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The Past, the Present and the Way Forward: The Role of Victims at the International Criminal Court (ICC)

A study of the victim participation regime at the ICC

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1 Introduction

1.1 The big scenario

The Preamble of the Rome Statute underlines that States Parties are: “mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”¹

The victim participation regime at the International Criminal Court (ICC or the Court) has been one of the major achievements of the international criminal justice system. The idea of a permanent international criminal court took hold in the aftermath of the atrocities committed during WWII, and after prolonged negotiations finally led to the establishment of the ICC in 1998. International crimes have been prosecuted at the ICC since the Court started operating in 2003. A number of trials have since been completed and decisions and orders relevant for victims have been rendered by the ICC – alongside the filing of related submissions. This allows for an assessment of how the victim participation regime has been implemented in practice. From the drafting of the Rome Statute to the realization of a functioning Court handing down decisions and judgements, the proper scope and content of the victim participation regime at the ICC still needs to be determined. Furthermore, it is unclear how to best afford victims participatory rights in proceedings without conflicting with the rights of the accused and a fair and impartial trial. Consequently, there is a need to formulate a clear and comprehensive victim participation regime. This thesis will provide a comparison between the objectives envisioned by the drafters of the victim participation regime at the ICC and the results achieved in practice, in order to analytically identify how the role of victims at the ICC has changed, and recommend a way forward for the role of victims in years to come. Moreover, this thesis argues that the jurisprudence of the ICC has changed the role of victims before the Court.

1.2 Research questions

The main research question in this study is: *How has the role of victims at the ICC changed and what should be the way forward?* Furthermore, it is possible to break the main research question down into two secondary research questions:

1. To what extent and how has the role of victims at the ICC changed?
2. How should such a role evolve in years to come in light of the rights of the accused and the interest of victims themselves?

¹ The Rome Statute, Preamble.

There are two aspects to the first question. Firstly, there is a requirement to describe the role of victims at the ICC (*lege lata*). In doing so, this study will examine the legal construction of the victim participation regime at the ICC both in theory and practice. Secondly, this study will identify changes in the role of victims at the ICC. In the main, victims take on three different formal roles at the ICC: victims as witnesses, victims as reparations claimants, and victims as participants. This dissertation will only examine the victim participation regime *sensu stricto* due to the scope of the dissertation and space limitations.

The second question is more normative in nature (*lege feranda*). Central principles in international criminal justice and international human rights law, namely, the rights of the accused and the interests of victims themselves, will be evaluated in light of the development of the victim participation regime at the ICC to propose how such a role should evolve in years to come. In doing so, this thesis identifies three possible ways for the victim participation regime at the ICC to evolve: i) victim participation as the drafters of the Rome Statute envisioned it; ii) an expanded victim participation regime as confirmed by the jurisprudence of the ICC; or iii) victim participation as *partie civile*. The choice of the rights of the accused as the subject of scrutiny is due to the fact that the Rome Statute underlines that application and interpretation of the Courts applicable law must be consistent with “internationally recognized human rights”.² Furthermore, “the rights of the accused” is reflected in what became the most important article regulating victim participation in the Rome Statute, namely article 68(3).³ Victims interests in criminal proceedings is identified in previous research and expressed by victims to include amongst others; to be heard, being treated with respect and fairness, to obtain information on the progress of the case concerning them, and to obtain economic and emotional redress.⁴ Furthermore, such interests are also expressed by victims before the ICC. Consequently, it is necessary to examine both the rights of the accused and the interests of victims to fully analyze the victim participation regime at the ICC.

1.3 Research objectives

² The Rome Statute, article 21(3).

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

⁴ See Mina Rauschenbach and Damien Scalia, “Victims and international criminal justice: a vexed question?”, 90 *International Review of the Red Cross*, (2008), 444.

The research objectives in this thesis are to examine the role of victims at the ICC and identify the most beneficial way for this role to evolve in years to come. Thus, the purpose of this thesis can be formulated to three separate goals:

1. To describe, explain and clarify the role of victims at the ICC.
2. To evaluate if the intention of the drafters of the victim participation regime at the ICC is followed in practice or if the jurisprudence of the ICC has created an expanded victim participation regime. Furthermore, to evaluate if this practice is congruent with the rights of the accused and the interests of victims themselves.
3. To determine what the victim participation regime at the ICC actually entails and how the role of the victims should evolve in years to come. In doing so, determining whether: i) the victim participation regime should revert to what was envisioned by the drafters of the ICC; ii) to continue with the expanded victim participation regime established by the jurisprudence of the ICC; or iii) to implement victim participation as *partie civile*.

1.4 Methodologies and demarcations

Both doctrinal and non-doctrinal legal research methods are applied in the analysis of the role of victims at the ICC. Arguably, there are several factors that contributed to the fact that it took four decades to establish the ICTY and ICTR and eventually the ICC, after the completion of the Nuremberg trials. Therefore, when discussing the establishment and development of international criminal law this dissertation uses an interdisciplinary perspective which combines international law (IL) with elements from international relations (IR). Both lawyers and diplomats met in Rome to draft what became the Rome Statute. Arguably, international criminal justice is highly politicized. In fact, there is little doubt that the Rome Statute was associated with political compromises on issues such as which crimes to include and the role of the Security Council.⁵ Scholars have noted that international lawyers use international relations theory in a number of ways, including to diagnose and resolve international problems, to analyze particular international institutions and to reconceptualize international law and institutions.⁶

⁵ Valerie Oosterveld, “International Criminal Justice, Politics and the Special Court for Sierra Leone”, Proceedings of the Annual Meeting (American Society of International Law 2008), 19.

⁶ Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, “International Law and International Relations Theory – a new generation of inter-disciplinary scholarship”, 92 American Journal of International Law (1998), 373.

This study will identify some of the areas where scholars have noted that IL and IR are converging.⁷ However, due to the scope of this thesis international relations theory will not be explicitly used in this study. Furthermore, this dissertation will apply “doctrinal research method” often referred to as legal positivism defined by Ian Dobinson and Francis Johns as research which “ask what law is in a particular area”.⁸ This method will be applied to identify the role of victims in the law of the ICC. In doing so, this study use sources of international law, namely treaties, customary international law and general principles of international law as outlined in article 38(1) of the International Court of Justice Statute.⁹ More specifically, the Rome Statute outlines the Statute itself along with the Rules of Procedure and Evidence (RPE) as the primary source of interpretation.¹⁰ Moreover, in accordance with article 21 of the Rome Statute the Court can apply “applicable treaties”, “principles and rules of law as interpreted in its previous decisions” and “that the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights”.¹¹ In doing so, this study will be empirical, descriptive and analytical via the study of legal instruments, *travaux préparatoires* and jurisprudence. However, this thesis also applies “non-doctrinal research methods” such as problem, policy, and law-reform based research.¹² Thus, this thesis will be normative and policy-oriented through the discussion of what should change in the victim participation regime.

This thesis is qualitative in nature and uses multiple cases from the ICC to analyze court practice. Moreover, this thesis includes sources as of 25th November 2019. Ian Dobinson and Francis Johns underlines that the four categories of research, namely; doctrinal, problem, policy and law-reform can all be part of the same research project.¹³ This will be the case in this dissertation. After analyzing the underlying factors of the introduction of the victim participation regime at the ICC, the existing law regulating victims’ procedural rights before the ICC will be identified (doctrinal). Secondly, the study of the drafting of the Rome Statute will evaluate and highlight problems affecting the law and the policy choices underpinning the

⁷ See Slaughter et al., “International Law and International Relations Theory – a new generation of interdisciplinary scholarship”, 92 *American Journal of International Law* (1998).

⁸ Ian Dobinson and Francis Johns, “Legal Research as Qualitative Research” in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007), 21.

⁹ The Statute of the International Court of Justice, article 38(1).

¹⁰ The Rome Statute, article 21.

¹¹ *Ibid.*

¹² See Terry Hutchinson, “The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law”, *Erasmus Law Review* (2015).

