



Lubanga case

→ "129 victims admitted to the trial"

- Introduction: Two systems – two approaches
- Victim participation within the two systems of procedure
- Accessory prosecution in detail
- Common problems – particular problems
- Victims' position at international courts: Hybrid procedure as experimental ground for approximation?

Introduction: Two systems – two approaches

- Most national systems of criminal prosecution can be allocated to two basic models of procedure
- These models (traditions) are characterized by different aims, and different rules
- Two different procedural settings:
 - » *Anglo-saxon procedure (common law)*
 - » *Continental procedure (civil law)*
- These procedural settings determine, to a high degree, the possibilities for victim participation in trial, and its reach and limits

Similarities and differences

- Post-victimization stage: *similarities*
- Police/investigation stage: *(slight) differences*
- Court stage: *(fundamental) differences*
- Post-trial and correction stages: *similarities*
- Pre-release stage: *similarities*
- Post-release stage: *similarities*

Similarities and differences

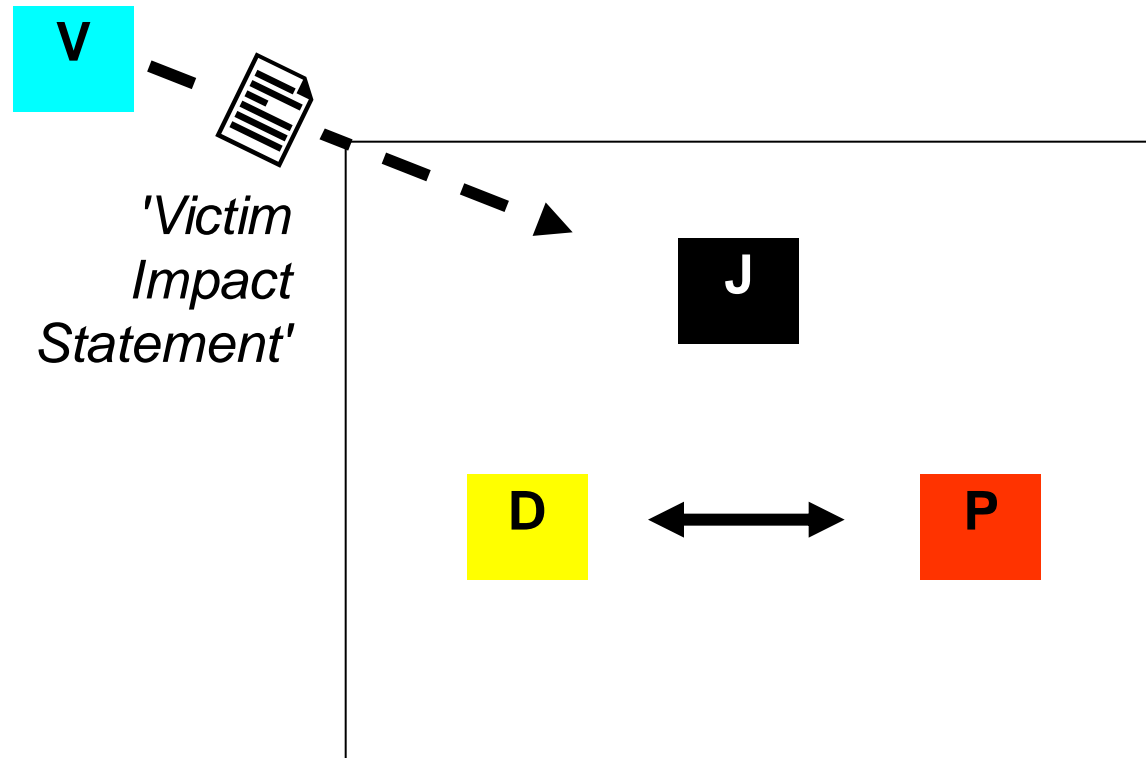
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- **Court stage: *(fundamental) differences***
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- Adversarial procedure:
 - (interlocutory) two-step procedure: examination of guilt, separate sentencing hearing
 - two parties: prosecution vs. defense
 - horizontal interaction
 - different addressees of interaction: jury, judge
 - aim: fair trial
- Inquisitorial procedure:
 - one conjunct trial
 - two- or multi-party setting possible: prosecution, defense, and victim(s)
 - vertical interaction
 - one addressee of interaction: judge(s)
 - aim: truth finding

