

THE ROLE OF VICTIMS AT THE INTERNATIONAL CRIMINAL COURT: LEGAL CHALLENGES FROM THE TENSION BETWEEN RESTORATIVE AND RETRIBUTIVE JUSTICE

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Abstract. *The work of the International Criminal Court is characterized by a diversity of legal goals: indeed, its purpose is not limited to the fulfillment of a classic retributive scope, by punishing the accused for the commission of crimes within the Court's jurisdiction, but it also intends to achieve a restorative aim, giving satisfactions to the victims of the perpetrated crimes by allowing their active participation in the proceedings. Such policy has been embraced as a response to the criticisms advanced at the former international tribunals for their failure in ensuring accountability for victims of international crimes.*

The un-precedent role accorded to victims at the ICC raises a series of questions on different levels, as the tensions between distinct objectives shines through a sometimes un-coherent statutory framework and risks to undermine the primary scope of the ICC, i.e. the ending of impunity for the commission of serious crimes of international concern. Such disharmony among the substantive principles and norms contained in the Rome Statute may consequently affect the attribution of competence to ICC organs and culminates with the necessity of judges' intervention in order to interpret the constitutive treaty and the Rules of Procedures and Evidence to fill the statutory gaps.

This paper analyses some issues of concern in respect of the above. Initially, it examines the process to obtain the status of victims before the Court and the problems related to the application procedure. Further, it continues considering the criticalities emerged at the trial stage, especially focusing on the role of the victims' legal representative and on the extent of victims' participatory rights at trial, such as the possibility to lead evidence in respect of the guilt or innocence of the accused. These topics appear particularly sensitive in the light of the concept of "victim's case", which comes up besides the Prosecutor and Defense ones, as happened for the first time in the Katanga trial.

The paper speculates on the challenges related to the victims' participation policy and wonders whether it might endanger the retributive scope of the ICC trial, the right of due process for the accused and even the protection of victims' security. It reaffirms the importance of granting a form of moral and material redress for victims through their involvement in the criminal proceedings, although suggesting the necessity of re-defining their role in the ICC procedure; in this perspective, it contemplates the possible consequences of a different interpretation of the concept of restorative justice, which aims to give victims the chance to be heard in Court in order to provide a meaningful contribution to the proceeding, though without assuming an active "third party" position. Ultimately, it considers if in so doing, the ICC could work more efficiently, establishing a necessary hierarchy of otherwise conflicting goals, satisfying the victims' interests and at the same time taking in due consideration both the respect of the right of a fair trial for all the parties involved in the proceedings and the material limits of the Court.

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1. Introduction.

The establishment of the International Criminal Court (ICC) entailed high expectations in the international community, as demonstrated by the debates that took place during the *travaux préparatoires* of the Rome Statute. The involvement of many States, each with its own legal tradition grounded either on common law or on civil law, naturally influenced the definition of the Court’s procedural framework. The ICC procedure has been thereupon described as a “mixed model”, including features of the adversarial common law-oriented procedure along with an inquisitorial approach typical of civil law traditions. In general terms, the former seeks a procedural truth, heavily relying on the principle of orality and focusing on the elaboration of two cases by conflicting parties. The latter adopts a one-case approach by elaborating the role of the Prosecutor as an organ of the State, whose objective is to search a substantive truth and thus needs to look for both inculpatory and exculpatory evidence. In this model the judge has a prominent role and the parties’ relation results hierarchical, whereas in the adversarial system the prosecution and defence roles are coordinated¹.

Such intersection of distinct conceptions has caused the insurgence of many criticalities in the work of the ICC, due primarily to the uncertainty on the procedural model to implement. This paper suggests that this derives from an inherent tension between the diversified goals that the Court is willing to achieve and is ultimately reflected in the incoherence of some norms of the ICC Statute and of the Rules of Procedure and Evidence (RPE)².

Indeed, the ICC aspirations seem to go beyond the traditional retributive scope lying behind criminal law enforcement, which is limited to guarantee the end of impunity for gross human rights violations committed by individual perpetrators. Some see the court as the adequate *milieu* for producing an historical record of the settings in which international crimes take place; others highlight the necessity of ensuring satisfaction of victims’ interests and underline the importance of restorative justice³. Such divergent objectives cause an “overabundance” in the ICC agenda⁴, especially if considering that the Court needs to rely on States parties’ cooperation in

¹ See AMBOS, K., *International Criminal Procedure: “Adversarial”, “Inquisitorial” or “Mixed”?* (2003), 3 *International Criminal Law Review*, at 3.

² See DAMASKA, M., *Problematic Features of International Criminal Procedure* (2010), in *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese.

³ *Ibidem*.

⁴ *Ibidem*.

the investigation and prosecution of the crimes within its jurisdiction⁵. Additionally, the lack of a clear legal guidance on the scope of application of the Rome Statute may lead to incoherent interpretations of its provisions, hence compromising the basic right of the accused to a fair trial.

This paper focuses on the proactive role that the Court attributes to victims in the proceedings as a privileged angle to analyse the abovementioned tension between conflicting goals. Particularly, it reflects on the consequences that the enactment of the victims' participation mechanism could have on the right of the indicted⁶. More broadly, it questions whether the presence of victims in the proceedings and the application of a restorative scope may compromise the internal *rationale* of the criminal process at the ICC, especially when adversarial system's elements gain preponderance.