¹³ Ian Dobinson and Francis Johns (2007), 22.

law. Lastly, this research will underpin argumentation on how the role of victims should evolve in years to come and support proposed changes to the law (law reform).¹⁴

1.5 Structure

This thesis is divided in five parts. Firstly, this introduction presents the research questions, aim and methodologies of this thesis. The second chapter is about the construction of the legal framework to victim participation at the ICC and will identify the evolvement and the push-factors for such a participation regime. Next, the third chapter outlines the legal practice at the ICC from 2006 until 2019 to examine the participation regime in practice, trying to identifying a periodization. The fourth chapter presents the different victim participation regimes that have evolved through theory and practice at the ICC. Furthermore, the fourth chapter discusses how the role of victims at the ICC should evolve in years to come in light of rights of the accused and the interest of victims themselves. In addition, the fourth chapter reintroduces the findings of chapter 2 and 3 and discusses which of the victim roles is most suitable in years to come: i) as envisioned by the drafters of the Rome Statute ii); an expanded victim participation shaped by the jurisprudence of the ICC or iii); victim participation as *partie civile*. Lastly, chapter five provides a conclusion.

1.6 State of the art and contribution to existent academic literature

This study aims to meaningfully contribute towards a better understanding of the role of victims at the International Criminal Court. Victim participation is a novelty in international criminal justice and its application in practice has suffered from procedural uncertainty.¹⁵ Therefore, this study seeks to examine both the theory and practice of the victim participation regime at the ICC. In doing so, *the past*, namely the role of victims as envisioned by the drafters of the Rome Statute, will be central for evaluating *the present*, the practice of the ICC on victim participation and for discussing *how* this role should evolve in years to come. Several academics have contributed to the field of victim participation at the ICC and have been a great inspiration to draw upon in this study.¹⁶ Much of the academic literature on the role of victims at the ICC have focused on participation in different stages of the proceedings as well

¹⁴ Ibid., 22.

¹⁵ See Salvatore Zappala, “The Rights of Victims v. the Rights of the Accused”, 8 *Journal of International Criminal Justice* (2010), 138.

¹⁶ Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011); Gilbert Bitti and Håkan Friman, “Participation of Victims in the Proceedings” in Roy S. Lee (eds.), *The International Criminal Court: Elements of Crimes & Rules of Procedure & Evidence*, (Transnational Publishers, Inc. 2001); Juan Pablo Pérez León Acevedo, *Victims’ Status at International and Hybrid Criminal Courts: Victims’ Status as Witnesses, Victim Participants/Civil Parties and Reparations Claimants*, (Åbo Akademi University Press 2014); Silva Fernández de Gurmendi, “The Elaboration of the Rules of Procedure and Evidence” in Roy S. Lee (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001).

as directly or indirectly comparing the law and practice. However, in this study the continuum; the past, present and the way forward will be central for determining the proper scope of the role of victims before the ICC. Moreover, this continuum will be central in analyzing *how* the role of victims at the ICC has changed.

2 THE ORIGINAL DESIGN: THE CONSTRUCTION OF THE LEGAL FRAMEWORK TO VICTIM PARTICIPATION AT THE ICC

It is often asserted that “to respond to mass atrocity with legal prosecution is to embrace the rule of law”.¹⁷ The focus in international law on the protection of the individual is in part a result of legal developments after WWII and the international community’s goal of international criminal responsibility.¹⁸ However, as the focus, importantly, has been on punishing those responsible for international crimes, the role of victims has not been prominent. In recent years, the largely exclusive focus on the accused has started to change in international criminal law. The first international criminal tribunals were established in response to the atrocities committed during WWII, where the magnitude of human victimization was a consequence of State action.¹⁹ That reality brought the need to establish international tribunals to protect victims’ rights. Thus, this chapter initially examines underlying factors in the introduction of the victim participation regime at the ICC. Moreover, it analyzes the construction of the legal framework of victims’ procedural rights at the ICC to understand what role was assigned victims and the rationale behind this role in the drafting period of the Rome Statute.

2.1 Underlying factors for the introduction of victim participation at the ICC

Although this chapter does not use international relations theory, it argues the delineation of a collaborative research agenda that focuses on; “international governance theory” as research that mostly focus on the role of domestic politics and the constitutive dimensions of rules and interstate interactions; “social construction through shared norms” as research as that focus on norm-based discourses on actors in the international system and; “liberal agency theory” that focus on the nexus between domestic and international law and politics are important for understanding factors leading up to the introduction of a victim participation regime.²⁰ In doing so, this thesis argues that globalization as coordinated response to global issues, the evolving human rights discourse as norm-based discourse that affects the international system, as well as the influence of civil law countries and retributive justice efforts are important factors affecting the emerging victim participation regime. Thereafter, this chapter analyzes the con-

¹⁷ Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, (Beacon Press 1998), 25.

¹⁸ M Cherif Bassiouni, “International Recognition of Victims’ Rights”, 6 *Human Rights Law Review* (2006), 208.

¹⁹ *Ibid.*, 209.

²⁰ See Slaughter et. al., “International Law and International Relations Theory – a new generation of interdisciplinary scholarship”, 92 *American Journal of International Law* (1998), 384.

struction of the legal framework to victim participation at the ICC to understand what role was assigned to victims and the rationale behind this role.

2.1.1 Evolving human rights discourse

The term “human rights” in law dates back to the UN Charter.²¹ The Charter underlines the inherent human dignity of every individual as a fundamental and universal right, requiring respect and protection on the part of states towards individuals.²² The emerging victim participation regime was influenced by a strong tendency in national and international law to acknowledge victims’ views in criminal proceedings. Consequently, victims’ procedural rights were incorporated in a growing number of legal instruments.²³ The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power²⁴ adopted by the United Nations General Assembly, was the first major instrument of victims’ rights. The Victims Declaration incorporated participatory rights for victims in article 6(b) which reads as follows: “allowing 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 national criminal justice system”.²⁵ This provision has been important for the development of victims’ procedural rights in international criminal law. Moreover, international human rights law such as the right to life²⁶ and the right to remedy²⁷ entail concepts of the *right to access to justice* which have been interpreted by human rights bodies as including the right of victims’ to participate in the criminal proceedings to present their views and concerns at appropriate stages.²⁸ Furthermore, *the right to truth* has been emphasized by several human rights institutions, including the Office of the High Commissioner for Human Rights.²⁹ In light of this, the role of criminal proceedings upholding the right to truth has been underlined. Thus, victims’ rights to participate in criminal proceedings are not explicitly recognized human rights as such, however, as Brianne McGonigle Leyh notes,

²¹ See. McGonigle Leyh, (2011), 12.

²² The UN Charter, Preamble.

²³ Valentina Spiga, “No Redress without Justice: Victims and International Criminal Law”, 10 Journal of International Criminal Justice (2012), 1384.

²⁴ Hereinafter “Victims Declaration”.

²⁵ The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34, (1985), article 6(b).

²⁶ Universal Declaration of Human Rights, article 3; European Convention of Human Rights, Article 2; International Covenant on Civil and Political Rights, article 6.

²⁷ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (2005).

²⁸ See McGonigle Leyh, (2011), 340.

²⁹ Ibid., 103.

they are undoubtedly linked important human rights standards.³⁰ Furthermore, a number of international and regional texts called for greater procedural rights for victims.³¹ In the 1980s, the Inter-American Court of Human Rights started to interpret articles of the American Convention on Human Rights as giving victims right of prosecution against their victimizers as well as the right to be heard.³² Similarly, the European Court of Human Rights accorded victims procedural and substantive rights.³³ Some years later, the Council of the European Union adopted a Council Framework Decision for the purpose of improving the role of victims in criminal proceedings.³⁴ Conversely, the rights of the accused are incorporated all major international human rights instruments and is to a large extent customary international law.³⁵ The rights of the accused include the right to a fair trial and the right to an expeditious trial amongst others. Evidently, there has been a growing focus on human rights corresponding to victims' rights the last decades including the right to be heard, the right of access to justice and the right to truth. Victim participation and the rights of the accused do not necessarily conflict.³⁶ However, fundamental principles such as due process and a fair trial need to be respected.³⁷ Later in this study these concerns will be addressed when examining the legal practice of the ICC on victim participation.