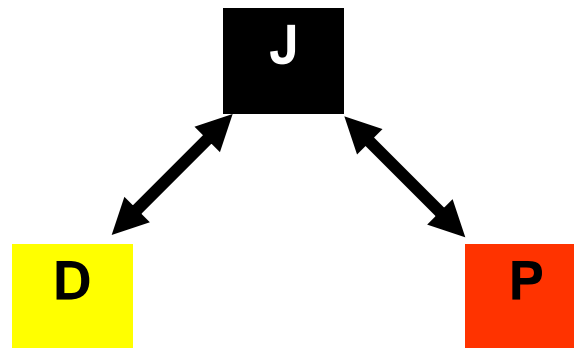
- Adversarial procedure:
 - victim input through victim impact statement (VIS)
 - post-conviction, written or oral
 - sentencing hearing
 - 'voice'
 - **passive victim participation**
- Inquisitorial procedure:
 - victim input through participatory procedures, e.g., Nebenklage (accessory prosecution), acusación particular, partie civile, etc.
 - quasi party status throughout the whole process
 - oral (direct or indirect)
 - **active victim participation**

Victim Participation within the two Systems of Procedure

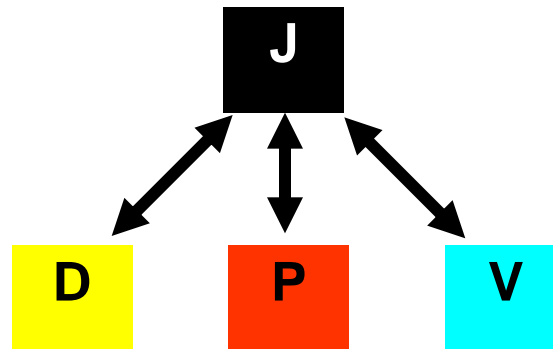
Common law: Adversarial procedure



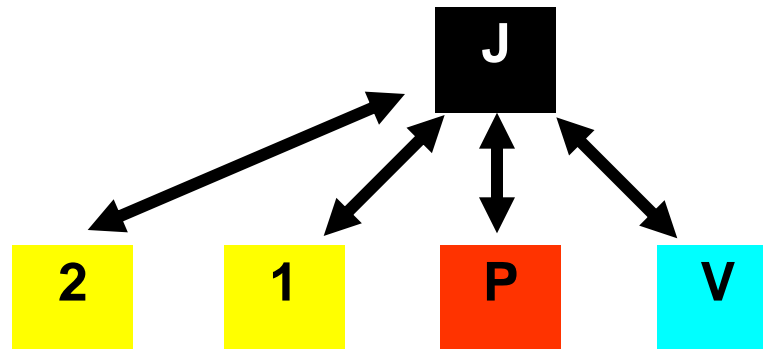
Continental law: Inquisitorial procedure



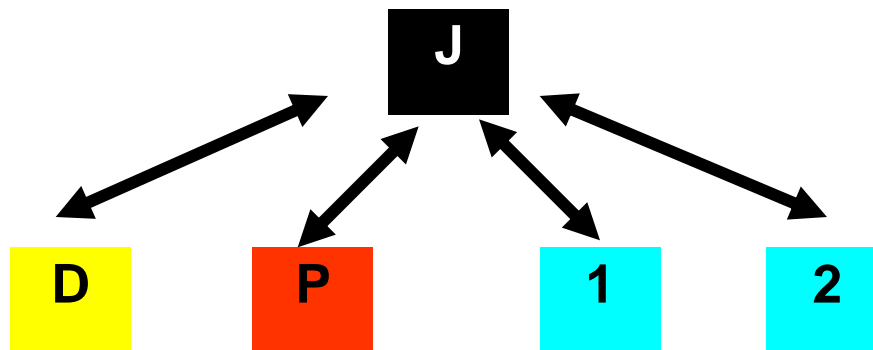
Continental law: Inquisitorial procedure



