) in

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[418] *The Prosecutor v Germain Katanga and Mathieu Nngudjolo Chui Decision on the implementation of Regulation 55 of the Regulations of the court and severing the charges against the accused persons* No.: ICC-01/04-01/07 (21 November 2012) Trial Chamber II para 6.

[419] Para 4.

[420] Para 7.

light of Article 25(3)(d). The Trial Chamber deliberated as follows in regard to the re-characterisation and its impact on the fair trial rights of Mr Katanga:

4 3 1 1 The right to be informed of the nature, cause and content of the charges

The majority relied on the ECHR and the Inter-American Court of Human Rights emphasising that these courts considered that the right to be informed of the nature, cause and content of the charges includes the right of the accused to be informed of the legal characterisation of the facts upon which the charges were initially based.[421] The majority held the view that the proposed legal re-characterisation, in fact, seeks to limit Katanga's liability only to facts and circumstances already contained in the decision on the confirmation of charges, and thereby fulfils the requirements of Regulation 55(1) and ensures full respect for the rights guaranteed by Article 67(1)(a) of the Statute.[422]

In sum, the majority of the court did not find that the re-characterisation of facts, at such a late stage in proceedings, infringed on Katanga's rights to a fair trial. This finding is troubling since this re-characterisation was based on Katanga's testimony and infringed his right to remain silent as contained in Article 67(1)(g) of the Statute. The re-characterisation was only made known to Katanga at the end of the trial with his co-accused and so for all intents and purposes, Katanga was preparing and awaiting the court's final judgment and not expecting to be confronted with new charges.

4 3 1 2 The right to have adequate time and facilities to prepare a defence

On this issue, the Chamber invited the defence, the victims and the prosecutor to make submissions on the re-characterisation.[423] The court regarded this invitation of allowing Katanga to make submissions on the re-characterised facts as sufficient to fulfil the accused's right to have adequate time and facilities for the preparation of his defence. The court failed to consider that the re-characterisation came at the end of

[421] Para 22.
[422] Para 34.
[423] Para 38.

Katanga's case and the extent to which it could materially impact on his defence strategy at such a late stage.

4 3 1 3 The right to be tried without undue delay

The majority acknowledged that triggering Regulation 55 at such a late stage of the proceedings will prolong the proceedings against Katanga, but the majority denied that this would automatically infringe the right of the two accused to be tried without undue delay based on the following reasoning:

> "(i) Firstly, because the situation of the co-Accused Mathieu Ngudjolo is being treated separately.
>
> (ii) Secondly, because, at this juncture, the Majority is satisfied that it is possible to enable the Accused to prepare an efficient and effective defence under regulation 55(3), without prolonging the proceedings such as to entail an undue delay. As attested to by the present decision, the Majority felt the need to provide Germain Katanga with certain information in order to facilitate the preparation of his defence on the basis of article 25(3)(d) of the Statute.
>
> (iii) Finally, because this prolongation of the proceedings resulting from the application of regulation 55(2) and 55(3) is, without prejudice to the rights of the defence, strictly regulated by the Chamber, which will ensure that the application of this regulation does not engender a future unjustified or undue delay."[424]

The court also made it clear that it has wide discretion to implement Regulation 55. It is unfortunate that the court took the view that it did by; first, acknowledging that it is activating Regulation 55 late in the proceedings, but at the same time finding that even though the court is now charging Katanga on new charges, that no undue delay would occur. The court failed to take into account Katanga's right to prepare an adequate defence to the new charges, which would entail finding new witnesses, disclosure of evidence and in essence starting a new defence from the beginning.

4 3 1 4 The right not to be compelled to testify against oneself

On this issue, the majority admitted that it was the first time the Court was asked to deliberate on the application of Article 67(1)(g) when Regulation 55 is triggered. The majority found that in the case against Katanga and in light of ECHR case law, this

[424] Para 44.

right is not being infringed by the use of this procedure.[425] The majority concluded that Katanga's evidence was not given under duress and emphasised that he chose freely, in the presence of his counsel, to testify before the chamber and that no duress had been exerted upon him to do so and that as a result thereof, Katanga's right not to be compelled to incriminate himself had not been violated.[426]

This argument by the majority seems absurd, given that when Katanga chose to testify, he had not been informed by the court that his testimony may be used against him and that a re-characterisation may occur. If Katanga had been informed of the potential re-characterisation, it is argued that he would not have testified as freely as he did. It must also be borne in mind that his testimony was being given considering the charges against him as confirmed by the Pre-Trial Chamber and his defence strategy and decision to testify was informed by rebutting the charges, as confirmed, against him. It was not foreseeable to him, at the time, that the Chamber was considering re-characterisation of the facts against him and he incriminated himself based on omissions on the part of the Chamber. The chamber made it quite clear in its introductory paragraphs, that its decision to re-characterise the facts at the stage that it did, was largely based on the evidence it received in Katanga's oral testimony. At the time of giving his oral testimony, it will be recalled that it was at the conclusion of his trial and it is submitted that he could not have known that effectively a new trial would commence after such testimony.

It is evident from this decision that the implementation of Regulation 55 at the stage at which Katanga was effectively preparing for the end of his trial, could not have been anticipated or expected by a reasonable person. Arguably this was a completely unexpected turn of events for Katanga, first his case was severed from his co-accused's case, the co-accused was acquitted which means that if the re-characterisation did not occur, Katanga may have been acquitted too because the decision of the court to re-characterise implies that there was insufficient evidence to convict Katanga of the initial charges in terms of Article 25(3)(a) and he should have been acquitted at the same time as Mr Ngudjolo.

The implementation of Regulation 55 at this stage of proceedings was contrary to Katanga's rights to legal certainty and his fair trial rights as contained in Article 22.

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[425] Para 47.

[426] Para 51.

4 3 2 Dissenting Opinion of Van Den Wyngaert J

Van den Wyngaert J wrote a strong dissent to the majority decision emphasising that the Majority's decision potentially leads to a reopening of the trial, more than a year after the evidentiary hearings have come to an end.[427] The judge criticised the timing of the initiation of Regulation 55 and argued that in terms of Article 64(2) of the Statute, the Trial Chamber has the duty to ensure that the trial is both fair and expeditious and that she was of the view that triggering Regulation 55 at such a late point in the deliberations, puts both the fairness and the expeditiousness of the trial in grave jeopardy. The judge[428] referred to the Lubanga judgment on Regulation 55 and noted a two-step process which the majority should have followed in deciding whether or not to utilise Regulation 55:

> "i) it must be determined whether it is possible for the proposed re-characterisation of facts 'to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges' ('First Step'); and
> ii) the Chamber must exercise its discretion and determine whether modifying the legal characterisation of the facts would render the trial unfair ('Second Step')."

The two-step process reflected by Van den Wyngaert J reiterates that the Court, in arriving at its final judgment in this case, must abide by Article 74(2) of the Statute and may not "exceed the facts and circumstances described in the charges." It is advanced that Article 74(2) of the Statute limits the manner in which the court arrives at its decision and places a duty on the judges to make their decision within the context of confirmed charges against the accused.[429] The second step proposed by the judge was not adhered to by the majority as they failed to conduct a proper assessment of whether the re-characterisation would render the trial unfair.

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[427] *Decision on the implementation of Regulation 55 of the Regulations of the court and severing the charges against the accused persons:* Dissenting Opinion Van den Wyngaert JA para 3.

[428] Para 10.

[429] See Chapter 3 for an explanation of the importance of the confirmation of charges hearing in relation to Article 74(2) of the Statute.

The judge[430] was of the view that by using the Article 25(3)(d) Notice Decision, the Majority threatened the right to a fair and impartial proceeding and that the majority's decision created the perception that:

> "(i) they would have had to acquit Germain Katanga on the indirect co-perpetration charges which he is facing and (ii) that Article 25(3)(d)(ii) is seen as a provision which could sustain a conviction. This perception is created because, had the Majority been prepared to convict the accused under Article 25(3)(a), then it stands to reason that they would have just convicted on that basis, rather than resorting to a Regulation 55(2) notice decision."

This argument fundamentally reflects the position that the majority knew that they would acquit Katanga's co-accused and therefore opted for a re-characterisation to ensure a conviction of Katanga.

The judge[431] also highlighted the potential encroachment by the majority on the role and duties of the prosecutor in that the "truth-seeking mission" of the majority cannot justify an encroachment by the Trial Chamber on the role of the prosecution. It is the duty and role of the prosecutor to formulate the charges against the accused and to ensure that the facts are correctly characterised at the confirmation of charges phase of proceedings. In this case, it appears that the charges formulated against the accused were too weak to secure a conviction, hence the court's decision to re-characterise the facts.

In respect of the accused's right under Article 67(1)(g) of the Statute, the judge argued[432] that the relevant provision guarantees the accused the right "not to be compelled to testify or to confess guilt and to remain silent" and that this right may be infringed by a Regulation 55(2) decision if the Chamber uses the accused's own testimony at trial as a justification for considering re-characterisation.[433] She argued that:

> "Mr Katanga testified in the context of an indirect co-perpetration case, and it was reasonable for the accused to not have contemplated Article 25(3)(d)(ii) when he chose to testify and waived his right to remain silent. Had Germain Katanga known he had to defend

[430] Para 31.
[431] Para 35.
[432] Para 36.
[433] Para 36.

himself against Article 25(3)(d)(ii) as well, then it cannot be discounted that he may not have testified."[434]

Notably, the court discounted this argument by stating that the accused was not forced to testify and that he was not placed under duress, that his testimony was given freely. However, the majority's view is contrary to what the Statute intended by including the right against self-incrimination as the accused could not have known at the time he decided to testify that his own testimony would be used against him to formulate a new charge.

The judge concluded[435] by reiterating that, whether or not the implementation of Regulation 55 is fair, it must "be done on a case-by-case assessment in light of the Court's procedural structure and that the court must be mindful of how the trial has been conducted when a re-characterisation is proposed." Consequently, the judge[436] found the Majority's decision to be in violation of Regulation 55(1), Article 64(2) and Articles 67(1)(a), (b), (c), (g) and (i) of the Statute.

This was indeed a damning but fundamental dissent from the judge for the protection of the fair trial rights of the accused. The most alarming element of the majority's decision is that the accused's own testimony was used as the basis for the implementation of Regulation 55.

4 3 3 The appeal and dissenting views on Regulation 55

Katanga appealed the decision to implement Regulation 55 and the judgment on Appeal was delivered on 27 March 2013. At the appeal, Katanga had raised his right to be informed promptly of the charges and to have adequate time and facilities to prepare his defence had been compromised because he:

a) should have been informed prior to the defence case, or in a timely fashion about the legal re-characterisation,

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[434] Para 45.

[435] *The Prosecutor v Germain Katanga Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012* entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons" ICC-01/04-01/07 OA 13 (27 March 2013) para 57.

[436] Para 58.

b) his defence strategy, including his decision to testify, may have been different had he known that his alleged form of participation would be changed.

He concluded that this amounted to an infringement of his right not to be compelled to testify.[437]

The Appeals Chamber unpacked the provisions of Regulation 55 and found in respect of the timing of the impugned decision, that while it is preferable that notice under Regulation 55(2) should be given as early as possible, Katanga's argument that the timing of the Impugned decision is incompatible with Regulation 55(2) is not persuasive.[438] The Appeals Chamber considered all the accused's fair trial rights in the appeal decision but upheld the Trial Chamber decision.

At this point of the proceedings, the Appeals Chamber should have set out clear safeguards for the Trial Chamber to adhere to in the conduct of the trial against Katanga based on the re-characterisation. Such safeguards should have included being informed in detail of the new charges against him in order that he may be afforded time and facilities to prepare a new defence strategy. The decision to leave this matter to be dealt with at the end of the trial, as we will see further herein, in fact, prejudiced the accused's rights.

4 3 3 1 Dissenting opinion Tarfusser J

Tarfusser J[439] dissented to the appeal decision and held the view that Regulation 55 vests in a Chamber the authority "to modify the legal characterisation of facts" and to do so "at any time during the trial." In so doing, it places itself at the crossroads between two fundamental tenets of the right to a fair trial:

"the right to be tried without undue delay, on the one hand, and
the right to be adequately informed of the nature, cause and content of the charges, on the other, both of which are contained in the Statute under Article 67(1)(c) and Article 67(1) (a) respectively."[440]

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[437] Para 67.

[438] Para 24.

[439] *Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012*: Dissenting Opinion Tarfusser JA para 2.

[440] Para 5.

Tarfusser J raised the right to legal certainty:

> "I believe that the ensuing degree of uncertainty and unpredictability is so high as to make this approach incompatible with the obligation of the Court to construe its instruments in such a way as to make them consistent both with the principle of legality and with internationally recognised human rights."[441]

Tarfusser J also took a firm stance in relation to the right to be adequately informed of the nature and content of the charges and found that in giving notice of their intention to consider a re-characterisation, the relevant Chamber should have provided adequate information as to the factual and legal scope of that change, with a view to allowing the accused to review his defence strategy.[442]

The implementation of Regulation 55 so late in proceedings against Katanga resulted in a serious violation of Katanga's fair trial rights as demonstrated by the dissenting opinions of both Van den Wyngaert J and Tarfusser J. The principle of legality was also not upheld by the court as the re-characterisation was not foreseeable by the accused and he remained uncertain about the new charges being brought against him.

4 4 Victim participation

For the purposes of assessing the extent to which the participation of victims influences the accused's fair trial rights, key judgments on this matter arose in the *Katanga* case, in which a broad interpretation to victim participation was confirmed. For the purposes of this analyses, it is important to recall that Article 68(3) of the Rome Statute recognises the balance between the rights of victims and the accused in that the participation of victims must "not [be] prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".[443]

The decision of the ICC in relation to the mode of participation granted to victims in the proceedings against Katanga and Ngudjulo was a matter of controversy as the judgments reflected that victims were now being given broad participation rights at the

[441] Para 16.
[442] Para 27.
[443] Article 68(3) of the Rome Statute.

ICC. On 22 January 2010, Trial Chamber II issued a ruling, setting out the modes in which victims could participate during the trial.[444]

4 4 1 Background to victim participation decision

Initially in 2008, prior to the commencement of the trial, the PTC had granted 57 victims the right to participate.[445] For the purpose of a status conference which took place in late November 2008, the parties were requested to make submissions on victim participation. Ngudjolo specifically raised concerns as to the participation of victims at the trial stage of proceedings. Subsequent to the Status conference, the parties were once again asked to set out their concerns in relation to victim participation.[446] On 31 July 2009, the Trial Chamber allowed 288 victims to participate in proceedings.[447] On 23 November 2009, the Chamber granted leave to fourteen additional victims to participate in the proceedings and requested seven other applicants to provide it with further information.[448] On 27 November 2009 and 1 December 2009 respectively, the legal representatives of the victims were allowed to view the list of evidence disclosed by the parties as well as incriminating evidence filed by the prosecutor.[449]

4 4 2 Trial Chamber decision – Victim's participation

In this particular case, Katanga raised the following concerns in respect of victim participation:

(i) "The defence wanted the court to define the scope and modalities of victim participation;[450]

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[444] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui Decision on the Modalities of Victim Participation at Trial* ICC-01/04-01/07-1788 (22 January 2010) Trial Chamber II.
[445] Para 1.
[446] ParaS 2-8.
[447] Para 8.
[448] Para 12.
[449] ParaS 14-15.
[450] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui Decision on the Modalities of Victim Participation at Trial* para 23.

(ii) That evidence led by victims should not have the effect of expanding or modifying the nature or scope of the prosecution's case;[451]
(iii) The defence proposes that the presentation of evidence be subject to four conditions: timely notice thereof, leave of the Chamber, timely notice of disclosure of documents, and admissibility of the documents tendered;[452]
(iv) Victims should not conduct investigations as this is the role of the prosecutor;[453]
(v) The Defence further argued that the victims participating in the proceedings may appear only as witnesses for one of the parties, that is, the Prosecution or the Defence, or at the Chamber's request, but they cannot be called by their own legal representatives;[454]
(vi) The Defence for Germain Katanga further requested the Chamber to order the victims participating in the proceedings and their Legal Representatives to disclose to the Defence any information in their possession which tended to show the innocence of the accused or mitigate his guilt, irrespective of their entitlement to lead incriminating evidence at trial;[455]
(vii) Lastly the defence requested that victims disclose all exculpatory information."[456]

The *Katanga* and *Ngudjolo* cases provided the Court with its first opportunity after the *Lubanga* Appeals Chamber judgment to consider the participation of victims during the trial phase of proceedings. In this instance, even though victims and their legal representatives were given broad rights of participation, the Trial Chamber also placed various limitations on these rights. By way of example, Trial Chamber II made it clear that victim's participation began at the commencement of trial proceedings but that such participation was limited 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 impact on the expeditiousness of proceedings.[457] The Trial Chamber inserted a proviso in respect of legal representatives who were able to attend and participate in public and *in-camera* hearings, only under conditions defined by the chamber and where hearings were held on an *ex parte* basis, the chamber would also assess whether or not they should attend on a case-by-case basis.[458]

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[451] Para 25.
[452] Para 26.
[453] Para 27.
[454] Para 28.
[455] Para 29.
[456] Para 30.
[457] Para 65.
[458] Para 71.

In respect of the questioning of witnesses or the accused, the Trial Chamber held that the legal representative must make an application to the Chamber and that the Chamber may make an order that the questions be formulated in writing and communicated to the Prosecutor and to the Defence, for their observations.[459] The Trial Chamber made it clear that it has the prerogative to issue directions on the manner and order of the questions and production of documents. The chamber also stated that it reserved its right to put questions to witnesses, an expert or the accused on behalf of the legal representative.[460]

The Chamber reiterated that the legal representatives may put questions to witnesses but the questions should not be prejudicial to or inconsistent with the rights of the accused and the requirements of a fair and impartial trial.[461] The chamber specified that the questions which the Legal Representatives may put are limited to points of clarity or to supplement evidence already given by the witness and that a neutral style of questioning should be adopted.[462]

This decision grants victims the right to participate during the trial phase of proceedings and gives them broad rights of participation in respect of questioning the accused as well. This could potentially create a situation where the accused is now facing two prosecutors. The paperwork envisaged for these procedures will also create a burden on the ICC and may impact on the length of proceedings. The decision also places a great burden on the judges to constantly ensure that the questions are not prejudicial to the rights of the accused.

The Trial Chamber 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 weighing up the victim's interests, the rights of the accused and the requirements of a fair and impartial trial.[463] This decision is a bit concerning as victims are not regarded as parties to proceedings in terms of the Rome Statute and it is only the prosecutor and defendant who are allowed to submit evidence in terms of either proving or disproving the guilt or innocence respectively. Even with the court's intervention and monitoring which it proposes, this decision places victims

[459] Para 72.
[460] Para 73.
[461] Para 74.
[462] Para 78.
[463] Para 83.

almost on an equal footing to the prosecutor and this could substantially affect the accused's right to be presumed innocent until proven guilty by the prosecutor.

In respect of the presentation of evidence, the Chamber stated that this will only be allowed, provided that it is not prejudicial to the defence or to the fairness and impartiality of the trial.[464] The Chamber stressed that even though the victims are authorised to present incriminating or exculpatory evidence during the trial, this does not mean that they are entitled to conduct investigations in order to establish the guilt of the accused as this would amount to them taking over the role of the prosecutor.[465]

In response, Mr Katanga's view was that the victims and their Legal Representatives are obliged to disclose to the Defence any evidence in their possession, whether incriminating or exculpatory, the chamber held that neither the Statute nor the Rules impose such an obligation on victims.[466] The court also clarified this matter by stating that victims do not have the right to present evidence, only the possibility of applying to the Chamber for leave to present evidence and because of this, there is no justification for obliging them generally to disclose to the parties any evidence in their possession, whether incriminating or exculpatory.[467]

The chamber's decision is contradictory in this regard, the Statutes and Rules do not confer the status of victims as parties to proceedings and yet they are being given rights in respect of presenting evidence on the same footing as a prosecutor or defendant.

The Chamber noted that neither the Statute nor the Rules prohibit victim status from being granted to a person who already has the status of a prosecution or defence witness. Further, that Rule 85 of the Rules does not prohibit a person who has been granted victim status from subsequently giving evidence on behalf of one of the parties.[468]

This decision reflects that the chamber awarded broad access to victims' participation, including their participation at the trial stage of proceedings. Up to now, given the *Lubanga* judgment, we know that victims were not allowed to participate in the investigation stage but are allowed to participate in the Pre-Trial and trial stages

[464] Para 101
[465] Para 102.
[466] Para 105.
[467] Para 105.
[468] Para 110.

of proceedings. However, this wide degree of participation afforded to victims has received criticism, mainly due to the fact that while the participation of victims is a noble quality at the ICC, it remains to be seen whether their active participation to the degree afforded in this decision, will be adequately balanced by the judges in relation to the rights of the accused.

4 4 3 Appeals Chamber judgment on victim's participation

On 16 July 2010, the Appeals Chamber[469] upheld the decision of the Trial Chamber on the modalities of victim participation, despite the accused raising arguments related to his fair trial rights. Both the Trial Chamber and Appeals Chamber relied heavily on the decisions in the *Lubanga* trial regarding the participation of victims and in essence, confirmed the modalities of participation as per the *Lubanga* judgment and as mentioned herein. Therefore, in light of the Trial Chamber's decision, victims now have extensive participatory rights at the trial phase of proceedings and a proper assessment of whether or not the judges are able to balance the rights of the accused versus the participation of victims, can only be assessed on a case-by-case basis because the Court's jurisprudence is still at a developmental stage.

To this end, Zago[470] opines that the reasons for allowing victims to participate in proceedings are to ensure that the victims are given a chance to be heard but that this does not necessarily mean that they should have a role in the adjudication of the case. Zago[471] argues quite strongly that victims' participation would require a more judge-led procedure particularly regarding the submission of evidence but that this should

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[469] *The Prosecutor v, Germain Katanga and Mathieu Ngudjolo Chui Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010* Entitled "Decision on the Modalities of Victim Participation at Trial No. ICC-01/04-01/07 O A 11 (16 July 2010) The Appeals Chamber I.

[470] G Zago "The role of victims at the international criminal court: legal challenges from the tension between restorative and retributive justice" (2010-2014) *Diritto Penale Contemporaneo* <https://www.penalecontemporaneo.it/upload/1415744172ZAGO_2014.pdf> (accessed 28-01-2019) 105.

[471] G Zago "The role of victims at the international criminal court: legal challenges from the tension between restorative and retributive justice" (2010-2014) *Diritto Penale Contemporaneo* 115.

also be approached with caution as the judges should not be guilty of overriding the prosecutor's role by sharing the burden of proof.

Van den Wyngaert J[472] argues that the participation of victims in the criminal trials may not be sustainable in the long run for the ICC. The judge argues that despite the limitations which the Court has proposed, participatory rights for victims are quite extensive, both during pre-trial and trial and the implication of this is that the Chambers have to consider the submissions of victims in addition to the submissions of the defence and prosecution which ultimately increases the length of time of proceedings. The judge[473] reiterates that in terms of the jurisprudence of the Court, victims have access to and are notified of all public filings, public decisions and all the evidence disclosed between the parties, they are also allowed to make short opening and closing statements and could request permission to make oral submissions. She argues that a paradox remains between the ICC trying to ensure a balance between the interests of victims and those of the accused and this is evident as victims have an interest in seeing the accused found guilty and convicted.[474]

Inman and Magadju have a different view, they believe that by allowing victims to participate in the criminal proceedings, promotes accountability and the rule of law in post-conflict transitioning countries.[475] Their argument is that by providing a role for victims within the criminal justice process, this can promote knowledge, awareness and understanding of the process involved in criminal proceedings, for victims. Secondly that such participation can promote individual healing by providing the victims with a sense of agency, empowerment and closure, leading to higher levels of overall satisfaction with the criminal justice system. Finally, participation can contribute to reconciling a community by promoting truth-finding in criminal proceedings.[476] Moffett, holds a similar viewpoint in that he believes that justice for victims comprises both the procedural and substantive aspects, complementing each other as a means to redress their harm. He, however, expresses the view that because the ICC has

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[472] Van den Wyngaert (2012) *Case West Reserve J Int Law* 485.
[473] 485.
[474] 488.
[475] D Inman & M Magadju "Prosecuting international crimes in the Democratic Republic of the Congo: Using victim participation as a tool to enhance the rule of law and to tackle impunity" (2018) 18 *African Human Rights Law Journal* 298.
[476] 298.

limited resources and jurisdictional bounds, it cannot provide a full account of justice to all victims of international crimes, but needs to be complemented with domestic processes.[477]

Once again, the balance between the rights of the accused and the victim becomes apparent. Inasmuch as the participation of victims is important, both for their personal healing as well as for the court to obtain the perspective of victims, it is arguable, that the ICC may not necessarily be the best-suited institution to meet their expectations.

4 5 Conviction decisions *Katanga* majority and minority decisions

4 5 1 Introduction

Due to the sheer volume of the majority decision (consisting of 660 pages), key selected fair trial rights of the accused are highlighted from the summary of the majority judgment as well as some aspects from the detailed majority judgment, mainly to review whether or not the fair trial rights of the accused had been addressed. The main fair trial rights which bear relevance in this section is the implementation of Regulation 55 on his right to know and understand the charges against him, to be given clear notice of the charges, his right to remain silent and to be tried without undue delay. Most of these discussions are already contained in the section discussing the implementation of Regulation 55 and will only be addressed briefly hereunder to demonstrate the impact the re-characterisation had on the findings of guilt against Mr Katanga.

4 5 2 Majority decision

The majority of the chamber found that in respect of the war crime of using children under the age of 15 years to participate actively in hostilities, that there were substantial grounds to believe that the members of the FRPI had committed them intentionally, this crime was alleged to have been committed only by Germain Katanga himself, and not by the militia members. However, the Chamber was unable to identify a direct nexus indicating that the accused used these children to participate in the

[477] Moffett (2015) *J Int'l Crim Just* 288.

hostilities.[478] The Chamber, therefore, found that the Prosecutor failed to establish that Germain Katanga had committed the alleged crimes within the meaning of Article 25(3)(a) of the Statute. Van den Wyngaert J (who wrote the dissenting opinion expressed hereunder) concurs with this finding.[479]

Therefore, on 7 March 2014,[480] Mr Katanga was convicted and found guilty under Article 25(3)(d) of the Statute, as an accessory to the crimes committed on 24 February 2003 of:

(i) Murder as a crime against humanity under Article 7(1)(a) of the Statute;
(ii) Murder as a war crime under Article 8(2)(c)(i) of the Statute;
(iii) Attack against a civilian population as such or against individual civilians not taking a direct part in hostilities, as a war crime under Article 8(2)(e)(i) of the Statute;
(iv) Destruction of enemy property as a war crime under Article 8(2)(e)(xii) of the Statute; and
(v) Pillaging as a war crime under Article 8(2)(e)(v) of the Statute.[481]

4 5 3 Key fair trial rights discussed in the majority and minority decisions

4 5 3 1 Re-characterisation – Article 67 fair trial rights of the accused and presumption of innocence and burden of proof beyond reasonable doubt

The chamber found that the proposed re-characterisation did not exceed the facts and circumstances described in the charges since the Chamber confined its examination to the same acts and same conduct relied on by the Pre-Trial Chamber, concerning Germain Katanga's coordinating role in the implementation of the common plan. The Chamber was also of the view that the re-characterisation concerns factual

[478] Summary of Trial Chamber II's Judgment of 7 March 2014, pursuant to article 74 of the Statute in the case of *The Prosecutor v. Germain Katanga* <https://www.icc-cpi.int/itemsDocuments/986/14_0259_ENG_summary_judgment.pdf> paras 40-43.
[479] Para 53.
[480] *The Prosecutor v Germain Katanga Judgment pursuant to Article 74 of the Statute* ICC-01/04-01/07 (7 March 2014) Trial Chamber II 658.
[481] Para 659.

allegations which underpin one of the legal elements of the criminal responsibility charged.[482]

It is on this point that Van den Wyngaert and the majority of the chamber substantially disagreed.

The judge stated quite emphatically that in her view the re-characterisation was made in repeated violation of the accused's fair trial rights set out under Article 67 of the Statute and Regulation 55(2) and (3) of the Regulations of the court.[483]

She was of the view that essential evidence was missing from the case record and that many witnesses were unreliable and on this basis, she found that it was impossible to enter findings beyond reasonable doubt.[484] The judge made it clear that under the circumstances of the case, she would have acquitted Mr Katanga because the Prosecution failed to prove Germain Katanga's responsibility as initially charged, that is, as an "indirect co-perpetrator" to the Bogoro attack under Article 25(3)(a) of the Statute.[485]

4 5 3 2 Right to be informed promptly and in detail of the nature, cause and content of the charge

The majority held that:

> "Having regard to the circumstances and particulars set out in the Decision on the confirmation of charges and the specific measures taken during the pre-trial proceedings and as of implementation of regulation 55, the Chamber considers that the Accused was duly informed in detail of the nature, cause and content of the charges."[486]

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[482] *The Prosecutor v Germain Katanga Judgment pursuant to Article 74 of the Statute* ICC-01/04-01/07 (7 March 2014) Trial Chamber II Para 1471.

[483] *The Prosecutor v Germain Katanga Judgment pursuant to Article 74 of the Statute:* Dissenting Opinion Van den Wyngaert JA para 2.

[484] Para 7.

[485] Para 8.

[486] *The Prosecutor v Germain Katanga Judgment pursuant to Article 74 of the Statute* ICC-01/04-01/07 (7 March 2014) Trial Chamber II Para 1527.