Developments in the 1980s and 1990s concerning victims' rights and the growing focus of victims' rights in human rights law was an important factor for change. Arguably, these developments can be highlighted by social construction through shared norms.³⁸ The evolving human rights discourse arguably influenced actors and structures in the international system.³⁹ The developments in national and regional law helped sparked the acknowledgement of victim's procedural rights at the international level. Consequently, the developments in courts and conventions helped establish a foundation for the ICC's more progressive victims' rights

³⁰ Ibid., 340.

³¹ African Commission on Human and Peoples' Rights (1986); Draft Basic Principles and Guidelines on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, UN. Doc. E/CN.4/1997/104 (1997); Basic Principles and Guidelines to the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (2005).

³² T. Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (2015), 37.

³³ Ibid., 37.

³⁴ Framework Decision on the Standing of Victims in Criminal Proceedings, 2001/220/JHA, 15 March 2001.

³⁵ Salvatore Zappala, "The Rights of Victims v. the Rights of the Accused", 8 *Journal of International Criminal Justice* (2010), 140.

³⁶ Ibid., 139.

³⁷ Ibid.

³⁸ See Slaughter et al. (1998), 384.

³⁹ Ibid., 384.

agenda.⁴⁰ Furthermore, an emerging globalization process and decline of state sovereignty enhanced efforts towards strengthening victims' rights in the international criminal justice system.

2.1.2 Globalization of (international) criminal justice

The establishment of international or hybrid criminal tribunals does not exist in a vacuum. According to Mark Drumbl the establishment of such institutions have been "one of the most extensive waves of institution-building in modern international relations".⁴¹ The establishment of The International Military Tribunal at Nuremberg (IMT) and the International Tribunal for the Far East (IMTFE) was a response to atrocities committed during WWII. However, the international criminal justice movement in the aftermath of WWII was blocked by political considerations affected by the Cold War. During the Cold War the establishment of an international criminal court was "widely seen as utopian".⁴² However, the end of the Cold War brought change to the *status quo*. The collapse of a system of superpower confrontation gave human rights more prominence in the discourse as well as in the practice of states and international organizations.⁴³ Globalization entail the emergence of nonstate actors and larger interdependence as well as the decline of state sovereignty.⁴⁴ In light of this, as Bruce Broomhall argues, the end of the Cold War and the process of globalization did not necessarily establish a formal level of preconditions for regular enforcement of international criminal law. However, aspects of globalization such as global communications and the growth of international civil society created an environment in which states are under pressure to account for their conduct towards their own citizens. Importantly, the course of development in international criminal law has been changed by this geopolitical change.⁴⁵ In light of this, advocates for victims' rights had a stronger opportunity to influence policy making.

Five decades after the establishment of the IMT and IMFTE, the conflicts in the former Yugoslavia and Rwanda led to the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) through Security Council resolutions pursuant to Chapter VII of the UN Charter in 1993 and 1994. This represented a breakthrough in international criminal justice.⁴⁶ Some years after this

⁴⁰ T. Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (2015), 38.

⁴¹ Mark Drumbl, *Atrocity, Punishment and International Law*, (Cambridge University Press 2007), 10.

⁴² James Crawford, "The drafting of the Rome Statute" in *From Nuremberg to the Hauge: The Future of International Criminal Justice* edited by Philippe Sands, (Cambridge University Press 2003), 124.

⁴³ Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, (Oxford University Press 2004), 186.

⁴⁴ Slaughter et al. (1998), 370.

⁴⁵ Broomhall (2004), 186.

⁴⁶ UN Security Council Resolution 827, UN Doc. S/RES/827 (1993), Res. 955, UN Doc. S/RES/955 (1994).

again, the establishment of the ICC was a fact. Arguably, the establishment of the ICC was a response to the need to help “put an end to impunity for the perpetrators of the most serious crimes of concern to the international community”.⁴⁷ Consequently, the process of globalization and decline of state sovereignty established an environment for debating and implementing international criminal justice at the international level. However, the international criminal tribunals before the establishment of the ICC, did *not* afford victims participatory rights.

2.1.3 Traditional lack of victim participation in international criminal justice

Victims did not participate in proceedings at Nuremberg, nor at the ICTY or ICTR. The role of victims was generally limited to serve as witnesses before the tribunals.⁴⁸ The drafters of the ICTY Statute declined different proposal for greater victims’ rights such as allowing the appointment of separate counsel for victims and the ability to seek reparations directly through the court.⁴⁹ The rejections were based on the fear that such actions could lead to infringements of the rights of the accused as well as pose challenges to the efficiency of the proceedings and conflicts with the prosecution’s case.⁵⁰ Thus, the Prosecutor was entrusted with representing the interest of the international community and victims.⁵¹ In doing so, the potential conflicts between victims’ interests and the Prosecutor’s interests became evident. The Prosecutor may pursue other legitimate goals over the legitimate interest of victims.⁵² Cases from both the ICTY and ICTR underpin this argument. One example of this was when the Prosecutor did not file appeals for rape acquittals in *Kajelijeli* and *Kamuhanda* at the ICTR.⁵³ Such events led to discussions on what should be victims’ role before international criminal tribunals. Consequently, initiatives from victims’ rights groups as well as some nation states, for reform and greater participation in international criminal justice, came to the fore. As Christine Van den Wyngaert notes, the ICC victim participation regime can in part be traced back to dissatisfaction with the lack of participation of victims of serious human rights abuses.⁵⁴

⁴⁷ Understanding the International Criminal Court available at (last visit on 5 November 2019): <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>

⁴⁸ McGonigle Leyh (2011), 8.

⁴⁹ *Ibid.*, 8.

⁵⁰ *Ibid.*, 8.

⁵¹ Valentina Spiga, “No Redress without Justice: Victims and International Criminal Law”, 10 *Journal of International Criminal Justice* (2012), 1379.

⁵² Pérez León Acevedo (2014), 300.

⁵³ *Ibid.*, 300.

⁵⁴ Christine Van den Wyngaert, “Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge”, 44 *Case Western Reserve Journal of International Law* (2011), 477.

From the above, it is evident that the accused's rights including the right to a fair and impartial trial as well as the right to an expeditious trial drove some of the main objections to the introduction of a victim participation regime at the ICTY and ICTR. When the Rules of Procedure and Evidence at the ICTY were drafted there was no existing code of international criminal procedure.⁵⁵ Furthermore, when drafting the Statute and Rules of the ICTY the Judges, who were entrusted with drafting the Statute and Rules, adopted a mainly adversarial approach. Thus, the procedures were focused on the parties, namely the Prosecutor and the Defense and the proceedings were focused on prosecution and punishment.⁵⁶ On the other hand, in inquisitorial systems victims have a more active role and their status is not limited to being witnesses. The establishment of the ICC introduced a change in the role afforded to victims in the international criminal justice system. Moreover, leading up to the introduction of the victim participation regime at the ICC; restorative justice elements influenced international criminal justice which to a larger extent than before focused on meeting the needs and concerns of victims in the criminal process.⁵⁷

2.1.4 From retributive to restorative justice efforts

Over the last decades, there has been a significant shift at an international level from retribution and the utility of punishment to also include restorative principles.⁵⁸ Such developments have enhanced victims' procedural rights. Arguably, there are several factors that have affirmed the norm of victims' right to participate in proceedings and the search for other justice models. As Martha Minow notes, conventional litigation "requires people to put aside their whole identities – their needs, their spirituality and their beliefs – in order to translate the conflict into specifically legal terms".⁵⁹ Serious violations of human rights amounting to international crimes are "by their very nature irreparable".⁶⁰ However, the goal of this intention is not to nullify the principle or redress of wrongs. It suggests that remedies for such violations should be found outside traditional legal categories of reparation and focus on other measures

⁵⁵ McGonigle Leyh (2011), 138.

⁵⁶ Ibid.

⁵⁷ See Claire Garbett, "The Truth and the Trial: Victim Participation, Restorative Justice and the International Criminal Court", 16 Contemporary Justice Review (2013).

