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Elizabeth Bingold

Michael H. Huneke

Don Shaver

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International Criminal Law

ELIZABETH BINGOLD, MICHAEL H. HUNEKE, AND DON SHAVER*

From war crimes tribunals to anti-corruption and organized crime prosecutions, 2008 saw significant developments in international criminal law. Victims took on a substantially enhanced role in two of the newer tribunals, and international efforts to fight transnational organized crime and foreign corrupt practices received a boost from enhanced cooperation measures.

I. The Growing Trend to Allow Victim Participation in Trial Proceedings in International Criminal Tribunals

Victims have long been allowed to participate in sentencing proceedings in domestic courts¹ and in reparation hearings in international criminal tribunals,² but the International Criminal Court (ICC) broke new ground in 2006 when it allowed direct participation of victims in all court proceedings. In 2008, the Extraordinary Chambers in the Courts in Cambodia (ECCC) became the second international criminal tribunal to do so when it authorized the participation of victims in the appeal of the pretrial detention hearing of Nuon, Chea over the defense's objection.³

One of the most unique hallmarks of the ICC and the ECCC is the status that they accord victims. Victims may be involved in the ICC process from the initial investigation

* Section I was prepared by Don Shaver, a Superior Court Judge in Modesto, California who worked with the Trial Chamber of the International Criminal Court from April 2006 to August 2006 as a "Visiting Professional" sponsored by the Judicial Council of the State of California. Section II was prepared by Elizabeth K. Bingold, who clerked for the Honorable William Duane Benton of the U.S. Court of Appeals for the Eighth Circuit. Section III was written by Michael H. Huneke, of White & Case, LLP. Additional updates on international criminal law issues during 2008 can be found in the year in review article from the International Human Rights Committee.

1. See, e.g., Exec. Order No. 12,360, 47 Fed. Reg. 17,975 (Apr. 23, 1982) available at <http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprtr/front.pdf>; Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248.

2. See, e.g., International Criminal Tribunal for the Former Yugoslavia [ICTY], *Rules of Procedure and Evidence*, Rules 105, 106 at 102-03, U.N. IT/32/Rev. 38 (1994) available at <http://www.un.org/icty/legaldocs/basic/rpe/IT032Rev38e.pdf>.

3. Prosecutor v. Nuon, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), Decision on Civil Party Participation in Provisional Detention Appeals, (Mar. 20, 2008) available at http://www.eccc.gov.kh/english/cabinet/courtDoc/37/Amicus_KID_C11_40_EN.pdf.

through sentencing and reparations.⁴ Victims in the ECCC process may be accorded the same status as other parties.⁵ Historically, European Courts have allowed for greater victim participation than English and American Courts.⁶ The ICC and ECCC victim participation rights are similar to the French civil law system in this regard. In the French system, a victim of a serious crime may join and participate in an ongoing criminal prosecution as a *partie civile*, with a civil claim for damages.⁷ This right to bring a civil claim before a *juge d'instruction* was recognized by the *Cour de Cassation* as early as 1906.⁸

A. CRIMINAL COURT EXPERIENCE

Under the Rome Statute, the International Criminal Court must allow the views and concerns of victims whose personal interests are affected to be presented and considered at all stages, but the Court is given great flexibility in determining how this will be done without causing unacceptable disruption to the trial and other proceedings.⁹ To be granted victim status, a victim must file a seventeen page written application with the Registrar.¹⁰ In the more remote and inaccessible areas, intermediaries from local non-governmental organizations will often assist with the completion and submission of the forms.¹¹ A victim may request anonymity,¹² but defense counsel is entitled to know the identity of the applicant.¹³ The parties are entitled to reply and lodge objections¹⁴ but do not have any related discovery rights.¹⁵ The matter is set for hearing, and if the application is granted, the Court specifies at what stage of the proceedings the victims may par-

4. See KARIN N. CALVO-GOLLER, *THE TRIAL PROCEEDINGS OF THE INTERNATIONAL CRIMINAL COURT: ICTY AND ICTR PRECEDENTS 244-49* (Martinus Nijhoff Publishers 2006).

5. EXTRAORDINARY CHAMBERS IN THE COURTS IN CAMBODIA [ECCC], INTERNAL RULES, Rule 23(6)(a) (revised Sept. 5, 2008), available at http://www.eccc.gov.kh/english/cabinet/fileUpload/88/IR_Revision2_05-01-08_En.pdf [hereinafter ECCC INTERNAL RULE].

6. David Donat-Cattin, *Protection of Victims and Witnesses and Their Participation in the Proceedings*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS NOTES, ARTICLE BY ARTICLE, 1275 (Otto Triffterer ed., 2d ed. 1999).

7. C. PR. PÉN., art. 1, (as amended June 15, 2000)(Fr.).

8. *Id.*

9. Rome Statute of the International Criminal Court art. 68, ¶ 3, 2187 U.N.T.S. 90 (July 1, 2002), available at http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf [hereinafter Rome Statute].

10. INTERNATIONAL CRIMINAL COURT [ICC], RULES OF PROCEDURE AND EVIDENCE, Rule 89(1), available at http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf [hereinafter ICC RULES OF PROCEDURE AND EVIDENCE]; see also Situation in the Democratic Republic of Congo, Case No. ICC-01/04-545, Decision on the Application for Participation in the Democratic Republic of the Congo by Applicants a/0189/06 et al., ¶ 25 (Nov. 4, 2008), available at <http://www.icc-cpi.int/icedocs/doc/doc583202.pdf> [hereinafter Doc. 545].

11. Doc. 545, *supra* note 10, ¶ 25.

12. Rome Statute, *supra* note 9, art. 68(1).

13. Case No. ICC-01/04-374, Decision on the Requests of the Legal Representatives of Applicants on Application Process for Victim's Participation and Legal Representation, ¶¶ 22, 29 (Aug. 17, 2007), available at http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-374_English.pdf.