The chamber also argued that it had invited further submissions from the defence[487] and that the chamber allowed the defence to undertake further investigations.[488]

Van den Wyngaert argued that Article 67(1)(a) had been infringed by the majority of the chamber refusing to provide the accused with clear and precise notice of the altered charges.[489] On this point, she went further to raise her disagreement with the fact that the majority of the chamber did not afford Mr Katanga the opportunity to conduct further investigations in order to effectively respond to the new charges under the re-characterisation.[490] In this regard, the majority only provided Mr Katanga with the opportunity to make submissions which in her view was insufficient. The judge stated that the final judgment relied on facts and allegations that clearly fell outside the "facts and circumstances" of the Confirmation Decision. The judge argued that the majority failed to engage with the legal question on how to interpret the concept of "facts and circumstances" and the majority instead introduced totally new factual elements into the charges under Article 25(3)(d)(ii).[491]

4 5 3 3 Right to remain silent

The majority of the chamber reflected on Mr Katanga's objections in this regard and held that in its 21 November 2012 decision, the Chamber considered that the accused's decision to testify was deliberate and that he had in no way been forced or coerced.[492]

On this point, the chamber made the following statement:

> "the Accused waived his right to remain silent. He willingly made an informed decision, with the guidance of counsel, to testify and take the initiative to raise or dwell on various topics which he deemed significant to the charges against him. Hence, the Chamber cannot be accused of not respecting his right to remain silent. Accordingly, the Chamber considers the Defence prayer unfounded in this regard."[493]

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[487] Para 1578.
[488] Para 1579.
[489] Para 13.
[490] Para 13.
[491] Para 19.
[492] Para 1529.
[493] Para 1531.

On the accused's right to remain silent, Van den Wyngaert J made it clear that when an accused waives his right to remain silent, he should understand the consequences of such a waiver.[494] The judge argued that Mr Katanga waived his right to remain silent under the confirmed charges in Article 25(3)(a) and that the chamber's questions went beyond the scope of these charges.[495] By implication, therefore, the judge intimates that Mr Katanga did not understand the extent of the waiver of his right to remain silent. The judge questioned why the chamber did not inform the accused that his testimony may be used against him in a possible re-characterisation.[496]

Van den Wyngaert J[497] referred to Katanga's testimony where he freely answers all questions pertaining to his role as a co-ordinator and which at the time undermined the prosecutor's theory that he had control over the crime as follows:

> "However, now the Majority relies heavily on Germain Katanga's role as a co-ordinator for its finding that he made a 'significant contribution' in the sense of article 25(3)(d). In other words, the majority has turned a perfectly legitimate defence against the confirmed charges into a major point of self-incrimination under a different form of criminal responsibility[498]."

This judgment effectively means that he was found guilty based on re-characterised crimes.

4 5 3 4 The right to be tried without undue delay

The Chamber was of the view that it had overseen the fair and expeditious conduct of the trial with due regard to the rights of the accused. The Chamber found that the difficulties which the defence encountered during investigations did not entail any violation of the rights of the Accused, and articles 67(1)(b), 67(1)(c) and 67(1)(e) in particular.[499]

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[494] *Dissenting opinion Van den Wyngaert to Judgement Pursuant to Article 74* para 52.
[495] Para 54.
[496] Para 56.
[497] *Dissenting Opinion van den Wyngaert to Judgement Pursuant to Article 74* paras 57 and 58.
[498] Para 58.
[499] *The Prosecutor v Germain Katanga Judgment pursuant to Article 74 of the Statute* ICC-01/04-01/07 (7 March 2014) Trial Chamber II Para 1592 to 1595.

Van den Wyngaert J[500] also reflected on the delay in proceedings and the impact on Mr Katanga as follows:

> "It is also now more than six years since Germain Katanga was surrendered to the Court by the DRC. The trial was lengthy in itself, beginning on 24 November 2009. The last witness testified in November 2011, evidence closed on 7 February 2012 and the arguments of the parties and participants closed on 23 May 2012. A delay of 182 days eventuated until the Majority rendered its Notice Decision on 21 November 2012. The Further Notice Decision was not issued until 15 May 2013. The Decision refusing further investigations did not come until 19 November 2013. Today, 444 days after the acquittal of Mathieu Ngudjolo, 471 days after the Notice Decision, 653 days after the closing arguments and 759 days after the closing of the evidence, we now have the final judgment. To me, this is an inordinately long delay."[501]

She considered the delays to be exceptionally long and completely in violation of Mr Katanga's right to a speedy trial.

4 5 3 5 Discussion on the fundamental aspects of fair trial rights – *Katanga* decision

One author, Dastague,[502] argues that both the prosecutor and defendant rely primarily on the initial confirmation of charges before and during the trial to prepare for their cases. Therefore the invocation of Regulation 55 at the trial stage of proceedings means that the minimum safeguards as provided for in Regulation 55(2) provides insufficient protection for the accused insofar as it can be assumed that he was always informed of the charges throughout the proceedings.[503]

Another author, Heller[504] confirms this view that to establish an effective criminal defence, the focus will be on rebutting facts and rebutting legal characterisations. Therefore, re-characterising facts to support new legal characterisations during or after

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[500] *The Prosecutor v Germain Katanga Judgment pursuant to Article 74 of the Statute*: Dissenting opinion Van den Wyngaert JA para 124.

[501] Para 124.

[502] M Dastugue "The Faults in Fair Trials: An Evaluation of Regulation 55 at the International Criminal Court" (2015) 48 V*anderbilt Journal of Transnational Law* 273 (294.

[503] 295.

[504] K Heller "'A stick to hit the accused with' The Legal Recharacterisation of facts under Regulation" in C Stahn (ed) *The Law and Practice of the international Criminal Court* (2015) 997.

trial will almost always substantially undermine the accused's right to effectively prepare his defence. Heller[505] argues further that the re-characterisation undermined the defence's entire trial strategy, which focused solely on rebutting the Prosecution's claim that the accused was responsible for the charged crimes as an indirect co-perpetrator.

The importance of the confirmation of charges hearing is once again reinforced in respect of the accused knowing the charges against him but also in terms of his defence and ensuring that he can create enough doubt regarding the charges being brought against him.

On the matter of the burden of proof; beyond reasonable doubt, Van den Wyngaert stated that she disagreed with the majority judgment that Mr Katanga's responsibility under Article 25(3)(d)(ii) had been proven beyond reasonable doubt and that she would have acquitted Mr Katanga.[506] She also raised the fact that in her view, the prosecution's case was weak, there were witnesses and Mr Katanga himself who were not interviewed and that Mr Katanga's testimony was used improperly. In the latter instance, the judge stated that it is quite telling that the main source of incriminating evidence under Article 25(3)(d)(ii) is the testimony of Mr Katanga.[507]

Heller[508] argues that when the judges decided to re-characterise, they were acting as advocates, not as decision-makers and they were trying to compensate for the weak prosecution case. Elaborating on this point he states that this manner of dealing with the trials does not accord with the ICC system of trials which is largely adversarial in nature and the Trial Chamber's interference fundamentally encroached on the accused's fair trial rights in Article 67(1), the accused is guaranteed a "fair and impartial trial."[509]

There are two issues here; one in respect of the burden of proof and two in respect of the weak prosecution case and the fact that the Trial Chamber felt the need to intervene and ensure a conviction at all costs, all of which is problematic and in direct

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[505] 1000.

[506] *The Prosecutor v Germain Katanga Judgment pursuant to Article 74 of the Statute*: Dissenting opinion Van den Wyngaert JA para 136.

[507] Para 167.

[508] Heller "'A stick to hit the accused with' The Legal Recharacterisation of facts under Regulation" in *The Law and Practice of the international Criminal Court* 1005.

[509] 1005.

conflict with the accused's rights both in respect of being presumed innocent until proven guilty and in terms of his right to a fair and impartial trial.

In respect of the right to remain silent, Heller[510] argues that Mr Katanga chose to testify on the assumption that the prosecution had to prove that he was guilty of the charged crimes as an indirect co-perpetrator. However, as a result of his testimony, he effectively conceded both the mental and physical elements of contributing to a group crime which was part of his defence strategy as he did not foresee that this may be used against him by the chamber re-characterising the charges to include common purpose liability under Article 25(3)(d). Heller considered the majority's narrow view of 'free will' and the fact that the accused was not coerced to testify as demonstrating the extent to which Regulation 55 undermines the right to silence enshrined in Article 67(1)(g) of the Rome Statute. Heller[511] concludes that in future trials, no rational accused will ever testify in his own defence again as a result of the way Mr Katanga's testimony was used against him to re-characterise the charges.

The conclusion of Van den Wyngaert J's[512] dissenting opinion is one which the prosecutor and judges can learn from at the ICC as it sets out procedural fairness in exacting terms. The judge shares the following reflection on the *Katanga* trial as a whole:

> "Trials like these are difficult and complex matters, both from a legal and evidentiary point of view. Moreover, they are challenging on the human level. Sympathy for the victims' plight and an urgent awareness that this Court is called upon to "end impunity" are powerful stimuli. Yet, the Court's success or failure cannot be measured just in terms of "bad guys" being convicted and innocent victims receiving reparation. Success or failure is determined first and foremost by whether or not the proceedings, as a whole, have been fair and just."[513]

An important consideration is that one of the judges wrote an opinion which so clearly considered the rights of the accused to a fair trial. Even though this opinion was not that of the majority of the chamber, it holds weight and merit in respect of ensuring that the international community knows that not all aspects of a fair trial was adhered

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[510] Heller "'A stick to hit the accused with' The Legal Recharacterisation of facts under Regulation" in *The Law and Practice of the international Criminal Court* 1003.

[511] 1003.

[512] *Dissenting Opinion van den Wyngaert to Judgement Pursuant to Article 74* para 310.

[513] *Dissenting Opinion van den Wyngaert to Judgement Pursuant to Article 74* para 310.

to and such a dissenting view will cast doubt in the mind of the international community in terms of whether or not the ICC did, in fact, conduct the proceedings in a just manner. The decision to re-characterise the facts and the manner in which it was undertaken coupled with this minority opinion conceivably casts serious aspersions on the legitimacy of the ICC as a *criminal court*, first and foremost.

4 5 4 Lessons from the tribunals on fair trial rights and amendment to the charges

An equivalent Rule at the ICTY and ICTR to Regulation 55, is Rule 50[514] which allows for an amendment to an indictment, admittedly it is not the same as Regulation 55 which allows for a re-characterisation of the charges at any stage of the proceedings, however, the manner in which the tribunals considered the fair trial rights of the accused and the impact of the amendment is of importance to the current argument.

In reviewing the jurisprudence concerning this Rule and whether or not fair trial rights of the defendant were protected, I wish to draw the reader's attention to the

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[514] Rule 50 Amendment of Indictment (Adopted 11 Feb 1994) (A) (i) The Prosecutor may amend an indictment: (a) at any time before its confirmation, without leave; (Amended 17 Nov 1999, amended 14 July 2000) (b) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and (Amended 10 July 1998, amended 17 Nov 1999, amended 14 July 2000) (c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties. (Amended 17 Nov 1999, amended 14 July 2000) (ii) Independently of any other factors relevant to the exercise of the discretion, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment. (Amended 10 July 1998, amended 17 Nov 1999, amended 14 July 2000, amended 28 July 2004) (iii) Further confirmation is not required where an indictment is amended by leave. (Amended 28 July 2004) (iv) Rule 47 (G) and Rule 53 bis apply mutatis mutandis to the amended indictment. (Amended 18 Jan 1996, amended 3 Dec 1996, amended 12 Nov 1997, amended 10 July 1998) (B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further IT/32/Re *v* 50 42 8 July 2015 appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges. (Amended 18 Jan 1996) (C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence. (Amended 18 Jan 1996, amended 12 Nov 1997, amended 10 July 1998). *UN Rules of Procedure and Evidence, July 2015*.

ICTR case of *Akayesu.*[515] In this case, following the evidence of two witnesses about sexual violence, one of whom testified to being raped in *Akayesu's* presence, the Chamber granted the Prosecution's Rule 50 application to amend the indictment a month after the close of the Prosecution's case to include charges of sexual violence, which is very similar to the stage at which Mr Katanga had been informed of the re-characterisation in his case. In the decision, the Trial Chamber opined that it had permitted the amendment at such a late stage as "the investigation and presentation of evidence related to sexual violence is in the interests of justice."[516] On Appeal, *Akayesu* argued that he had been prejudiced by the late amendment of the indictment which was rejected by the Appeals Chamber on the following grounds: the three new counts related to sites and a material time which were referred to in the initial Indictment and does not constitute a new indictment. The court held that the defence was granted a four-month adjournment following the amendment to defend against the new charges and did not object to their inclusion and therefore there was no prejudice.[517] In this case the defendant was given four months to prepare a defence strategy against the new charges, this, however, was denied to Mr Katanga as he had requested time to investigate further and the court had denied his request.

In another case, *Kovacevic*,[518] the Trial Chamber considered Article 20(4)(c)[519] Statute, another Article which is similar to Article 67 of the Rome Statute, which is to be "tried without delay". In this case, the ICTR Appeals Chamber asked the question:

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[515] *The Prosecutor v Akayesu*, ICTR-96-4-T Judgement (2 September 1998) paras 416-417.

[516] Para 417.

[517] *The Prosecutor v Akayesu* AC Judgement (1 June 2001) paras 119-123.

[518] *The Prosecutor v Kovacevic* No. IT-97-24-AR73, Decision stating reasons for Appeals Chamber's Order of 29 May 1998 (2 July 1998).

[519] Article 20:

Statute of the International Tribunal for Rwanda, Rights of the Accused 1. All persons shall be equal before the International Tribunal for Rwanda. 2.In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to article 21 of the Statute. 3.The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute. 4.In determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her; b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing; c) To be tried without undue delay;

> "whether the additional time which the granting of the motion for leave to amend would occasion is reasonable in light of the right of the accused to a fair and expeditious trial."[520]

The Appeals Chamber gave some guidance in interpreting this section in light of an amendment by stating that the Article "must be interpreted according to the special features of each case."[521]The court went further to state:

> "The timeliness of the Prosecutor's request for leave to amend the Indictment must be measured within the framework of the overall requirement of the fairness of proceedings."[522]

In the *Katanga* case, the court found that Mr Katanga's fair trial rights were not affected by the re-characterisation. In another case at the ICTR, *Karemera et al*,[523] the Appeals Chamber stated that

> "a postponement of the trial date and a prolongation of the Pre-Trial detention of the accused" are some but not all of the considerations relevant to determining whether a proposed amendment would violate the right of the accused to a trial "without undue delay."

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d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it; e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her; f) To have the free assistance of an interpreter if her or she cannot understand or speak the language used in the International Tribunal for Rwanda; g) Not to be compelled to testify against himself or herself or to confess guilt.

[520] *The Prosecutor v Kovacevic* No. IT-97-24-AR73, Decision stating reasons for Appeals Chamber's Order of 29 May 1998 (2 July 1998) para 28.

[521] Para 30.

[522] Para 31.

[523] *The Prosecutor v Karemera et al* No ICTR-98-44-AR73, Decision on Prosecutor's interlocutory appeal against Trial Chamber II Decision of 8 October 2003 Denying leave to File an amended Indictment (19 December 2003) para 19.

The court stated that in making this assessment, it should also consider such factors as the nature and scope of the proposed amendments, whether the prosecution was diligent in pursuing its investigations and in presenting the motion, whether the accused and the Trial Chamber had prior notice of the prosecution's intention to seek leave to amend the indictment, when and in what circumstances such notice was given, whether the prosecution seeks an improper tactical advantage and whether the addition of specific allegations will actually improve the ability of the accused to respond to the case against them and thereby enhance the overall fairness of the trial.[524] The Trial Chamber must further consider the risk of prejudice to the accused and the extent to which such prejudice may be cured by methods other than denying the amendment, such as granting of adjournments or permitting the accused to recall witnesses.[525]

In this case, it is significant that the court also considered the 'diligence' of the prosecutor in his investigations, which was not a consideration by the majority in *Katanga* and which is a matter that was highlighted by Van den Wyngaert in her dissent to the majority that the prosecution's case was weak both in evidence and in relation to the credibility of witnesses. Further, this case also reviews whether or not through the amendment, the prosecutor is seeking a tactical advantage. It is unfortunate that in the *Katanga* case no such assessment can be made as it was not the prosecutor who sought the amendment but the judges.

The only difference between the cases at the tribunals and the *Katanga* case is that the judges sought the change in the mode of liability in *Katanga* and most of the tribunal's cases refer to the prosecutor's case. However, it is clear from the cases at the tribunals that the accused's fair trial rights are of paramount importance in determining any amendment to charges and in relation to the stage of proceedings at which such amendments are proposed.

[524] Paras 20-30.

[525] Para 28.

4 6 Post-judgment and sentencing: Article 108

4 6 1 Background and context

On the 29 February 2016, the Presidency of the ICC received a letter in which the DRC requested that the ICC approves the prosecution of Mr Katanga in the DRC before the *Haute Cour Militaire* (military court in the DRC) in terms of Article 108(1)[526] of the Rome Statute.[527]

The background to this request is that when requested by the ICC in 2015 to elect where he wished to serve the remainder of his sentence, Mr Katanga elected to serve the remainder of his sentence in the DRC as the term of his sentence would end in January 2016. Therefore, on the 19 December 2015, Mr Katanga was transferred to a prison facility in the DRC as per his request.[528] Shortly thereafter, on 13 January 2016, a number of documents, including a *Decision de renvoi* (decision to refer) was filed at the ICC by the *Haute Cour Militaire* against Mr Katanga which referred to offences allegedly committed by Mr Katanga between 2002 and 2006.[529] These documents were accompanied by a letter referring to Article 108(1) of the Rome Statute.

On 14 January 2016, the ICC Presidency requested the DRC to explain the legal consequences of the *Decision de renvoi* and the next procedural steps foreseen, taking into consideration the fact that Mr Katanga's sentence would be completed on 18 January 2016. The court further requested clarity as to whether the letter referring

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[526] Article 108: Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.
2. The Court shall decide the matter after having heard the views of the sentenced person.
3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

[527] *The Prosecutor v Germain Katanga Decision pursuant to article 108(1) of the Rome Statute* No.: ICC-01/04-01/07 The Presidency (7 April 2016) para 1.

[528] Para 3.

[529] Para 4.

to Article 108(1) constituted a request for the Court's approval of the prosecution and punishment of Mr Katanga.[530] It is important to note that as a result of these court documents, Mr Katanga was not released from custody upon completion of his sentence on 18 January 2016. On 20 January 2016, the DRC clarified to the ICC that it intended to conduct domestic criminal proceedings against Mr Katanga and referred to its sovereignty and the principle of complementarity.[531]

4 6 2 Defence rights: non bis in idem and right to life

On the 21st of January 2016[532] he applied for his release before the *Haute Cour Militaire,* on the basis of his unlawful detention, and on 22 January 2016 the defendant filed "*Preliminary observations by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo.*" In essence, this document stated that Mr Katanga's continued detention was unlawful and Mr Katanga requested an oral hearing for his views on the matter to be heard.[533] In order to determine whether Mr Katanga would face a fair trial in the DRC, the defence requested that the proper forms, charges and legal provisions be provided to Mr Katanga and that he is adequately advised of the specific charges against him in order for him to prepare a proper defence.[534] Broadly and not in an official format, the DRC listed the following offences which it was pursuing against Mr Katanga:[535]

i) "As Commander in Chief, participated in a rebel movement named FNI/FRPI between 2002 and 2005, led the FRPI militia and occupied by armed force a large part of the District of Ituri, notably Mungwalu territory, as well as the villages situated along Lake Albert.
ii) In the period 2003-2005, as War Crime, as Commander in Chief of the FNI/FRPI militia, co jointly with the President of the movement, namely Floribert NDJABU, incorporated children less than 15 years in the FNI militia and made them participate

[530] *The Prosecutor v Germain Katanga Decision pursuant to article 108(1) of the Rome Statute* No.: ICC-01/04-01/07 The Presidency (7 April 2016) para 5.
[531] Para 7.
[532]*The Prosecutor v Germain Katanga Preliminary observations by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo* No.: ICC-01/04-01/07 The Presidency (22 January 2016) para 9.
[533] Para 15.
[534] Para 20.
[535] Para 21.

actively in hostilities. During 2003, as a Crime against Humanity, in Bunia, conjointly with General Goda Sukpa, committed in the framework of a widespread or systematic attack against a civilian population, the murder of fourteen persons, among others Mr Dema and Madam Ktura at the home of Mr Bunu Tbamwenda Pelerin.

iii) In the period between 2002 and January 2005, as a Crime against Humanity, conjointly with his troops, provoked the murder of several persons at the villages of Mandro, Largu, Tchomia, Blukwa and Lengabo."

The defence[536] referred to Article 20 which encompasses the *non bis in idem* principle which prevents the prosecution and punishment of a person for conduct for which he or she has already been prosecuted.[537] The DRC has legal provisions which incorporate this principle. The defendant referred to Article 108 which he stated offers greater protection to the defendant than Article 20 and stated further that the ICC is obliged to refuse authorisation to prosecute under Article 108 if the accused faces abuse of its own process, the human rights conditions of detention as well as the imposition of the death penalty must be taken into account, when the court makes such a decision.[538] The defence argued that the ICC, in making its decision under Article 108, should take into account fair trial principles. The defendant argued further that the DRC should only be allowed to prosecute Mr Katanga for charges which fall outside the scope of the investigations conducted by the ICC prosecutor.[539]

In the defence's "further observations following the defence mission to Kinshasa", Mr Katanga submits[540] that in considering whether it is appropriate and fair to prosecute Mr Katanga for additional offences:

(i) "The alleged offences for which the DRC seeks approval are offences of a similar nature to those for which Mr Katanga was tried at the ICC, committed at a similar period of time and in the same capacity.[541]

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[536] *The Prosecutor v Germain Katanga Preliminary observations by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo* para 26.

[537] Refer to chapter 1 for detailed discussion on this principle.

[538] Para 28.

[539] Para 31.

[540] *The Prosecutor v Germain Katanga Further observations following the defence mission to Kinshasa*' Case No: ICC-01/04-01/07 (26 February 2016) para 21.

[541] Para 21.

(ii) The ICC trial and sentencing was a long and complex process that inflicted considerable hardship on him.
(iii) The DRC charges came eleven years after the event with no prior notice that the DRC intended to proceed with them. The prosecution is therefore unfair, in appropriate and oppressive and would reflect adversely on the ICC.
(iv) In striking a balance that takes into account the principle of complementarity the court must guard against permitting a regime of prosecution that is unfair or oppressive."[542]

In his plea to the ICC, Mr Katanga summarised his fair trial concerns as follows; excessive delay, lack of legal aid, lack of adequate facilities for the preparation of a defence, confirmed availability of the death penalty, systemic failures of DRC justice system, political or executive interference and lack of impartiality.[543] Mr Katanga submitted that the Presidency has supervisory powers which should be used in Mr Katanga's case to prevent the DRC from prosecuting him and that the president should provide a remedy for the violation of the accused's fair trial rights in this instance.[544]

4 6 3 Presidency Decision – Article 108

In considering Article 108 in relation to *non bis in idem*, the Presidency reviewed the crimes for which Mr Katanga was found guilty by the ICC and found that the DRC's *Decision de renvoi* relates to crimes other than those for which he has been convicted and acquitted by the Court and that the principle of *non bis in idem* has not been undermined.[545] In respect of the death penalty, the ICC stated that it had received assurances from the DRC that the death penalty would not be imposed against Mr Katanga.[546]

In respect of Mr Katanga's submissions that he may not receive a fair trial in the DRC, the Presidency stated "that under Article 108(1) of the Rome Statute, the approval of the prosecution, punishment or extradition of a sentenced person should only be denied when it undermines fundamental principles or procedures of the Rome Statute or otherwise affects the integrity of the Court. Further,

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[542] Para 22.
[543] Para 29.
[544] Para 42.
[545] *The Prosecutor v Germain Katanga Decision pursuant to article 108(1) of the Rome Statute* No.: ICC-01/04-01/07 The Presidency (7 April 2016) Para 25.
[546] Para 28.

> "the presidency noted that the Appeals Chamber emphasised that the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights."[547]

The presidency also justified its decision based on the fact that the DRC had confirmed that Mr Katanga will be prosecuted in accordance with the rights of the defence contained in the Constitution and that the DRC is a party to relevant international instruments recognising minimum guarantees in relation to the right to a fair trial, including the ICCPR and the African Charter on Human and Peoples Rights.[548] In line with this reasoning, the Presidency therefore approved the prosecution of Mr Katanga by the DRC.

4 6 4 Double jeopardy

The core of the rule against double jeopardy is the idea that a person should not be tried more than once for the same offence.[549] While it is clear from the ICC judgment above, the rule of double jeopardy did not find application because Mr Katanga was not tried in respect of the same crimes, it is important to analyse the principle in light of the fair trial rights of defendants generally. The ICC decision also raises very real questions on what will happen to defendants in the future in a similar scenario.

One author, Finlay argues[550] that the principle of double jeopardy reflects the importance of finality in the criminal justice system and protects against inconsistent results. The rule against double jeopardy reinforces the need for investigations and prosecutions to be thorough and diligent. In the ICC, Article 20[551] deals with the

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[547] Para 31.

[548] Para 31.

[549] L Finlay "Does the International Criminal Court protect against Double Jeopardy: An analysis of Article 20 of the Rome Statute" (2009) 15 *University of California, Davis* 221 223.

[550] 223-224.

[551] Article 20 of the Rome Statute Ne bis in idem 1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court. 2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court. 3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding

principle of double jeopardy. Finlay argues[552] that the reasons for the inclusion of Article 20, were related to concerns about fairness to the accused, individual human rights, and the protection of the integrity of the judicial system. At the same time, however, the creation of the ICC introduces an additional jurisdiction in which double jeopardy issues may arise, particularly in respect of the question of state sovereignty and the relationship between national courts and the ICC.[553] Therefore in analysing the operation of Article 20 of the Rome Statute, it is necessary to also consider the principle of complementarity reflected in Article 17 of the Statute.[554] Article 17 prevents the ICC from asserting jurisdiction where such jurisdiction has already been asserted

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the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

[552] Finlay (2009) *University of California*, *Davis* 225-227.

[553] 225-227.

[554] Article 17 Issues of admissibility:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; 13 Rome Statute of the International Criminal Court (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court. 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

by a national judicial body. Article 20(1)[555] on the other hand prevents the ICC from trying a person who has already been convicted or acquitted by the ICC. Finlay opines[556] that the comprehensive nature of the *non bis in idem* protection under Article 20(1) follows from the reference to the "conduct which formed the basis of crimes." This approach means that the characterisation of the offence and its legal elements are irrelevant in determining the application of *non bis in idem*, and that the prosecution is barred from pursuing a subsequent trial based on the same facts even if it charges the accused with a technically different offence." Finlay, argues that this conduct-based approach provides strong protection for an accused and is illustrative of a broad application of the *non bis in idem* principle.[557]

In the *Katanga* matter, the defence argued similarly by stating that Article 108 of the Statute has a wider ambit than the principle of *non bis in idem* in Article 20(2)[558] which refers to 'crimes' while Article 108(1) speaks of 'conduct'. The defence here referred to another case before the ICC, *Ble Goude* case[559] in which it was stated that the word "conduct" under Article 108 should receive a wider interpretation than that given to "crimes". The judge in the *Ble Goude* case noted that: "Article 101(1)[560] not only refers

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[555] 1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

[556] Finlay (2009) *University of California*, *Davis* 228-229

[557] 228-229.

[558] 2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court. Article 5 Crimes within the jurisdiction of the Court 1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

[559] *The Prosecutor v Charles Ble Goude Decision on the 'Defence request to amend the document containing the charges for violation of the rule of speciality'*, ICC-02/11-02/11-151 (11 September 2014) para 10, referred to by the defence in *Prosecutor v Germain Katanga*, *'Further observations following the defence mission to Kinshasa'* ICC-01/04-01/07 (26 February 2016) para 18.

[560] Article 101 Rule of speciality:

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

to specific offences or conduct but also to the broader term of 'course of conduct.'" The defence argued that the alleged offences for which the DRC seeks approval to prosecute are of a similar nature to those for which Mr Katanga was tried at the ICC, committed at a similar period of time and in the same capacity.[561] Further, that the offences fell within the temporal and geographical ambit of the ICC investigation and which were in plain view of the OTP at the time of the investigation and did not come to light later.[562]

Carter[563] introduces the tests used in determining whether crimes are the same and have been prosecuted before, in the following way: the "same elements" test looks at "whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution."' In contrast, the "same conduct" test provides that "if, to establish an essential element of an offence charged in that prosecution, the government will prove conduct that constitutes an offence for which the defendant has already been prosecuted, 'a second prosecution may not be had'." While there is a range of interpretations for terms, such as "same conduct" and "same offense," the latter is usually narrower than the former.

In these definitions, the range of interpretations for "same offense" focuses more on the legal characterisation while the interpretations of "same conduct" focus more broadly on the underlying factual incident.[564] If one were to apply these standards of interpretation to the case at hand, upon closer inspection of the charges for which Mr Katanga was convicted and those now imposed by the DRC, it is clear that they are similar in timeframes and also constitute "crimes against humanity" including murder within the DRC. Besides the enlisting of child soldiers, all the other charges appear to fall within the category of 'same conduct'. It is therefore submitted that the ICC should have applied this test more precisely in determining whether Mr Katanga would be subject to double jeopardy. It is clear from the foregoing that *non bis in idem* should be interpreted broadly and within the context of other Articles of the Rome Statute to

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[561] *Prosecutor v Germain Katanga*, *'Further observations following the defence mission to Kinshasa'* ICC-01/04-01/07 (26 February 2016) para 21.

[562] Para 22.

[563] L Carter "The principle of complementarity and the International Criminal Court: The Role of Ne Bis In Idem" (2010) 8 *Santa Clara Journal of International Law* 165 171.

[564] 174.

ascertain whether or not double prosecution of similar offences will, in fact, occur if the DRC, in this instance, were to prosecute Mr Katanga. Further, upon closer inspection of the framing of the charges by the DRC, it lacks specificity which in turn places the defendant at a disadvantage in being able to adequately respond to the charges and therefore violates a fundamentally fair trial right.

Finlay[565] opines that the protection against double jeopardy provided for under Article 20 cannot be properly assessed as a stand-alone guarantee. The principle, therefore, needs to be situated within the broader framework of the Rome Statute and analysed within the context of the various interests that need to be balanced if the objectives of the ICC are to be fully met. In applying this interpretation, the ICC did not apply the principle broadly and failed to take into account all the interests in determining whether double jeopardy had application in the *Katanga* case. In particular, if we were to apply Finlay's reasoning and look at the context of the Rome Statute broadly as well as the jurisprudence of the court, fair trial principles would be of paramount importance.