⁵⁸ University of Oxford, "Victim Participation in International Criminal Justice at a Crossroads: A Promising Route Forward?", 28 February 2018, available at (last visit on 28 October 2019): <https://www.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2018/02/victim-participation-international-criminal>

⁵⁹ In Thomas M. Antkowiak "An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice", Stanford Journal of International Law (2011), 285; Martha Minow, *Keynote Address at the Ninth Annual Stein Center Symposium on the Role of Forgiveness in Law: Forgiveness and the Law* (28 January 2000).

⁶⁰ *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*. Final report submitted by Theo van Boven, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, 131.

such as the verification of facts and truth findings and on accountability of offenders.⁶¹ As mentioned above, recent trends in international criminal justice supports a shift from retributive to restorative justice. Traditionally, retributive justice paradigms have been prominent for the status of victims in international criminal proceedings. Retributive justice efforts endeavor to achieve proportional punishment. However, the emerging trend of participation of victims in international criminal proceedings can be seen in light of the restorative justice efforts. Judgements and prosecutions alone are not sufficient to redress harm inflicted on victims.⁶² Furthermore, restorative justice efforts entail several principles and values that include reparation, victim participation in the redress process, respect for victim's dignity and the recognition of the harm suffered from the crime committed.⁶³

The evolving human rights discourse, the end of the Cold War which created a new environment for international criminal justice, the lack of victim participation at the ICTY and ICTR, and an emerging discourse on victims' needs established a momentum for establishing a permanent international criminal court. It was against this backdrop lawyers and diplomats met in Rome in 1998 to finalize the drafting of the Rome Statute.

2.2 The Rome Statute: 1994 – 1998

The ICC became the first international criminal tribunal to incorporate proper victim participation in its proceedings. A relatively broad victim participation regime was finally drafted for the Rome Statute. The work leading to the United Nations Diplomatic Conference of Plenipotentiaries on Establishment of an International Criminal Court (Diplomatic Conference of Rome) is reflected in various UN documents. The UN's goal to establish a permanent international criminal court can be followed down two tracks. First, codification of international crimes and the reworking of its *Draft Code of Crimes against the Peace and Security of Mankind*.⁶⁴ Second, the elaboration of a draft statute for the establishment of an international court.⁶⁵ This study will focus on the latter to examine the role of victims participating at the ICC.

2.2.1 Drafting history prior to the Diplomatic Conference of Rome

⁶¹ Spiga (2012), 1381.

⁶² Mariana Pena and Gaelle Carayon, "Is the ICC Making the Most of Victim Participation?", 7 *The International Journal of Transitional Justice* (2013), 522.

⁶³ *Ibid.*, 523.

⁶⁴ *Draft Code of Crimes against the Peace and Security of Mankind* (1996).

⁶⁵ In 1989 the General Assembly requested the International Law Commission to address the question of establishing an international criminal court. See A/RES/44/39 (1989).

In the 1990s the world was witnessing the commission of crimes on the territory of the former Yugoslavia and in Rwanda. In the aftermath of these atrocities the Security Council established two *ad hoc* tribunals, one for each situation. Arguably, the establishment of the two *ad hoc* tribunals were a response to one of the most pressing human rights issues in international law in this period, namely, the issue of impunity for heinous international crimes. In light of this, several states pushed for a permanent international criminal court.⁶⁶ In 1994 the UN General Assembly gave the International Law Commission (ILC) the task of creating a Draft Statute for an International Criminal Court. The drafting of the Rome Statute had to reflect the two main criminal justice systems in the world, namely, the common law system and civil law system.⁶⁷ This proved to be difficult during the negotiation of the Rome Statute.⁶⁸ Some delegations were worried that “victim participation would duplicate the role of the Prosecutor and infringe the right of the accused”.⁶⁹ Furthermore, concerns that participation would end up being symbolic and challenge the effectiveness and efficiency of the system due to the large number of victims, were raised by some lawyers and delegations.⁷⁰ On the other hand, NGOs such as Amnesty International strongly believed that victim participation was necessary for fulfilling the Court’s mandate of effectively determining responsibility.⁷¹ Consequently, there were different views amongst diplomats, lawyers and NGOs during the drafting of the Rome Statute on the extent of the procedural rights that were to be afforded victims.

In 1994 the ILC prepared 60 draft articles and commentary for an international criminal court (Draft Articles). James Crawford notes that the Draft Statute of 1994 was “no more than a point of departure”.⁷² The provision regulating victim rights is article 43 entitled “protection of the accused, victims and witnesses”:

The Court shall take necessary measures available to it to protect the accused, victims and witnesses and may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means.⁷³

⁶⁶ See. UN Doc. A/RES/44/89, (1989).

⁶⁷ Silva Fernández de Gurmendi, “The Elaboration of the Rules of Procedure and Evidence” in Roy S. Lee (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001), 220.

⁶⁸ Ibid.

⁶⁹ Luke Moffett, *Justice for Victims before the International Criminal Court*, (2014), 95.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² James Crawford, “The Drafting of the Rome Statute” in Phillippe Sands (eds), *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge University Press 2003), 110.

⁷³ Draft Statute for an International Criminal Court with commentaries (1994), article 43.

The first draft article does not elaborate on participation of victims. Likewise, the commentary contains no comments regulating participation in the proceedings before the international court.⁷⁴ In fact, article 43 of the Draft Statute of 1994 contained provisions very similar to article 22 of ICTY Statute and article 21 of the ICTR Statute.⁷⁵ As mentioned above, victims' role before the ICTY and ICTR was generally limited to one of witnesses. The result was that the first draft articles did not advance victims participatory rights compared to those of previous international criminal tribunals.

The General Assembly established an Ad Hoc Committee on the Establishment of an International Criminal Court.⁷⁶ The Ad Hoc Committee's mandate was to work on the Draft Statute.⁷⁷ In a report to the General Assembly in 1995, the Ad Hoc Committee underlined that article 43 of the Draft Statute was viewed by a "few delegations as needing further elaboration".⁷⁸ Thus, it is reasonable to draw the assumption different delegations had different views as to what extent procedural rights should be afforded victims before the Court. The report of the Ad Hoc Committee was reviewed by the General Assembly. Thereafter, it organized a Preparatory Committee on the Establishment of an International Criminal Court⁷⁹ to work on the Draft Statute to serve as a basis for negotiation at the Diplomatic Conference in Rome.⁸⁰

In the Preparatory Committee government delegations and representatives of NGOs made efforts towards establishing a new international criminal tribunal.⁸¹ In a report from the Preparatory Committee in 1996, it became evident that several delegations viewed article 43 from 1994 to be of a "really general nature" and "should be formulated in another way".⁸² In light of this, the report drew attention to the principles of justice for victims for crimes contained in the 1985 Victims' Declaration.⁸³ Arguably, as the Victims' Declaration contains provision such as "allowing the views and concerns of victims to be presented and considered

⁷⁴ Ibid.

⁷⁵ See David Donat Cattin, "Article 68 – Protection of Victims and Witnesses and Their Participation in the Proceedings" in Otto Triffterer (eds), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, (Nomos 1999), 888.

⁷⁶ Hereinafter "Ad Hoc Committee".

⁷⁷ T. Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (2015), 10.

⁷⁸ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, A/50/22 (1995), 35.

⁷⁹ Hereinafter "Preparatory Committee".

⁸⁰ Funk (2015), 11.

⁸¹ Fanny Benedetti and John L. Washburn, "Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference", *Global Governance* (1999).

⁸² Report of the Preparatory Committee on the Establishment of an International Criminal Court (Proceedings of the Preparatory Committee during March-April 1996), A/51/22, 59.