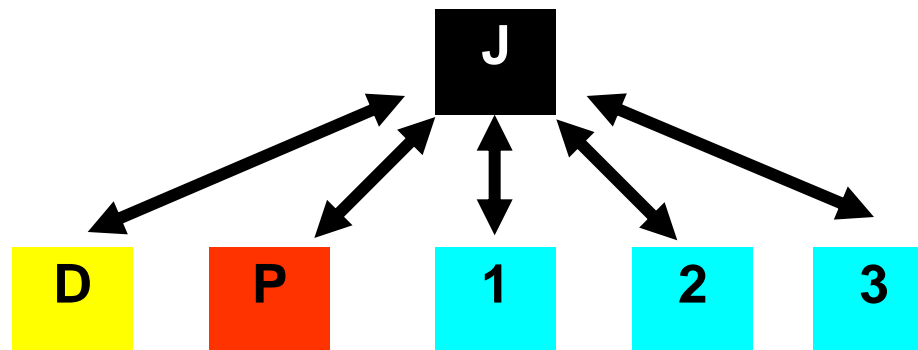
Continental law: Inquisitorial procedure



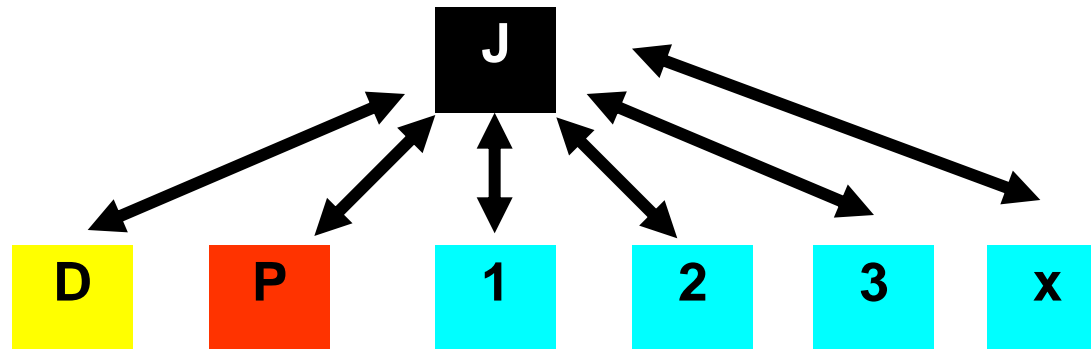
Continental law: Inquisitorial procedure



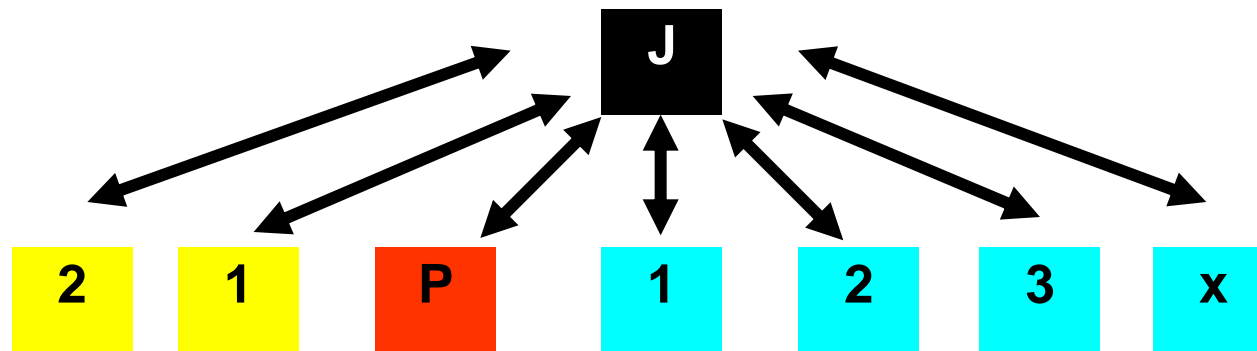
Continental law: Inquisitorial procedure



