



**A VICTIMOLOGICAL ANALYSIS ON THE ROLE AND FUNCTION OF  
THE INTERNATIONAL CRIMINAL COURT WITH SPECIFIC  
REFERENCE TO THE PARTICIPATION RIGHTS OF VICTIMS**

**BY**

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## DECLARATION

I hereby declare that this dissertation for a Degree of Master of Criminology and Forensic Studies at the University of KwaZulu-Natal, hereby submitted by me, is my own work and has not been previously submitted to this University or any other University. I declare that the contents of this dissertation are the result of my own work except where otherwise stated and acknowledged.

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In memory of my mother

To my father

With love and eternal appreciation

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**This thesis is dedicated to the memory of my beloved mother, Monique Lukolo Ilundu.**

**It is your shining example that I try to emulate in all that I do.**

**Thank you for everything.**

## List of Abbreviations

CPC	Criminal Procedure Code
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers of the Court of Cambodia
ECOSOC	Economic and Social Council
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
OPCD	Office of Public Counsel for the Defense
OTP	Office of The Prosecutor
PreCom	Preparatory Committee
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
SLTRC	Sierra Leone Truth and Reconciliation Commission
SPET	Serious Panels in East Timor
SPSC	Special Panels for Serious Crimes
STL	Special Tribunal for Lebanon
TRC	Truth and Reconciliation Commission
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
UNTAET	United Nations Transitional Administration in East Timor
USA	United States of America
VLRs	Victims' Legal Representatives

VPRS	Victims Participation and Reparations Section
WWI	World War I
WWII	World War II

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## **ABSTRACT**

The International Criminal Court (hereinafter ICC) is a permanent international judicial tribunal which plays a vital role in combating international crimes. It was established in 1998 by the international community after much effort and negotiation. The creation of the ICC made a significant change in International Criminal Justice. The Rome Statute instituted the ICC as a lasting organization with authority over persons committing international crimes.

The Rome Statute of the ICC has been designed as a broad victims' participation scheme. Even though it is addressed as a significant and effective mechanism for giving victims of international crimes a voice, the procedural and substantive detail are far from being settled.

The aim of this paper is to give a critical overview on victims' participatory scheme within the ICC. It analyses what meaningful participation denotes and the interpretation of victims' participatory rights at the International Criminal Court. The paper critically reviews suggestions to amend the way in which victims may participate in court proceedings at the ICC. The findings from this paper illustrate which kind of amendments have to be done on victims' participatory scheme within the ICC to fit victims' satisfaction.

## **CHAPTER 1: GENERAL ORIENTATION AND PROBLEM FORMULATION**

### **1.1. Introduction**

Human history is replete with tragedies of genocide, war crimes, crime against humanity and other massive crimes. In almost all cases victims have been denied any form of redress for their suffering (Kreb, 2001). For instance, victims of the brutal massacres and rapes committed during the 1971 war of liberation in Bangladesh, victims of massive atrocities committed during the Khmer Rouge Regime in Cambodia, victims of the 1994 genocide in Rwanda, victims of the bloody war in the Democratic Republic of Congo, in Sierra Leone or in the former Republic of Yugoslavia have mainly been unable to receive adequate redress, not even in the form of a simple official apology from the individual, government or state responsible (Ingadottir, 2003).

Through the adoption of the Statute of the International Criminal Court (ICC) in July 1998 the first ever permanent, treaty based, international criminal court was created. On the first of July 2002 with the entry into force of the Rome statute, the international community inaugurated a new era of the international criminal justice as well as a new avenue for victims' redress in situation involving massive violation where domestic courts are unwilling or unable to deal with (Bottigliero, 2004).

The Rome Statute has been praised for many of its features, including the fact that it takes victims' rights into account (Fernandez de Gurmendi, 2001). Justice traditionally was done when the guilty was prosecuted and punished. The Rome Statute has embodied a concept of justice that goes beyond punishment of the guilty. In this regard, De Hemptinne & Rindi (2006) refer to the Rome Statute as a milestone in the development of victim protection and participation, therefore it has been termed victim-centered.

The Rome Statute thus picks up on a trend that has emerged in national law and politics over a longer period, that is, a shift of paradigm focus of criminal law on the accused to a focus on victims (Schabas, 2004). The ICC main innovative approach is that it treats victims' interests differently than previous international criminal tribunals. Procedurally, it gives victims the right to be participants, making it possible to include their perspectives and interest in Court processes (Kuhner, 2013).

## **1.2. Conceptualization**

To provide a victimological analysis of the role and function of the ICC with specific referral to the participation rights of victims, it becomes firstly necessary to provide an exposition of key concepts of this study.

### **1.2.1. The Rome Statute of the ICC**

On 17 July 1998, a conference of 160 States established the first treaty based permanent international criminal court. The treaty adopted during that conference is known as the Rome Statute of the ICC (Lee, 1999). Among other things, it sets out the crimes falling within the jurisdiction of the ICC, the rules of procedure and the mechanisms for States to cooperate with the ICC (Triffterer, 1999). The countries which have accepted these rules are known as States Parties and are represented in the Assembly of States Parties. The Rome Statute established the ICC as a permanent institution that shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern (Triffterer, 1999).

#### **1.2.1.1. Jurisdictional Limits of the Rome Statute**

The Rome Statute grants jurisdictional power to the ICC over individuals who commit the most serious crimes concerning the welfare of the international community. Specifically, it establishes jurisdiction over the crime of genocide, war crime, crimes against humanity and the crime of aggression (Lattanzi & Schabas, 2000).

The ICC has jurisdiction over nationals from countries that ratified the Rome Statute if the individual directly commits a crime, commits a crime through another person, or orders or solicits the commission of a crime (Shelton, 2000). The ICC may also exercise jurisdiction if a non-member State's national commits the crime against a national from a member state. Although the Rome Statute recognizes the primacy of national governments, it grants the ICC complementary jurisdiction; therefore, judges can determine a case is inadmissible if the State with jurisdiction over the crime is genuinely prosecuting or carrying out an investigation (Lee, 2001).

The United Nations (UN) Security Council can also confer to the ICC jurisdiction over non-member State by referring the situation to the ICC prosecutor for investigation or prosecution (Politi & Nesi, 2001). In this instance, the UN Security Council could initiate an investigation through the Security General, review the resulting report, and decide whether the act constitutes a threat to international peace and security (Politi & Nesi, 2001).

#### **1.2.1.2. Legal Interpretation and Application of Law Under the Rome Statute**

The Rome Statute requires strict interpretation of the definitions of crimes (Cassese, Gaeta, & Jones, 2002). If ambiguity exists, the ICC must construe definitions in favor of the charged party. When interpreting a provision, the ICC must first apply the Statute itself, the elements of crimes, and its rules of procedure and evidence (Sadat, 2002). If appropriate, the judges may secondarily apply applicable treaties and the principles and rules of international law. If neither of these first two sources provides clarity, the ICC may apply general legal principles derived from national legal systems, including the national law of the State with jurisdiction; as long as that law is consistent with internationally recognized standards and the Rome Statute (Sadat, 2002). The ICC must apply and interpret law pursuant to this provision consistently with internationally recognized human rights (Broomhall, 2003).

#### **1.2.1.3. Crimes within the Jurisdiction of the ICC**

The ICC has jurisdiction over four categories of crimes:

- *Genocide,*
- *Crimes against humanity,*
- *War crimes and*
- *Crime of aggression.*

These crimes are described as the most serious crimes of concern to the international community as a whole. The Rome Statute describes it as unimaginable atrocities that deeply shock the conscience of humanity (Bassiouni, 1997).

All four crimes within the jurisdiction of the ICC have been prosecuted, a least in an earlier and somewhat embryonic form, by the Nuremberg Tribunal and the other post-war courts

(Schabas, 2004a). At the Nuremberg Tribunal, they were called crimes against peace, war crimes and crimes against humanity. Since Nuremberg, the concepts of crimes against humanity and war crimes have also undergone significant development and enlargement (Schabas, 2004a). The definition of these crimes in the Rome Statute is in some cases the result of different treaties, such the 1984 Convention against Torture or the earlier Apartheid Convention (Bassiouni, 1997).

### ***E. Crime of Genocide***

The word genocide was coined in 1944 by Raphael Lemkin in his book on Nazi crimes in occupied Europe (Lemkin, 1944). He formed the word genocide by combining “geno-”, from the Greek word for race or tribe, with “cide”, derived from the Latin word for killing. In proposing this new term, Lemkin had in mind a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves (Lemkin, 1944).

In 1945, the term genocide has been adopted by the prosecutors at Nuremberg Tribunal and in 1946 genocide was declared an international crime by the General Assembly of the United Nations (Schabas, 2004). On December 9, 1948, the United Nations approved the convention on the Prevention and Punishment of the Crime of Genocide. This convention establishes genocide as an international crime, which signatory nations undertake to prevent and to punish (Schabas, 2004). The term genocide is defined in Article 6 of the Rome Statute as:

*“Five specific acts committed with the intent to destroy a national, ethical, racial or religious group as such. The five acts are: killing members of the group; causing serious bodily or mental harm to members of the group; imposing conditions on the group calculated to destroy it; preventing births within the groups; and forcibly transferring children from the group to another group”.*

### ***F. Crimes against Humanity***

Although occasional references to the expression crimes against humanity can be found dating back several centuries, the term was first used in its contemporary context in 1915

during the massacres of Turkey's Armenian population (United Nation War Crimes Commission, 1948).

The Rome Statute defines crime against humanity as a widespread or systematic attack against a civilian population, and that the perpetrator has knowledge of the attack (Cassese, Gaeta and Jones, 2002). In other words, crime against humanity refers to a category of crimes against international law which includes the most egregious violations of human dignity, especially those directed toward civilian populations (Jackson, 1949).

As codified in article 7 of the Rome Statute, the following acts are punishable as crimes against humanity when perpetrated by a state actor as part of a systematic or widespread attack against a civilian population:

*“Murder; extermination; deportation or forcible transfer; false imprisonment; torture; rape, sexual slavery, or enforced sterilization; ethnic persecution; disappearance; apartheid as well as other inhuman acts intentionally causing great suffering or serious injury to body or to mental or physical health”.*

#### **G. War Crime**

A war crime is a violation of the law of war. The legal understanding of war crime has been codified in several multilateral treaties, most notably the Geneva Conventions. More recently, the most comprehensive legal statement on war crimes was the Rome Statute of the ICC. Article 8 of the Rome Statute defines war crime as:

*“Any act related to wilful killing; torture; biological experiments; mutilation; unjustified destruction and appropriation of property; unlawful deportation and transfer; unlawful confinement; taking of hostage; pillaging; international attacks against civilians; international attacks against non-military targets; international attacks against peacekeepers or humanitarian aid groups; killing or wounding combatants who have surrendered; employing poisoned weapons; rape; sexual slavery; enforced sterilization as well as conscripting children under the age of 15”.*



## H. Crime of Aggression

Under article 8 of the Rome Statute, crime of aggression means the planning, preparation, initiation or execution by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations (Hall, 1998). An act of aggression means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations (Holmes, 1999).

Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 of 14 December 1974, qualify as an act of aggression:

- i) *The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;*
- ii) *Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;*
- iii) *The blockade of the ports or coasts of a State by the armed forces of another State;*
- iv) *An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;*
- v) *The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;*
- vi) *The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;*
- vii) *The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.*

### **1.3. Historical Development of the International Criminal Court**

Over the past 500 years the global community has sought numerous ways to address the most serious crimes that concerned and equally horrified the whole world (Jamison, 1995). Bassiouni (1999) even argues that there is evidence of a tribunal holding the individuals responsible for war crimes in Greece in 405 BC. Schabas (2001) joins this view saying that war criminals have been prosecuted at least since the time of the ancient Greece, and probably well before that. Some others also refer to similar examples from ancient China, India and Japan (Bos, 1999). Therefore, it could be argued presumably that the world has always shown an interest and desire toward a superior judicial body having the power to deal with the most heinous crimes, given that those crimes have always been committed (Schabas, 2001). However, both historians and international lawyers often agree that such a body has not come into the existence until the end of the fifteenth century.

#### **1.3.1. Initial Attempts for the Establishment of the ICC**

The first genuinely international trial for the perpetration of atrocities was probably that of Peter von Hagenbach, who was tried in 1474 for atrocities committed during the occupation of Breisach (Schabas, 2001). When the town was retaken, von Hagenbach was charged with war crimes, convicted and beheaded (Bassiouni, 1997). But what was surely no more than a curious experiment in medieval international justice was soon overtaken by the sanctity of State sovereignty resulting from Peace of Westphalia in 1648. With the development of the law of armed conflict in the mid-nineteenth century, concepts of international prosecution for humanitarian abuses slowly began to emerge (Meron, 2001). One of the founders of the Red Cross movement, which grew up in Geneva in the 1860s, urged a draft statute for international criminal court. Its task would be to prosecute breaches of the Geneva Convention of 1864 and other humanitarian norms. But Gustave Moynier's innovative proposal was much too radical for its time (Hall, 1998).

The Hague Conventions of 1899 and 1907 represent the first significant codification of the laws of war in an international treaty. They include an important series of provisions dealing with the protection of civilian populations (Schabas, 2001). Article 46 of the Regulation that are annexed to The Hague Convention IV of 1907 enshrines the respect of family honour and rights, the lives of persons, and private property, as well as religious convictions and practice (Convention Concerning the Laws and Customs of War on Land, 1907).

As World War I came to its end, public opinion, particularly in England, was increasingly keen on criminal prosecution of those generally considered to be responsible for the war. There was much pressure to go beyond violations of the laws and customs of war and to prosecute, in addition, the waging of war itself in violation of international treaties (Willis, 1982). Therefore, in 1926 the International Law Association (ILA) drafted a statute for an International Penal Court (Zahar & Sluiter, 2008). It was envisioned that the International Penal Court would have jurisdiction over violations of international obligations of a penal character, violation of treaties or convention regulating methods and conduct of war and violations of the laws and customs of war generally (ILA Draft Statute, 1926) (Zahar & Sluiter, 2008). In 1937 the League of Nations produced its Convention for the creation of an ICC to deal with the crime of terrorism as put forward by the League's Convention for the Prevention and Punishment of Terrorism (Ferencz, 1998).

During the Second World War the London International Assembly, created under the auspices of the League of Nations, called for international criminal law to be codified and war of aggression to be recognized as a crime (Zahar & Sluiter, 2008). The London Assembly appealed for those for those militarily responsible for aggressive war to be held personally accountable (Ferencz, 1998). To further these goals, it drafted a convention for an ICC to be established by the United Nations having jurisdiction over those who had committed war crimes irrespective of rank (London Assembly Draft Convention, 1943).

### **1.3.2. Nuremberg and Tokyo Trials**

Although not permanent, the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East (Tokyo) were the first international criminal tribunals (Zahar & Sluiter, 2008). The Allies Power (Britain, France, Russia and the United States of America), subsequent to the defeat of Germany and Japan, established them in 1945. The objective was to punish those responsible for the international crimes of crimes against peace, war crime and crime against humanity (Taylor, 1993). However altruistic the thinking beyond the two tribunals may have been, both the Nuremberg and Tokyo Tribunals were accused of being "victors" courts; an accusation denied by the United States of America (USA) amongst others. On the other hand, both the Nuremberg and Tokyo trials advanced the international rule of law and are commonly regarded as the archetypes of modern international criminal law (Bassiouni, 1999).

While they have established a moral legacy, one must recognize that, especially in respect of the international facet, they are imperfect examples (Cassese, Gaeta, & Jones, 2002).

Although the judges and prosecutors were drawn from more than one country and the tribunals invoked the notion of universal jurisdiction, they were in essence military courts created by the victors whose jurisdiction was founded on unconditional surrender (Cassese, Gaeta, & Jones, 2002). Many Japanese, and indeed other observers, considered the Tokyo Tribunal more vengeance than justice (Schabas, 2001).

### **1.3.3. The United Nations and its Attempts to Create an ICC**

The idea of an international criminal court was taken up thereafter by the United Nations when its Economic and Social Council (ECOSOC) included an international criminal court in its draft convention on genocide (Taylor, 1993). The contracting parties were to commit persons guilty of genocide under the convention for trial by an international court where they were unwilling to try or extradite the offenders, or where the acts were committed by persons acting as organs of the state or where there was support or toleration of the state for the acts in question (Jeff, 2006).

ECOSOC presented different views on an international court in two separate drafts:

- (i) an international court having jurisdiction in all matters connected with international crime, and*
- (ii) an international criminal court only having jurisdiction over genocide.*

This court could be either permanent or Ad Hoc. States reviewed the first draft and raised various concerns. A few countries seemed unwilling to see their sovereignty infringed, whilst others saw it as being too unrealistic. Consequently, the United Nations General Assembly voted to remove any reference to an international criminal court from the Genocide Convention (Garkawe, 2003).

Furthermore, following Nuremberg and Tokyo, the United Nations General Assembly had given the International Law Commission (ILC) the assignment of examining the possibility of establishing a permanent international criminal court. Draft statutes were produced in the 1950s, but the Cold War made any significant progress impossible (Bassiouni, 1997). There were some trials by national courts in the post-World War II period, but a permanent international criminal court was considered a pipe dream by most.

The ILC's post Nuremberg project was revived in 1989 via an unexpected route when Trinidad and Tobago approached the United Nations General Assembly to suggest an international judicial forum for drug trafficking prosecutions (Findlay, 2009). The Assembly held a special session on drugs in 1989, and in 1990 the ILC submitted a report that went beyond this limited issue. The report was well received and the ILC was encouraged, without a clear mandate, to continue its project. Thus, it was able to return to the task begun in the 1940s of preparing a draft statute for a comprehensive international criminal court (Ferstman, 2005).

There appeared to be little hope for the ICC between 1989 and 1992, but Security Council Resolution 780, establishing a Commission of Experts to investigate international humanitarian law violations in the former Yugoslavia, changed all this (Bassiouni, 1999). The breakdown of the bipolar world and the increased expectations of peace with the end of the Cold War sparked a strong international response to the humanitarian crisis in the Balkans, and allowed the major powers to find common ground (O'Connell, 2005). The creation of Ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) followed the Commission's work and garnered worldwide recognition and credibility that gave support to the process for establishing the ICC (O'Connell, 2005).

It has been suggested that the ICTY was born of the frustration of having exhausted all other measures to stop a brutal war, except the measure that took too much courage, and that the ICTR was born of the guilt of having stood by while half a million were slaughtered in one hundred days (Arbour, 2001). The cynicism surrounding the establishment of the Ad Hoc tribunals was exacerbated by the fact that Rwanda voted against Resolution 955, which created the ICTR, although it subsequently agreed to cooperate with tribunal prosecutions (Drumbl, 2007).

The creation of the ICTY and ICTR demonstrates an evolution of the concept of an independent prosecutor. Although having greater political autonomy than their Nuremberg counterparts, the tribunals are still a creation of the UN Security Council and are beholden to it for funding and enforcement assistance (Drumbl, 2007). And there is judicial oversight because prosecutions require authorization. Despite some significant cynicism with respect to money spent and the ability of these tribunals to achieve true peace and reconciliation, as well as difficulties in arresting those indicted by the ICTY, both tribunals have made historic

progress in international humanitarian law (Henham, 2004). At the ICTY, for example, rape and enslavement have been recognized as crime against humanity and head of state was indicted while still in office.

As valuable a precedent as they are, the ICTY and ICTR took two years of negotiation and preparation to establish, thereby confirming the necessity of a permanent ICC (Schabas, 2004a). Therefore, in 1994, a draft statute for international criminal court was submitted to the General Assembly; and in 1996, the Preparatory Committee (PreCom) on the Establishment of an International Criminal Court was founded. An amended draft statute was submitted in April 1998, setting the stage for the five week conference in Rome in June (Schabas, 2004).

#### **1.3.4. The Establishment of the International Criminal Court**

In 1994, the United Nations General Assembly decided to pursue work towards the establishment of an international criminal court, taking the ILC's draft statute as a basis (Bassiouni, 1997). It convened an Ad Hoc Committee, which met twice in 1995 (Bassiouni, 2006). Debates within the Ad Hoc Committee revealed rather profound differences among States about the complexion of the future court, and some delegations continued to contest the overall feasibility of the project, although their voices became more and more subdued as the negotiations progressed (Young, 2000).

The ILC draft envisaged a court with primacy, much like the Ad Hoc tribunals for the Former Yugoslavia and Rwanda (Schabas, 2001). In meetings of the Ad Hoc Committee, a new concept reared its head, that of complementarity, by which the court could only exercise jurisdiction if domestic courts were unwilling or unable to prosecute (Young, 2000). Another departure of the Ad Hoc Committee from the ILC draft was its insistence that the crimes within the court's jurisdiction be defined in some detail and not simply enumerated (Young, 2000). The Ad Hoc Committee concluded that the new court was to conform to principles and rules that would ensure the highest standards of justice, and that these should be incorporated in the statute itself rather than being left to the uncertainty of judicial discretion (Lee, 1999).

It had been hoped that the Ad Hoc Committee's work would set the stage for a diplomatic conference where the statute could be adopted. But it became evident that this was premature.

At its 1995 session, the United Nations General Assembly decided to convene a PrepCom, inviting participation by Member States, non-governmental organisations and international organisations of various sorts (Schabas, 2001). The PrepCom held sessions in 1996, presenting the United Nations General Assembly with a voluminous report comprising a hefty list of proposed amendments to the International Law Commission draft (Lee, 1999).

Based on the PreCom's draft, the United Nation United Nations General Assembly decided to convene the United Nations Conference of Plenipotentiaries on the Establishment of an ICC at its fifty second session to finalize and adopt a convention on the establishment of an ICC (Durham, 2000). The Rome Conference took place from 15 June to 17 July 1998 in Rome, Italy, with 160 countries participating in the negotiations (Durham, 2000). At the end of five weeks of intense negotiations, 120 nations voted in favour of the adoption of the Rome Statute of the ICC, with seven nations voting against the treaty including the United States, Israel, China, Iraq and Qatar and 21 states abstaining (La Haye, 1999).

The PrepCom was charged with completing the establishment and smooth functioning of the Court by negotiating complementary documents, including the Rules of Procedure and Evidence, the Elements of Crimes, the Relationship Agreement between the Court and the United Nations, the Financial Regulations, the Agreement on the Privileges and Immunities of the Court (La Haye, 1999).

On 11 April 2002, the 60th ratification necessary to trigger the entry into force of the Rome Statute was deposited by several states in conjunction. The treaty entered into force on 1 July 2002 to create a permanent ICC (Schabas, 2004a).

#### **1.4. Aims and Methodology of the Study**

The aim of this study is to analyze the current role and function of the ICC toward it victims' participation scheme. This study will examine the position of victims under the Rome Statute with specific reference to their rights to participate in the Court proceedings.

