# Systematic and Casuistic Approaches to the Role of Victims in Criminal Proceedings before the International Criminal Court

<table>
<thead>
<tr>
<th>Journal:</th>
<th><em>New Criminal Law Review</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>Manuscript ID:</td>
<td>draft</td>
</tr>
<tr>
<td>Manuscript Type:</td>
<td>Original Article</td>
</tr>
<tr>
<td>Keywords:</td>
<td>Rome Statute, International Criminal Court, Victims Participation, Victims, international criminal procedure, discretion, Pre-Trial Chamber, inquisitorial, Review Conference, ICC Statute</td>
</tr>
<tr>
<td>Abstract:</td>
<td>The article does not intend to review the overall system of victims’ participation in ICC proceedings. Quite the contrary, it focuses on one specific aspect of such a system: the systematic and casuistic approaches adopted so far by different ICC Chambers in shaping, pursuant to article 68 (3) of the Statute, the role of victims at the investigation stage of a situation and in case-related proceedings. Furthermore, it is written against the backdrop of the first Review Conference scheduled for next year pursuant to article 121 (1) of the Rome Statute.</td>
</tr>
</tbody>
</table>
1. Introduction

Prior to the establishment of the International Criminal Court (‘the ICC’), the statutes and rules of procedure and evidence of international criminal tribunals only provided for victims’ participation as witnesses in the proceedings.1 This falls short of the role granted to victims in criminal proceedings in most national jurisdictions. Common law jurisdictions, such as Canada, Ireland, New Zealand, and the United States of America, grant victims the right to appear before the Court at sentencing in order to make impact statements.2 Some national jurisdictions from the Romano-Germanic tradition, such as France, grant victims the procedural status of parte civile.3 Others, such as Spain, go as far as to grant victims the right to become private prosecutors on a regular basis.4 The Rome Statute (‘the RS’), along with the ICC Rules of Procedure and Evidence (‘RPE’) and the ICC Regulations of the Court (‘RegC’), confer upon victims an unprecedented procedural status in international criminal proceedings.5 This procedural status is considered by many to be one of the most significant features of the RS.6 It is the result of a negotiation process carried out against the backdrop of the trend in international human rights law and international humanitarian law towards increasing the role of victims.7 It acknowledges that the interests of victims often differ from the interests of the Prosecution.8 It puts an end to

---

3 Ibid. Concerning the procedural status of victim under French Law, see Jorda and De Hemptinne (Above n 1), at 1401. See also articles 89, 117, 118, 183, 186, 312, 487(3), 573, 567 and 573 of the French Code of Criminal Procedure.
4 Article 101 of the Spanish Code of Criminal Procedure.
the decades in which victims’ procedural rights were left aside in international criminal proceedings, which for many constituted a form of re-victimization.9

The provisions addressing the role of victims in ICC proceedings can be divided according to the specific stage of the proceedings in which they are applicable. Article 15 (3) of the RS and rules 50, 92 (3), 93, 107 and 109 of the RPE provide for the participation of victims during the triggering procedure - which aims at deciding whether the ICC should initiate an investigation over a given situation defined by temporal, territorial and personal parameters (for instance, the situation in the territory of the Democratic Republic of the Congo since 1 July 2002 or the situation in the territory of the Darfur region since 1 July 2002).10

Rules 92(2), 93, 107 and 109 of the RPE provide for the participation of victims at the investigation stage of a situation – this stage follows the triggering procedure and precedes the initiation of a case through the issuance of a warrant of arrest or a summons to appear.11 Furthermore, according to the case law of Pre Trial Chamber I (‘PTC I’)12 and Pre Trial Chamber II (‘PTC II’), article 68 (3) of the RS and rules 91 to 93 of the RPE provide additional procedural rights for victims at this stage.13

Articles 19 (3) and 68 (3) of the RS and rules 91 and 93 of the RPE provide for the participation of victims once a case arises – the subject of a case (as opposed to a situation) is the alleged criminal liability of one or more individuals for those specific incidents contained in a warrant of arrest or summons to appears.14 Article 19 (3) of the RS is confined to jurisdiction and admissibility proceedings. Hence, article 68 (3) of the RS, as developed by rules 91 to 93 of the RPE, constitutes the core provision on the participation of victims during the different procedural stages of a case.

