

# **ANNEXE 1**

*Publique*

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**Transcription écrite de l'intervention de  
Monsieur le Juge Marc Perrin de Brichambaut  
à la Peking University Law School (Beijing)  
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**Lexsitus Lecturer:** Judge Marc Perrin de Brichambaut (ICC)

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Just to show you that I am a real judge in the International Criminal Court—because you never know who those people are who come—I brought you a picture. We will come back to this, but just to give you—these are the new premises of the International Criminal Court which were inaugurated in December last year, and this is the major courtroom. So just to give you the atmosphere and, don't worry, I'll talk about victims. You see three judges, actually the middle is Judge Schmitt of Germany which was presiding that Chamber, you see a humble servant to his right, and Judge Pangalangan of the Philippines to his left.

You have here the view of the witness. So, this is what the witness sees when he is invited in the main courtroom. To the right—I am sorry I don't have all the detailed pictures—you have the accused and the Defense team. To the left looking from where you are, you have the Prosecutor's team—and I will come back to this because I have another picture—the legal representatives of victims. It's unusual because this is not how courts are usually organized, it's the other way around. I don't know who invented this, but it works, and of course you can see it's a modern court. We all have screens and we have on our screens the transcripts of the discussions in real time so there is not only continuous interpretation in French and in English, but there is also continuous interpretation in the language of the accused. So, in this particular case there was no need for it because the accused was Mr. Bemba. I will come back to him. He spoke excellent French, really Belgian, but he did understand French extremely well. But the transcripts are useful because you know exactly what has been said with about two minutes delay and you can constantly refer to the to the verbatim text of the debate which has taken place.

So, I will come back to the courtroom but just to give you an impression that the ICC is an institution that is working, that currently has three major trials going on in a staggered way because there only two teams to manage courtrooms, and the trials are long. I will come back to all three of them in the little bit of detail for your interest. Just for your amusement, before we get into serious business, this is a view of the legal representative of victims.

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So, you have two teams, [this is in the any case against Mr. Ongwen], we would come back to who Mr. Ongwen is. You have on the left the legal representative team number one, and you have on the right the Office of the Public Counsel for Victims. The Office of Public Counsel for Victims is an independent institution within the Court. It is part of the Court but it is independent because it fulfills defense duties. So, when you are in the witness' seat, they are immediately to your left.

So, back to the subject. I didn't choose the subject. It was Professor Bergsmo's idea and he always has something behind his mind, so I'm sure he has an excellent reason. But one of the reasons I can think of is that basically, this is one of the major innovations within the ICC. The International Tribunal for the former Yugoslavia, the International Tribunal for Rwanda, which had been created by Security Council resolutions, had no provisions for victims. They just had the Prosecutor and the Defense, and when we were together in Rome, there was already the experiences they were both created in '93, '94. The discussions for the Prep Comm before Rome, or at Rome proper in '98 already could taken to account some of the lessons, some of the initial background problems that had been experienced by those tribunals. Which, by the way took a certain amount of time to take off. They didn't reach cruising speed very soon.

This was at a time in international relations where, if I may say, the wave of convergence around a certain model of values was already quite strong, was still quite strong—not already. It's the 90s. It's the period, years after the fall of the Berlin wall where a lot of major texts were adopted. Some of you may come and listen to me on Saturday when I speak about the Organization for Security and Co-operation in Europe, but there was still a drive to push forward with the rule of law, with democratic principles, and with human rights. To be perfectly honest, it may have been at the tail end of that wave that the Rome Statute was adopted, because immediately after at the beginning of the century I think the mood in general started to change. It is quite improbable that the current, that something like the Rome Statute could be adopted in the current international context nowadays.

For your background, the Rome Conference on the creation of an International Criminal Court was a UN event. Everybody was there. There was a very active Chinese delegation, there were a very active Turkish delegation, there was—you're not surprised—an extremely active American delegation. It was a very intense negotiating process.

I will tell you a few anecdotes if you're interested before we start on this. There were actually, now it's public, so few people have read about it. I'm not sure that what I'm going to tell you is a favorite topic of Professor Bergsmo, but there were actually two parallel negotiations, Morten. There was the P5 meetings. We met about once a week only the delegations of the heads of nations of the P5 with a small group of advisers and [And the P5 are?] [Sorry---everybody knows who the P5 are here because of course I refer as a P5 because China, US, UK, Russia, France.

Why was there a particular track about the P5? Well, because they used to work together and negotiate together in the Security Council. Also, because the idea was—is it possible to establish an International Criminal Court which will be universal? Which will include everybody. It could have been universal only if all members of the P5 were there, crucially.

But it was also in terms of context, the tail end of the Clinton Presidency. Clinton was nearing the end of his mandate and there was in the U.S. Senate a formidable character called Jesse Helms. Jesse Helms you guys never heard about him, but he was the Head of the Foreign Relations Commission in the U.S. Senate. He was a Senator from the deep south and he was extremely skeptical about anything which could impinge on American sovereignty and on American troops abroad. So, we had, the American negotiator, Ambassador Schieffer in Rome had observers from Jesse Helms in his delegation. I had observers in my delegation from my Ministry of Defense also, making sure that I wouldn't adopt anything which would make the work of French soldiers serving in peacekeeping missions, which were quite active at that time particularly in Yugoslavia, former Yugoslavia.

So, we had that discussion among the P5 and the main elements of the P5 discussion was how will we define the conditions for the exercise of the jurisdiction, of the ICC. What will be the conditions? Who can initiate it, and who can then pull it forward? So a lot of the provisions you see in the Statute—the Statute is not a perfect legal object—it's the result of a diplomatic negotiation. The possibility for the Security Council to suspend prosecutions for a year by decision taken under Chapter 7, the possibility for the Security Council to defer cases to the Court—all these are elements which were a product of our negotiations.

The good people like Professor Bergsmo, the like-minded group of countries who thought that this had to be a virtuous universal court that could prosecute everybody universally, they had the major negotiations. They are the ones who wrote most of the articles. We were the nasty people who tried to sort of make sure that the Court would come out in a way which would still keep a balance between sovereignty. This extraordinary new tool which was being created, which was going after major crimes in the name of humanity.