In this perspective, the paper first briefly describes the evolution of the concept of restorative justice with a look at the experience of the international tribunals; it then considers the definition of victims as legally and practically established by the ICC, particularly underlining the criticalities in the application procedure to acquire the status of victim before the Court and stressing the existing conflict between the considerable number of applications and the right of the accused to be prosecuted without undue delay⁷. It subsequently addresses some issues of concern related to the victims' participation at the trial stage, regarding the institution of legal representation for victims and the interpretation of the concept of "participant".

Conclusively, this paper argues the necessity of setting a coherent hierarchy of goals that the Court plans to achieve, paired with the fixation of a more consistent legal framework to guarantee victims' participation in Court and the strengthening of the safeguards for the Defence, which risks to be penalised by the unclear approach held by the Chambers.

2. The restorative justice movement and its influence on victims' status at the ICC.

Until recently, the process of helping and rehabilitating the victims of international crimes has enjoyed little attention in the history of international courts. The Statute of the Nuremberg International Military Tribunal, established to prosecute the representatives of Nazi party for the crimes committed during the Second World War, never mentioned the word "victim" or foresaw any form of support or protection for victims and witnesses. Though, when the trial took place there were few risks that the dismantled Nazi regime could endanger persons willing to testify; plus, most of the proceedings were based on documentary evidence that scrupulously described the implemented atrocities.

⁵ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6 (Rome Statute), art. 86.

⁶ See *supra* note 2.

⁷ Rome Statute, art. 67(1)(c).

A “victims movement”⁸ first developed in the 1960s, promoting the recognition and enhancement of the rights of victims during the process. Principally, it underlined the problem of “secondary victimization”, i.e. any conduct held by the parties at trial leading to the further suffering of the victim after the harm experienced for the crime⁹, as well as the unbalance of the adversarial system, which leaves the victims at the margins of the proceeding.

The international community manifested growing attention to the status of victims and witnesses when establishing the *ad hoc* International Tribunals in the 1990s: both the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹⁰ and of the International Criminal Tribunal for Rwanda (ICTR)¹¹ contained a number of innovative provisions, such as special procedures of protection¹² and the creation of a Victims and Witness Section¹³, aimed to adopt recommendations on the issue of victims’ protection and to assist them in dealing with administrative issues.

The increased attention on these individuals deeply depended on the procedural operative framework, since documentary evidence was not so voluminous as in Nuremberg and the Prosecutor needed to heavily rely on oral testimony to prove the charges. Additionally, many of the alleged perpetrators still had connections or support in their territory where they used to reside, so that witnesses were at serious risk of intimidation and retaliation¹⁴.

However, the experience of the *ad hoc* tribunals showed also some imperfections: victims/witnesses could only be heard in the course of the proceedings if so asked by the parties, thus restricting the chance to tell their stories to evidentiary needs. Therefore, few victims had been effectively involved in the proceeding and there was scarce attentiveness to the psychological stability of the individuals called to testify¹⁵. The absence of a restorative approach to the trial beyond a classic retributive function, i.e. to guarantee victims the right to participate in the proceedings and obtain compensation for the harm suffered¹⁶, brought many commentators to argue that victims were left aside from the core phases of the proceedings and risked to

⁸ See GARKAWE, S., *Victims and the International Criminal Court: Three major issues* (2003), 3 International Criminal Law Review, at 347-348.

⁹ See Council of Europe, *The Position of the Victim in the Framework of Criminal Law and Procedure*, Strasbourg: European Committee on Crime Problems, 1985, at p. 15.

¹⁰ UN Security Council, Resolution 827 (1993) adopted by the Security Council at its 3217th meeting, on 25 May 1993, 25 May 1993, S/RES/827 (1993).

¹¹ UN Security Council, Resolution 955 (1994) Adopted by the Security Council on 8 November 1994, S/RES/955 (1994).

¹² UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*, 25 May 1993 (ICTY Statute), art. 22. See also *Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (as amended on 29 May 2013)* (ICTY RPE), Rules 69 (Protection of Victims and Witnesses), 75 (Measures for the Protection of Victims and Witnesses) and 79 (Closed Sessions).

¹³ ICTY RPE, Rule 34.

¹⁴ See *supra* note 8, at 350.

¹⁵ See SACOUTO S. & CLEARY, C., *Victims’ Participation in the Investigation of the International Criminal Court* (2008), 17 Transitional Law and Contemporary Problems, at 86.

¹⁶ *Idem*, at 76.

suffer a “secondary victimization”¹⁷ specially if subject to a troublesome cross-examination.

When creating the ICC, the international community attempted to ensure the establishment of a proper victims’ participation regime, with the objective of combining a retributive justice system with a restorative-oriented model. In particular, the victims’ participation scheme should neither be designed to merely assist the Court in “clarifying the facts”¹⁸ or “punish the perpetrators of crimes”¹⁹, nor should provide victims the right to ascertain the guilt or innocence of the accused or to find the truth²⁰, since they cannot become “decision-makers”, as it would be incompatible within a system considerably influenced by the adversarial form of two partisan cases.

Contrarily, victims usually ask to overcome the obscurity that generally surrounds the progression of a case through prompt information²¹. Also, they should become aware of their role in the proceedings, especially in the early stages, in order to avoid the creation of false expectations²².