Article 75 (3) of the RS, rules 94 to 99 of the RPE, and regulation 88 of the RegC grant victims the procedural status of party to the reparation proceedings held against a convicted person.15

Finally, rules 86, 89 and 90 of the RPE and regulation 86 of the RegC address a number of common problems related to the role of victims in ICC proceedings, and, in particular, those relating to victims’ access to the Court and their legal representation.16

This article does not intend to review the overall system of victims’ participation in ICC proceedings. Quite the contrary, it focuses on one specific aspect of such a system: the

---

11 Ibid at 40, 41, 107-110; and Bitti and Friman (Above n 5), at 470.
12 See in particular DRC Situation (Pre-Trial Chamber I Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6) ICC-01/04-101-EN (17 January 2006) paras 28-54, 65-76 [hereinafter Pre-Trial Chamber I 17 January 2006 Decision].
13 See Uganda Situation (Pre-Trial Chamber II Decision on Victim’s Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06) ICC-02/04-101 (10 August 2007) paras 88-104 [hereinafter Pre-Trial Chamber II 10 August 2007 Decision].
14 The application of article 68 (3) of the RS at the investigation stage of a situation is not supported by some writers. See, in particular, Donat-Cattin (Above n 6), at 873; and CH Chung, ‘Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise’ (2008) 6 Northwestern Journal of International Human Rights 459, 467. According to Chung, Pre-Trial Chamber I 17 January 2006 Decision, ‘[…] expanded the victim’s participation right: (1) beyond any definition foreseen or advocated by any commentator on the Rome Statute; (2) by the Chamber’s own description, beyond any right required by the Statute’s text.’
15 Pre-Trial Chamber I 17 January 2006 Decision (Above n 12), at para. 65. See also Olasolo Triggering Procedure (Above n 10), at 109.
16 According to article 75 ICC Statute, reparation proceedings can also be held simultaneously with the trial. See P Lewis and H Friman, ‘Reparations to Victims’, in RS Lee (ed), The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers 2001) 474.
17 Bitti and Friman (Above n 5), at 460.
systematic and casuistic approaches adopted so far by different ICC Chambers in shaping, pursuant to article 68 (3) of the Statute, the role of victims at the investigation stage of a situation and in case-related proceedings. Furthermore, it is written against the backdrop of the first Review Conference scheduled for next year pursuant to article 121 (1) of the RS.

2- The Broad Discretion Conferred by Article 68 (3) RS on ICC Chambers

The scope of victims’ participation at the investigation stage of a situation and throughout case-related proceedings is today one of the critical issues before the ICC. The key provision on this matter is article 68 (3) of the RS, which states:

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.

This provision entrusts the ICC Chambers with the discretion to determine (i) when victims can participate in ICC proceedings, and (ii) the specific manner in which such participation can take place.

In exercising their discretion, the ICC Chambers are only bound by two general criteria. Firstly, victims are only entitled to participate at ‘stages of the proceedings determined to be appropriate by the Court’ when their ‘personal interests’ are affected. Secondly, they are only entitled to present ‘their views and concerns’ in a manner which is not ‘prejudicial to or inconsistent’ with the rights of the accused and a fair and impartial trial. These two criteria give rise to numerous questions, such as:

(i) How should victims’ personal interests be defined? Should any distinction be drawn between those interests that are common to all victims (victims’ general interests) and those other interests specific to a particular victim or a limited group of victims (victims’ specific interests)?