So, we have to get to victims but to make a long story short, I lost. I wanted all the P5 to sign the Statute and it didn't work. It didn't work for a variety of reasons. It didn't work because basically the Americans made a major negotiating mistake and they didn't accept some of the provisions within the Statute that the British and I had managed to insert in the Statute which would have protected them. So, they called for a vote and they lost massively the vote. The Russians signed, but never ratified and you may be aware President Putin has recently withdrawn his signature.

And if you have an interest to what was the attitude of China, there is a remarkable statement in the Sixth Commission of the General Assembly in September of 1998 by the Chinese delegate, which explains with great precision and detail, the questions China had about the ICC in a very articulate and I must say a very clever way. China made it clear that it was not going to be there if the US and Russia were not going to be there fully.

So, what you see here is a construction which is not universal, which is based on three groups of countries. Basically, the Western and now Eastern Europeans together who pay the bills, and that's important. The Africans who are a group of 54 countries who provide the suspects and the accused, and the Latin Americans who are in an odd situation if we have time we will discuss. There are a few Asian countries, there is Japan, Korea, Philippines; of course, Australia, New Zealand but not very many altogether. So, this is to give you a little bit of a of a background picture. This is an international organization, a very exceptional construction, the ICC, and a very ambitious one. I tend to present—because I also have students, I teach also in Paris—to be perfectly honest, I tell them, see it as a major experimental organization, do not see it as a final construction. It will take many-many-many years to stabilize the institution and to create all the good practices which are inherent to a to an international tribunal.

So, I hope I have not discouraged you, but I thought this useful to give you as a background and I hope I'm not contradicting what Professor Bergsmo is teaching you in any way. So, in spite of this broader picture and of the P5 trying to find ways to accommodate their specific concerns of major countries, there was on the ground in Rome, a huge presence of non-governmental organizations. They were allowed. Something unusual about UN conferences, but it is not only states which are in the room and participate in the negotiations, you have NGOs once they have been accredited, they are all over the place. I tell the story that France is seated next to Gabon, in alphabetical orders, and I rarely saw the Gabonese delegate because he had better things to do on a summer day in Rome, but there was an excellent group of Italian lawyers from an NGO who was sitting on behalf of Gabon, in the seats of Gabon, and who were making quite interesting statements—who, by the way, did not really represent the views that I expected Gabon to have, but nevertheless Gabon was happy to let some do this, so they did it.

This is to say that the atmosphere in which things happen and international negotiations take place is very important. When you had the COP 21 negotiations in Paris recently I think there were 30,000 delegates altogether. Of course, a gigantic complement, probably 20,000 of these were from the NGO community all together, so this is a big element.

For the NGOs, creating an International Criminal Court meant giving a voice to the victims. There had to be a change of tack and ever since the NGOs have continued to be in the Assembly of State Parties, in the constant lobbying if you look at the at their websites, very active proponents of the role of victims. If you're interested I will give you some references to those who work best, because they work very hard and they are very dedicated.

Then there was another lobby who is interested in victims, if I may say that was the civil law countries who are attuned to having a role of victims. In the French system, you can have as an ordinary citizen, you can go to the courts and ask that some prosecution start on something—well you have to go to the police first—but you inscribe yourself as *party civil*. You are an independent citizen who requests something. Then you participate in the process. Ultimately, the state has prosecution which will which will feed the case, but you will still be you will still be present. This is a tradition in most civil law countries that exist.

Therefore, the civil law countries were keen to have victims and they said, “look”—this is a little bit what I've tried to put here—“we are going now after major crimes, this is something which shocks the conscience of humanity, we are going now after genocide, war crimes, crimes against humanity. The number of victims of these acts, which more often than not have happened with the complicity of the state is very large. They should be given a chance to express themselves, to have a voice.”

Therefore, the two key articles within the Statute which we will be looking at, 68(3) and 75, were something where there was a joint lobby—and the P5 members could have other interests and were defending each other. So, the French if I must say, the French delegation, which I was head of at that time, we were very keen to also have victims inscribed in the Statute altogether.

Now we will go over in more depths, but you also have to understand, it's impossible when you create an institution like the ICC to foresee the complexity and the multiplicity of the consequences. There were nevertheless a few things which come out. What sort of justice did we intend to provide in the in the context of this Court? Would it be retributive justice, punishing and sentencing the accused? Or would be there be an element of restorative justice, providing for reconciliation, providing for recognition of the [situational victim], which is very important, providing for reparations? [We will come back to it later on reparations], but for the victims in reparations it is fundamental to be individually recognized as a victim. It is almost 70% of their satisfaction. Whether they get, on top of it, something concrete—it's good, but the mere fact that they had been recognized as victims of the crimes of that guy who has been brought to trial by an international court, and then sentenced, is absolutely fundamental for them. We know it. We have a dialogue with them—I'll tell you how, and we know how important it is to them. So, this is part of restorative justice to a certain extent.

To have a situation where you are re-creating in the society that has been affected by those mass crimes, a different context, a different atmosphere, and when you punish the culprits, you are also doing something to bring the society forward together.

At the same time, you have to realize those big UN negotiating events, you have to stop any moment, because you have so many people [in the meeting rooms] and so on. In a parliament, and so on, you can say, just stop, and say “okay, we continue in the next session”. When you're in the global conference you have to say at certain moment, “okay, we have to stop.” It happened on the 17<sup>th</sup> June 1998, in the evening, and that the head of the Norwegian Delegation who is now Ambassador in Paris played a very big role in this. We had to give back the premises on the 18<sup>th</sup> in the morning. So, if you like, a game of musical chairs, when the music stops, whoever can find the chair remain seated—a few characters cannot find a chair. This is to say that you have in a text like the Rome Statute, many elements which are at a very unequal degree of elaboration. Those regarding the victims in particular, they're very general, they're not specific.

So, what happened as you may know I am sure, Professor Bergsmo has told you, that after the adoption of the Statute there was a post-Statute period where States continued to discuss and negotiate among themselves, and adopted the Rules of Procedure, the RPP's. They tried to fill in the gaps but it was not simpler. There were still a lot of political differences and it was still, by the way, a universal discussion with the participation of all those countries—even those who would have no intention to either sign or ratify the Statute.