Victim participation in this context refers to the right of victims to participate in the proceedings in their capacity as victims. In its examination of the general area of victim participation, this study will deal with a number of specific key issues:

- First, the underlying objectives of allowing victim participation shall be elucidated when discussing the question on how exactly victim participation is to be achieved before the ICC.
- Second, the extent to which such participation corresponds to the needs and wishes of victims will be assessed.
- Finally, the analysis of victims' participatory rights before the ICC will be conducted with a view to possible improvements in the current provisions but also in order to show where alternative solutions might prove useful.

To address the aim of this study, a review of literatures has been conducted. Information has been gathered from the most important documents on the basis of which the ICC was established as well as from historical documents that were prepared before the establishment of the ICC. This study took into consideration the Rome Statute, the ICC documents regarding the implementation of victims' rights. Consideration has been also given to the United Nations documents on the Right of Victims of Crime and Abuse of Power as well as other documents issued at the United Nation Diplomatic of Plenipotentiaries on the Establishment of an ICC. Information has been gathered also from books, journals, reports, articles as well as critical and evaluative works based on victims' participation rights before the ICC.

### **1.5. Structure of the Study**

The present chapter commence by presenting the general orientation and problem formulation of this study. It also delineates the historical, political and legal processes which eventually led to the creation of the ICC.

The underlining subject of the research is the international criminal justice. Thus, theories of criminal justice provide an important backdrop for understanding the current and future role of victims in criminal proceedings. Theories of criminal justice help both explain criminal justice systems and their purpose in societies and shape criminal justice systems and how they operate in society. Chapter 2 examines the three main theoretical frameworks of criminal justice, which all shed light on the roles provided to the accused and victims. These include the retributive framework, the utilitarian framework and the restorative framework. These



three theoretical frameworks represent the major theories of criminal justice that have impacted those judicial systems that have been most influential on international criminal institutions and the procedures they apply.

Chapter 3 explores to which extent the role of victims was considered in the provisions of the International Military Tribunals of Nuremberg and Tokyo, the International Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone and the Extraordinary Chambers of the Court of Cambodia. This is important, as only with an understanding of this past development it will be possible to understand whether the Rome Statute has in fact set new standards for international criminal law regarding the role of victims.

Chapter 4 provides the bulk of this study. Taking into account ICC case law, chapter 4 will focus on victims' participation at the ICC. In order to be able to extensively interpret the ICC's provisions on victims' participation, it will first of all be necessary to elaborate the objectives of the ICC, its aims and purposes on victims of international crimes and abuse of power. Next, the notion of victim as a precondition for participation will be elucidated and followed by a detailed analysis of the ICC's requirements on victim participation as well as problems faced by victims' participation scheme at the ICC. Chapter 5 concludes and suggest potential areas of reform that might allow the ICC to better achieve the implementation of it victims' participation scheme making it comfortable to the needs and wishes of victims.

## **CHAPTER 2: THEORETICAL FRAMEWORK: THEORIES OF CRIMINAL JUSTICE**

### **2.1. Introduction**

Theories of criminal justice seek to obtain, among other things, as better appreciation of the nature of law, legal systems and legal institutions (Leyh, 2011). Theories help both to explain criminal justice systems and their purpose in the society and to shape criminal justice systems and how they actually operate in societies (Leyh, 2011). In other words, theories attempt to clarify the philosophical motivations behind criminal justice practices and often inform the criminal procedures utilized by different justice systems. Generally the procedures applied by criminal justice systems are meant to further the overarching goals of that system.

This chapter examines the three main theoretical frameworks for criminal justice, which all shed light on the roles provided to the accused and victims. These include the retributive framework, the utilitarian framework and the restorative framework. These three theoretical frameworks represent the major theories of criminal justice that have impacted those judicial systems that have been most influential on international criminal institutions and the procedures they apply. First the two predominant traditional legal theories of retributivism and utilitarianism and the role of the victim within these theories will be examined. Given the fact that the traditional theories tend to marginalized the role afforded to victims, this chapter will then explore what it is that victims want from criminal justice systems and look at alternative theories that have been developed which seek to emphasize the needs and concerns of victims. Said differently, this chapter aims to show how various theories contribute to the current motivations and scope of international criminal law and procedure, with emphasis on the role of the victim in these processes.

### **2.2. Traditional Theories of Criminal Justice**

Traditional criminal law theories can be categorized into two philosophical groupings, consequentialist theories and non-consequentialist theories (Duff, 2001). The difference between the groupings is significant because the differences are based on their focus and goals (Leyh, 2011). The consequentialist grouping is forward-looking in that the theories that fall within this grouping focus on the future consequences of the punishment following a

finding of guilt (Leyh, 2011). The non-consequentialist grouping is backward-looking in that these theories are solely interested in the past acts and mental states of the perpetrator (Fatic, 1995). The following section will first examine the two traditional theories of retributivism and utilitarianism, which have dominated criminal justice dialogue, and how they conceptualize the role of the various actors in the criminal process.

### **2.2.1. Retributivism**

Retributivism is the primary theory falling within the non-consequentialist grouping. Retributive justice emphasizes the imposition of punishment for offenders because it is deserved due to the commission of crime (Leyh, 2011). The retributive school of justice asserts the traditional justification for punishment in criminal trials which is that punishment is justified as an end in itself, emphasizing the link between punishment and moral wrongdoing (Heikkila, 2004). Essentially, an individual deserves punishment if he commits a wrongful act, encapsulating the notion of punishment for just deserts (Dubber, 2005). In contrast to consequentialist theories, retributivists argue that criminal institutions, which pronounce upon wrongful act, should produce morally correct decisions regardless of ultimate effects on society (Luna, 2003). In this sense, retribution conveys a society's condemnation of the criminal act in question and of the perpetrator found guilty (Luna, 2003). The theory is backward-looking in that it looks back at the wrong action in order to explain why an individual deserves punishment (Whiteley, 1998). Retributive criminal justice systems assess punishment based on the seriousness of the crime and the mental state of the offender (Heikkila, 2004). Therefore, disproportionate punishment based on the likelihood of recidivism is frowned upon, as is disproportionate punishment based on forgiveness or revenge (Cottingham, 1979).

It is noteworthy to mention that retributive theories vary in scope and justification. Moore (2000), for instance, argues a rather pure form of retributivism, submitting that criminal law should be understood functionally in that its purpose is to achieve retributive justice through punishing only those who are morally culpable in the doing of some morally wrongful action (Moore, 2000). Thus, he argues that criminal law has no use beyond the punishment of individuals for immoral conduct (Moore, 2000). Others views punishment as emotional response to crime that is both natural and acceptable, as a form of sanctioned revenge, or as a form of communication to the offender, victim and larger society (Fletcher, 1994). With

regards to communication, where offender once dominated the victim, the criminal justice system can now pronounce upon the guilt of the accused and acknowledge the suffering of the victim, thereby restoring the victim's moral worth (Fletcher, 1994).

However, in systems based on the rule of law, the state cannot simply punish individuals without some formal process. Therefore, judicial Retributivism, the most commonly accepted form of state retribution, requires publicly promulgated procedure and due process guarantees (Oldenquist, 1988). This focus on due process rights is at the heart of a retributive system which emphasizes punishing only those individuals who have committed a wrong (Barnett, 1977). The practical consequences of implementing the goals of retributive justice theories are that retributive systems often strictly adhere to the ideas of state punishment and fair procedures for the accused (Heikkila, 2004). Therefore, during criminal proceedings the rights of the accused and the notion of impartiality of the decision-maker are emphasized (Leyh, 2011).

Despite the widespread of retributive practices, there are many critics of the non-consequentialist approach. Some critics argue that because the theories are largely on moral grounds it is almost impossible to come to any widespread acceptance of morality since moral values change over time (Heikkila, 2004). Furthermore, critics argue that retributive justice theories simply constitute sanctioned revenge and that they fail to take into consideration traditional values important in human relationships, such as reconciliation, mercy, compassion and forgiveness (Hall, 1998). Therefore, Retributive theories are not victim-centered. These theories view punishment as a response to a wrong and not a response to the harm experienced by the victim (Heikkila, 2004).

### **2.2.2. Utilitarianism**

Utilitarianism is the primary consequentialist theory. Consequentialism refers to those theories which hold that the consequences of one's conduct are the true basis for any judgment about the morality of the conduct (Heikkila, 2004). Thus, from a consequentialist standpoint, a morally right act is one that will produce a good outcome, or consequence.

The utilitarian school regards criminal justice as an appropriate means to a justifiable end and views deterrence, prevention, reform and/or imprisonment as the main objectives of criminal

justice (Heikkila, 2004). Unlike retributive justice theories, which are backward-looking, utilitarian theories are forward-looking because they focus on the benefits of criminal justice, such as the predictability of punishment as a consequence of a wrongful act (Fatic, 1995). Moreover, utilitarian theories are forward-looking because they seek to reduce the occurrence and gravity of crime in society (Fatic, 1995). For example, society should punish offenders in order to prevent future crimes, thereby serving the common good (Dubber, 2005). According to Luna (2003: 32), utilitarian theories assert that the imposition of criminal sanctions may serve a number of goals, including:

- i) Specific deterrence: deterring the specific offender from committing future crime;*
- ii) General deterrence: deterring others from committing future crimes;*
- iii) Rehabilitation: rehabilitating the specific offender from committing future crimes;*
- iv) Incapacitation: disabling the specific offender from committing future crimes.*

The various utilitarian theories depart from one another when having to decide what good consequences criminal justice in fact produces. However, reduction of crime, often through deterrence, is almost always an important consequence of punishment in utilitarian justice theory models (Ten, 1987). Consequently, measures targeting both specific deterrence, targeted at individual offenders and general deterrence, targeted at the public, are central to utilitarian theories (Ten, 1987).

Within this consequentialist theory, often referred to as instrumental theory, there are differences between pure instrumentalists and non-pure instrumentalists. The pure instrumentalists seek to explain aspects of a justified criminal justice system in pure consequentialist terms (Leyh, 2011). They only ask which doctrines, practices and rules will efficiently serve the articulated goals. In contrast, non-pure instrumentalists take into account non-consequentialist values and argue that requirements of justice may preclude some practices even if those practices would efficiently serve the system's goals (Leyh, 2011). The proper structure of a criminal justice system, for pure instrumentalists, depends on studies into how the goals can be most efficiently met, whereas for non-pure instrumentalists issues outside of the system must also be taken into consideration, such as the gravity of the crime or fair trial rights (Leyh, 2011).

Critics of utilitarian theories argue that empirical studies do not support the argument that the deterrent effect actually works to curb crime; that punishment often reflects the broader goals of criminal law rather than reflecting the seriousness of the crime, leading to un-proportionate penalties; that the theories fail to answer why an innocent person should not be punished if the punishment has a positive result on society or that individual; and the theories rest on the premise that individuals are rational thinkers, which often is not the case (Luna, 2003). Opponents of utilitarian theories also question whether incapacitation and deterrence achieve their stated goals (Luna, 2003). Arguably, there are too many assumptions surrounding the notion that increased incapacitation will decrease crime and increase social utility, such as the assumptions that others will not commit the crimes in the absence of the offender, that the offender will in fact reoffend if not incarcerated or that crime does not occur within incarceration facilities (Luna, 2003).

Another criticism levelled against utilitarianism is the fact that practices may not be in accordance with the principles of fairness and justice (Keller, 2007). Utilitarianism rejects the idea that individual rights should trump certain security interests of a community (Dworkin, 1977). Instead, under pure utilitarianism individual rights may be sacrificed or marginalized so as to promote the common good. As a result, the procedural safeguards, such as due process and fair trial rights, may not take precedence. Along the same lines, there is no emphasis on the pursuit of truth or protection of innocence (Luna, 2003).

Problematic from the position of the accused, classical utilitarian theories are also problematic from the victim's perspective (Leyh, 2011). This has to do with the fact that, like retributive theories, utilitarian theories do not directly allow for a central role for the victim. Heikkila notes that "the goals of deterrence, prevention, reformation, incapacitation and education are all society-oriented and/or offender-oriented" (Heikkila, 2004, p. 31). Therefore, under classical utilitarian theories the interests of society or of the offender will always take precedence over those of the victim (Heikkila, 2004). Importantly, utilitarian theories view society as the victim of crime in addition to the victimized individual (Heikkila, 2004). This classical form of criminal justice therefore focuses on the accused and on society in criminal proceedings, rather than on the victim's suffering. As a result, many criminal justice systems, which incorporate utilitarian beliefs and structures, often fail to focus on victims in criminal proceedings (Heikkila, 2004).

### **2.3. Victims' Interests in Criminal Justice System**

Traditional criminal justice theories put its focus on crime and society, with less emphasis on the individual victim. However, in the late 1960s and early 1970s the idea that victims like accused should have greater rights within national criminal justice (Heikkila, 2004). Throughout much of the world, researchers, policy-makers, those working with victims and victims themselves all voiced their concern over the disregard of the victim in the criminal process (Shapland, Willmore, & Duff, 1985). Social movements centered on victims of crime began to mobilize at local and national levels and the notion that there should be a greater focus on victims gradually developed into what became known collectively as the victims' rights movements (Tobolowsky, 1999). Parallel with the growth of national victims' rights movements; academic around the world began studying victims and crime (Tobolowsky, 1999). This field of study soon became known as Victimology. The growth of Victimology as a distinct discipline, which began in earnest in the 1970s has played a profound role in the achievements related to victims and criminal justice reform at the domestic level (Aldana-Pindel, 2004).

Victims' rights campaigners assert that victims are re-victimized by the very judicial systems that are designed to protect and support them, and argue that government institutions must do more to address their needs and concerns (Van Dijk, 1983). At its most basic level, the victims' rights movement advocates for improved service related and procedural rights through greater protection and reparation (Van Genugten, Scharf, & Radin, 2009). Increased victim support in the form of protective measures, medical and psychological services and information services are all considered service related rights whereas victims having a greater say in the decision making processes related to their case or some type of standing before the court to share their views and concerns are considered procedural rights (Van Genugten, Scharf, & Radin, 2009).

Building upon Thibaut and Walker's influential study to from the mid-1970s on procedural justice, research indicates that individuals affected by criminal justice processes determine fairness by how fair and satisfactory they consider the outcomes they receive and how fair and satisfactory they consider the procedures used to reach those outcomes (Lind & Tyler, 1988). In fact, studies suggest that procedural justice may even be more important than distributive justice because in general individual value process control irrespective of the

outcomes they receive (Lind & Tyler, 1988). Thus, in addition to the outcome of a judicial matter, individuals, including victims, are concerned with the procedural justice they receive, and research on procedural fairness indicates that having a voice in the process is associated with an increased perception of fairness (Lind & Tyler, 1988).

The benefits of procedural justice include increased satisfaction with the process and greater acceptance of the outcomes (Greenberg, 1987). In addition, O'Hear argues that when individuals of the justice process are treated fairly the legitimacy of the judicial institutions and the role of the authority are enhanced (O'Hear, 2008). For a victim, procedural justice may refer to a broad range of available support services as well as procedural rights in proceedings (Lind & Tyler, 1988). Thus, the research on victims within the criminal justice process generally shows that in order to view proceedings as fair and satisfactory they want to be informed; to attend and participate in proceedings in order to have their voices heard; to emotional restoration and apology; to receive reparation (Danieli, 2004).

### **2.3.1. Information**

Victims repeatedly say that one of the greatest sources of frustration to them is the difficulty in finding out from criminal justice authorities on developments in their cases (Boyle, 2006). Indeed, some victims have said that is all they want from the justice system and would be satisfied simply to achieve that goal (Weed, 2009). But it appears that the amount of information victims are likely to be given about their case depends on their value to the prosecution-defense adversaries at each stage of the justice process (Zappala, 2010). A study of over two hundred victims of violent crime found that victims initially expressed high levels of satisfaction about their treatment by police at the point of processing where victims are of highest value as a source of information for the prosecution (Tumbull, 2008). By the middle of the investigation, victims' satisfaction started to decline and continued to do so, due largely to lack of information about progress with their case (Tumbull, 2008).

### **2.3.2. Participation**

A major complaint of victims is that they are not encouraged to feel part of justice proceedings in their case (Erez, 1999). It appears that participation in the processing of their cases assists victims both in their emotional recovery and in reducing the sense of alienation



that results from believing they have no control and no status (Erez, 1999). Victim attendance at proceedings and participation in proceedings, whether broad or limited, serves as formal acknowledgment that victims of crime have a stake in the criminal process that is different from the judicial authorities and prosecution (Leyh, 2011). Even when they share similar views as those held by the prosecution victims look at the case from a different perspective and they want their interests to be taken into account (Leyh, 2011). Moreover, studies have shown that individuals perceive a judicial process as fair when procedures allow them a voice (Lind & Tyler, 1988).

### **2.3.3. Emotional Restoration and Apology**

Beyond the calculable material harm victims of crime may experience, there are emotional and psychological dimensions to the loss that have routinely been ignored by the justice system and that need redressing if the experience of victimization is ever to be satisfactorily resolved (Sanders, 2003). There are feelings of insecurity, mistrust and an overall sense of a loss of control (Strang, 2002). Often they are in great need of support and have little knowledge of what is available to them. While courts and lawyers make reference to pain and suffering experienced by victims, and in some cases financial settlements are arrived at in civil or criminal courts to compensate for this, victims themselves say that emotional harm is healed, as opposed to compensated for, only by an act of emotional repair (Leyh, 2011). The evidence suggests that victims see emotional reconciliation to be far more important than material or financial reparation (Sanders, 2003). Accordingly, receiving either direct support or information about support services is important to victims coping with the stress of a criminal process (Sanders, 2003).

### **2.3.4. Reparation**

The victims' rights movement grew, in part, out of the call for restitution for victims of crime. This call for direct restitution of victims soon developed into the call for reparations generally. The key aspects of a reparation program are usually restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (Keller, 2007). Restitution is meant to restore victims to their original situation before the violation occurred. Where restitution is not possible, compensation is appropriate for economically assessable damage, including for physical or mental harm, lost opportunities such as employment, material

damages and loss of earnings, moral damages, and the costs of medical, legal and social services (Sanders, 2003). Rehabilitation includes medical and psychological care, and legal and social services. Satisfaction usually refers to a wide range of measures including those aimed at the cessation of violations, public disclosure of the truth, a public apology, sanctions against persons liable for the violations, and commemorations and tributes to the victims (Sanders, 2003).

#### **2.4. Restorativism**

In an attempt to meet the needs and concerns of victims of crime a new theory of criminal justice emerged. In contrast to traditional criminal law theories, this modern theory, based on restorative justice principles, has begun to focus attention on the role of the victim within criminal justice (Leyh, 2011). Although the exact role and status of victims varies widely within retributive and utilitarian theories, advocates of restorative justice argue that classical criminal justice models ignore victims by placing too much attention on the offender or on the interests of society (Garvey, 2003). Though some commentators view restorativism as a social movement it is in fact distinct from the victims' rights movement and is itself a theory of criminal justice (Luna, 2003). The theory focuses on shared values between the offenders and seeks to repair the harm suffered, through an inclusive process (Leyh, 2011).

Arguably, the term restorative justice was first introduced in the contemporary criminal justice literature and practice in the 1970s. However, strong evidence suggests that the roots of its concept are ancient, reaching back into the customs and religions of most traditional societies (Braithwaite & Strang, 2001). In fact, some have claimed that the restorative justice values are grounded in traditions of justice as old as the ancient Greek and Roman civilisations (Braithwaite & Strang, 2001).

The understanding of what restorative justice is; it is a complicated task by the fact that there exists no universal agreed definition or meaning of the term and the concept itself is deeply contested among proponents of restorative justice (Roberts, 2008). One consequence of this is that the restorative justice label is confusingly applied to a variety of often disparate practices which include interventions such as victim-offender mediation and various forms of conferencing and sentencing circles; the provision of certain services such as victim support services; assorted procedural reforms such as introduction of victim impact statements; and

various court imposed sanctions such as community service and victim compensation orders (Dignan, 2005). These can all be seen as restorative practices but only the genuinely dialogic processes, such as mediation and conferencing, are, as far as I am concerned, restorative justice (Braithwaite & Strang, 2001).

Some restorativists have attempted to define restorative justice by practices, describing as restorative any new initiative that does not follow the typical trajectory of arrest, prosecute, convict and punish (Palmer, 2012). Most restorative theoretical frameworks encompass values, aims and processes that have as their common factor attempts to repair the harm caused by criminal behaviour (Braithwaite & Strang, 2001). Core values include: mutual respect; the empowerment of all parties involved in the process; accountability; and the inclusion of all the relevant parties in dialogue, in particular those considered to be the victims (Hoel, 2007). Restorative should address emotional as well as material loss, safety, damaged relationships, and the dignity and self-respect of victims and other stakeholders recognized as having a legitimate interest in determining the societal response to those offences committed against them (Palmer, 2012). Accordingly, restorative justice prioritized the need to salvage and affirm the moral worth and dignity of everyone involved like victims, perpetrators and society as whole in pursuit of a minimally decent society (Hoel, 2007). While policy makers seem to care more about outcomes than theoretical notions about process, focusing in particular on reductions in the risk of re offending, restorativists direct their attention on the restorative process itself and aspire towards the lessening of the fear of crime and a strengthening of a sense of community (Palmer, 2012).

Although a universal definition of restorative justice remains elusive, probably the most frequently quoted definition is provided by Marshall who sees it as a process whereby all the parties with stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implication for the future (Marshall, 1999). An alternative definition is provided by McCold and Wachtel, who describe restorative justice as a process where those primarily affected by an incident of wrongdoing come together to share their feelings, describe how they were affected and develop a plan to repair the harm done or prevent reoccurrence (McCold & Wachtel, 2004). They add that the essence of restorative justice is a collaborative problem solving approach to social discipline intended to reintegrate individuals and repair affected communities (McCold & Wachtel, 2004).

### **2.4.1. Conceptions of Restorative Justice**

Restorative justice has two conceptions: one focuses on process, the other on values (Braithwaite & Strang, 2001). In relation to process, restorative justice brings together all stakeholders affected by a wrong. The values conception of restorative justice deals with healing the victim of the injustice and restoring the victim to the position they were in before the wrong was committed (Braithwaite & Strang, 2001). It also deals with repairing harmed relationships. This additional value concept is closely linked with reconciliation between perpetrator and victim, where attempts are made to repair relations damaged by injustice, while at the same time working to rehabilitate the victim (Thompson, 2002).

#### **2.4.1.1. Process**

Restorative justice can be seen as a process whereby those affected by the injustice or abuse are brought together to discuss the harm suffered, the impact of them, and to determine strategies and measures to repair the harm and to prevent a repetition of the wrong (McCold & Wachtel, 2004). The process emphasizes a process of healing rather than punishment.

John Braithwaite and Strang notes that a favourable restorative justice model will ensure non-domination, empowerment and respectful listening (Braithwaite & Strang, 2001). Martha Minow characterizes restorative justice as building connections and enhancing communication between perpetrators and those they victimized (Minow, 1998). One defining feature of the restorative justice approach is that it seeks to set up a conversation between the wrongdoer and the victim where the injustice and its consequences are discussed (Bassiouni, 2006). Victims are thereby given the opportunity to ask the wrongdoer why the wrong was committed or why the victims were targeted. Such information is often critical to victims' own understanding, peace of mind, and sense of blamelessness (Walker, 2009). According to Professor Jennifer J. Llewellyn: "Truth telling in the form of an admission of responsibility for what happened on the part of a wrongdoer is a precondition for a restorative process, and truth telling in the form of an honest relating of one's story and experience by all parties is a fundamental part of restorative justice process" (Llewellyn, 2007, p. 45).