(ii) When are victims’ personal interests affected? Should the ICC competent Chamber analyse whether victims’ personal interests are affected by (a) overall stages of the proceedings (i.e., the investigation stage), or (b) by specific procedural activities (i.e., a defence challenge to the admissibility of those documents obtained in an allegedly unlawful search and seizure) or items of evidence (i.e., a video of the conditions of a detention camp or the statement of a witness)?

(iii) What is the value of the abundant case law of international and regional human rights bodies, as well as that of numerous national jurisdictions, highlighting the fact that, in addition to their right to obtain reparations, victims have a central interest in the identification and prosecution of those who have allegedly harmed them?\(^{18}\)

(iv) Which stages of criminal proceedings can be considered ‘appropriate’ for victims’ participation when, at the national level, there are some systems providing for victims’ participation at all stages of criminal proceedings, and others which only provide for victims’ participation at the sentencing stage?\(^{19}\)

(v) Which procedural activities are encompassed in the expression ‘to present views and concerns’?

---

\(^{18}\) See, the abundant case law on this matter cited by Pre-Trial Chamber I in Katanga and Ngudjolo Case (Pre-Trial Chamber I Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case) ICC-01/04-01/07-474 (13 May 2008) paras 31-44 [hereinafter Pre-Trial Chamber I 13 May 2008 Decision].

\(^{19}\) See supra n 2-4.
(vi) Which manners of presenting ‘views and concerns’ can be considered prejudicial or inconsistent with the rights of the accused, in light of the fact that international and regional human rights bodies have not found the role of victims as private prosecutors in some national systems to be *per se* contrary to international human rights standards?\textsuperscript{20}

Rules 89 to 93 of the RPE do not provide an answer to the abovementioned questions. Rules 89 and 90 of the RPE regulate the process of victims’ application for participation in ICC proceedings and the issues concerning victims’ legal representation.\textsuperscript{21}

Rule 91 of the RPE underscores that:

A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rule 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative’s intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims.

Rule 91 of the RPE also regulates the procedure in which victims can request to question witnesses in those hearings in which they have been granted the right to attend and participate by the competent Chamber.\textsuperscript{22}

Rule 92 of the RPE is concerned with notification of decisions and judicial proceedings to victims. Paragraphs 2 and 3 provide for the notification to victims of (i) the Prosecution’s decisions not to open an investigation and not to prosecute under article 53 of the RS, and (ii) the Pre-Trial Chamber’s decision to hold a confirmation hearing. The *rationale* behind the notification of these decisions is ‘to allow victims to apply for participation in the proceedings in accordance with rule 89.’ Paragraphs 5 through 8 provide for the notification to victims of those proceedings (including hearings and judicial decisions) in which they have been granted the right to participate by the competent Chamber.\textsuperscript{23}

Finally, Rule 93 of the RPE grants the ICC Chambers discretion to seek the views of victims in relation to any issue that may arise out of the proceedings.\textsuperscript{24}

As a result, one cannot but conclude that article 68 (3) of the RS, along with rules 89 to 93 of the RPE, grant the ICC Chambers broad discretion to shape the role of victims at the investigation stage of a situation and throughout case-related proceedings.\textsuperscript{25}

The role of victims in criminal proceedings is closely related to the core principles that are at the roots of any give system of criminal procedure. Those systems with a more adversarial approach provide no role for victims in criminal proceedings or limit their participation to making impact statements at the sentencing stage. Those other systems that, despite being accusatorial, have a less adversarial approach and allow the bench to have a more prominent role in the conduct of the proceedings often provide victims with an extensive role throughout all stages of the criminal proceedings.

As a result, the ample discretion in shaping the victims’ role granted by article 68 (3) of the RS and rules 89 to 93 of the RPE to ICC Chambers ultimately means that the drafters of the RS and the RPE chose to entrust the ICC Chambers with broad discretion to shape ICC

\textsuperscript{20} Pre-Trial Chamber I 13 May 2008 Decision (Above n 18), at paras 52-75.