Even now, at the Assembly of States Parties, there is an important Chinese delegation who pays a lot of attention to things. There recently was a bit of a scandal because there was a Swiss coordinator, you were not there Morten at the last session, it was on a very technical issue and he said that there are two delegations here who do not belong, I would like them to leave—and it was the US and China. So, they were so surprised so unused to it that they actually did leave the room. It had no impact whatsoever, but it showed that that there is now, a little more of a difference between those countries who are State Parties and those who are not. In the RPP's there was no such difference.

So, in what we are going to be looking at today, the essential element is what Chambers did because the Chambers, when they started to work, either for the confirmation stage in Pre-Trial, or during Trials, or Appeals, well had to write the music and start playing it. So, they created their own practical rules about how to take into account victims, as we will see in different aspects altogether. These practical rules—once again, I hope I'm not going to disappoint you—they are quite different between you, because you put together three judges from very different backgrounds. First, it's quite complicated among them to agree on anything; but if you compare with three judges in other room which have equally very different background, the chances that the three other judges will have the same interpretation are close to zero.



So, you have to realize that this is a process of progressive consolidation; you have diverging approaches by different chambers and I will spare you some of the attempts which happened in the field of victims because it would be too complicated, and I will only give you the attempt to consolidate on which we are operating now which is which is called the Ongwen case.

One last thing, because it's very important. We are lawyers here. We have to give definitions. One of the rules which is particularly important in this respect is rule 85(a), "Victim means a natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the Court". You see in this sentence already the question of causality. There has to be harm, but disaster had been caused as a result of a crime within the jurisdiction of the Court. You cannot say, [until] the decision is taken whether the accused is guilty or not. Still, there is a jurisdictional limit, and it has to be a natural person. This is one of the things well, we will [cover].

So, the first major article [which has had to be] interpreted and implemented by the Court, article 68(3). I'm sure you've worked very hard on it already, but nevertheless it's might be useful to look at it again:

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.

Any one of you has a liberal legal experience knows that you have about two centuries of jurisprudence built into this sentence because there are so many things potentially involved. First, you have to make sure, what is a personal interest of a victim? So, it's not simple and we will see how complicated it is, and maybe the personal interests are different when the victims want to participate in the trial and when the victim claims to be allowed to receive reparations after the sentencing of the accused. So that's not necessarily at all the same approach, same definitions.

What are views and concerns to be presented and considered buy the victims? Is this the same thing as what the Prosecutor says, or is this a different story? Not at all simple to elaborate and to clarify. What are the stages of the proceedings, where victims can come in? When do they start, the proceedings? When the Prosecutor is at the very initial phase and he is in the process of asking *ex parte* for an arrest warrant from a single judge in the Pre-Trial Chamber, there are not yet victims, but once the arrest warrant is there how do you go after victims and find them? Are the victims which have been allowed to participate in the trial phase also allowed to be present at the appeals phase. All these are questions which are very open, which have had to be ruled upon and determined.



Then of course, this is a court of justice, so it has to be fair and balanced. How do you combine the interests of the victims with the interest of the accused—because the [Prosecutor] has to make sure that the victims are entitled to be victims and to be present, and the [Prosecutor] has to make sure that they don't sort of overwhelm the proceedings. Or that they don't delay them exaggeratedly, because if you have victims coming in at every moment in the proceedings, the effectiveness of the trial is in question. The trial is very much slowed down. So, the issue of how you fit these new elements into the process of the trial to keep it fair and impartial is a very crucial element which is still in the process of being adjusted.

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.

So, that's the other essential element. They send something called the legal representative of victims. Under certain circumstances, individual victims can ask to be present physically in the courtroom, but these are very exceptional circumstances. Normally the victims are present, participate through the presence of legal representative of victims.

You immediately see the multiplicity of problems: How does victim and the legal representative meet, assemble, communicate, share views? Who pays for the legal representative of victims? How does a Legal Representative of Victims function? Where do they come from? Who are they? In normal national tribunals, you have barristers and you have a bar. In the ICC, you start from nothing, so you have to invent all those tools, if I may say, of the roles of victims. So, the things that have progressively emerged in the interpretation of article 68(3) is first victims can be participants in the legal proceedings, they have to express the interest, the willingness it's on a voluntary basis.

The mere fact that you declare yourself a victim of Mr. Lubanga, which is in trial in The Hague, can create a lot of trouble for you because Mr. Lubanga's tribal members and some of his henchmen are still very much present in your village. So, they are not going to be very happy that you go to a foreign court and ask for justice and potentially for reparations. So, this is a very complicated issue. It's immensely complicated for witnesses, but is also very complicated for ordinary victims. When we are talking about major crimes, we are not talking about stable societies, we are talking about societies which have been wracked by major conflicts and where there is very sharp contradiction.

The other things that has emerged is that victims can be called upon as witnesses because the Prosecutor can ask victims to come and explain what has happened to them. So, they have a dual status: they are witness and they claim to be victims. They can be called by the defense sometimes.



It has happened in the Kenya cases, where some victims have been called by the Defense and ultimately, although it's not very frequent, the chamber itself can ask victims to come over and be present and gives their testimony altogether.

So, what I've tried to put in in this slide is all the decisions that the chamber has to take regarding victims. The interpretation of 68(3) and its implementation is largely something which is left to the presiding judge. On the major issues, the presiding judge and his other two judges have the deliberations on it, but since these are very procedural issues, it's very often the [presiding] judge that has to take the decision because he's the one who keeps the process moving altogether.

So, first category of things that the chamber has to determine are the applicant's victims. Then the applicants voluntarily present themselves, but they have to provide some evidence that they are victims, that they have been present, involved in the situation where the accused was committing crimes. Not easy, and one of the major difficulties has been to create the conditions under which the applications are handled by the chambers. Initially, the Court was very virtuous, the application form, the files that you had to fill in to be a victim, were 18 pages long. Needless to say that in view of the background most of the victims are in, this was completely an illusion. It was a huge paperwork and it called for yet more evidence, and so on. So, progressively, now there is a standard file which is one sheet of paper which has to be filed.