⁸³ Ibid.

at appropriate stages of the proceedings where their personal interests are affected (...)”,⁸⁴ several delegations wished for a more active role for victims. During this time, several delegations argued their position around article 43 and what role should be assigned victims before the Court. The French delegation made it clear in a working paper submitted in August 1996 that they argued a more detailed provision regulating the rights of victims.⁸⁵ The delegation proposed a separate article regulating victims’ procedural rights. In doing so, France proposed to replace article 43 by an article 102 (measures for ensuring the protection of victims and witnesses) and an article 104 (public nature of the trial).⁸⁶ France is a civil law country and many civil law countries allow victims to participate in the criminal proceedings as a *partie civile*. In doing so, victims are afforded participatory rights such as to ask the defendant and witnesses questions.⁸⁷ Moreover, Egypt submitted a proposal for article 43 on 19th of August 1996 which underlined: “Article 43 of the ILC draft statute contains certain protections for witnesses and victims of crimes but does not extend to the substantive right of compensation to victims of crimes, nor does it provide for a mechanism allowing the victim, as “partie civile”, to participate in the proceedings”.⁸⁸ Furthermore, Egypt also supports that legal representative of victims have the right to present additional evidence pertaining to establishing the basis of criminal responsibility.⁸⁹

During the fourth session of the Preparatory Committee in August 1997 a more substantial text emerged, following proposals from New Zealand.⁹⁰ New Zealand proposed an amended article 43 that included the following paragraph (3): “The Court shall permit the views and concerns of the victim to be present and considered at appropriate stages of the proceedings where their personal interest are affected in a manner which is consistent with the rights of the accused and a fair and impartial trial”.⁹¹ In fact, the final draft adopted by the Preparatory Committee contained all the elements of the final version of article 68.⁹² However, some

⁸⁴ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985.

⁸⁵ Draft Statute to the International Criminal Court, Working Paper submitted by France, 66, A/AC.249/L.3, 6 August 1996.

⁸⁶ Draft Statute to the International Criminal Court, Working Paper submitted by France, 66, (A/AC.249/L.3) 6 August 1996.

⁸⁷ Carsten Stahn, Hector Olasolo and Kate Gibson “Participation of Victims in Pre-Trial Proceedings of the ICC” 4 *Journal of International Criminal Justice* (2006), 220.

⁸⁸ Proposal submitted by Egypt for Article 43, 1. (A/AC.249/WP.11) 19 August 1996.

⁸⁹ *Ibid.*

⁹⁰ See William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), 823; Article 43, Protection of the [Accused] Victims and Witnesses and Their Participation in The Proceedings, Revised Abbreviated Compilation, A/AC.249/1997/WG.4/CRP.9, 14. August 1997.

⁹¹ Non.Paper/WG.4/No.19/Rev.1 (Amended Proposal by New Zealand on Article 43) 13 August 1997, 3.

⁹² Schabas (2010), 823.

components were bracketed.⁹³ The wording in the proposal from New Zealand is clearly influenced by the Victims' Declaration. Moreover, in a document on abbreviated compilations of proposals on procedural matters from August 1997, article 43(8) was included:

Legal representatives of victims of crimes have the right to participate in the proceedings with a view to presenting additional evidence needed to establish the basis of criminal responsibility as a foundation to their right to pursue civil compensation.⁹⁴

The inclusion of the right of legal representatives of victims to present additional evidence needed to establish the basis for criminal responsibility is similar to the rights of victims as civil party or *partie civile* which characterize civil law countries. Thus, the inclusion, respectively 43(3) and 43(8) in drafts of the Statute, indicates that the drafting was influenced by civil law countries and inquisitorial systems. In January 1998 the Preparatory Committee met in Zutphen in the Netherlands to continue the work and restructure and consolidate different draft articles into a final draft.⁹⁵ In what has become known as the Zutphen Draft, article 61 contained the same provision on participation as the 1997 report, although the report makes it clear that some delegations thought it should be a further reflection on that paragraph.⁹⁶ Finally, the text transmitted by the Preparatory Committee for scrutiny at the Diplomatic Conference, reads as follows 68(3):

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representative of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.⁹⁷

2.2.2 Drafting history during the Diplomatic Conference of Rome

In July of 1998 the UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Diplomatic Conference of Rome) was held in Rome. The purpose was

⁹³ Ibid.

⁹⁴ Article 43, Protection of the [Accused] Victims and Witnesses and Their Participation in The Proceedings, Revised Abbreviated Compilation, A/AC.249/1997/WG.4/CRP.9, 14. August 1997; Report of The Inter-Sessional Meeting From 19 To 30 January 1998 In Zutphen, The Netherlands, A/AC.249.1998/L.13, 04 February 1998.

⁹⁵ Funk (2015), 11.

⁹⁶ A/AC.249/1998/L.13 (Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands), 116.

⁹⁷ M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute (Volume 2)* (2005), 497.

to draft and adopt the Statute of the ICC. At the Conference, Fiona McKay on behalf of *The Victims Rights Working Group* stated: “Punishing criminals is not enough. There will be no justice without justice for victims. And in order to do justice for victims, the ICC must be empowered to address their rights and needs.”⁹⁸ The representatives at the Diplomatic Conference had several issues to discuss. However, as this study has underlined, the conference took place at a time of emerging focus on victim rights. At the Diplomatic Conference, Canada submitted a proposal regarding article 68.⁹⁹ This proposal framed much of the discussion at the Diplomatic Conference regarding victims procedural rights.¹⁰⁰ Importantly, it recognized the role of legal representatives of victims.¹⁰¹ However, in the final proposal submitted by Canada it becomes clear that paragraph (8) as mentioned above, was deleted. This provision had contained the power of victims’ legal representative to submit evidence.¹⁰² In the final version it stated that the legal representatives of victims may present the “views and concerns” of victims where the Court considers it “appropriate”. Thus, the more expansive rights contained in the previous draft was deleted. Nevertheless, victims were given an active role in the proceedings. In the Draft Statute submitted to the committee of the whole article, 68(3) reads as follows:

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 in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representative of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.¹⁰³

During the drafting of the Rome Statute several NGOs as well as individuals and governments supported the full realization of victims’ procedural rights. However, many delegations were concerned that the potential number of victims that would participate in proceedings could lead to practical difficulties.¹⁰⁴ Therefore, the modalities for exercising the right to participate in a case was given to the Court. As mentioned above, article 68(3) permits participation of

⁹⁸ See Bitti and Friman (2001), 474; Statement by Fiona McKay representing REDRESS, on behalf of *The Victims Rights Working Group* delivered to the Rome Conference on 17 June 1998.

⁹⁹ Proposal Submitted by Canada, A/CONF.183/C.1/WGPM/L.58 and A/CONF.183/C.1/WGPM/L.58/Rev.1 (6 July 1998).

¹⁰⁰ See William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), 823.

¹⁰¹ Ibid.

¹⁰² Proposal Submitted by Canada, A/CONF.183/C.1/WGPM/L.58, 6 of July 1998.

¹⁰³ Report of the Drafting Committee to the Committee of the Whole, Part. 6 The Trial, A/CONF.183/C.1/L.88. (16 July 1998), 7.

¹⁰⁴ Bitti and Friman (2001), 457.

victims determined “appropriate” by the Court. However, it was important for the drafters of the Rome Statute to address the shortcomings of previous international criminal tribunals regarding victims’ procedural rights. As David Donat-Cattin notes, “the inclusion of norms on victims’ participation in the Court’s proceedings was a result of a strong and widespread criticism against the lack of provisions of this kind in the Statutes and Rules of Procedure and Evidence in the Ad-Hoc Tribunals”.¹⁰⁵ Present at the Rome Conference were delegations with different legal traditions, and some were concerned that participation of victims would infringe the rights of the accused. Thus, to overcome such concerns victim participation should take place “in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. As Ruti Teitel notes, the development of the “judicialization and legislation of the discourse of victim participation has been reflected in a pronounced trend towards its enhancement at the international level”.¹⁰⁶ In analyzing the drafting period of the Rome Statute, it is clear that victims were assigned an active role in the proceedings. However, to safeguard the rights of the accused and to address concerns of procedural efficiency, the Judges of the ICC were given great discretion to decide on a case-to-case basis when victim participation is “appropriate” and presented in a manner which is not inconsistent with the right of the accused.