\textsuperscript{21} Bitti and Friman (Above n 5), at 460-5.

\textsuperscript{22} *Ibid* at 466-468.

\textsuperscript{23} *Ibid* at 470-473.

\textsuperscript{24} *Ibid* at 473-474.

\textsuperscript{25} In this regard, Bitti and Friman (*Ibid*), at 457, explain that the definition of the procedural role of victims in the proceedings before the ICC was left to the competent ICC Chambers. According to Bitti and Friman, this was the result of the fear by a number of delegations that victims’ participation in ICC proceedings would be impracticable due to the high number of victims. The same is highlighted by Donat-Cattin (Above n 6), at 880-882.
criminal proceedings according to a more, or to a less, adversarial approach.\textsuperscript{26} Needless to say, the choices that the drafters of the RS and the RPE left in the hands of ICC Chambers go to the very heart of ICC criminal proceedings.

3- Systematic versus Casuistic Approach in Exercising the Discretion Granted by Article 68 (3) of the RS

a. Systematic Approach

ICC Chambers have so far adopted diverse approaches to the interpretation of article 68 (3) of the RS. According to PTC I, PTC II and Pre Trial Chamber III (‘PTC III’), the definition of victims’ personal interests under article 68 (3) of the RS is not limited to those interests that are specific to one or a few victims. On the contrary, such a definition also includes interests that are common to all victims, such as verification of the events in which they were allegedly harmed, identification and prosecution of the alleged perpetrators and securing reparations.\textsuperscript{27}

Furthermore, the analysis of whether victims’ personal interests have been affected must be carried out in relation to the stage of the proceedings - such as, for instance, the investigation stage of a situation, or the preliminary stage of case-related proceedings (also known as the confirmation hearing stage) - and not in relation to specific procedural activities or items of evidence.\textsuperscript{28}

Moreover, whenever victims’ personal interests are affected by a given stage of the proceedings, such a stage must be considered automatically as ‘appropriate’ for victims to present their views and concerns - that is to say, to participate.\textsuperscript{29}

Once a given stage of the proceedings has been considered appropriate for victims’ participation, those procedural rights that victims can exercise during that stage must be defined in a manner ‘which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.\textsuperscript{30}

PTC I and PTC II have found that victims’ personal interests are affected, within the meaning of article 68 (3) of the RS, at the investigation stage of a situation because the

\textsuperscript{26} G de Beco, ‘La Participation des Victimes à la Procédure devant la Cour Pénale Internationale’ (2007) 87 Revue de Droit Pénale et de Criminologie 797, 798, refers to this situation as a mixture of more adversarial and less adversarial systems.

\textsuperscript{27} Pre-Trial Chamber I 17 January 2006 Decision (Above n 12), at paras 63 and 72; Pre-Trial Chamber I 13 May 2008 Decision (Above n 18), at paras 31-44; Pre-Trial Chamber II 10 August 2007 Decision (Above n 13), at paras 9-11; and \textit{Bemba Case} (Pre-Trial Chamber III Fourth Decision on Victims’ Participation) ICC-01/05-01/08-320 (12 December 2008) paras 90-91 [hereinafter Pre-Trial Chamber III 12 December 2008 Decision].

\textsuperscript{28} \textit{Darfur Situation} (Pre-Trial Chamber I Decision on the Requests for Leave to Appeal the Decision on the Application Participation of Victims in the Proceedings in the Situation), ICC-02/05-121 (6 February 2008) p. 6 [hereinafter Pre-Trial Chamber I 6 February 2008 Decision]; \textit{Bemba Case} (Pre-Trial Chamber III Third Decision on the Question of Victims’ Participation Requesting Observations from the Parties) 01/05-01/08-253 (17 November 2008) paras 6-7 [hereinafter Pre-Trial Chamber III 17 November 2008 Decision]; and Pre-Trial Chamber III 12 December 2008 Decision (\textit{Ibid}), at paras 84, 92-3.