Still, because of an important rule of procedure, article 89(1), the Court is expected to reach a decision on whether an applicant is a victim entitled to participation or not, and that can be very complicated because when you have a big group it takes a lot of time. [When] we speak about reparations, I have just recently finished chairing the bigger, the most significant order in reparations and we determined very early on in the course of the discussion among judges, we wanted to identify precisely those victims which would be allowed to receive reparations. So, we worked with the legal representative of victims. It was a very small group. We had only 341 applicants. I will come back to later the Katanga case. We have only 341 applicants and we worked with the legal representative of victims who has a very solid team and they end up practically knowing every one of them. They came up with, for each one, identification, a minimum of proof that they were there when the crime took place, a minimum of proof of the damage—you know how many chicken they had lost, and how many parents they had lost, how many children they had lost, the size of the house that has been destroyed—all sorts of things you have to think about—their wounds.

Therefore, we had a we had a number of files, and I had people like you, interns, working for me over a period of two years. There were always four of them working in succession but altogether I must have used the goodwill of at least 12 interns and we produced a reasoned opinion on each of the 341 victims. We had our own standard, and three pages, and we accepted 297 and rejected the rest.

The Annex to the Katanga reparations order—you of course are not going to go and read it because it's in French and will never be translated—is 1003 pages long. So, this was a collective work, if I may say of my interns, but you understand also the problem I am pointing by saying this: I did not have in my chamber enough manpower to have it done by legal assistants. My two legal assistants were involved in writing with me the opinion which is 163 pages, but I could not have identified the 341 different cases, even with the goodwill of the Legal Representative of Victims, had I not been relying on philanthropists, because my interns were not paid. They just came for six months to work with us. Of course, I do my best to afterwards to thank them and to give them recommendations and helps them in their career, but it's also there is a problem of resources. There is a massive problem of resources dealing with victims, and my colleagues are experiencing the same problem, certainly in reparations but also in participation

In participation in the Bemba trial, there were 4500 requests to be admitted as victims. In the Kenya trials there was also a very large group, and in the Kenya trials, the problem of protection of victims was a major one because if you rose your finger to say I'm a victim, you could get in trouble very, very quickly in the local environment. So, this is just an aside.

Now, Chamber has to determine when there are views and concerns which deserve to be aired, not so simple. You have to make sure that the victims are not there to duplicate what the Prosecutor is doing. That they are not going to be just repeating, saying what are the crimes that have been committed by the accused, but give their specific point of view. So, this requires a lot of sound judgment, and it requires that the Legal Representative of the Victims explain to the Presiding Judge, a little bit in advance, what is it that my victim (if it is an individual) or myself (if I intervene) as LRV, what points I'm going to make.

We come back to the different stages: investigation, confirmation, trial, sentencing, reparations, but ultimately there is also the problem, can the victims ask questions to the witnesses? There are two categories of witnesses: witnesses of the prosecution; and witnesses the defense. Victims can have interesting things to ask both, but the chamber has to make sure that it doesn't get out of hand, that the questions are well taken, contribute to the process, contribute to the determination of all the truth altogether.

Third elements that the chamber has to rule on, because this is the common law tradition, there is a constant exchange of documents between the Prosecutor, the Defense and one of them is—and I hate it because we don't have it in our system and in the civil law system—interlocutory appeal. If either party, either the Prosecutor or the Defense is not happy with a decision which has been taken by the chamber, he asks for leave to appeal to the Chamber of Appeal. So, there are different approaches to this. I sat in the *Bemba and others* Chamber. This is the picture you saw, presided by Judge Smith. Judge Smith, serious German judge, no nonsense: “Interlocutory appeals—I don’t have. None. Full-stop”.

I agreed, actually, and the Filipino judge also agreed. We all said, “We won't accept any interlocutory appeal. If they have any questions to make they will make it in the full appeal.” That allowed us to reach a decision from the beginning of the trial process to the end of the trial process in 400 days. So, we were by far—well, there was another smaller case which was shorter—but we were by far the fastest, we could have even been faster in terms of reaching a decision because we had to make choices.

But, my colleagues [that] come from a common law background, ah—interlocutory appeal is sacred—usually, they accept. So, that goes to the Appeals Chamber. Doesn't necessarily stop the process, but nevertheless, it slows it. When the appeals decision comes in, you have to integrate it, sometimes come back, it's complicated. So, this is the problem of running an international court you have different traditions and each judge comes from his own traditions and the chemistry within each chamber is different.

So, we were civil lawyers in Bemba and others. We said interlocutory appeals shouldn't even exist, we will ignore it. We had every right to do it, by the way, it was not just the whim of our own, because we have to appreciate whether the interlocutory appeal is justified or not. But, in another chamber—[I won't quote some of my common law colleagues]—they would practically accept every single interlocutory appeal, making their life much more complicated in my humble view, but ok. So, this is to tell you don't expect anything neat, clean, systematic, coming out of this process. It's a process of progressive adjustment, hit-and-run, and things are done step-by-step.

So, what is the first? The first step is the issue of admission of victims to participate in the proceedings, and that's where Rule 89 comes in. I have not copied all elements of Rule 89, just the Chapeau: Victims should make written applications to the Registrar, applications are transmitted to the chamber, copy to the prosecutor and defense, possible reply to the chamber—it's not even verbatim, I have a simplified it—and possible reply to the chamber, the chamber can reject applications if the applicant cannot be qualified as a victim.

In other words, not only does the chamber have to take a decision on whether each applicant is a valid victim or not, but the Defense has a right to challenge whether each applicant is valid victim or not. Now, this raises a lot of questions in terms of the protection of the victim because, and this is very time-consuming, you have to make redactions. In other words, you have to hide certain elements of the identity of the victim which is that of the applicant which is requesting to be a victim so that the Defense cannot hurt them. But of course, you also have to leave to let the Defense know enough so that they can make a valid assessment of whether they're going to challenge that applicant or not. So, it's a very-very delicate balance.

We are having now on our Katanga decision, a [full appeal], not an interlocutory appeal [by, in fact] one of the Representatives of Victims who says that we didn't do the right thing in terms of the redactions, and that we didn't allow them to do their job. Very complicated, takes time, make sure that you apply it in a uniform way, over a large number of files, and that you always find the right balance. If you are a Defense lawyer, you will of course challenge, and say, "Well this guy, I don't know enough, take this redaction away, I need to know more, otherwise I can't do my job." And, if you are a judge, you say, "Well I'm not going to lose time with those guys, they are not being very constructive, so I will ignore it." But still, you have to make sure you are fair and give them a chance.