By engaging in an open and authentic dialogue with the wrongdoer, victims do not need to rely solely on receipt of an arbitrary monetary figure to reclaim a sense of their place in the

community (Bassiouni, 2006). Rather, victims are empowered, and emotional harm may be healed simply by affording them the opportunity to have their stories of past injustice heard. This is seen as a starting point toward healing the hurts of injustice and transforming the conditions that allowed the injustice to flourish (Braithwaite & Strang, 2001). Margaret Urban Walker observes: “As injustices grow in magnitude, violence, and historical duration, the reality, nature, intent, and seriousness of violation become predictably contested, and the need for a careful and detailed articulation of the full story of violence, oppression, terror, or subjugation becomes both a reparative activity and a measure of the adequacy of other measures of repair.” (Walker, 2009, p. 386)

#### **2.4.1.2. Values**

The features of the process’ conception lay the foundation for accomplishing the restorative justice values (Bassiouni, 2006). However, in many respects they also form the value components of restorative justice. For example, coming together and listening are components of the healing process. However, healing is also a value of restorative justice, as are non-dominating speech and truth telling. The dual process-value identity is reflected in Braithwaites’ comment that a favourable restorative justice model will, inter alia, ensure non domination, empowerment, and respectful listening (Thompson, 2002). It will restore human dignity; repair damaged human relationship; re-unite communities; establish stable emotions, promote freedom, peace, and civic duty; and prevent future injustices (Braithwaite & Strang, 2001).

High on the list of values is reconciliation, along with redemption and moral restoration of the perpetrator and the offending community or society (Brooks, 2005). American reparations scholar Roy Brooks associates restorative justice with the “atonement model”, which centers on the rehabilitative aspect of reparations (Brooks, 2005). A necessary element of Brooks “atonement model” is an apology to the victims of a past injustice, which will be made more significant by monetary or other additional reparations.

Acknowledgment of the wrong; apology; making amends; forgiveness; and a guarantee the wrong will not be repeated are major restorative justice values. These values are both reparative and reconciliatory (Thompson, 2002).

Restorative justice stresses society's civic duty to atone for the injustices of the past, transcending the attribution of guilt to the wrongdoer, which often is the focus of corrective justice and retribution (Buss, 2009). This is particularly attractive if the original wrongdoer no longer exists (Buss, 2009). As Brooks notes, in matters of reparations claims, the powerful influence of morality may come to the fore to place a responsibility on the successors of the original wrongdoer to make good with reparations (Brooks, 2005). At the very least, "other must acknowledge the wrong and harm done to victims and accept the legitimacy of victims' demands for recognition and redress" (Walker, 2009, p. 384).

This sense of community morality is established through the implementation of a new national narrative of the past (Miers, 2007). By encouraging communication between those who have done, allowed, or benefited from wrong and those harmed, deprived, or insulted by it, restorative justice processes perform an important educational function that is not readily apparent in either corrective justice or distributive justice (Walker, 2009). Truth commissions, for example, aim to publicly reveal the truth about past atrocities by allowing narratives of hurt and harm to be told. This hopefully provides a transformative understanding of a society's past and its future (Bassiouni, 2006).

Thus, a restorative justice approach hopes to overcome the objection of those in the community who feel disconnected from the acts of their predecessors. To paraphrase one of the theory's founders, past human rights abuses generate needs and responsibilities not only for the direct victims and offenders, but also for the larger community in which the injustice occurred (Zehr, 2002). At a minimum, exposure to past wrongs and their public condemnation may increase perceptions of the need for respect for historically subjugated minorities. Restorative justice aims to create the conditions to leverage responsibility, that is, to move people from a minimal or peripheral sense of connection and responsibility to a richer and more demanding perception of what harms the wrong does and how they might be related to it (Walker, 2009).

The process of bringing stakeholders together and encouraging dialogue serves the value of moral restoration and reconciliation well. Restorative justice not only aids the restoration of the wronged, but also the repair of damaged relationships (Leyh, 2011). It allows the state to perform state justice in response to an historical injustice or human rights abuse. Restorative

justice highly values respect, participatory democracy, healing, social support, non-domination speech, community involvement and solidarity (Braithwaite & Strang, 2001).

## **2.5. Retributive Theory and the International Criminal Law**

The retributive approach at the international level holds that the crimes falling under the jurisdiction of international courts are crimes that shock the conscience of mankind and therefore individuals who commit these crimes deserve to be punished if for no other reason than for the fact that they have committed these crimes (Findlay & Henham, 2005). The emphasis on prosecution is taken to be retributive. Retribution typically justifies prosecution and punishment based on individual culpability: a person is prosecuted and punished because he deserves it (Drumbl, 2007). Retribution requires proportionality between the gravity of the offense and the severity of sanction (Drumbl, 2007). Retribution is generally linked to criminal prosecution, but its concern with individual culpability and proportional punishment might be furthered by alternative measures (Doak, 2008).

The international criminal law in general and its sentencing practice in particular, appear to be animated by a deep retributive impulse (Henham, 2004). Retribution is acknowledged at the outset in the long list of the international criminal regime's goals (Damaska, 2008). As Allison Danner notes, retribution may be considered the dominant sentencing model in international law (Danner & Martinez, 2005). The retributive bent of international criminal sentencing is all the more remarkable because it constitutes a salient trend amidst a regime sentencing policy that has been widely criticized as incoherent (Henham, 2004). Penalties receive only glancing attention in the conventions that outline the major international crimes (Bassiouni, 2006). Judges have wide discretion in determining the length, type, and purpose of their sentencing decisions (Bassiouni, 2006). Accordingly, they have suggested a range of sentences and a range of reasons for those sentences, perhaps none of which can fully serve the multiple goals of the retribution system (Hoyle & Zedner, 2007). But most of those involve an assumption that the appropriate punishment turns on the goodness or badness of the act, not on the implications or consequences of the punishment; that is, the sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused (Barbara, 2009). This idea is largely accepted in international criminal scholarship (Barbara, 2009).

## **2.6. Restorativism and the International Criminal Law**

Restorative approach has influenced post conflict responses at the international level. Restorative justice at the international level is a set of principles, values and ideals that define a just reaction to the commission of a crime. These principles including healing and making amends; establishment of truth and reconciliation; guarantee against repetition of crime; restorative or repairing harm that may entail some form of recompense including restitution, compensation and reparation (Oduro, 2008).

The attractiveness of restorative justice theoretical framework for reparation is further enhanced by a number of international human rights instruments and documents that provide a value guide for the restorative process (Orentlicher, 1991). A significant value of it can be found in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Basic Principles of Justice, 1985). The Declaration includes articles on compassion (article 4), redress (article 5), and restoration of the environment (article 10). Furthermore, the Declaration provides for restoration of rights (article 8) and, most interestingly, article 7 refers to informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices that should be utilized where appropriate to facilitate conciliation and redress for victims (UN Basic Principles of Justice, 1985). Furthermore, the 2006 Basic Principles and Guidelines are victim-centered, where the victim's harm, suffering and needs are given central focus, the obligations of the perpetrator, and the methodology and procedure for doing justice are also prescribed. Thus, they are compatible with the conflict-centric features of restorative justice.

The pursuit of justice is expressly stated in the right to reparation section of the 2006 Basic Principles and Guidelines (Principles 15-25). The first principle in this section, Principle 15 states that adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of individual human rights or serious violations of international humanitarian law (Barbara, 2009). This principle also describes that the state must provide reparations if it is the perpetrator of the wrong.

Throughout the 2006 Basic Principles and Guidelines, the state is given a major role and responsibility in providing reparations and justice (Barbara, 2009). There is an emphasis on healing the victim. For example, Principle 10 states that victims should be treated with



humanity and respect for their safety, physical and psychological well-being and privacy, as well as those of their family. The principle continues: “The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatisation in the course of legal and administrative procedures designed to provide justice and reparation” (UN Basic Principles of Justice, 1985). The victim’s rights of access to justice, reparations and the truth are codified in Principle 12-14. These principles reinforce the victim-based perspective of the 2006 Basic Principles and Guidelines. They are also features of restorative justice, both the process and value conceptions.

Restorative justice theory is concerned with the restoration of relationships between human beings and, more specifically, with the restoration of social relationships of equality (Llewellyn, 2007). This is a most important component of restorative justice, but the healing of the victim is paramount. Often, healing of the victim and relationships are mutually dependent. Furthermore, the state becomes a significant participant in the healing process and in enshrining values, which are key components of restorative justice theory.

## **2.7. Conclusion**

Criminal justice theories have directly or indirectly informed mediation schemes, changing policies, procedural norms, sentencing schemes, and most importantly for this study the role of the victim in the criminal justice system. Although traditional theories of criminal justice system dominate criminal justice systems, more recently, restorative justice theories have also impacted criminal processes and dispute resolution.

For the purpose of this chapter it was most helpful to first look at the various theories in their purest forms so as to examine their influence on criminal justice and procedure. In turn, this influences the international level in many respects. No pure theory is heartedly accepted. This lack of acceptance of pure theories simply reflects the complex nature of crime and criminal justice. To be sure, international criminal justice system pursues a plurality of goals, including deterrence, retribution, and restoration. While clearly international criminal justice is not based on one clear philosophical justification, the various criminal law theories, both traditional and modern, have helped shape the structures employed by the system and the procedures adopted therein. This influence is apparent because the procedures of the criminal

process should arguably be determined by asking how best to serve the goals of the criminal system most efficiently.

## **CHAPTER 3: VICTIMS PARTICIPATION IN INTERNATIONAL CRIMINAL LAW PRIOR TO THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT**

### **3.1. Introduction**

The origin of modern international criminal law dates back to the military tribunals established after the World War II. The Allied Powers had the option to summarily execute their enemies but instead opted to hold trials (Minow, 1998). Thus, in many ways, the Nuremberg and Tokyo trials represent the possibility of legal responses, rather than responses grounded in sheer power politics or military aggression (Minow, 1998). Although the trials have been largely criticized for the fact that they operated without precedent; there was no separation between lawmakers, prosecutors and judges; new norms were applied that previously did not exist; they failed to examine crimes committed by the Allies; and the defense rights were limited with regard to, amongst other things, their access to documents and investigations, the trials' legacies have endured and their jurisprudence has aided in the further development of international criminal law (Minow, 1998). Indeed, the legal principles underlying the trials were developed into what became referred to as the Nuremberg Principles.

Following the military trials, the United Nations, through the ILC, sought to codify the Nuremberg Principles, proposing the creation of a permanent international court. However, the establishment of such a court would be postponed during the cold war (Willis, 1982). It would not be until almost fifty years following WWII that pursuant to its Chapter VII powers, the United Nations Security Council established the former Yugoslavia ICTY and Rwanda ICTR. In addition, the world also witnessed the creation of a new type of international court: the hybrid court. Hybrid courts combine international and national features, making them an attractive option in the fight against impunity (Bass, 2001).

All of these international criminal courts seek to hold individuals accountable for the commission of international crimes (Bass, 2001). As such, they play a crucial role in the development and enforcement of substantive international criminal law. The criminal proceedings of these courts not only underscore the importance of the rule of law but they also serve to remind states of their primary responsibility for the enforcement of such law (Zahar & Sluiter, 2008). These international institutions operate and function pursuant to their own

statutes and rules as well as international norms and general principle law. In their governing documents and jurisprudence these courts have routinely acknowledged human rights norms in criminal proceedings, with particular emphasis on the right of fair trial (Beigbeder, 2001). Though the statutory guarantees have not always translated into practical guarantees, the recognition of the liberal model, detailing the rights of accused in criminal proceedings towards a more powerful authority is significant. At the same time, however, the governing documents of many of the international criminal courts have paid little attention to the rights or interests of victims (Beigbeder, 2001). This oversight has not gone unnoticed. In fact, it has led to greater calls for victims' rights in international criminal proceedings.

This chapter explores the development of the role of the victim beginning with the military tribunals following the World War II. It explores to which extent the role of victims was considered in the provisions of the International Military Tribunals of Nuremberg and Tokyo. The chapter then examines the procedural role afforded to victims at the Ad Hoc Tribunals such as the International Tribunals for the former Yugoslavia and Rwanda. Furthermore it will look at the role of victims in the hybrid tribunals of the Special Court for Sierra Leone, the Serious Panels in East Timor, the court in Kosovo and finally the Extraordinary Chambers of the Court of Cambodia. This chapter seeks to assess whether a clear development with regard to the procedural role afforded to victims can be established and whether the approaches adopted by the various courts reflect not only advancements made in victims' rights but to what extent the unique characteristics of the courts and the contexts in which they operate were taken into account.

### **3.2. The Role of Victims in International Criminal Tribunals after the Second World War**

The Second World War resulted in the greatest loss of human life in history, with some fifty to seventy million killed and tens of millions left physically and emotionally scarred. In its aftermath international criminal justice became established at Nuremberg and Tokyo (Moffett, 2012). This is in contrast to the experience of the First World War where the international community was divided in its approach to deal with international crimes (Willis, 1982). In the aftermath of the First World War there was an impetus to prosecute Germany and the Ottoman Empire for atrocities committed during the conflict, so as to address the suffering of victims and their "cries for justice" (Meron, 1993). The subsequent national trials

in Germany and Turkey, provided victims with the right to participate as parties, and recognized the crimes committed by German and Ottoman forces, such as the organized massacres of the Armenians (Akçam, 2006).

Yet, the national courts were unwilling to prosecute those most responsible, including Kaiser Wilhelm II and the Turkish government, instead only prosecuting a handful of low-ranking subordinates (Dadrian, 1991). It was these failing that the Allies sought to remedy after the Second World War and ensure that the mistakes made in the First World War were not repeated.

The tribunals of the Second World War did experience a procedural shift from civil to common law since the trials of the First World War owing to America's influence (Garkawe, 2006). By instituting a common law adversarial trial, the Americans wanted to ensure that the defendant received a fair trial through contesting evidence with the prosecutor (Garkawe, 2006). However, in adversarial trials victims are prevented from participating as a party for fear that it would make the trial unfair for the defendant by facing two prosecuting parties, thereby undermining the equality of arms (Bassiouni, 2006). For victims, by preventing them from participating, the adversarial trial limits their voices and ability to shape justice to serve their needs. Furthermore, the adversarial trial only recognizes victims' suffering if the defendant is successfully punished. Until the conviction, they remain alleged victims (Garkawe, 2006). Consequently, the adoption of common law at Nuremberg and Tokyo stymied the role of victims to express their views in international criminal justice for sixty years until a more civil law approach to proceedings at the International Criminal Court (Garkawe, 2006).

### **3.2.1. Nuremberg Tribunal**

The European theatre witnessed some of the worst atrocities in the Second World War, most notably, the organized extermination of six million Jews and millions of other minorities. Early on in the war, the Allies (America, Britain, France and the Soviet Union) were determined to ensure that those responsible for such atrocities would be held to account but their conceptions differed on how this could be best achieved (Bass, 2001). America led the calls for an international tribunal to punish those who were the most responsible for the war. France also supported this proposal, based on the mass victimization of French citizens under Nazi occupation, as well as the desire to be considered a victor (Beigbeder, 2001). Presenting itself as a victim and victor, France sought to redefine itself from its collaboration with the

Nazis under the Vichy government (Beigbeder, 2001). Britain, on the other hand, was more cautious on relying on a court to punish those most responsible after the failure of the First World War trials (Bass, 2001). Instead, Britain believed that the summary execution of leading Nazis and the prosecution of subordinates would be more appropriate (Bass, 2001). Whilst the Soviet Union having suffered the greatest during the war, losing some twenty million civilians and eight million soldiers to Nazi forces, considered the execution of 50,000 to 100,000 German officers as the necessary satisfaction of justice (Bazyler, 2006). In the end, after intense negotiations, the American delegation succeeded in establishing an international court to adjudicate on Nazi crimes, the International Military Tribunal (IMT) based in Nuremberg was created on 18 October 1945 (Moffett, 2012).

The Allies were not only victors but also victims of Nazi aggression and atrocities, key to legitimizing their use of punishment. Throughout the negotiations and the Tribunal's proceedings, victims were often invoked to justify the use of an international court (Moffett, 2014). The Allied Prosecutors' speeches were replete with statements beseeching the judges to ensure the defendants were punished on behalf of the victims (Moffett, 2012). The French Prosecutor, De Ribes in his closing statement called upon the judges, to heed the voice of innocent blood crying for justice (Moffett, 2012). The American Chief Prosecutor, Robert Jackson, called on the Tribunal to find the defendants guilty so that, justice may be done to these individuals as to their countless victims (Moffett, 2012). The Soviet Chief Prosecutor General Rudenko implored the Tribunal that:

*“we have no right to forget the victims who have suffered. We have no right to leave unpunished those who organized and were guilty of monstrous crimes. In sacred memory of millions of innocent victims of the fascist terror. May justice be done!”* (ITM , 1946, p.193).

For victims of Nazi atrocities, the trials intended to provide a symbolic sense of justice and vindication by punishing the Nazi leadership (Karstedt, 2008). This is indicative of the rhetoric used by the prosecutors; justice for victims was simply the retributive purpose of punishing the defendants. Victims were just used to rationalize and license the punishment of defendants without obtaining more tangible forms of justice, such as reparations. Karstedt (2008) epitomizes the failing of the Nuremberg tribunal for victims as being largely a victim free trial; whilst Garkawe states that victims were given no voice (Garkawe, 2006). However, there were a number of victims that testified at Nuremberg, in addition to the Tribunal detailing and evidencing numerous types of victimization (Moffett, 2012). Rather than being

victim free or silent, due to the number of victim-witnesses, Nuremberg's shortcomings can be characterized as having insufficient concern for victims' needs and interests. This neglect subsequently affected the Tribunal's impact and legacy for victims. This is apparent by who was recognized as a victim before the Tribunal.

### **3.2.1.1. Victim Recognition at Nuremberg Tribunal**

The London Agreement and its annexed Charter, which establish the Tribunal, make no reference to victims (Bloxham, 2006). Only in the Moscow Declaration, a preparatory document of the Tribunal is there an ambiguous statement that those responsible for atrocities will be, brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged (Bloxham, 2006). Thus suggesting that those victimized or outraged should be in the best position to judge those responsible. Beyond this there is no clear stipulation of who is recognized as a victim.

Victim recognition can be instead associated through the stipulation of the three crimes under the jurisdictions of the Tribunal: crimes against peace, war crimes, and crimes against humanity (Douglas, 2001). The Tribunal, due to American dominance, focused on the crimes against peace (Douglas, 2001). The Americans deemed crimes against peace or waging an aggressive war as the principal crimes committed by the Nazis, with war crimes and crimes against humanity as only manifestations of aggression. The focus on aggression takes an international law approach rather than a criminal one by recognizing States as the primary victims and justice required between countries (Moffett, 2012). For Jackson, the prosecution of aggression meant that civilization itself was the victim of Nazism barbarism (Douglas, 2001). This understanding of victimization and morality was used to define the whole system of Nazism as barbaric. Defining the Allies as civilized also sought to legitimize the Tribunal as impartial and fair. Yet this approach marginalized the suffering of individual victims and victimized groups (Moffett, 2012).

The prosecution of crimes against humanity did recognize the individual and collective suffering of certain victims of Nazi atrocities. The inclusion of crimes against humanity at Nuremberg heralded the first time that they were prosecuted at an international court. Crimes against humanity, under Article 6(c) of the Charter, covered a wider spectrum of violence than war crimes (Moffett, 2012). War crimes only covered acts carried out during war time against enemy combatants or civilians. Whereas, crimes against humanity encompassed crimes committed before, during, and after the war, against any civilian population and

without being defined by domestic law, thereby enforcing the supremacy of international law over national sovereignty (Douglas, 2001). Despite the extensive scope of Article 6(c), the provision was severely constrained by the phrase, in execution of or in connection with any crime within the jurisdiction of the Tribunal (Moffett, 2012). In issuing its judgement the Tribunal found that this limiting language meant crimes against humanity were supplementary crimes to crimes against peace and war crimes, which did not contain such restrictive language, were therefore crimes within the Tribunal's jurisdiction (Douglas, 2001). Thus for victims of crimes against humanity, their recognition would only occur if such crimes were in execution of or in connection with crimes against peace or war crimes.

One of the major criticisms of Nuremberg was the participation of the Soviet Union at the Tribunal, which further circumscribed victim recognition. Not only did the Soviet Union suffer some of the greatest losses during the war, it has also committed some of the worst atrocities (Moffett, 2012). The Soviets invasion of Eastern Europe and Finland during the war meant that it was guilty of aggression. More worryingly, amongst other violence, the Soviet Union committed two infamous atrocities, the Katyn massacre of over twenty-thousand Polish officers in 1940, and the mass rape of German women (Gromet, 2006). At the Nuremberg Tribunal, the Soviets blamed the Katyn massacre on German forces, calling three witnesses to testify on German responsibility for the massacre (Cienciala, Lebedeva, & Materski, 2007). Although the charges of German responsibility for the Katyn massacre were dismissed, the Soviet Union's manipulation of the court to falsely implicate the defendants demonstrated the political nature of the Tribunal (Taylor, 1993). This not only undermined the defendant's right to a fair trial, but disrespected the memory of the victims by concealing the responsibility of the Soviet Union (Parfitt, 2010).

In relation to mass rape committed by Soviet forces, the legal limitations of the Charter again became apparent. The Tribunal only had jurisdiction to punish crimes committed by the European Axis, thereby excluding jurisdiction over Soviet crimes (Bazyler, 2006). The Charter was also silent on rape. Although war crimes and crimes against humanity were left open to interpretation under the phrases ill-treatment and other inhuman acts, rape never appeared on the indictment or in the judgement of the Tribunal (Askin, 1997). It is possible that rape was ignored in order to avoid the criminalization of the Soviet Union (Askin, 1997). The absence of rape in Article 6 of the Charter indicated not only an unwillingness to recognize victims of sexual violence, but also prevented access to justice for women and German victims. Furthermore, with only two out of thirty-three witnesses being women,



which intentionally or not, Nuremberg also minimized the voices of female victims (De Brouwer, 2005). The exclusion of women as drafters, judges or lawyers, perpetuated this lack of gender balance at the Tribunal (De Brouwer, 2005). Victim recognition at Nuremberg was therefore restricted by legal language and prevailing politics. The lack of consideration for victims at Nuremberg is further echoed in its lack of victim provisions (Moffett, 2012).