2.2.3 The Rules of Procedure and Evidence: 1998 – 2002

The Rome Statute included groundbreaking provisions on victims’ procedural rights in international criminal proceedings. However, more specificity was needed in the Rules of Procedure and Evidence (RPE) in order to make the role of victims clearer. A Preparatory Commission was established to adopt the Rules of Procedure and Evidence and Elements of Crimes.¹⁰⁷ In 1999 France hosted a meeting on victims’ access to the ICC.¹⁰⁸ As Gilbert Bitti and Håkan Friman notes, the initial stages of the negotiations on the RPE featured different views on whether additional provisions regulating participation of victims were needed, as the various delegations differed on these issues. For example, the proposal from the Australian delegation contemplated one rule on the participation of victims.¹⁰⁹ On the other hand, the French proposals included several rules dealing with practical aspects of participation of vic-

¹⁰⁵ Donat Cattin (1999), 871.

¹⁰⁶ University of Oxford, “Victim Participation in International Criminal Justice at a Crossroads: A Promising Route Forward?”, 28 February 2018, available at (last visit on 28 October 2019): <https://www.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2018/02/victim-participation-international-criminal>

¹⁰⁷ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN. Doc. A/CONF.183/10 (17 July 1998).

¹⁰⁸ Report on the International Seminar on Victims’ Access to the International Criminal Court (PCNICC/1999/WGRPE/INF/2).

¹⁰⁹ See Bitti and Friman (2001); Rule 92 in PCNICC/1999/DP.2 (1 February 1999).

tims. One of the French proposals underlined that participation could take place in all phases of the proceedings.¹¹⁰ Furthermore, several NGOs came up with suggestions on the rules regulating participation of victims.¹¹¹ The final Rule 89 of the RPE regulated application for participation of victims in the proceedings, and confirmed the statutory powers of the Court pursuant to article 68(3)¹¹² to determine when and in what manner victims' rights to participate should be exercised in any given case.¹¹³ Thus, the Rules of Procedure and Evidence is *mutatis mutandis* similar to the Rome Statute.

2.2.4 The legal outcome

The Rome Statute addresses victims' participatory rights in the following provisions: articles 15(3) and 19(3) of the Rome Statute regulates respectively the submission of "representations to the Pre-Trial Chamber in accordance with the Rules of Procedure and Evidence"¹¹⁴ and the submission of "observations"¹¹⁵ in accordance with the Prosecutor's request for authorization of an investigation and the admissibility of a case.¹¹⁶ These two articles do not require a formal application to participate in ICC' proceedings.¹¹⁷ However, the key provision regulating participation in proceedings before the ICC is article 68(3), which is broader and not confined to a specific stage of the proceedings:

When the personal interest of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representative of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.¹¹⁸

Article 68(3) requires that the victim of a crime which the ICC has jurisdiction over must apply to participate as a victim participant. However, the relevant Chamber determines subse-

¹¹⁰ Ibid. 7.

¹¹¹ Amnesty International, *The International Criminal Court: Ensuring an effective role for victims* (1999); Human Rights Watch, *Elements of Crimes and Rules of Procedure and Evidence* (1999).

¹¹² "Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. (...)"

¹¹³ Bitti and Friman, (2001), 460.

¹¹⁴ The Rome Statute, article 15(3).

¹¹⁵ The Rome Statute, article 19(3).

¹¹⁶ Carsten Stahn, Hector Olasolo and Kate Gibson "Participation of Victims in Pre-Trial Proceedings of the ICC" 4 *Journal of International Criminal Justice* (2006), 222.

¹¹⁷ Pérez León Acevedo (2014), 304.

¹¹⁸ The Rome Statute, article 68(3).

quently whether the victim participant is actually given the permission to participate as well as the extent of participation and the form of participation.¹¹⁹ In doing do, the Judges will determine if participation is “appropriate” and “consistent with the rights of the defense to a fair and expeditious trial”. This corresponds to article 68(3) which underlines that participation “at stages of the proceedings determined to be appropriate by the Court” “in a manner which is not prejudicial to” or “inconsistent with the rights of the accused and a fair and impartial trial”. Furthermore, the notion of “victim” is defined in Rule 85¹²⁰ of the RPE. Victim participants before the ICC must fulfill the victim definition under rule 85. Rule 89¹²¹ of the RPE provides the procedure for victims applying to take part in the Court’s proceedings. The norms included in the Rome Statute and the RPE of the ICC is a compromise between two conflicting concerns. The right of victims to participate in the proceedings and the rights of the accused as well as the practical requirements of a fair and impartial trial.¹²²

2.3 Concluding remarks

What role was assigned victims during the drafting period of the Rome Statute? Victims’ were given substantive procedural rights. In analyzing the role of victims in the drafting period it is evident that the Rome Statute incorporates to main considerations, namely, the rights of the accused on the one hand and the interest of victims on the other. Therefore, the modalities of participation were given to the Court to decide and the important decision of how to interpret the extent of participation was left to the Judges. Thus, the need to examine the legal practice of the ICC is pivotal in order to describe the role of victims before the ICC.

¹¹⁹ McGonigle Leyh (2011), 257.

¹²⁰ Rule 85 of RPE: (a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) 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 to their historic monuments, hospitals and other places and objects for humanitarian purposes”.

¹²¹ Rule 89 of RPE regulates application of victims to participate in the proceedings.

¹²² Donat Cattin (1999), 888.

3 THE LEGAL PRACTICE OF THE ICC ON VICTIM PARTICIPATION: 2006 – 2019

The Rome Statute and the Rules of Procedure and Evidence established a relatively broad victim participation regime. However, both the Statute and the RPE left “gaps with regard to participation provisions, believing the Judges would be in the best position to provide greater clarification”.¹²³ Thus, the need to examine the practice of the ICC on victim participation is decisive to analyzing the role of victims before the ICC. How has the participation regime been implemented in practice? The ICC has at the time of writing 12 situations under investigations and nine completed or closed cases. Thus, this allow for a periodization of the legal practice at the ICC with regards to victim participation. This thesis study in depth what are arguably two of the most important and seminal decisions of the Court on victim participation; namely, *Decision on victims’ participation of 18 January 2008*¹²⁴ and *Lubanga, Judgement on the Appeals of the Prosecutor and The Defense against Trial Chamber I’ Decision on Victims’ Participation of 18 January 2008*.¹²⁵ In addition, other decisions and cases from the ICC which are important for victim participation will be analyzed. Furthermore, this chapter identifies both internal and external factors in explaining the legal practice of the ICC on victim participation. In doing this, the thesis identifies internal factors such as the Court’ role in interpreting the role of victims. On the other hand, external factors are understood as circumstances not affecting the law. This thesis examines the role of victims in the legal practice of the ICC light of international human rights standards such as the rights of the accused and the interests of victims themselves.

3.1 First cases and decisions: 2006 – 2012

In 2006 the ICC issued its first decision. Six years later, in March 2012, the first trial before the ICC ended. The victim participation regime drafted for the Rome Statute had to be tested in practice. The Rome Statute and the RPE afforded victims the right to participate at each stage of the proceedings whether it be pre-trial, through trial or post-trial.¹²⁶ As Hector Olosolo notes, the ICC Chambers were entrusted with discretion to determine i) when victims can participate and ii) the manner in which such participation can take place. Importantly, this discretion implies that the ICC Chambers are only bound by two general criteria.¹²⁷ Firstly,

¹²³ McGonigle Leyh (2011), 240.

¹²⁴ Lubanga (ICC-01/04-01/06-1119) Decision Victims’ Participation, Trial Chamber I, 18 January 2008.

¹²⁵ Lubanga (ICC-01/04-01/06-1432) Judgement on the Appeals of the Prosecutor and the Defense against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008.

¹²⁶ McGonigle Leyh (2011), 234.

¹²⁷ Hector Olosolo, “Systemic and Casuistic Approaches to the Role of Victims in Criminal Proceedings before the International Criminal Court”, 12 *New Criminal Law Review* (2009), 517.

victims can only participate at “stages of the proceedings determined to be appropriate by the Court” and when their “personal interests” are affected. Secondly, victims can only “present their views and concerns” in a way that is not “prejudicial to or inconsistent” with the rights of the accused and a fair and impartial trial.¹²⁸ This study will identify participation pursuant to article 68(3) in these stages of the proceedings: the application process, pre-trial, trial and the appeal process.