So, this is not an artificial issue, and this is why we have worked—[I have] been with the Court now for little more than two years. One of the first things we did among the Pre-Trial Judges, try and find guidelines, so that we would create a little bit of predictability in the whole process, how we determine groups, how we determine what is a proper level of redactions, how we tried to simplify the different jurisprudence which had been emerging from our colleagues.

Just to make your life comfortable, there was a debate between two camps, and I was in the camp that lost. So, I wanted to give maximum freedom for the Registrar to himself determine what would be the appropriate information needed to be a victim, because [if] everything has to be ruled upon by the chamber it's very labour intensive and long. But that would have meant we would have had to amend our Rule 89(1). My colleagues say "no, no, no, no—we are not changing anything." Rule 89(1) is still there and the chambers still have to rule on every application individually. To be fair to my colleagues, in the one case which I am going to talk about now, Ongwen, it worked—to my great surprise, because you will see [there was a] very large number of applicants, but they managed to do it. So, it can be done. It can be done. I think they did the same thing I did in Katanga, they heavily relied on interns to sort of apply the rules in a systematic way.

So, key element—it is the Registry. There is a specialized unit within the Registry which is called Victims Participation Reparation Section, VPRS. They are the people who have the expertise and the hardware and the software to interact with the victims and the Legal Representatives at each stage. They are the ones who are the initial stage, when there is just the beginning of a case, who do the outreach, go to the field, and go around saying guys: "If you are interested in participating in a trial in front of the International Criminal Court against Mr. Lubanga, or against Mr. Katanga, or against Mr. Ntaganda, please come to me, fill in this form, I will help you to fill it, and I'll send it over to the to the Court." So, it's a big job because you actually have to go to the field. Problems of security, safety, it's not always very simple. Then, whenever the redactions have to be done and so on, etc. It's largely their job. We check on how the redactions have been done, but we don't do them [ourselves] in the in the different chambers.

So, the Registry has the first gathering and screening process altogether for the victims, and they have to work with something which is been very controversial in the Court, which is called intermediaries. You have people, whether NGOs or people who know the ground and the context, who can help in bringing forward victims. But inevitably, those people are not necessarily entirely neutral, or disinterested, by the way. Everybody has to make life, so you have to make sure that those intermediaries do a proper job, don't exaggerate, and that they are that they are fair.

[When] the Court was still finding its way and Judge Fulford was presiding in the Lubanga case, he had a head-on clash with the Prosecutor on intermediaries. He was so unhappy with the job that the Prosecutor had done that he suspended the hearings for six months. Judge Fulford was a very energetic and forceful person, and he would not be intimidated by the Prosecutor. He just said, "You don't want to do what I asked you to do. Okay. We stop. Come back later, we will discuss it." He won. The Prosecutor gave in and gave the identities of the intermediaries and so on which allow the Defense to also come into it. But this is, by the way, a typical common law dialogue. In a civil law court, I don't know what would happen in other countries, but we would never accept such a thing, which is to tell the Prosecutor, "go home and tomorrow morning, this is what we want"—but, okay.

So, then there is one last actor. We will see a picture later, I mentioned it to you already: the Office of the Public Counsel for the Victims. Public Counsel for the Victims are functionaries of the Court, but they are given a special status of independence. They can act as independent lawyers on behalf of the victims, and that's very important because they are very experienced. They don't have to learn all the tricks that some of the lawyers have to do. They are very dedicated since many of those cases overlap to some extent in geography and in time, they have a good understanding of the situation on the ground.

And, I'm sorry to say a little detail, they are extremely cheap because they are already paid as functionaries of the Court, while the lawyers which are hired to represent the victims are paid very well out of the legal assistance budget of the Court. This is currently a major issue for discussion within the Court, because of course you can make a career as a as a lawyer for representing victims, and you do it sometimes very well, sometimes not so well. We as judges, very quickly, we understand who are the serious guys. Basically, to explain to you, there are two categories of legal representatives of victims. There are the people who come from the region, who know the region, who can relate to the victims. This is, I was courting my Congolese lawyer in Katanga. I actually had a little working session with him yesterday before boarding my plane to come here. Fidel Sita. He has become absolutely indispensable, both to the work of our Chamber and for the Trust Fund because he knows practically, personally all the victims. So he can really interact and relay their concerns.

And then there is another lawyer, which is Mr. Hooper—he is also President of the ICC Bar right now—who is a well-to-do, very clever, very astute British lawyer who is in the Inns in London and who, not going to set foot in the Tory region in the mud with all those peasants, and he sends us beautifully crafted and very clever and sharp memos making strictly legal points, but I don't think he has ever talked to any of the victims. But, nevertheless, he has been appointed so he can speak for one of the group of the victims. To be fair, I also have a woman lawyer from Paris in another case in Lubanga, I will mention her name since you will forget it immediately, Madame Mabe, who is even more of pain than Mr. Hooper because she shoots at everything that moves on the other side, but she never has met the victim either, but she's very effective in terms of defending their interests and makes the life of the chamber a little bit unpleasant occasionally. So, I don't like Madame Mabe at all, neither do I have enormous respect for Mr. Hooper, but they are in the picture. Just to give you the realities of life in an International Court.

[Cut].

So, just a few words, to tell you who Mr. Ongwen is, to give you a little bit of background. First, why do we have a Mr. Ongwen? We have a Mr. Ongwen because the first Prosecutor of the International Criminal Court, an Argentinian Judge called Luis Moreno Ocampo, he took over his job and found himself in not a very easy situation. He said, well, when and how am I going to find cases within the jurisdiction of this Court that can sort of get the process going, sort of pump priming. There was nothing. No precedent. So, he made a very clever choice, but also a very ambiguous choice. He says, "I will be in contact with States and will tell them that I'm available to address situations which they will entrust to me and help them in dealing with major crimes which have may have been committed in those situations."

The first country he struck a deal with was Uganda. In 2005, he met with the then President of Uganda, Mr. Museveni. Be reassured, the President of Uganda today is still called Mr. Museveni, it's the same one. He's been there since 1973. So, Mr. Museveni told him, "Young man, I'm interested in what you can do for me. Why don't I give you the situation in Northern Uganda which has been an area where there have been persistent groups which have been creating abominable crimes, and you can deal with that." So, he wrote a letter to the Prosecutor, saying, applying article 12 of the Statute, I give you jurisdiction for the facts committed in Uganda in that part of Uganda after certain after a certain date. I don't remember the exact date but it's, I think, spring of 2003, more or less, ok.