14. ICC RULES OF PROCEDURE AND EVIDENCE, *supra* note 10, Rule 89(1).

15. Case No. ICC-01/04-417, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(c) of the Regulations on the Court and on the Disclosure of Exculpatory Materials by the Prosecutor ¶ 15 (Dec. 7, 2007), available at <http://www.icc-cpi.int/icedocs/doc/doc388041.PDF> [hereinafter Doc 417].

ticipate, and the extent and manner of the participation allowed.¹⁶ Minors are not allowed to submit their own application, but a person acting on their behalf may make the application.¹⁷

Victims may not represent themselves at the ICC and may only participate through a legal representative.¹⁸ Financial assistance is available for those determined to be indigent.¹⁹ Unless otherwise ordered by the Court, the right to participate includes appearing and arguing at all hearings as well as the trial.²⁰ For hearings, the Court may, in its discretion, limit a victim's counsel's role to presenting written observations or submissions.²¹ The Court may, on its own motion, solicit the views of a represented victim on any issue.²²

If the victim's counsel wishes to question a witness, he or she must make a separate application to the Chamber.²³ The Court may require, as part of the application, that the victim's counsel submit the proposed questions with the application.²⁴ If the request is granted, the Court may either grant the request on the same basis as the parties or grant the request with restrictions, such as directions on the manner and order of the questions, directions on the production of documents, or a directive that the court rather than counsel will ask the submitted questions of the witness.²⁵

1. *Determining Who is a "Victim"*

Victims may be natural persons, organizations, or institutions that suffer direct harm to any property dedicated to religious, educational, art, science, or charitable purposes.²⁶ For a natural person to qualify as a victim, they must meet three criteria: they must have personally²⁷ suffered harm, the crime alleged by the applicant must fall within the jurisdiction of the Court, and there must be a causal link between these crimes and the harm suffered by the applicant.²⁸ It is not necessary for the Court to determine in any great detail the precise nature of the causal link²⁹ between the crime and the alleged harm.³⁰

16. ICC RULES OF PROCEDURE AND EVIDENCE, *supra* note 10, Rule 89(1).

17. *Id.* Rule 89(3); *see* Doc. 545, *supra* note 10, ¶ 33.

18. ICC RULES OF PROCEDURE AND EVIDENCE, *supra* note 10, Rule 90(1).

19. *Id.* Rule 90(5).

20. *Id.* Rule 91.

21. *Id.* Rule 91(2).

22. *Id.* Rule 93.

23. *Id.* Rule 91(3).

24. *Id.* Rule 91(3)(a).

25. *Id.* Rule 91(3)(b).

26. *Id.* Rule 85.

27. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1432, Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I's Decision on Victim's Participation on 18 January 2008, ¶ 38 (July 11, 2008), *available at* <http://www.icc-cpi.int/iccdocs/doc/doc529076.PDF> [hereinafter Doc. 1432].

28. ICC RULES OF PROCEDURE AND EVIDENCE, *supra* note 10, Rule 85(a); Situation in the Democratic Republic of Congo, Case No. ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS1 et al. ¶ 79, (Jan. 17, 2006), *available at* <http://www2.icc-cpi.int/iccdocs/doc/doc183441.PDF> [hereinafter Doc. 101].

29. Doc. 1432, *supra* note 27, ¶ 58.

30. Doc. 101, *supra* note 28, ¶ 94.

The determination of a single instance of harm suffered is sufficient.³¹ Only a prima facie showing is required and it does not need to be corroborated by external evidence.³² As long as the allegation is consistent with events in official reports, it is taken at face value.³³ To fall within the jurisdiction of the Court, a crime must be included in Article 5 of the Rome Statute (genocide, crimes against humanity, and war crimes). It must also have occurred within the time period specified in Article 11 and Article 12(2).³⁴ The harm suffered may be physical, mental (moral), or economic (material).³⁵ Mental harm includes the loss of a loved one, as well as emotional distress.³⁶

2. *The Congo Investigation*

a. Victim Participation at the Preliminary Investigation Stage

In addition to showing that they qualify as a "victim," the applicant must also qualify for participation in the particular stage of the proceedings.³⁷ To do so, the applicant must show that their personal interests are affected and that participation in that particular stage of the proceedings is appropriate.³⁸ The ICC decided very early that victim participation rights attach during the preliminary investigation of a "situation" (country) even before any charges are filed.³⁹ Victims can continue to be accorded participation rights in the preliminary investigation as long as it continues even though individual cases have been filed.⁴⁰

Victim participation rights in the preliminary investigation in the Congo were granted to six victims two months before the first suspect, Thomas Lubanga Dyilo,⁴¹ was even in ICC custody.⁴² Although not entitled to the confidential investigation files of the Office of the Prosecutor (OTP),⁴³ the victims were entitled to present their views and concerns to the OTP, to file pleadings in the court file for the situation, and to request the Pre-Trial Chamber to order specific measures consistent with the Chamber's general supervisory role over the OTP.⁴⁴

31. *Id.* ¶ 82; *see also* Situation in the Democratic Republic of the Congo, ICC-01/04-423-Corr Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 et al." ¶ 3 (Jan. 31, 2008), *available at* <http://www.icc-pi.int/jccdocs/doc/doc463642.PDF> [hereinafter Doc. 423].

32. Doc. 417, *supra* note 15, ¶ 8.

33. Doc. 101, *supra* note 28, ¶ 101.

34. *Id.* ¶ 85.

35. *Id.* ¶ 116.

36. Situation in the Democratic Republic of Congo, Case No. ICC-01/04-505, Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0047/06 et al., ¶ 41 (July 3, 2008) [hereinafter Doc. 505].