### **3.2.1.2. Victim Provisions at the Nuremberg Tribunal**

Provisions on victim participation, treatment, and reparations in the Nuremberg Charter are virtually absent. Victim participation at Nuremberg was severely circumscribed by the adoption of common law proceedings. Efforts by the Institute for Jewish Affairs to participate in the trial as a party, by *amicus curiae* (friend of the court), was rejected on the grounds that other victims and groups would want to participate, which threatened to render the trial unworkable and unfair (Marrus, 2006). Instead, responsibility was on the Allied prosecutors to represent victims, at least those within their own borders, and to ensure the charges against the defendants represented the crimes committed against victims (Marrus, 2006). Nevertheless, victims did participate more directly as witnesses.

Of the thirty-three prosecution witnesses before the Tribunal, fourteen were victims with three of them Jewish and only two of them women. The American and British prosecutors called nine witnesses of which only one was a victim, the French prosecutors used eleven witnesses including eight were victims, and the Soviet prosecutors called thirteen witnesses of which five were victims and three of those were Jewish (Dodd, 2000).

The imbalance in witness and victim numbers amongst the different prosecution teams was due in part to the division of prosecution. America presented evidence on Count One of the indictment (conspiracy to commit war crimes and crimes against humanity), and Britain presented evidence on Count Two (aggression) (Dodd, 2000). Most of the American and British witnesses testified on the Nazi high command and the organization of concentration camps; information that most victims would not have witnessed (Garkawe, 2006). Whereas, France and the Soviet Union presented evidence on the other two counts, war crimes and crimes against humanity, which involved more victims. The French and Soviet presentations were divided geographically (Garkawe, 2006). France presented evidence of Nazi crimes committed in the west involving victims who were subjected to forced labour, prisoners of war mistreatment, concentration camps, medical experiments, torture and the annihilation of the Jews. The Soviet Union evidenced atrocities committed in the east, such as the execution

of civilians, torture, prisoners of war mistreatment, and the Nazis brutal degradation and butchery of the Jews in the ghettos and concentration camps (Garkawe, 2006).

Victim-witnesses at Nuremberg testified on their own personal suffering, their identification of the defendants at the scenes of atrocities, and on the suffering of others in camps, prisons, and ghettos (Shmaglevskaya, 1946). Although victim-witnesses mentioned their own suffering, their testimony focused on atrocities that they witnessed, motivated by the need to tell the world what happened for those who were unable to do so (Levi, 1989).

Despite allowing some victims to tell their story, the number of victim-witnesses called by the prosecution was diminutive considering the tens of millions of victims and limited victims' voices. Many of the victim-witnesses were chosen to testify due to their experience of numerous types of victimization and at multiple sites, so as to expedite proceedings (Moffett, 2012). Such few victim-witnesses were a result of prosecutorial strategy of relying on documentary evidence in order to ensure the impartiality and credibility of the trial (Salter, 2007). The Nazis had left detailed volumes of evidence of their crimes negating the need for victims to identify the defendants or to testify on their crimes. There were also issues as to the credibility of witnesses, as shown by the use of three Soviet witnesses who falsely testified on German perpetration of the Katyn massacre, though none of them were victims (Dodd, 2000). Although allowing every victim to testify before the Tribunal would be impossible, a greater number of victims could have participated to inform the world of the extent of suffering they endured (Moffett, 2012).

The victim-witnesses called by the Nuremberg Tribunal were unrepresentative of all victims' suffering during the war. Many testified on the suffering of nationals from prosecutors' countries rather than specific groups (Moffett, 2012). The millions of victims who were targeted for extermination by the Nazis for belonging to religious, political, and ethnic groups, or sexual orientation; such as Jehovah witnesses, those with disabilities or mental-illness, Freemasons, Roma, and homosexuals were absent (Moffett, 2012). Their suffering was substantiated by documentary evidence or other witnesses, but none of these victims were allowed to testify so as to tell the world of their subjective and group suffering.

### **3.2.2. The Role of Victims in the Tokyo Tribunal**

Following Nuremberg's lead, the Tokyo Tribunal also known as the International Military Tribunal for the Far East (IMTFE) was established in Tokyo on 5 May 1946 to judge Japanese forces who committed mass atrocities against tens of millions of victims (Moffett,

2012). In one of the worst instances in the Chinese city of Nanking over 350,000 civilians were executed, buried alive, used as bayonet practice, and tens of thousands more raped or tortured by Japanese forces, leading it to be named the Rape of Nanking (Chang, 1997). Moreover, many women in occupied Japanese countries were forced into prostitution. The so-called comfort women were used to satisfy the needs of the Japanese army, thereby institutionalizing sexual slavery and rape (Nearey, 2001). Captured Allied prisoners also suffered horrendously at the hands of Japanese forces. Many prisoners were used as forced labour, tortured, subjected to long marches through the jungle, such as the Bataan Death March, experimented upon, vivisection, starved, and in some cases were victims of Japanese cannibalism (Moffett, 2012). These atrocities clearly provided a strong motivation for justice and punishment of those responsible.

The design of the Tokyo Tribunal was predominantly a replication of the Nuremberg Tribunal which had begun only a few months beforehand (Piccagallo, 1979). However, the Tokyo Tribunal involved a greater participation of countries affected by Japanese atrocities. Unlike Nuremberg in which four countries participated, Tokyo comprised of eleven nations who had been victimized by Japan's aggression and atrocities (Totani, 2009). Ostensibly, the Tribunal represented more of a victims' tribunal against their common victimizer than a victor's tribunal over the vanquished at Nuremberg (Totani, 2009). Yet, for a number reasons the Tribunal failed to deliver justice to victims.

### **3.2.2.1. Victim Recognition at the Tokyo Tribunal**

The Tokyo Charter makes no reference to victims. The Potsdam Declaration, which paved the way for the Tokyo Tribunal, only refers to the treatment of Allied prisoners as victims (Minear, 1972). The accusation on the other hand, against the twenty-eight defendants covered fifty-five counts and explicitly affirmed the widespread nature of Japanese crimes before the Tribunal (Piccagallo, 1979). The first thirty-six counts were on crimes against peace for the aggressive war that Japan waged in the Pacific. The next sixteen counts were on murders linked to the crimes against peace charges. The final three counts involved war crimes and crimes against humanity (Moffett, 2012).

As the indictment indicates, the Tokyo Tribunal focused on those most responsible for waging an aggressive war, the so-called Class A war criminals (Minear, 1972). This attention on crimes against peace by the prosecution, as in Nuremberg, limited the recognition of victims before the Tribunal. War crimes and crimes against humanity, Class B and C crimes,

were to be dealt with more by national prosecutions (Piccagallo, 1979). Their subsidiary nature seems almost as an afterthought by the Tribunal, due to the difficulties in evidencing the defendants' responsibility for war crimes and crimes against humanity as the Japanese government and armed forces had destroyed most of the documentary evidence in the closing weeks of the war (Boister & Cryer, 2008). As in Nuremberg, in execution of or in connection with any crime within the jurisdiction of the Tribunal placed crimes against humanity as ancillary crimes to the main crimes of the Tribunal which are crimes against peace and war crimes (Moffett, 2012).

Placing murder as a separate category in order to evidence crimes against peace proved problematic. The murder charges involved war crimes and crimes against humanity but were used to evidence the overarching plan of the defendants to wage an aggressive war (Moffett, 2012). If the defendants could have argued that their actions were justified and the war was legitimate, the murder counts would have ceased to be relevant due to their connection to the crimes against peace charges (Futamura, 2008). Additionally, the IMTFE's concentration on the crimes against peace meant that states were considered the primary victims rather than individuals or groups (Moffett, 2012). Therefore limiting the number of victims recognized before the Tribunal from the outset (Futamura, 2008).

Victim recognition was restricted by the crimes being prosecuted before the Tribunal. The majority judgement acknowledged the ill-treatment, pillage, forced labour, arson, torture, murder, mutilation, cannibalism, vivisections, medical experimentation and mass executions committed by Japanese forces (Totani, 2009). However, the extent of these crimes in providing recognition to victims was unrepresentative of victims' suffering in Asia and the Pacific. The largest group of victims recognized by the majority judgement were Allied prisoners and civilians, especially Allied victims of the eleven nations which were prosecuting and presiding over the Tribunal (Moffett, 2012). This fulfilled the mandate of the Tribunal as set out by the Potsdam Declaration, which focused on the victimization of Allied prisoners (Piccagallo, 1979). Moreover, the prosecutorial approach of using selected representative groups of victims and atrocities, such as the Rape of Nanking or the Bataan Death March, as examples of a common plan of Japanese atrocities, marginalized the recognition of other victims (Totani, 2009).

While the Tokyo Tribunal recognized rape as an international crime for the first time in international criminal justice, certain victims of sexual violence were neglected by the Tribunal. The Tribunal sent out a mixed message on the extent and responsibility of Japanese

forces for sexual violence (Doak, 2008). The judgement did not hold the defendants responsible for the widespread and organized use of women for sexual slavery across Asia, and is considered as one of the major historical shortcomings of the Tribunal (Totani, 2009). The Tribunal's recognition of sexual violence committed by Japanese forces was thus unclear and unrepresentative of numerous victims. Similar to Nuremberg, this could have been the result of the absence of a balanced representation of women at the Tribunal as both judges and lawyers (Futamura, 2008).

Millions of Asian victims were overlooked at Tokyo. For example, Asian countries who participated at the Tribunal disregarded certain victims in their own country, such as Chinese communist victims who were overlooked by the Chinese nationalist prosecutor (Boister & Cryer, 2008). Other Asians were excluded for their involvement in the war, such as the Japanese colonies of Korea and Taiwan (Boister & Cryer, 2008).

Victim recognition at Tokyo Tribunal was insufficient. This was the result of the political nature of justice at the Tribunal which stemmed from America's dominance, led by Chief Prosecutor Joseph Keenan, who focused on aggression and the war in the Pacific rather than atrocities committed by Japanese forces in the whole of Asia (Moffett, 2012). Certain crimes and victims were entirely excluded from the Tribunal, such as Japanese victims of Allied crimes (Moffett, 2012). Whereas other crimes, such as sexual slavery, were evidenced but the recognition of victims was not part of the final judgement or convictions (Moffett, 2012). The lack of consideration for victims is also apparent in the absence of the Tribunal's provisions on victims.

### **3.2.2.2. Victim Provisions at Tokyo Tribunal**

The Tokyo Charter is silent on victim provisions. The Tokyo Tribunal, as in Nuremberg, ignored the rights of victims (Boister & Cryer, 2008). Yet, the Tribunal gave the impression that it was a victims' court. Keenan, the chief Prosecutor of the Tokyo Tribunal, did invoke the suffering of victims as the justification of the Tribunal's purpose of prevention or deterrence of future aggression (Totani, 2009). Additionally, the prosecutors and judges from the different victim nations were supposed to represent the victims in their own countries.

But victims that were involved in the Tribunal were only the few who testified as witnesses. Unlike Nuremberg, the Tokyo Tribunal was reliant on witness testimony due to the destruction of the majority of documentary evidence (Boister & Cryer, 2008). In all 419 witnesses orally testified at the Tribunal, of which 102 were for the prosecution. The small

number of victim-witnesses was due to two main reasons (Boister & Cryer, 2008). First, the focus on crimes against peace meant that only a few victim-witnesses were called to testify on atrocities. Second, there were problems in translating proceedings into Japanese and Japanese into English as well as other participants' languages, which slowed the proceedings of the trial (Piccagallo, 1979). Consequently, the Tribunal moved towards more written evidence with witness testimony to be provided through affidavits in order to expedite the trial (Piccagallo, 1979).

Furthermore, the Tokyo Tribunal did not offer any reparations to victims. Although the Potsdam declaration referred to the exaction of just reparations in kind the issue was never raised at the Tribunal (Askin, 1997). For many victims of Japanese atrocities they have struggled for decades for reparations. Japan has tentatively apologized, but remains unwilling to compensate the hundreds of thousands of victims who have suffered physical, economic, social and psychological harm as a result of Japanese sexual slavery (Nearey, 2001). Japan has been more willing to pay military pensions to perpetrators than to pay reparations to victims. For victims this has counteracted the positive outcome and impact of the Tribunal (De Brouwer, 2005).

### **3.3. The Ad Hoc Tribunals**

It was not until the end of the cold war that international criminal justice arose again as the answer to international crimes. In response to widespread violence against civilians in the former Yugoslavia, in 1993 the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (Yael, 2009). The Tribunal's purpose was to prosecute of persons responsible for serious violations of international humanitarian law in the hope of bringing them to justice in order to contribute to reconciliation and the restoration of peace in the region (Beigbeder, 2001). In the following year, the genocide in Rwanda again prompted the United Nation Security council to create the ICTR to investigate and prosecute those responsible for international crimes being committed in Rwanda. The purpose of the ICTR was to end the cycle of impunity by prosecuting those responsible with the hope that it would promote reconciliation, and the restoration and maintenance of peace (Fattah & Parmentier, 2001).

### **3.3.1. The Development of the Role of Victims and their Influence on the Drafting of the Ad Hoc Tribunals.**

In the interim between the Second World War and the ad hoc Tribunals in the 1990s, there had been greater attention to the needs of victims and their role in criminal proceedings through the evolution of victimology discipline, international law, and human rights law (Bassiouni, 2006). Victimology has developed from the categorization victimization to the understanding that victims need to be able to participate, as well as seek protection and support within criminal justice system (Fattah & Parmentier, 2001). Since the 1970s victim groups in numerous states have advocated for criminal justice systems to be more victim-friendly through the introduction of new procedures, standards and rights (Bassiouni, 2006). The culmination of this advocacy was the adoption of the Victims' Declaration that recognized victims' need in justice (Bachrach, 2000).

The Victims' Declaration defines victims as person who individually or collectively suffers harm as a result of crimes, and includes indirect victims, such as family members (Principle I and II of Victims' Declaration). Principle 6 of the Declaration stipulates that judicial mechanisms should be responsive to victims' needs and interests.

International law and human rights law have also advanced the protection of individual and group rights through numerous conventions, such as the 1948 United Nations convention on Genocide, the 1948 Universal Declaration of Human Rights, the four Geneva Conventions of 1949 and the 1977 Additional Protocols I and II to the Geneva Conventions, the 1950 European convention of Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1969 American Convention on Human Rights, the 1981 African Charter on Human and Peoples' Rights, the 1984 United Nations Convention against Torture, and the 1989 United Nations Convention on the Rights of the Child (Moffett, 2012). Human right law established after the Second World War also affirms each individual's inherent human dignity, autonomy, freedoms, and rights that impose obligations on states, to ensure a remedy to victims' harm (Doak, 2008)

In light of these developments, a number of states supported the inclusion of victim articles during drafting of the ICTY Statute. The Islamic delegation strongly advocated victims' rights based on their domestic practices and international human rights law (Moffett, 2012).

The delegation suggested that victims should have access to protection measures, which were in part incorporated under article 22 of the Statute (Moffett, 2012). Furthermore, they recognized that victims should be compensated by governments. However, this was excluded from the final draft of the Statute. The French delegation also supported victims' rights on the basis of human rights law, as well as recognizing their importance in ensuring the long term effectiveness and credibility of the ICTY, so as to avoid the tribunal being purely symbolic (Arbour, 2001). The delegation proposed closed hearing to protect victims, although they were opposed to reparations on the grounds that they would make the Tribunal ineffective by flooding it with claims, finding that it should instead be provided through national courts (Chung, 2009). It was this proposal on reparations that was incorporated into the ICTY Rules of Procedure and Evidence (Baumgartner, 2008). Although the drafting of the Statute included a number of states, from common, civil, and Islamic law jurisdictions, it was mainly influenced by the proposals of the United States, due to its position on the United Nations Security Council (De Hemptinne & Rindi, 2006).

Nonetheless, the resulting ICTY Statute included a number of articles for victims incorporating some procedural rights, such as protection and support under Article 22 and restitution in Article 24(3). As the Statute of the ICTR was a "boiler plate" copy of the ICTY, many of the articles are nearly identical in both Tribunals (Drumbl, 2007). For the first time international criminal justice, victims are mentioned throughout the governing Statute and in the Rules of Procedure and Evidence (RPE) (ICTY Statute, 1993). The ad hoc Tribunals also established a victims and witnesses section to provide support and protection to victims (Cassese, Gaeta, & Jones, 2002). The ICTY and ICTR Statutes therefore signified the incorporation of victims in international criminal justice, but not necessary justice for victims, as can be seen from the degree to which they were granted formal recognition (Drumbl, 2007).

### **3.3.2. Victim Recognition at Ad Hoc Tribunals**

Victims are defined under common Rule 2(A) of both Tribunals as a "person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed (RPE of the ICTY and ICTR). The use of the word "allegedly" reinforces an adversarial trial position, as individuals are only recognized as victims once the accused has been successfully convicted. This contrary to the United Nations Victims Declaration, where a victim is recognised



regardless if their perpetrator is identified, apprehended, prosecuted or convicted (Bloxham, 2006). Additionally, the ad hoc tribunals definition of a victim only recognizes direct and individual victims by use of the language of committed against and person. This definition narrowly recognizes the suffering caused by international crimes, which also causes indirect and collective harm (Bloxham, 2006).

The ad hoc Tribunals have a wider jurisdiction over crimes than Nuremberg and Tokyo owing to legal developments in the interim. This provides a greater recognition of victims' suffering (Talbee, 2000). The most notable is that crimes against humanity no longer need to be connected to an internal or international armed conflict, thereby going beyond the Second World War Tribunals (Talbee, 2000). Furthermore, the section of perpetrators and charges are also important in recognizing victims. A victim oriented approach, which is consistent with the critical victimology of recognising those who suffer as a result of a crime, would as far as possible provide a representative picture of their suffering in the perpetrators and crimes charges (Bloxham, 2006).

On the other hand, the ICTY Prosecutors have taken different approaches. For example, in the Milosevic case, the Prosecutor believed that despite the length of the case she had a duty to victims to ensure that they are representatively recognised by the charges brought against the defendant (Groenhuijsen & Pemberton, 2011). The prosecution tried to ensure a representative picture of victimization caused by Milosevic was evidence in the charges brought against the defendant (Groenhuijsen & Pemberton, 2011). The prosecution tried to ensure a representative picture of victimization caused by Milosevic was evidenced in the charges by including victims in Bosnia, Croatia, and Kosovo, so called just representation (Moffett, 2014).

However, the defendant died after four years of proceedings and without a judgment. The death of Milosevic left his victims with "little justice", by preventing them from being recognized, and the defendant being held responsible for his crimes (Kiza, Rathgeber, & Rohne, 2006). Conversely, in some cases regarding sexual crimes, the prosecution neglected its duty to represent victims, with charges being reduced in order to expedite the trial. For instance, in the case of Milan and Sredoje Luric, charges of rape and sexual violence were dropped from the indictment so as to speed up the trial to the anger of many victims (Kiza, Rathgeber, & Rohne, 2006) . Additionally, in certain cases, charges of genocide were

discontinued due to a plea bargain, or not appealed owing to the discretion of the Prosecutor, despite the facts indicating that the defendants were involved in committing or aiding genocide (Barbara, 2009).

### **3.3.3. Procedural Justice for Victims at Ad Hoc Tribunals**

The ad hoc Tribunals' Statutes and Rules outline victim provisions on participation, treatment, protection and support. As such, the Tribunals recognised some victims' procedural rights. However, their practice has not been victim oriented as victims have neither been treated with respect nor have their interest been fairly balanced with those of other parties (Gallon, 2008).

#### **- *Victim Participation at Ad Hoc Tribunals***

There are four ways victims can participate before the ICTY and the ICTR: amicus curiae; writing a letter to the Prosecutor; victim impact statement; and testifying as witnesses (Findlay, 2009). With regards to the first of these participation measures, under the Rule 74 of RPE of both Tribunals, any state, organization, or person can make amicus curiae application to the chamber to aid in the proper determination of the case. A Chamber decides which submissions are relevant, leaving some victims with no right to participate. As victims are unlikely to have the resources, expertise and information required to submit an application, only a few amici were submitted on their behalf by NGOs and academics (Keller, 2007).

Victims can also contact the Prosecutor directly through correspondence, yet like amicus curiae they require the resources, expertise, and information to advocate effectively their interests. NGOs, especially the Coalition for Women's human Rights in Conflict Situations, played a vital role in filling this gap (Baumgartner, 2008). However, the impact of victims' correspondence on the Prosecutor's discretion is questionable.

The third way victims can participate is through submitting written impact statements on how the crime affected them to a Chamber when it is determining the defendant's sentence (Duttwiler, 2006). Victim impact statements are derived from the practice of common law countries, which permit victims to express their views and influence the severity of

sentencing. These statements are under the discretion of the Chamber to consider such information, leaving victims without any guaranteed access to have their voices heard by the tribunal (Duttwiler, 2006).

In light of the limitations of the preceding participation modalities, victims mostly appear before the ad hoc tribunals as witnesses. Unlike Nuremberg's vast documentary evidence, the ICTY and ICTR rely heavily on witnesses, especially victim-witnesses, to testify on crimes. Over 4,500 witnesses testified at the ICTY and over 3,000 at the ICTR (Karstedt, 2009). This is in comparison to 94 witnesses the Nuremberg and 419 to Tokyo. For many witnesses, testifying at the Tribunals is a positive experience (Buss, 2009). Many of them considered testifying as their moral duty by speaking on behalf of those who died, which provided them with some closure and satisfaction. The ICTY claimed that it had given a voice to victims by enabling them to be heard and to speak about their suffering through testifying (Buss, 2009).

However, for some victims and witnesses, testifying before the Tribunal can be discouraging due to narrow focus of proceedings. As in domestic criminal proceedings, the Tribunal confine victim-witnesses testimony to issues that are relevant to the case and charges at hand, rather than permitting them to tell their story in narrative form (Damaska, 2008). A number of victims have also had a negative and traumatising experience in testifying before the Tribunals due to inadequate protection and treatment measures (Damaska, 2008).

### **3.4. Hybrid Courts**

Following the establishment of the Ad Hoc Tribunals, there was a proliferation of internationalized criminal jurisdictions that became precursors to be the International Criminal Court. Established through a variety of ways such as through the United Nations Secretariat or through treaty provisions, these new jurisdictions are commonly referred to as hybrid courts because they combine international and national elements, such as specific domestic laws and staff with international laws and staff (Cerone & Baldwin, 2004). The taxonomy of a court as hybrid may depend on a variety of criteria. The criteria range from the court's legal basis, its location within or outside of a domestic Court system, its subject matter jurisdiction and the composition of the court's personnel (Cerone & Baldwin, 2004). The allure of hybrid Courts has even continued after the establishment of the ICC. The hybrid tribunals discussed in this section include the Special Court for Sierra Leone (SCSL), the

Serious Panels in East Timor (SPET), the Special Tribunal for Lebanon (STL) and finally the Extraordinary Chambers of the Court of Cambodia (ECCC) (Bazyler, 2006). All these Courts approached victim participation in unique ways taking into account their specific characteristics.