4 6 5 Mr Katanga's right to life

In respect of the fair trial rights which the defence was concerned about, if the prosecution in the DRC was to proceed; the defence argued that the ICC had to take Article 21(3) into account in making its decision and should deny a request if a violation of internationally recognised human rights is likely to occur in the course of the requested prosecution and the gravity of such a violation would outweigh the legitimate extradition interests.[566]

The defence summarised his fair trial concerns as follows: excessive delay, lack of legal aid, lack of adequate facilities for the preparation of the defence, inability to secure the attendance and examination of witnesses under the same conditions as the prosecution, absence of appeal from the *Haute Cour Militaire* on the merits of the case, continued availability of the death penalty, systemic failures of the DRC justice system and political or executive interference and lack of impartiality.[567] The defence

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[565] Finlay (2009) *University of California*, *Davis* 248.

[566] *Prosecutor v Germain Katanga*, *'Further observations following the defence mission to Kinshasa'* ICC-01/04-01/07 (26 February 2016) para 27.

[567] Para 29.

relied heavily on the abuse of process doctrine and referred to an ICTR decision in *Bell v DPP* of Jamaica in which the court stated "under the abuse of process doctrine courts have an inherent power to decline to adjudicate a case which would be oppressive as a result of unreasonable delay. In making this determination, the following guidelines were set out:

"i) the length of the trial,
ii) the prosecution's reasons to justify the delay;
iii) the accused's efforts to assert his rights; and
iv) the prejudice caused to the accused."[568]

The Presidency, in addressing Mr Katanga's fair trial concerns, stated that in respect of Mr Katanga's fear of being subjected to the death penalty, the ICC had received assurances from the DRC that the death penalty would not be sought against Mr Katanga.[569] It is arguable that the ICC should have taken a firmer stance in respect of the death penalty and should have protected Mr Katanga from being prosecuted in a country that has the death penalty. Further, the ICC did not analyse the extent of the defendant's concerns related to his fair trial rights in the DRC. In fact, the court had a terse response as follows:

> "the presidency noted that the Appeals Chamber emphasised that the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights."[570]

Indeed, the court is bound to take into account international human rights standards, the court should have taken its guidance from Article 21(3), as referred to by Mr Katanga. This Article in the Statute instructs the court to ensure that its decisions consider international human rights. The right to life is the most important human right afforded to everyone and is enshrined in Article 3 of the UDHR, Article 6 of the ICCPR and in Article 4 of the African Charter on Human and Peoples' Rights.

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[568] Para 35.
[569] *The Prosecutor v Germain Katanga Decision pursuant to article 108(1) of the Rome Statute* No.: ICC-01/04-01/07 The Presidency (7 April 2016) para 28.
[570] Para 31.

Considering Article 21(3), the court had no basis for its argument that it was not required to take into account international human rights. However, the court sends a clear message to future defendants who may be prosecuted at the ICC that they too may be sent back to their home countries to be prosecuted again for similar offences for which they had either been convicted or acquitted of and that the ICC washes its hands of any potential human rights infringements that the accused may suffer as a result thereof.

4 6 6 Lessons from the Tribunals and fair trial rights of the accused

The case law pertaining to Rule 11 bis at the ICTR in respect of the transfer of cases is particularly relevant to this discussion. To this end, the ICTR took a firm stance in *Prosecutor v Yussuf Munyazi* ("*Munyazi*")[571] not to transfer the case to Rwanda as the Trial and Appeals Chamber was not persuaded that the accused would receive a fair trial in Rwanda. Rule 11 *bis*[572] governs the transfer, to competent national jurisdictions of individuals indicted but not yet tried by the ICTR.[573] This rule was intended to create a bridge between the practice of international criminal law and domestic criminal justice processes by ensuring that domestic courts have an adequate legal framework to try international crimes and provide suitable fair trial guarantees. In applying Rule 11 *bis*, a Trial Chamber must consider whether the case's intended recipient State has a legal framework that criminalises the alleged conduct of the accused, provides an adequate penalty structure, does not impose the death penalty and provides fair trial safeguards.

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[571] *The Prosecutor v Yussuf Munyazi Decision on the Prosecutor's appeal against Decision on Referral under Rule 11 bis,* ICTR-97-36-R11bis, AP Ch (8 October 2008).

[572] Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 24 July 2009: Rule 11 bis (B) The Referral Bench may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. (Revised 30 Sept 2002, amended 10 June 2004, amended 11 Feb 2005)

[573] N Palmer "Transfer or Transformation? A review of the Rule 11 BIS Decisions of the International Criminal Tribunal for Rwanda" (2012) 20 *African Journal of International and Comparative Law* 1.

In the *Munyazi* case,[574] the Appeals Chamber had occasion to consider the death penalty as well as the prison conditions and found that due to ambiguity in respect of "which punishment provision would apply to transfer cases, and since, therefore, the possibility exists that Rwandan courts might hold that a death penalty of life imprisonment in isolation would apply to such cases", the court declined the transfer. The Appeals Chamber ruled that due to this the current structure in Rwanda is not adequate for the purposes of transfer under Rule 11*bis* of the Rules. In this case, Rwanda had furnished a statement giving the assurance that no person transferred from the Tribunal would be sentenced to solitary confinement in Rwanda.[575]

This statement or assurance could be equated with the assurance given by the DRC to Katanga that the death penalty would not apply. However, at the tribunal, the defence argued that the statement is not itself law and does not change the law as enacted by the legislature.[576] This argument is very pertinent to the ICC's decision to rely on the DRC's assurance that it would not impose the death penalty. However, from my viewpoint, the ICC erred in this regard and should have taken a similar stance to the one taken at the ICTR to not refer the case back on the basis of the concerns raised by Mr Katanga in respect of his fair trial rights. In fact, the ICC should have interrogated the issue of Mr Katanga potentially being subjected to the death penalty in greater detail. At the tribunal, a valid point was made, namely that an assurance is insufficient in light of legislation which governs either the death penalty or solitary confinement and yet the ICC relied on this assurance given by the DRC in its decision to allow the DRC to prosecute Mr Katanga.

Although the ICC does not have an exact Article similar to Rule 11*bis* which specifies and therefore compels the tribunal to consider the death penalty and fair trial considerations of defendants, it may be argued that if the ICC leaned on the vast jurisprudence of the ICTR, it may provide guidance in its future interpretations of Article 108. The manner in which the Tribunal considers transferring cases and its specific consideration of fair trial principles related to the country to which the case will be transferred, acts as a capacity-building mechanism for the country receiving the case,

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[574] *The Prosecutor v Yussuf Munyazi Decision on the Prosecutor's appeal against Decision on Referral under Rule 11 bis,* ICTR-97-36-R11*bis*, AP Ch (8 October 2008) para 15.

[575] Para 14.

[576] Para 15.

as one can see due to the ICTR's constant refusals of transfers due to fair trial concerns, Rwanda has changed its legislation to ensure the smooth transfer of cases. This same approach by the ICC could have served to ensure that the DRC makes similar legislative changes to protect the accused and ensure that the Mr Katanga is suitably protected when tried at the DRC. As it stands now, the ICC did not analyse case law or provide clear legal argument in respect of its agreement to allow Mr Katanga to be tried by the DRC. Mr Katanga therefore faces prosecution based on an 'assurance' that the DRC will not subject him to the death penalty and without suitable recourse regarding his fair trial concerns.

4 7 Reflection on the impact of the case on the rights of victims and the international community

In respect of the victims of crimes particularly in respect of rape and sexual slavery and the recruitment of child soldiers, Mr Katanga was found not guilty which has a fundamental impact of the rights of victims to reparations. This is particularly so given the fact that neither Mr Katanga nor the prosecutor decided to proceed with an appeal to the conviction decision. So on the one hand, approximately 363 victims were allowed to participate in proceedings but sadly are unable to claim reparations due to the finding of Mr Katanga not being guilty of rape and sexual slavery and the recruitment of child soldiers in the DRC.[577] This decision is not a victory for the rights of victims, however, it could be viewed as a significant milestone in respect of their increased rights of participation which were afforded to them during this trial.

In respect of reparations to victims, on 24 March 2017, Trial Chamber II issued its Reparations Order awarding 297 out of 341 victims of the crimes for which Katanga was convicted individual and collective reparations. All 297 victims were awarded a symbolic amount of USD250 per person, as well as collective reparations in the form of support for housing, support for income-generating activities, education aid and psychological support. The extent of harm that was suffered by the victims was estimated to have a monetary value of approximately USD3 752 620, and Katanga's

[577] A Ngari "The ICC Prosecution's decision to discontinue its appeal has left victims of international crimes in the Katanga case feeling disappointed and betrayed" (29-08-2014) *ISS* <https://issafrica.org/iss-today/hope-deferred-abrupt-end-to-the-katanga-case-fails-victims> (accessed 29-11-2019).

liability was set at USD 1,000,000. Due to Katanga's indigence, the Board of Directors of the TFV were invited to consider using its resources to fund and implement the reparations.[578]

The DRC is still impacted by severe crimes against women and children. The *Katanga* judgment should focus the DRC authorities on addressing the enormous "impunity gap" for crimes committed against its people. The ICC alone cannot address impunity comprehensively and this places a demand on the DRC to ensure that first it co-operates with the ICC in investigations, arrests and surrender of suspects. The DRC must also ensure that its legislation is in line with international law and the DRC authorities should establish an appropriate framework for the rule of law and ensure the rights of victims of past and continuing violations are being addressed. [579]

Legislative reform should be the first aspect for the DRC to tackle to ensure that its laws are in line with international human rights agreements, particularly in light of the death penalty still being implemented within the DRC. Reform is however only possible when the very real conflicts threatening the DRC are addressed and the political situation is stabilised.

4 8 Conclusion

This chapter raised critical issues and concerns related to the fairness of proceedings and the application of the fair trial rights as enshrined in Article 67 of the Rome Statute.

In particular, the chapter demonstrated that key aspects of Article 67 of the Rome Statute protecting the rights of the accused had been violated by the court, particularly the accused's right to remain silent. Particular fair trial issues of concern relate to the length of trials, inadequate and timely notice of charges and the inability of the defence to prepare a proper defence to the charges after the implementation of Regulation 55.

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[578] Women's Initiative for Gender Justice "Gender Report Card on the International Criminal Court 2018" (2018) *4GenderJustice* 79 <https://4genderjustice.org/ftp-files/publications/Gender-Report_design-full-WEB.pdf> (accessed 29-11-2019).

[579] Amnesty International "DRC: All you need to know about the historic case against Germain Katanga" (06-03-2014) *Amnesty International* <https://www.amnesty.org/en/latest/news/2014/03/drc-all-you-need-know-about-historic-case-against-germain-katanga/> (accessed 29-11-2019).

In particular, the case analysis demonstrated the need for the ICC to ensure that the accused's right to life is protected if an accused person is transferred back to their country of origin.

The next chapter will review the acquittals of three (3) accused at the ICC; including *Bemba*, *Gbagbo* and *Blé Goude* and review the fair trial rights employed in their cases, particularly in relation to legal certainty, the right to an expeditious trial, the right to be informed of the charges and no case to answer motions. The chapter will further review the decisions related to victim participation.

CHAPTER 5: THE ACQUITTAL OF *BEMBA*, *GBAGBO* AND *BLE GOUDE*

5 1 Introduction

The previous chapter focused on the fair trial rights of Mr Katanga, with a particular focus on Regulation 55, the right to silence and Mr Katanga's right to life. It also reviewed the importance of the role of the confirmation of charges stage of proceedings, particularly in relation to the accused being informed in detail about the nature of the charges against him.

The current chapter is important for the purposes of this dissertation as it relates to both substantive and procedural unfairness in the conduct of proceedings of *Mr Bemba, Mr Gbagbo and Ble Goude.* Mr Bemba was a militia leader in the Central African Republic ("CAR") and Mr Gbagbo was a previous head of state in the Ivory Coast. Both countries were ravaged with conflicts in leadership which resulted in atrocities being committed. In both cases, the prosecutor based the accused's liability on command responsibility as defined in Article 28 of the Statute.

The acquittals therefore critically raise the tensions which were discussed in Chapter 2 of this dissertation and demonstrates the extent of these tensions for the ICC whose main aim is, according to its Preamble at least, to end impunity.

The cases also demonstrate the extent to which the fair trial rights of the defence has been treated by the ICC, particularly in light of the fact that the accused persons have served lengthy periods of detention and after many years, were then acquitted. The length of detentions and subsequent acquittals therefore infringe on Article 64(2) to ensure that the accused receives a fair and expeditious trial at the ICC.

5 2 Background to the *Bemba* decision

The CAR ratified the Rome Statute on 3 October 2001. On 21 December 2004, the Government of the CAR referred to the ICC crimes committed in the territory of the CAR after 1 July 2002. On 10 May 2007, the Prosecutor informed the Government of the CAR, Pre-Trial Chamber III and the President of the ICC of his decision to open

an investigation. On 3 July 2008, Mr Bemba was transferred and surrendered to the ICC.[580]

5 2 1 Confirmation of charges hearing – the right to be informed promptly and in detail of the nature, cause and content of the charge

The confirmation hearing took place from 12 to 15 January 2009. On 3 March 2009, the Pre-Trial Chamber decided to adjourn the confirmation hearing in the case and requested the Prosecutor to consider submitting to it an amended DCC, taking into account that the legal characterisation of the facts of the case may correspond to a mode of liability other than the individual responsibility relied on by the Prosecutor, namely criminal responsibility as a military commander or superior within the meaning of Article 28 of the Rome Statute.[581]

Following an in-depth review of the amended DCC submitted by the Prosecutor, and of the observations of the Defence and the legal representatives of the victims, Pre-Trial Chamber II considered, on 15 June 2009, that there was sufficient evidence to establish substantial grounds to believe that Mr Bemba is criminally responsible for having effectively acted as a military commander within the meaning of Article 28(a) of the Statute, for war crimes (murder, rape and pillaging) and crimes against humanity (murder and rape). The judges confirmed that Mr Bemba would be criminally responsible as a commander under Article 28(a) of the Statute and not individually under Article 25 or as a superior under Article 28(b).[582]

The Pre-Trial Chamber, in its analysis of Article 28 of the Statute, found that a superior may be held responsible for the prohibited conduct of his subordinates if he failed to repress their lawful conduct or failed to submit it to the competent

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[580] *The Prosecutor v Jean-Pierre Bemba Gombo* Case Information Sheet ICC-01/05-01/08 ICC-PIDS-CIS-CAR-01-020/18_Eng (September 2018) <https://www.icc-cpi.int/CaseInformationSheets/bembaEng.pdf 2.

[581] *The Prosecutor v Jean-Pierre Bemba Gombo* Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute No.: ICC-01/05-01/08 Date: 3 March 2009 Pre- Trial Chamber III Para 49.

[582] *The Prosecutor v Jean-Pierre Bemba Gombo* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo No.: ICC-01/05-01/08 Date: 15 June 2009 Pre-Trial Chamber II Page 184, 185.

authorities.[583] The chamber also held that under Article 28, it must be proven that a suspect "either knew or, owing to the circumstances at the time, should have known that his subordinates were committing or about to commit" one or more of the crimes contained in Articles 6 to 8 of the Statute.[584] The chamber clarified this by pointing out that the suspect must have knowledge or should have known that his forces were about to engage or were engaging or had engaged in conduct constituting the crimes referred to above.[585]

Following the confirmation of the charges on 18 September 2009, the Presidency constituted Trial Chamber III and referred the case to it for the conduct of the trial.[586]

The formulation and framing of the charges is critical to the accused's fair trial rights in terms of Article 67(1) (a) and (b) as follows: To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks; (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence.

Cryer et al argue that the indictment (or DCC as it is commonly referred to at the ICC) is an important instrument and establishes the framework for the trial as only what is properly charged may lead to a conviction. To this end, the DCC must contain material facts containing sufficient detail to allow the defendant to prepare an adequate defence.[587] Therefore at the ICC, an accused must be provided with a detailed description of the charges before the confirmation hearing. In terms of Article 61(5) the prosecutor must support each charge with sufficient evidence to establish "substantial grounds to believe" that the suspect has committed the crimes charged. The suspect may object to the charges, challenge the Prosecutor's evidence, and present evidence him or herself. Victims are usually allowed to participate in the confirmation hearing, generally by making submissions through their legal representatives.[588]

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[583] Para 405.

[584] Para 428.

[585] Para 428.

[586] *Case Information Sheet Situation in the Central African Republic The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08 ICC-PIDS-CIS-CAR-01-020/18_Eng Updated: September 2018 <https://www.icc-cpi.int/CaseInformationSheets/bembaEng.pdf> 2.

[587] Cryer et al *An introduction to International Criminal law and procedure* 458-459.

[588] Nerlich (2012) *J Int'l Crim Just* 1339.

In terms of Article 61(7) at the confirmation hearing, the Pre-Trial Chamber has to determine whether the Prosecutor has indeed established substantial grounds to believe that the suspect has committed the crimes charged. If the Pre-Trial Chamber is so convinced, it shall confirm the charges; if it is not so convinced, it may either decline to confirm the charges, or adjourn the hearing and invite the Prosecutor to present additional evidence or conduct further investigations; furthermore, the Chamber may invite the Prosecutor to amend the charges "because the evidence submitted appears to establish a different crime within the jurisdiction of the Court".

This is of particular importance in the current case as the chamber intervened and requested the prosecutor to amend the charges and to include the mode of liability under Article 28 instead of under Article 25. This is the first case at the ICC based on Article 28 which is a mode of liability for command responsibility. It is also the first case to focus on rape as a war crime and a crime against humanity and to deal substantially with command responsibility. This case, therefore, has important lessons in respect of fair trial concerns. For the purposes of this chapter, the focus will be primarily on the Trial Chamber conviction decision, the participation of victims and the Appeals chamber judgment as these are the critical decisions related to the fair trial rights of the defendant and the rights of victims.

5 3 Commencement of trial

On 22 November 2010, the trial commenced before Trial Chamber III with the parties and participants making their opening statements. The presentation of evidence commenced on 23 November 2010. Trial Chamber III granted 5229 persons the status of victims authorised to participate in the proceedings.

On 21 March 2016,[589] Trial Chamber III of the ICC issued a judgment in the case of *The Prosecutor v Jean-Pierre Bemba Gombo*. Mr Bemba was found guilty under Article 28 of the Statute of murder as a war crime and crime against humanity, rape as a war crime and crime against humanity, as well as pillaging as a war crime, committed in the CAR between 2002 and 2003. The chamber found that, In light of the measures available to Mr Bemba, as a superior and under the command responsibility

[589] Situation in the Central African Republic the case of *The Prosecutor v Jean-Pierre Bemba Gombo Trial Chamber* III *Judgment pursuant to Article 74 of the Statute* No.: ICC-01/05-01/08 (21 March 2016).

doctrine contained in Article 28 of the Statute, the Chamber concluded that the measures he took fell short of "all necessary and reasonable measures" within his power to prevent or repress the commission of crimes by his subordinates during the 2002-2003 CAR Operation and that Mr Bemba failed to submit the matter to the competent authorities.[590]

In respect of the fact that the crimes were committed as a result of Mr Bemba's failure to exercise proper control over his subordinates, including authority over disciplinary matters, the Trial Chamber held that he failed to take any measures to remedy such deficiencies in training, either prior to deployment of the troops or in response to the consistent reports of crimes occurring from the earliest days of the 2002-2003 CAR Operation. Additionally, the Chamber held that Mr Bemba's failure to take all necessary and reasonable measures within his power to prevent and repress the commission of the crimes and submit the matter to the competent authorities demonstrated that Mr Bemba failed to exercise control properly over the forces deployed to the CAR.[591]

The conviction was therefore based on Article 28 of the Statute which encompasses command responsibility which means that superiors could be held responsible for crimes of their subordinates where they knew of them but did not intervene.[592] The decision was also the first to convict a superior commander of the crime of rape as a war crime and was seen as a victory for the rights of victims who were affected by the crimes and those who participated in the proceedings.

5 3 1 Separate opinions to Trial Chamber decision

Steiner J in her separate opinion highlighted the need for there to be a causal connection between the commander's actions and the crimes committed by the subordinates and she stated that the language "as a result of" is meant to address this connection.[593] The judge also equated the commander's duties to repress the commission of the crime to 'punish'

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[590] Trial Chamber Conviction Decision paras 731-734.

[591] Para 737.

[592] R Cryer, H Friman, D Robbinson & E Wilmshurst *An introduction to International Criminal law and procedure* 3 ed (2014) 384.

[593] Separate opinion of Judge Sylvia Steiner to the Trial Chamber Conviction Decision para 7.

> "and the duty to submit the matter to the competent authorities are more easily distinguishable from the duty to exercise control properly, since they arise after the commission of a crime. Accordingly, I agree with this opinion that a failure of these duties cannot "cause" the crimes, as a crime cannot be "caused" retroactively."[594] The judge agreed with the pre-trial chamber that "it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under article 28(a) of the Statute."[595]

The judge also provided insight as to the degree of risk by arguing that

> "the causality requirement would be satisfied where, at least, there is a high probability that, had the commander discharged his duties, the crime would have been prevented or it would have not been committed by the forces in the manner it was committed. I believe "high probability" is the appropriate threshold, reflecting a strict construction of the causality assessments relevant for both acts and omissions. In my view, the causality assessments should mirror each other as much as possible."[596]

Arguably, given the inferences in the *Katanga* decision to the lack of evidence, it seems that the ICC prosecutor is struggling to find reliable evidence to support its charges and therefore improbable that it would be capable of establishing causality to support the charges under Article 28.

Ozaki J reflected on the following section of Article 28(a): "as a result of his or her failure to exercise control properly over such forces", the judge argued that this phrase raises a number of interrelated interpretative questions:

(i) First, competing views have been expressed as to whether this clause properly attaches to the criminal responsibility of the commander or to the commission of the crimes.

(ii) Second, the scope of the phrase "to exercise control properly" and its relationship with Article 28(a)(ii) is to be considered.

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[594] Para 14.

[595] Para 23.

[596] Para 24.

(iii) Third, the nature of the nexus implied by the words "as a result of" must be considered, particularly if the failure of control is deemed to correlate to the commission of the crimes."[597]

The judge held the view that the duty to exercise proper control, including, to put effective systems of supervision and discipline in place, to which the nexus requirement attaches, is operative before the point in time when the forces are committing or about to commit the crimes.[598]

The judge also discussed the standard to be applied and confirmed that in his view "as a result of" dictates that the standard adopted be more than a merely theoretical nexus to the crimes. He suggested that the starting point for the inquiry is the principle of personal culpability, which, in this context, requires that, at least, the liability of an accused should be confined to results that are reasonably foreseeable.[599]

It is important to note that the decisions related to the correct interpretation of causation which was central in both of these separate opinions to the Trial Chamber decision as well as in the separate opinions of the judges to the Appeals Chamber judgment which will be discussed further in this chapter.

5 3 1 1 Article 28 of the Statute – Command Responsibility

Due to the lengthy deliberations of the judges in respect of causation in relation to Article 28, it is important to understand Article 28 of the Rome Statute considering Mr Bemba's conviction and subsequent acquittal. The provision provides as follows:

"Article 28 Responsibility of commanders and other superiors
In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

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[597] Separate opinion of Judge Kuniko Ozaki to the Trial Chamber Conviction Decision para 3.
[598] Para 17.
[599] Para 23.

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

Cryer et al[600] opine that under the Rome Statute, command responsibility is treated as a form of liability for the underlying offences and the Article imputes liability to the superior for the actions of the subordinates.

It is further submitted that whether or not a superior has knowledge of these crimes, should still not result in prosecution for those crimes, instead the superior should be prosecuted as a superior only and for the elements connected therewith, not for the actual crimes against humanity which were committed by those who fell under his command, *unless* the causal connection between the commander and the crimes committed by the subordinates are established beyond reasonable doubt.

It must also be borne in mind that command responsibility is a form of liability under the Rome Statute and not a crime which falls within the jurisdiction of the court. The commander only becomes guilty of the crimes after the elements connecting him to those crimes are committed. If these elements are not proven beyond reasonable doubt, the commander cannot be held liable for the crimes of his subordinates within the framework of the Rome Statute.

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[600] Cryer et al *An introduction to International Criminal law and Procedure* 395.

As will be seen in the analysis of the appeals judgment hereunder, the biggest issue in respect of command responsibility for the Appeals Chamber rested on causation in that there must be a causal link between the fact that the crimes occurred as a result of the failure of Mr Bemba to supervise his subordinates.

It must be borne in mind that at the time of the conviction decision, it was lauded as a great success for the ICC and for victims in particular to receive reparations but also in respect of the fact that it was the first case tried at the ICC that dealt with command responsibility and succeeded in securing a conviction against a commander. Bemba was one of only four people convicted by the ICC in its 16 years of operation and the highest-ranking among them. He had been convicted of murder, rape and pillaging for actions by fighters he sent to the CAR to back then-president Ange-Felix Patasse.

5 4 Victim Participation in *Bemba* trial

5 4 1 Background to the decisions

Due to the large numbers of victims who were allowed to participate in this case, in total 5229,[601] it is important to reflect on some key aspects of the modalities of participation which the court allowed.

On 22 February 2010, the Chamber decided that victims authorised to participate at the confirmation stage of the proceedings should, in principle, continue to participate in the trial proceedings and to counter the volume of applications set a deadline date of 16 September 2011 for the submission of any new victim's applications.[602] The Chamber issued eleven decisions on applications by victims to participate in the proceedings and admitted fourteen organisations or institutions. Among the natural persons authorised to participate in the proceedings, eighteen individuals had dual status as they also appeared as witnesses before the Chamber.[603]

The Chamber recognised the role played by intermediaries in the application process in assisting in the filling in of the forms, even writing down the answers given by applicants some of them being illiterate or not speaking the language in which the

[601] Situation in the Central African Republic the case of *The Prosecutor v Jean-Pierre Bemba Gombo Trial Chamber* III *Judgment pursuant to Article 74 of the Statute* No.: ICC-01/05-01/08 (21 March 2016) para 18.
[602] Para 19.
[603] Para 21.

form was filled in. However, following the notification of three reports concerning issues arising out of the involvement of a very limited number of intermediaries in the completion of victims' applications for participation, the Chamber (i) deferred its decision on pending applications completed with the assistance of the intermediaries concerned; (ii) ordered the VPRS to re-interview the applicants concerned in order to verify the accuracy of the information contained in their applications; and (iii) instructed the VPRS to re-file the original applications together with any supplementary information collected, as well as a consolidated individual assessment report.[604] The use of intermediaries has been a bone of contention for the ICC as the prosecutor had similar concerns related to the use of intermediaries in the *Lubanga* case.

5 4 2 Modalities of participation

With a view to ensuring meaningful participation by victims and in line with the imperative that the participation of victims not be prejudicial to the rights of the accused, Sixteen individuals were called by the Prosecution and two individuals were called by the Legal Representatives. Two legal representatives were designated to represent the interests of victims allowed to participate in this case. For that purpose, participating victims were divided into five groups depending on the location of the harm allegedly suffered, as well as the victims' status. In addition, the OPCV was appointed to represent victims whose applications were pending a decision by the Chamber.[605]

In accordance with the common legal representation scheme described above and through their Legal Representatives, victims were authorised to participate at hearings and status conferences, to make opening and closing statements, to file written submissions, to introduce evidence, to question witnesses subject to a discrete written application decided upon in advance by the Chamber, and to have access to confidential documents in the record.[606]

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[604] Para 22.

[605] *The Prosecutor v Jean-Pierre Bemba Gombo Trial Chamber* III *Judgment pursuant to Article 74 of the Statute* para 23.

[606] Para 24.

In addition, in a decision in February 2012,[607] the Chamber authorised the Legal Representative to call two victims to give evidence as witnesses during the trial and invited three further victims to present their views and concerns in person. This decision was of importance as it evoked a partly dissenting opinion from Steiner J who was of the view that the chamber should have allowed the participation of more victims.

In this decision, Steiner J partly dissented from the Majority's decision with regard to the requirements for the presentation of evidence by victims and the judge indicated that more victims should have been allowed to give evidence and to present their views and concerns. In the view of the judge,

> "the strict limitations imposed by the Majority to the presentation of evidence by victims and the 'case-by-case' analysis of the victims' right to present their views and concerns reflect a utilitarian approach towards the role of victims before the Court, which has no legal basis and appears to unreasonably restrict the rights recognised for victims by the drafters of the Statute."[608]

The judge took a strong stance in relation to the rights of victims to present evidence, particularly considering the number of victims involved in this case.

Concerning the distinction between the presentation of evidence and of views and concerns in person, the Chamber found Trial Chamber I's approach instructive:

> "[…] the process of victims 'expressing their views and concerns' is not the same as 'giving evidence'. The former is, in essence, the equivalent of presenting submissions, and although any views and concerns of the victims may assist the Chamber in its approach to the evidence in the case, these statements by victims (made personally or advanced by their legal representatives) will not form part of the trial evidence. In order for participating victims to contribute to the evidence in the trial, it is necessary for them to give evidence

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[607] *The Prosecutor v Jean-Pierre Bemba* No. Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims : ICC-01/05-01/08 Date: 22 February 2012 TRIAL CHAMBER III para 55.

[608] Para 24 of Conviction decision and para 11 of *The Prosecutor v Jean-Pierre Bemba* Partly dissenting opinion of Judge Steiner Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims : ICC-01/05-01/08 Date: 22 February 2012 TRIAL CHAMBER III para 55.

under oath from the witness box. There is, therefore, a critical distinction between these two possible means of placing material before the Chamber."[609]

In line with this approach, the Chamber found that:

"the threshold to grant applications by victims to give evidence is significantly higher than the threshold applicable to applications by victims to express their views and concerns in person" and "victims who fail to reach the threshold to be authorised to give evidence may still be permitted to express their views and concerns in person."[610]

The majority was of the view that in allowing victims views and concerns to be presented under Article 68(3), the chamber had to do so 'in a manner which is not inconsistent with the rights of the accused', in particular, the majority was concerned about the accused's rights to be tried without undue delay.[611]

Steiner J disagreed with the majority finding, particularly that the participation of all the victims in the proceedings, would not cause undue delay.[612] Further,

"In light of my firm and unequivocal interpretation of the role of victims in the proceedings before this Court, and of their right to give evidence or to present their views and concerns, and having thoroughly analysed the relevant victims' written statements, their relevance to the case, their probative value and the potential prejudice to the defence, I am of the view that the Majority's decision does not provide any factual or legal basis that would justify why most of victims proposed by legal representatives were denied the possibility to give evidence or the right to present their views and concerns in person."[613]

The two victims authorised to give evidence appeared before the Chamber between 1 and 8 May 2012 and were questioned by the Legal Representatives, the

[609] Para 25 of Conviction Decision and para 19 Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims.
[610] Para 26 conviction decision and para 20 Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims.
[611] Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims para 21.
[612] Dissent Steiner J para 49.
[613] Para 47.