37. Rome Statute, *supra* note 9, art. 68, ¶ 3.

38. Doc. 505, *supra* note 36, ¶ 25.

39. Doc. 101, *supra* note 28, ¶¶ 25, 38, 57, 185. Once a preliminary investigation is opened in a country, it is referred to as a "situation." As charges are filed against individual perpetrators, they are referred to as "cases" within the "situation." *Id.* ¶ 65.

40. *See, e.g.*, Doc. 505, *supra* note 36; Doc. 545, *supra* note 10.

41. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1337, Prosecution's Submission on the Review of Thomas Lubanga Dyilo's Pre-Trial Detention ¶ 24 (May 19, 2008).

42. Doc 101, *supra* note 28.

43. *Id.* ¶ 59.

44. *Id.* ¶ 185.

With the arrest of Lubanga, victim interest in participation skyrocketed. In 2006, no less than 250 applications to participate in the preliminary investigation were received,⁴⁵ and nine were granted.⁴⁶ In 2007, at least 337 more applications were received,⁴⁷ and fifty-eight individuals and one institution (a school) were granted participation rights.⁴⁸ In 2008, following the arrest of Katanga and Ngudjolo,⁴⁹ at least 110 more applications were received, and sixty-two more were granted.⁵⁰ Some of the applications granted had been pending for nearly two years.⁵¹ By the end of 2008, 130 victims had been granted rights to participate in the ongoing investigation in the Congo.

Since the beginning, both the OTP and the Office of Public Counsel for the Defence (OPCD) have consistently and strenuously opposed granting victim participation rights at the preliminary investigation stage.⁵² The OTP has taken the position that “proceedings” do not include the investigation of a “situation”; therefore a “proceeding” is not pending under the statute until an individual case is opened.⁵³ It further argues that personal interests of the applicant can only be determined once a case is initiated and cannot be determined merely from the fact that a crime is being investigated.⁵⁴ As 2008 came to a close, the issue was still pending before the Appeals Chamber.

b. Victim Participation at the Pre-trial Stage

Once an individual suspect is arrested, and a case file is opened, a victim may then apply to participate in proceedings in the Pre-Trial Chamber.⁵⁵ Individuals recognized as victims at the preliminary investigation who want to participate in pretrial proceedings related to a particular case must explicitly request permission to do so⁵⁶ and must show that they were harmed directly as a result of the crimes alleged against the accused in the relevant case.⁵⁷

45. Doc. 423, *supra* note 31.

46. Doc. 101, *supra* note 28, at 41; Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-177, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo 16 (July 31, 2006) [hereinafter Doc. 177].

47. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-357, Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08 (Apr. 2, 2008) [hereinafter Doc. 357].

48. Doc. 423, *supra* note 31, ¶¶ 137-138, 142-143.

49. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07-422-Anx1A, Document Containing the Charges Pursuant to article 61(3)(a) of the Statute (Apr. 21, 2008).

50. Doc. 505, *supra* note 36, at 41 (granting for thirty-two victims); Doc. 545, *supra* note 10, at 38-39 (granting for thirty victims).

51. Doc. 505, *supra* note 36, ¶ 5.

52. Situation in the Democratic Republic of Congo, Case No. ICC-01/04-444, Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation 15 (Feb. 6, 2008).

53. Doc. 101, *supra* note 28, ¶ 25.

54. Doc. 505, *supra* note 36, ¶ 7.

55. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-172, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo (June 29, 2006) [hereinafter Doc. 172].

56. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-601, Decision on Applications for Participation in Proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo, 8 [hereinafter Doc. 601].

57. Doc. 172, *supra* note 55, at 6.

i. *The Lubanga Case*

The *Lubanga* Court adopted a narrow definition of whether the harm suffered is directly linked to the crimes set forth in the arrest warrant.⁵⁸ Shortly after Lubanga's arrest, the Court denied the same first six victims the right to participate in his pretrial proceedings.⁵⁹ Of the 105 additional applications to participate in the pre-trial proceedings filed in the remainder of 2006, only four victims were granted participation rights.⁶⁰ In 2007, although fifty-nine new victims were granted participation rights in the on-going preliminary investigation, no additional victims were granted participation rights in the *Lubanga* case.

The four victims who were allowed to participate in the *Lubanga* pretrial proceedings were not allowed to present evidence or question witnesses at the confirmation hearing⁶¹ in November 2006.⁶² Because they had requested to remain anonymous throughout the hearing, the Court felt it would be unfair to require the accused to defend against "anonymous accusations."⁶³ The victims were, however, allowed to present their views and concerns by making opening and closing statements.⁶⁴ They were also allowed to submit post-hearing briefs prior to the decision.⁶⁵

ii. *The Katanga and Ngudjolo Case*

Unlike the *Lubanga* Chamber, the *Katanga* and *Ngudjolo* Chamber was much more liberal in allowing victim participation in the confirmation hearing. In April 2008, the Chamber granted participation rights to five victims⁶⁶ and in June to fifty more individuals and one institution.⁶⁷ Thirty-seven of the victims requested anonymity and were subject to the same limitations as in the *Lubanga* case, but fourteen agreed to waive anonymity.⁶⁸ These fourteen were allowed to participate fully, including objecting to evidence and examining witnesses without having to submit a list of questions in advance.⁶⁹ These fifty-six victims were represented at the confirmation hearing by five different attorneys.⁷⁰

58. *Id.* at 6; Doc. 601, *supra* note 56, at 6.