### **3.4.1. Special Court for Sierra Leone**

Established in early 2002 to prosecute those believed to be the most responsible for crimes committed during the 10 years conflict in Sierra Leone in the 1990s, the SCSL was the first hybrid court established after the creation of the Ad Hoc Tribunals (Mochochoko & Tortora, 2004). The conflict in Sierra Leone was exceptionally violent, leaving the country devastated and its domestic justice system ill equipped to investigate and prosecute individuals accused of serious human rights and humanitarian law violation (Leyh, 2011).

The SCSL has a procedural framework similar to that of the Ad Hoc Tribunals and adopted the advanced provisions on the protection of victims and witnesses from the ICTR Rules (Friman, 2009). Therefore, like the Ad Hoc Tribunals, victims do not have the right to participate as victims as such. Instead, they may only actively participate as witnesses called by the parties or the Judge or have impact statements submitted on their behalf by the prosecutor (Leyh, 2011). Moreover, issues of victims' compensation and reparation have been left to domestic courts despite the fact that within proceedings a criminal court can order compensation awards on applications by the prosecutor on behalf of victims (Friman, 2009).

While not having the opportunity to share their victim narrative at the court, victims did have the opportunity to do so through a non-judicial, post conflict mechanism (Miers, 2009). At the same time the Court was created, so too was a national truth and reconciliation commission. The SCSL and that country's truth and reconciliation commission illustrate a successful combination of two independent institution performing complementary roles (Cockayne, 2005). Despite some of their goals overlapping, such as examining the responsibility of groups, their primary goals were distinct. The criminal court was designed to prosecute individuals alleged to have committed serious crimes (Romano, Nollkaemper, & Kleffner, 2004). In contrast, the Sierra Leone Truth and Reconciliation Commission (SLTRC) was established to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict in 1991 to the signing of the Lome Peace

Agreement, to address impunity, to respond to the needs of victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered (Sierra Leone Truth and Reconciliation Commission Act 2000, Section 6(1)).

Operating parallel to one another, the two institutions primarily functioned at the same time with a slight overlap in jurisdiction (Schabas, 2004). Nevertheless, the SLTRC was able to investigate a number of issues that the SCSL could not, such the events that occurred prior to the conflict as well as the role of external actors (Stanley, 2009). And although the two institutions showed feasibility of simultaneous operations of a court and a Truth and Reconciliation Commission (TRC), tension did exist. The major concern centered on whether the two institutions should have an agreement detailing their relationship and whether they would share information (Bassiouni, 2003). Essentially, the two institutions agreed not to share information or sign agreements with each other, creating a cordial, albeit ill-defined relationship (Schabas, 2004). Moreover, the two institutions suffered from competition for resources, in terms of both monetary contributions and trained personnel (Schabas, 2004b). Nevertheless, victims, while unable to participate in their own right before the court, were encouraged to share their experiences in narrative form with the truth commission.

### **3.4.2. East Timor: Special Panels for Serious Crimes**

In 1999 after East Timorese voted for their independence from Indonesia, the Indonesian National Army and a number of Timorese militias violently attacked the people of East Timor. The attacks destroyed most of the East Timor's infrastructure, killing thousands and displacing an estimated 500,000 civilians (Bassiouni, 2003). Following the violence, the United Nations Security Council created the United Nations Transitional Administration in East Timor (UNTAET) which was responsible for stabilizing the region and the administration of justice (Megret, 2009).

Despite the fact that the violence destroyed almost all of the courts and prisons located in East Timor and many of the qualified legal professionals fled, UNTAET established a Court in the town of Dili to try those suspected of committing crimes associated with the conflict (Leyh, 2011). The Courts were referred to as the Special Panels for Serious Crimes (SPSC) (Leyh, 2011). UNTAET's decision to establish these courts was based, in part, on the fact that Indonesia opposed an international court (Megret, 2009). Given the complete lack of domestic infrastructure, a hybrid court became a favourable alternative. The SPSC in Dili

were the first specially constructed internationalized Courts which have tried serious crimes within a local justice system (De Bertodane, 2006). The applicable procedural law for the SPSC came from UNTAET Regulation 2000/30, and resembled civil law practice with recourse to an investigating Judge. At the same time, however, many of the procedural provisions are similar to those found in the Rome Statute, reflecting both adversarial and inquisitorial elements (Romano, Nollkaemper, & Kleffner, 2004).

Although commentators have taken exception to the Court given its many institutional flaws, with respect to victims, on paper the SPSC in East Timor employed a sophisticated approach echoing many international development and domestic practice (Othman, 2001). A victim was defined as:

*A person who, individually or as a part of collective, has suffered damage, including physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights through acts or omissions in violation of criminal law. By way of illustration and not limitation, a victim may be the spouse, partner or immediate family member of a deceased person whose death was caused by criminal conduct; a shareholder of a corporation with respect to criminal fraud by the administrators of officers of the corporation; or an organization or institution directly affected by a criminal act (UNTAET Reg.2000/30, 2000).*

Moreover, Section 12.2 of UNTAET Regulation 2000/30 states that the status of a person, organization or institution as victim is not related to whether the perpetrator is identified, apprehended, prosecuted or convicted (Leyh, 2011). Nevertheless, the Regulation time and again refers to the victim as an alleged victim (UNTAET Reg.2000/30, 2000). In accordance with the Regulations, the Court must take appropriate measures to ensure victim safety, physical and psychological well-being, dignity, and privacy, and the prosecutor is required to respect the interests and personal circumstance of victims and witnesses when ensuring the effective investigation and prosecution of crimes (UNTAET Reg.2000/30, 2000).

The SPSC provided to victims active participatory rights in the criminal proceedings beyond the victim-witness model (Leyh, 2011). During the pre-trial stages, victims were entitled to request the prosecutor to conduct specific investigations (Section 12 of UNTAET Reg.2000/30, 2000). However, the prosecutors had full discretion to either act upon or reject such request. Victims also had the right to be heard at a review hearing before the

investigating Judge and at any hearing on an application for conditional release (Leyh, 2011). Victims could be represented in Court by legal counsel. They had the right to notification of hearings and progress of the case, and could request the court to be heard at stages of the criminal proceedings other than review hearings (Section 12 of UNTAET Reg.2000/30, 2000). Furthermore, they were able to request a review of the prosecutor's decision not to go forward with a prosecution (Section 25 of UNTAET Reg.2000/30, 2000). Again, however, the General Prosecutor maintained the discretion to confirm the dismissal or to continue with an investigation (Section 25.2 of UNTAET Reg.2000/30, 2000).

Although the SPSC's code of criminal procedure did not afford victims an absolute right to participate at trial UNTAE regulations permitted the Court to allow for participation when appropriate (Stanley, 2009). In this regard, victims had the right to request the Court to be heard at any stage of the criminal process other than in review hearings (Section 12.5 of UNTAET Reg.2000/30, 2000). In addition, to acting as victim-participants victims could testify as witnesses if called by the parties or judges. When appropriate, the Court would protect the identities of victims and took note of the fact that just because some witnesses were uneducated and could not fully understand questions posed to them, this would not invalidate their testimony (Linton, 2001). Nevertheless, it does not appear that any lawyers representing victims took part in proceedings. Therefore, victim participation was mainly in the form of acting as witnesses.

### **3.4.3. War Crimes Court in Kosovo**

In the aftermath of a Serb-led attack on Kosovar Albanians in 1998-1999 approximately 10,000 individuals were killed and approximately one million displaced (Bassiouni, 2003). Following the end of hostilities, the UN stepped in to govern the turbulent region through the United Nations Interim Administration Mission in Kosovo (UNMIK) (Pigou, 2005). Deriving its authority from the Security Council's Chapter VII powers, UNMIK maintained a broad mandate, including re-establishment the rule of law. Accordingly, UNMIK established a Kosovo court system, which included the maintenance of civil law and other and the protection and promotion of human rights (UN Doc. S/Res/1244, 1999). Foremost among one of UNMIK's tasks included the apprehension and prosecution of those believed responsible for the commission of war crimes (Betts, Carlson, & Gisvold, 2001). Administered through the Special Representative of the Secretary General, UNMIK Regulations became the governing law in Kosovo (UN Doc. S/1999/779, 1999).

UNMIK soon realized, however, that the number of available local judges or lawyers decreased substantially because Serbian judges and lawyers had fled or refused to take part and many of the non-Serbians lacked the required experience given the fact that ethnic Albanians had, for years, been barred from the judiciary (Strohmeier, 2001). Added to this predicament was the fact that many of the Albanian judges did not have the required independence and impartiality to oversee trials, particularly those trials concerned with the war crimes (Del Ponte, 1999). As a result, UNMIK appointed international judges to work together with domestic judges and international prosecutor to work alongside domestic lawyers.

Within the Kosovo court system victims have extensive participatory rights, similar to those provided for under domestic proceedings found in many civil law systems. In this sense, in addition to submitting complaints and acting as witnesses, victims are free to act as civil parties, subsidiary prosecutors, or private prosecutors (Colquitt, 2001). The term “injured party” refers to a person whose personal or property rights were violated or endangered by a criminal offense (Romano, Nollkaemper, & Kleffner, 2004). Thus, the property rights of victim are emphasized. In cases of serious crimes, victims, therefore, can be viewed as parties to the proceedings whether acting as an injured party or as a subsidiary prosecutor.

Article 78 of the Criminal Procedure Code (Kosovo CPC) explicitly provides that the competent authority conducting the criminal proceedings shall at all stages of the proceedings consider the reasonable needs of the injured parties, especially of children, elderly persons, persons with a mental disorder or disability, physically ill persons and victims of sexual or gender related violence (CPC, 1999). Interestingly, it appears that the Kosovo CPC favours victims representing themselves but the legal representation is also permitted (CPC Article 79, 1999). If represented by legal counsel, the authorized representative has a duty to safeguard the rights of the victim and especially to protect his or her integrity during proceedings and to file property claims (CPC Article 81(3), 1999). Victim Advocates working within the Victim Advocacy Unit are meant to be available to assist victims and, where appropriate, represent them (CPC Article 81(4), 1999).

The injured party may call attention to all facts and to propose evidence which has a bearing on establishing the criminal offense or on establishing his or her property claims (CPC Article 80, 1999). Therefore, victims may participate on issues of guilt as well as their property claim (Leyh, 2011). In addition, injured parties may file civil claim outside of the criminal process. During the investigation the injury party may apply to the public prosecutor



to collect certain evidence. If the public prosecutor rejects the application to collect evidence, the injured party may appeal such decision to the pre-trial judge (CPC Article 239, 1999). At trial, the injured party may propose evidence, put questions to the defendant and the witnesses, and make oral remarks and written submissions (CPC Article 80(3), 1999). Moreover, victims have the right to access the case file and all objects that will serve as evidence, and importantly shall be informed of all of their rights existing under the Code (CPC Article 80(4), 1999).

From available records it appears that the number of victims participating as injured parties in war crimes or related cases is relatively low. However, as victim-witness protection improves and as victims groups become more organized a larger number of victims are beginning to act as injured parties. The Humanitarian Law Center, a human rights organization based in Belgrade and Kosovo, has played an important role in trial monitoring and the filing of victim complaints and victim compensation lawsuits (Humanitarian Law Center Annual Report, 2008). According to their most recent Annual Report from 2008, injured parties have played an important role in a number of war crimes and related cases (Humanitarian Law Center Annual Report, 2008). But calls for greater protection and access to justice remain.

#### **3.4.4. The Extraordinary Chambers in the Courts of Cambodia**

In the wake of the wide spread atrocities committed by the Khmer Rouge regime from 1975-79, victims in Cambodia demanded justice. Out of a population of 7 million, scholars estimate that from 1.1 to 2.1 million people died from torture, summary executions, forced labour, starvation or illness (Wemmers, 2009). However, it was not until more than 25 years later that the Extraordinary Chamber in the Courts of Cambodia (ECCC), an in-country hybrid court, was jointly established by the Royal Government of Cambodia and the United Nations not only to prosecute senior leaders and those most responsible for the atrocities, but also to support the reconciliation process (Kirchenbauer, Balthazard, & Vinck, 2013).

Although a hybrid-court with integrated international staff and mandates, the ECCC is part of the Cambodian Court system. It uses Cambodian criminal laws and procedure, which are derived from the French civil law tradition, but also incorporates and is supplemented by international law (Werner & Rudy, 2010). In accordance with the civil law tradition, the court allows for the participation of victims in the court proceedings as civil parties.

The ECCC allows victims to participate in its proceedings as civil parties or complainants. As such, victim participation at the ECCC provides a unique opportunity to initiate a more

victim-oriented process of justice in Cambodia, which, concurrently, is a means of combining traditional retributive justice with elements of restorative justice (Evans, 2011). Civil parties share many of the same procedural rights afforded to the prosecution and the defence. They are also entitled to legal representation and may seek moral and collective reparations (Kelsall, 2009). Pursuant to the ECCC Internal Rules, their role is to participate by supporting the prosecution (Kirchenbauer, Balthazard, & Vinck, 2013). In addition to the possibility of becoming civil parties, victims may participate in the proceedings by becoming complainants. In this role a victim submits, to the Co-Prosecutors, information related to the crimes within the jurisdiction of the court, and which have bearing on the case (Kelsall, 2009). They may be called as a witness to the court, but are not a party to the proceedings or eligible to seek reparations.

Despite victim involvement being one of the most important features of the Court, questions about the inclusion of victims were some of the last issue addressed by the Judicial Officers when drafting the Internal Rules and almost no mention was made of victims in the ECCC law (Acquaviva, 2008). This prior omission, particularly with regard to civil party participation and claims for reparation, may have to do with the fact that domestic Cambodian law provide for participation, either as an initiator of complaint, a witness for the Court or as civil party (Kelsall, 2009).

As with domestic procedures, the Internal Rules of the ECCC allow victims to participate in one of three ways: as a complainant, a civil party or as a witness. Each of these roles offers varying degrees of opportunities to assist the Court (Acquaviva, 2008). However, the drafters of the Internal Rules sought to create a workable approach to victim participation for mass crimes, thereby departing from domestic practice when deemed necessary to ensure the efficiency of proceedings and preserve the right to a fair trial (Acquaviva, 2008). By and large, this workable approach required that the rights of victims be limited or curtailed.

- *Victim Complainant*

The Internal Rules define victim as referring to a natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the Court (ECCC Internal Rules, 2004). Victims, like other individuals, may file complaints with the Court so that the co-prosecutors can made aware of particular crimes. In practice this means that the victims check a box on an application form, detailing their complaints and prompting the co-prosecutors to be informed about alleged offenses. The complaints do not require specificity but may contain general statements such as a massacre happened in my village;

the Court should come look here (Bair, 2009). If the co-prosecutors find the complaint useful they may seek further information and may seek to have the complainant act as a witness. Unlike in Cambodian domestic proceedings, if the co-prosecutors choose to not to take action regarding a complaint, victim-complainants are in no position to initiate prosecutions or force the co-prosecutors or Co-Investigating Judges to undertake an investigation (Bair, 2009).

- ***Civil Party***

In addition to acting as complainants, victims may constitute themselves as civil parties in the criminal case if their harm suffered is a direct result of one of the crimes found by the Court (Aldana-Pindel, 2004). A civil party is therefore defined as a victim whose application to be become a civil party has been declared admissible by the Court (Aldana-Pindell, 2002). Victims wishing to participate as civil parties must apply for, and be granted, civil party status. As with domestic practice, becoming a civil party allows victims to participate throughout the criminal process and attach a claim for reparation. Again, however, the Court shaped civil party participation to fit the specific needs of the Court and civil party participation differs in practice from that at the domestic level (Barbara, 2009).

Importantly, Rule 23(1) of the Internal Rules states that the purpose of the civil party action is to participate in the proceedings against those responsible by supporting the prosecution and to allow victims to seek moral and collective reparations. The wording of this provision is interesting (Ciorciari & Heindel, 2009). First, it presupposes the guilt of the accused by failing to include the word allegedly before responsible (Ciorciari & Heindel, 2009). Second, the phrase by supporting the prosecution has a number of important consequences. The wording suggest the possibility that civil parties may support the prosecution similar to the way an auxiliary prosecutor supports the public prosecutor in many national systems, such as through submitting evidence on the guilt of the accused and that participation is not limited to their interest in reparations (Ciorciari & Heindel, 2009). The wording also suggests that victims joining as civil parties must be aligned on the same side as the prosecution. In other words, civil parties must seek the conviction of the accused. Victims calling for a dismissal of charges, for example in the name of national reconciliation, would likely not fit this criterion (Leyh, 2011). Finally, the wording relating to reparations is important because it recognizes that victims are entitled to redress and that, together with supporting the prosecution, this is a primary interest of their participation (Bair, 2009).

In contrast with victims acting as complainants, civil parties have a number of important participatory rights. They are entitled to five days' notice before an interview with the Co-Investigating Judges take place (Damaska, 2008). During this time, the lawyer for the civil party may consult the case file. Moreover, unlike victim-complainants, civil parties may not be questioned by the Judicial Police but must be questioned by one of the Co-Investigating Judges in the presence of their lawyer. During the pre-trial stage civil parties may request investigations and may appeal decisions by the Co-Investigating Judges not to investigate to the Pre-Trial Chamber (Doak, 2008). At trial, a civil party, like the accused, does not testify under oath, and, through their lawyers, are granted a number of rights. These include the right to have full access to the case file, to make limited pre-trial and trial appeals, to make legal and factual submissions, to attend hearings, to request witnesses, to question witnesses, to question the accused, to make closing arguments, to rebut the closing statements of the accused, and to request reparations (Doak, 2008).

- *Witness*

Because direct victims are generally in the best position to provide investigating and prosecuting authorities with information on various aspects of an alleged crime it is clear that one of the most important roles of the victim is as a witness. Accordingly, victim-witnesses act as valuable information providers (Leyh, 2011). However, as with Cambodian domestic procedures at the ECCC a victim may not simultaneously act as both a civil party and a witness. The rationale behind this policy is the recognition that a civil party may have something to gain, financially or otherwise, by the conviction of an accused. Although this limitation is a disadvantage of constituting oneself as a civil claimant because in theory more weight is given to statements made under oath, it is meant as a way of preserving the integrity of the judicial process and fair proceedings (Avruch & Vejarano, 2002). In domestic proceedings, however, an individual who wishes to attach a claim for damages and act as a witness first testifies as a witness and after doing so applies to participate as a civil party. This practice is possible because Cambodian criminal procedure allows victims to join a criminal case as civil parties up until the close of the prosecution's case. At the ECCC, however, it is not possible to first act as a witness and then as a civil party because the deadlines imposed for submitting civil party applications are set before that start of trial. Therefore, a direct victim in a case will need to decide whether to participate as a witness, if approached by one of the parties, or as a civil party (Barbara, 2009).

The participation of victims before the ECCC has been both hailed and criticized (Ciorciari & Heindel, 2009). It has been hailed because for the first time a significant number of victims were able to actively participate as civil parties in an international trial, many have been able to sit inside the courtroom and face those individuals they hold responsible, and almost two dozen have had the opportunity to address the Court directly (Damaska, 2008). It has been criticized because their participation has been perceived as unnecessarily delaying proceedings and infringing upon the rights of the accused. Moreover, through no fault of their own, their participation has inevitably raised their expectations about the outcomes of trial (Damaska, 2008). These expectations were greatly let down when many victims openly lamented about being re-victimized by the Court due to what they viewed as an inappropriate sentence, unjust reparations award and unfair revocation of civil party status qualifications (Leyh, 2011).

### **3.5. Conclusion**

Modern international criminal justice was borne out of prosecutions following the World War II. It was not until after the completion of their work did the notions of victimology and human rights arise that acknowledged the suffering and needs of victims. Only in the 1990s did a victim discourse become apparent in most criminal justice systems. Despite these developments, Nuremberg and Tokyo were established and legitimized on the suffering of victims without providing substantial outcomes for the majority of victims. Whilst neglecting the delivery of justice for victims, the Second World War tribunals did establish the precedent that individuals could be held responsible for committing international crimes. It was the practice and proceedings of these Tribunals that were used to design the later ad hoc tribunals.

Noticeably absent from the governing documents of the Ad Hoc Tribunals are references to the rights of victims. In term of participation, victims were only permitted to participate as witnesses. Though victim impact statements were submitted to their behalf by the prosecution, no victims were called before the Judges to publically express the impact of the crimes.

Paving the way for later international criminal courts, a preference for the adversarial approach would remain for some time, and although improvements in terms of defence rights have been introduced, the basic adversarial approach, with limited victim participation, endured at the SCSL. Accordingly, victims associated with these courts have not always felt

that they were treated with dignity and respect, they were not individually notified and informed of important case developments, they did not support or protection unless they also participated as witnesses, they were not permitted to be directly heard by the chambers unless called as witnesses, they could not attach reparations claims to the trials and the courts did not provide legal assistance. For the vast majority of victims not acting as witnesses, the option to participate was nonexistent.

Unlike the ICTY, ICTR and SCSL the hybrid courts in East Timor and Kosovo have provided for greater victim participation in the criminal process. The greater role for victims at these courts reflects the domestic practices of the relevant domestic jurisdictions. However, the fact that victims have chosen not to actively participate in most of the trials is likely the result of many factors, including but not limited to the availability of the courts to the population; the resources at the disposal of the courts for victim services; the limitations placed on civil claims for damages; and, in the case of Kosovo, the requirement that the injured party pays for the criminal process if the accused is acquitted. Thus, despite governing documents that appear to provide victims with the opportunity to be kept informed about case developments, to be heard in the criminal process, and to seek reparations, in practice, participation continued to be limited.

However, the ECCC made every effort to treat victims with dignity and respect, victims have been notified and informed of developments at the Court, and they received victim support in terms of psychological. With regard to their participation, civil party status at the ECCC allows victims to have access to the Court in order to support the prosecution and to claim reparations. Despite the hugely significant symbolic benefits of participation, which itself has not been proven, its practical benefits are questionable. Moreover, the inability of the civil party lawyers to cooperate and the repetitive questioning at trial further added to frustrations with the participation scheme at the Court. In addition, the most serious concern about participation had to do with the impairment of the fair trial rights of the accused, most notably by making the accused face multiplicity of opponents.

For this reason, a study of the ICC in which victims have taken advantage of their participatory rights is necessary. Chapter 4 will examine victim participation at the only permanent international criminal court, the ICC, which was the first international court to recognize the rights of victims to participate in the criminal justice proceedings at all levels.

## **CHAPTER 4: VICTIMS PARTICIPATION AT THE INTERNATIONAL CRIMINAL COURT**

### **4.1. Introduction**

There is little argument that the primary function of international tribunals is to investigate, prosecute and punish those believed to be responsible for the most serious crimes of concern to the international community, namely war crimes, crimes against humanity and genocide. International criminal courts, from the time of Nuremberg trials to today, have steadfastly attempted to carry out their respective functions through condemnation of the criminal acts in question and of the perpetrators found guilty (Bassiouni, 2003). In line with traditional theories of criminal justice, the focus of international criminal courts has unquestioningly been on the seriousness of the crime committed and the role of the offender. Thus, the spotlight of international criminal trials has almost exclusively centred on the crime committed rather than on the harm suffered. For example, at the Ad Hoc ICTY and ICTR or the SCSL, if the victims played a part in the trial process it was solely as witnesses called by the parties or by the Court but never participating in his or her right as a victim (Bassiouni, 2003).