So, quite a radical policy choice, if I may say, because it was the government which gave the jurisdiction to the Prosecutor. He didn't give jurisdiction to necessarily what happened in the rest of the country, or clearly indicated that it would not be a good idea if the Prosecutor went after what the government troops had been doing, only what the other side had been doing. Now, to be fair, the government of Uganda.



I know a little bit about the case because I was there in Pre-Trial, gave extraordinarily good judicial cooperation to the Court. They gave enormous amounts of evidence. So, Mr. Moreno Ocampo, in this lead case, he had on Northern Uganda, within a few months he was able to admit five arrest warrants. This was the first five arrest warrants of the Court. The principle one was a called, it's the group which had been doing atrocities in northern Uganda, was called the Lord's Revolutionary Army, and it was led by a chap called Joseph Kony. Don't be impressed by the word "Lords." This is basically a criminal group which is using force, and I'll tell you how, in order to further the interests of its leadership, and who basically tries to grab the profits of all sorts of trafficking in the region.

Among the five, beyond Kony, which had arrest warrants, was Mr. Ongwen. Mr. Ongwen was one of the heads of division, because within the Lords Revolutionary Army, there was division, and there was Mr. Ongwen. So, what happened after 2005? Well nothing for 10 years. None of the five were caught. Two actually died, because it's a very hard life when you are in the Savanna, and I will tell you more about it afterwards.

Nevertheless, at a given moment, fortune of the arms changed, and the Lord's Revolutionary Army left Northern Uganda and went to the bush of the Central African Republic. If you look at a map, they went westwards. They were caught by, surprisingly, the US Special Forces, because the US had sent Special Forces in order to go after the LRA which have just withdrawn now, and they caught Ongwen. In fact, Ongwen accepted to be caught because he had fallen out with Kony and his days were numbered. So, he thought it's better to go over to those guys over there, rather than be executed by my boss. He knew a lot about the way that the things happened, and I'm sorry to go into those details, but the reaction of the guys who got Ongwen was, well let's send him to Uganda. There were other people on the ground, also French forces in the Central African Republic who said, "No, sorry, you give him to the authorities of the of the Central African Republic and the authorities of the Central African Republic will send him to The Hague, because it's an international arrest warrant in his regard. So, the Americans were not too happy because their friends were Mr. Museveni, but in the end, we got Ongwen.

So Ongwen arrived in The Hague in 2015, December. 10 years after the arrest warrant. Now who is Mr. Ongwen? Just to give you a profile. Mr. Ongwen was nine years old when the Lord's Revolutionary Army, which has been in action for long time, attacked his village in northern Uganda. He was kidnapped. Usually when a village is attacked, there are three categories: they took the young girls for what you can imagine; they take the young boys to train them as soldiers; and they take the rest of the population to carry the loot, and then execute them. Those who are going to be trained as soldiers go through some very unpleasant initiating rituals to sort of completely break down their emotional balance, so that they become sort of killing machines. So Ongwen, sadly became a killing machine, and he did well. He is a talented guy, so he rose, if I may say, in the hierarchy of the Lord's Revolutionary Army and became the head of one of the four divisions, over the years.



This was pre-2005. Just to give you a concrete element of the isolation in which he lived, when he arrived at our jail in Scheveningen, not far from the Court, he had never drunk a soda. So, he drank Coca-Cola for 15 days and got 5 kilos fatter. So, you see the ambiguity. But in between, throughout that period, he had participated in a lot of very ugly actions in terms of attacking villages, in terms of the way he treated women, the way he initiated his own child soldiers, and the people he executed on behalf of Kony, because Kony kept a very tight leash on them and forced them to be extremely violent in order to have no temptation to ever break down or go back to the villages. This is the realities of the Court.

So, Mr. Ongwen, [I] was involved in addressing his case in pre-trial and he's now under trial. Now, of course the first thing, once we had Mr. Ongwen, was for the VPRS to go to Northern Uganda to Acholiland, and to go around and say, who is interested in being considered as a victim of Mr. Ongwen. Quite a few people were interested in fact, and this is a good situation because the LRA is out of the way. So, in Congo it was more complicated because all groups of Katanga and Lubanga are still present and can threaten you, but in Uganda they are out of the way. So, you will see that it's in the thousands, literally. There were, I think, if you added 2605 and 1502, makes more than 4000 altogether victims which have applied.

So, they applied with the Registry. The Prosecutor and the Defense were allowed to make observations. It's once again my friend Judge Schmitt who was in charge of the Ongwen case in trial, so no nonsense. He was quite rough, and accepted most of them, so sorry you have the figure here 4107. There are only two groups of victim which have been identified. One which sort of had a legal representative which [went to them] and said, "You know, I'd like to be your legal representative, do you accept?" And, because of some intermediaries, he managed. But that's also the ironies of the Court. You would expect the legal representative designated by the victims to be somebody from Uganda, or from the region who knows something about it. Mistake. He comes from Chile, and I don't think knows very much about the local situation, but he's learning. [But] *de facto* he was clever, he learned the trick and he got himself designated, and now he's in business for the next few years, if I may say, and not making a bad living in representing the victims.

And then there is friends from the OPCV, which [take] care of another group. So, the Chamber had no choice but to first the OPCV, when the VPRS brought in the first victim, took care of the first victims; and then when his guy came in, there were two different team which were which were accredited. So, it's a messy process. Don't expect it to be to be simple, but ultimately the victims are represented in Court and you will see them—well, you have seen them already-- in the trial room.



The possibility of victims becoming witnesses has been effective in the Ongwen case. Not on a huge scale, but already three different victims having called by the Prosecution to be witnesses and I think ultimately the Defense identified also a few.

So, it's not an abstract possibility. [Whenever there is—there won't be] interlocutory appeals here because it's Schmitt, so no interlocutory appeals. But when there will be a final appeal, the same group of victims will be allowed to be present in the Appeals Chamber, but that may not happen for at least another couple of years.