59. Doc. 172, *supra* note 55, at 8-9.

60. Doc. 177, *supra* note 46, at 16; Doc. 601, *supra* note 56, at 13.

61. Similar to the U.S. preliminary hearing.

62. Prosecutor v. Thomas Lubanga Dyilo, Case No. 01/04-01/06-462, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing 7 (Sept. 22, 2006) [hereinafter Doc. 462]; Doc. 601, *supra* note 56, at 13.

63. Doc. 462, *supra* note 62, at 7.

64. *Id.* at 6; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-678, Decision on the Schedule and Conduct of the Confirmation Hearing 7 (Nov. 7, 2006).

65. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-750, Observations Made During the Confirmation Hearing on Behalf of Victims a/0001/06, a/0002/06 and a/0003/06 (Dec. 4, 2006); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-745, Written Submissions of the Legal Representative of Victim a/0105/06 (Dec. 1, 2006).

66. Doc. 357, *supra* note 47, at 13.

67. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/06-579, Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case," ¶¶ 127-28, 139 (June 10, 2008).

68. *Id.* ¶¶ 142, 149-153.

69. *Id.* ¶ 146.

70. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/06-717, Decision on the Confirmation of Charges, ¶ 53 (Sept. 30, 2008).

c. Victim Participation at the Trial Stage

To be permitted to participate at the trial stage of the proceedings, victims must show that their personal interests are affected by the trial issues and that the harm the victim is alleged to have suffered is “linked with the charges confirmed against the accused.”⁷¹ In January 2008, the *Lubanga* Trial Chamber decided that it would allow the four previously authorized victims to introduce evidence on Lubanga’s innocence or guilt, examine witnesses, make motions, file briefs, and object to evidence submitted by the other parties at the upcoming trial.⁷² Both the prosecutor and defense appealed this ruling. Both pointed out that while they are bound by “disclosure” (discovery) obligations, no such obligation applies to victims.⁷³ The prosecution further argued that allowing victims to present evidence of the accused’s guilt would “shift the burden of proof” because this is the exclusive job of the prosecution and allowing victims to collect evidence in hostile environments would jeopardize their security.⁷⁴ Finally, the prosecution argued that Article 68(3) only authorizes victims to present “views and concerns,” which should not be considered to include evidence.⁷⁵ The defense further argued that it would be put in the position of having to confront more than one accuser.⁷⁶

The Appeals Chamber noted that while the responsibility to present and challenge evidence at trial lies primarily with the prosecution and defense,⁷⁷ the Trial Chamber is not precluded from allowing victims to do so as well under its general authority to “request submission of all evidence that it considers necessary for the determination of the truth.”⁷⁸ The Court further held that the right to participate must include this right to be truly meaningful.⁷⁹ The Court approved the procedure established by the Trial Chamber to insure against unfair surprise, namely: “(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 protective orders, (v) determination of appropriateness, and (vi) consistency with the rights of the accused and a fair trial.”⁸⁰

3. *The Investigations in Central African Republic, Uganda, and Darfur*

The only other accused in the custody of the ICC is Jean-Pierre Bemba Gombo in the Central African Republic investigation.⁸¹ Although his confirmation hearing was scheduled for December 8 to 12, 2008, no victims were approved to participate in the hearing.⁸² Although no arrests have been made on the charges in either the Darfur, Sudan investiga-

71. Doc. 1432, *supra* note 27, ¶ 65.

72. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1119, Decision on Victims’ Participation, ¶¶ 103,108-109, 112 (Jan. 18, 2008).

73. Doc. 1432, *supra* note 27, ¶¶ 71, 78.

74. *Id.* ¶ 71.

75. *Id.* ¶ 72.

76. *Id.* ¶ 78.

77. *Id.* ¶ 93.

78. *Id.* ¶¶ 94, 95.

79. *Id.* ¶ 97.

80. *Id.* ¶ 104.

81. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08 (July, 4, 2008).

82. The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-267, Decision Requesting Observations on the Proposed Schedule for the Confirmation of Charges Hearing, 4 (Nov. 21, 2008).

tion or the Uganda investigation of Vincent Otti and the Lord's Resistance Army, victim applications to participate in the cases have been received in both. In the Darfur investigation, at least fifteen victims submitted applications in 2006 and another thirty-eight in 2007. The Court approved eleven for participation in the investigation and denied ten.⁸³ In the Uganda investigation, at least 127 applications were submitted in 2006 and another 125 in 2007. By December of 2008, the Court had approved sixty-two victims to participate in the investigation, with forty-one of those also approved to participate in the case.⁸⁴

4. Summary

Since the first six victims were granted participation rights in the Congo investigation in January 2006, the Court has become increasingly busier reviewing victim requests for participation, and it now spends a significant portion of its time on related issues. There are now 203 court-authorized victims participating in the on-going country investigations in the four countries currently pending before the Court.

B. ECCC EXPERIENCE

Following the lead of the ICC, the newly created ECCC also allows direct victim participation. Cambodian domestic law is based on the French civil law system, so the ECCC procedure adopts the term *partie civile*, or "civil party," rather than "victim."⁸⁵ The purpose of the "civil party action" is to "participate in criminal proceedings . . . by supporting the prosecution, and allow victims to seek collective and moral reparations. . . ."⁸⁶ A civil party is considered a party for all purposes⁸⁷ and entitled to a separate judgment based on the judgment in the prosecution.⁸⁸ A victim may apply to participate in the pretrial investigative phase, the trial phase, or both.⁸⁹ Unlike the ICC, which limits participation to "stages of the proceedings determined to be appropriate,"⁹⁰ the ECCC victim need not show any special interest in that particular stage of the proceeding to be approved.⁹¹ Civil parties have the same rights as the defense and prosecution and may participate in appeal hearings without seeking prior permission, unlike the ICC.⁹²

83. Situation in Darfur, Sudan, Case No. ICC-02/05-111-Corr, Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 et al., 23 (Dec. 14, 2007).