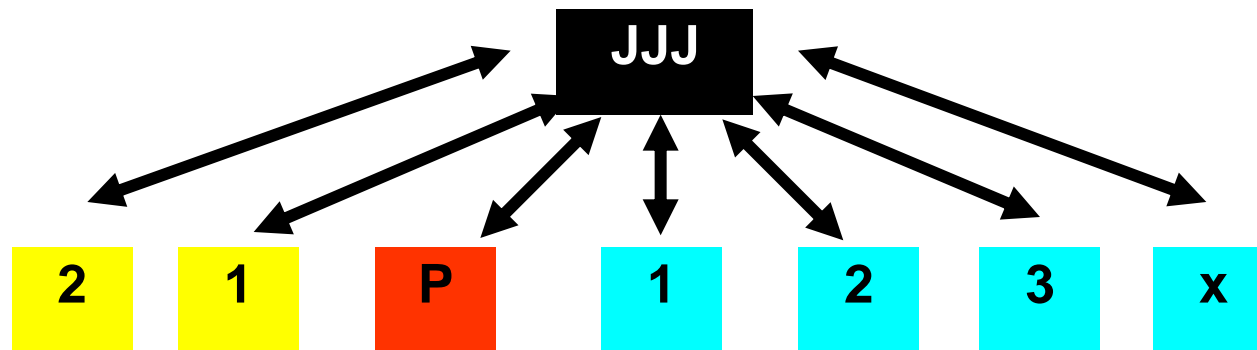
Continental law: Inquisitorial procedure



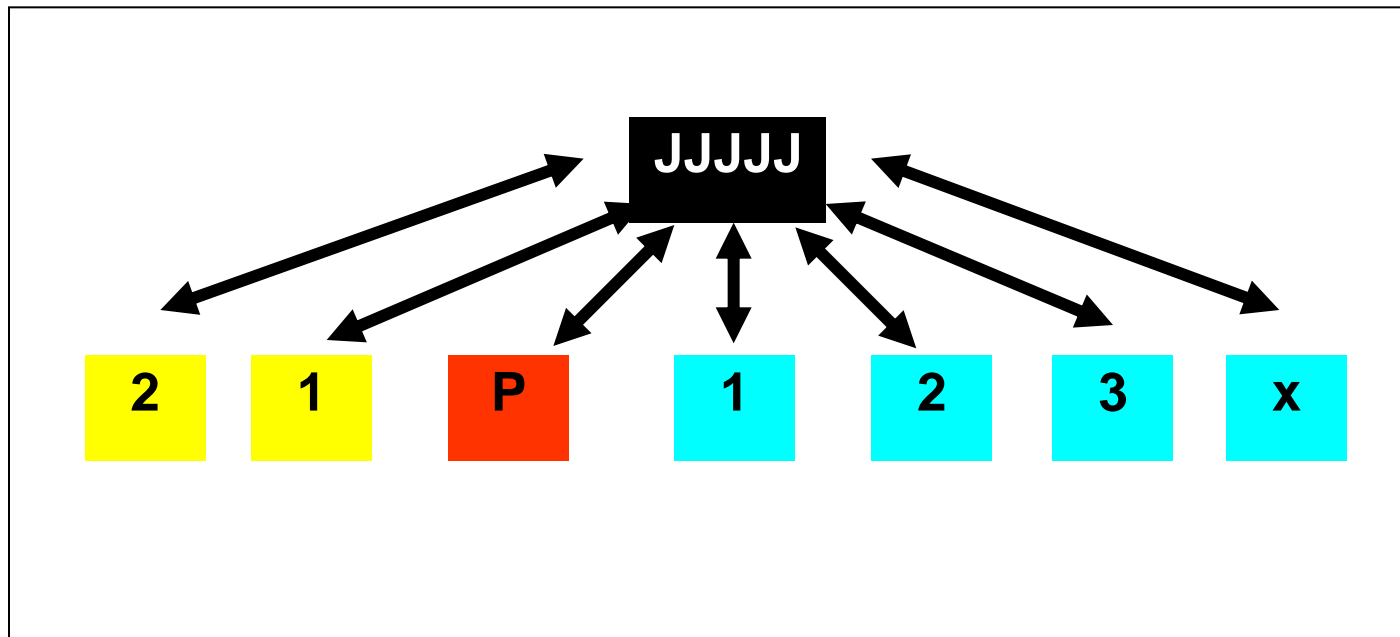
Continental law: Inquisitorial procedure