2.1. Victims’ participation at the ICC: legal status of victims and application procedure.

In the light of previous criticisms, the drafters of the Rome Statute took a different path and introduced a participatory regime for victims, accompanied by the right to obtain reparations for the suffered injuries²³. Furthermore, they organized a supporting network composed by two sections within the Registry, the Victims and Witness Unit (VWU)²⁴, aimed to provide protective measures and security agreements for victims and witnesses appearing before the Court, and the Victims Participation and Reparations Section (VPRS)²⁵, specialised in participation and reparations. The drafters also established the Office of the Public Counsel for Victims (OPCV)²⁶, an

¹⁷ MALSCH, M., CARRIERE, R., *Victims’ Wishes for Compensation: The Immaterial Aspect* (1999), 27 *Journal of Criminal Justice* 239-240, at 240.

¹⁸ See *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-tEN-Corr, para. 63 (Pre-Trial Chamber I, 17 January 2006).

¹⁹ *Ibidem*.

²⁰ See e.g. *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, para. 35.

²¹ STRANG, H., SHERMAN W. L., *Repairing the Harm: Victims and Restorative Justice* (2003), 20 *Utah Law Review* 15.

²² BAUMGARTNER E., *Aspects of Victim Participation in the Proceedings of the International Criminal Court* (2008), 90 *International Review of the Red Cross* 409 – 410, at 440.

²³ The ICC victims participation regime is influenced by the 1985 UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, containing guidelines on victims participation and reparation; see UNGA Res. 40/34, U.N. Doc. A/RES/40/34, 29 Nov. 1985.

²⁴ See [Victims and Witnesses Unit](#), accessed 9 June 2014; see also Art. 43(6) Rome Statute.

²⁵ See [Reparation for victims](#), accessed 4 May 2014.

²⁶ See [Office of Public Counsel for Victims](#), accessed 9 June 2014; see also International Criminal Court, *Regulations of the Court*, 26 May 2004 (ICC Regulations), Regulation 81.

independent body that relies on the Registry for administrative matters and provides support to counsels representing victims.

The definition of victim contained in the RPE is quite broad as corresponds to an individual who has suffered harm as a result of the commission of one of the crimes within the jurisdiction of the Court²⁷. As underlined by the Defence in the *Lubanga* case, it is important to clarify the concept of victim so that the exercise of victims' rights would be consistent with the rights of the accused²⁸.

To participate in the proceeding, victims should present their views and concerns to the judges whether their interests are affected by filing an application.²⁹ Therefore, once verified that the eligible persons have been injured, it must be proved the existence of a causal link between the crime and the alleged harm³⁰. The Appeals Chamber specified that the harm (material, but also physical or psychological) suffered by the victims should be personal³¹ but not necessarily direct³², since the definition of Rule 85 was not meant to exclude categories of victims normally recognised under international law.³³

The Chamber qualifies an individual as a victim through the analysis of the application form that the applicant fills in accordance with the procedure illustrated in Rule 89 of the RPE:

1. *In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. (...)*
2. *The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.*

Accordingly, the victim should send the application to the VPRS, which forwards it to the competent Chamber. The form shall also be sent to the Prosecution and the Defence, who are entitled to make their observations, although it is upon the Chamber to finally scrutinize the presence of all the required criteria.

The Chambers have adopted different approaches to examine the applications. For instance, in the *Lubanga* case judges supported a two-step analysis: first, they stated

²⁷ See International Criminal Court, *Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add.1 (2000) (ICC RPE), Rule 85.

²⁸ Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Lubanga* (ICC-01/04-01/06-1432), Appeals Chamber, 11 July 2008, para. 19.

²⁹ Art. 68(3) Rome Statute.

³⁰ See *supra* note 18, at 68; *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6, *Lubanga* (ICC-01/04-01/06-172), Pre-Trial Chamber I, 29 June 2006, at 6; see *supra* note 29, para. 65.

³¹ See note 28, para. 32.

³² *Idem*, para. 36.

³³ *Idem*, para. 39.

that Rule 85 RPE requirements have to be verified, and explained that independent evidence are unnecessary to verify the information included by the alleged victim in the application form³⁴; subsequently, once assessed whether an individual is a victim under Rule 85 RPE, the next step consists in determining whether the victim's personal interests have been affected. If the Chamber recognizes the applicant the status of victim, the latter is allowed to present its "views and concerns"³⁵.

On the contrary, the Trial Chamber in the *Muthaura and Kenyatta* case developed a different approach trying to overhaul the problems of the established practice³⁶. The judges appropriately underlined the importance of a "meaningful participation" of victims to avoid a merely "symbolical" contribution³⁷. In consequence, the ever-increasing amount of submissions and the unprecedented security concerns in the case in question³⁸ required a departure from previous decisions through a new interpretation of art. 68(3) of the Statute³⁹. Indeed, the Chamber sustained that such article should be considered the legal basis to scrutinize the application procedure⁴⁰. In so doing, judges distinguished between individuals wishing to appear in person, or also via video-link, before the Court (direct individual participation), which Rule 89 procedure as described above applies; and victims who only wish to attend the proceeding through a common legal representative, thus obtaining recognition as "participants" in the proceedings. Moreover, the Chamber further differentiated victims who are not willing to appear in person in registered and unregistered ones. The former may enrol with the Registry through a less detailed process by sending their personal data, that will not be subject to the Chamber's individual evaluation procedure. Dissimilarly, unregistered or unidentified victims, who do not register due to their incapacity or unwillingness, should be guaranteed a common legal representative to uphold their concerns in a general way⁴¹.