So, once again this is the picture with the two teams. The guy standing as a lawyer from Chile, and the other group is the OPCV. Now, this is a real exercise. The hearings start at 9:00 in the morning, and go on until 4:30, and its cross-examination, so we are still right now in Ongwen at the stage where the prosecution witnesses are present. So, the prosecution brings their witnesses, first asks questions, prosecution asks questions to witnesses; and then the defense is allowed to counter interrogate their witnesses; and, occasionally the Chamber also ask questions. So, it takes time because those witnesses are not trained lawyers. They are people who come from a rural background, as I said, from societies which have been deeply shaken and disrupted. Sometimes they collapse, they fall in tears, they are away, and you have occasionally to have to make sure that it's completely in confidence because it's women who come and tell the situations they were confronted with, so takes time it takes time.

This is also the characteristic of international justice, if you want to make it fair, it's expensive and it takes time—because one day of an international court, I hate to tell you how much it costs the international community. Anyhow, the Chinese taxpayer does not contribute. So, you don't have to know, but for those taxpayers who contribute, it's quite a steep bill altogether. So, you have to think—it's not only trying to convict individuals which is the case, it is making a bigger message. It is providing that there is somewhere an exemplary court that can provide justice, and that can provide precedents, that is progressively setting a set of standards and rules globally for how to address those major crimes.

Now this is just a brief resume of things we have already addressed. As I told you, the procedural rights are basically the initiative of the chambers, which means that there are great variations among chambers. But a few issues have already gone to appeals, so in his great wisdom our colleague from the Appeals Chamber has said, “participation should be as meaningful as possible as opposed to purely symbolic.” Perfect legal determination: what is meaningful? So that ball is back in our court now. In trial, what is it to be meaningful but while remaining within the parameters of article (6)(a)(3). It should not be against the interests of the accused, and it should not be against the process of a fair and free trial. So, progressively there has been a differentiation with what can be done with victims.

At the investigation phase, basically, because in order not to waste time you cannot expect that the victims are organized before you give them a role, so the OPCV sort of represents them and makes written filings and they don't have access to the arrest warrant, for instance, or stuff like that, this is confidential.

Victims come really in, in the confirmation phase. Confirmation phase is when the Pre-Trial Chamber—at the lower degree or lower standard of evidence; and then then at the final phase it's just a reasonable doubt—has to determine whether there is a case to be prosecuted and this lasts, usually the hearing lasts, not more than a week. So, the prosecution makes its case, the defense makes its case, there are no witnesses, but the victims are present and the victims can take the floor and express their views. They can make opening and closing statements. They can submit documents. They can make written motions, and they have access to the filings. So, they can go and look at what is in the overall file. But the big role is really at the trial stage.

So, this is what Ongwen is going through now. Ongwen is present at every session. He is there and on the on the right-hand corner, behind his defense teams, he follows what is going on; and on the other side, there is the legal representative of victims, the two teams I have shown to you, and they can play an active role. They can ask a question to witnesses. They of course have to carry an authorization from the presiding judge, so that it's not, you know, futile and doesn't waste time. They have to say exactly what it's going to be about, but they can do so. They can ask to intervene as witnesses, and the Chamber always has to weigh how this fits in with the rights of the accused.

Sentencing stage, 'cause you know this is common law, so we have first a decision about the conviction; and then we have a second decision, a few months later, about the sentence. Sentencing is a second stage that is entirely in writing. We don't have new hearings there is no new witnesses. Well, there is—the chamber can ask for new hearing just to listen to the arguments by the Prosecutor and by the Defense, but there the victims are not expected to intervene very much, but they can make some written submissions.

So, in other words, this is a little bit of a list—a more analytical way—of the thing that the victims are allowed to do. First, this is really during the trial, but the trial can last for a long time. The Lubanga trial lasted six years, including the two interruptions imposed by Mr. Judge Fulford because he was unhappy with the Prosecutor. The Katanga trial, which was chaired by my compatriot, the great Judge Bruno Cotte also lasted six years. I can tell you he was so fed up at the end. He just wanted to get out of this, but he did meticulously. If you want to familiarize yourself with a with a solidly built argued, constructed—it's now in English translation—look at the Katanga judgment. This is really how things should be done. On top of it, its civil law so it shouldn't be very different from the Chinese practices and ways of reasoning. Unfortunately, the decisions we've had since are not exactly an in continuity with what Cotte tried to do.

So, they're present. They can they can make unsworn statements through individually, or through their LRVs, reflecting the views and concerns. They have access to public filings and to records, which is which is important. So, they know [what is going on] between the Prosecutor and the Defense. They can make opening and closing statements. They can ask permission to make oral submissions, and they are free to make written submissions.

And, that big job off the trial, the admissibility of evidence. This is what judges spend most time doing, actually. Looking at the evidence which is put forward, and determining whether it is admissible. There will rule on the contents of this evidence in the conviction decision, but they have to rule whether or not a given piece of evidence is admissible. That takes a lot of time because if you're a good defense lawyer, you know all the tricks in order to challenge the evidence which is presented by the Prosecutor. If you are a good Prosecutor, you know all the tricks in order to reverse the argument to the Defense So, this is cross-examination, this is common law, it's not simple. If you are on the bench, every morning you have to issue a decision, either orally or in writing. I think that Cotte commented that in his years in in Katanga, he took two decisions for each working day or hearing day because of the constant exchanges of arguments between the user Prosecution and the Defense which are largely about the admissibility of evidence.

So, we saw that they can ask to be witnesses, to testify, that they can ask to question witnesses. Now, why has—this is truly praetorian, the questioning of witnesses by victims. It's nowhere in the Statute, it's nowhere in the RPP's. This is a decision which was progressively accepted by the judges, because the judges thought that in support of the establishment of the truth, and provided the questions put by the LRVs were reasonable, there was no reason not to accept the LRVs to put questions to the witnesses. This has progressively crystallized and been accepted, but it was not an obvious choice because this is also time consuming and raises issues of a fairness of all sorts.

So, you've seen that picture. Now just to sum up some of the elements which I've already mentioned to you. Some of the problems in victim participations in proceedings of trials, not in reparations I'm coming to reparations now. First, the problem is that it takes time. You understand why: you have to outreach, fill in the forms, process the forms, the court of the chamber has to take a decision on the forms—it takes time before the victims are constituted., if I may say, within a given trial. So, in the initial phase of a trial they don't have much of role. This applications process, it's taken a lot of approximation to move from 18 pages to 1, to move from the different regimes—which existed in the early cases, in the most recent cases, in Kenya and in Gbagbo—and to progressively converge on what I tried to describe to you, which is the Ongwen case, which was made on the explicit provision that we keep 89(1). That you need a continued decision by judges to authenticate victims, which takes time and is expensive. And then you know, [you have] two groups in Ongwen. What do those groups have in common?