The exclusion of the victim from any role other than a witness at the international level, however, has met with strong criticism. In almost all domestic legal systems victims are permitted to play a broader role in the process (Baumgartner, 2008). In general, common laws countries tend to allow victims the opportunity to present their views and concerns to the court at the sentencing stage of a criminal process through either oral or written victim-impact statements. In civil law countries victims are usually allowed to participate either as civil parties, in which case they attach their reparation claim to the criminal process, or as private or subsidiary prosecutors, in which they may have the opportunity to initiate prosecutions (Brienem & Hoegen, 2000). And although the primary focus of the international courts is unlikely to change, a shift in thinking has occurred. The idea of justice for victims, to a large extent, now implies that international courts should afford victims a greater role in the criminal process.

To this end, international criminal courts are increasingly broadening their mandates in an attempt to better address the needs and concerns of the victims of the crimes under their respective jurisdictions. In addition to their primary task, courts have taken on additional functions related to the notions of reconciliation, restoration and victim empowerment (Chung, 2009). These ideals are, in many ways, addressed through greater rights concerning

protection, reparation and participation. Accordingly, the procedural position of victims in international criminal proceedings has been significantly advanced (Chung, 2009). The ICTY, the ICTR and the SCSL only allowed victims to participate as witnesses, victims now have limited opportunity to participate in their own right, as victims, before a handful of international, internationalized and United Nations administered courts, including, for example, the ECCC and the UNMIK war crimes panels in Kosovo (Leyh, 2011). Foremost among those courts allowing victim participation is the International Criminal Court (ICC).

The Preamble of the Rome Statute of the ICC acknowledges the suffering of millions of victims of human rights and humanitarian law violations, and that such violations are contrary to the values and conscience of the world community (Leyh, 2011). In furtherance of this recognition, the Rome Statute and ICC rules of Procedure and Evidence (Rules) provide victims with general and specific rights to participate in the criminal process regardless of whether or not they testify as witnesses (Haslam, 2004). In this regards, they may be represented by legal counsel and present their views and concerns at appropriate stages of the proceedings so long as this participation is not prejudicial or inconstant with the rights of the accused and a fair trial. Moreover, they may also claim reparations for their harm suffered regardless of whether or not they testify as witness or participate with victim status. These procedural rights have been heralded as innovative and praised by many (Haslam, 2004).

Thus, although the victim scheme at the ICC was a well-intentioned attempt to address the shortcomings of previous tribunals that for one reason or other failed to properly address victims' concerns, it is necessary to examine whether or not the incorporation of victims as participants in the proceedings has been managed effectively and efficiently. The aim of this chapter, therefore, is to examine the scope and content of victim participation at the ICC. It will first explore what the Rome Statute and Rules provide with regard to participatory rights. Next, it will elaborate the aim and purpose of victim participation at ICC. The notion of victim as a precondition for participation will be also elucidated. And lastly, this chapter will examine the current procedural status of the victim both in theory and in practice.

#### **4.2. The ICC Victim Participation Framework**

The broad wording of the provisions on victim participation in the ICC's constitutive documents suggests that the drafters intended to leave wide discretion to the judges in actually shaping the Court's victim participation scheme (Haslam, 2004).



However, that broad and at times not entirely consistent drafting raises a multitude of complex legal issues, with both substantive and procedural implications. The first decisions rendered by the ICC Pre-Trial Chambers on victim issues give an initial idea of the subject's complexity (Baumgartner, 2008). Article 68 of the Statute lays down the basic rule on victim participation in the proceedings in its paragraph 3, which reads: “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”. Such participation should, however, not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. It is complemented by a whole set of provisions that shed light on what is meant by shall permit their views and concerns to be presented and considered (Stover, 2008).

They are partly contained in the Statute itself, but mostly in the ICC Rules of Procedure and Evidence, and relate to victim definition, participation, legal representation, notification and other central procedural issues (ICC Rules of Procedure and Evidence, 2008). Some of the issues were decided by Pre-Trial, Trial Chamber and Appeals Chamber judges after the first important victim-related decision of 17 January 2006 (De Hemptinne & Rindi, 2006). Almost exactly two years later, on 18 January 2008, Trial Chamber I rendered another landmark decision on the issue of victim participation (Prosecutor vs Thomas Lubanga Dyilo, 2008). Prior to the decision, Trial Chamber I invited all parties and participants to make submissions on the role of victims in the proceedings leading up to, and during, the trial (Prosecutor vs Thomas Lubanga Dyilo, 2008). Based on these submissions and prior pronouncements by the different chambers, the said decision was intended to provide the parties and participants with general guidelines on all matters related to the participation of victims throughout the proceedings (Prosecutor vs Thomas Lubanga Dyilo, 2008).

Nonetheless, many questions concerning victim participation remain controversial and are still pending: one of the three judges dissented and both parties filed an application for leave to appeal, which was finally granted by Trial Chamber I (Prosecutor vs Thomas Lubanga Dyilo, 2008). Undefined legal terms need to be clarified, such as personal interests, presentation of views and concerns and appropriate stages of the proceedings, as do the requirements for such presentations, the content of the participation right and issues of standard of proof. The issue of victim participation at the investigation stage and its implications for the balance of interests, as well as the general problems linked to prejudice and inconsistency with the rights of the accused and with principles of fair trial, still have to

be resolved (Prosecutor vs Thomas Lubanga Dyilo, 2008). Furthermore, practical issues such as identification of the applicants, the legal representation of victims, collective participation of large victim groups and the form and modalities of presentations need to be assessed. Since leave to appeal has been granted, some of those issues will be settled by the Appeals Chamber (Prosecutor vs Thomas Lubanga Dyilo, 2008).

- *Various participation regimes*

The structure of the Statute and Rules, mainly outlined in Rule 92(1), suggests that the drafters created various victim participation schemes. At least two are easy to identify: the submission of representations and observations, and participation “*stricto sensu*” (strictly speaking) (Stahn, Olasolo, & Gibson, 2006).

The first participation scheme, specifically provided for in Articles 15(3) and 19(3) of the Statute takes effect at an early and crucial stage, when the initiation or continuation of the proceedings is at stake. In Article 15 of the Statute, victim participation appears as the logical consequence of the Prosecutor’s “*proprio motu*” (own decision) investigation, for which victims constitute an important source of information (Bergsmo & Pejic, 1999). With regard to Article 19(3) of the Statute, observations submitted by victims are essential to assess challenges to jurisdiction or admissibility by states or by the defendant, as they provide for a more objective point of view that is linked neither to political nor to individual interests, since it is not directly linked to the reparation regime (Bitti & Friman, 2001). No formal application procedure seems to be necessary for these forms of participation, which consist of submitting observations and making representations (Timm, 2001). Nevertheless, the question remains as to how the victims will be chosen, how their credibility is assessed and how the information obtained is used and corroborated.

The more complex, second participation scheme, under Article 68(3) of the Statute and Rules 89 entails an application procedure pursuant to the Rules of Procedure and Evidence and the Rules of the Court and provides for broader participation (Donat-Cattin, 1999).

Finally, a specific victim participation scheme has been established with regard to the reparation procedure in Article 75 of the Statute. The inclusion of a possibility of obtaining reparation for victims, similar to adhesive procedures known in civil law systems, is considered as revolutionary in international criminal law (Ferstman, 2002). Although

integrated in the course of the regular procedure, it forms a kind of extra civil action procedure that is reflected in the separate procedural regime (Garkawe, 2003).

- *Victims of a situation and victims of a case*

A controversy between the Pre-Trial Chambers and the Prosecutor developed around the question of whether victims should be allowed to participate as early as the investigation stage of a situation or only at a later stage of the proceedings (De Hemptinne & Rindi, 2006).

The differentiation between situation and case level, although not explicitly mentioned in the ICC's constitutive documents, emanates from the structure of the Statute (Olasolo, 2005). Whereas a situation is broadly defined in terms of temporal and territorial parameters and may include a large number of incidents, supposed perpetrators and thus potential indictments, case refers to a concrete incident with one or more specific suspects occurring within a situation under investigation, entailing proceedings following the issuance of a warrant of arrest or a summons to appear (Olasolo, 2003).

The Pre-Trial Chamber maintained that victim participation at the situation level was not excluded and would “not per se jeopardise the appearance of integrity and objectivity of the investigation, nor is it inherently inconsistent with basic considerations of efficiency and security” (De Hemptinne & Rindi, 2006). The Prosecutor on the other hand insisted that the elements defining a victim pursuant to Rule 85 must be read together with Article 68(3) of the Statute in order to qualify a person as victim. He claimed that permitting general victim participation at the situation level had no basis in the Statute (De Hemptinne & Rindi, 2006). To support this argument, the Prosecutor pursued a two-step test, starting with the general victim qualification of Rule 85, followed by an assessment of whether the personal interests of the victim were directly affected by the proceedings in which he or she wished to participate (De Hemptinne & Rindi, 2006). Such personal interests must be judicially recognizable and directly related to a specific matter within the proceedings (Haslam, 2004).

A decision that has been taken by Pre-trial Chamber and the Prosecutor on the 17<sup>th</sup> of January regarding the status of victims of situation and victims of case brought up various questions and problems. First, early victim participation at the investigation stage might adversely affect the rights of the accused, the impartiality and independence of the investigation and, most importantly, the expeditiousness of the proceedings as a whole (De Hemptinne & Rindi, 2006). Second, the Pre-Trial Chamber did not precisely define the procedural rights provided

to victims at such an early stage of the proceedings. Further, early involvement of victims under the Article 68 regime is most probably not even in the victims' interest. It is submitted that the separate form of victim involvement in the early stage of the proceedings, outside the general framework of Article 68(3) of the Statute, covers victims' interests adequately.

In connection with other trigger mechanisms such as state or Security Council referral, the control mechanism provided for in Article 53 of the Statute incorporates victim participation through Rules 92(2) and 89, and the Pre-Trial Chamber did not reveal why formal victim participation according to the Article 68 regime was necessary prior to these procedures (Brubacher, 2004). It is questionable whether the potential advantages, such as the counterbalancing of too broad prosecutorial discretion and enhancing the fairness of the investigation, can become effective at all outside the Pre-Trial Chamber scrutiny provided for in Articles 15 and 53 of the Statute. On the contrary, as the Prosecutor contended correctly, premature victim participation entails an unnecessary waste of the Court's resources that could be better used for more meaningful victim participation once proceedings in a case begin (Prosecutor vs Thomas Lubanga Dyilo, 2008).

Furthermore, the majority of the so-called "situation victims" will most probably not be accepted in a case before the ICC, because the specific incident in which they were victimized is either not investigated at all or will never be the subject of a specific case. Those individuals are then left with unfulfilled hopes and expectations, and might in addition be in serious danger themselves (Prosecutor vs Thomas Lubanga Dyilo, 2008). In addition, the impediment to the objectivity and independence of the investigation and the risk of an imbalance between the interests of the victims and the accused seem important, since prior to the existence of any case no purposeful defence is possible (De Hemptinne & Rindi, 2006).

#### **4.3. Aim and Purpose of Victim Participation at ICC**

In order to elucidate the aims and purpose of victim participation before the ICC, the purposes of punishment must first be explored. It can be assumed that the purposes of punishment and those of participation partially overlap or complement one another, or at least that they are not conflicting. The purposes of punishment may not determine the answers to all questions of victim participation in detail, however, the purposes of punishment are highly relevant to the structures of the proceedings and therefore also for the determination of the role of the victim.

#### **4.3.1. Purposes of Punishment before the ICC**

The Rome Statute and the Rules of Procedure and Evidence contain no particular norms governing the question of the purposes of punishment. However, one can draw conclusions on this matter from the wording of the preamble (Mumba, 2001).

In classical criminal law theory retribution, deterrence, incapacitation and rehabilitation of the convicted person are typically identified as the main purposes of punishment (King & La Rosa, 1999).

While it is possible to have recourse to the purposes of punishment in domestic criminal law, at least to a certain extent, when determining the purpose of a term of imprisonment for crimes against humanity, this must be done so cautiously (Werle, 2005). This is because the jurisdiction of an international criminal court differs fundamentally from that of a national court which punishes all sorts of offences, usually ordinary crimes (Werle, 2005).

##### **- *Retribution***

The wording of the preamble of the Statute indicates that the ICC recognizes “retribution” as one of the purposes of punishment (Moller, 2003).

In the absence of any elaboration on the objectives of punishment in the Statute and RPE, the Trial Chamber of the ICTY has examined international criminal law precedents on the matter. It identified retribution, deterrence, stigmatization, and to some degree, rehabilitation as goals of punishment (Prosecutor vs. Kunarac et al, 2001). In later cases, the tribunal has confirmed these goals and added reconciliation and protection of society (Prosecutor vs. Jelusic, 1999). Of these goals, retribution and deterrence have been singled out as the main goals (Prosecutor vs. Aleksovski, 2000). The rehabilitative function of punishment has, on the other hand, clearly been given a secondary role (Prosecutor vs. Blaskic, 2000).

Differing views are to be found among international law scholars on the question of whether retribution should or does have any place in the proceedings before the ICC. Some see retribution as the primary purpose of punishment, while some ascribe a similar significance to retribution and deterrence and others state that the idea of retribution undeniably has its place but that the preventive effect of international criminal law is even more important (Glickman, 2004). According to others retribution has to be criticized as a purpose of punishment especially in an international context (Avruch & Vejarano, 2002).

However, on the basis of the wording of the preamble, it can be assumed that notwithstanding other purposes retribution will be recognized as a purpose of punishment and will probably rank as one of the primary purposes, even if criticism of this concept is justified (Olasolo, 2005).

- ***Deterrence***

Deterrence is also recognized as a purpose of punishment in the preamble of the Rome Statute and has been cited as one of the main goals by the ICTY (Prosecutor vs. Aleksovski, 2000). Some authors see deterrence among the primary purposes of punishment while others classify deterrence as a secondary purpose in international criminal law pointing out that such purposes as norm stabilization might prove to be much more effective (Werle, 2005). Again others hold the view that deterrence is a problematic concept (Gisvold, 2000). It has also been held that deterrence has certainly failed thus far. As long as law was not enforced it could hardly bring about deterring effects, in the contemporary international context, the retributive and hence deterrent capacity of the ICC was severely affected by its relative political weakness (Lu, 2004). It has been added that the preventive function of an expanding criminal law remained ineffective, that it often takes one-sided action against only certain forms of deviance and certain strata of the population, and thereby serves the interests of specific social groups (Stolle & Singelstein, 2007).

Like retribution, it is clear that deterrence is one of the purposes of punishment before the ICC. Here, too, it has yet to be seen how significant other purposes will be seen and if deterrence is ultimately be viewed as one of the main purposes of punishment.

- ***Rehabilitation***

The purpose of rehabilitating the convicted person into society could also be inferred from the preamble's wording "to prevent such crimes" if one accepts that rehabilitation has a preventive effect. The ICTY accepted this as a purpose of punishment while clearly giving it a secondary role (Prosecutor vs. Blaskic, 2004).

Given the fact that the ICC will usually give long, often lifelong sentences, the present purpose of punishment may ultimately be of less significance than other matters (Moller, 2003). It has also been stated that rehabilitation of the convicted perpetrator may be considered secondary, since the person concerned is in general held to be socially integrated, his deeds committed in extraordinary situations that cannot be repeated in this form (Stolle & Singelstein, 2007). It has even been said that the Rome Statute seems to have left behind one

of the pillars of modern criminal law consisting of the rehabilitation of convicted persons (Olasolo, 2003).

- ***Reconciliation***

There is no direct reference to “reconciliation” as a purpose of punishment in the preamble of the Rome Statute. International Criminal Law protects peace, security and the well-being of the world, referring to the accepted basic, inherent values of the international community (Triffterer, 1999). Reconciliation could be one means to achieve the goals mentioned, however, the preamble does not go into any further detail on the intended means to achieve peace, security and the well-being of the world (Stehle, 2006). Still, some authors argue that collective reconciliation is thereby included as one of the objectives of the ICC that a reconciliatory role inheres in the aims of the ICC beyond the punitive function that the ICC therewith goes beyond what is expected from national trials (McDonald, 2002). It has even been said that reconciliation is one of the most important purposes of punishment in this context, that reconciliation is indispensable because peace and security cannot be achieved through punishment and retribution alone (Stehle, 2006). Reconciliation has on the other hand been said to be merely a side effect of the restoration of the values of the international community (Safferling, 2004). Others seem to view reconciliation as a subject reserved to institutions like the Trust Fund or Truth Commissions and ascribe a purely retributive function to International Criminal Tribunals (Glickman, 2004).

The incorporation of norms on victim participation and reparations into the Rome Statute could be indicative of the incorporation of restorative elements into this body of rules, which also involve the concept of reconciliation (Eisnagle, 2003). However, this line of reasoning could lead to a circular argument if victim participation for instance was only introduced to serve the purpose of retribution. As concerns reparations, they however clearly serve a reconciliatory goal (Shelton, 2005).

- ***Victim-Related Purpose of Punishment***

It is further possible that there is another purpose of punishment, namely a victim-related purpose of punishment that goes beyond of what is achieved by the purposes of reconciliation (Osiel, 1997).

There are different options which might be considered when looking at the content of such a purpose. Proposals on this issue include giving a voice to victims, doing justice for victims,

acknowledging the suffering of victims or restoration and healing of victims (Bachrach, 2000). These proposals at first view seem to serve a similar purpose but are not clear as to their exact meaning. These catchwords could comprise completely different objectives and cover a wide range of aims. First, it seems conceivable that by doing justice for victims for instance or restoration and healing what is meant is that a criminal process has the aim of satisfying victims' individual interests such as individual retribution, reconciliation and healing (Danieli, 2004). Another inherent association could be that the aforementioned general objectives like retribution are pursued explicitly in the name of victims or on behalf of victims while giving victims limited or no influence on the process (Danieli, 2004). Another interpretation would be that justice for victims is seen as a necessary means of accomplishing other aims such as collective reconciliation (Danieli, 2004). It would therefore be a necessary precondition for the main objective of the proceedings rather than an original objective even if personal interests may be satisfied as a side effect.

Victims are mentioned in the preamble of the Rome Statute, but there is no reference to a victim related purpose of punishment (Timm, 2001). However, it is significant that doing justice for victims was often mentioned as an objective at the Rome Conference (Timm, 2001). Furthermore, provision on victim participation and reparation are also contained in the Statute and Rules. In one of its decisions an ICC Chamber has stated that the Statute grants victims an independent voice and role in the proceedings before the Court, classifying this as an object and purpose of victim participation but not as a general object of the proceedings (Heikkila, 2004).

Similarly in the victim information booklet it is said that by presenting their own views and concerns to the judges, victims were given a voice in the proceedings that was independent of the Prosecutor (Bachrach, 2000). This would help the judges to obtain a clear picture of what happened to them or how they suffered, which they might decide to take into account at certain stages in the proceedings thus eventually leading to an impact on the way proceedings were conducted and in the outcomes (Bachrach, 2000).

A victim-related objective has not been mentioned in decisions before the ICTY, only on the website is rendering justice to victims mentioned as part of the mission of the ICTY (Werle, 2005). However, the website does not form part of the official documents of the Tribunal. Although victim participation has been incorporated into many national criminal law proceedings discussions on the purpose of punishment do not refer to the victim of the crime (Hoyle & Young, 2006). Thus, one may say that the inclusion of provisions on victim



participation in the Statute indicates that any possible victim-related purpose of punishment certainly goes beyond merely punishing on behalf of the victims (Heikkila, 2004).

With regard to the question of whether the individual interests of victims can form part of a punishment purpose, it is first necessary to ascertain whether individual interests can be accommodated in international criminal law at all before examining the relevant legal materials. Whether international criminal law rather protects collective or also individual concerns is being discussed (Werle, 2005). It has been opined that international criminal law has the primary task of directly protecting international peace and security but at the same time protects the legal values of individuals (Triffterer, 1999).

The former Secretary-General of the United Nations in an inaugural meeting of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court declared in his opening speech that the overriding interest must be that of the victims, and of the international community as a whole, thereby on the first view giving the victims interests the first place (Safferling, 2004).

There are several arguments for the predication that individual as well as collective interests are being protected. First it can be said that the restoration of the interests of individual victims is a necessary precondition for the healing of a society as a whole (Moller, 2003). One may see from the Statute and Rules that the hardships, needs and the rights of victims of crimes are now on an equal footing to the international community's interest or right on punishment (Moller, 2003). It has been stated that the crimes contained in the statute did not only protect collective but also individual interests. It could further be argued that individual persons are being accused before the ICC and that therefore on the other side also individual interests are being protected.

Others negate the inclusion of legally protected rights of individuals in general (Lagodny, 2001). Thereto it has been said that the individual is first of all victim in his or her quality as member of the respective group (Safferling, 2004).

Pertaining to the aspect that the guilt of the perpetrator is being individualized it has been replied that this does not mean that there is also an individualization of victims. International law applied to the entirety of the world community and the aim of international criminal law was to restore the values of international community through punishing a crime against mankind not against an individual or rather only against an individual as part of a collective (Safferling, 2004). Individualizing victims would set aside the predominantly collective

character of the crime and would require a selection of individual victims from the collective of victims being necessarily arbitrary (Morris, 2000). The crimes contained in the Rome Statute always embodied a collective element. It was accordingly inappropriate to utilize international criminal procedure for the purpose of rehabilitating individual victims (Bottiglieri, 2004).

Again others propose that there should be a distinction between the different international crimes in determining whether only collective or also individual interests are protected (Pfeiffer, 2003). It is submitted that it is correct to view the objective goal of international criminal as the defense and restoration of collective interests (Friman, 2006). This does not mean that individual interests are not protected at all: The fate of individual persons shall by no means be negated or ignored. However, this does not alter the fact that before the ICC their fate will only be regarded within a larger context - the primary goal of the ICC's procedures is to defend and restore collective interests (Stehle, 2006). The protection or restoration of individual interests will often correspond with the defence or restoration of collective interests. However, it is conceivable that the enforcement of individual interests in the proceedings could indeed conflict with collective interests if the rights of other individuals are neglected leading to an overall undesirable result (Henham & Mannozi, 2003).

The Inter-American Court has stated that the fact that a right may take on a collective or general character intended to benefit the public as a whole does not mean that an individual may not have a standing to assert that right (Mekjian & Varughese, 2005). Furthermore the Statute and Rules explicitly provide for the rights of individual victims (Olasolo, 2005).

In practice the solution might be that personal interests will be considered for obtaining a super ordinate interest but that maybe not every individual interest can or will be considered (Haslam, 2004). As an example, efforts to the healing of single persons could be seen as useful in the greater context of preparing the grounds for reconciliation. It will probably be necessary to consider the merits of a trade-off between considering certain individual interests more intensely than others thereby neglecting other individual interests or whether it is more desirable and effective to consider as many individual interests as possible but in a less intense manner.