Prosecution, the Defence, and the Chamber. Both witnesses testified without protective measures.[614]

This decision reflects that a clear distinction was made between victims who give evidence and those who present their views and concerns. This is evidenced by the fact that the three victims authorised to present their views and concerns in person were heard by means of video-link technology and because they did not appear as witnesses, their submissions were not presented under oath, they were not questioned by the parties, and their views and concerns did not form part of the evidence of the case.[615]

5 5 Acquittal decision, dissenting and separate opinions

5 5 1 The Appeals Chamber: Majority judgement

On 8 June 2018,[616] the Appeals Chamber by a 3:2 majority acquitted Mr Bemba. As indicated, the Appeals Chamber was divided in terms of the judgments, therefore Van den Wyngaert J, Eboe-Osuji J and Morrison J were of the view that the second ground of appeal that the conviction exceeded the charges; and part of the third ground of appeal, namely Mr Bemba's argument that the Trial Chamber erred when it found that he did not take all necessary and reasonable measures to prevent or repress the commission of crimes, were determinative of the outcome of the appeal.

The Appeals Chamber limited its assessment to the Trial Chamber's finding regarding Mr Bemba's purported failure to take all necessary and reasonable measures, given the clear error therein.[617] Separate dissenting opinions were also written by Monageng J and Hofmański J who disagreed with the standard of review for factual errors and aspects of the substantiation requirement and dissented from the majority's determination on the second ground of appeal and on the third ground of appeal, concerning necessary and reasonable measures.[618]

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[614] Para 27.

[615] Para 28 Conviction decision.

[616] Situation in the Central African Republic in the case of The Prosecutor *v* Jean-Pierre Bemba Gombo *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"* No. ICC-01/05-01/08 A (8 June 2018) 5-6.

[617] Para 32.

[618] Para 34.

5 5 1 1 Conviction exceeded the charges – The right be informed promptly and in detail of the nature, cause and content of the charge and the right to legal certainty

This brings us to Mr Bemba's main argument on appeal,[619] that the Conviction Decision exceeded the "facts and circumstances described in the charges" in violation of Article 74(2) of the Statute because he was convicted partly based on individual acts of murder, rape and pillaging committed against particular victims at specific times and places that had not been confirmed in the Confirmation Decision.

In his view, the scope of the trial against him was limited to the criminal acts that were specifically confirmed by the Pre-Trial Chamber in the Confirmation Decision, arguing that "[i]f [a criminal] act was not confirmed by the Pre-Trial Chamber, […] it does not form part of the charges and cannot be used to found a conviction." This raises the question as to whether or not the Pre-Trial Chamber erred in the charges which it confirmed against Mr Bemba.

The majority of the Appeals Chamber referred to Article 74(2):

> "The decision of the Trial Chamber at the end of the trial shall not exceed the facts and circumstances described in the charges and any amendments to the charges."

The Appeals Chamber found that the charges against Mr Bemba were 'confirmed' in relation to categories of crimes without further qualification and that this was too broad and provided an insufficient basis to bring Mr Bemba to trial and that it cannot amount to a description of facts and circumstances in terms of Article 74(2) of the Statute.[620]

The Appeals Chamber went further and stated that the criminal acts which the prosecutor added *after* the confirmation decision was issued cannot be said to have been part of the 'facts and circumstances described in the charges' in terms of Article 74(2). The prosecutor had not amended the charges to include murder, rape, and pillaging. The Appeals Chamber, therefore, held that the criminal acts that were added after the confirmation decision had been issued did not form part of the facts and

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[619] Majority appeals judgment para 99.

[620] Situation in the Central African Republic the case of The Prosecutor *v* Jean-Pierre Bemba Gombo *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute*" No. ICC-01/05-01/08 A (8 June 2018) para 107.

circumstances and Mr Bemba could therefore not be convicted of them.[621] In essence, therefore, the Appeals Chamber found that Mr Bemba could only be convicted of one murder, the rape of 20 persons and five acts of pillaging.[622]

In the dissenting opinion, the judges disagreed with the majority in respect of the charges and stated that it is for the Prosecutor to define the factual scope of a case and that the identification of the broad parameters of a case may suffice to serve Article 74(2)'s purpose of delineating the jurisdiction of the Trial Chamber.[623] The judges stated that:

> "the pre-trial chamber is tasked with determining whether there is a case to be tried; "whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged."[624]

Indeed, this is the standard by which the Pre-Trial chamber makes its decision whether to confirm or decline to confirm the charges.

The judges, however, argued that:

> "we consider that the pre-trial chamber may confirm the crimes charged in a broad manner depending on the nature of the charges brought by the Prosecutor."[625]

On this aspect, the majority and the minority judgments varied considerably and in my view the broader the scope of the charges, the more difficult it becomes for the defendant to prepare an adequate defence which amounts to a contravention of Mr Bemba's fair trial rights.

In respect of the prosecutorial discretion, the dissenting judges were of the view that "the Prosecutor has discretion to formulate the charges in a manner appropriate to the type of case she wishes to bring."[626]

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[621] Para 115.

[622] Majority Appeals Chamber judgment para119.

[623] Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański para 20.

[624] Para 21.

[625] Para 21.

[626] Para 27.

In reality though the broad discretion given to the prosecutor is problematic as it allows too much room for correcting poor investigative strategies and defining of charges against an accused person which further complicates the accused's ability to adequately defend him/herself as the parameters are constantly changing which is raised in the separate concurring opinion. It is argued that this dissertation supports the view that the principle of legality, as contained in the Statute, specifies that the accused is entitled to legal certainty. Legal certainty should be viewed as a guiding factor in all chambers of the ICC in making its determinations. Further, the confirmation of charges hearing is therefore a critical component of ensuring that the correct charges are formulated against the accused in order for him to know and understand the charges against him and to prepare an adequate defence.

Heinze[627] argues that the least that can be expected in international trials is that there is a clear and strict formulation of the charges and he argues that the majority decision was therefore correct to insist on such strict formulation of the charges against the accused. Cryer[628] argues that the importance of the indictment is for it to be clear and to contain the material facts which should be clear enough to inform the defendant clearly of the charges against him. Cryer[629] argues that defects may be cured through amendments however the fair trial rights of the defendant must not be affected by such amendments.

In the present case, it is clear that the amendment resulted in Mr Bemba being tried as a superior under Article 28 instead of as an individual in Article 25. Also, as a direct result of the manner in which the charges were framed, Mr Bemba was convicted under Article 28. Cryer[630]argues that only what is properly charged in an indictment may lead to a conviction which clearly indicates that if the charges were incorrectly formulated in the *Bemba* case, it could not have led to his conviction and it did, in fact, exceed the facts and circumstances of the case against him.

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[627] A Heinze "Some reflections on the Bemba Appeals Chamber Judgment" (18-06-2018) *Opinio Juris* <http://opiniojuris.org/2018/06/18/some-reflections-on-the-bemba-appeals-chamber-judgment/> (accessed 12-07-2018)

[628] Cryer et al *An introduction to International Criminal law and procedure* 458.

[629] 458.

[630] 459.

5 5 1 2 The Appeals Chamber – Joint Separate Opinions

In the joint separate opinion,[631] the two judges held a different view to the dissenting opinion and noted that a number of criminal acts were added after the Confirmation Decision was issued without following the procedure required in Article 61(9) of the Statute which would have required an amendment of the charges.[632]

The judges expressed the view that while it may have been convenient for the prosecutor to have summarised or grouped these acts by way of geographical and temporal parameters, it is the *criminal acts* that form the basis of criminal responsibility and that must be established at trial beyond a reasonable doubt.[633] The judges also argued that the challenges several Pre-Trial Chambers have experienced in the past were attributable more to the fact that the Prosecution was not fully prepared when it initiated confirmation proceedings than to the applicable deadlines.[634] The judges reiterated that the confirmation of charges procedure has to properly identify criminal acts to allow a Trial Chamber to manage the trial proceedings and to allow the accused to prepare a meaningful defence, as well as to organise the participation and reparations of victims.[635]

The judges raise an important point in relation to the role of the prosecutor in deciding when to prosecute which, according to Cassesse,[636] is very broad as prosecutors in international criminal courts have wide discretionary powers on who to prosecute and charge.

The confirmation of charges proceedings also affords the judges the opportunity to decide whether the charges are sound prior to commencing to trial and it is for the Pre-Trial Chamber to ensure that suspects are not wrongfully convicted. Cassesse[637] argues however that to ensure reliability and the retroactive sanctioning of investigative impropriety can only be accomplished through judicial scrutiny of the information at the trial.

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[631] Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison.
[632] Para 21.
[633] Para 25.
[634] Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison para 28.
[635] Para 29.
[636] A Cassesse, P Gaeta, L Baig, M Fan, C Gosnell & A Whiting *Cassese's International Criminal Law* 3 ed (2013) 369.
[637] 367.

On this point, one wonders then as to the role and function of the confirmation of charges hearing as charges are not confirmed prior to the judges ensuring that they are satisfied that there are “substantial grounds to believe that the person committed the crime charged” as articulated in Article 61(5) of the Statute.

On this point, Nerlich opines that the most obvious function of the confirmation proceedings at the ICC*,* is the filtering out of unmeritorious cases. Nerlich argues further that before a suspect is put on trial (which may last several years, during which the suspect may have to be detained) there should be a judicial review of the sufficiency of the evidence. He argues that the confirmation process cannot be a mere rubber-stamping of the Prosecutor's charges.[638] Nerlich opines further that an essential aspect of the confirmation process is that it defines the subject matter of the trial and it is submitted ensures legal certainty for the accused. Therefore, under Article 74(2) Rome Statute, the Trial Chamber, in its decision at the end of the trial, may 'not exceed the facts and circumstances described in the charges'. Thus, the DCC and the decision on the confirmation of charges have a crucial limiting function in that facts and circumstances that were not charged cannot lead to a conviction of the accused.[639]

These authors raise important points in respect of the function of the Pre-Trial Chamber and the confirmation of charges procedure which is in line with Mr Bemba’s argument on appeal, that the charges should have been clear at the beginning of proceedings, prior to the matter been sent to trial and that the conviction judgment, therefore, exceeded the facts and circumstances of the case.

In the *Gbagbo* judgment, similar issues related to the role of the Pre-Trial Chamber and the confirmation of charges have occurred. It is concerning that the judges at the ICC have different views on the function and parameters of the Pre-Trial Chamber. It is submitted that if it is utilised less as a mini-trial and more clearly in terms of confirming only the charges which are supported by evidence, it may be a useful feature which could potentially ensure shorter, more focused trials and which would then also shorten the length of time spent by accused persons in detention.

[638] Nerlich (2012) *J Int'l Crim Just* 1347.

[639] 1348.

5 5 1 3 Joint separate opinion – victim participation

For the purposes of this dissertation, it is important to highlight the fact that the two judges in the joint separate opinion also raised their concerns as to the number of victims who were allowed to participate based on the broadness of the charges at an early stage of proceedings as more than 5000 victims were allowed to participate.[640] The judges expressed the view that allowing victims of crimes that were not explicitly confirmed to participate at such an early stage "can only lead to inflated expectations and bitter disappointment at the end of the trial."[641]

The victims were therefore allowed to participate at a stage of the trial when the charges had not been confirmed, the participation of victims at such an early stage not only raises expectations as stated by the judges, but is also capable of influencing the Pre-Trial Chamber in making its determination on the charges.

In conclusion, therefore, the judgment highlights the problems in relation to the formulation of charges and the discretion of the prosecutor to decide whether or not to prosecute. Further, it highlights the role of the confirmation hearing to ensure that the facts are correctly defined so as to provide the defendant with the facts required for him to understand the charges against him.

5 5 1 5 Discussion of the main elements which had a bearing on the accused's right to a fair trial

5 5 1 5 1 Causation

In the various separate opinions of the judges, a particular issue related to causation was discussed at length, particularly in light of the accused's individual liability under Article 28 and some interesting arguments unfold as follows:

In the dissenting opinion view[642] the judges agreed with the Pre-Trial Chamber that insofar as the duties to repress and to punish are concerned, causation needs to be demonstrated in respect of subsequent crimes that were committed because of the failure to punish earlier crimes.[643] The judges were of the view that holding a superior "criminally responsible for crimes within the jurisdiction of the Court" committed by his

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[640] Para 30.

[641] Para 30.

[642] Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański

[643] Para 333.

or her subordinates pursuant to Article 28 of the Statute without causation would be incompatible with the culpability principle, which the ICTY Appeals Chamber has summarised as follows:

> "The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)."[644]

In light of this, the dissenting judges argued that there has to be a nexus between the crime and the superior as it would be irreconcilable with basic tenets of criminal law if a superior were to be held responsible for crimes to which he or she has no connection.[645]

This is a notable conclusion for the minority opinion as it is in keeping with upholding the fair trial rights of the accused in light of command responsibility. Finally, they decided that interpreting the "result of" element as requiring causation is in keeping with the principle of strict construction recognised in Article 22(1) of the Statute.[646] The judges therefore agreed with the Trial Chamber that the superior's failure to exercise control properly caused the commission of crimes by his or her subordinates.[647] The judges argued further that the causation requirement in Article 28 of the Statute is satisfied where it is established that, had the commander exercised control properly, there is a high probability that the crimes would have been prevented and agreed with the Trial Chamber on this matter.[648] It is substantially on this issue related to causation that the other judges disagreed with the minority judges as will be seen hereunder.

Osuji J[649] wrote a detailed separate opinion and discussed causation at length. In his discussion of causality, the judge raised an interesting point in that he argues:

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[644] Para 333.
[645] Para 334.
[646] Para 335.
[647] Para 336.
[648] Para 341.
[649] Concurring Separate Opinion of Judge Eboe-Osuji para 182.

> "where more than one person may be reasonably said to have caused harm by their acts or omissions, the more just approach is not to absolve all from responsibility, leaving the victim bereft of justice."

The judge argues that the more appropriate approach is to attribute responsibility "at least, proportionably," according to the part that each accomplice had played. In criminal law, that approach is readily accounted for as a matter of sentencing.[650] This is an important point as the proportionality of sentencing in respect of command responsibility is the appropriate remedy for addressing this matter.

The judge refers to the distinction between dereliction of duty and crimes against humanity. The judge argues that the Trial Chamber erred to convict him for those crimes against humanity and war crimes committed by his subordinates (because he did not commit them himself) and the judge also took note of the fact that Mr Bemba was in fact neither charged with (nor convicted of) dereliction of duty. The judge then asks the relevant question, on what legal basis, then, is the Appeals Chamber to assess his criminal responsibility for dereliction of duty?[651] The judge argues that it is difficult to reconcile the dereliction of duty theory with the terms of Article 28, which expressly require the commander to be held responsible "*for crimes within the jurisdiction of the Court*."[652]

The judge makes an important point in respect of fairness of holding an accused accountable for the crimes of others. He states in this regard that the text and structure of Article 28 and the statutory policy of the Rome Statute, together with questions of fairness about holding an accused responsible when other persons commit crimes also apply with necessary variation in the analysis of the commander's failure. The judge argues that these considerations do not add up convincingly in support of the dereliction of duty theory, as they do for accomplice liability.[653]

The judge goes further and states that:

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[650] Para 182.

[651] Para 194.

[652] Para 195

[653] Concurring Separate Opinion of Judge Eboe-Osuji para 209.

> "the only way in which it will be fair to convict a commander 'for' the crime committed by the subordinate is if the commander's conduct contributed to the offence: that is to say, the offence was as 'a result of' the commander's failure."[654]

5 5 1 5 2 Personal culpability

Here it is necessary to investigate the principle of *personal culpability* as it was mentioned in the dissent as well as in Eboe-Osuji J's arguments. According to Werle[655] "the principle of personal culpability encompasses the principle of individual criminal responsibility, under which responsibility can only arise from the attribution of specific acts or contributions, and which excludes coincidental liability."

Werle[656] argues that the principle entails that the sentence be proportionate to the defendant's individual responsibility. In regard to the ICC, the principle is not explicit in the Rome Statute but forms the basis of Article 25(2) and is only specifically referred to in relation to sentencing in Rule 145. Hence an argument can be made in this case that Mr Bemba had demonstrated during the course of the trial that he took all reasonable measures to prevent the crimes which his subordinates were committing and the court was unable to convict him on the basis of any omission on his part. The judges have agreed that the causal element, in this case, rests on the "result of" standard and that there has to be a causal connection between the actions of the commander and his subordinates in the commission of crimes.

The majority of the Appeals Chamber, however, held that this causal connection was not proven beyond reasonable doubt. On the issue of proof beyond reasonable doubt, Eboe-Osuji J makes the point that the theory of complicity puts two important and necessarily connected considerations into sharper relief: First, it makes the element of causality plainer to see in the interrelated criminality of the conducts of both the superior and the subordinate. Consequently, it puts in plainer perspective the fairness of holding the superior criminally responsible for the crimes committed by the subordinate but the judge argues that it must all be proven beyond reasonable doubt.[657] The judge is effectively arguing that the prosecutor chose the wrong form of liability to ensure the successful prosecution of Mr Bemba.

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[654] Para 212

[655] G Werle & F Jessberger *Principles of International Criminal Law* 3 ed (2014) 42.

[656] 42.

[657] Concurring Separate Opinion of Judge Eboe-Osuji para 216.

The judges in the joint separate opinion[658] argue quite strongly that:

> "we should not desire to hold responsible those in high leadership positions and to always ascribe to them the highest levels of moral and legal culpability."[659]

The judges argue that Article 28 of the Statute may not always be the right tool to link them directly to the conduct of the physical perpetrators.[660] This is indeed true both in the *Bemba* and *Gbagbo* judgments in which both accused persons were prosecuted on the basis of command responsibility and both were acquitted due to insufficient evidence to prove that they should be held liable under Article 28. The element of causation being the determinative factor in the prosecutor's burden of proof.

The judges found errors in the Trial Chamber judgment both on issues of law and of fact in the following manner: The judges reasoned that the Trial Chamber *erred in law* by not making specific findings which specific crimes Mr Bemba was aware and at which point in time. The judges argued that it was for the Trial Chamber to differentiate, for each crime in relation to which Mr Bemba was said to have failed in his supervisory duties, between knowledge prior, during or after the troops committed the crimes.[661] The judges also argued that the Trial Chamber *erred in fact* by relying on weak and vague evidence in relation to its findings on knowledge.[662] The judges stated quite emphatically "In sum, we are of the view that Article 28 does not – and should not – require that the commander's failure caused his or her subordinates to commit crimes. This view is in line with the principle of strict interpretation enshrined in Article 22(2) of the Statute."[663]

On the issue of whether or not they were crimes against humanity, the judges concurred with Osuja J and found that Mr Bemba was convicted of crimes that in their view were not crimes against humanity because the Prosecutor made the mistake of

[658] Separate opinion Judge Christine Van den Wyngaert and Judge Howard Morrison.
[659] Para 35.
[660] Para 35.
[661] Para 49.
[662] Para 50.
[663] Para 56.

considering that the *legal elements* as such are the *material facts.*[664] The judges emphasised this point by stating:

> "This cannot be correct: the 'multiple commission' and 'widespread' requirements are legal elements, which must be substantiated by way of material facts, and those material facts must be concrete (that is, have a time and place, identified victims and perpetrators, etc.) Each of these material facts must be proved to the relevant standard. This means that there must be sufficient evidence for each individual instance of criminal conduct that is alleged to be part of the 'course of conduct involving the multiple commission of [criminal] acts"[665]

The judges took issue therefore with the manner in which the prosecutor tried to prove the facts based on hearsay evidence and dubious circumstantial evidence which in their view was not capable of a finding beyond reasonable doubt.[666] Eboe-Osuji J raised a similar point in this regard earlier, questioning on what basis Mr Bemba was in fact convicted as the charges against him were not proven beyond reasonable doubt.

5 5 1 5 3 Fair labelling

Robinson[667] argues that most writings on the topic of command responsibility confirm the centrality of causation. However, Robinson makes a valid point in respect of the protection of the accused and argues that fair labelling must take precedence. Fair labelling, in essence, means that an individual should not carry the burden of being accused of crimes he did not commit. Robinson argues strongly that this is a main line of defence in respect of command responsibility as it is inaccurate to label a failure on the part of a commander to prevent crimes as for example a crime against humanity. Robinson[668] , therefore, argues that the distinction must be made between the commander's failure to carry out his duty as a superior to exercise control over his subordinates from the crimes which the subordinates are guilty of committing. For example, Mr Bemba was accused of various crimes including murder, rape and

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[664] Para 66.
[665] Para 66.
[666] Para 67.
[667] D Robinson "The Identity Crisis of International Criminal Law" (2008) 21 *Leiden Journal of International Law* 925 951.
[668] 951.

pillaging which for all intents and purposes, it became clear was not committed by him but by his subordinates, hence he may have been liable, if it had been proven beyond reasonable doubt for his failure to exercise proper control over his subordinates but not for the crimes which his subordinates committed. This very point was made by the judges in their separate opinions and particularly by Eboe-Osuji J who claimed that if Mr Bemba could not be convicted for dereliction of duty then what justification was there to convict him of the crimes of murder, rape, pillaging and that there are specific crimes which fall within the jurisdiction of the court, which does not include dereliction of duty or better said, command responsibility is not a crime as listed in the Statute which falls under the ICC's jurisdiction.

Robinson[669] uses the example, of a case at the ICTY, *Krnojelac*[670] and makes the point that despite the assertions in *Krnojelac* that the accused was charged with failure to exercise control and not the underlying crimes, *Krnojelac* was charged with and, through command responsibility, convicted of, numerous war crimes and crimes against humanity of torture, murder, and persecution, and he was sentenced for those crimes. Robinson[671] argues strongly that the label attached to the charges, convictions, and sentence conveyed to the world that the accused was responsible for war crimes and crimes against humanity. He argues that the ICTs are imposing such labels, for crimes bearing enormous stigma, in contravention of the principle of culpability recognised by the system, which requires a causal contribution to the crime for which one is convicted. He argues that "if the command responsibility doctrine were to conform to the principle of culpability, liability for international crimes based on a failure to punish would require that the failings of the commander 'contributed to, or ... had an effect on' crimes and that in the absence of any such contribution, to convict a person for genocide, crimes against humanity, or war crimes, and to impose the stigma that such crimes bear, contradicts the principle of culpability which ICL claims to respect."[672]

This argument may be subsumed into the present case of Mr Bemba and the issue was correctly raised in the separate opinions. Mr Bemba had been convicted by the

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[669] 952.

[670] *Prosecutor v Krnojelac*, Judgement, Appeals Chamber, Case No. IT-97-25-A, 17 September 2003 para. 97.

[671] Robinson (2008) *Leiden Journal of International Law* 952.

[672] 952.

Trial Chamber for crimes which he did not commit himself but were, if it was proven correctly by the prosecutor, for the crimes of murder, rape and pillaging and as argued by Robinson this would be contrary to the principle of culpability. Despite Mr Bemba's acquittal, he spent over 10 years in detention and has already been labelled for crimes against humanity. Despite the acquittal, he will therefore always have to carry the unfair label associated with the crimes committed by his subordinates.

5 6 Reflection on the impact of the case on the rights of victims and the international community

It is important to note that on the other charges related to bribery of witnesses, Mr Bemba was in fact convicted but he did not have to serve any further time in prison as he had already served almost ten years in detention in The Hague.

Questions have also been raised as to the ICC's credibility and the influence of politics over particularly this decision as Mr Bemba headed the Movement for the Liberation of Congo party and its affiliated militia. After he lost an election to Laurent Kabila in the DRC in 2006, he was sent to The Hague to stand trial for atrocities committed by his troops in the neighbouring CAR in 2002 and 2003. In this regard, Ba opines that although he has spent ten years in prison in The Hague, Bemba remains a key political figure in his country. In a political landscape already marred with uncertainty, Bemba's return will pose a serious challenge to President Kabila who is trying to cling to power despite having finished his second term in December 2016.[673]

Taffo, who shares this view, avers:

> "Kabila is for all these reasons no longer regarded as a legitimate president of the DRC and the leader that can bring peace and security to the country and the Great Lakes region as a whole. Could the ICC have been manipulated by those who uphold prescriptive democratic ideals and who have the necessary power to impose "democracy" in developing countries? The possible manipulation of the ICC could have led to Bemba's freedom and he can now challenge the presidential elections in the DRC."[674]

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[673] O Ba "What Jean-Pierre Bemba's acquittal by the ICC means the ICC decision to overturn Bemba's conviction will have major consequences for both the DRC and the court" (13-06-2018) *Aljazeera* <https://www.aljazeera.com/indepth/opinion/jean-pierre-bemba-acquittal-icc-means-180612121012078.html> (accessed 10-02-2019)

[674] African Centre for the Constructive Resolution of Disputes (ACCORD) F Taffo Analysis of Jean-Pierre Bemba's Acquittal by the International Criminal Court 13 December 2018

The International Federation for Human Rights ("FIDH") monitors the developments of the ICC, particularly in relation to the development of victim's rights at the court and in 2018 made recommendations to *"The 17th session of the Assembly of States Parties ("ASP" or "Assembly") to the Statute of the International Criminal Court ("ICC" or "Court") held from 5 to 12 December 2018 in The Hague, the Netherlands."*

The FIDH highlighted the following as the main challenges facing the ICC:

> "a standstill in the quest for universality, an insufficient level of cooperation with the Court, an inconsistent implementation of victims' rights, inadequacy of resources made available to the Court, a need to strengthen the Court's investigations and prosecutions, particularly in relation to sexual and gender based crimes; the perception of the Court in affected communities, in particular after Jean-Pierre Bemba's acquittal, a need to elect ICC Judges and Prosecutor on merits only, and the attacks against human rights defenders"[675]

The FIDH made it clear in its submission that "Bemba's acquittal was a devastating outcome for the 5,229 victims who participated in the trial and the reparation proceedings, and who had waited 15 years to see justice done and to receive some form of redress. FIDH fears that the decision may have a negative impact on the perception of the ICC in the country and in the eyes of victims and witnesses of future proceedings at the ICC and other courts.

For this reason, FIDH welcomed the decision of the TFV, announced following Bemba's acquittal, to accelerate the launch of a programme under its assistance mandate. One million euros from the voluntary contributions will be earmarked for medical, psychological and material assistance programmes for the victims of the Bemba case, as well as other victims of sexual and gender based violence in the 2002–2003 conflict."[676]

Therefore, even though the acquittal of Mr Bemba may have been a success in terms of the court ensuring substantive and procedural fairness in its proceedings

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<https://www.accord.org.za/conflict-trends/analysis-of-jean-pierre-bembas-acquittal-by-the-international-criminal-court/> (accessed 10-02-2019).

[675] FIDH Recommendations to the 17th Session of the Assembly of States Parties to the ICC Statute. The Hague, 5-12 December 2018 <https://www.fidh.org/IMG/pdf/asp17th729aweb.pdf> 4.

[676] 8.

towards the accused, it is evident that the acquittal significantly affected the multitude of victims who had been affected by the crimes committed in CAR.

Mr Gbagbo's case, to which I now turn, raises similar evidentiary and procedural issues as has been raised in the Bemba judgment.

5 7 The *Laurent Gbagbo* and *Blé Goude* cases

5 7 1 Background

Laurent Gbagbo is the former president of Côte d'Ivoire. Charles Blé Goudé, a close ally of Gbagbo, was the youth and employment minister in Gbagbo's government and the leader of the Young Patriots, a pro-Gbagbo militia group. The ICC has charged both men with individual criminal responsibility on four counts of crimes against humanity: murder, rape and other forms of sexual violence, other inhumane acts, and persecution.

The charges relate to the 2010–2011 post-election crisis in Côte d'Ivoire, when Gbagbo refused to accept the victory in the November 10 presidential election of Alassane Ouattara. Gbagbo's refusal to leave office led to an armed conflict during which at least 3,000 civilians were killed and more than 150 women were raped, with serious human rights violations by both sides.[677] Gbagbo is the first former head of state to be tried by the ICC. In December 2010, Gbagbo refused to step down when the Independent Electoral Commission and international observers proclaimed his rival, Ouattara, the winner of the 28 November 2010 presidential runoff.[678]

Côte d'Ivoire, which was not party to the Rome Statute at the time, had accepted the jurisdiction of the ICC on 18 April 2003, by a declaration made in accordance with Article 12-3 of the Rome Statute; on both 14 December 2010 and 3 May 2011, the Presidency of Côte d'Ivoire reconfirmed the country's acceptance of this jurisdiction. On 3 October 2011, the Pre-Trial Chamber judges granted the Prosecutor's request to open an investigation with respect to alleged crimes within the jurisdiction of the Court committed in Côte d'Ivoire since 28 November 2010, as well as with regard to

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[677] Human Rights Watch "The Laurent Gbagbo and Charles Blé Goudé Trial" (25-01-2016) *Human Rights Watch* <https://www.hrw.org/news/2016/01/25/laurent-gbagbo-and-charles-ble-goude-trial#Q4> (accessed 10-02-2019).

[678] Human Rights Watch "The Laurent Gbagbo and Charles Blé Goudé Trial" (25-01-2016) *Human Rights Watch*.

crimes that may be committed in the future in the context of the same situation in this country.[679] On 15 February 2013, Côte d'Ivoire ratified the Rome Statute. Gbagbo was captured by Ouattara's troops, who were being aided by UN and French forces, and sent to The Hague in November 2011.[680]

The cases of *Gbagbo* and *Ble Goude* were only joined in March 2015. However, for the purposes of this dissertation, the earlier decisions of the ICC against Mr Gbagbo are relevant in relation to his fair trial rights and will be discussed hereunder, particularly in respect of the confirmation of charges hearings, the implementation of Regulation 55 and then the events leading to the acquittal of Messrs Gbagbo and Blé Goudé. A discussion of the similarities and differences between this case and that of Mr Bemba will be woven into the discussion and form part of chapter 7 which deals with the conclusions of the dissertation.