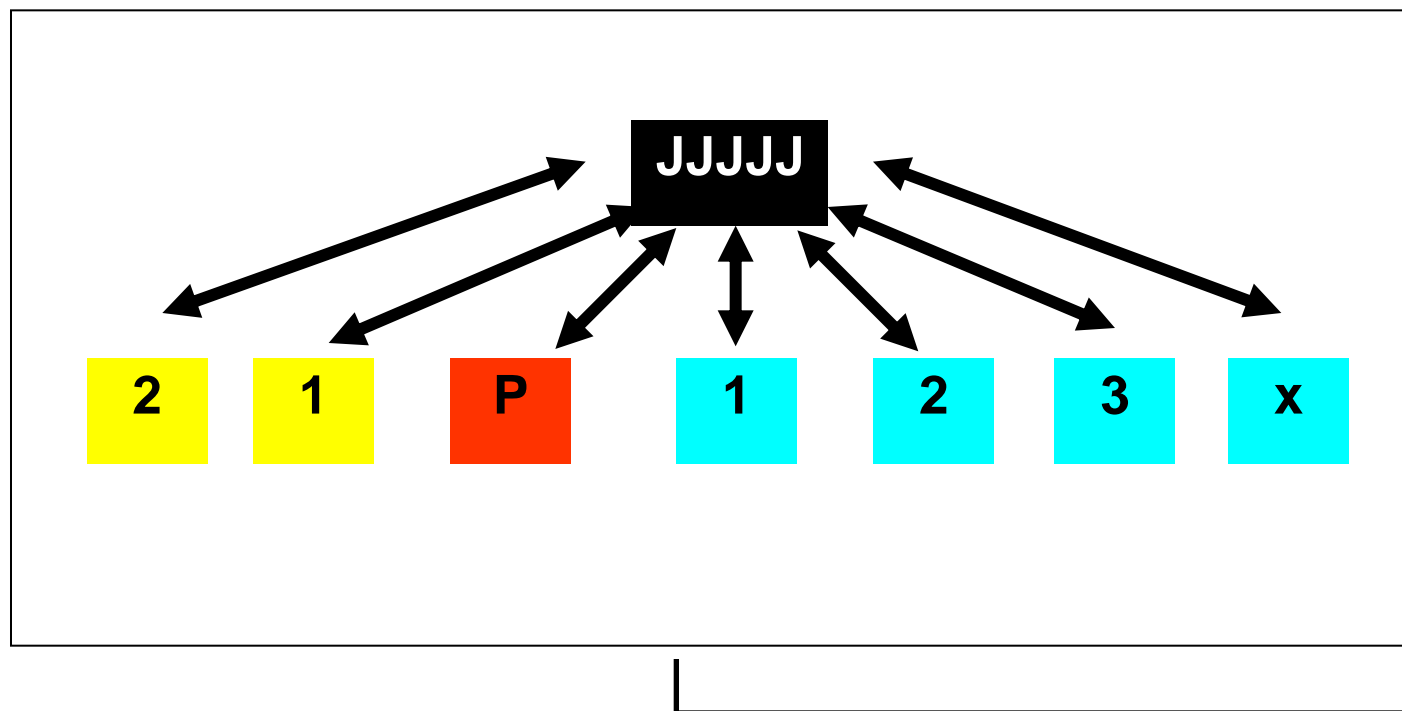
Continental law: Inquisitorial procedure



Continental law: Inquisitorial procedure



Continental law: Inquisitorial procedure



- Basically no structural limits
- Suited for the handling of cases of mass victimization (war crimes)

Accessory Prosecution in detail

Accessory prosecution (*Nebenklage*) in detail

- Two examples:

The first 'Contergan' [=Thalidomide] trial (1968-1971):

» *312 victims admitted as accessory prosecutors*

The John Demianjuk trial (2009-2011):

» *40 victims admitted as accessory prosecutors*

Accessory prosecution (*Nebenklage*) in detail

- Pre-trial rights:
 - full access to all case files, incl. evidence
- Rights during trial:
 - legal representation
 - permanent presence
 - examination/cross-examination of the accused (offender), authorized experts, and witnesses
 - questions
 - procedural motions
 - statements, in particular: final pleading
- Post-trial rights:
 - delivery of a duplicate of the written verdict, incl. full reasoning
 - remedy (appeal)

Accessory prosecution (*Nebenklage*) in detail

- The setting:
 - victim party as regular actor of the trial
 - permanent presence
 - placed together with the other actors/parties in the front section (stage) of the courtroom
 - seated on their own desk, besides the prosecution and opposite (face-to-face) to the defense desk
- Participation is optional; it can be initiated (and stopped) at any stage of the proceedings, without explanation
- Participation can be exercised personally, or through a legal representative, or both