³⁴ In the scrutiny of the applications, the Chamber takes into consideration both official and non-official documents to prove the victims' identity, due to the difficulty that the applicants normally meet in transmitting the information needed in context of instability and governmental deficiencies.

³⁵ See CATANI, L., *Victims at the International Criminal Court – Some Lessons Learned from the Lubanga Trial* (2012), 10 *Journal of International Criminal Justice*, at 908; see also IBA/ICC Monitoring and Outreach Programme, [Balancing Rights – The International Criminal Court at a Procedural Crossroads](#) (2008), accessed 4 May 2014.

³⁶ See *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* (ICC-01/09-02/11-498), Decision on victims' representation and participation, Trial Chamber V, 3 October 2012.

³⁷ *Idem*, para. 10.

³⁸ *Idem*, para. 24.

³⁹ Art. 68(3) Rome Statute: *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.*

⁴⁰ See note 36, para. 22.

⁴¹ *Idem*, section IV.

It has to be seen if such approach will be followed in other cases⁴². Certainly, the analysis of the applications conducted on a case-by-case basis can be extremely cumbersome, also depending on the length of the forms to be submitted by the applicants⁴³. Moreover, the parties can hardly make observations on the files notified to them, for they present heavy redactions to prevent retaliations upon victims⁴⁴. Particularly, the Defence objects that redactions are often linked with essential information and thus limit the possibility to challenge the applications admissibility⁴⁵. Besides, the current practice at the ICC consists in evaluating the existence of a personal interest of the victim for every stage of the proceeding; consequently, an individual who is willing to participate in an interlocutory appeal must demonstrate its personal interest again, independently from the legal status he acquired in the proceedings giving rise to the appeal⁴⁶.

An individualised process like the one described above may work in national proceedings with few participants, whereas at the ICC the number of victims submissions progressively grow⁴⁷, so affecting the rights of the defendant, which has to deal with consistent delays in the proceedings and cannot adequately verify the single forms.

Nonetheless, neither the approach initiated in *Muthaura and Kenyatta* seems conclusive or legally grounded. The problem of the growing number of requests represents a commonality of all the cases before the ICC, hence there is no “principle of speciality” validating the enactment of a different procedure for this case. Further, the reasoning supported by the Chamber appears problematic, as it should be preliminary assessed if an applicant could be considered a victim under Rule 85 RPE and only on a

⁴² At present, the Court reaffirmed the victims’ participation scheme consolidated in *Lubanga* also in the *Katanga* and *Bemba* cases, which nonetheless predate the conclusions issued in *Muthaura and Kenyatta*. See e.g. *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, (ICC-01/04-01/07), Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, Trial Chamber II, 23 September 2009; *The Prosecutor v. Jean Pierre Bemba Gombo*, (ICC-01/05-01/08), Decision on 799 applications by victims to participate in the proceedings, Trial Chamber III, 5 November 2012.

⁴³ See VAN DEN WYNGAERT, C., *Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge* (2012), 44 Case Western Reserve Journal of International Law.

⁴⁴ *Idem*, at 482.

⁴⁵ See note 35, at 912. The Trial Chamber in the *Lubanga* case, justified the admissibility of redacted versions of the victims’ applications to be sent to the parties on practical and financial considerations more than on legal ones, taking into account the expensive character of other measures, especially in terms of victims’ relocation. See *Prosecutor v. Lubanga* (ICC-01/04-01/06-1308), Decision inviting the parties’ observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08, Trial Chamber I, 6 May 2008, para. 28.

⁴⁶ *Prosecutor v. Thomas Lubanga Dyilo*, (ICC-01/04-01/06 OA9 OA10), Decision on Request of the Prosecutor and the Defence for Suspensive Effect of the Appeal Against Trial Chamber I’s Decision on Victim’s Participation of 18 January 2008, 22 May 2008, paras.17–20.

⁴⁷ See note 43, at 483.

second stage it could be analysed if a personal interest as described under Art. 68(3) of the Rome Statute is involved, whereas the judges reversed this logical order⁴⁸.

Such *rationale* allows *de facto* for some individuals to obtain the legal status of victims with no previous monitoring by the Chamber, in evident violation of Rule 85 RPE; plus, it invests the legal representative of the power to qualify the applicants, in a worrying departure from the basic procedural guarantees of the criminal proceedings. In practice, the lack of certainty on the legal status of victim risks to create a fraction between the ones with a “privileged status” and a mass of undefined individuals which claim to “be victimized”⁴⁹. Doubtlessly, the latter seem purely symbolical and evaluated as less relevant in comparison of the declarations of recognized victims⁵⁰.

Further, the Defence rights appear underestimated, for it is not specified how the accused can face the generic affirmation of a potentially crowded group of victims collectively represented and not even identified in their legal status by the Chamber⁵¹. Ultimately, both interpretations of the application procedure highlight the criticalities of operating in a procedural framework that aspires to be retributive and restorative at the same time. The procedure would require an active role of the judge to regulate the presence of participants that are not bound by the same obligations of the parties to the proceeding; however, the ICC lack of resources to deal with the enormous amount of requests forces the Chambers to venture creative interpretations of the Statute to accommodate divergent objectives, though jeopardizing the respect of the fundamental principle of fair trial.