Not much. It just happened to have been assembled according to the way that the files were gathered, and so on.

In other cases, it is different. In Gbagbo, there are different groups, but there, clearly in Gbagbo, the different groups come from different geographic and ethnic backgrounds, even from different political backgrounds.

So, there is more cohesion but having groups determined by given LRVs is a bit of a hit and miss exercise.

Now I've also hinted how complicated it is to live in a system where you are in a nice, clean, quiet city in The Hague; and you have to communicate with people who are deep in the field in a country which is which is still in the process of war and in civil conflicts. So, the distance—the psychological, physical, and emotional distance—is huge in the cases of victims who come in to testify. There have been women from central Africa, who have wanted to come and testify about how wretched their personal experience was of the crimes which were committed against them, and of course it's a very strong and emotional type of moment and some breakdown, so you have to have psychological assistance, and so on. None of this is easy or simple, and that's also one of the reasons why international justice is expensive and requires special effort.

Then, you may have noticed I described VPRS, I described OPCV. There is a third unit within the court which is called VWU, Victims and Witnesses Unit. Victims and Witnesses Unit are the people who actually helps the victims and witnesses when they are in The Hague. They take them at the airport, they make sure that that they had food which they can handle, that that they have a coat when it's cold, very simple things. Now, of course some of the victims are very clever. Never underestimate human nature. They comment, I have a terrible toothache could you please take me to the dentist. What do you do? They take you to the dentist. So, the victims exchange notes and some of them come and say, "I have this ailment could you please take me to the doctor?" So, of course you have to take care of them. So, you can make some profit in being a victim. On top of it, you have a per diem and you travel around. And then some of the victims also have also understood, "I reach the airport. I ask for asylum. I don't want to go home. I want to stay in the Netherlands. It's a much better place." So, Dutch authorities say,

"You guys that's your responsibility. We don't want them."

"They're at the airport now. It's your responsibility."

There have already been a number of cases like that, which are very difficult to handle, because you have to determine when the responsibility of the Court bringing in a witness or victim starts and finishes. So, you have to protect the victims. All this process of redactions I mentioned to you.

And also to a certain extent, protect souls locally who have come out as victims. Witness protections, it's a nightmare, because bringing over in The Hague, witnesses which can really say nasty things about the accused. Some of them never come back to their country. They have to be relocated because the risk would be too great for them. But those witnesses also understand, "Ah, if I am witness in The Hague, I can exfiltrate my whole family to a much nicer environment. That's a good deal."

In the Bemba case, things were very complicated and ambiguous because some of the witnesses which had been accused, which had been witnesses of Mr. Bemba and Defense, then became witnesses of the Prosecutor against Mr. Bemba, when it was obvious that those first round of witnesses had been created by Mr. Bemba. Mr. Bemba was not a small war lord. He was a major political figure in DRC. Richest man in DRC. He got caught in special circumstances, we don't have time to discuss it. Mr. Bemba had a whole legal and political machinery and large resources. So, when he was accused of having his militia misbehave heavily in Central African Republic, he invented witnesses. He created a group of people who are well aware, who were central Africans and his legal team told them what to do. So, this is a little bit of a manipulation of justice. They were good, but not good enough that it didn't start to become obvious, so the Prosecutor went after them, found out.

So, we had in Bemba II, we were addressing the second issue. We were going after Bemba and the legal team who had tried to disrupt justice by false testimony. But the witnesses we had, they were also quite clever. So, they had been invented by Mr. Bemba, but while they were witnesses, they were protected and paid for. [When the Prosecutor] went to them and said,

"You have been lying."

They say, "Well, c'mon now, maybe yes, maybe not, but what do you offer me?"

So, we had, I won't tell you how many, but a number of witnesses which had been defense witnesses of Mr. Bemba, which—who, when it came to the second round—were turn coats. They were defense witnesses of the Prosecution, and in between they had lived a fairly comfortable life at the expense of the taxpayers of the ICC. Ironical, but inevitable. So, this just to amuse you with a little bit of background.

Now, numbers of the applicants, this is really the major problem, because it's very difficult to address. I gave you an example regarding Katanga and reparations—how difficult it is to make sure that you give a fair treatment to every applicant, when you determine that they have a right to reparations. In the following case—and this is public, so I can tell you—our Chamber has to address the victims of Mr. Lubanga.



Victims of Mr. Lubanga—[who] was convicted and sentenced for the use of child soldiers by his political movement in northeastern Congo, the UPC. The UPC had, in your opinion, how many child soldiers operative? (More or less in the same principles as Ongwen, by the way.)—3000.

Now there, it's a real problem to claim that you are a victim because UPC still exists. Mr. Lubanga is in the jail, in Kinshasa, but has a lot of networks. So, if you raise your finger and say, "I'm a victim of this guy," you really have to be motivated. So, we are having a much harder time getting a victim's claim for reparations, and we have to make a much bigger effort in protecting them in terms of redactions and so on, for those who are willing to come out. And by the way, we need good LRVs on the ground, they are so-so.

So, it's quite difficult and complicated to help identify those victims, but we are not going to be able to do the same thing as Katanga, to identify them individually. We are working on the idea of having a sample, and on the basis of the sample, we determine the criteria of those who can claim to be victims, and then when the Trust Fund will be doing reparations programs and people come which say who met those criteria, we will allow them, we will certify them afterwards. So, you have to be creative in doing this job altogether.

So, this is the OPCV in action. You will notice that none of them, only one of them in the back is African, which is also a problem, because all the accused are African. Fortunately, if you allow me a personal note, they're all Francophone, and all the accused are Francophone—while most of the judges are Anglophone. This is one of the problems of the Courts, is that the only Chamber which works in French is the one I chair on reparations for Lubanga and Katanga. Every other chamber works in English, and therefore does not understand, cannot communicate without interpretation with either the accused, or most of the time the lawyers of the accused are also Francophone, another little problem.