5 7 2 Confirmation of charges

5 7 2 1 To be informed promptly and in detail of the nature, cause and content of the charge

On the 3 June 2013,[681] the Pre-Trial *C*hamber had occasion to decide on adjournment of the confirmation hearings pursuant to Article 61(7)(c)(i).[682] This was an interesting judgment as it raised issues specifically related to the role of the pre-*Trial Chamber* in confirmation of charges hearings. The chamber discussed the evidentiary threshold of "substantial grounds to believe" and stated that the standard required for the confirmation of charges is higher than the threshold required for the issuance of a

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[679] Case information sheet Situation in Cote d'Ivoire *The Prosecutor v Laurent Gbagbo and Charles Ble Goude* ICC-02/11-01/15 4 February 2019 available at:< https://www.icc-cpi.int/CaseInformationSheets/gbagbo-goudeEng.pdf (accessed 10-02-2019) 2.

[680] Times live report Ivory Coast ex-strongman Gbagbo in shock ICC acquittal 15 January 2019https://www.timeslive.co.za/news/africa/2019-01-15-ivory-coast-ex-strongman-gbagbo-in-shock-icc-acquittal/ (accessed 10-02-2019).

[681] Situation in the Republic of Cote D'ivoire in the case of *The Prosecutor v Laurent Gbagbo Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute* PTC I No.: ICC-02/11-01/11 (3 June 2013).

[682] Article 61(7)(c) Adjourn the hearing and request the Prosecutor to consider: (i) Providing further evidence or conducting further investigation with respect to a particular charge; or (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

warrant of arrest ("reasonable grounds to believe") but lower than the threshold required for the conviction of an accused ("beyond reasonable doubt").[683]

The chamber identified its role as the "gatekeeper' and elaborated on this by describing its role as follows:

> "(i) only those cases proceed to trial for which the Prosecutor has presented sufficiently compelling evidence going beyond mere theory or suspicion; (ii) the suspect is protected against wrongful prosecution; (iii) and judicial economy is ensured by distinguishing between cases that should go to trial and those that should not."[684]

This is important in terms of the developing jurisprudence of the chambers in relation to the distinction of their roles. Of particular relevance here is that the Pre-Trial Chamber in this case as opposed to Mr Bemba's case, demonstrated concern for the lack of evidence in support of the charges and was also concerned about countering wrongful prosecutions whereas in the *Bemba* decision, the Pre-Trial Chamber took an interventionist approach and claimed that the evidence suggested a "different crime" and adjourned the hearing to ensure that the prosecutor amended the charges to include Article 28, based on the chamber's intervention.

The chamber held that even though Article 61(5) of the Statute only requires the Prosecutor to support each charge with "sufficient" evidence at the confirmation hearing, the chamber stated that it has to assume that the Prosecutor has presented her strongest possible case based on a largely completed investigation.[685]

5 7 2 2 The right to be tried without undue delay

The chamber relied heavily on the findings of the Appeals Chamber in *Mbarushimana* and highlighted, "the investigation should largely be completed at the stage of the confirmation of charges hearing. Most of the evidence should, therefore, be available, and it is up to the Prosecutor to submit this evidence to the Pre-Trial Chamber." The chamber was of the view that this approach would ensure continuity in the presentation of the case and that it would safeguard the rights of the Defence

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[683] *Gbagbo Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute* para 17.

[684] Para 18.

[685] Para 25.

who would then not be presented with a wholly different evidentiary case at trial and that it will ensure that the commencement of the trial is not unduly delayed which the chamber held conforms with the right of the Defence to be tried without undue delay pursuant to Article 67(l)(c) of the Statute.[686]

The crux of the chamber's position was that it took issue with the prosecutor's over-reliance on hearsay evidence and the chamber found that the prosecutor should avoid using hearsay evidence, particularly when it relates to anonymous statements.[687] The chamber, therefore, adjourned the hearing and based its decision on the defence's right to be informed in detail of the content of the charges and ordered the prosecutor to submit a new Amended DCC setting out in detail the facts of the case, including all incidents forming the contextual elements of crimes against humanity. The prosecutor was also instructed to submit a new list of evidence setting out the entirety of the evidence on which she intends to rely for the purposes of the confirmation of charges and an updated consolidated Elements-Based Chart covering the entirety of the charges.[688]

5 7 2 3 Dissenting opinion Silvia Fernández de Gurmendi J

In the dissenting opinion written by Silvia Fernández de Gurmendi J, she disagreed with the chamber's interpretation of its role and also the amount of evidence which the prosecutor should provide at the confirmation hearing. The judge was of the view that it was not for the Chamber to speculate on whether it has received all the evidence or the "strongest possible" evidence, but solely to assess whether it has sufficient evidence to determine 'substantial grounds to believe' that the person has committed the crimes charged.[689] In respect of the chamber's reference to its 'gatekeeper' role, the judge's view of the Pre-Trial Chamber was the limited purpose of the confirmation hearing as the judge was of the view that the chamber's expansive interpretation of its purpose could potentially infringe on the procedural system of the court and may create duplication in proceedings.[690]

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[686] Para 25.
[687] Para 28.
[688] Para 45.
[689] Dissenting Opinion para 21.
[690] Para 26.

I am inclined to agree with this view. On the one hand the Pre-Trial Chamber framed its argument based on the insufficiency of evidence at the Pre-Trial phase but on the other hand, the position the chamber took by stating that "it has to assume that the Prosecutor has presented her strongest possible case based on a largely completed investigation",[691] presupposes a different standard being applied by the chamber, bearing in mind that the chamber is confined to the 'substantial grounds to believe" standard and not the "beyond reasonable doubt" standard.

The judge further clarified that in her opinion, a clear line, based on the individual charges as presented by the Prosecutor, must indeed be drawn between the facts and circumstances which are "described in the charges" and the facts and circumstances that are not "described in the charges", as only the former must be proven to the requisite threshold of substantial grounds to believe.[692]

The judge was very clear about the distinction between the role of the prosecutor and that of the Pre-Trial Chamber. She indicated that in her view under Article 61(7)(c)(ii) of the Statute the Chamber may request the Prosecutor to consider amending the charges but only in relation to the legal characterisation of the facts. The judge made it clear that the Statute does not allow the Chamber to involve itself in the Prosecutor's selection of which facts to charge and it is for the Prosecutor and not for the Chamber to select her case and its factual parameters. The judge stated emphatically that:

> "The Pre-Trial Chamber is not an investigative chamber and does not have the mandate to direct the investigations of the Prosecutor."[693]

It is important to note at such an early stage of proceedings, the chamber was already questioning the prosecutor's evidence to substantiate the charges and the PTC was correct in its assessment of its role to ensure that suspects are not subject to wrongful convictions, however, the basis of the standard "substantial grounds to believe" was infringed by the Pre-Trial Chambers in *Bemba* and in *Gbagbo*. In both

[691] See the text to n 114 above.
[692] Dissenting Opinion para 34.
[693] Para 51.

cases, the chamber intervened and requested the Prosecutor to amend the charges, although this duty of the Trial Chamber is covered in terms of Article 61(7)(c).

On 3 December 2013,[694] the Appeals Chamber upheld the Pre-Trial Chamber decision and thereafter the prosecutor amended the DCC in line with the judgments. The confirmation hearing took place on 12 June 2014.

5 7 2 4 Final Confirmation of Charges decision

At the confirmation hearing held on 12 June 2014, the Pre-Trial Chamber had to decide whether or not to confirm the charges as set out by the prosecutor in the DCC in which the prosecutor charged Mr Gbagbo under alternate forms of liability; "alternately, Article 25(3)(a) (indirect co-perpetration), 25(3)(b) (order, solicit and induce) and 25(3)(d), as well as Article 28(a) and 28(b) of the Statute.[695]

On the matter of alternative charging, the chamber was of the view that:

> "when alternative legal characterisations of the same facts proposed by the Prosecutor are satisfactorily established by the evidence, it is appropriate that the charges be confirmed with the various available alternatives, in order for the Trial Chamber to determine whether any of those legal characterisations is established to the applicable standard of proof at trial."[696]

The chamber found that confirming all applicable alternative legal characterisations on the basis of the same facts is a desirable approach as it may reduce future delays at trial, and provides early notice to the defence of the different legal characterisations that may be considered by the trial judges.[697] The chamber, however, refused to confirm Mr Gbagbo's liability under Article 28 as it was of the view that there was

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[694] Situation in the Republic of Cote D'ivoire in the case of *The Prosecutor v Laurent Koudou Gbagbo Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute"* No. ICC-02/11-01/11 OA 5 Appeals Chamber (16 December 2013).

[695] Situation in the Republic of Côte D'ivoire in the case of *The Prosecutor v Laurent Gbagbo* Decision on the confirmation of charges against Laurent Gbagbo Pre-Trial Chamber I No.: ICC-02/11-01/11 (12 June 2014) para 226.

[696] Para 227.

[697] Para 228.

insufficient evidence to support his liability under Article 28.[698] This is interesting as in *Bemba*, the ICC arrived at a different conclusion concerning cumulative charging. The Trial Chamber held that:

> "the Chamber intended to make it clear that the prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence. The Chamber considers that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other."[699]

In *Gbagbo* the ICC allowed cumulative charging claiming that this manner of charging supported the fair trial rights of the defendant whereas in *Bemba* the court refused to allow cumulative charging claiming that it was in contravention of the accused's fair trial rights. However, in *Bemba*, the court found that Regulation 55 was still available to charge the accused at a later stage.

Cassesse considers this to be contrary as it is difficult to see how cumulative charging could be viewed as detrimental to the rights of the accused, when implementing Regulation 55 at any stage of the proceedings would not be detrimental to the fair trial rights of the accused.[700] Cassesse expresses the view that often cumulative charging has become acceptable for international crimes due to the complexity and difficulty of investigations.[701]

Irrespective of the difficulties involved in investigations of international crimes, the preferred approach to ensure the adequate protection of the rights of the accused would be to avoid cumulative charging, as well as the implementation of Regulation 55.

In Van den Wyngaert J's dissent on this decision, she made it clear that she did not agree with the chamber that the charges as formulated in the DCC under Article

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[698] Para 263.

[699] Situation in the Central African Republic the case of The Prosecutor *v* Jean-Pierre Bemba Gombo *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo* Pre Trial Chamber II No.: ICC-01/05-01/08 (15 June 2009) para 202.

[700] Cassesse et al *Cassese's International Criminal Law* 370.

[701] 370.

25(3)(a), (b) were sufficiently strong for the case to go to trial,[702] she also found that there was insufficient evidence and that the hearsay evidence of anonymous witnesses was still being relied upon.[703] The insufficiency and unreliability of evidence, therefore still remained after the initial adjournment and amendment of the DCC and yet the charges were still confirmed by the Pre-Trial Chamber, bearing in mind that in terms of Article 61, the chamber could have declined to confirm the charges, which it chose not to do.

The Prosecutor submitted a request to join the two cases on 22 December 2014, citing the similarity in facts between the two cases and claiming that joining the cases would minimise the impact of on witnesses, avoid duplication of evidence, promote judicial economy, and create consistent rulings regarding the evidence and issues. The cases of *Gbagbo and Ble Goude* were then joined on 11 March 2015.[704]

5 8 Regulation 55

5 8 1 The right to be informed promptly and in detail of the nature, cause and content of the charge and the right to be tried without undue delay

Bearing in mind that at the confirmation hearing the Pre-Trial Chamber refused to confirm charges against the accused under Article 28, on 24 April 2015,[705] the Prosecutor requested that the Chamber give notice to the parties and participants that the legal characterisation of the facts may be subject to change to include liability under Article 28(a) and (b) of the Rome Statute.

Of particular interest is that the prosecutor framed the request in such a way as to imply that the implementation of Regulation 55 underscores Mr Gbagbo's fair trial rights. The prosecutor emphasised that:

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[702] Dissenting Opinion Van den Wyngaert para 12.

[703] Para 2.

[704] Situation in the Republic of Côte D'ivoire in the cases of *The Prosecutor v Laurent Gbagbo and The Prosecutor v Charles Blé Goudé* Case No: ICC-02/11-02/11 Trial Chamber I (11 March 2015).

[705] Situation in the Republic of Côte D'ivoire in the case of the Prosecutor *v* Laurent Gbagbo and Charles Blé Goudé *Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court* No.: ICC-02/11-01/15 (19 August 2015) para 2.

> "notice before trial ensures that Mr Gbagbo (i) is informed in detail of the charges; (ii) has adequate time to prepare his defence; and (iii) is tried without undue delay."[706]

The defence raised very pertinent arguments against the implementation of Regulation 55:

> "that the Chamber cannot reintroduce charges expressly rejected by the Pre-Trial Chamber: doing so would render the confirmation phase redundant and deny the accused notice of the charges; secondly that, in all other cases, notice under Regulation 55 of the Regulations was only given at trial and addressed modes of liability not considered during the confirmation phase and lastly that the Pre-Trial Chamber chose particular facts to sustain the confirmed charges and these facts only hold meaning in light of a particular charge."[707]

5 8 2 To have adequate time and facilities for the preparation of the defence

The chamber interpreted the meaning of "trial" and found that "in this context and the special circumstances of this case, the term 'trial' is not limited to the hearing of evidence, but also extends to the phase after a trial chamber is seized of a case and before opening statements."[708] The Trial Chamber upheld the prosecution request for the implementation of Regulation 55 and the re-characterisation of the charges under Article 28 (command responsibility) was allowed. The chamber also denied the defence the opportunity to make submissions on the re-characterisation and decided that this could be done "after the hearing of evidence and at an appropriate stage of the proceedings."[709]

This decision is troubling considering the specific function of the confirmation of charges hearing and the different and varied interpretations of the use of Regulation 55 at the ICC. This decision, like the decisions in *Bemba*, reflects serious problems of interpretation of the Statute in respect of the functions of the Pre-Trial Chamber, the purpose of the confirmation of charges hearing and the implementation of Regulation 55 which is contrary to the fair trial rights of the accused.

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[706] Para 4.
[707] Para 5.
[708] Para 11.
[709] Para 16.

On appeal, the decision of the Trial Chamber to re-characterise the facts and circumstances under Article 28 was upheld. The Appeals Chamber[710] made the following key findings:

I. While the Appeals Chamber is not called upon to consider whether the term "trial" has the same interpretation when used in other contexts throughout the legal framework of the Court, the ordinary meaning of the phrase "at any time during the trial" in the context of Regulation 55, does not exclude the stage after a Trial Chamber is seized of a case and before opening statements.
II. There is no legal impediment to a Trial Chamber re-characterising facts and circumstances to include a mode of liability that was considered, but not confirmed by the Pre-Trial Chamber, so long as the facts and circumstances that could potentially be re-characterised were confirmed by that Pre-Trial Chamber.

Even though the Appeals Chamber upheld the finding of the Trial Chamber to implement Regulation 55 and to change the mode of liability to Article 28, it must be borne in mind that in Van den Wyngaert J's dissent (previously discussed under confirmation of charges), she raised the limited amount of evidence to support this mode of liability and the fact that most of the evidence which the prosecutor relied on was hearsay evidence. Despite the clear lack of evidence and the fact that the Pre-Trial Chamber declined to confirm the charges based on Article 28, the Chamber decided to re-characterise the mode of liability.

In addition, the argument raised above remains, that despite the prosecutor and Appeals Chamber arguing that giving the notice as early as possible in fact addressed the accused's fair trial right to be informed timeously of the charges, Mr Gbagbo was placed at a disadvantage in that his defence strategy would have to be amended to accommodate a different mode of liability. Even more interesting is how this judgment nullifies the decision of the Pre-Trial Chamber's confirmation decision, in which the Pre-Trial Chamber specifically declined to confirm the charges based on Article 28

[710] Situation in the Republic of Côte d'ivoire in the case of The Prosecutor *v* Laurent Gbagbo and Charles Blé Goudé *Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court"* The Appeals Chamber No. ICC-02/11-01/15 OA 7 (18 December 2015) 3.

liability largely due to insufficient evidence to support this form of liability. This decision seriously puts into question the role of the confirmation hearing and in particular, the accused's right to legal certainty.

5 9 Victim participation *Ghabgo* and *Ble Goude*

On 17 January 2012, Silvia Fernández de Gurmendi J acting as the Single Judge convened a meeting to assess with the VPRS and other representatives of the Registry the victims' application process and to explore different options, including, in particular, the possibility of applying a collective approach to victims' applications for participation in the Case.[711] In light of the above, the Registry proposed a particular approach to victims' participation to be implemented in three main phases:

(i) the production of an initial mapping report identifying the main communities of victims affected by the alleged crimes, their representatives and civil society organisations, as well as security considerations;
(ii) the subsequent collection and processing of victims' applications for participation, for which the Registry requests that a "reasonable final deadline" is set; and
(iii) the organisation of the common legal representation of the victims, suggesting that the Chamber "initiates this process at the earliest opportunity.[712]

The Single Judge agreed with the mapping approach but stated that the approach should be used for the following:

(i) identify main communities or groups of victims;
(ii) identify potential persons that could act on behalf of multiple individual victims, with their consent, in accordance with Rule 89(3) of the Rules;

[711] *The Prosecutor v. Laurent Gbagbo*, Decision on Issues Related to the Victims' Application Process, ICC-02/11-01/11 (Pre-Trial Chamber III, 6 February 2012 para 1.
[712] Para 3.

(iii) encourage potential individual applicants to join with others and to that effect consent to a single application to be made on their behalf in accordance with Rule 89(3) of the Rules.[713]

Furthermore, the Single Judge considered the mapping process should also provide an opportunity to initiate the organisation of legal representation. The judge indicated that it should be used to assess whether the applicants could be further grouped for the purposes of common legal representation in accordance with Rule 90 of the Rules and to start identifying potential common legal representation.[714]

On 11 June 2014, the Single Judge, issued the *"Decision on victims' participation in the pre-trial proceedings and related issues"* in the Blé Goudé case, wherein she admitted 199 victims to participate in the proceedings, appointed counsel from the OPCV as common legal representative and ruled on the set of procedural rights accorded to the participating victims in the present case.[715]

On 1 August 2014, the Single Judge admitted a further 272 victims to participate in the proceedings, represented by the same common legal representative and terminated the status as victim participating in the case of one applicant.[716]

In March 2015, the chamber reflected on the fact that the Registry had estimated the total number of victims would not exceed 700.[717] The chamber in this matter decided to adopt option 1 advanced by the Registry, which followed the system implemented in the case of Bosco Ntaganda (the case discussed in chapter 6 hereof).[718]

This system requires the Registry to:

(i) receive applications for participation;

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[713] Para 10.

[714] Para 11.

[715] *The Prosecutor v. Charles Blé Goudé* Pre-Trial Chamber Decision on victims' participation in the pre-trial proceedingsand related issues ICC-02/11-02/11-83 Pre-trial Chamber I.

[716] *The Prosecutor v. Charles Blé Goudé* Second Decision on victims' participation in the pre-trial proceedings and related issues ICC-02/11-02/11 Pre-trial Chamber I.

[717] *The Prosecutor v Laurent Gbagbo* Decision on victim participation No.: ICC-02/11-01/11 Date: 6 March 2015 Trial Chamber para 49.

[718] Para 50

(ii) prepare redacted versions of the Simplified Form; and

(iii) transmit them, in their redacted or unredacted version, to the Chamber and the parties, together with a Report under Regulation 86(6) of the Regulations.

Thereafter, the parties may submit their views in accordance with Rule 89(1) of the Rules. Finally, the Chamber will consider the applications individually and grant victim status to qualifying applicants.[719]

These decisions represent an initiative of the court to effectively address the volume of victim applications in a systematic way and to ensure that they have adequate representation during the course of the trial. Essentially, this case implemented a collective approach to victim participation which has been criticised, in this regard Moffett is of the view that this approach could dilute the role of victims in proceedings and transform their participation into a 'purely symbolic' form of participation thereby negating their real experiences.[720]

5 10 Orders for the continuance of proceedings

It should be noted that the continual lack of evidence and the weak prosecutorial case eventually resulted in Mr Gbagbo's acquittal in January 2019. The events leading up to the acquittal are discussed below.

The trial commenced on 28 January 2016, bearing in mind that Mr Gbagbo was in custody since 2011. In February 2018,[721] however, the Trial Chamber issued an order on the continuance of the trial. This order came as a result of a request from the defence that the prosecutor provide an amended pre-trial brief because a number of witnesses had withdrawn since the commencement of the trial.[722] The Trial Chamber therefore ordered the prosecutor to submit an amended pre-trial brief containing all the evidentiary items submitted and the testimonies linked to each of the charges as

[719] Option 1 is reflected in para 12 of the decision.

[720] Moffett (2015) *J Int'l Crim Just* 291.

[721] Situation in the Republic of Côte Dtvoire in the cases of *The Prosecutor v Laurent Gbagbo* and *The Prosecutor v Charles Blé Goudé* Order on the further conduct of the proceedings No.: ICC-02/11-01/15 (9 February 2018).

[722] Para10.

well as how she thinks the evidence supports each of the elements of the different crime and forms of liability charged.[723]

On 19 March 2018, the prosecutor submitted the amended mid-trial brief stating that she only included relevant evidence, only addressed matters of importance and reserved her right to make further submissions in the event of the defence raising challenges to the sufficiency of evidence provided.[724] On 23 April 2018, the defence filed their observations claiming that the prosecutor had not provided sufficient evidence and requested an acquittal of all charges.[725]

On 4 June 2018, the Trial Chamber rendered a second order on the continuance of proceedings and was of the view that the chamber had a duty to ensure the fairness and expeditiousness of proceedings and that the chamber was therefore required to "devise procedural steps to contribute to a shorter and more focused trial, thereby providing a means to achieve greater judicial economy and efficiency in a manner which promotes the proper administration of justice and the rights of an accused."[726]

The chamber stated as follows:

> "Accordingly, the Chamber believes that, at this stage, the most appropriate and efficient way to proceed in light of its statutory duties is to authorise the defence to make concise and focused submissions on the specific factual issues for which, in their view, the evidence presented is insufficient to sustain a conviction and in respect of which, accordingly, a full or partial judgment of acquittal would be warranted. More specifically, the defence are invited to explain why there is insufficient evidence which could reasonably support a conviction. In order not to defeat their purpose, and in light of the stage reached by these proceedings, such submissions must be filed and resolved expeditiously."[727]

The Trial Chamber also held that after receiving the written submissions, it would hold public hearings to allow parties to respond to specific questions.[728]

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[723] *Order on the further conduct of the proceedings* para 10.

[724] Situation in the Republic of Côte Dtvoire in the cases of *The Prosecutor v Laurent Gbagbo* and *The Prosecutor v Charles Blé Goudé* Second Order on the further conduct of the proceedings No.: ICC-02/11-01/15 Trial Chamber I (4 June 2018) para 3.

[725] Para 4.

[726] Para 9.

[727] Para 10.

[728] Para 12.

5 10 1 No Case to Answer – Presumption of innocence and proof beyond reasonable doubt

On 28 September 2018, the defence filed a no case to answer motion which means that the prosecutor has not proven its case beyond reasonable doubt and the defence seeks an acquittal from the Trial Chamber. One may well ask what the 'no case to answer' motion entails as it is not specified in the Rome Statute. In the *Ruto* case at the ICC, Trial Chamber V(A) set out quite clearly what this motion is about as well as the standard which the Trial Chamber should apply in determining whether there is 'no case to answer'. For the purposes of this chapter, it is important to understand the court's jurisprudence on this issue. In *Ruto*,[729] therefore, the court found that the primary rationale underpinning a no case to answer motion is the principle that an accused should not be called to answer a charge when the evidence presented by the prosecution is insufficient for the defence to present a case.[730] The ICC emphasised that their reasoning is in line with the accused's right to be presumed innocent and to a fair and speedy trial in terms of Article 66(1) and 67(1) of the Statute.[731] The Trial Chamber clarified this motion further by noting:

> "the Statute places the onus on the Prosecution to prove the guilt of an accused. This is consistent with the underlying premise of a 'no case to answer' motion, which is appropriately brought in cases where the Prosecution has failed to fulfil that burden by not having presented evidence for the elements that would be required to be proven in order to support a conviction."[732]

The Trial Chamber also clarified the different evidentiary standards applicable to the confirmation of charges hearing and the trial by stating:

> "The lower evidentiary standard, limited evidentiary scope and distinct evidentiary rules applicable at the confirmation of charges stage do not preclude a subsequent consideration

[729] Situation in the Republic of Kenya in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)* No.: ICC-01/09-01/11 (3 June 2014) Trial Chamber V(A).
[730] Para 12.
[731] Para 12.
[732] Para 13.

> of the evidence actually presented at trial by the Prosecution in light of the requirements for conviction of an accused. Furthermore, the nature and content of the evidence may change between the confirmation hearing and completion of the Prosecution's presentation of evidence at trial. In addition, the Prosecution need not introduce the same evidence at trial as it did for confirmation."[733]

In respect of the fact that this motion is not included in the Statute the chamber held that Article 64(3)(a) of the Statute sets out that the Chamber shall:

> "[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings."

The Chamber was also of the view that it could entertain "no case to answer" motions pursuant to its power to "rule on any other relevant matter", as contained in Article 64(6)(f) of the Statute.[734] The Trial Chamber also referred to Rule 134 which it claimed conferred broad powers on the Chamber to rule on "any issue concerning the conduct of the proceedings" and on "issues that arise during the course of the trial". The chamber further emphasised that by considering a "no case to answer motion" the chamber would be complying with its general obligation under Article 64(2) to ensure that the trial is fair and expeditious.[735]

In respect of the elements required to be proven in order to sustain a conviction before the Court (i) both the legal and factual components of the alleged crime and (ii) the individual criminal responsibility of the accused must be established. The court found, therefore, that evidence which could support both of those aspects must be present.[736] The chamber concluded that the appropriate test to be applied is whether there is evidence on which a reasonable chamber could convict. To this end, the chamber stated that this would be done considering each count in the DCC separately but "for each count, it is only necessary to satisfy the test in respect of one mode of liability, as pleaded or for which a Regulation 55 of the Regulations notice has been

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[733] Ruto *Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)* Para 14.

[734] Para 15.

[735] Para 16.

[736] *Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)* para 26.

issued by the Chamber. The Chamber will not consider questions of reliability or credibility relating to the evidence, save where the evidence in question is incapable of belief by any reasonable Trial Chamber."[737]

This decision set the standard for no case to answer motions at the ICC, the Trial Chamber also referred to the fact that no case to answer motions have been dealt with at the tribunals even though it is not specifically contained in the Rome Statute. Even though this standard for "no case to answer" motions was set out and followed in Gbagbo's trial, the same standard was not followed in *Ntaganda* which will be evidenced in Chapter 6 hereof.

5 11 Mr Gbagbo and Blé Goudé's acquittal

On 23 July 2018, Mr Gbagbo filed a motion for acquittal claiming that the evidence presented by the prosecutor failed to prove the charges beyond reasonable doubt. On 3 August 2018, the defence for Mr Blé Goudé filed a similar motion, both motions effectively amounted to a no case to answer motion which the court had to deliberate and decide upon. After the court conducted hearings on these motions, the court issued an oral decision on 15 January 2019 stating that it would issue a full reasoned judgment in due course. *The oral judgment acquitted both the accused persons and Carbuccia J issued a dissenting opinion*.

The majority found that the Prosecutor had failed to submit sufficient evidence to demonstrate the responsibility of Mr Gbagbo and Mr Blé Goudé for the incidents under the Chamber's scrutiny. In particular, having thoroughly analysed the evidence, the Chamber concluded by majority that the Prosecutor had failed to demonstrate several core constitutive elements of the crimes as charged, including the existence of a "common plan" to keep Mr Gbagbo in power, which included the commission of crimes against civilians "pursuant to or in furtherance of a State or organisational policy"; and the existence of patterns of violence from which it could be inferred that there was a "policy to attack a civilian population." Furthermore, the Chamber concluded, by majority, that the Prosecutor failed to demonstrate that public speeches by Mr Gbagbo or Mr Blé Goudé constituted ordering, soliciting or inducing the alleged crimes. The

[737] Para 32.

Chamber decided that, accordingly, there is no need for the defence to submit further evidence.[738]

5 11 1 Dissenting opinion of Carbuccia J to the Oral Decision of 15 January 2019

Carbuccia J issued a dissenting opinion to the oral decision of the majority of the court and disagreed with the majority on two points: first, delivering a decision without any reasoning, and secondly, on the majority's conclusion to grant the Defence motions for judgment of acquittal on the basis that there is no evidence capable to sustain a conviction for either one of the two accused in this case.[739]

The judge argued that a reasoned judgment was essential to the accused's right to a fair trial and allows parties to understand the basis of any subsequent right to appeal and that any undue delay in reaching such a decision impairs the accused's fair trial rights.[740]

The judge also raised the issue of the length of time for delivering judgment and she cited Rule 142(1) of the Rules which provides that the Chamber's "pronouncement shall be made within a reasonable period of time after the Trial Chamber has retired to deliberate." [741] The judge argued that the timing of the judgment is important for the parties to file their appeals[742] and also that it safeguards judicial impartiality which prevents judges from taking hasty decisions before fully analysing the facts and assessing the evidence.[743] In her argument regarding the expeditiousness of proceedings, the judge was of the view that the right to a fair trial applied to both the defence and the prosecutor.[744]

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[738] Press Release: ICC "ICC Trial Chamber I acquits Laurent Gbagbo and Charles Blé Goudé from all charges" (15-01-2019) *ICC* <https://www.icc-cpi.int/Pages/item.aspx?name=pr1427> (accessed 10-02-2019).

[739] Situation in the Republic of Côte D'ivoire in the cases of The Prosecutor *v* Laurent Gbagbo and The Prosecutor *v* Charles Blé Goudé *Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019* No.: ICC-02/11-01/15 (15 January 2019) para 1.

[740] Para 22.

[741] Para 28.

[742] Para 31.

[743] Para 32.

[744] Para 35.

Respectfully, this is not a view supported in this dissertation as expressed in the introductory chapters. The view supported and argued in this dissertation is that the accused and victims have a right to a fair trial; the same rights are not afforded to the prosecutor under the Rome Statute.

The judge also held the view that there was evidence upon which a reasonable Trial Chamber could convict the accused.[745] The judge argued that the Chamber must analyse the evidence bearing in mind the nature and purpose of this "halfway stage", which will not conclude with a determination of the truth or a decision based on a "beyond reasonable doubt" finding[746] standard. She also criticised the chamber for taking long to arrive at its decision having taken over six months to arrive at its decision which once again she argued impaired the expeditiousness of proceedings.[747]

In respect of the standard to be applied in determining no case to answer motions, the judge referred to the ICTY Appeals Chamber in the case of *The Prosecutor v Goran Jelisic*:[748]

> "The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt."