It can be said that it will always be necessary to weigh up whether considering individual interests also serves and does not conflict with collective interests. Consequently, it is clear;

that individual interests will not be the primary focus of proceedings and those interests may be considered within the overall context but cannot explicitly be part of a punishment purpose. The consideration of individual interests does thus most probably not reach beyond being a possible side-effect of collective interests.

The next question must be whether doing justice for victims will be a purpose of punishment in the sense that the ICC deems it necessary to pursue prosecutions explicitly for the victims and ultimately for the purpose of achieving reconciliation while also giving victims the chance to participate in the proceedings.

As already shown it can be assumed that the ICC will not commit itself only to retributive ideas but will also aim to achieve reconciliation. For that purpose, the Court will therefore most probably see victim participation as a necessary constituent in the process (Morris, 2000).

The International Criminal Court's victim participation regime is a product of a broader movement seeking to achieve restorative, rather than strictly retributive, justice (SaCouto & Thompson, 2013). Proponents of restorative justice contend that, to truly achieve justice, punishing the guilty is insufficient (SaCouto & Thompson, 2013). Rather, it is also necessary to allow victims to participate in the proceedings and provide compensation to victims for their injuries. Proponents believe that participation provides victims with a sense of closure, empowerment, and healing (McKay, 1999). While there is no universal understanding of what victim participation should entail, it has been broadly described as victims having a say, being listened to, or being treated with dignity and respect (Doak, 2005).

In translating the desire to serve the goals of restorative justice, the drafters of the ICC Rome Statute were particularly influenced by the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, unanimously adopted by the UN General Assembly in 1985 (Fernandez de Gurmendi, 2001). The Declaration marks the first formal recognition at the international level that victims are assured "access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered (Bassiouni, 2006). More specifically, the UN Victims Declaration encourages states to implement measures designed to ensure, inter alia, that victims are "treated with compassion and respect for their dignity (Fernandez de Gurmendi, 2001). In addition, states are to facilitate the responsiveness of judicial and administrative processes to the needs of victims by informing victims of their role and the scope, timing and progress of the

proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information; and allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system (Fernandez de Gurmendi, 2001).

The rights promoted by the Victims Declaration, including the right to receive information regarding relevant judicial proceedings and the right to present their views and concerns to a court, have been repeatedly recognized as fundamental to providing victims access to justice (Strang & Sherman, 2003). Indeed, among the most important rights of victims in the context of their interactions with a criminal justice system in domestic systems is the right to receive information, as victims repeatedly say that one of the greatest sources of frustration to them is the difficulty in finding out from criminal justice authorities on developments in their cases (Rauschenbach & Scalia, 2008).

Furthermore, research on victim notification indicates that victims who are kept informed by authorities feel that they had an opportunity to express their wishes, that their wishes were taken into consideration by the authorities and that they had some degree of influence over the outcome of the case (Strang & Sherman, 2003). In addition, it is commonly understood that victims are more likely to be satisfied with the criminal justice system if their voice has been heard (Strang & Sherman, 2003). Importantly, however, this does not mean that victims necessarily want a role in the adjudication of their cases. Rather, according to restorative justice experts Heather Strang and Lawrence Sherman (2003), victims merely seek the chance to present their views on the case to someone, and not necessarily a key decision maker. It is the chance to be heard at all that is usually the crucial aspect for victims in achieving a sense of satisfaction with the justice system (Strang & Sherman, 2003).

It remains to be seen whether the ICC will consider doing justice for victims as an own, independent purpose of punishment or rather as a component of other purposes. Technically, it appears that this is of little significance and what is most important is that doing justice for victims will form part of the purposes of punishment (Kim, 2003). Of course, it may be desirable for victims that there be a purpose of punishment which would make explicit reference to their concerns.

#### 4.4. Victims and the ICC

Although the Rome Statute expressly provides for a role for victims in the proceedings, more specificity was needed in the Rules of Procedures and Evidence (Rules) in order for the rights of victims to be made less ambiguous (Safferling, 2001). Thus, as part of the many additional meetings which took place after the Rome Conference, in order to finalize the Rules, in April 1999 France hosted a seminar on victims' access to the ICC referred to as the Paris Seminar. Subsequently, in February of 2000 Italy hosted an informal meeting on the Rules, known as the Siracus Meeting, and in April-May of 2000, Canada hosted the inter-sessional meeting at Mont Tremblant where delegates prepared a set of the draft Rules (Schotmans, 2005). Debates at these meetings all contributed to the final version of the Rules and the role of victims in proceedings.

Inspired by the Victims' Declaration and other domestic and regional developments related to the rights of victims, the Rules further elaborate the rights of victims with regard to participation. But who exactly qualifies as a victim?

##### 4.1.1. Definition of Victims Within the ICC Framework

The right to participate as a victim at ICC is not automatic. The first condition for participation is very clearly stated in the Rome Statute: the participant must qualify as a victim (Prosecutor vs Thomas Lubanga Dyilo, 2008). The Rome Statute does not define the term victim, which is given in Rule 85 of the Rules of Procedure and Evidence of the ICC. Therefore, the first consideration when examining participatory rights is the concept of victim. According to the Rule 85 of the ICC Rules of Procedure and Evidence:

- i) *victims are natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court;*
- ii) *victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and their historic monuments, hospitals and other places and objects for humanitarian purposes.*

The term victims is quite vague and it includes not only natural persons but also organizations and institutions, which in practice translate as a greater category of victims who can take part in the proceedings (Sadat, 2002). The scope of the definition of victims, it has

been argued, might interfere with the fairness and expeditiousness of the trial since the definition is too broad and vague allowing for too many victims to participate (Rombouts & Vandeginste, 2003). Thus a precise analysis of victims' applications for participation is crucial.

Relying on Rule 85, the ICC established a few conditions for applicants to be granted the status of victims in order to participate in proceedings (Politi & Nesi, 2001). Namely, victim applicants have to:

- i) be natural persons;*
- ii) persons who have suffered harm;*
- iii) the harm has to have been caused by alleged crimes covered by the ICC's jurisdiction; and*
- iv) show a causal link between the alleged crimes and the harm*  
(Jouet, 2007, p. 262)

The definition of victim is the basis of any application for participatory rights leading one to conclude that it is a general definition and not one that only applies pursuant to article 68(3) of the Rome Statute.

Qualifying as a victim is not sufficient to participate in proceedings pursuant to article 68(3) (Pellet, 2002). Given that the definition of victim does not seem to cause much ambiguity, participants to proceedings not only have to be victims within the above-mentioned definition pursuant to Rule 85, but must also have their personal interests affected (Jouet, 2007). Therefore, the notion of personal interests becomes of crucial relevance because it represents the condition for the application of this article. Since the article is unclear as to what can affect their personal interests, it can be argued that the proceedings in which they wish to take part should affect their personal interests and not, in a broad approach, the entire proceedings (Jouet, 2007).

The notion of personal interests has great impact in practice since, depending on the interpretation the Court gives to this concept, the right to participate may be denied. Furthermore, the right is highly dependent on the proceeding the victim may wish to participate in, since in certain proceedings, for example concerning procedural issues, it is difficult to conceive that a victim's personal interests could be affected (Chinkin, 2002). The notion of personal interests has been given some attention in the decisions rendered by the Court (Prosecutor vs Thomas Lubanga Dyilo, 2008). Therefore, it is necessary to analyze

whether the notion has been restrictively or broadly interpreted. Since this criterion is a condition to allow participation, it is important that the decisions of the Court are consistent in the interpretation of this concept in order to provide for certainty and clarity for future proceedings (Buss, 2009).

#### **4.4.2. Participation in the Court Proceedings**

Throughout the negotiations of Rome Statute and Rules, delegates presented different and at times competing, ideas concerning victim participation (Baumgartner, 2008). Fernandez de Gurmendi (2001, p.25) noted that: “the crafting of the regime on victims was probably the most challenging task undertaken by the Preparation Commission due to the fact that delegates came from different legal traditions”. The momentum in favour of participation was mitigated by concerns equally widely considered and shared that victims’ participation should not occur to a degree or in a manner that would undermine the core ICC mission of trying perpetrators of mass crimes (Chung, 2009). Delegates at the drafting of both the Statute and the Rules sought to devise a realistic system that would, on the one hand, include victims and, on the other, would not jeopardize the primary function of the Court (Lee, 2001). Thus, the participatory rights found in the Statute and Rules, while broader than those existing in previously established international criminal tribunals, were deliberately made more restrictive than those found in domestic systems (Fernandez de Gurmendi, 2001).

In order to fully acknowledge the role of the victim in the criminal process, the Statute and Rules provide for victim participation at each stage of the proceedings: from pre-trial, through trial, to post-trial (Lee, 2001). In general victims have three ways of participating in the criminal trial. Victim may submit a communication to the Court complaining about an offense; participate as a victim participant in proceedings; and act as a victim-witness. In addition to their participation in relation to the criminal trial, victims may also participate in hearings on reparation, which are likely to occur following a conviction of an accused, without having participated in pre-trial or trial proceedings (Leyh, 2011).

##### **- *Victim Complainant***

Victims, like other individuals or organizations, have the opportunity to participate in a limited way by submitting communications to the Office of The Prosecutor (OTP) about potential cases falling under the Court’s jurisdiction (Chung, 2009). The filing of a communication is similar in many ways to the filing of a complaint (Leyh, 2011). The prosecutor is obligated to evaluate all materials received. After conducting a preliminary

examination of the information, which can take as long as the prosecutor deems necessary, the prosecutor must then decide whether to authorize the initiation of an investigation or seek authorization from the Pre-Trial Chamber for the commencement of an investigation and a subsequent prosecution (Chung, 2009).

- ***Victim Participant***

With regards to direct participation in the criminal proceedings, the Rome Statute provides for three explicit instances when victims may participate. First, pursuant to Article 15(3), victims may make representations to the Pre-Trial Chamber when the prosecutor requests the authorization of an investigation from the Pre-Trial Chamber (Bitti & Friman, 2001). Second, pursuant to Article 19(3), victims may submit observations to the Court when a challenge to the jurisdiction of the Court or the admissibility of a case arises (Bitti & Friman, 2001). Finally, pursuant to Article 68(3), victims may express their views and concerns in other proceeding so long as their participation does not infringe upon the rights of the accused and a fair trial (Bitti & Friman, 2001).

In addition to Article 68(3), Rule 86 from the RPE, entitled General Principle provides:

*A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or Rules, shall take into account the needs of all victims and witnesses in accordance with the Article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.*

Rule 86, like Article 68(3), makes it mandatory for the Court to recognize victims. Originating from the Siracusa seminar on protection of victims, Rule 86 requires the Court to consider the needs of victims when making any direction or order (Boyle, 2006). If read carefully, the rule makes no distinction between issues affecting the personal interests of victims and those that do not. Therefore, Rule 86 requires a Chamber to take victims' concerns into account even when making decisions on matters that may or may not deal directly with victim issues (Boyle, 2006).

In order to meaningfully exercise their participatory rights victims have the right to choose a legal representative. In accordance with Rule 91, legal representatives may attend and participate in proceedings unless the relevant Chamber believes their interventions should be confined to written observations; they may be permitted to make opening and closing statements, present their views and concerns; make representation in writing to the Pre-Trial



Chamber concerning a request for the authorization an investigation; submit observations concerning challenges to the jurisdiction of the Court or the admissibility of a case; request protective measures; and apply to the Court to question witnesses (Doak, 2008). In order to ensure the fairness of proceedings, the prosecutor and the defence have the opportunity to reply to any oral or written observation submitted by victims. Despite what might appears as a litany of participatory rights, many participatory rights are not explicitly provided for in the governing documents. Accordingly, the various Chambers, each with their own wide discretion to shape proceedings, were left to decide upon the proper modalities of participation (Doak, 2008).

#### - *Victim-Witness*

In addition to appearing before the Court as a victim participant and individual may also appear as a victim-witness. In this sense, a victim may be called as a witness by the prosecution, defense or the relevant chamber (Buss, 2009) . In contrast with victim participants, victim-witnesses do not share their views and concerns but instead give evidence, usually by answering questions posed (Findlay, 2009). In many cases they are not represented by legal counsel and do not take part in all proceedings but instead are called at specific times to testify (Findlay, 2009).

#### **4.5. Participation in Practice**

Article 68(3) of the Rome Statute leaves the Chambers of the Court a great deal of discretion to determine the exact scope and modalities of victims' participation. To date, the ICC has conducted confirmation of charges hearings in ten cases and six cases have reached the trial stage (Van den Wyngaert, 2012). By and large, the scope and manner of victim participation has been the same in each of these cases.

The first aspect of the victim participation scheme worth highlighting is that in each case, every victim has been represented by an attorney, and in all but the very first case, each legal representative has been selected by the Court and has been charged with representing large numbers of victims (Van den Wyngaert, 2012). Thus, for example, in the Katanga & Ngudjolo case, the 366 victims who participated in the trial were divided among two groups, and each group was represented by a common legal representative (Prosecutor vs Germain Katanga and Mathieu Ngudjolo Chui, 2009). Similarly, in the Bemba case, all 4,121 participating victims have been placed into one of two groups, with each group represented by a common lawyer (Prosecutor vs Jean-Pierre Bemba Gombo, 2010). In each of the Kenya

cases, all of the victims in each case are represented as a single group by a common legal representative (Prosecutor v. William Samoei Ruto, 2011).

The second important aspect of the victim participation scheme is that, with one exception, all participation takes place through a common legal representative (Van den Wyngaert, 2012). In other words, it is the legal representatives, not victims themselves, who are permitted to attend status conferences and hearings, make submissions to the Chamber, tender evidence, examine witnesses, and deliver opening and closing statements (Van den Wyngaert, 2012). The one exception to this general rule is that, in the first three cases to go to trial, the Trial Chamber has allowed a limited number of victims, after submitting an application and obtaining the approval of the Chamber, to appear personally in the trial proceedings to testify under oath or to present his or her views to the Court. Specifically, in the Lubanga case, three victims were granted the right to testify in person in The Hague (Prosecutor vs Thomas Lubanga Dyilo, 2008); in the Katanga and Ngudjolo case, the Chamber initially decided four victims would be permitted to testify in The Hague, but later revoked the victim status of two because the Chamber was concerned about the veracity of their accounts (Prosecutor vs Germain Katanga and Mathieu Ngudjolo Chui, 2009); and in the Bemba case, the Chamber permitted two victims to give evidence under oath in The Hague, and three victims to present their views and concerns via video-link (Prosecutor vs Jean-Pierre Bemba Gombo, 2010). Otherwise, no individual victim or group of victims has personally participated in any manner in a case being tried at the ICC.

#### **4.5.1. Obtaining Victim Status at the ICC**

The process by which an individual obtains victim status before the ICC has gone through an evolution over the past several years, and the Court is still struggling to find an acceptable model that will work going forward. Specifically, the challenge is to find a process that will permit victims of crimes being prosecuted before the Court to be recognized as participants in the proceedings within a reasonable time, and enjoy the rights that go along with that status, without unduly taxing the very limited resources of the Court itself and the parties appearing before it.

##### **- *The Early Cases: Lubanga, Katanga & Ngudjolo, and Bemba***

In the first three cases tried at the ICC, the Chambers, Registry, and parties followed the application procedure laid out in Rule 89 of the ICC Rules and the accompanying regulations (SaCouto & Thompson, 2013). In other words, each individual wishing to participate in

proceedings before the ICC would submit an application to the Victims Participation and Reparations Section (VPRS), which is the organ of the Registry charged with assisting victims, for individualized determination. As described by Judge Christine Van den Wyngaert, one of the three judges on the Trial Chamber that presided over the Katanga and Ngudjolo case, the “long and cumbersome process” went as follows:

*“VPRS receives the applications, which arrive in the form of very lengthy standard forms plus supporting evidence. These forms and especially the supporting evidence may have to be translated into one of the working languages of the Court. Once that is done, the applications must be sent to the parties for observations. In almost all cases victims are afraid of being identified publicly and ask for the redaction of identifying information. This means that their names are blackened out, as well as any passages in their story that may lead to their identification. In principle, these redactions must each be checked and approved by the competent Chamber. The parties are then given a deadline to make observations. However, as they usually only receive heavily redacted forms, their submissions are unavoidably somewhat abstract. The Chamber is then required to decide on a case-by-case basis whether each applicant meets the criteria of Rule 85 and whether his or her interests are affected by the proceedings”.* (Van den Wyngaert, 2012, p. 82)

The process was further drawn out by the fact that applications submitted by the VPRS to the Chambers were often incomplete (REDRESS, 2012). For instance, in 2010, the Court reported that only 66 percent of the applications received were accurately completed (REDRESS, 2012). When applications were incomplete, the Chamber had to remit the application back to the VPRS and the VPRS had to follow up with the applicant in an attempt to fill in the missing information or supporting documentation (Prosecutor vs Jean-Pierre Bemba Gombo, 2010).

As of November 2011, the ICC had received 9,910 applications for participation, and each application was reviewed according to this process (Van den Wyngaert, 2012). Although the VPRS grouped victim applications when there were links founded on such matters as time, circumstance or issue, pursuant to Regulation 86(5), each application was nevertheless

individually reviewed by the parties and the Court. Unsurprisingly, this consumed a great deal of resources (Prosecutor vs Thomas Lubanga Dyilo, 2008). For instance, although relatively few victims participated in the first case to be tried at the ICC, the Lubanga case, the defence repeatedly complained that the burden of responding to applications to participate, and the ‘potentially detrimental’ allegations raised therein, was impairing the defence’s preparation for the hearing (Chung, 2009). The situation was much worse for the Defense in Bemba, which currently has 4,121 participating victims (Prosecutor vs Jean-Pierre Bemba Gombo, 2010). In that case, the defence filed multiple submissions to the Chamber explaining that the time spent on examining and making submissions on the victim applications was to the complete detriment of its capacity to investigate and prepare its own defence for the trial (Prosecutor vs Jean-Pierre Bemba Gombo, 2010).

It added that it was able to process the applications only because the Chamber granted it a time extension, and the Office of Public Counsel for the Defense (OPCD) aided the defence team in examining the applications (Prosecutor vs Jean-Pierre Bemba Gombo, 2010). The Chambers were also taxed under this system, as noted by Judge Van den Wyngaert, who has written that before the start of the hearings on the merits in the Katanga case, for several months, more than one third of the Chamber’s support staff was working on victims’ applications (Van den Wyngaert, 2012). Finally, the system placed significant strain on the VPRS, which is required not only to process thousands of individual applications, but to obtain information and documentation missing from incomplete applications, prepare reports for the Chambers pursuant to Regulation 86(5) of the Regulations of the Court, and redact sensitive information before transmitting the applications to the Prosecution and Defense (REDRESS, 2012).

Of course, the glacial pace at which individual applications were adjudicated in these early cases also meant that the victims themselves had to wait significant amounts of time between submitting their applications and learning whether they had been recognized by the Court, and before gaining any participatory rights (Chung, 2009). Indeed, even in the first few years of the Court’s operations, during which the overall number of applications was relatively low and the Court itself was operating in a limited number of situations, some applicants waited more than two years to receive word on their victim status (Pena, 2009). Unfortunately, such persistent backlog resulted in many victims losing out on presenting their views and concerns in relation to key proceedings (Pena & Carayon, 2013).

This state of affairs caused Mariana Pena, who was at the time the Permanent Representative to the ICC of the International Federation for Human Rights (FIDH), to complain in 2009 that the current application system was a long and cumbersome process for all parties involved, including victims (Pena, 2009). Pena also noted that the process brought about a high amount of litigation during a phase which should be purely administrative (Pena, 2009). This situation had not improved by 2011, as ongoing delays in processing applications meant that a large number of applicants in the Bemba case were admitted at a very late stage, by which time a significant part of the trial had unfolded (REDRESS, 2012). In addition to lamenting the slow pace of processing applications, victims' advocates have also complained that victims find the application procedure complicated, noting that most victims need assistance in completing the standard forms (Pena & Carayon, 2013). The frustration victims experience when completing the forms is compounded by the fact that, once they do obtain victim status, their interests are represented collectively by a legal representative and thus their participatory rights are limited (REDRESS, 2012). As the organization REDRESS has explained:

*“Because of the individualised processing requirements, victims are requested to provide an array of personal information, including information to prove their identity, information on their experience of crimes under the jurisdiction of the Court and how they suffered harm, even though they will invariably be heard through a legal representative which represents their interests collectively with the interests of other victims also being represented. Thus, there is an apparent mismatch between the typical way in which victims will ultimately participate and the information they are required to produce in order to enable them to participate”* (REDRESS, 2012, p. 25).

Finally, even with this individualized review, it was difficult for the parties to effectively review the applications, given the heavy redactions, calling into question the meaningfulness of the review (REDRESS, 2012). Indeed, in the Lubanga case, in which there were relatively few victims and thus presumably the defence had more opportunity and resources to devote to reviewing the applications, all three of the victims who came before the Chamber to testify

at their own request were subsequently stripped of their victim status after the Chamber determined that the accounts they gave to the Court were unreliable (Prosecutor vs Thomas Lubanga Dyilo, 2012).

Similarly, two of the four victims who received permission from the Katanga and Ngudjolo Trial Chamber to present testimony to the Court were later denied that privilege, and had their victim status revoked, after their legal representative expressed doubts as to the veracity of the statements provided by the victims to the Court (Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, 2011). In these cases, the applications of the five individuals had been reviewed by the parties and victim status had been granted by the Chamber, and it was not until they provided the Court with far more detailed statements that the Chamber was able to determine that the individuals did not, in fact, meet the criteria to participate as victims in the case (Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, 2011).

#### - *The Gbagbo Approach*

The first Chamber to explore a new application model for victims was Pre-Trial Chamber III, which presided over the Gbagbo confirmation hearing (Van den Wyngaert, 2012). Specifically, Single Judge Silvia Fernandez de Gurmendi began discussions in January 2011 with the Registry representatives to seek new approaches to the victims' application process that would improve the efficiency and substantive value of the victim participation scheme, including a possible collective approach (Cryer, 2013). The Registry, recognizing the substantial backload of applications that had yet to be processed, outlined its views regarding the possibility of implementing a more collective approach to the application process (Cryer, 2013). It opined that an approach that allowed victims to participate only through a collective application would likely reduce its workload (Cryer, 2013).

However, the Registry stated that implementing a collective process represented a long term project that would require more resources, radical changes in the application process, and significant amendments to the Court's legal framework, which, in its opinion, expressly calls for at least a partially individualized approach (REDRESS, 2012). It recommended, in the short term, that the Single Judge implement what it called the mixed approach that would allow victims to apply either individually or as a group (Prosecutor vs Laurent Gbagbo, 2012). The Court could, at a later stage in the proceedings, consider in more detail whether a

fully collective approach could be implemented in the long term (Prosecutor v. Laurent Gbagbo, 2012).