3. Participatory rights of victims at the trial stage.

3.1. The appointment of one or more legal representatives for victims.

One of the major innovations of the ICC Statute consisted in the possibility for victims to freely choose a legal representative⁵², who must be a person with at least ten years’ experience as a criminal lawyer, judge or prosecutor and be fluent in one of the Court’s working languages⁵³. A victim who is willing to be legally represented in Court shall submit a written application to a Chamber, which will later consult the Prosecution and the Defence and finally decide on the request⁵⁴. The Court attempted to balance the guarantee of effective participation of victims at trial with the assurance of the right of the accused by setting up a workable procedure: primarily, it directly

⁴⁸ See e.g. BATCHVAROVA, T., *Comment on the Victims Decision of Trial Chamber V*, Phd Studies in Human Rights, accessed 5 May 2014.

⁴⁹ *Ibidem*.

⁵⁰ *Ibidem*.

⁵¹ *Ibidem*.

⁵² Art . 68(3) and Rule 90(1) ICC RPE.

⁵³ See [Victims before the International Criminal Court – A Guide for the participation of Victims in the Proceedings of the Court](#), accessed 5 May 2014. As defined in Rule 90(6) ICC RPE, the legal representative must have the same legal qualifications as that required for appointment as defence counsel at the ICC.

⁵⁴ See note 8, at 360.

engages Chambers in the selection of the legal representative⁵⁵; additionally, it limits the number of victims' counsels and circumscribes their involvement in the proceedings.

Plus, in order to deal with the consistent amount of requests by potential victims, the Chamber may demand the victims to appoint a collective legal representative (CLR) or representatives, if necessary with the help of the OPVC⁵⁶. In so doing, judges have to guarantee the respect of victims' rights and consider that they usually consist in a diverse group of individuals with different interests⁵⁷; therefore, their categorization must be carefully scrutinized to avoid potential conflicts⁵⁸.

3.1.1. Procedural issues related to the communication between the legal representative and its client.

A general problem both in case of individual and common legal representation concerns the lack of efficient communication between the counsel and its client. Legal representatives often struggle to have direct contact with clients who live far away from The Hague, especially in situations of on-going armed conflict or whether the victims are menaced by their community for their participation in an international trial⁵⁹.

Judges in *Muthaura and Kenyatta* tried to overcome this issue by appointing a legal representative for the victims who remains *in situ*, while the OPCV should coordinate with him or her and act on behalf of the victims during the proceedings, if needed also presenting oral submissions or questioning witnesses⁶⁰. Some commentators believe that this repartition of roles is "unrealistic"⁶¹, since it is the legal representative who meets the clients and looks after their interests. Contrarily, it seems that the OPVC, when presenting evidence at trial, would autonomously submit the necessary request to the Chamber and only later communicate the strategic decision to the legal representative, without any chance of preventively consulting victims. This process appears utterly illogical⁶² and will probably lead to undue delays, compromising the rights of the accused.

⁵⁵ See Rule 90(2) and 90(3) ICC RPE.

⁵⁶ Rule 90(2) ICC RPE. See also note 53, at 18.

⁵⁷ Rule 90(3) ICC RPE.

⁵⁸ Rule 90(4) ICC RPE. See also Ambos, K., *The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues* (2012), 12 *International Criminal Law Review*, at 118. By 2012, the OPCV had directly represented more than 1,000 victims in pre-trial and trial proceedings at the ICC in addition to supporting victims' legal representatives; see *Counsel Matters at the International Criminal Court: A Review of Key Developments Impacting Lawyers Practising before the ICC* (2012), IBAHRI Report, accessed 11 May 2014.

⁵⁹ See note 43, at 489.

⁶⁰ Although the legal representative can participate in "critical junctures involving victims"; see note 36.

⁶¹ See note 48.

⁶² *Ibidem*.

Such approach could also undermine the rights of the parties and the function of the OPCV. The former could face difficulties in addressing the appropriate interlocutor to debate choices concerning victims, whereas the latter would be affected in its efficiency especially if taking into account the budget limitations of the Court, since its main tasks concern the support and assistance to the legal representatives of victims and to victims themselves⁶³ and do not include their direct involvement in the proceeding⁶⁴.

3.1.2. Other issues of concern regarding the appointment of a common legal representative for victims.

The appointment of a CLR at the ICC is affected by a series of criticalities. Firstly, the Court has often failed to consult the interested persons before selecting a CLR, so compromising one's basic right to choose its lawyer⁶⁵. Further, due to their high numbers, victims will hardly be able to personally participate in the proceeding and thus feel discomforted by their trial experience⁶⁶. Plus, the variety of victims' personal interests cannot be considered in an overly broad manner⁶⁷ and it is thus essential that the Chambers and the Registry would adopt all reasonable steps to ensure that CLRs effectively represent the different requests of victims⁶⁸. Moreover, the appointment of the CLR raises some questions in respect of the absence of any conflicts of interest among the different groups of victims⁶⁹ as well as with the parties to the proceeding.

As a premise, a victim shall be free to choose a legal representative⁷⁰ providing that he detains the same legal qualifications required for being appointed as defence counsel at the ICC⁷¹. Accordingly, the Chambers and the Registry should appoint a common legal representative only whether victims are not able to agree on finding a counsel⁷²; however, the Court seemed to have ignored this practice in at least one situation⁷³.

As a general principle, the consultation of victims in the choice of their representative constitutes a meaningful substantial application of restorative justice

⁶³ Regulation 81, ICC Regulations.

⁶⁴ See note 58, at 119.

⁶⁵ See KORRIE, K., *Victims' Participation at the ICC: Purpose, Early Developments and Lessons* (2013), AMICC; see also Rule 90(1) ICC RPE.