84. Situation in Uganda, Case No. ICC-02/04-101, Decision on Victims' Application for Participation a/0010/06 et al. 61 (Aug. 10, 2007); Situation in Uganda, Case No. ICC-02/04-125, Decision on Victims' Application for Participation a/0010/06, et al. 70 (Mar. 14, 2008); Situation in Uganda, Case No. ICC-02/04-170, Decision on Victims' Applications for Participation a/0066/06 et al. 19 (Nov. 17, 2008); *Situation in Uganda, Case No. ICC-02/04-172, Decision on Victims' Applications for Participation a/0014/07 et al. 66-67* (Nov. 21, 2008).

85. ECCC INTERNAL RULES, *supra* note 5, Rule 23 § 3 (revised Sept. 5, 2008).

86. *Id.* § 1.

87. *Id.* § 6(a).

88. *Id.* § 6(b).

89. *Id.* §§ 3-4.

90. Rome Statute, *supra* note 9, art. 68(3).

91. Chea v. Nuon, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), Decision on Civil Party Participation in Provisional Detention Appeals, ¶ 49, (Mar. 20, 2008).

92. *Id.* ¶ 13.

II. Organized Crime and Corruption: Recent Increases in International Law Enforcement Cooperation

As corporations continue to globalize their operations, U.S. law enforcement agencies have stepped up cross-border cooperation efforts throughout 2008 to more effectively investigate, and where appropriate, prosecute criminals whose conduct transcends physical borders. U.S. Attorney General Michael B. Mukasey and Securities and Exchange Commission (SEC) Chairman Christopher C. Cox have both noted the important role that international governmental cooperation plays—and will continue to play—in their agencies' efforts to fight corruption, organized crime, terrorism, and computer crimes.

A. NEW INTERNATIONAL GOVERNMENTAL COOPERATION

In July 2008, Attorney General Mukasey stressed the importance of international cooperation in the global fight against transnational crime. In his testimony before the U.S. Senate Judiciary Committee, Mukasey underscored the U.S. Department of Justice's (DOJ) "focused . . . efforts to build the law enforcement capacity of emerging overseas partners."⁹³ On a recent trip through Asia, Mukasey met with foreign law enforcement and diplomatic officials and witnessed "first-hand the highly successful capacity-building programs the Justice Department has underway in Indonesia,"⁹⁴ including placing a U.S. federal prosecutor in Jakarta to work alongside the Indonesian Attorney General's new Anti-Corruption Task Force and the country's Terrorism and Transnational Crime Task Force. Mukasey emphasized that the United States is aggressively "working with foreign governments around the world to develop professional and accountable law enforcement institutions that protect human rights, combat corruption, and reduce the threat of transnational crime and terrorism."⁹⁵

In recognition of the increasing need for U.S. law enforcement to adapt to the changing face of international organized crime, in April 2008, the DOJ announced a new, cooperative law enforcement strategy.⁹⁶ The strategy establishes a framework, designed to assist federal law enforcement agencies in their attempts to dismantle criminal organizations here and abroad. "These modern-day criminals threaten our physical, economic and national security, indeed, in many circumstances without even setting foot inside U.S. borders," said former Assistant Attorney General for the Criminal Division Alice Fisher.⁹⁷ "As international organized criminals have adapted their tactics over time and embraced emerging technology, we too must adapt," Mukasey said.⁹⁸ "[W]ith this strategy, we're building a new, 21st century program that we believe will be nimble enough to fight the

93. *Oversight of the U.S. Department of Justice: Testimony Before the U.S. S. Comm. on the Judiciary*, 110th Cong. (July 9, 2008) (statement of Michael B. Mukasey, U.S. Att'y Gen), available at <http://www.justice.gov/criminal/icitap/press/room/2008/jul/07-09-08mukasey.pdf>.

94. *Id.*

95. *Id.*

96. Press Release, U.S. Dep't of Justice, Department of Justice Launches New Law Enforcement Strategy to Combat Increasing Threat of International Organized Crime (Apr. 23, 2008), available at [http://www.usdoj.gov/opa/pr/2008/April/08-04-08-0330.html](http://www.usdoj.gov/opa/pr/2008/April/08-04-08-08-0330.html) [hereinafter New Law Enforcement Strategy].

97. *Id.*

98. *Id.*

threat of international organized crime for years to come.”⁹⁹ According to the DOJ, the strategy offers:

a comprehensive and detailed plan that will enable the Department and nine federal law enforcement agencies to . . . most effectively combat the threat of international organized crime. Ultimately, the strategy aims to create consensus among domestic law enforcement in identifying the most significant priority targets and then [present a] unified and concerted action among domestic and international law enforcement in significantly disrupting and dismantling those targets.¹⁰⁰

Specifically, the new threat assessment initiative identifies and defines eight strategic threats, including: energy markets and other strategic sectors of the world economy; logistical and financial support for terrorists; human trafficking; corrupt financial service providers; cyberspace crimes jeopardizing personal information, commercial and governmental infrastructures, and the solvency of financial investment markets; securities fraud schemes; public corruption; and politically motivated violence. The strategy was specifically created as a reaction to the “globalization of legal and illegal business, advances in technology, particularly the Internet, and the evolution of symbiotic relationships between criminals, public officials and business leaders that have combined to create a new, less restrictive environment within which international organized criminals can operate.”¹⁰¹ Recognizing the need to adjust their methods in response to the globalization of legal and illegal business, law enforcement is attempting to combat criminals that target the United States while remaining outside the country. “The activities of transnational and national organized criminal enterprises are increasing in scope and magnitude as these groups continue to strengthen their networking with each other to expand their operations,” said FBI Deputy Director John S. Pistole.¹⁰² “By increasing international cooperation and information sharing, together we can disrupt and dismantle these global, sophisticated organizations that have exploited geopolitical, economic, social, and technological changes over the last two decades to become increasingly active worldwide.”¹⁰³ The new approach is largely “a response to international organized criminals’ ability to operate unconstrained by national borders and geographic law enforcement jurisdictions, . . . [and] aims to ensure criminal laws and operating procedures reflect the modern realities and needs of international crime fighting.”¹⁰⁴