\textsuperscript{29} Pre-Trial Chamber I 6 February 2008 Decision (\textit{Ibid}), at p. 6. A similar conclusion is implicitly reached in relation to the preliminary stage of case-related proceedings (also known as confirmation hearing stage) by Pre-Trial Chamber III 12 December 2008 Decision (\textit{Ibid}), at paras 87-94.

\textsuperscript{30} Pre-Trial Chamber I 6 February 2008 Decision (\textit{Ibid}), at p. 9; and Pre-Trial Chamber III 12 December 2008 Decision (\textit{Ibid}), at paras 94-6.
verification of the events and the identification of the alleged perpetrators takes place at this stage.\textsuperscript{31}

PTC I,\textsuperscript{32} PTC II\textsuperscript{33} and PTC III\textsuperscript{34} have also held that victims’ personal interests are affected, within the meaning of article 68 (3) of the RS, at the preliminary stage of case-related proceedings because a trial can only be opened if the charges against the suspect are confirmed at this stage. In this regard, PTC II has highlighted:

That the personal interests of a victim are affected in respect of proceeding relating to the very crime in which that victim was allegedly involved entirely in line with the nature of the Court as a judicial institution with a mission to end impunity for the most serious crimes. This was evident throughout the negotiations leading up to the adoption of the Statute, during which most delegates “doubtless thought it morally right to provide to persons who have suffered serious violations of humanitarian law, the right to participate in the trial of the perpetrators of those violations and to ensure, during the course of the proceedings, that the Court is fully apprised of their personal sufferings”.\textsuperscript{35}

As a result, PTC I and PTC II have concluded that the investigation stage of a situation and the preliminary stage of case-related proceedings are appropriate stages for victims’ participation. Furthermore, although PTC III has not addressed so far the issue of whether victims’ personal interests are affected, within the meaning of article 68 (3) of the RS, at the investigation stage of a situation, it has reached the same conclusion than PTC I and PTC II in relation to the preliminary stage of case-related proceedings. Moreover, as PTC I, PTC II and PTC III have reached this conclusion on the basis of general personal interests which are common to all victims, there is no need to carry out the same analysis again once a new situation or case arises.\textsuperscript{36}

After ascertaining the appropriateness of victims’ participation in the two said stages of the proceedings, PTC I, PTC II and PTC III proceeded to determine which procedural rights victims could exercise during them.

In carrying out this task, PTC I has emphasized that, according to article 68 (3) of the RS, the competent Chamber must only be attentive to ensuring that victims’ procedural rights are not defined in a manner that is ‘prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’\textsuperscript{37}. Accordingly, for PTC I, victims’ personal interests are only relevant for the determination of those stages of the ICC proceedings that are ‘appropriate’ for victims’ participation. Nevertheless, they are irrelevant for the

\textsuperscript{31} Pre-Trial Chamber I 17 January 2006 Decision (Above n 12), at paras 63-72; DRC Situation (Pre-Trial Chamber I Decision on Request for leave to appeal the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor) ICC-01/04-438 (23 January 2008) p. 5 [hereinafter Pre-Trial Chamber I 23 January 2008 Decision on DRC Situation].

\textsuperscript{32} Pre-Trial Chamber I 23 January 2008 Decision on DRC Situation (Above n 31), at para 5; and Pre-Trial Chamber II 10 August 2007 Decision (Above n 13), at paras 32-41.

\textsuperscript{33} Pre-Trial Chamber III 12 December 2008 Decision (Above n 27), at paras 91-2.