3.1.1 The first seminal decisions on victim participation

The ICC’s first decision on victim participation during investigation was issued by Pre-Trial Chamber I on 17th January 2006.¹²⁹ One central question was whether victims were allowed to participate in the investigation phase of a situation as this was unclear under article 68(3). The Pre-Trial Chamber rendered that victims were allowed to participate during the investigation phase. The Chamber argued this would not “*per se* jeopardize the appearance of integrity and objectivity of investigation, nor is it inherently inconsistent with the basic considerations of efficiency and security”.¹³⁰ This decision was enhancing victims procedural rights or at least clarifying that victims did have participatory rights during investigation. However, in 2008 the Pre-Trial Chambers in the Darfur situation and the DRC situation granted leave to appeal the issue.¹³¹ The Appeals Chamber disagreed with the approach and found that investigations are not judicial proceedings and that victims’ right to participate in investigations is in conflict with the Rome Statute which does not provide such a right.¹³²

The first seminal decision on victim participation during trial came when Trial Chamber I in the *Prosecutor v. Thomas Lubanga Dyilo*¹³³ rendered a decision on the criteria for allowing victims to participate in the proceedings pursuant to article 68 of the Rome Statute and Rule 85 of RPE. Before the decision on 18th January 2008, Trial Chamber I invited parties and participants to make submissions on the “role of victims in the proceedings leading up to, and during, the trial.”¹³⁴ In *Lubanga* the legal representatives of victims submitted that victims’ interests in participation in the proceedings were diverse but included, “obtaining reparations, expressing their views and concerns, verifying facts, protecting their dignity during the hear-

¹²⁸ Ibid., 517.

¹²⁹ Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-101-tEN-Corr (Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6. (Hereinafter Situation in DRC).

¹³⁰ Ibid., para. 57.

¹³¹ McGonigle Leyh (2011), 272.

¹³² Ibid.

¹³³ Hereinafter “*Lubanga*”.

¹³⁴ Elisabeth Baumgartner, “Aspects of victim participation in the proceedings of the International Criminal Court” 90 *International Review of the Red Cross* (2008), 411.

ings and securing recognition as victims”.¹³⁵ Furthermore, the legal representatives contended that in addition to making oral and written submissions, victims should be able to initiate issues, call evidence and ask questions.¹³⁶ Arguably, this argumentation reflects restorative justice principles and the request entails provisions similar to victims participating as *partie civile* in other jurisdictions.

In early drafts of the Rome Statute as mentioned above, legal representatives of victims were allowed to introduce evidence to establish a basis for criminal responsibility. On the other hand, the defense argued that victims should request participation on an individual basis when “appropriate, by reference principally to whether their interests are affected at any particular stage”.¹³⁷ Arguably, this position is similar to the position assigned to victims during the drafting period of the Rome Statute. Trial Chamber I emphasized in *Lubanga* that “participation is not a once-and-for-all event but, rather should be decided on the basis of the evidence or issue under consideration at any particular point in time”.¹³⁸ In doing so, victims that wished to participate at any stage of the proceedings had to set out the nature of the proposed intervention in a discrete written application. The Chamber underlined that the victim must describe in which way his or her personal interest was affected. Subsequently, after the Chamber had determined if the interests of victim were affected at a specific stage of the proceedings, they had to determine if the participation of the victims in the way requested was appropriate and in line with the rights of the defense and the right to a fair and expeditious trial.¹³⁹ In doing so, Trial Chamber I in *Lubanga* implemented a casuistic approach when determining participation pursuant to article 68(3). Importantly, Trial Chamber I rendered that the right to introduce evidence during trials before the ICC should *not* be limited to the parties. In doing so, the Chamber held that victims participating in the proceedings could be allowed to “tender and examine evidence” if the Chamber found it would help determining the truth.¹⁴⁰ Furthermore, the Chamber rendered that it would allow appropriate questions from victims whenever “their personal interests are engaged by the evidence under construction.”¹⁴¹

In conclusion, when analyzing the decision on the modalities of victim’ participation in *Lubanga*, some important positions on the role of victims can be identified. Firstly, victims

¹³⁵ *Lubanga*, (ICC-01/04-01/06-1119) Decision on Victims’ Participation, 18 January 2008, para. 39.

¹³⁶ *Ibid.*, paras. 38-43.

¹³⁷ *Ibid.*, para. 52.

¹³⁸ *Ibid.*, para. 101.

¹³⁹ *Ibid.*, para. 104.

¹⁴⁰ *Ibid.*, para. 108

¹⁴¹ *Ibid.*

must establish a link between their personal interest and the issues or evidence that are subject to the specific trial to be allowed to participate in the proceedings. Secondly, to participate victims need to show that their personal interests are affected by the specific procedural activity or particular evidence. In doing this, participation is determined on a case-by-case basis. This is in line with the drafting of the Rome Statute which entails the wording “determined to be appropriate by the Court”. Thirdly, if this first criterion are fulfilled, victims are allowed to participate in a manner which “is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial”. Consequently, in its decision the Chamber define the role of victim participants under article 68(3) as entailing only participatory rights within relation to specific procedural activities or evidence and in light of the personal interests of those victims who wish to participate. Arguably, the abovementioned constitutes an expansion of victims procedural role pursuant to what the drafters of the Rome Statute envisioned. However, the Prosecutor and Defense appealed the Decision on victims’ participation of 18 January 2008.

On 11th July 2008, the Appeals Chamber rendered its judgement on the of the prosecutor’s and the defenses’ decision to appeal the 18 of January 2008 Decision.¹⁴² They were granted leave to appeal three issues.¹⁴³ One issue being the right to lead evidence pertaining to guilt or innocence of the accused. Trial Chamber I’s decision on 18th January 2008 rendered that Rule 85 of the RPE does *not* restrict victims’ participation to crimes contained in the charges confirmed by Pre-Trial Chamber I. The Chamber argued that such restriction did not have any basis in the Rome Statute.¹⁴⁴ However, the defense submitted that not establishing a link between the victim’s status and the participatory rights on one hand, and the charges against the accused on the other, constituted an infringement of the principle of legality.¹⁴⁵

The Appeals Chamber acknowledged that Rule 85 of the RPE did *not* limit victim’s participation to the crimes contained in the charges confirmed by Pre-Trial Chamber I. However, the Chamber underlined that the provision must be read in light of context and its object and purpose.¹⁴⁶¹⁴⁷ The Chamber held that although Rule 85 does not “*per se* limit the notion of victims to the victims of the crimes charged, the effect of article 68(3) of the Statute is that the participation of victims in the trial proceedings, pursuant to the procedure set out in Rule

¹⁴² Lubanga (ICC-01/04-01/06-1432) Judgement on the Appeals of the Prosecutor and the Defense against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008.

¹⁴³ Lubanga (ICC-01/04-01/06-1119) Decision Victims’ Participation, Trial Chamber I, 18 January 2008.

¹⁴⁴ *Ibid.*, para. 93.

¹⁴⁵ Lubanga (ICC-01/04-01/06-1432) Judgement on the Appeals of the Prosecutor and the Defense against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, para. 46.

¹⁴⁶ *Ibid.*, paras. 53-54.

¹⁴⁷ See Vienna Convention on the Law of the Treaties, article 31(1).

89(1) of the Rules, is limited to those who are linked to the charges”.¹⁴⁸ The Appeals Chamber rendered that for the purpose of participation in trial proceedings, harm suffered by a victim and “personal interest” under article 68(3), must be linked with the charges confirmed against the accused.¹⁴⁹ In doing so, the Appeals Chamber upheld the second issue on appeal. The “personal interest” must be linked to charges confirmed against the accused. In its decision the Appeals Chamber underscore that to give effect to the intention of article 68(3) in the context of trial proceedings “it must be interpreted so as to make participation by victims meaningful”.¹⁵⁰ In doing so, the Chamber based it on contextual and teleological argumentation. Moreover, the Appeals Chamber emphasized that in precluding victims from tendering evidence related to guilt or innocence of the accused “their right to participate in the trial would potentially become ineffectual”.¹⁵¹ However, the Appeals Chamber held that victims were required to explain why their interests are affected by the evidence or issue before the Chamber will decide on whether or not to allow such participation. Moreover, the Chamber will determine on a case-by-case basis if such participation should be allowed. The Appeals Chamber underlines that when exercising such powers, the rights of the accused has to be accounted for.¹⁵² In doing so, considerations of the appropriateness should take into account the accused’s right to timely proceedings. Thereby, the Appeals Chamber confirmed the decision of the Trial Chamber I. Victim participants were allowed to lead evidence pertaining to the guilt or innocence of the accused. Furthermore, victims could also challenge the admissibility of evidence in the trial proceedings.