The DOJ is not the only federal law enforcement agency to see the need for increased international cooperation. During remarks made to representatives of foreign securities regulators in November 2008, SEC Chairman Cox highlighted the “massive” international cooperation efforts made by the SEC this year.¹⁰⁵ In 2008, SEC staff requested

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. See Christopher Cox, Chairman, Sec. and Exch. Comm’n, Remarks on the Importance of International Enforcement Cooperation in Today’s Markets (Nov. 7, 2008), available at <http://www.sec.gov/news/speech/2008/spch110708cc.htm>.

assistance from overseas regulators 556 times.¹⁰⁶ During the same period, foreign regulators called upon the SEC 454 times.¹⁰⁷

In particular, Chairman Cox referenced three recent examples of effective international cooperation between the SEC and its foreign counterparts. First, in the case of a United Kingdom (UK) citizen who was a defendant in a pending SEC action in Boston, Chairman Cox acknowledged the UK Financial Services Authority for providing valuable intelligence that was “instrumental in the SEC’s obtaining a Freezing Order in the UK courts.”¹⁰⁸ Next, Chairman Cox recognized the Swiss Federal Banking Commission for its support in a suspicious insider trading matter that aided the SEC in winning a temporary restraining order in U.S. District Court and further praised the U.S. DOJ and the Swiss federal criminal authorities for their assistance in freezing millions of dollars in Swiss accounts.¹⁰⁹ Third, in an ongoing case, Chairman Cox explained that the SEC is tracking down the mastermind of an international securities fraud scheme with the assistance of the Andorran authorities. By virtue of this cooperation, the SEC was able to successfully obtain an asset freeze.¹¹⁰

Additionally, Chairman Cox noted the SEC’s response to the recent sub-prime mortgage crisis has taken on a distinctly international character. In response to the crisis, Chairman Cox explained that the SEC “has been working closely with our international regulatory counterparts . . . to coordinate our actions and align our strategies.”¹¹¹ Currently, twelve of the SEC’s open sub-prime investigations have required information sharing across borders.¹¹²

B. EXAMPLES OF INTERNATIONAL COOPERATION

Evidence of international law enforcement cooperation abounded throughout 2008. In March 2008, for example, the United States and Germany agreed to share fingerprint databases and information regarding known and suspected terrorists.¹¹³ The agreement gives each country mutual access to fingerprint databases for the purpose of “determining if evidence in them could be helpful in criminal investigations and prosecutions.”¹¹⁴ This agreement is especially useful to the United States, given the strict data protection laws that are in place within the European Union. By having this procedure in place, U.S. law enforcement will be able to obtain evidence while “ensuring that personal data is appropriately protected.”¹¹⁵ More than just a practical law enforcement initiative, this agreement symbolizes the joint resolve of German and U.S. authorities to cooperate in fighting terrorism and transnational crime. “The values we share with Germany and our mutual

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. Press Release, U.S. Dep’t of Justice, United States and Germany Agree to Share Fingerprint Databases and Information on Known and Suspected Terrorists (Mar. 11, 2008), available at http://www.usdoj.gov/opa/pr/2008/March/08_ag_190.html.

114. *Id.*

115. *Id.*

interest in protecting our citizens makes us even more determined to deepen our partnership with Germany. We look forward to implementing this important instrument in a spirit of mutual respect and cooperation,"¹¹⁶ said Attorney General Mukasey.

Strategies such as those announced in Germany have already proven useful. In May 2008, cooperation between the U.S. and Romanian law enforcement disrupted and ultimately dismantled an organized crime ring operating over the Internet in the United States and Romania.¹¹⁷ Working closely with their Romanian counterparts, the Justice Department and the FBI charged thirty-eight people with computer fraud and identity (ID) theft violations. This case serves as an example of the fact that, by using the Internet for banking and commerce, Americans are at an increased risk of harm by foreign criminals. As Deputy Attorney General Mark R. Filip stated, "[c]riminals who exploit the power and convenience of the Internet do not recognize national borders; therefore our efforts to prevent their attacks cannot end at our borders either. Through cooperation with our international partners, we can disrupt and dismantle these enterprises . . ."¹¹⁸ In discussing the key role Romanian officials played in bringing these criminals to justice, U.S. Attorney for the Central District of California Thomas O'Brien stated:

Partnerships and cooperation among all levels of law enforcement—both domestic and foreign—are the keys to tackling criminal activity that increasingly knows no borders. Just as street gangs don't respect municipal borders, computer criminals can reach into other countries and prey upon unsuspecting victims who have no idea their identities and money are going to another country.¹¹⁹

The FBI has also given their support to increased cooperation between U.S. and foreign law enforcement. FBI Deputy Director Pistole noted that, "[d]espite being separated by oceans, we are united in the fight against organized crime."¹²⁰

Another example of U.S. law enforcement's increased cooperation took place in June 2008, between the United States and the United Kingdom, when three UK businessmen were sentenced to two-and-a-half to three years imprisonment for cartel offenses under the Enterprise Act of 2002 (UK).¹²¹ The sentencing was the culmination of an international investigation undertaken by the U.S. DOJ, the European Commission, and the Office of Fair Trading (UK), that earlier resulted in plea bargains in the United States under which each defendant agreed to a fine between \$75,000 and \$100,000 and jail terms of between twenty and thirty months.¹²² The increase in transatlantic cooperation was evidenced through the first-ever coordinated dawn raids by the DOJ, European Commis-

116. *Id.*

117. Press Release, U.S. Dep't of Justice, 38 Individuals in U.S. and Romania Charged in Two Related Cases of Computer Fraud Involving International Organized Crime (May 19, 2008), available at <http://newhaven.fbi.gov/dojpressrel/2008/nh051908.htm>.