⁶⁶ See note 43, at 489.

⁶⁷ PENA, M., CANON, G., *Is the ICC Making the Most of Victim Participation?* (2013), 7 *The International Journal of Transitional Justice* 3, at 533.

⁶⁸ See Rule 90(3) ICC RPE, see also note 8, at 360.

⁶⁹ Rule 90 ICC RPE.

⁷⁰ Rule 90(1) ICC RPE.

⁷¹ Rule 90(6) ICC RPE.

⁷² Rule 90 ICC RPE.

⁷³ *Prosecutor v. Ruto and Sang*, Proposal for the Common Legal Representation of Victims, (ICC-01/09-01/11-243), 1 August 2011, paras. 3 – 6.

theories; ergo, it could be necessary to improve the consultative practice between the Registry and the victims in the aim of identifying the appropriate criteria to select a competent legal representative⁷⁴.

The equivalence of entry requirements for both the legal representative of victims and the Defence Counsel pairs with the former's obligation to respect the Code of Professional Conduct for Counsel⁷⁵. Under Article 16 of the Code, the legal representative appointed for a group of victims is bound to inform his or her clients of the potential conflicting interests within the group, and in case a disagreement arises, the counsel has to withdraw from representation after having informed the Chamber⁷⁶ or obtain the written consent of all the clients potentially affected by the conflict to continue representing them⁷⁷.

Nonetheless, the norm does not provide any solution in circumstances where the legal representative has been previously involved in the proceeding as a counsel for one of the parties to the case. The Code provides different grounds for termination of representation⁷⁸, yet none of them appears to be applicable for a request of withdrawal addressed by the Defence. Although the client can always ask for a replacement of his legal representative, this will hardly happen if the accused complains for conflict of interest. Rather, if the clients or the legal representative insist for continuing the representation, a possible solution may derive from article 12 of the Code, which enumerates the hypothesis of impediments to representation and contemplates the impossibility to defend a client when the case is "the same as or substantially related to another case in which counsel or his or her associates represents or formerly represented another client and the interests of the client are incompatible with the interests of the former client, unless the client and the former client consent after consultation". It infers from it that the Court must ensure the guarantees of the accused⁷⁹.

Such provision seems to be pertinent also in the hypothesis of a member of the OTP who is appointed as legal representative for the victims in a same case that he has treated during his previous employment. Even if Art. 12(1)(a) cannot be applied, as the Prosecutor does not have "clients", it is argued that the confidentiality obligation should prevent any form of representation of the victims in Court by the former Prosecutor, since there is a substantial risk that he will reveal confidential information to his clients; the Court may therefore refer to the interests of justice

⁷⁴ See note 67, at 534.

⁷⁵ See *Code of Professional Conduct for Counsel*, (ICC/ASP/4/Res.1), (Code of Conduct), 2 December 2005, art. 1.

⁷⁶ Art. 16(1) Code of Conduct.

⁷⁷ Art. 16(2) Code of Conduct.

⁷⁸ Art. 18 Code of Conduct.

⁷⁹ See e.g. WONG, C., [Decision on the Apparent Conflict of Interest in relation to the Legal Representative of Victims a/0015/08 ... a/0035/08, Prosecutor v. Katanga and Ngudjolo Chui, Case no ICC-01/04-01/07, Pre-Trial Chamber I, 16 July 2008](#) (2012), *The Selected Works of Christoffer Wong*, accessed 11 May 2014.

principle even in the circumstance that the OTP avoids submitting a motion to oppose such appointment⁸⁰.

At present, the Court has not examined a case of apparent conflict of interest or set coherent guidelines. However, in the *Katanga and Chui* case, the judges ascertained a potential conflict of interest and seemed to have adopted the right approach by ordering provisional measures of protections, such as the provisional separation of the legal representative of the victims from the case, and calling the Registry to carry out initial investigations⁸¹.

3.2. Modalities of victims' participation at the trial stage.

The practical enactment of the statutory provisions related to the participatory rights of victims at the trial stage highlights the existing tension between the retributive and restorative models. In theory, the aim of the ICC policy regarding victims consists in giving the Chambers the possibility to consider the facts from victims' perspective, as their knowledge of the events can offer meaningful insights of the situation⁸². Nonetheless, such efforts need to be balanced with the guarantee of a fair trial for the accused and thus cannot lead to depict the legal representative of victims as a "second prosecutor⁸³".

Art. 68(3) of the Rome Statute attributes the victims the right to present their views and concerns "in appropriate stages of the proceedings"⁸⁴; this expression leaves room for the Court to interpret which role should be attributed to a participant in an adversarial-oriented model, and to what extent victims, through their legal counsel, may exercise the same rights of a party, such as the possibility to call its own witnesses, cross-examine other parties' witnesses, submit opening and closing statements or bring evidence related to the guilt or innocence of the accused.

In the early cases before the ICC⁸⁵, victims have been granted a wide range of opportunities to express their views and concerns, both on legal and factual issues⁸⁶. They had access to confidential filings related to the proceedings; they participated in hearings and status conferences; they submitted evidence in respect of the guilt or

⁸⁰ This scenario has become apparent when Louis Moreno-Ocampo, the former ICC Prosecutor, has been offered to represent the victims of Barlonyo Massacre before the Court, in the context of the Uganda situation. See e.g. Heller, K.J., [Could Moreno-Ocampo Represent LRA Victims at the ICC?](#), *Opinio Juris*, accessed 11 May 2014.