The judge concluded that she was not convinced that the Trial Chamber complied with their duty to consider the relevance, probative value and potential prejudice to the accused of each item of evidence. She argued that this was required to reach a conclusion of beyond reasonable doubt.[749]

The judge's standard for a no case to answer motion is therefore different to the standard adopted by *Ruto*. The judge relies on the *Jelic* standard which is:

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[745] Para 38.
[746] Para 41.
[747] Para 43.
[748] Para 44.
[749] Para 45.

> "the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could"

as opposed to the *Ruto* standard:

> "The lower evidentiary standard, limited evidentiary scope and distinct evidentiary rules applicable at the confirmation of charges stage do not preclude a subsequent consideration of the evidence actually presented at trial by the Prosecution in light of the requirements for conviction of an accused. Furthermore, the nature and content of the evidence may change between the confirmation hearing and completion of the Prosecution's presentation of evidence at trial. In addition, the Prosecution need not introduce the same evidence at trial as it did for confirmation."[750]

The *Ruto* standard specifically refers to 'the evidence actually presented at trial' which is the beyond reasonable doubt standard, whereas the judge argues that it is not based on the standard beyond reasonable doubt and that the Trial Chamber erred in its application of the relevant standard. What is more concerning about the dissenting opinion is the judge's constant reference to the fair trial rights of the accused, although she clearly refers to the fair trial rights as applying to both the accused and the prosecutor which is difficult to understand given that an acquittal based on insufficient evidence which became apparent at the confirmation of charges phase of proceedings is in favour of the accused's rights.

The more worrying aspect of this judgment is the fact that on the one hand the judge argues that the chamber erred specifically in relation to the length of time it took between the no case to answer motions and its final judgment, when the prosecutor's case was flawed in 2014 already at the pre-trial stage of proceedings. At the time of completion of this dissertation, the ICC had not issued its final written decision.

5 12 Reflection on the impact of the case on the rights of victims and the international community

Similarly, to the *Bemba* acquittal, the acquittal and subsequent release of Mr Gbagbo has attracted much media attention, particularly in respect of the

[750] Para 14.

disappointment of victims who had been promised justice and received none due to the acquittals of the leaders who had been accused of gross human rights violations.

In November 2010, following a contentious presidential election, Alassane Ouattara, a former senior International Monetary Fund official, became the president of Côte d l'Voire. A few weeks later, the Ivoirian Constitutional Council overturned the Commission's verdict and named Ouattara's opponent, former President Laurent Gbagbo, the victor. Soon thereafter, violence erupted between Ouattara's and Gbagbo's supporters, leaving more than three thousand people dead and a million displaced. In Abidjan, Gbagbo's forces abducted political opponents from their homes, torturing and killing them. Others were burned alive, beaten to death with bricks, or simply executed.[751]

By late December 2010, Navi Pillay, the UN High Commissioner for Human Rights, had found *"growing evidence of massive violations of human rights" in Côte d'Ivoire*.[752]

It is important to note, that in 2020 the Ivory Coast is once again facing elections and the acquittal makes one contemplate whether or not the same levels of violence will not be reignited.

In respect of the failings of the case at the ICC, the prosecutor has also received much criticism for the paucity of evidence in relation to prosecuting high-profile accused persons. In this regard, Batros argues, in each of the high-profile cases that have been dismissed, the prosecution had started at the top with a case that targeted the highest political or military leader. Such cases are challenging, both in terms of the "linkage" to establish the individual criminal responsibility of senior leaders for specific crimes, and the political opposition that the cases generate. Focusing all of the investigative and prosecutorial resources on a single high-profile case is a high-risk strategy, as the fallout from the recent cases illustrates. Trying to distil the complexity

[751] Human Rights Centre "The Victim's Court? A Study of 622 Victim Participants at the International Criminal Court Uganda, Democratic Republic of Congo, Kenya and Cote D'Ivoire" (2015) *Berkeley* 60 <https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_full_rev_b-4.pdf> (accessed 29-11-2019).

[752] Human Rights Centre "The Victim's Court? A Study of 622 Victim Participants at the International Criminal Court Uganda, Democratic Republic of Congo, Kenya and Cote D'Ivoire" (2015) *Berkeley* 60.

of mass atrocity situations into a single case can also give the impression, likely unwarranted, of a superficial investigation or understanding.[753]

The argument is that the prosecutor should develop an effective prosecutorial strategy aimed at securing convictions, taking into account the needs and interests of victims, this may not entail necessarily prosecuting those high in power but it may be more satisfactory for victims to see at least mid-level leaders being prosecuted for victims to receive some form of justice.

Clearly, the impact of this acquittal would have left victims feeling particular disappointment, especially in light of a study conducted in 2015 of victim's experiences and expectations of the ICC.

The FIDH made the following statement following the acquittal announcement:

> "In October and November 2018, hearings were held by the Chamber for the parties to present their arguments. Victims, through their legal representatives, expressed concern over the conduct of proceedings, and regretted their inability to put forward their views in relation to the assessment of evidence and any eventual withdrawal of any charge given its impact on their personal interests. Without convictions, victims participating in the case will no longer expect reparations, and the assistance programme announced by the Trust Fund for Victims (TFV) for Côte d'Ivoire is not yet in place."[754]

As seen above, the victims have a deep desire for justice to be done and also to ensure that the accused pays the price for the crimes committed against them.

5 13 Conclusion

This chapter demonstrated that in both the *Bemba* as well as in *Gbagbo and Ble Goude* decisions, that the Pre-Trial Chamber must play a more effective and efficient role in ensuring that only the cases for which the prosecutor has reliable evidence

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[753] B Batros "Just Security? The ICC acquittal of Gbagbo: what next for crimes against humanity? (18-01-2019) *Just Security* <https://www.justsecurity.org/62295/icc-acquittal-gbagbo-crimes-humanity/> (accessed 29-11-2019).

[754] FIDH "ICC/Côte d'Ivoire: Towards total impunity for 2010-2011 crimes after acquittal of Laurent Gbagbo and Charles Blé Goudé" (15-01-2019) *FIDH* <https://www.fidh.org/en/issues/international-justice/icc-cote-d-ivoire-towards-total-impunity-for-2010-2011-crimes-after> (accessed 29-11-2019).

proceeds to trial, if it fails to do so the confirmation of charges phase in the ICC proceedings becomes null and void and should then be removed.

The chapter demonstrated that the fair trial rights of specificity of charges at the pre-trial stage as well as through the implementation of Regulation 55 has been infringed. In addition, the principle of legal certainty and the detrimental impact of the length of proceedings on the accused had been violated. The accused's right to be presumed innocent and for the prosecutor to prove their guilt beyond reasonable doubt, was also found to be wanting.

The next chapter focuses on the fair trial rights of Mr Ntaganda which was the first trial at the ICC to secure a conviction on the basis of war crimes of rape and sexual slavery. The chapter discusses the relationship between international humanitarian law and international criminal law, the principle of legal certainty and the manner in which the court applied these principles to Mr Ntaganda's case. The chapter further demonstrates the lack of consistency in the court's interpretation and reasoning in relation to "no case to answer" motions. The chapter reviews the decisions relating to victim participation.

CHAPTER 6: THE TERMINATOR (BOSCO NTAGANDA)

6 1 Introduction

The previous chapter discussed the fair trial rights and the acquittals of Mr Bemba, Ghabgo and Blé Goudé and the impact that their acquittals had on the rights of victims. In particular, the chapter raised some important aspects in relation to the fair trial rights of the accused in terms of their right to know the charges against them, the importance of the confirmation of charges hearing and the paucity of evidence which the prosecutor had to ensure a conviction. The chapter also reviewed command responsibility, personal culpability and fair labelling of the accused persons.

This chapter will focus on the Appeal Judgement of 15 June 2017 regarding Counts 6 and 9: Rape and Sexual Slavery of Child Soldiers as War Crimes (Article 8(2)(e)(vi) of the Statute). The chapter will explore the relevant court decisions pertaining to these charges in relation to the interplay between international criminal law and international humanitarian law ("IHL") and the fair trial concerns. Of importance in this chapter is the court's decision on the participation of victims and their legal representatives, the principle of legal certainty and the court's different view in Mr Ntaganda's case as opposed to Mr Bemba and Gbagbo on "no case to answer" motions as well as the impact of the Article 70 proceedings on Mr Ntaganda's fair trial rights. At the time of writing this chapter, the closing arguments in the trial had been concluded but the court had not issued its final decision.

6 2 Introduction and background to the *Ntaganda* case

Mr Ntaganda is alleged to be the former Deputy Chief of the General Staff of the Patriotic Forces for the Liberation of Congo ("FPLC"), the armed wing of the UPC. Known as "the Terminator" or "Warrior" among his troops for his tendency to lead from the front and directly participate in military operations. Mr Ntaganda faces charges of multiple war crimes and crimes against humanity, including sexual violence against civilians, acts of rape, and sexual slavery against child soldiers.

The DRC ratified the Rome Statute, the founding instrument of the ICC, on 11 April 2002.[755] On 3 March 2004, the Government of the DRC referred to the Court the

[755] Case Information Sheet Situation in the Democratic Republic of the Congo *The Prosecutor v Bosco Ntaganda* ICC-01/04-02/06 ICC-PIDS-CIS-DRC-02-012/18_Eng Updated: October 2018 <https://www.icc-cpi.int/CaseInformationSheets/NtagandaEng.pdf> 1.

situation (the events falling under the Court's jurisdiction) in its territory since the entry into force of the Rome Statute on 1 July 2002. After a preliminary analysis, the Prosecutor initiated an investigation on 21 June 2004. On 22 March 2013, Bosco Ntaganda surrendered himself voluntarily and is now in the ICC's custody. His initial appearance hearing took place before Pre-Trial Chamber II on 26 March 2013.[756] The crimes were allegedly committed during 2002 and 2003 while Ntaganda was the deputy chief of staff of the FPLC. At the time, the FPLC, which was the armed wing of the UPC headed by Thomas Lubanga, was among various militia involved in an ethnic conflict in Ituri district of the DRC. 2123 victims have been granted the right to participate in the *Ntaganda* trial.[757]

6 3 Rape and sexual slavery as war crimes

The discussion hereunder reviews the decisions of the Pre-Trial Chamber, the Trial Chamber and finally the Appeals Chamber decision on the matter of whether Mr Ntaganda could be charged for Rape and Sexual Slavery as a war crime. These decisions are important particularly in respect to Mr Ntaganda's right to the principle of legality.

6 3 1 Pre-Trial Chamber decision

In the Pre-Trial Chamber, the cause of disagreement centred around counts 6 and 9: Rape and Sexual Slavery of Child Soldiers as War Crimes (Article 8(2)(e)(vi) of the Statute). The Prosecutor charged Mr Ntaganda with the rape and sexual slavery of "UPC/FPLC child soldiers under the age of 15.[758] Mr Ntaganda argued that the crimes of rape and sexual slavery against these persons are not foreseen by the Statute, as IHL does not protect persons taking part in hostilities from crimes committed by other persons taking part in hostilities on the same side of the armed conflict.[759]

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[757] 2.

[758] *The Prosecutor v Ntaganda* (Pre-Trial Chamber II) Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda Case No ICC-01/04-02/06-309 09-06-2014 28/98 EC PT, Judgement 9 June 2014 para 76.

[759] Para 76.

In making its decision as to whether the Chamber may exercise jurisdiction over alleged acts of rape and/or sexual slavery committed by members of the UPC/FPLC against UPC/FPLC child soldiers under the age of 15 years, the Chamber noted the following:

> "The Chamber takes note of common article 3 of the 1949 Geneva Conventions, the relevant part of which sets forth that "[p]ersons taking no active part in the hostilities […] shall in all circumstances be treated humanely". "The Chamber also noted the relevant parts of article 4(1) and (2) of APII, which stipulate that "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities […] shall in all circumstances be treated humanely" and that the following acts against these persons "are and shall remain prohibited at any time and in any place whatsoever: […] (e) outrages upon personal dignity, in particular […] rape, enforced prostitution and any form of indecent assault". In determining whether UPC/FPLC child soldiers under the age of 15 years are entitled to protection against acts of rape and sexual slavery by other members of the UPC/FPLC, the Chamber must assess whether these persons were taking direct/active part in hostilities at the time they were victims of acts of rape and/or sexual slavery."[760]

The Chamber was of the view that the direct/active participation in hostilities of children under the age of 15 years must be assessed in the light of the prohibition.[761] The chamber stated that the mere membership of children under the age of 15 years in an armed group cannot be considered as determinative proof of direct/active participation in hostilities, considering that their presence in the armed group is specifically proscribed under international law in the first place.[762] The Chamber said that "to hold that children under the age of 15 years lose the protection afforded to them by IHL merely by joining an armed group, whether as a result of coercion or other circumstances, would contradict the very rationale underlying the protection afforded to such children against recruitment and use in hostilities."[763] This is an important point because the crimes against Mr Ntaganda were of such a serious nature and concerned the use of children as child soldiers, bearing in mind that many international

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[760] *The Prosecutor v Ntaganda* (Pre-Trial Chamber II) Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda Case No ICC-01/04-02/06-309 09-06-2014 28/98 EC PT, Judgement 9 June 2014 para 77.

[761] Para 78.

[762] Para 78.

[763] Para 78.

agreements (as discussed in chapter 1 and 2) also afford protection to children as victims of crime.

The chamber concluded that,

> "children under the age of 15 years lose the protection afforded by IHL only during their direct/active participation in hostilities.[764] That said, the Chamber clarified that those subject to rape and/or sexual enslavement cannot be considered to have taken active part in hostilities during the specific time when they were subject to acts of a sexual nature, including rape, as defined in the relevant Elements of Crimes. The sexual character of these crimes, which involve elements of force/coercion or the exercise of rights of ownership, logically preclude active participation in hostilities at the same time."[765]

On this basis, the Chamber found that child soldiers under the age of 15 years continue to enjoy the protection of IHL and that the Chamber has jurisdiction over these counts.[766] The Chamber based its findings on the following evidence:

> "Witness P-0758, aged 13 at the time, was abducted by UPC/FPLC soldiers in or around July-August 2002 and raped in several UPC/FPLC camps, including Lingo camp, where she underwent training. The rapes continued throughout her training which lasted around 3 months. Two other girls, one aged 9 and another under 13 were raped in Lingo camp during the training period of witness P-0758. They were unable to escape from the camp as there were soldiers around and "they shot at people who tried to flee". Also, women in the UPC/FPLC camps, and this included children under the age of 15 years, were likened to a "*guduria*", a large cooking pot, to express the fact that any soldiers could sleep with them at any time."[767]

The chamber relied on the above evidence to support its finding that child soldiers under the age of 15 remain protected by IHL.

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[764] Para 79.

[765] Para 79.

[766] Para 80.

[767] Para 81.

6 3 2 Trial Chamber decision

6 3 2 1 The principle of legality

Mr Ntaganda challenged this decision until it reached the Trial Chamber on 4 January 2017.[768] The Defence argued "that Counts 6 and 9 do not fall within the subject matter jurisdiction of the Court because:

i) Article 8(2)(e)(vi) of the Statute is subject to the established requirements of international law;
ii) according to Article 3 common to the Geneva Conventions of 1949[769] ('Common Article 3') war crimes may not be committed by members of an armed force against fellow members of the same armed force;
iii) the Prosecution has defined the victims of Counts 6 and 9 as being 'members' of the same armed force as the perpetrators

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[768] *The Prosecutor v Bosco Ntaganda* Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 Trial Chamber VI Case No: ICC-01/04-02/06 4 January 2017 Trial Chamber VI.

[769] Art. 3. — In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; b) taking of hostages;

c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

iv) the notion of 'membership' of an armed force is not compatible with 'taking no active part in hostilities'; and

v) international humanitarian law does not recognise any exception for child soldiers."[770]

Notably, the tension here specifically relates to the nature of the crimes for which he had been charged which concerned crimes of a sexual nature against children. The protection of children is important in all instances and the rights of children are widely protected by many international human rights instruments but at the same time, the Rome Statute also prescribes protection for the rights of the accused, particularly in respect of the principle of legal certainty.

The Chamber decided to conduct its analysis on the basis of both international and non- international conflicts.[771] In this instance, the distinction between the two types of conflicts becomes relevant. An international armed conflict is a conflict waged between two or more states and IHL and the law of war is applicable to this type of conflict.[772] Non-international armed conflict involves conflicts between government forces and other armed groups or between armed groups that take place within the territory of one single state.[773] IHL has been extended to non-international armed conflicts by Common Article 3 of the Geneva Conventions and by APII.[774] The Rome Statute prescribes certain conditions for a conflict to be of a non-international nature in Article 8(2)(f):

> "(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."

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[770] Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 4 January 2017 para 27.

[771] Para 34.

[772] Werle & Jessberger *Principles of International Criminal Law* 412.

[773] 416.

[774] 416.

Hence the requirements for a non-international armed conflict are that the armed conflict has to be "protracted" and there has to be a form of organisation.[775] It is only when these two elements have been fulfilled, that a non-armed conflict affects the international community. Werle explains the application of IHL on non-international armed conflict only comes into play if an intrastate conflict is comparable to an inter-state conflict due to the organisation of the parties and the increased power to control the belligerents connected with it. He argues that intrastate conflicts do not endanger world peace.[776] The Chamber in its decision making failed to make this important distinction and instead treated the conflict as encompassing both international and non-international and this distinction would have significantly impacted its decision in terms of the applicability of IHL on the conflict and crimes.

The Chamber noted that the defence argued that the criminalisation of acts committed against members of one's own forces does not form part of customary law and that Counts 6 and 9 violate the principle of legality.[777]

The Chamber responded as follows:

> "The Chamber observes that the Statute is first and foremost a multilateral treaty which acts as an international criminal code for the parties to it. The crimes included in Articles 6 to 8 of the Statute are an expression of the States Parties' desire to criminalise the behaviour concerned. As such, the conduct criminalised as a war crime generally will, but need not necessarily, have been subject to prior criminalisation pursuant to a treaty or customary rule of international law."[778]

In its analysis of IHL, the Chamber referred to the fact that:

> "Rape and other forms of sexual violence have long been prohibited by international humanitarian law, namely; the 1863 Lieber Code which states that 'all rape' against persons in the invaded country is prohibited, the 1949 Geneva Conventions and 1977 Additional Protocols expressly prohibit rape in certain provisions, as well as behaviour that would include sexual violence. The fundamental guarantees contained in Article 75 of Additional Protocol I ("API"), for any person in the power of a Party to the conflict, include the

[775] 417.
[776] 419.
[777] *Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9* para 35.
[778] Para 35.

> prohibition of 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault'. In addition, various chambers of the ICTY have held that rape or other forms of sexual assault are prohibited under customary international law at all times, and in times of armed conflict constitute serious violations of international humanitarian law, thus qualifying as war crimes."[779]

The Chamber went further in respect of slavery, stating

> "that it is prohibited in all forms under APII, which therefore includes sexual slavery. Sexual slavery can also be considered to fall within the general prohibitions on indecent assault and attacks against honour as applicable to rape, as well as enforced prostitution. The prohibitions on rape and (sexual) slavery also form part of customary international humanitarian law, applicable both in times of international and non-international armed conflicts."[780]

The Chamber referred to the ICRC, in its updated Commentary to the First Geneva Convention of 1949 which addresses the question of 'whether armed forces of a Party to the conflict benefit from the application of common Article 3 by their own Party'. "When considering the 'example' of 'members of armed forces who are sexually or otherwise abused by their own Party'", the ICRC explains that:

> "[t]he fact that […] the abuse [is] committed by their own Party should not be a ground to deny such persons the protection of common Article 3. This is supported by the fundamental character of common Article 3 which has been recognized as a 'minimum yardstick' in all armed conflicts and as a reflection of 'elementary considerations of humanity'."[781]

In summary, the Trial Chamber based its analysis on the prohibitions against rape and sexual violence in IHL and referred to Article 75 of Additional Protocol I. The Chamber also referred to an ICTY decision, the Martens Clause[782] and the ICRC updated Commentary to the First Geneva Convention of 1949 to substantiate that counts 6 and 9 constitute war crimes and does fall within the jurisdiction of the court.[783]

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[779] Para 46.
[780] Para 46.
[781] Para 50.
[782] Para 47.
[783] Para 50.

6 3 3 Appeals Chamber judgment on the charges – the principle of legality

Mr Ntaganda submitted that any argument by the Prosecutor that the factual allegations under Counts 6 and 9 do not preclude a finding that the victims at the relevant time were not actively participating in hostilities should be rejected. He argued that, under Counts 6 and 9 it is alleged that the victims were members of the UPC/FPLC, and that membership in an armed group is incompatible with the notion of not taking active part in the hostilities. In his submission he stated that a member of an armed force or group attains that status only when ceasing to be a member of that force or group, laying down arms, or being placed *hors de combat.*[784]

In its analysis, the Appeals Chamber found "when the provisions on war crimes were negotiated, there was a desire to "define the specific content or constituent elements of the violations in question."[785] The court found that at the time, States were concerned with providing certainty as to the specific conduct that would give rise to criminal liability and in upholding the principle of legality.[786]

The Appeals Chamber stated that:

> "even if no Status Requirements were to apply to the crimes pursuant to Article 8(2)(b) (xxii) and (e) (vi) of the Statute, there would in all probability be much overlap with the war crimes listed under article 8(2)(a) or (c). This is because in practice it is likely that in many cases the victims of rape or sexual slavery would actually be "protected persons" or "persons not actively participating in hostilities", thereby potentially fulfilling the elements of article 8 (2) (a) or (c) of the Statute, in addition to those of article 8 (2) (b) (xxii) and (e) (vi)."[787]

The important portion of the decision is as follows:

> "If customary or conventional international law stipulates in respect of a given war crime set out in Article 8 (2) (b) or (e) of the Statute an additional element of that crime: "the Court cannot be precluded from applying it to ensure consistency of the provision with international humanitarian law, irrespective of whether this requires ascribing to a term in the provision a particular interpretation or reading an additional element into it. In the view of the Appeals Chamber, this does not violate the principle of legality recognised in article

[784] *The Prosecutor v Bosco Ntaganda*, *(Appeals Judgement*), Case No: ICC-01/04-02/06, 15 June 2017 para 31.
[785] Para 48.
[786] Para 48.
[787] Para 48.

> 22 of the Statute, which protects accused persons against a broad interpretation of the elements of the crimes or their extension by analogy; therefore, it does not impede the identification of additional elements that need to be established before an accused person can be convicted."[788]

This aspect of the judgment is crucial in determining whether or not the appeals chamber complied with the principle of legality. The Appeals Chamber summarised its reasoning as follows:

> "Notwithstanding the fact that the provisions of Geneva Conventions I and II extend protection irrespective of affiliation, the Appeals Chamber is not aware of any case in which the grave breaches regime has been applied to situations in which victims belonged to the same armed force as the perpetrators. However, the Appeals Chamber is unconvinced that this, in and of itself, reflects the fact that Status Requirements exist as a general rule of international humanitarian law. In this regard, and as noted by the Prosecutor, Common Article 3 provides for unqualified protection against inhumane treatment irrespective of a person's affiliation, *requiring only that the persons were taking no active part in hostilities at the material time.*"[789]

In this decision, the Appeals Chamber found that it will ascribe additional elements into crimes if it must and that the decision of the court to do so, does not violate the principle of legality. The Appeals Chamber comes to this conclusion without analysing such interpretation against the principle of legality. The Appeals Chamber places emphasis on the nexus between the conduct and the context as a defining characteristic of what serves to define a war crime but concludes that the provisions of the Statute do not include the status requirements and whether the children were active participants at the time. The nexus requirement which the court refers to is the fact that the perpetrator must be aware of the actual circumstances from which the existence of an armed conflict arises.

Werle opines that the existence of an armed conflict is not only an objective condition for criminality and a requirement for jurisdiction of the ICC but it must also be reflected in the perpetrator's mind.[790] He explains further that in the event that the conduct only amounts to a war crime when committed in the context of an international

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[788] Para 54 [own emphasis].

[789] Para 60.

[790] Werle & Jessberger *Principles of International Criminal Law* 425.

armed conflict, the principle of individual guilt requires that the perpetrator be aware of the circumstances establishing the international character of the conflict.[791] Therefore, the nexus requirements or mental elements of the crime must be established to provide for the jurisdiction of the court over the crimes of rape and sexual slavery as set out in Article 30[792] of the Statute.

6 4 International law

6 4 1 The distinction between human rights law, international human rights law and international criminal law

In respect to these decisions, it is important to discuss the distinction between human rights law, international human rights law and international criminal law and its application in the present case.

Sivakumaran asserts that just as there are significant differences between international and internal armed conflicts, so are there important differences between IHL and international criminal law, and between IHL and international human rights law. He cites the differences as follows:

> "International Humanitarian Law works on the premise of equality of belligerents; international human rights law traditionally has been constructed around the relationship between the state and the individual. International criminal law is based on individual criminal responsibility; international humanitarian law seeks to strike a balance between military necessity and humanity. The bodies are closely related, suggesting that each can

[791] 426.

[792] Article 30 Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

> usefully draw upon the other; however, the differences suggest that ideas from one body cannot be imported into another *ipso facto* without more."[793]

This distinction illustrates how the Chambers arrived at their decisions, how they analysed the law and what weight was attached to IHL in respect of determining that rape and sexual slavery were in fact war crimes. Most importantly, he avers that the ideas from one body of law cannot be imported into another body of law. Sivakumaran goes further to state that:

> "given that international criminal law relates to 'the most serious crimes of international concern and that war crimes give rise to individual criminal responsibility, the war crime is sometimes drawn up or interpreted in a narrower fashion than its international humanitarian law equivalent."[794]

Illustrating how the international criminal law standard is not always coterminous with the IHL standard by considering the issue of child soldiers,[795] he argues that Article 4(3)(c) of APII provides that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".[796] This, the author argues, stands in contrast to the equivalent war crime as well as the equivalent provisions in the law of international armed conflict and international human rights law, all of which are narrower.[797]

Sivakumaran goes further to explain that Article 8(2)(vii) of the Rome Statute refers to '[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities." On the other hand, Article 77(2) of APII prohibits children from taking *any* part in hostilities, which means that only an aspect of that prohibition has been criminalised, namely the *active* participation of children in hostilities.[798]

He, however, cautions that:

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[793] S Sivakumaran "Re-envisaging the International Law of Internal Armed Conflict" (2011) 22 *The European Journal of International Law* 238.

[794] 239.

[795] 239.

[796] 239.

[797] 239.

[798] 239.

> "future case law of the International Criminal Court should not be taken as a reflection of the IHL standard. Indeed, it may be that the provision is not even reflective of customary international criminal law on point; rather it goes to the delimitation of the crime for the purposes of the International Criminal Court alone".[799]

It is evident from this analysis, that a distinction must be drawn between ICL, IHL and HRL and that the Chambers cannot merely apply the principles interchangeably, instead, the judges should exercise caution in their interpretation of what constitutes a war crime.

In analysing this important paragraph of the Appeals Chamber, it is important to investigate the Geneva Conventions' application in the *Ntaganda* case, the protection afforded to civilians who are *hors de combat*, other case law pertaining to how courts interpret crimes as well as the principle of legality which serves to protect the fair trial rights of the accused.

6 4 2 The Geneva Convention and hors de combat

The Geneva Conventions (but not the Additional Protocols to them) have been universally ratified and are binding on all states and is generally regarded as rules of customary international law. These treaties deal mainly with the humanitarian treatment of the victims of warfare, in particular, those persons who do not, or who no longer, take part in armed conflict.[800]

For the purposes of this discussion, it is important to distinguish between the two types of armed conflict as the rules applicable to non-international armed conflicts are more limited than those applicable to international armed conflicts. The rules applicable to non-international conflicts were first contained in Common Article 3 of the Geneva Conventions; the only provision in these treaties dealing with non-international conflict. APII deals exclusively with non-international armed conflicts.[801]

While human rights law protects all people within the jurisdiction of a state, IHL categorises persons and affords different protections to different groups of protected persons. The Geneva Conventions of 1949 only apply to protected persons within the

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[799] 240.

[800] Commonwealth Secretariat *International Humanitarian Law and International Criminal Justice: An Introductory Handbook* (2014) 12.

[801] 18.

meaning of each of those conventions. Therefore, it must be established that a particular individual is under the protection of the particular Convention.[802]

Under Article 5 of the Rome Statute, the ICC has jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression. *War crimes* are violations of the laws and customs of war. They can be committed in both international and non-international armed conflicts, though there are differences regarding the war crimes that may be committed in the two types of conflicts. Accordingly, Article 8(2) which sets out the list of war crimes is divided into:

a. Grave breaches of the Geneva Conventions [Arts 50, 51, 130, 147, GCs I, II, III and IV]. Since the Geneva Conventions apply only to international armed conflicts, liability for these crimes ensues only when the armed conflict is international.
b. Other serious violations of the laws and customs applicable in international armed conflicts. These crimes are provided for in customary international law, but many are also grave breaches of Additional Protocol I [Art. 85(3) and (4)].
c. Serious violations of Common Article 3 of the Geneva Conventions, which deals with non-international armed conflicts.
d. Other serious violations of the laws and customs applicable in non-international armed conflicts.

The Pre-Trial Chamber investigated the aspect of direct/active participation in hostilities at length as can be seen from the quoted sections above whereas the Trial Chamber and Appeals Chamber did not place much emphasis on that aspect. Common Article 3 states that in non-international armed conflicts, fighters who have laid down their arms and those placed "*hors de combat*" are to be treated humanely in all circumstances without distinction. Amongst other acts, violence to life and person, mutilation, cruel treatment and torture, and murder are specifically prohibited.

While Common Article 3 offers no definition of the term *hors de combat*, its definition is provided for in Article 41 of Additional Protocol I of the Geneva Conventions (Additional Protocol 1) which lays out that a person is *hors de combat* if:

[802] 48.

a. They are in the power of an adverse Party;
b. They clearly express an intention to surrender; or
c. They have been rendered unconscious or are otherwise incapacitated by wounds or sickness, and therefore are incapable of defending themselves; provided in any of these cases they abstain from any hostile act and do not attempt to escape.[803]

In *Ntaganda*, the Chambers did not consider whether the children were *hors de combat* and yet applied the relevant Geneva Convention.