118. *Id.*

119. *Id.*

120. *Id.*

121. Press Release, Office of Fair Trading, Three Imprisoned in First OFT Criminal Prosecution for Bid Rigging (June 11, 2008), available at <http://www.oft.gov.uk/news/press/2008/72-08>.

122. Press Release, U.S. Dep't of Justice, Three United Kingdom Nationals Plead Guilty to Participating in Bid-Rigging Conspiracy in the Marine Hose Industry (Dec. 12, 2007), available at http://www.usdoj.gov/atr/public/press_releases/2007/228561.htm.

sion, and Office of Fair Trading and the simultaneous arrests of the three businessmen at a trade conference while in the United States.

International cooperation has also proven useful in extraditing criminals who are being held in foreign countries to stand trial within the United States. In October 2008, the Colombian government granted the United States' request to extradite Luis Hernando Gomez-Bustamante, one of the leaders of the Norte Valle Colombian Drug Cartel, to the United States.¹²³ Gomez-Bustamante has admitted to a leadership role in the Norte Valle Cartel, a criminal organization that is allegedly responsible for exporting more than 500,000 kilograms of cocaine, worth more than \$10 billion, from Colombia to Mexico, and ultimately to the United States.¹²⁴ As part of the extradition request, the United States has assured the Colombian government that it will not seek a life sentence for Gomez-Bustamante.

The United States is also working with its foreign counterparts to extradite criminals who are held in the United States. In October, the United States extradited Jose Francisco Granados de la Paz, a serial killer, to Mexico.¹²⁵ This case marks the first time that authorities have utilized a special provision of the U.S.-Mexico Extradition Treaty allowing either country to surrender a defendant who is serving a sentence in another country for trial before the sentence he is serving has expired.¹²⁶

Extraditions have proven to be useful, as evidenced by the sentencing of Lan Dang, the ringleader of an international Asian drug trafficking organization, who was sentenced to forty years in prison for smuggling large amounts of illegal drugs manufactured in China, into the United States.¹²⁷ Dang is accused of coordinating a sophisticated scheme to distribute drugs to customers in the United States then laundering the proceeds of those sales back to China. "To date, Dang is one of the highest ranking members of an Asian organized crime group to be prosecuted in the United States."¹²⁸ This case is touted as an example of U.S. and Canadian law enforcement agencies working closely together to crack down on organized crime groups.¹²⁹

C. INTERPOL MEMBERS UNITE TO APPREHEND AND ARREST CRIMINALS

In 2008, Interpol continued to play an important role in facilitating communications and cooperation among international police organizations. In one highly public case involving an American who was accused of traveling to Thailand to engage in illicit sexual conduct with children, Interpol released a photo of the suspect to media outlets in the

123. Press Release, U.S. Dep't of Justice, Leader of Colombian Drug Cartel Pleads Guilty to Racketeering Charges (Oct. 17, 2008), available at http://www.usdoj.gov/criminal/pr/press_releases/2008/10/10-17-08bus-tamate-guilty.pdf.

124. *Id.*

125. Press Release, U.S. Dep't of Justice, United States Extradites Accused Serial Killer to Mexico (Oct. 22, 2008), available at http://www.usdoj.gov/criminal/pr/press_releases/2008/10/10-22-08_serial-killer-extradited.pdf.

126. *Id.*

127. See Press Release, U.S. Dep't of Justice, Ringleader of International Drug Trafficking Conspiracy Sentenced to 40 Years in Prison (Oct. 8, 2008), available at http://www.usdoj.gov/criminal/pr/press_releases/2008/10/10-08-08_ringleader-sent.pdf.

128. *Id.*

129. *Id.*

United States and abroad and made a global appeal for information that would help identify the offender depicted in the photograph.¹³⁰ Through the cooperation of the U.S. Immigration and Customs Enforcement agents and Interpol, within forty-eight hours of the photo's release Wayne Nelson Corliss of New Jersey was identified and arrested.¹³¹

The Corliss case is just one of many cases in which Interpol has played a major role this year. In 2008 alone, more than "600 people have been arrested on the basis of INTERPOL notices, and since 2000, almost 27,000 fugitives who were the subjects of INTERPOL notices and diffusions have been caught."¹³² The increased globalization of crime has made Interpol a vital organization with its network of 187 member countries. At its annual conference in Johannesburg, South Africa, Interpol members discussed expanding Interpol's global police communications system.¹³³ United States Marshals Services Director John Clark explained that:

[T]ransnational criminal organizations and international fugitives take advantage of our global economy to travel, communicate and even to hide from police detection. It is more critical now than ever before that we unite to be an international police force, capable of apprehending and arresting criminals through co-operation with each other.¹³⁴

III. Emerging Trends in FCPA Enforcement: U.S. Supreme Court Leaves Expansive Coverage Decision Intact

On September 11, 2008, Mark F. Mendelsohn, Deputy Chief of the Fraud Section at the DOJ, and Gerald W. Hodgkins, Assistant Director of the Division of Enforcement at the SEC, addressed the American Bar Association on emerging trends in Foreign Corrupt Practices Act (FCPA) enforcement. Because issues arising under the FCPA are rarely the subject of litigation, public statements by DOJ and SEC officials offer a valuable perspective for understanding the FCPA and appreciating trends in FCPA enforcement.