\textsuperscript{34} Pre-Trial Chamber I 13 May 2008 Decision (Above n 18), at para 45; Pre-Trial Chamber I 6 February 2008 Decision (Above n 28), p. 9. See also Pre-Trial Chamber II 9 January 2008 Decision on DRC Situation (Above n 31), at p. 5; and Darfur Situation (Decision on Request for leave to appeal the Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor), ICC-02/05-118 (23 January 2008) p. 5 [hereinafter Pre-Trial Chamber I 23 January 2008 Decision on Darfur Situation].
determination of those procedural rights that victims can exercise at the investigation stage of a situation and the preliminary stage of case-related proceedings.\(^{38}\)

As a result, once defined by the competent Chamber, the relevant procedural rights can be exercised by all natural and legal persons, who fulfil the criteria set out in the definition of ‘victim’ provided for in rule 85 of the RPE.\(^{39}\) Only those victims who are granted anonymity will have a more limited set of procedural rights in order not to violate the prohibition against anonymous accusers.\(^{40}\) Moreover, nothing prevents the competent Chamber from granting the same set of procedural rights to victims every time a new situation or case arises.\(^{41}\)

This interpretation of article 68 (3) of the RS has led to the recognition of a procedural status of victim at the investigation stage of a situation and at the preliminary stage of case-related proceedings. The content of this procedural status need not be revised every time a new situation or case arises. Indeed, whenever new situations or cases arise, the competent Chamber need only to decide which applicants fulfil the criteria set out in the definition of ‘victim’ provided for in rule 85 of the RPE. It is for this reason that this approach can be qualified as a systematic approach to victims’ participation in ICC proceedings.

b. Casuistic Approach

Trial Chamber I (‘TC I’) has embraced a different interpretation of article 68 (3) of the RS. TC I acknowledges the existence of several ‘general interests of victims’, such as securing reparations, presenting their views and concerns, verifying certain facts and ascertaining the truth, protecting their dignity at trial, protecting their security and being recognized as victims of a case.\(^{42}\) Nevertheless, it considers that the analysis of victims’ personal interests pursuant to article 68 (3) of the RS cannot be confined to analysing whether such ‘general interests of victims’ are affected by overall stages of ICC proceedings.\(^{43}\) For TC I, article 68 (3) of the RS requires a case-by-case analysis based on the specific personal interests of each victim.\(^{44}\)

TC I considers that victims’ personal interests must be assessed in two steps. First, it is necessary to carry out an initial analysis of whether the specific personal interests of a given

\(^{38}\) *Ibid.* Pre-Trial Chamber III 12 December 2008 Decision (Above n 27), at paras 108-110, has adopted a different approach, according to which victims must show that their specific personal interests are affected by an specific issue of law or fact before they can make at the confirmation hearing oral or written submissions other than opening and closing statements. This approach resembles, to a certain extent, to the casuistic approach adopted by Trial Chamber I in the *Lubanga* Case.

\(^{39}\) Pre-Trial Chamber I 13 May 2008 Decision (Above n 18), at para 45; Pre-Trial Chamber I 6 February 2008 Decision (Above n 28), p. 9; Pre-Trial Chamber I 23 January 2008 Decision on DRC Situation (Above 31), at p. 5; and Pre-Trial Chamber I 23 January 2008 Decision on Darfur Situation (Above n 37), p. 5.

\(^{40}\) Pre-Trial Chamber I 13 May 2008 Decision (Ibid), at paras 171-174; and *Lubanga* Case (Pre-Trial Chamber I Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing) ICC-01/04-01/06-462-tEN (22 September 2006) pp 8 and 9 [hereinafter Pre Trial Chamber I 22 September 2006 Decision]. Pre-Trial Chamber I 13 December 2008 Decision (Above n 27), at para 99, has adopted a different approach, according to which anonymous and non-anonymous victims are to be granted the same set of procedural rights.

\(^{41}\) Pre-Trial Chamber I 13 May 2008 Decision (Ibid), at para 45; Pre-Trial Chamber I 6 February 2008 Decision (Above n 28), p. 9; Pre-Trial Chamber I 23 January 2008 Decision on DRC Situation (Above 31), at p. 5; and Pre-Trial Chamber I 23 January 2008 Decision on Darfur Situation (Above n 37), at p. 5.