⁸¹ *Prosecutor v. Katanga and Ngudjolo Chui*, Decision on the Apparent Conflict of Interest in relation to the Legal Representative of Victims a/0015/08 ... a/0035/08, (ICC-01/04-01/07), Pre-Trial Chamber I, 16 July 2008.

⁸² See note 43, at 487.

⁸³ See note 65.

⁸⁴ Art. 68(3) Rome Statute.

⁸⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation (ICC -01/04-01/06), 18 January 2008; see also *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (ICC -01/04-01/07), 13 May 2008.

⁸⁶ See note 35, at 919.

innocence of the accused and could challenge the relevance and admissibility of evidence⁸⁷. In order for these rights to be available to them, victims need to fulfil a specific procedure, involving the submission of a “discrete written application” in which explaining “the reasons why [his or her] interests are affected by the evidence or issue then arising in the case and the nature and extent of the participation they seek”⁸⁸. The Court also clarified that the applications should be examined on a case-by-case basis, since the personal interests of victims need to be evaluated in relation to the facts occurred⁸⁹.

Therefore, although the Appeals Chamber in the *Lubanga* case reaffirmed the exclusive competence of the parties to submit evidence relevant to the case⁹⁰ and their consequent duty, binding exclusively upon them and not on victims, to respect disclosure obligations⁹¹, it still allowed the latter to submit evidence related to the guilt or innocence of the accused. Such decision arose from a broad interpretation of Article 69(3) of the Rome Statute, providing that the Chambers have the possibility “to request the submission of all evidence that it considers necessary for the determination of the truth”⁹². This right is not “unfettered”, since the judges will evaluate its admissibility on a case-by-case basis.

The Court seems to consider the submission of evidence by victims as an essential measure to ensure the implementation of the objective and purpose of Article 68 (3) of the Rome Statute and prevent the participation of victims from being ineffectual⁹³. However, the very fact that no disclosure rule applies to victims proves the difference between them (participants) and the Prosecution and Defence (parties) and confirms that the drafters of the Statute did not have any intention to attribute similar competences to the victims⁹⁴.

Indeed, the approach followed by the Appeals Chamber appears problematic for two main reasons: first, it is not clear the scope of Chambers powers, neither whether they can autonomously require new evidence nor if participants can exercise the same request when judges have to assess a specific submission⁹⁵; secondly, judges gave no indication on the modalities to balance the victims’ active role in the proceedings as concerns evidentiary submissions with the Defence’s right to receive

⁸⁷ See note 85, *Lubanga*, paras. 105-107, 108-109, 112-118. The right to challenge the admissibility of evidence has been confirmed also in the *Katanga* case: see note 85, *Katanga*.

⁸⁸ See note 85, *Lubanga*, para. 96.

⁸⁹ *Ibidem*.

⁹⁰ *Idem*, at 93.

⁹¹ *The Prosecutor v. Lubanga* (ICC-01/04-01/06 OA 9 OA 10), Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, para. 93.

⁹² *Idem*, paras. 86-88.

⁹³ FRIMAN, H., *The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?* (2009), 22 *Leiden Journal of International Law* 3, at 492-493.

⁹⁴ See note 91, Judge Kirsch partly dissenting opinion, paras. 36-38.

⁹⁵ See note 93, at 493.

disclosure of all evidence to be presented at trial, as well as all exculpatory evidence, prior to the commencement of the trial.⁹⁶

Friman notices that the Statute does not touch the problem of disclosure in relation to evidence whose collection is ordered by the Chamber, and that in other Tribunals, such as the ICTY, the judges independently requiring additional evidence usually deal with the problem of disclosure in separate rulings⁹⁷.

Besides, provided that the Trial Chamber has no investigative power, the decision to lead evidence should be taken relying on parties' information, especially in an adversarial system where there is no single dossier that collects all the information gathered during the investigation.

Also, this interpretation of the statutory norms is in contradiction with the considerations of the drafters of the Rome Statute, who rejected the idea of giving victims the right to present evidence at trial; despite their willingness to attribute a role to victims, they did not mean to square their presence as a sort of third party without the same obligations of the Prosecution, such as the duty to disclose to the accused any exculpatory evidence in their possession⁹⁸. The very meaning of article 68(3) implies that in case of risk that the rights of the accused may be violated by the participation of victims, such involvement should be denied⁹⁹.

The approach held by the Court jeopardizes the right of the Defence and may create a "victims case"¹⁰⁰ which sides the case of the Prosecutor, particularly when the legal representative(s) of victims call to testify individuals who would not have been selected by the Prosecutor itself¹⁰¹. Victims do not necessarily have the same views and objectives of the Prosecutor, so that a broad interpretation of their participatory rights may undermine the inherent structure of the adversarial system.

4. Conclusions and recommendations.

As commented above, the provisions of the Rome Statute related to victims contain a certain component of unintelligibility, due to the "constructive ambiguity" of diplomatic negotiations¹⁰². Consequently, the task to find adequate ways to render

⁹⁶ The so-called principle of information and prohibition to take the defence by surprise: see e.g. note 91, at 93-97. See also *Victim Participation at the Case Stage of Proceedings* (2009), War Crimes Research Office, American University Washington College of Law, accessed 9 June 2014.