Kevin Heller[804] opines that "one of the most basic assumptions of ICL is that an act cannot be a war crime unless it violates a rule of international humanitarian law (IHL)." He argues that if the Appeals Chamber had limited the scope of its judgment to rape and sexual slavery committed against child soldiers who were *hors de combat* as defined by the ICRC, as "anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness", the Appeals Chamber would have been on firm ground.

Heller argues that instead, the Appeals Chamber made it clear that member-against-member rape and sexual slavery are war crimes *even if the victim is an active combatant* – that is, one who is not *hors de combat.*

In respect of paragraph 65[805] of the Appeals Chamber judgment, Heller asserts that this is incorrect as there is a *specific* rule excluding active combatants from the war crimes of rape and sexual slavery in member-against-member situations: namely, the rule that says violence in member-against-member situations violates IHL only when

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[803] KJ Heller "Persons Hors de combat in Non-International Armed Conflicts" (2017) *Humanitarian Response* <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/ohchr_syria_-_hors_de_combat_-_legal_note_en.pdf P2> (accessed 18-01-2019).

[804] KJ Heller "ICC Appeals Chamber holds a war crime does not have to violate IHL" (15-06-2017) *Opinio Juris* <http://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/> (accessed 01-11-2018).

[805] "If customary or conventional international law stipulates, in respect of a given war crime, an additional element of that crime, the Court cannot be precluded from applying it to ensure consistency of the provision with international humanitarian law, irrespective of whether this requires ascribing to a term in the provision a particular interpretation or reading an additional element into it. This does not violate the principle of legality recognised in article 22 of the Statute, which protects accused persons against a broad interpretation of the elements of the crimes or their extension by analogy; therefore, it does not impede the identification of additional elements that need to be established before an accused person can be convicted.

the victim is *hors de combat*. He argues that not all violations of IHL are war crimes, but all war crimes are violations of IHL. In this regard, therefore, he argues that the burden of proof was not on Ntaganda to show that rape and sexual slavery cannot be war crimes in member-against-member situations if the victim is an active combatant. The burden was on the prosecution to prove that such acts actually violate IHL."[806]

The author makes the following statement regarding the Appeals Chamber's judgment:

> "In the end, the AC's decision in *Ntaganda* is little more than the latest iteration of the Court's willingness to rely on teleological reasoning when the Rome Statute does not protect victims as much as the judges think it should. No one is in favour of raping and sexually enslaving child soldiers. But the solution isn't to detach the law of war crimes from its moorings in IHL by holding — if only implicitly — that an act can be a war crime even if it does not violate IHL. To do so is not only legally indefensible, it risks delegitimising both the Court and the law of war crimes itself."

Rodenhauser, writing on the Appeals Chamber's findings, has a different view which is more in line with the Chamber's reasoning. He offers a more supportive commentary on the Appeals Chamber judgment and opines that in respect of the concept of protection for persons that are *hors de combat*, that this was not developed with intra-party violence in mind and that members of the same party to the conflict are normally not considered a threat to each other, and intra-party violence does not provide a military advantage.[807] The author explains further that the notion of *hors de combat* is also understood as including persons who are in the power of a party to the conflict, normally through detention by the adversary. He clarifies this by stating that:

> "at least during acts of rape or sexual slavery, which by definition include an element of coercion or deprivation of liberty, a child is in the power of the perpetrator and confined against his or her will. These considerations show that victims of intra-party rape or sexual slavery, in particular children under the age of 15, can be considered *hors de combat* for the purposes of common Article 3 as well as Article 8(2)(e)(vi) ICC Statute. As a result,

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[806] Heller "ICC Appeals Chamber holds a war crime does not have to violate IHL" (15-06-2017) *Opinio Juris*.

[807] T Rodenhauser "Squaring the Circle Prosecuting Sexual Violence against Child Soldiers by their own Forces" (2016) 14 *Journal of International Criminal Justice* 191.

even in cases where children may no longer be considered civilians under IHL, intra-party sexual violence can still amount to war crimes under the ICC Statute."[808]

Rodenhauser concludes by stating:

"losing civilian status vis-a'-vis the adversary in the context of the conduct of hostilities should not mean that children also lose fundamental protections vis-a'-vis those who unlawfully use them. In addition, even if children are no longer considered civilians, they continue to benefit from IHL protection if they are rendered *hors de combat*."[809]

Upon closer examination, the Appeals Chamber confirmed that it was persuaded that IHL does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same armed group.[810]

6 5 Case law: ICC and the Tribunals

6 5 1 ICC case law

In *Lubanga*, the Trial Chamber's interpretation of what constitutes 'using [children] to participate actively in hostilities' in Article 8(2)(e)(vii) of the Rome Statute centred around "those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target.[811]

The decisive factor, therefore, in deciding if an ''indirect'' role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. Given the different types of roles that may be performed by children used by armed groups, the Chamber's determination of whether a particular activity constitutes ''active

[808] 191-192.

[809] 193.

[810] Para 65 Appeals Chamber Judgement.

[811] *Prosecutor v Thomas Lubanga*, No.: ICC-01/04-01/06 (14 March 2012) para 628.

participation'' can only be made on a case-by-case basis.[812] In *Lubanga* it is clear that the court considered the notion of active participation as a determinant in establishing whether children were protected or not. It remains unclear why the judges in *Ntaganda* did not look at the direction given in this case or others already tried at the ICC.

In the *Katanga* Trial decision, the Trial Chamber embraced the same position as in *Lubanga* and confirmed that children are considered to be a "potential target" and should be protected and held that IHL does not recognise any exception for child soldiers.[813]

The court could not be clearer in its analysis of the crimes and what constitutes a war crime and it is submitted that the judges in *Ntaganda*, should have drawn from the jurisprudence in these judgments in arriving at its decision in *Ntaganda*.

In the *Vasiljevic* judgment at the ICTY, the Trial Chamber held that the principle of *nullum crimen sine lege*:

> "does not prevent a court from interpreting and clarifying the elements of a particular crime. Nor does it preclude the progressive development of the law by the court. But under no circumstances may the court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable and punishable, or by criminalising an act which had not until the present time been regarded as criminal."[814]

Considering this, it is arguable that if this principle had been applied strictly in the *Ntaganda* judgment, the court would have arrived at a different conclusion. Hence, the ICC did not effectively apply the principle of legality in the *Ntaganda* judgment. In fact, in arriving at its conclusion, the Appeals Chamber should have placed more emphasis on previous judgments of the tribunals as well as the ICC, which it failed to do.

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[812] Para 628.

[813] The Prosecutor v Germain Katanga Judgment pursuant to article 74 of the Statute No.: ICC-01/04-01/07 Date: 7 March 2014 para 1045.

[814] *Prosecutor v Mitar Vasiljevic* Trial ChamberII (ICTY) IT-98-32-T 29 November 2002Para 196.

6 6 Principle of legality

In assessing the *Ntaganda* judgments related to whether rape and sexual slavery amounts to a war crime, it is evident that the principle of legality has largely been neglected and in this regard, Mcgonigle raises an important point:

> "where human rights norms and standards may be interpreted expansively in order to achieve their stated goals of broad protection, the principle of legality and the rights of an accused in a criminal process largely dictate that criminal law be strictly interpreted and in cases of ambiguity resolved in favour of an accused."[815]

This is consistent with the wording of Article 22(2) as stated above. Mcgonigle goes further and states that the ICC was never designed to operate as a human rights institution but rather as a criminal court.[816] This is a crucial point, particularly in light of the tensions which exists within the court and as espoused in this dissertation.

This distinction is important and begs the questions: to what extent has the ICC adopted an overtly human rights approach to the interpretation of its substantive and procedural provisions and does it do so in a clear and principled manner?[817] She asserts that:

> "there has been a real fear by those working within international criminal law that international criminal institutions have been adopting "contradictory assumptions and methods of reasoning" from criminal law and international human rights law. This amalgamation has manifested in internal contradictions and potentially unfair practices."[818]

Mcgonigle cites and supports liberal criminal justice systems which rely on and employ restraining principles in order to achieve accuracy and fairness in the process.[819] In turn, she quotes Robinson who emphasises three important liberal criminal justice restraining principles: the principle of personal culpability, the principle

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[815] B McGonigle "Pragmatism over Principles: The International Criminal Court and a Human-Rights based Approach to Judicial Interpretation" (2018) 41 *Fordham International Law Journal* 699-700, 699.
[816] 699-700.
[817] 700.
[818] 700.
[819] 703.

of legality and the principle of fair labelling[820] (which has been discussed in detail in Chapter 5).

The principle of legality, or *nullum crimen sine lege*, holds that definitions of crimes should not be applied retroactively and be strictly applied, to provide fair notice to individuals and restrain any arbitrary abuse of power.[821] Here, the importance of legal certainty should be emphasised and Mcgonigle states that it is closely related to the notion of predictability, the principle of legitimate expectation and the rule of law. The principle of legal certainty refers to the requirement that legal rules be sufficiently clear and precise, and that situations and legal relationships remain foreseeable.[822]

This argument conforms to fair trial principles of the accused in which there should not be an element of surprise in regard to the crimes an accused may be prosecuted and convicted for. It also points to the role of judges in ensuring that their methods of interpretation relate to the key principles in international criminal law.

Mcgonigle asserts that the ICC deals with the prosecution of individuals accused of serious violations of human rights (and IHL). Further, international human rights standards are listed as a secondary source of applicable law under the Statute and that due to the fact that the ICC was never designed to operate as a human rights institution but rather as a criminal court, obvious tensions ensue. She argues that to resolve these tensions, a more comprehensive and transparent approach by the judges is required.[823]

The point is important as the present case displays the tensions between the rights of the accused to legal certainty but also the rights of victims who have been subjected to sexual violence and who are entitled to all the protections afforded to them in respect of international law.

Davidson, opines that Article 22 contains three overlapping guarantees in an attempt to translate strict construction into a variety of legal languages; First, crime definitions shall be strictly construed; Secondly, crime definitions shall not be extended

[820] 703.
[821] 703.
[822] 704.
[823] 735.

by analogy and thirdly, ambiguities shall be interpreted in favour of defendants or would-be defendants.[824]

Davidson articulates a way forward for judges at the ICC as follows:

> "Thus, if judges are inquiring into the possibility of unfair surprise due to a new application or interpretation of an ambiguous or vague provision of the Rome Statute, and are looking to customary international law for guidance, judges should look for strong evidence of both state practice and *opinio juris* in support of a crime under customary international law or, at a minimum, of a clear international norm supporting a particular reading of a Rome Statute crime. This traditional approach to identifying customary international law may not be optimal from a "utopian," ending-impunity vantage point, but it is more defensible from the vantage point of legality and strict construction."[825]

She concludes her argument by advancing the proposition that the ICC is likely to be in a better position, from a resource, knowledge, and, political perspective, to identify the emergence of new customary international law norms than most. To achieve this aim, the author argues that what is required is transparent reasoning and explicit customary international law and comparative criminal law analysis in judgments.[826]

It is for this reason that in interpreting the crimes and applying Article 21, the ICC Appeals Chamber should have consistently worked through the entire Article 21 in its interpretation of the law together with Article 22, which it failed to do. In its failure to do so it did not take the fair trial rights of the accused into account. It is of significance that no dissenting or separate opinions were written by the judges which demonstrate that a unanimous decision was taken on an important legal principle.

6 7 Victim participation

In May 2013, the single judge adopted the following decisions regarding victim participation, with the particular aim of ensuring the simplification of the application procedures for victims as well as ensuring that victims understand the processes followed at the ICC:

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[824] C Davidson "How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court" (2017) 91 *St. John's Law Review* 45.

[825] 98.

[826] 101.

The Single Judge was of the view that outreach action, in accordance with rule 92(3) and (8) of the Rules, is the first step in the victims' application process to ensure that the application process runs smoothly. In this regard, the Registry and PIDS were tasked with performing this function.[827] The judge elaborated on the outreach activities and said that it should

> "be aimed at providing potential victims, in a timely manner, with accurate, concise, accessible and complete information both on the Court's overall mandate and, more specifically, on the various roles which the victims are statutorily called to play in the proceedings."[828]

The judge emphasised the need for the education and outreach to include an explanation of the reparations proceedings and to ensure that victims are made aware that they are only entitled to claim reparations if the accused is found guilty.[829]

In light of the need to improve the victims' participation system, the Single Judge was of the view that the availability of a concise and simplified individual form might significantly assist victims willing to participate in the current case, as well as the VPRS in processing their applications and the Chamber in its assessment of the requirements set forth in rule 85 of the Rules. The judge emphasised that this form would enhance the overall efficiency and expeditiousness of the proceedings leading to the confirmation of charges hearing.[830]

The Single Judge endorsed the approach of grouping victims' applications but decided that the VPRS will itself perform the grouping of victims who have filled in the Simplified Form.[831] In respect of the model of common legal representation which was inaugurated in the case of the *Prosecutor v Laurent Gbagbo*, whereby the OPCV's lead counsel was appointed as common legal representative of all admitted victims and was assisted by a team member based in the field, "with wide knowledge of the context" and "to be paid by the Court's legal aid budget". The judge took note of this

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[827] *The Prosecutor v Bosco Ntaganda* Decision Establishing Principles on the Victims' Application Process No.: ICC-01/04-02/06 Date: 28 May 2013 PRE-TRIAL CHAMBER II Before: Judge Ekaterina Trendafilova, Single Judge para 12.

[828] Para 13.

[829] Para 13.

[830] Para 17.

[831] Para 33.

but was of the view that in the event that the involvement of the OPCV as common legal representative becomes an option, such a person in the field could have the role of an "assistant to counsel" as provided for in regulation 81(3) of the Regulations.[832]

In *Ntaganda*, the issue of victim participation was clarified by a ruling of Trial Chamber VI in February 2015.[833]

At the confirmation stage, the Pre-Trial Chamber II granted victim status to 1120 applicants, permitting them to participate at the confirmation of charges hearing and in related proceedings.[834] On 21 July 2014, the Chamber scheduled a status conference on this matter and invited the parties to make relevant submissions on the procedure to allow victims to participate in trial proceedings.[835] The Trial Chamber set out a detailed admission system for victims to participate in trial proceedings. This admission system would be managed by the registry who would be responsible for assessing the applications of victims.[836] This process set out by the chamber was meant to simplify the victim application process but it is submitted would require a lot of work on the part of the registry.

The chamber recognised the rights of victims to participate as well as the fair trial rights of the accused in the following manner:

> "The Chamber recognises the importance of effective and meaningful victim participation in the proceedings. Achieving an efficient application process which provides applicants with a fair and timely determination of their status based on straightforward criteria is an important element in giving effect to such participation. However, such a process must not negatively impact the fairness or expeditiousness of the proceedings or the rights of the accused."[837]

The chamber provided clarity on what "direct participation" means as well as the differentiation between victims and witnesses as follows:

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[832] Decision Establishing Principles on the Victims' Application Process Para 47.

[833] Situation in the Democratic Republic of the Congo in the case of The Prosecutor *v* Bosco Ntaganda *Decision on victims' participation in trial proceedings* Trial Chamber VI No.: ICC-01/04-02/06 (6 February 2015).

[834] Para 1.

[835] Para 2.

[836] Para 24.

[837] Para 26.

> "As for what participating 'directly' means, this term covers any victims who may be subsequently allowed to appear solely to present their views and concerns to the Chamber. 'Direct participation' is not referring to participating victims who testify before the court as witnesses called by the Prosecution ('dual status witnesses'). Witnesses do not ordinarily act as 'participants' in ICC proceedings - they are persons called upon by the participants (or the chamber) to give evidence. Because they do not become 'direct participants' simply by testifying, dual status witnesses will have had their applications assessed through the procedure applicable to all other victims."[838]

The chamber indicated that only persons who were victims of the crimes charged would be allowed to participate.[839] The chamber also decided that LRVs have a right to access the case record including filings, transcripts and material, both public and confidential.[840]

In the second decision on victim participation,[841] in June 2015, a discussion ensued as to the matter of legal representation, with a dissenting opinion on this issue. The majority of the chamber was of the view that it had considered whether any reasons exist to modify the current legal representation system. The Majority considered whether counsel from the DRC should replace the current counsel in order to achieve closer proximity of the counsel to the victims.[842] The Majority, with Ozaki J dissenting, considered that there are no compelling reasons to modify the current system of legal representation for the purpose of trial proceedings. In reaching the decision the Majority took into account that the current LRVs have been working on the case since December 2013 and are thus familiar with the voluminous record of the case, as well as the procedural history. In the Majority's view, besides the importance of continuity and the general requirement of possessing the necessary legal skills, proximity to the victims is a relevant consideration to be taken into account when deciding who should represent these victims. In this regard, it considers that proximity to the victims does not necessarily require physical proximity. Any counsel representing victims should have knowledge of the victims' culture, the context in which the alleged crimes took

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[838] Para 39.

[839] Para 43.

[840] Para 55.

[841] *The Prosecutor v. Bosco Ntaganda* Second decision on victims' participation in trial proceedings No.: ICC-01/04-02/06 Date: 16 June 2015 Trial Chamber VI

[842] Para 28.

place (that is, the armed conflict) and, in order to assess the impact of the alleged crimes on the individual victims, also the circumstances in which the victims live.[843]

In the *partly dissenting opinion of Ozaki J*, he presented his argument in relation to proximity and independence as follows:

The judge was of the view that many of the participating victims live in villages that are not easily accessible and do not have means of following the proceedings independently, thereby being reliant on regular, personal contact with the LRVs in order to be properly informed, give instructions to their counsel and participate in a meaningful way is important.[844] The judge argued further that the requirement for proximity and confidence is additionally heightened in cases such as the present where the participating victims include former child soldiers and those reporting crimes of sexual violence.[845]

The judge was of the view that, local counsel, counsel living and working in the affected region, whether nationals of the situation country or not, should, where appropriate, be afforded the opportunity to lead the representation of the victims. He argued that the perspective of these lawyers, including arising from their proximity to and understanding of the victim communities, as well as their diversity of experience, and knowledge of domestic laws and cultural context, has the potential to greatly enhance the proceedings.[846]

The minority view is of particular importance in ensuring that domestic regions play an active role in ensuring the effective participation of victims and also protecting the fair trial rights of victims. It is important to note that a total of 2129 victims, represented by their legal representatives participated in the trial.

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[843] *The Prosecutor v. Bosco Ntaganda* Second decision on victims' participation in trial proceedings No.: ICC-01/04-02/06 Date: 16 June 2015 Trial Chamber VI para 28.

[844] Partly Dissenting Opinion of Ozaki J para 6.

[845] Para 8.

[846] Para 15.

6 8 Other fair trial concerns of importance in the *Ntaganda* trial

6 8 1 No case to answer

In the *Ntaganda* case, the court came to very different conclusions compared to the decisions taken in *Bemba* and *Gbagbo* and *Ble Goude* regarding 'no case to answer' motions.

The Trial Chamber found that the circumstances of Mr Ntaganda's case in respect of the evidence led at the close of the prosecution's case was very different to the *Ruto* case in which it was clearer to the court that there may indeed be no case to answer.[847] In this regard the court found the following:

> "The Chamber does not consider that the situation in the present case meets the conditions which would warrant the Chamber, at this stage of proceedings, granting leave to file a 'no case to answer' motion and assess whether the evidence presented, when taken at its highest, would require any partial acquittal."[848]

On appeal, the chamber found that the court has a discretion to consider 'no case to answer' motions.[849]

The Appeals chamber set out the relevant provisions of the Statute which it considered relevant in reviewing 'no case to answer' motions as follows:

> "Nevertheless, in the view of the Appeals Chamber, a 'no case to answer' procedure is not inherently incompatible with the legal framework of the Court. A Trial Chamber may decide to conduct such a procedure based on its power to rule on relevant matters pursuant to

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[847] Situation in the Democratic Republic of the Congo in the case of *The Prosecutor v Bosco Ntaganda Decision on Defence request for leave to file a 'no case to answer' motion* Trial chamber VI No.: ICC-01/04-02/06 (1 June 2017) para 28.

[848] Trial chamber judgement no case to answer para 28.

[849] Situation in the Democratic Republic of the Congo in the case of *The Prosecutor v Bosco Ntaganda* Judgment on the appeal of Mr Bosco Ntaganda against the *"Decision on Defence request for leave to file a 'no case to answer' motion* No. ICC-01/04-02/06 OA6 (5 September 2017) para 44.

article 64 (6) (f)[850] of the Statute and rule 134 (3)[851] of the Rules. A decision on whether or not to conduct a 'no case to answer' procedure is thus discretionary in nature and must be exercised on a case-by-case basis in a manner that ensures that the trial proceedings are fair and expeditious pursuant to article 64 (2) and 64 (3) (a) of the Statute."[852]

The Appeals Chamber found that even though the Trial Chamber relied on the reasoning as set out in the *Ruto* case, due to the differences between the *Ntaganda* and *Ruto* cases, the court is not bound to entertain the same request by Mr Ntaganda and subsequently his no case to answer motion was turned down by the Appeals Chamber confirming the decision of the Trial Chamber.[853]

The article and rule relied on by the court in respect of the applicable legislation in the Rome Statute appear to be very vague, however the court relied on the fair trial rights of the accused too. This situation still seems largely open to the discretion of the judges as there is no specific Article or Rule dealing specifically with "no case to answer" motions.

The vagueness of this procedure in addressing 'no case to answer' motions in the absence of a specific legislative framework seems to the rights of the accused to legal certainty and the Statute, therefore, provides very little guidance to an accused in motions of this nature.

6 8 2 The impact of Article 70 proceedings on the accused's rights

Problems arose in the *Ntaganda* case in relation to the acquisition of information by the prosecutor of privileged information due to the same prosecutor working on the *Ntaganda* main case as well as the Article 70[854] case.

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[850] Article 64 (6). In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:
(f) Rule on any other relevant matters.

[851] Rule 134(3) After the commencement of the trial, the Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may rule on issues that arise during the course of the trial.

[852] Para 44.

[853] Para 54.

[854] Article 70 Offences against the administration of justice 1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally: (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth; (b) Presenting evidence that the party knows is false or forged; (c) Corruptly

In this matter, the second stay of proceedings decision is important. In this decision,[855]the Defence requested that the Chamber '[order] the stay of the proceedings against Mr Ntaganda with prejudice to the Prosecutor' since the prosecutor had obtained 4,684 conversations of Mr Ntaganda's. The defence claimed that:

> "given the high relevance of those conversations to Defence strategy as well as to Mr Ntaganda's personal knowledge of the case amounts to an abuse of the Court's process, as a result of which Mr Ntaganda cannot receive a fair trial."[856]

The Trial Chamber set out the following procedure to be followed in these cases stating that "it is not necessary to find that the Prosecution acted in bad faith. It is sufficient to show that:

> "(i) the rights of the accused have been violated to such an extent that the essential pre-conditions of a fair trial are missing; and
> (ii) there is no sufficient indication that this will be resolved during the trial process."[857]

The Trial Chamber referred to the *Bemba* decision as a precedent on this issue and found that it had a duty to ensure that the proceedings were fair and that the rights of the accused were respected.[858] However the court observed that the ICC was different to the tribunals on this matter and that Article 70 does not prohibit proceedings from being initiated and conducted by the same Prosecution team as in the main

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influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence; (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties; (e) Retaliating against an official of the Court on account of duties performed by that or another official; (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

[855] Situation in the Democratic Republic of the Congo in the case of The Prosecutor *v* Bosco Ntaganda *Decision on Defence request for stay of proceedings with prejudice to the Prosecution* Trial Chamber VI No.: ICC-01/04-02/06 (28 April 2017) para 11.

[856] Para 11.

[857] Para 21.

[858] Para 24.

proceedings and that this view was confirmed in the *Bemba* decision and that it does not result.[859]

In respect of the decision to stay proceedings, the court held:

> "The Chamber recalls that a permanent stay of proceedings is an exceptional remedy only to be granted as a last resort, when the essential pre-conditions of a fair trial are missing, and when there is no sufficient indication that the relevant issues will be resolved during the trial process, rendering it impossible to 'piece together the constituent elements of a fair trial."[860]

The chamber found in the circumstances of the *Ntaganda* trial that it was still possible to conduct a fair trial. The court did, however, impose measures to protect the accused's fair trial rights by prohibiting the prosecutor from using the material obtained in the Article 70 proceedings in the main trial of Mr Ntaganda.[861] The chamber also found that it may consider taking additional measures upon receipt of a substantiated application setting out concrete instances of prejudice as a result of the Prosecution having unduly benefitted from its access to the Conversations and these measures may include allowing the defence to recall prosecution witnesses, and/or disregard certain evidence.[862]

The relevance of this decision to the fair trial rights of the accused is crucial as the court should have a mechanism in place which either prevents the same prosecution team from prosecutions on Article 70 and the main case against an accused to ensure the integrity of the proceedings are not tainted or a "Chinese wall" should be established between the main case and the Article 70 proceedings as each case is independent of each other and not interrelated. In this regard, to prevent future problems arising in similar situations, it is recommended that the Court appoint separate prosecutors to try the Article 70 proceedings against an accused as the current situation does not support the protection of the fair trial rights of the accused in the main case. It must be borne in mind that the Article 70 proceedings are still under investigation, the charges have not yet been proven against the accused and

[859] Para 30.
[860] Para 60.
[861] Para 61.
[862] Para 62.

should therefore not be used against him in his main case. This situation is fundamentally unfair towards the accused and should not be allowed to continue.

6 9 Reflection on the impact of the case on the rights of victims and the international community

Subsequent to the conclusion of this dissertation, Mr Ntaganda was found guilty of all thirteen counts of war crimes and five counts of crimes against humanity, including enlisting and conscripting child soldiers, rape and sexual slavery. He was also sentenced to 30 year's imprisonment.

This represented the first case at the ICC to ensure the conviction of a leader for rape and sexual slavery. It, therefore, served as a great victory for the many victims who had been involved in the trial and who had suffered the trauma of rape and sexual slavery.

To this end, Amnesty International responded as follows:

> "We can only hope that today's verdict provides some consolation to those affected by the grotesque crimes perpetrated by Ntaganda and paves the way for his victims and their families to finally obtain a measure of justice and reparations."
>
> "Every day of the seven years that Ntaganda freely roamed the streets of Goma after the International Criminal Court issued his arrest warrant increased the torment that the victims and their families had to endure – to the shame of DRC authorities and the international community."[863]

A statement from the United Nations office on Mr Ntaganda's sentence reflected the following:

> "The sentence of 30 years of imprisonment is the longest ruled by the ICC since its establishment in 2002. Ntaganda's crimes include, among others, murder and attempted murder, rape, sexual slavery, persecution, intentionally directing attacks against civilians, and the conscription and use of children under the age of 15 into an armed group and using them to participate actively in hostilities.

[863] Amnesty International "DRC: ICC conviction of Ntaganda provides long awaited justice for victims of grotesque crimes" (08-07-2019) *Amnesty International* <https://www.amnesty.org/en/latest/news/2019/07/drc-icc-conviction-of-ntaganda-provides-long-awaited-justice-for-victims-of-grotesque-crimes/> (accessed 29-11-2019).

> The sentence handed down today by the ICC sends a strong message to both perpetrators and victims that no one is above the law and that accountability for atrocity crimes must be pursue at all times," the three UN Officials stated. They commended the survivors for their courage and expressed their deep support and solidarity with the victims and their families.
>
> "No sentence can compensate the suffering of the victims; yet, this verdict has the power to bring some peace and a sense of justice to victims and survivors of grave violations and human rights abuses in the DRC and around the world," said the three UN Officials. They also stressed that there are other alleged perpetrators in ICC custody facing similar charges."[864]

The DRC has now seen three accused convicted and sentenced at the ICC, including *Lubanga, Katanga* and now *Ntaganda*. These judgments highlight the need for further action against impunity, especially in the context of ongoing violence in Ituri and elsewhere in the country. Justice efforts for victims should be focused not only on the ICC but also on ensuring that justice occurs at national and local levels.

6 10 Conclusion

It is clear from this chapter and from the manner of analysis in the judgments pertaining to the jurisdiction of the court over rape and sexual slavery that the court relied heavily on international law interpretation in determining the crime and did not adhere to the principle of legality in coming to its conclusion because if it had interpreted the law in the strictest sense according to customary international criminal law and had also relied on previous case law of the tribunals as well as the ICC itself, it may not have arrived at the same conclusion.

The chapter, therefore, reviewed the application of IHL to war crimes and in relation to the principle of legality. The chapter further reviewed the court's reasoning in

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[864] UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict Special Representative of the Secretary-General for Children and Armed Conflict, Virginia Gamba, Special Adviser on the Prevention of Genocide, Adama Dieng, and Special Advisor on the Responsibility to Protect, Karen Smith Accountability for Perpetrators: UN Officials Welcome ICC Sentence Against Bosco Ntaganda for War Crimes and Crimes Against Humanity 7 November 2019 <https://childrenandarmedconflict.un.org/accountability-for-perpetrators-un-officials-welcome-icc-sentence-against-bosco-ntaganda-for-war-crimes-and-crimes-against-humanity/> (accessed 29-11-2019).

respect of ‘no case to answer’ motions and Article 70 proceedings. The chapter further explored the important decisions related to victim participation.

The next chapter will comprehensively explain the importance of this dissertation and set out the main conclusions and recommendations of the dissertation as a whole.

CHAPTER 7: CONCLUSION

7 1 Introduction

This chapter constitutes the conclusion of the entire dissertation; the summary of lessons which may be derived from the chapters including recommendations on how to address these in the future.

The research and analysis contained in this dissertation represent an important contribution to the advancement of fair trial rights of the accused. In addition, the research critically assessed the rights of the accused in relation to the dialectical tensions between the rights of the accused, the participation of victims and the demands of the international community within the context of selected cases at the ICC.

The importance of this research is that it contributes to the discourse in the field of international criminal law as the ICC is a relatively new court, with developing jurisprudence. The research provides documented insight into key decisions undertaken by the court thus far, reflecting on both the rights of the accused as well as the participation of victims. The research further analyses the complexities inherent in the nature and function of the ICC, particularly in light of the diverging interests the court seeks to accommodate.