\(^{42}\) *Lubanga* Case (Trial Chamber I Decision on Victim’s Applications) ICC-01/04-01/06-1119 (18 January 2008) para 97 [hereinafter Trial Chamber I 18 January 2008 Decision].

\(^{43}\) *Ibid* at paras 97 and 98.

\(^{44}\) *Ibid.*
victim are affected by the issues and/or items of evidence that are the subject of the trial.\textsuperscript{45}
Only those victims that can show a link between their specific personal interests and the issues and/or items of evidence which are the subject of the trial can be granted ‘participating status.’\textsuperscript{46}
Securing ‘participating status’ does not mean, nevertheless, that victims are entitled to exercise procedural rights in the trial proceedings. Quite the contrary, according to TC I, only those victims who, in addition to having secured ‘participating status’, can show that their personal interests are affected by a specific procedural activity or item of evidence are entitled to participate.\textsuperscript{47} As a result, the right to participate in relation to any given procedural activity or item of evidence is only secured after a second analysis of the specific personal interests of those granted ‘participating status’ is carried out in light of the relevant procedural activity or item of evidence.\textsuperscript{48}
It is after this second analysis is met that the competent Chamber will entertain the task of determining the manner in which victims can participate in relation to the specific procedural activity or piece of evidence at hand.\textsuperscript{49} It is at this point, when the second criteria of article 68 (3) of the RS comes into play to ensure that the manner in which victims are allowed to participate ‘is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’\textsuperscript{50} All in all, according to TC I, the determination of the stages of the proceedings that are appropriate for victims’ participation within the meaning of 68 (3) of the RS must be carried out in relation to specific procedural activities or items or evidence. Hence, the competent Chamber must carry out a separate analysis in relation to each procedural activity and item of evidence which is the subject of the trial proceedings as long as victims request to participate in them. Moreover, such analysis must be carried out in light of the specific personal interests of the victims who request to participate in relation to the relevant procedural activity or piece of evidence.
As a result, according to the interpretation of article 68 (3) of the RS embraced by TC I, there is no procedural status of victim in ICC proceedings, as participatory rights are only granted (i) in relation to specific procedural activities or items of evidence and (ii) in light of the specific personal interests of those requesting to participate. Furthermore, given the uniqueness of those factors that the competent Chamber must take into consideration to decide upon each victim’s request, it is highly unlikely that any such decision could automatically be applicable in subsequent cases with different victims. It is for this reason that this approach can be qualified as a casuistic approach to victims’ participation in ICC proceedings.

c. Appeals Chamber Case Law

\textsuperscript{45} Ibid at para 95. In order to carry out this analysis, TC I uses as its main reference tool the ‘summary of evidence’ that the Prosecution must file prior to the start of the trial (Trial Chamber I 18 January 2008 Decision (\textit{Ibid}), at para 102).
\textsuperscript{46} Ibid at paras 2, 95-6, 102-3 and 138.
\textsuperscript{47} Ibid at paras 96-104. See also \textit{Lubanga Case} (Trial Chamber I 15 December 2008) para 130 [hereinafter Trial Chamber I 15 December 2008 Decision].
\textsuperscript{48} Trial Chamber I 18 January 2008 Decision (\textit{Ibid}), at paras 96-104. See also Trial Chamber I 15 December 2008 Decision (\textit{Ibid}), at p. 41, where TC I instructs those victims granted \textit{participating status}, who wish to participate during the trial proceedings, ‘to set out in a discrete written application the nature and the detail of their proposed intervention at the earliest possible opportunity.’
\textsuperscript{49} Trial Chamber I 18 January 2008 Decision (\textit{Ibid}), at para. 104; and Trial Chamber I 15 December 2008 Decision (\textit{Ibid}), at paras. 130-1.
\textsuperscript{50} Ibid.
The case law of the AC on the interpretation of article 68 (3) of the RS has granted so far implicit support for both the systematic and the casuistic approaches. For instance, the 13 June 2007 AC’s decision can be understood as supporting a systematic approach, as long as one considers that the AC analyzes in such decision whether victims’ personal interests are affected by an interlocutory appeal as a whole, which would constitute a distinctive and autonomous procedure.\(^{51}\)

Nevertheless, the said decision can also be understood as providing support for a casuistic approach, if one considers that the subject of interlocutory appeals is usually a specific issue, procedural activity or item of evidence\(^{52}\).