Mendelsohn stated that the DOJ brought sixteen criminal enforcement actions in 2007, which is double the number of enforcement actions brought in 2006. He expects this trend to continue "given the significant number of matters that [are] under investigation."¹³⁵ Additionally, the DOJ has "come up [with] some creative ways to try to resolve cases involving companies," including "non-prosecution agreements, deferred prosecution agreements, [and] corporate compliance monitors."¹³⁶ Mendelsohn characterized these mechanisms' impact on the number of companies willing to disclose potential FCPA

130. See Press Release, U.S. Dep't of Justice, Two Men Plead Guilty on International Sex Tourism Charges (Nov. 13, 2008), available at http://www.usdoj.gov/criminal/pr/press_releases/2008/11/11-13-08_2-men-guilty.pdf.

131. *Id.*

132. See Media Release, Interpol, Interpol Fugitives Conference Focuses on International Co-operation via Global Police Tools (Nov. 18 2008), available at <http://www.interpol.int/Public/ICPO/PressReleases/PR2008/PR200866.asp>.

133. *Id.*

134. *Id.*

135. Mark F. Mendelsohn, Deputy Chief of Fraud Section, U.S. Dep't of Justice, Address at the American Bar Assoc. sponsored luncheon addressing FCPA enforcement (Sept. 11, 2008).

136. *Id.*

problems to the DOJ as “enormous.” According to Mendelsohn, “the number of individual prosecutions has risen—and that’s not an accident.”¹³⁷ In fact, the recent increase is “quite intentional” and has a “credible deterrent effect” on future FCPA violations. “People have to be prosecuted where appropriate,” said Mendelsohn, because “[t]his is a federal crime; this is not fun and games.”¹³⁸ As evidence of this, the DOJ announced new charges against Gerald and Patricia Green on October 2, 2008, for bribing Thai officials in exchange for lucrative contracts.¹³⁹ According to Hodgkins, the SEC is also pursuing individuals, including foreign nationals, for FCPA violations.

Mendelsohn identified “industry-wide initiatives” by the DOJ and SEC as a current enforcement priority. Of note are recent DOJ enforcement actions with several medical device makers¹⁴⁰ and an ongoing investigation into freight-forwarder Panalpina and its clients. Mendelsohn stated that the DOJ will broaden its investigation when a foreign official’s financial records indicate that multiple corporations were bribing the official, or when an involved employee has worked at several competitors. Corporations need to be especially diligent if a competitor is under investigation because if the DOJ finds that one company has violated the FCPA, it is likely to look at the conduct of the company’s competitors.

A new trend Mendelsohn identified is “increased attention to foreign payments issues in the context of transactions,” such as mergers and acquisitions (M&A) and IPOs.¹⁴¹ Mendelsohn attributed this trend to increased due diligence as a result of Sarbanes-Oxley.¹⁴² Hodgkins confirmed that many SEC reviews of foreign payments “are coming in as a result of M&A activity.”¹⁴³ Pre-merger FCPA due diligence is “one of the most critical factors we consider,” Mendelsohn said, in making charging decisions related to merger activity.¹⁴⁴

According to Hodgkins, the SEC determined several years ago that disgorgement is an important remedy, and as a result the SEC sought disgorgement in a number of recent cases. For example, in March 2008, AB Volvo disgorged \$8.5 million in ill-gotten gains and pre-judgment interest as part of a consent agreement with the SEC.¹⁴⁵ Hodgkins also cautioned that disgorgement is not limited to ill-gotten gains; the SEC staff will “think creatively” about disgorgement and consider whether disgorgement should also include the value of the bribe paid, regardless of whether the SEC would have jurisdiction over the bribe itself.

137. *Id.*

138. *Id.*

139. See Press Release, U.S. Dep’t of Justice, Film Executive and Spouse Indicted for Paying Bribes to a Thai Tourism Official to Obtain Lucrative Contracts (Oct. 2, 2008), available at <http://www.usdoj.gov/usao/cac/pressroom/pr2007/162.html>.

140. There have been six medical device makers who are under investigation by, or who have settled with, the DOJ for alleged FCPA violations: Wright Medical Group, Biomet Inc., Stryker Corp., Zimmer Holdings Inc., Smith & Nephew PLC, and Medtronic Inc.

141. Mendelsohn, *supra* note 135.

142. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002).

143. Mendelsohn, *supra* note 135.

144. *Id.*

145. AB Volvo, SEC Litigation Release No. 20504 (Mar. 20, 2008), available at <http://www.sec.gov/litigation/litrelases/2008/lr20504.htm>.

On October 6, 2008, the U.S. Supreme Court denied a petition for writ of certiorari in the case of *Kay v. United States*, one of the relatively rare court decisions in the FCPA area.¹⁴⁶ Although the Supreme Court's denial of certiorari does not mean that the Court agreed with the Fifth Circuit's decision, it had the effect of leaving in place the Fifth Circuit's decision to broadly interpret the phrase "obtaining or retaining business" in the context of the FCPA.

In *Kay*, the Fifth Circuit determined that payments to government officials to obtain a reduction in import taxes and duties violated the FCPA. At trial, the defendants argued that such benefits did not constitute "obtaining or retaining business" as required by the statute. After a jury conviction, the Fifth Circuit held that payments to government officials that allow a company "to keep up with competitors" constitute FCPA violations. The Fifth Circuit concluded that while "obtaining or retaining business" may be ambiguous, the ambiguity does not rise to the level of vagueness and unfair notice that violates due process.

The Supreme Court's failure to take up this challenge to the meaning of "obtaining or retaining business" portends further government enforcement of business activities that, while not intended to secure a particular contract or sale, provide a benefit to the company or reduce operating costs.

146. See *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004), *cert. denied*, 129 S. Ct. 42 (2008).