In a 6 February 2012 decision, the Single Judge agreed to implement the Registry's recommendations, calling for a mixed approach in the short term, with the aim of possibly progressing toward a fully collective approach, applicable to all cases, in the long-term (Cryer, 2013). She acknowledged that while the Court cannot impose collective applications on victims, victims could, pursuant to Rule 89(3), be encouraged to join with others so that a single application is made by a person acting on their behalf. To that end, the Single Judge requested that the Registry implement its proposal and formulate a collective application form that would provide such encouragement (Cryer, 2013).

On 4 June 2012, the Single Judge granted 139 out of 158 applicants victim status for the confirmation of charges hearing. Out of the 158 applicants, fifty-seven applied individually while the remaining 101 applicants applied through one of six collective applications (Prosecutor v. Laurent Gbagbo, 2012). On 6 February 2013, the Single Judge admitted an additional sixty individual applicants as victim participants.

#### - *The Ntaganda Approach*

The most recent case in which a Chamber has attempted to simplify the victim application process is the Ntaganda case. As an initial matter, the Single Judge overseeing pre-confirmation proceedings in that case requested that the Registry present its observations on the partially collective approach adopted in Gbagbo (Pena, 2015). In response, the Registry informed the Single Judge that the Gbagbo experience was an invaluable experiment into more collective processes, and that it had observed certain benefits with this approach. For instance, the group meetings that the VPRS facilitated to discuss matters pertaining to the application process improved victims' psychological wellbeing (Pena, 2015). Additionally, grouping victims at the application stage improved not only the application process itself, but also the ability of victims to participate in that it made it easier for the victims' legal representative to interact with his or her clients when they are pregrouped .

However, the Registry also acknowledged that in some cases it may not be advisable or feasible to physically bring together groups of victims for the application process due to security concerns or discomfort of victims (Stahn, 2015). Indeed, the Gbagbo experience

indicated that, where a group was not pre-existing or self-identified, victims within the group lacked trust, which resulted in reluctance to appoint a single contact person, even when he or she was to have no representational capacity (Moffett, 2014). Ultimately, for these reasons, the Registry did not recommend that the Gbagbo approach be adopted in the Ntaganda case.

#### **4.5.2. Participation during Various Stages of the Proceedings**

The participation of victims of crime within the jurisdiction of the Court in legal proceedings is said to be one of the major achievements of modern day international criminal justice. The shift in the Rome Statute from provisions purely retributive in nature to incorporating restorative aspects of justice through the inclusion of this right of victims to participate in the proceedings was in response to criticisms of the Ad Hoc tribunals where there was no provision in the ICTR and ICTY Statutes expressly addressing the rights of victims (Fernandez de Gurmendi, 2001).

In incorporating this right to participate in legal proceedings, the drafters of the Rome Statute were cognizant of this new role that victims would play in dispensing international criminal justice and particularly that the right to participate in legal proceeding may give a measure of satisfaction to those who have suffered harm (Rome Statute, Article 75(3)).

##### **- *Victim Participation at the Investigative Stage of Proceedings***

Aldana-Pindell points out that the Rome Statute and ICC RPE do not grant victims complete autonomy to make decisions regarding either the initiation of criminal investigation or how the investigation should proceed before trial (Aldana-Pindell, 2002). Investigative powers lie squarely with the Prosecutor, in accordance with Article 42 of the Rome Statute. But, the first decision on this right to participate was issued in January 2006 by the Pre-Trial Chamber in the investigation of crimes in the situation in the Democratic Republic of Congo (DRC), and effectively constituted the first interpretation of Article 68(3) (Sheppard, 2010). The Pre-Trial Chamber, while recognising that the general right to participate in legal proceedings at the investigative stage was not expressly granted by the Rome Statute, nevertheless granted victims this right (De Hemptinne & Rindi, 2006). The Chamber found that this participation of victims was consistent with the object and purpose of the victims participation regime established by the drafters of the Statute.



At the investigative stage, victims known to the Office of the Prosecutor and the Registry may express their views and concerns where a Pre-Trial Chamber adopts measures in relation to the protection of persons and evidence (Manning, 2007). This includes measures related to the following: the protection and privacy of witnesses and victims; the preservation of evidence; the protection of arrested persons or those who have appeared in response to summons; and the protection of national security information (Manning, 2007). Equally, a unique investigative opportunity may arise, which requires immediate security of evidence, thus necessitating the adoption of measures considered essential for the defence trial. Victims may also express their views and concerns during such unique investigative opportunity. Victims, through their legal representatives, also participate in the pre-trial phase of the confirmation of charges proceedings (Sheppard, 2010) .

- ***Participation at the Trial Stage of Proceedings***

The trial stage is the most visible platform for victims participating in legal proceedings at the Court. During this stage of participation, victims are not only represented as witnesses called by either the Prosecution or the Defence but are also considered as a party to the trial proceedings represented by Counsel of their choice. Concerns have been raised that the presence of victims as a party during the trial stage unduly prejudices the accused, in that Counsel for Victims may take on the role of the second prosecutor. Musila notes that:

*“The Prosecutor’s and victims’ interests do not always converge and that the Prosecutor may often be driven by the singular objective in the furtherance of her/his law enforcement function, establishing guilt as efficiently as possible, a fact that may lead to ignoring issues central to victims’ claims and concerns”*  
(Musila, 2011, p. 35)

If the first trial at the Court in the case Prosecutor v. Thomas Lubanga Dyilo is anything to go by, however, the trial judges are astute and have been seen to uphold the rights of the accused to a fair trial. The trial process in an adversarial system presupposes that the Prosecution will build its case against the accused and discharge the burden of proof. The defence for its part will make submissions aimed at creating a reasonable doubt that the accused committed the crimes for which he is charged (Prosecutor vs Thomas Lubanga Dyilo, 2008). The Court’s

RPE have, however, adopted a hybrid version of both the adversarial and inquisitorial systems, much like the RPE of the ICTR and ICTY. In the ICC's context, the inclusion of the expression of victims' views and concerns is akin to the French legal system (Prosecutor vs Thomas Lubanga Dyilo, 2008).

Additionally, Victims are permitted to participate in reparations proceedings, which commence at the end of a trial and where an accused has been found guilty of the offences with which he was charged (Rauschenbach & Scalia, 2008). Reparations proceedings commence at the Trial Chamber and are subject to appeals. In this regard, the Rome Statute provides that before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States (Rauschenbach & Scalia, 2008). Legal representatives are invited to make submissions orally, in writing, or both, as the Chamber please, relating to orders for reparations that the Chamber will make.

- ***Victim Participation at the Appeal proceeding.***

With regard to appeal, the Appeals Chamber has held that those who have previously been granted the right to participate in the case by a Pre-Trial Chamber or a Trial Chamber must file an application seeking leave to participate in the appeal; and participation may be permitted if it is shown that the victims' personal interests are affected by the issues on appeal and if the Appeals Chamber deems participation to be appropriate (Prosecutor vs Thomas Lubanga Dyilo, 2012). The Appeals Chamber further explained that in seeking to demonstrate that their personal interests are affected victims should generally ensure that express reference is made to the specific facts behind their individual applications, and the precise manner in which those facts are said to fall within the issue under consideration on appeal (Prosecutor vs Thomas Lubanga Dyilo, 2012).

#### **4.6. Procedural Issues Arising out of Victim Participation at the ICC**

The ability of victims to participate in legal proceedings is a key feature of the Rome Statute. Article 68(3) of the Rome Statute allows victims to participate at stages of the proceedings determined to be appropriate when their personal interests are affected in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

But scholars' analysis indicates that the ICC's participation system is currently failing to achieve this potential (Greco, 2014). Despite significant efforts and investment, scholars are questioning the sustainability, effectiveness and efficiency of the system, as well as its meaningfulness for victims.

- ***Victims are not Informed of their rights to participate***

Most victims and affected communities are not informed generally about the ICC, its proceedings and the rights of victims before the ICC as early as possible in the ICC's work in a situation, even if there are no proceedings taking place (Glassborow, 2014). Early outreach should include a general description of what participation before the Court involves the participation process and what victims who apply to participate can expect. Providing accurate information at an early stage will build knowledge and trust in the ICC, which is essential for victims to engage, and manage expectations. It is also essential to prevent frustration if progress in a situation or case is slow.

- ***Victims Applications Process***

The ICC Registry has reported that the rate at which the Court received applications has increased by 300 per cent, from 187 applications received on average per month in 2010, to 564 in 2011. As at the end of April 2014, more than 19,422 applications for participation and for reparations have been submitted, and more than 4,107 victims have been accepted to participate in proceedings before the Court (Glassborow, 2014). In the future, while the number of victims who decide to apply to the Court may fluctuate, it can be predicted that they will continue to involve the same high numbers as currently received.

Moreover, the challenges of the current approach concern the amount of time and energy it can take to process each application individually. These challenges have put strain not only on the Registry, but also on the applicants, the parties as well as the judges required to consider the applications (Stahn, 2015). The joint facilitation on Victims, Affected Communities and the Trust Fund for Victims and Reparations, of the Hague Working Group of the Bureau of the Assembly of States Parties has termed the victim application process unsustainable, going further to suggest that leaving this matter unresolved might, in fact, place the credibility of the entire Rome Statute system and the Court's work at risk, if it

results in the system's failure to protect victims' rights and interests and ensuring that they are fully represented and are able to participate in the proceedings (Stahn, 2015).

Moreover, beside the huge number of applications, the process victims must go through to apply for participation in ICC proceedings has not been adapted to victims' needs. In addition, the way the ICC has administered the process has put a strain on the Court itself and on the parties, which has ultimately also affected victims (Henry, 2011). While the Court has started to take steps to address these shortcomings, such steps have been fraught with challenges given the lack of a unified approach and the fact that the focus is placed on the Court rather than on victims (Henry, 2011).

In order to apply to participate in proceedings, victims must complete an application process that most find complicated and slow. It involves filling out a complex application form, for which the great majority of victims need assistance (Musila, 2011). The Court's processing of the application forms is cumbersome and frustrating for victims because of the individualized processing requirements. Victims are requested to provide an array of personal information, including information to prove their identity, information on their experience of crimes under the jurisdiction of the Court and how they suffered harm, even though they will invariably be heard through a legal representative who represents their interests collectively with the interests of other victims also being represented (Yael, 2009). Thus, there is an apparent mismatch between the typical way in which victims will ultimately participate and the information they are required to produce in order to enable them to participate. The emphasis on eligibility to participate, as opposed to the modalities of participation once eligibility has been determined, may be frustrating for certain victims, when it becomes clear to them that ultimately, after the cumbersome process of proving their eligibility to participate there is little scope for their individual voices to be heard by the Court (Zappala, 2010).

Often victim applicants do not have easy access to the requisite proof to submit to the Court. Also, they may misunderstand what is required which leads to incomplete applications and extensive back and forth communication, made more complicated by the poor infrastructure and limited communications capacity of many victims located in situation countries (Funk, 2010). In some countries civil records and identification documents are non-existent or difficult to access (Funk, 2010).

## - *Meeting Court Deadlines*

Regulation 86(3) of the Regulations of the Court provides that “victims applying for participation in the trial and/or appeal proceedings shall, to the extent possible, make their application to the Registrar before the start of the stage of the proceedings in which they want to participate”. Often the relevant Chamber has tied deadlines for processing applications to the Registry’s receipt of the applications, example 60 days after having received the applications, or to the stages in the ongoing proceedings, example 45 days before the commencement of the confirmation of charges hearing (Ferstman, 2012). Whilst victims have not always been able to comply with such deadlines given the paucity of outreach and limited support they receive in the field to complete their applications, it is appropriate that these deadlines exist and that Court proceedings are not unduly delayed to await victim applications (Ferstman, 2012). Several challenges have been noted, however, in the administration of such deadlines:

- i) *First, the communication of the existence of a deadline has at times occurred very close to the actual deadline.*
- ii) *Second, even when victims have managed to comply with the deadlines, the VPRS has not always been able to process the applications in advance of the deadline and thus such applicants were denied the opportunity to participate in key hearings, at no fault of their own (Wemmers, 2010, p. 645).*

## **4.7. Conclusion**

The introduction of provisions on victim participation in the Rome Statute of the ICC and the Court’s RPE represented a departure from the earlier ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda which were established by the UN Security Council. According to the ICC Statute and RPE, victims are not merely seen as witnesses but are also afforded the right to participate in the proceedings and to seek reparations from the perpetrator.

Victim participation at the ICC offers several potential benefits to legal proceedings, not to mention the victims themselves. Participation promotes individual healing and rehabilitation by providing victims with a sense of agency, empowerment, and closure. Greater participation also recognizes the victims’ suffering, and thus constitutes reparation in the

form of satisfaction. Moreover, it lays the foundation for reconciliation in affected communities as well as it serves a learning purpose mostly through exchanges with their legal representatives, victims learn about the rule of law, their rights, and the Court's mandate.

Participation benefits the actual proceedings in multiple ways as well. Victim participation contributes to providing factual and cultural information that can help the ICC establish the truth. Victim participation also helps gather social support for the ICC in the geographical area of the investigation. When the victims feel involved in the justice process and their participation is meaningful, they develop a sense of ownership vis-à-vis the Court and its quest for truth and justice.

However, it goes without saying that there are many challenges to effective and meaningful victim participation in the ICC's proceedings. Many of these challenges are not legal, but rather practical and logistical in nature. One major challenge is how to inform victims about the proceedings and their possible participation when many victims live in inaccessible and insecure locations. Moreover, victims need not only be informed, but also assisted through the participation application procedure, yet many of them are illiterate and have no official proof of identity. Requiring the Defence, the Prosecution, and the Judges to scrutinize thousands of individual victim application forms result in slowing down the proceedings and missing the Court deadlines which conflicts with the accuser's right to a speedy trial as well as the exclusion of participation rights to some victims. For this reason, victim participation scheme at the ICC needs some amendments. Thus, Chapter 5 conclude this study and recommend potential areas of reform that might allow the ICC to better achieve it victims' participation scheme making it more useful to the needs and wishes of victims.

## **CHAPTER 5: CONCLUSION AND RECOMMENDATIONS**

### **5.1. Introduction**

It has been increasingly recognized that transitional justice processes has to acknowledge and address the needs of victims, but this has not always been the case (Massidda & Pellet, 2009). Victims' views had often been rendered silent or made invisible when it comes to the prosecution of those responsible for violations (Markus Funk, 2010). Their calls for justice had at times been disregarded in the name of reconciliation, peace and stability. The prosecutions that had occurred had frequently been initiated on behalf of or for the benefit of victims without close attention being paid to their actual views and concerns about the process (Guhr, 2008).

While some national legal systems allow for the involvement of victims in criminal proceedings, victims had traditionally been left out of international criminal trials (Guhr, 2008). That was the case with the Nuremberg and Tokyo trials, as well as the International Criminal Tribunals for the former Yugoslavia and Rwanda.

In contrast with previous international and hybrid tribunals, the Rome Statute of the International Criminal Court sets out an autonomous role for victims in legal proceedings. The Statute introduces the right of victims to participate in judicial proceedings, which was unprecedented in the history of international criminal justice (Vasiliev, 2014). It also recognizes a series of other rights, including the right to reparations (Vasiliev, 2014). But, more than a decade after the entry into force of the Rome Statute, the ICC is coming under increased scrutiny when it comes to the implementation of its victim's mandate. Building upon Chapter 4; this Chapter concludes and addresses the research question of this study. It recommends and provides ways that victims might obtain more meaningful and extensive participation in ICC proceedings in the cause of bringing accountability and vindicating victims' interests.

### **5.2. Effective and Meaningful Victims' Participation**

Effective and meaningful victim participation is based on taking into consideration the views and concerns of victims in the course of the judicial process (Prosecutor vs Lubanga, 2007). As victims suffer harm as a result of crimes it is accepted that they have interests in criminal proceedings against those responsible. How victims' interests are considered is dependent on the procedural rules to which they can represent their views and concerns, as well as more substantively in how those interests are considered by decision makers, in the case of the

courts, Judges. Accordingly, the consideration of victims' interests can be distilled down to two notions of procedural and substantive justice for victims (Moffett, 2014). Procedural justice entails fairness of treatment in processes. With regards to victims this involves their participation in proceedings, impact on decisions, and ability to shape outcomes (Danieli, 2011). Treating victims with respect can improve their satisfaction with criminal proceedings (McGonigle-Leyh, 2011). Substantive justice refers to the outcomes of judicial mechanisms. For victims this involves redressing their harm and the causes of victimization, giving rise to three main rights in relation to outcomes: truth; justice; and reparations (Kiza, Rathgeber, & Rohne, 2006). Together procedural and substantive justice complement each other to ensure a more effective remedy for victims' harm.

Participation enables victims to present their interests in judicial proceedings so that they have an impact on judges' decision making process, which in turn can help to ensure outcomes more effectively respond to their needs. Although allowing victims to express their needs and interests is important, it does not require their views to dominate judges' decisions, just that they are considered and taken into account in determining justice (Wemmers, 1996). Thus the consideration of victims' interests is supposed to improve the responsiveness of a justice mechanism to victims' needs, which can be reflected through compromise with other parties' interests (UN Victims' Declaration, 1985).

The inclusion of victims' interests in international criminal justice mechanisms is important for a number of reasons. First, victims are indispensable actors in the success of international criminal justice mechanisms. They are essential in proving the occurrence of such crimes by testifying and giving evidence to assist investigations and prosecutions. In order to achieve this, providing sufficient protection of their rights is justified to build a sense of trust between the victims and the international criminal justice mechanisms so as to facilitate their proactive co-operation. Second on a moral basis, as criminal Courts are concerned with adjudicating on crimes, it is considered unjust that victims, as those most affected by crimes, can have their needs and interests ignored in the determination of justice (Jackson, 2003). Victims' rights are meant to ensure justice mechanisms are responsive to their needs and their input is considered in proceedings so as to remedy their harm. This resonates well with the theory of procedural justice as well as improving the legitimacy of such institutions in the eyes of those most affected by international crimes.

At the ICC, victims' needs and interests is carried out through Victims' Legal Representatives (VLRs). VLRs are meant to facilitate the communication of victims' needs



and interests to the ICC so that it can tailor proceedings, measures and, more generally, justice to their concerns (McGonigle-Leyh, 2011). As such, VLRs are able to participate in proceedings before the Court where victims' personal needs and interests are affected (Haslam, 2004). Access to legal assistance or representation can more effectively translate and advocate victims' interests and needs into legal processes by lawyers independent of the prosecution.

Therefore, the opportunity to participate meaningfully is first and to a very large extent dependant on the quality of the representation provided to the victims. The best protection for participating victims is to ensure that they are represented by good, competent, counsel, able to take their instructions and to sufficiently investigate the matters which victims want to raise. The representation provided to the victims must ensure that victims are: informed about their rights; informed about the ICC's proceedings; enabled to access the participation process, and enabled to present their views and concerns to the Court.

### **5.3. Recommendations**

If the ICC wants to keep its promise of serious consideration for victims' interests, it urgently needs to define a more comprehensive, concerted and defined approach towards victim participation. To come back with the research question of this study, this section will provide recommendations needed to better achieve a meaningful victims' participation scheme at the ICC.

#### **- *Informed victim their rights to participate***

The ICC has to establish outreach strategies to inform victims and affected communities about the ICC, its proceedings and the rights of victims before the ICC as early as possible in the Court's work in a situation. This should include explaining during the preliminary examination phase the rights of victims to participate in situations and cases, if the OTP decides to open an investigation, and the OTP making a systematic and comprehensive effort to communicate with victims.

Develop standard outreach messages and materials on participation, adapted to different media, to be agreed by all organs of the ICC, which inform victims about what participation involves, the participation process and what they can expect.

Review its strategies for reaching remote communities. The possibility of the ICC purchasing a short-wave radio frequency to broadcast outreach and other information to remote

communities should be explored as one additional option. Develop additional innovative strategies and policies to reach out more effectively to women and girls, as well as members of marginalized groups in affected communities.

It is also unclear whether effective systems are currently in place to inform victims on the outcome of their applications in a timely manner. Victims who are accepted to participate in ICC proceedings should be informed of that decision as well as the next steps, including informing them of their legal representative or the process for appointing one. If victims' applications are rejected they should also be informed promptly.

- ***Victims Application Process***

The option to consider addressing the increasing numbers of victims applying to participate is to adopt a collective approach to applications. Group applications may be a useful tool that can allow Chambers, legal representatives and others to see more clearly the different classes of victims participating.

But Article 68(3) provides for victims' individual right to participate in proceedings. While victims may decide to apply as a group or to exercise this right collectively, such a decision should not negate their individual right to participate and to present their views and concerns when their personal interests are affected. Group forms should therefore require the personal information of each individual victim composing the group and allow each member of the group to attach individual statements and other information to the form.

Where group applications are considered, it will be essential to consider grouping early in the process. Sufficient information must be collected on the possible groups of victims that may be formed or already exist, followed by a clear process for the formalization of the groups and verification of victims' wish to be part of a group application. Trust within the group will be essential.

- ***Simplify Application Form***

The standard form recommended for victim wishing to participate before the Court is lengthy and complicated. The first application form for participation issued in 2005 was 17 pages long and a revised seven page form covering both participation and reparation applications was issued in 2010.

A short form is preferable because it can be completed without a significant burden on victims and make the process of assisting victims easier for intermediaries. Furthermore, a shorter form will require less processing time and resources by VPRS. However, the application form should also provide an opportunity for victims to provide any information they feel relevant to their application including short narrative responses to satisfy the key requirements of Rule 85, possible protection concerns, information about their choice of legal representation and telling the story of what happened to them in their own words.

Application forms are available currently in English and French only. This raises obstacles for victims who do not speak either language as well as challenges for intermediaries who are required to translate the questions on the form for victims, and then transcribe their answers back into English or French. Some technical words and expressions used in the forms may not be possible to translate precisely into local languages and may lead to misinterpretation with regard to their true meaning. Therefore, key phrases and words should be translated or explained in local languages on the forms to ensure that they are appropriately understood by victims and those assisting them.

- ***Meeting Court Deadlines***

The Court has adopted different approaches in setting deadlines for applications. In some instances where deadlines have been set, the amount of time required for the Registry to process the forms has not been taken into account. As a result, forms received at the last minute in some proceedings have not been processed and victims' applications for participation have not been ruled upon.

To address this, the Court must consider allocating two deadlines, in consultation with the Registry. One for applications to be submitted to the Registry, followed by another allowing sufficient time to process them. Alternatively, the Court must instruct the Registry to set a fair deadline for submission of applications. The minimum reasonable time to allow victims to apply should be no less than two to three months from the announcement of the deadline. VPRS and intermediaries will need sufficient time to ensure, in the specific circumstances of each situation or case, that all victims are provided with the opportunity to apply and to supply them with effective assistance to complete forms accurately.

Also, the VPRS has been unable to process applications to meet deadlines and the commencement of proceedings due to limited staff capacity. To resolve this issue, the Court

must create a roster of professionals which can be recruited at short notice to assist with the collection and processing of applications. It notes that similar strategies, sometimes referred to as surge capacity, are used by United Nations agencies to respond to refugee and other crises.

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