Likewise, the AC’s most recent decision on the matter, issued on 11 August 2008, can be understood as supporting a systematic approach when, at paragraph 61, states the following:

> Participation of victims at trial will first and foremost, take place through the procedure of rule 89 (1) of the Rules. By way of written applications, applicants will have to demonstrate, firstly, that they are victims within the meaning of rule 85 of the Rules. Secondly, pursuant to article 68 (3) of the Statute, victims will first have to demonstrate that their personal interests are affected by the trial in order to be permitted to present their views and concerns 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.\(^{53}\)

Nevertheless, the 11 August 2008 AC’s decision can also be understood as providing support for a casuistic approach when, at paragraph 104, holds as follows:

> The Trial Chamber has correctly identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (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. With these safeguards in place, the Appeals Chamber does not consider that the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of the evidence is inconsistent with the onus of the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial.\(^{54}\)

### 4- Conclusion

The first instances of application of article 68 (3) of the RS by the competent ICC Chambers show diversity in the approach to the shaping of the role of victims at the investigation stage of a situation and in case-related proceedings. Furthermore, if one looks carefully to the content of the procedural rights that have so far been granted to victims by the competent ICC Chambers, one also finds diversity in the approach to a number of issues, such as the presentation of additional evidence by victims or their participation in the disclosure process.\(^{55}\)

---

\(^{51}\) *Lubanga Case* (Appeals Chamber Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007) ICC-01/04-01/06-925 (13 June 2007) paras 26-9 [hereinafter Appeals Chamber 13 June 2007 Decision].

\(^{52}\) *Ibid.*

\(^{53}\) *Ibid* at para 61.

\(^{54}\) *Lubanga Case* (Appeals Chamber Judgement on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victim’s Participation of 18 January 2008) ICC-01/04-01/06-1432 (7 July 2008) para 104 [hereinafter Appeals Chamber 7 July 2008 Judgement].

\(^{55}\) See, in particular, Pre-Trial Chamber I 13 May 2008 Decision (Above n 18), paras 90-114; Pre-Trial Chamber III 12 December 2008 Decision (Above n 27), at paras. 83-111; Trial Chamber I 18 January 2008 Decision (Above n 42), at paras 108-11; and Appeals Chamber 7 July 2008 Judgement (*Ibid*), at paras 86-105.
This a natural consequence of the choice made by the drafters of the RS and the RPE: Entrusting ICC Chambers with broad discretion to shape ICC criminal proceedings according to a more, or to a less, adversarial approach depending on the ultimate role granted to victims in such proceedings. Indeed, in the author’s view, when making their choice, the drafters of the RS and the RPE could not be unaware that the uncertainty and lack of predictability inherent to their choice could only be decreased by the ICC case law over time. It is for this reason that it would be premature to reverse such a choice by including the role of victims in ICC criminal proceedings in the agenda for the first Review Conference scheduled for next year pursuant to article 121 (1) of the RS. Furthermore, the experience accumulated in the first instances of application of article 68 (3) of the RS will facilitate the adoption by the ICC case law of a more homogenous approach to those choices that go to the very heart of the ICC criminal proceedings. As a result, only if this goal is not achieved within a reasonable period of time, bringing the role of victims in ICC criminal proceedings to a future Review Conference pursuant to article 121 (2) of the RS will, in the view of the author, be justified.