⁹⁷ See note 93, at 495; see also e.g. *Prosecutor v. Momir Nikolic*, Order Summoning Miroslav Deronjic' to Appear as a Witness of the Trial Chamber Pursuant to Rule 98, IT-02-60/1-S, T. Ch. 1A, 10 October 2003, at 4.

⁹⁸ See note 96. See also *supra* note 92, Judge Pikić's partly dissenting opinion, para. 15, who expressed his belief that the Rome Statute does not permit to anyone but the Prosecutor and the accused to lead evidence linked to "the proof or disproof of the charges". See also note 44.

⁹⁹ See ZAPPALÀ, S., *The Rights of Victims v. the Rights of the Accused* (2010), 8 *Journal of International Criminal Justice* 137, at 143.

¹⁰⁰ See note 44.

¹⁰¹ *Idem*, at 488.

¹⁰² See note 99, at 141.

victims' participation in the proceedings effectively rest primarily upon the judges, introducing a strong element of judicial activism¹⁰³ in an otherwise essentially adversarial procedural model. Indeed, the reference to victims' "interests" seems to be influenced by the civil-law approach to victims' participation.

Anyhow, the impression is that many decisions regarding victims at the ICC did not include an exhaustive analysis of the scope of their participation, especially in the light of the distinct character of the ICC procedure as compared to domestic systems, both in terms of the nature of the crimes the Court has to deal with and in relation to the objective and purpose of the restorative justice mechanisms as envisaged by the drafters of the Rome Statute¹⁰⁴.

The core scope of the restorative scheme consists in granting the victims a chance to be heard, so to have the opportunity to present their views and concerns. This does not necessarily mean that they should have a role in the adjudication of the case¹⁰⁵: in fact, victims' rights at the ICC should be shaped in accordance with the practical problem of the large numbers of potential individuals who are willing to participate, in reason of the unique nature of the crimes within the jurisdiction of the Court and to the specific features of a "mixed" procedural model¹⁰⁶.

In practice, the balance between the rights of the parties and the attribution of a proper role to victims in the proceedings could be found by addressing some procedural issues. First, the application procedure shall be simplified, as the standard form is lengthy, excessively complicated and unrealistic in respect of the substantial situation of the population affected by the commission of serious international crimes. For instance, though it is important to inform victims of the several ways of participation at their disposal, as well as to ask them to specify how they intend to be engaged (by presenting their views or even asking for compensation)¹⁰⁷, it is probably less fundamental to demand victims to divide their story into different parts when reporting the alleged crimes, or to require detailed data on their medical history¹⁰⁸. Also, the Registry should offer a better legal aid to applicants, who often ignore how to deal with questions of a legal character¹⁰⁹. Besides, it should be allowed to the parties to analyse the Registrar's report on victims' application, which it is actually consultable by the Chambers¹¹⁰, to speed-up the eligibility decisions, since parties could consult summarized data regarding the victims' participation and find out linked applications¹¹¹.

¹⁰³ *Ibidem*.

¹⁰⁴ See note 96, at 30.

¹⁰⁵ See note 21, at 24.

¹⁰⁶ See note 96, at 42.

¹⁰⁷ See note 99, at 160.

¹⁰⁸ See note 96, at 45.

¹⁰⁹ *Ibidem*.

¹¹⁰ Rule 86(5) ICC RPE.

¹¹¹ See note 96, at 48-49.

More importantly, it appears of paramount importance to adopt a procedure to be applied by all Chambers of the Court at least in its basic elements, so avoiding the adoption of arguable interpretations such as in the *Muthaura and Kenyatta* case¹¹².

As concerns the modalities of participation of victims in the proceedings, the ICC should reconsider the right of the legal representatives of victims to make submissions on evidentiary issues, particularly if to present and challenge evidence, as it risks affecting the essential guarantees of the accused. Indeed, the Statute expressly attributes this power to the parties; plus, the written application that the legal counsel submits before the Court is frequently evaluated with no respect of the Defence right to disclose all relevant evidence before the commencement of the trial¹¹³.

Even if victims' interests may not always coincide with the objectives of the Prosecution, it seems worthwhile for the effective functioning of the ICC procedure that victims' requests do not deal with the legal dimension of the case, due to the possible interference with the Prosecution strategy; more generally, the Chambers should properly challenge their requests¹¹⁴.

Ultimately, the policy of victims' participation would require a more judge-led procedure at least in the phase of submitting evidence, yet keeping in mind the need to find a balance between the civil law institution of victims' participation and the adversarial character of ICC litigation. In this perspective, Article 66 of the Statute states that the onus to find the accused guilty relies on the Prosecution, whereas an interventionist judge and an active victims' role might lead to a "shared burden of proof"¹¹⁵. Would this be the case, it should be necessary to safeguard the right of the Defence, for instance by assuming that judges could intervene only if the search of the truth is in favour of the accused¹¹⁶.

Overall, the participation of victims in the proceeding shows the criticalities of an international court whose constitutive instrument encloses a number of goals in tension with each other that are not clearly ordered in terms of priority. Such ambiguity is reflected in judgements, which could easily offer different interpretations to similar issues. In reverse, the clarity on the goals of international criminal justice is a necessary precondition to achieve a trustworthy criminal procedure, both for the parties and for the victims' expectations.

¹¹² See *supra*, Section 2.1.

¹¹³ See note 96, at 52-54.

¹¹⁴ See note 99, at 162.

¹¹⁵ *Idem*, at 148.

¹¹⁶ *Ibidem*.