Further, the dissertation reviewed these complex issues in light of the roles of the prosecutor and judges at the ICC. The lessons and recommendations will, therefore, serve to contribute to the discourse and literature on these important developments at the ICC, which is still in its fledgling stages of developing jurisprudence on international crimes, ending impunity and ensuring the participation of victims. In sum, this research is important because it openly confronts the underlying challenges confronting the ICC and it ventilates the tensions inherent in the functioning of the court, based on the case law.

In developing the lessons and recommendations contained in this chapter, the dissertation covered the following:

Chapter 1 and Chapter 2 reviewed the content of the relevant articles of the Rome Statute in relation to fairness and to set out a comprehensive theoretical framework in terms of which “fairness” (as identified in the Rome Statute and other relevant frameworks) should be evaluated. These chapters further set out the fair trial

framework for the rights of victims and initiated a conversation on the international community, with a focus on African States, largely due to the fact that all of the cases which had been analysed arose from African States; including the DRC and the Ivory Coast.

Chapters 3, 4, 5 and 6 sought to assess the extent to which fairness in trials has been applied by the ICC with particular reference to the *Lubanga* and *Katanga, Bemba, Gbagbo and Ble Goude* and *Ntaganda* cases.

Finally, the concluding chapter seeks to suggest a balanced approach in answer to the dialectics presented by the competing demands in the theoretical and practical senses and as identified in the dissertation.

Through the analysis of the case law, I have concluded that the ICC does not adequately protect the fair trial rights of the accused. During the course of the dissertation I have identified key themes to support this finding which will be discussed hereunder. This chapter also identifies the limitations encountered in the course of the research undertaken and makes suggestions for future research.

7 2 Lessons on re-characterisation and its impact on the Accused's right to know and understand the charges and the accused's right to legal certainty

In all the cases investigated in this dissertation, a critical issue arose in respect of the application of Regulation 55 which had a detrimental impact on the rights of the accused. In particular, the activation of this regulation resulted in the lengthy trials of the accused persons at the ICC. Regulation 55 grants the authority of the Chamber to modify the legal characterisation of facts. It is important to bear in mind that the regulations of the ICC are judge-made rules. Therefore, Regulation 1 which encompasses the "Adoption of these Regulations" states:

> "These Regulations have been adopted pursuant to article 52 and shall be read subject to the Statute and the Rules."

As a result of the framing of the Regulation, it gives us permission to read the Articles in the Statute together with the Regulations to ensure that fair trial processes have been followed. In *Lubanga* (Chapter 3), we found that Fulford J and the Appeals Chamber went a long way in interpreting and defining the parameters of Regulation

55. The Appeals Chamber also distinguished Regulation 55 from Article 61(9) which deals with the amendment of charges.

The invocation of Regulation 55 allows the legal characterisation to be changed at various stages of proceedings which consistently allows for a level of uncertainty on the part of the accused in respect of his Article 67 rights and also in respect of legal certainty which is a fundamental common law right.

If we look at this in more detail, it is apparent that Regulation 55 refers to the "Chamber" which may invoke Regulation 55. Regulation 2 defines "chamber" as "a chamber of the court". The Chambers consist of eighteen judges organised into the Pre-Trial Division, the Trial Division, and the Appeals Division. The judges of each Division are then divided into chambers which are responsible for conducting the proceedings of the Court on specific cases and situations at different stages of the judicial procedure. Therefore, if we were to apply the Regulation literally, the chamber does not include the prosecutor or victims who may invoke the regulation and yet to date this has been the case.

It is, therefore, my conclusion that Regulation 55 both in the way that it is written and the way it has been applied, despite its reference to the fair trial rights of the accused does not provide any form of legal certainty to the accused.

The issue of legal certainty remains a critical concern in terms of the rights of the accused. The right to legal certainty is the cornerstone to the rights of the accused to know the case against him or her.[865] The principle of legal certainty is contained in Article 22[866] of the Rome Statute. Legal certainty prevents the unintended charges

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[865] Article 67 Rights of the accused 1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks; (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence; (c) To be tried without undue delay.

[866] *Nullum crimen sine lege*:

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

and convictions against an accused that was not foreseeable. It goes further to restrict any cases of ambiguity and states that crimes should be interpreted in favour of the accused. However, the very nature of Regulation 55 creates legal uncertainty for the accused throughout the trial.

In my view, Regulation 55 is too broad. It allows for too many errors in the prosecution's case to be amended; it allows victims to attempt to amend or re-characterise charges and, given that it is a judge-made rule, it ultimately protects the decisions of the court and allows for the judges to decide to recharacterise or not.

In my view, the Regulation gives too much room for judges to decide what outcome they wish for in a particular case. If they feel the accused should be treated harshly, invoke Regulation 55, if they feel the accused should be protected acquit the accused based on the irregular Regulation 55. This in and of itself is problematic and demonstrates the inconsistent application of the Regulation in the different cases reviewed within this dissertation.

Further hereto, the investigation and formulation of charges by prosecutors should be clear and defined at the pre-trial stage already and the case should proceed on this basis. The use of Regulation 55 seems to be a fall-back mechanism by the ICC in case it gets it wrong. This is simply not good enough when its objective to end impunity needs to be balanced against ensuring that trials are conducted in a fair manner.

Throughout the dissertation, I have leaned on the judgments and manner of decision making of the tribunals. In this instance, Rule 50[867] of the ICTY Rules bears relevance for the discussion of Regulation 55. In the *Katanga* (Chapter 4) chapter of this dissertation, I referred specifically to this rule and to case law at the ICTY.

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3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

[867] "Rule 50 of ICTY Rules which deals with amendment of indictment:
(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further
appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges. (Amended 18 Jan 1996) (C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence."

In the *Katanga* chapter, I referred to a case at the ICTR, *Karemera et al*,[868] in which the Appeals Chamber stated that "a postponement of the trial date and a prolongation of the pre-trial detention of the accused" are some but not all of the considerations relevant to determining whether a proposed amendment would violate the right of the accused to a trial "without undue delay".

In my opinion, the ICC can learn critical lessons from the tribunals in utilising Regulation 55.

7 2 1 Recommendations

In the first instance, it is my view that Regulation 55 should be removed from the regulations. There should never be a regulation that allows for continuous re-characterisation of charges against any accused person because it infringes on the accused's Article 64, 67 and Article 22 rights. If the regulations are to be read together with the Statute as per Regulation 1 then the regulation does not correspond with the many rights which the statute seeks to protect in terms of the fair trial rights of the accused.

In the second instance, if Regulation 55 was not to be removed, the ICC should take key lessons from the tribunals and review Rule 50. In this instance, Regulation 55 has to contain provisions which more specifically guarantees the fair trial rights of the accused by making provision for the following:

- The re-characterisation timeframe is too broad, and it has to be framed in a more finite manner in order to ensure that the accused has legal certainty at the pre-trial stage of proceedings.
- Upon re-characterisation, a specific time period should be set out for the accused to be given sufficient time to prepare his defence. In the case of the tribunals it was 30 days, however this would largely be dependent on the extent of the re-characterisation and the impact it may have on the defendant's case. The time period should therefore be assessed on a case-by-case basis, taking into

[868] *Prosecutor v Karemera et al*, No ICTR-98-44-AR73, Decision on Prosecutor's interlocutory appeal against Trial Chamber II Decision of 8 October 2003 Denying leave to File an amended Indictment, 19 December 2003, para 19.

account the rights of the accused to have the time and facilities to prepare an adequate defence.

To conclude on this matter, Regulation 55 has been applied inconsistently in most cases to seriously prejudice the accused's rights to a fair trial, not only has it served to provide legal uncertainty, but it has also unnecessarily delayed proceedings.

7 3 Lessons on disclosure of evidence and confidentiality

This issue of disclosure of evidence, confidentiality and exculpatory evidence came out quite profoundly in the *Lubanga* case (Chapter 3). Disclosure of evidence is of paramount importance in ensuring the fair trial rights of the defence are upheld. The disclosure of evidence ensures that a defendant is in a good position to adequately prepare his or her defence which is a key aspect of a fair trial. Further, when the disclosure of evidence is delayed, the trial is also delayed which further infringes upon the defence's right to be tried without undue delay. In the *Lubanga* case this was particularly concerning as is evidenced by the many stays in proceedings before the chamber in an attempt to address the failure of the prosecutor to disclose evidence which proved to be exculpatory and would have a direct bearing on the guilt or innocence of the defendant.

There are various Articles and Rules in the Rome Statute that govern disclosure of evidence. The most concerning Article 54(3)(e) which was problematic in the *Lubanga* trial related to confidentiality agreements entered into by the Prosecutor:

> Article 54(3)(e) "Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents"

This Article is in direct conflict with Article 67(2) which states:

> "In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide."

In the *Lubanga* judgment, the court ultimately made the correct decision by insisting that the prosecutor disclose the relevant evidence, however, in my opinion, Article 54(3)(e) needs to be tightened. In addition, to avoid undue delays in trials, the prosecutor should receive punishment or sanctions for acting contrary to the fair trial rights of the defendant.

My argument is as follows: I concur with the recommendation made by Ambos who recommended, in line with the interpretation of Article 54(3)(e), the Prosecutor should conclude confidentiality agreements only under three conditions: first, there is no other "normal" way to obtain the respective information; second, the information is absolutely necessary to continue the investigation; and third, the information is only requested to generate new evidence.[869]

This suggestion and perhaps an insertion into the rules which requires the prosecutor to argue before the chamber why confidentiality agreements are required in a particular case may circumvent the difficulties which were experienced in *Lubanga* and also avoid undue delays for the defendant.

7 3 1 Recommendations

In this regard I concur with Ahronwitz and a few other authors[870] who have advocated that there should be consequences for the misconduct of prosecutors. However, as can be seen from my argument regarding the judicial approaches in the *Lubanga* chapter, the tribunals, as well as the ICC in *Lubanga*, have been hesitant to impose penalties for prosecutors.

In order to achieve the balance between impunity and respect for the fair trial rights of the defence it is necessary and indeed prudent for the judges to demonstrate through its jurisprudence, that the Prosecutor, who has been given wide discretion, can and will be punished for transgressions that result in the infringement of the fair trial rights of the accused and particularly in relation to undue delays in the cases before the ICC.

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[869] Ambos (2009) *New Criminal Law Review* 556.

[870] Turner (2012) *International Law and Politics* 175-257; Pitcher *Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings* 413-435. Both authors argue robustly for the tribunals and the ICC to sanction the prosecutor for non-disclosure violations.

In terms of the rules at the tribunals and the ICC which provides for sanctioning of the prosecutor, the Tribunal has Rule 68 *bis*.[871] A similar rule which provides for misconduct at the ICC is contained in Article 71:[872] Pitcher argues that the approach of the tribunals and the ICC to rely on whether the late or non-disclosure prejudiced the accused has been problematic.[873]

In my view, the approach undertaken by the tribunals and the ICC judges in regard to violations of the disclosure of evidence infringes on equality of arms and certainly infringes upon the fair trial rights of the accused. We can learn from the approaches taken by the tribunals, however, a more stringent approach should be undertaken by the ICC judges. It is arguable, therefore, that the judges at the ICC should implement sanctions against prosecutors to ensure equity and fairness in proceedings for the accused to receive a fair trial at the ICC.

In conclusion, Article 54(3)(e) should be tightened in terms of its application to only include instances where confidentiality agreements are necessary. This should further be confirmed by the chamber, through the judges, who should have the final say in respect of whether such confidentiality agreements are necessary or not. Sanctions should be imposed as opposed to stays of proceedings against prosecutors who fail to adhere to the rules of the disclosure of exculpatory evidence. In this way the fair trial rights of the accused and equality of arms would be protected.

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[871] Rule 68 bis Failure to Comply with Disclosure Obligations (adopted 13 Dec 2001)
The pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules.

[872] ICC Article 71 - Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.
2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

[873] Pitcher *Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings* 429.

7 4 Lessons on Katanga's right to life

Katanga represented a critical area of non-adherence to fair trial principles of the defendant, particularly considering the Court's interpretation of Article 108[874] of the Rome Statute. The prosecution of Mr Katanga in his home country would and does undermine his fair trial rights. Not only has he already been tried by the ICC (even though it was argued that it is not for the same offences, that still remains open to interpretation in my view) but he had also already served a lengthy sentence and more than that his life is at stake in a country that still has the death penalty. I find it remarkable and non-sensical, to say the least, that the ICC made this grave decision so lightly. At the very least, the ICC should have developed criteria to be used in future cases in deciding a matter of this magnitude. The criteria which I allude to should include whether the accused would be given a fair trial in his home country. This is not evident from the decision of the court at all.

Chapter 1 set out the fair trial principles applicable to accused persons and specifically referred to the ICCPR and the ECHR, in both the general comments and guidelines, it was clear that international human rights law does not condone the current situation faced by Mr Katanga, as is evident from the Human Rights Committee:

> "Returning an individual to a country where there are substantial grounds for believing that the individual faces a real risk of a severe violation of liberty or security of person such as prolonged arbitrary detention may amount to inhuman treatment prohibited by article 7 of the Covenant.[875]

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[874] Article 108 Limitation on the prosecution or punishment of other offences
1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.
2. The Court shall decide the matter after having heard the views of the sentenced person. Rome Statute of the International Criminal Court 67
3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

[875] General Comment 35 International Covenant on Civil and Political Rights Distr.: General 16 December 2014 Original: English Human Rights Committee General Comment No. 35 Article 9 (Liberty and security of person) Para 57.

7 4 1 Recommendations

In the *Katanga* chapter of this dissertation, I referred to the *Munyakazi* case at the ICTR and the fact that the ICTR declined to refer the defendant back to Rwanda due to the potential of life imprisonment in isolation. In this case, the tribunal was not assured by Rwanda that the defendant would receive fair treatment and it was a big consideration by the judges. The applicable Rule which found application at the ICTR was Rule 11*bis.*[876]

The Rome Statute contains no similar rule. However, it can be argued that in the Court's interpretation and application of Article 108, particularly in light of the importance of such a decision for the accused, the Court was also bound by Article 21(3) which clearly points to the fact that the court should have considered international law. If the court had done so and particularly looked at human rights and the fundamental right to life as well as the fair trial rights of the accused contained in Article 67 of the Rome Statute, the court may have arrived at a different conclusion.

Secondly, the Rome Statute falls short in terms of not clearly articulating the criteria by which the court should be guided in making its decision.

In sum, therefore, my argument has a few components:

(i) First, the court should have considered international law in making its decision as this is clearly enunciated and offers the court direction in Article 21(3).

(ii) Secondly the court should have reviewed the work of the tribunals and the manner in which they made their decisions, particularly taking into account the fair trial rights of the defendant and refusing to allow the transfer of a case in instances where the accused would also not receive fair treatment.

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[876] Rule 11 bis (B) The Referral Bench may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. (Revised 30 Sept 2002, amended 10 June 2004, amended 11 Feb 2005)

(iii) Thirdly, similar situations such as the one in *Katanga* should be prevented in the future as it is utterly and completely unfair for the accused to effectively be prosecuted twice.

This situation could be averted by a revision of Article 108 of the Rome Statute to include criteria which would be used to guide the decision making of the judges in respect of the accused. Such criteria would include whether the accused would have his or her fair trial rights protected and whether the death penalty is imposed in the country to which he will be transferred. It is common cause that most international or bilateral agreements between countries in respect of extradition contain such guarantees.[877]

Such criteria are simply not optional but should rather be mandatory in ensuring that the ICC is given the respect as an international criminal court as its duty is not only to end impunity but also to protect the rights of the accused. In interpreting law and deciding on the fate of an accused, it is argued that the judges at the ICC need to inculcate a more consistent approach throughout all their cases and that they should lean more effectively on the work of the tribunals in determining difficult matters pertaining to the fair trial rights of the accused.

In conclusion, therefore, Article 108 should be amended to include criteria as discussed above and the judges should be more consistent in their interpretation of the Articles of the Statute and also take account of the circumstances surrounding each case respectively but ultimately ensure that there is fairness in all proceedings and decisions of the court.

7 5 Lessons from the acquittals of *Bemba* and *Gbagbo* and *Ble Goude*

The key lessons from these acquittals were in respect of the confirmation of charges hearings and the accused's right to be informed about the charges and to have legal certainty. Other rights of the accused that were of critical importance pertained to the accused's rights to an expeditious trial, the inconsistent approaches of the court to 'no case to answer' motions as well as prosecutorial discretion.

[877] See the discussion on extradition and human rights in Strydom et al *International Law* (2016) 292-295.

7 5 1 Recommendations: Pre-Trial Chamber and Confirmation of Charges Hearings

The confirmation hearings have a specific function at the ICC and is a new and innovative concept, which if utilised correctly can ensure the effective, smooth and expeditious trial process. However, to achieve this, it is recommended that:

- Clear guidelines be developed in respect of the formulation of charges which should only focus on charges supported by reliable evidence;
- Cumulative charges should be avoided, and Regulation 55 should be used only in exceptional cases;
- The distinction between the role of the prosecutor and the judges should be clarified and a clear distinction should be drawn between the two to ensure that the prosecutor investigates cases which are only capable of successful convictions;
- The judges should only confirm charges which will not result in the wrongful prosecution of suspects;
- In instances where there is insufficient or unreliable evidence, the judges should decline to confirm charges instead of adjourning proceedings which result in undue delays for the defendant.

7 5 2 Recommendations: Fair trial rights of the defendant

The fair trial rights of the defendant should be of paramount importance in all proceedings before the court. This is particularly so in the following instances:

- The principle of fair labelling should be adhered to by all chambers of the court, particularly in relation to the exact charges for which accused persons are convicted;
- Command responsibility as a mode of liability should only be used when the prosecutor has sufficient evidence to support the elements necessary to prove this form of liability; and the principle of personal culpability should take precedence in determining whether or not to charge a defendant under Article 28;
- Regulation 55 (if it is to be retained) should be implemented with caution by the ICC chambers and should not be implemented at late stages during the trial as

this fundamentally impacts on the accused's fair trial rights to prepare an adequate defence;

- Written and reasoned judgments should be delivered by the court to ensure that the accused understands the basis upon which his acquittal or conviction was determined but also to ensure that there are no untoward inferences drawn on the basis of an oral judgment, particularly in light of the divergent interests and expectations from different role-players who have an interest in the court.

7 5 3 Recommendations: Defendant's right to an expeditious trial

- Mr Bemba was arrested in 2008 and released in 2018, which means he spent over 10 years in detention at the ICC for crimes that were never proven beyond reasonable doubt against him. The time between his arrest and the commencement of the trial amounted to two years which means that the Pre-Trial Chamber took two years to confirm the charges against him.
  Mr Gbagbo was arrested in 2011 and released in 2019, which means he spent 8 years in detention also for crimes that were never proven beyond reasonable doubt. There were five years between his arrest and the commencement of his trial at the ICC and the Pre-Trial Chamber took approximately five years to confirm the charges against him, based on insufficient evidence, to begin with. The length of Pre-Trial proceedings and trial proceedings needs to be reduced significantly, as the ICC procedures are negating the accused's rights to an expeditious trial at the ICC.
- The length of trial proceedings may be unnecessarily prolonged due to the extensive participation of victims. In Mr Bemba's trial, over 5000 victims were allowed to participate and in Mr Gbagbo's trial over 700 victims participated in the Pre-Trial Chamber. The participation of victims requires that extensive and time-consuming applications are being attended to by the court and victims are being allowed to participate at almost every stage of proceedings. The court has however tried to reduce the time taken by implementing the collective approach to victim participation. This approach may reduce the length of trials in the future.
- A further argument is that victims should not be allowed to participate at a stage when charges are not yet confirmed, as their participation could potentially

influence the manner in which the charges are formulated and confirmed in a Pre-Trial Chamber which is already struggling to comply with its mandate in terms of the Statute.

7 5 4 Recommendations: No case to answer

It is recommended that due to the fact that this motion is not contained in the Statute, that the Statute be amended to include such a motion which clearly sets out the manner and standard upon which the judges are to decide to either acquit the accused or continue with the trial. The inconsistent approaches currently being employed by the court concerning. The ICC needs to ensure that it develops clear jurisprudence to guide the work of the chambers on this matter. The inclusion of this motion in the Statute and through clear guidelines of the court will further serve to protect the fair trial rights of defendants who will clearly know how and at what stage to invoke such a motion, on what basis they are able to do so, the format for such a motion along with a clear standard of review which the judges will follow in making their decisions on such motions. This will ensure consistency and adherence to the principle of legality.

7 5 5 Recommendations: Prosecutorial Discretion

It is evident from the case law discussed in this dissertation that the discretion of the prosecutor in selecting cases, the potential outside influences on the selection of cases and the pressure to ensure a conviction all play a role in the manifestation of fair trial rights of the defendant.

Mechanisms need to be put in place by the ICC to curb the discretionary powers of the various functionaries, especially the Prosecutor, as many of the subsequent problems encountered by the ICC, begins with the prosecutor's selection, investigation of cases and formulation of charges.

In the cases discussed the prosecutor relied on weak evidence, and the accused persons spent years in detention away from their families. Article 85 of the Rome Statute provides for compensation to accused persons for wrongful convictions and detentions and it is recommended that this be implemented by those acquitted of crimes against them, particularly in instances where they have been in detention for long periods of time. Too often we dehumanise individuals who are being prosecuted

due to heinous crimes being committed during times of armed conflict, however, we fail to recognise that they are human, they have families and lives and if they have been wrongfully prosecuted surely, just as victims, they should receive reparations for their suffering.

It is strongly recommended that the prosecutorial strategy for the selection and investigation of cases should be revisited but more than that, prosecutor's should receive sanctions in these instances for their poor performance and the Pre-Trial Chamber needs to take a firmer stance in terms of only confirming charges, based on reliable evidence and according to the 'substantial grounds to believe' standard, not 'beyond reasonable doubt' standard which is reserved for the Trial Chamber.

7 6 Lessons from Ntaganda and the principle of legal certainty

The *Ntaganda* chapter significantly reviewed the principle of legality and the court's interpretation of international human rights law in relation to legality. Particularly the ICTY had the following guidance in respect of the principle of legality:

> "But under no circumstances may the court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable and punishable, or by criminalising an act which had not until the present time been regarded as criminal."[878]

7 6 1 Recommendations

In the *Ntaganda* case, it is my view that the judges erred in terms of the interpretation of the crime. The importance of this case is the manner in which the judges disregarded the fundamental principle of legality. The principle of legality provides certainty for an accused person and this certainty provides a firm basis upon which an accused may prepare his or her defence. Nevertheless, the fundamental concept of equality of arms was infringed in the *Ntaganda* judgment as the judge's interpretation placed the defence at an unfair disadvantage. In *Ntaganda*, the ICC interpreted IHL too broadly without taking the facts and circumstances of Mr Ntaganda's specific case into account.

[878] Para 196.

Therefore, in sum I am of the view that the critical and fundamental principles of criminal law were infringed by the chambers in the *Ntaganda* decisions in respect of jurisdiction. That the court's reliance on IHL infringed on Mr Ntaganda's right to know the case against him and the principle of legality.

It was clear that the court relied heavily on teleological international law interpretation in determining the crime and did not strictly adhere to the principle of legality in coming to its conclusion because if it had interpreted the law in the strictest sense according to customary international criminal law and had also relied on previous case law of the tribunals as well as the ICC, it may have arrived at a different conclusion.

Lastly, it is recommended that Article 70 prosecutions should be conducted by independent and separate prosecutors from the main case. Judicial economy is simply not a reason to continuously allow the same prosecutors to prosecute the main case as well as Article 70 proceedings. If this were to continue, a similar situation regarding the prosecutor's access to confidential information may occur in future cases before the court and accused persons should be protected from this eventuality. A system of a clear delineation between cases should be adhered to by prosecutors working independently on the two distinct and separate cases against the same accused. Judges should conduct oversight over this process to ensure that the fair trial rights of the accused are protected.

7 7 The dialectical tensions demystified

Is the ICC a confused and conflicted Court in need of guidance? Is it a court to end impunity, one defending the fair trial rights of the accused or a court whose sole aim is to ensure that victims receive reparations?

In *Katanga* we saw that the court did not utilise the opportunity to pronounce on the fair trial rights of the accused when it allowed Mr Katanga to be prosecuted after its Article 108 decision. In *Bemba* we saw an entirely different scenario, where the court found numerous errors and acquitted the accused. The most telling portion of the *Bemba* judgment and the Court's confusion regarding its role is set out in the following paragraph:

> "What we do suggest is that we stop viewing the International Criminal Court's reparation procedures as (part of) a mechanism to restore social justice and to heal the wounds of societies that have been torn apart by aggression, genocide, crimes against humanity or war crimes. Only if we do that will it be possible to manage victims' expectations and can we relieve International Criminal Court prosecutors and judges from potential pressure that is currently imposed upon them to secure convictions at all cost."[879]

This paragraph illustrates the crux of the tension which the ICC experiences in respect of its role and competing interests within the international community. The different cases reviewed the various decisions taken by the court in relation to the participation of victims. The cases have demonstrated the extent to which the ICC has grappled with the role of victims and their participation in criminal proceedings.

Chapter 1 and 2 expressly set out all the fair trial rights to which victims are entitled. The views of various authors have also been included to ensure that the tensions between the rights of the accused and the participation of victims are ventilated. The dissertation revealed that victims have equal rights to justice in the same way as the accused.

However, the case law research further revealed that the ICC is grappling with ensuring the appropriate balance between the rights of the accused and the participation of victims in proceedings. It is for this reason, that the argument is made that the ICC should ensure a more effective method of the participation of victims in proceedings to ensure that the rights of the accused are upheld in all proceedings before the court but also to ensure that victims receive their rights to truth, justice and reparations.

The ICC, in the first instance, is an international criminal court and it is grappling with the very noble aspirations that it seeks to achieve; those being ensuring that the fair trial rights of the accused are upheld, that victim participation is meaningful and that ending impunity is a reality for international communities. It is for this reason that the following recommendations are made:

(i) The court moves towards a point of becoming clearer about its role in relation to the competing interests of all parties;

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[879] Para 75.

(ii) That the ICC and the Assembly of States Parties reach consensus on the impact it wishes to make within the context of balancing the political arena and ending impunity for crimes against humanity;

(iii) That the ICC, and particularly the prosecutor, reviews the manner in which it conducts investigations and relates to victims in the context of African countries, taking into account the particular context of the countries in which investigations are initiated and the needs and interests of the victims in those countries. In particular, reviewing the best possible way to obtain evidence and to represent victims in African countries with a view to also engaging in outreach activities in a more substantive and nuanced manner; and

(iv) That the ICC institutionalises a practice of reform within African countries, by advocating for those countries who are not parties to international human rights agreements to become parties thereto and to implement legislative reform to address potential gaps to ensure fair trial practices are upheld and fair treatment is adhered to.

In conclusion, the dissertation revealed the very real conflicting interests confronting the ICC, however, the main function and purpose of the court are primarily to ensure the convictions of those accused of crimes against humanity. By focusing on this objective primarily, the court will as a consequence ensure that the needs of victims and the international community are met.

7 8 Limitations of study and recommendations for future research

The focus of this study was on the fair trial rights of the accused as viewed through the legal and factual matrixes of six cases; *Lubanga, Katanga, Bemba, Gbagbo and Ble Goude and Ntaganda*. Since its inception in 2002 however, the ICC has only dealt with 26 cases of which six have been closed.

A key limitation of this dissertation is therefore that only six cases were analysed and this was done primarily with a view to investigating whether or not the ICC had conducted fair trials towards defendants, also taking into account the participation of victims and the international community. Even so, principles are not about raw numbers, but about universality, consistency and rationality.

The numerical limitation, however, presents an opportunity for further research in the future particularly in respect of the following key areas identified by this dissertation:

(i) The amendment of Regulation 55;
(ii) Further research into complementarity and Article 108, particularly in light of the right to life of defendants;
(iii) The role and function of the prosecutor and the Pre-Trial Chamber in confirmation of charges against defendants;
(iv) Insertion of an Article in the Statute on 'no case to answer' motions;
(v) The appointment of an independent prosecutorial team in Article 70 investigations and
(vi) A revision of certain Articles and Rules of the Rome Statute, particularly in relation to the wide discretion given to the prosecutor and sanctions which should be imposed against the prosecutor in actions which serve to subvert the proper functioning of the court.
(vii) Furthermore, in-depth research on the actual experiences of victim's who have participated in the ICC trials, focusing on whether their experiences within the ICC trials has contributed to their rights to truth, justice and reparations; and
(viii) Further detailed research into the political influences which potentially impact the ICC.

7 9 Concluding remarks

The ICC has been given a huge challenge to try those accused of the most heinous crimes, to end impunity and also to ensure the participation of victims. It comes as no surprise that the ICC has received much criticism, particularly from African countries. As to date, the ICC has tried and convicted accused persons from African countries only. South Africa for one has stated that it wishes to withdraw from the ICC.[880]

[880] As of date the latest South African withdrawal bill, in the form of the International Crimes Bill, is still in bill form and in the various legislative and committee phases. It is not clear when, and if at all, this bill will be tabled in parliament for debate and adoption.

The ICC case law reflects the many challenges still encountered by this court struggling with defining its role and finding credibility within the international community.

However, there are judges at the court who have come out quite clearly in favour of protecting the rights of the accused. This, however, is insufficient as the Rome Statute and its Rules need to be applied consistently in *all* cases. In the future, the court has an important decision to make in terms of its identity and its consistent application of the law.

The Rome Statute as the founding instrument of the ICC projects the ICC (wrongly) as primarily a *human rights court* with a broad mandate to end impunity and enhance world peace. In reality, the ICC is, of course, a *criminal court* with one paramount task: to determine, via fair criminal trials, whether accused persons are guilty of crimes within the jurisdiction of the ICC. More emphasis or at least a balanced approach should be applied between the interests of victims and those of the accused. In many instances (as illustrated in this dissertation) the court has unfortunately not succeeded in protecting the fair trial rights of the accused nor ensured that there is equality of arms within trial proceedings.

Contradictions and tensions, in the dialectical sense, can be healthy. Law is not an exact science and competing interests, interpretation, consideration, reflection and reform are all tools and dispositions that can help to achieve justice for both the perpetrator and the victim of crime. The criticisms and proposals for reform put forward in this dissertation should, therefore, be seen as an attempt to make the ICC a better institution; a legal and institutional role-player in the international criminal justice project that will not collapse under its own contradictions, but that will find synthesis in a narrow, precise and fair construction of its role as *the* eminent tribunal where those accused of the most serious crimes under international law can face justice in which the international community – and victims – can have confidence.

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