Accessory prosecution (*Nebenklage*) in detail

- Victims' perceptions:
 - symbolic setting:
 - » institutionally enhanced status of a process party
 - » being accepted as a legitimate participant
 - protective and affirmative setting:
 - » presence of the lawyer as a supportive figure
 - » permanent information about, and explanation of, the procedural rules and developments (incl. negative ones)
 - » emotional assistance towards the court (victim not being 'exploited' as a witness) and the defense (delivering feelings of relative security, not being exposed again to 'uncontrollable forces')
- these factors can help to avoid or at least reduce secondary victimization during trial and facilitate the coping process

Accessory prosecution (*Nebenklage*) in detail

- Additional findings:
 - the presence of a *Nebenklage* attorney alone can change the atmosphere in the courtroom to a degree that the willingness to treat the victim respectfully increases significantly
 - defense attorneys anticipate that respectful treatment of the victim can have mitigating effect on the sentencing outcome while putting unnecessary pressure on the victim can be counted as an aggravating circumstance
 - on the other side, aggressive appearance of victim attorney, too, can have similar negative effects as an aggressive, conflict-oriented defense strategy

Common Problems – Particular Problems

- Witness role
 - confrontation with victimizer and victimization
 - public setting
 - formal rules
 - court instructions and advises
 - obligation to tell the truth
 - risk to be prosecuted in case of non-compliance
- Examination/cross-examination
 - confrontation with offender(s)
 - confrontation with defense counsel(s)

- Diversion and plea bargaining
 - no participation
- Witness protection
 - only for selected groups of (explicitly vulnerable) victims
- Victim escort
 - problem of thorough attendance during trial
- Information in general
 - often still insufficient

- Only selected groups of victims eligible
 - sexual crimes
 - assault (intentional or negligent)
 - crimes against personal liberty (incl. extortion, kidnapping & hostage taking, aggravated coercion, indecent assault, forced marriage)
 - attempted homicide, negligent homicide
 - in case of homicide: close relatives (parents, descendants, brothers & sisters, spouses, living partners)
 - crimes according to the Protection of Domestic Violence Act
 - stalking
 - all other victims who suffer from serious consequences (new general clause, introduced 2009)
 - **defamation in exceptional cases only (constricted 2009)**

- Costs
 - only for some victims fully covered by the state ('privileged victim representation')
 - » victims of a felony
 - » victims below age 18
 - » close relatives
- Limited options for remedy
 - appeal against acquittal
 - appeal against legal grounds on which a conviction is based
 - no (isolated) appeal against a concrete penalty

Victims' position at international courts: Hybrid procedure as experimental ground for approximation?

- International *ad hoc* tribunals (ICTY, ICTR):
 - common law procedure
 - no genuine right for victims to participate
 - victim witnesses selected according to procedural needs/interests of prosecution or defense
 - victim witnesses allowed to speak (testify) only about points of procedural relevance
 - one of the reasons for widespread dissatisfaction amongst victims from the region
- Permanent criminal court (ICC):
 - hybrid procedure that combines elements of both systems
 - Rome Statute provides explicit recognition of and reference to victim interests with regard to reparation (→ art. 75) and participation (→ art. 68)

- Art. 68(3):
Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate in accordance with the Rules of Procedure and Evidence.

- RPE Rule 89:
Victims can apply to participate in proceedings.
- RPE Rule 90:
Victims are free to choose a legal representative. Where there are many victims, the chambers may request that victims or groups of victims choose a common representative.
- RPE Rule 91:
The legal representative of a victim is allowed to participate in the proceedings, depending on the ruling of the Chamber under Rules 89 and 90.

- More concrete positions resulting from case law
 - no victim participation in the pre-trial phase
 - but far-reaching procedural rights in the trial
 - victims' legal representative has a right
 - to have access to the records
 - to attend all hearings, including closed sessions
 - to express their views and concerns throughout the trial
 - to question witnesses
 - to call new witnesses
 - to present evidence
 - to challenge the admissibility of evidence

Conclusion

- From an emotive plea (VIS) towards proper procedural participation
- (Partial) adoption of ideas and elements of the *Nebenklage* and similar concepts

Thank you.

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