3.1.2 Other decisions and cases in the period of 2006 – 2012

At the pre-trial stage and during the confirmation of charges the modalities of victims’ procedural rights also need to be implemented in practice. The confirmation of charges hearing is held to establish whether there exists enough evidence to put a suspect on trial.¹⁵³ The modalities of victim participation during this procedural stage have differed in practice. In *Lubanga* the legal representatives of victims were allowed to make opening closing statements, but their participation had to be limited to the charges brought against Lubanga. In *Prosecutor v. Germain Katanga and Mathieu Ngudjolo*¹⁵⁴ at the confirmation of charges hearing the Judge

¹⁴⁸ Ibid., para. 58.

¹⁴⁹ Ibid., para. 65.

¹⁵⁰ Lubanga (ICC-01/04-01/06-1432) Judgement on the Appeals of the Prosecutor and the Defense against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, para. 97.

¹⁵¹ Ibid., para. 97.

¹⁵² Ibid.

¹⁵³ McGonigle Leyh (2011), 273.

¹⁵⁴ Hereinafter “*Katanga/Ngudjolo*”.

allowed all victims the same procedural rights throughout the pre-trial proceedings.¹⁵⁵ The procedural rights granted to victims included the right to make submission on the admissibility of evidence but not to introduce additional evidence.¹⁵⁶ In *Prosecutor v. Bahr Idriss Abu Garda*¹⁵⁷ victims had participatory rights such as access to public record of the case, participation in hearings, questioning of witnesses and the filing of documents during the pre-trial proceedings of the case.¹⁵⁸

In *Lubanga* victims' legal representatives were allowed in consistence with the 18th January 2008 decision to question witnesses on the guilt of the accused. In doing so, they were "assisting the bench in its pursuit for truth".¹⁵⁹ Moreover, in *The Prosecutor v. Jean-Pierre Bemba Gombo*¹⁶⁰ victims' legal representatives were also allowed to question witnesses on the guilt of the accused.¹⁶¹ However, in the *Katanga and Ngudjolo* case, Trial Chamber II stated, in its decision on the modalities of victims participation at trial rendered on 22nd January 2010, that the "only legitimate interests the victims may invoke when seeking to establish the facts which are the subject of the proceedings is that of contributing to the determination of the truth by helping the Chamber to establish what exactly happened".¹⁶² In light of this reasoning, Trial Chamber II in *Katanga and Ngudjolo* underlined that victims can only actively participate if such participation contributes to the truth and does not have a negative impact on the expeditiousness of the proceedings.¹⁶³ Moreover, victims via their legal representatives, were allowed to give evidence under some circumstances. In this regard, the Chamber argued that it considered that requesting the submission of "incriminating and exculpatory evidence pursuant to article 69(3) of the Statute would be means for the victims to express their "views and concerns" within the meaning of Article 68(3) of the Statute".¹⁶⁴ In light of this argumentation, the Chamber underscore that this is a mere possibility victims have pursuant to article 68(3). Moreover, the interests of accused must be considered by the Chamber when determine

¹⁵⁵ See McGonigle Leyh, (2011), 282; *Katanga/Ngudjolo* (ICC-01/04-01/07-474) Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, para. 44-45.

¹⁵⁶ *Ibid.*, 283.

¹⁵⁷ Hereinafter "*Abu Garda*".

¹⁵⁸ McGonigle Leyh (2011), 286.

¹⁵⁹ *Lubanga* (ICC-01/04-01/06-2127) Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, 16 September 2009, para. 27.

¹⁶⁰ Hereinafter "*Bemba*".

¹⁶¹ *Bemba* (ICC-01/05-01/08-1935) Order regarding applications by victims to present their views and concerns to present evidence, 21 November 2011,

¹⁶² *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1788-tENG), Decision on the Modalities of Victim Participation at Trial, Trial Chamber II, 22 January 2010, para. 60.

¹⁶³ *Ibid.*, para. 65.

¹⁶⁴ *Ibid.*, para. 81.

the modalities of participation. In doing this, the accused's right to avoid undue delay in the proceedings must be observed. The Chamber emphasized that victims are not supporting the prosecution.¹⁶⁵ Therefore, when receiving applications, it must be clearly stated how the testimony will help establish the truth.

In March 2012 Lubanga was found guilty of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities.¹⁶⁶ The case was the first to be held before the ICC. Thus, the trial was the first before the ICC where victims actively participated in the proceedings. The Trial Chamber received and considered applications from victims and allowed 129 victims to participate in the proceedings.¹⁶⁷ The victims participated through their legal representatives, and the victims were divided in two groups of legal representatives who made opening and closing statements.¹⁶⁸ The various Chambers' decisions in *Lubanga* have been important in order to interpret the role of victims pursuant to article 68 of the Rome Statute. Victims were granted participatory rights in practice unprecedented in international criminal proceedings. The broad participatory rights afforded victims in *Lubanga* have been followed by other chambers in subsequent cases. However, the application process was time and resource consuming both for the victims and the Court.¹⁶⁹ Moreover, in the *Lubanga* case no deadline was set for application. Thus, the Chamber had to consider applications until the end of the presentation of evidence.¹⁷⁰ As mentioned, victims that want to participate in the proceedings pursuant to article 68(3) has to apply to do so. The large number of victims in situations and cases before the ICC makes good application procedures a prerequisite. The Victim Participation and Reparation section (VPRS) of the Registry is responsible for assisting victims in the process of applying for participation in the proceedings.¹⁷¹ The victim application process is closely related to enjoying the rights under article 68(3). In the coming sections it becomes clear that victims' participation application procedure has been a continuous point before the Court, especially due to the large number of victims in cases before the ICC.

¹⁶⁵ Ibid.

¹⁶⁶ Lubanga (ICC-01/04-01/06-2842), Judgement pursuant to Article 74 of the Statute, 14 March 2012.

¹⁶⁷ Lucia Catani, "Victims at the International Criminal Court: Some Lessons Learned from the *Lubanga* Case", 10 *Journal of International Criminal Justice*, (2012), 912.

¹⁶⁸ Ibid., 913.

¹⁶⁹ Ibid., 917.

¹⁷⁰ Ibid., 919.

¹⁷¹ See, Regulations of the Court, Regulation 86(9).

3.1.3 Different approaches to victim participation in the jurisprudence from the ICC: 2006 – 2012

In analyzing a selection of decisions and cases on the ICC' practice on victim participation in its first operative years some conclusions can be drawn. The role of victims and the modalities of participation have been interpreted differently by various Chambers. In *Lubanga* the scope of participation pursuant to article 68(3) is interpreted to be broad. This is evident by the fact that victims' representatives as mentioned above, are allowed to question witnesses pertaining to guilt or innocence of the accused. On the other side, the *Katanga and Ngudjolo* Trial Chamber underscore that if such participation contributes to the truth it can be allowed. In applying this approach, the Judges in *Katanga and Ngudjolo* have for example rarely allowed legal representatives of victims to question witnesses about the guilt of the accused. In contrast, the Judges in *Lubanga* and *Bemba* allowed the legal representatives to ask such questions.¹⁷²

3.2 Period of increasing challenges and deficits: 2012 – 2016

In March 2012, Lubanga was found guilty for war crimes.¹⁷³ This was the first judgment rendered by the ICC and the first case where victims participated actively during the trial. In the above, the legal issues of the Court's interpretation of the role of victims in its first decisions and cases is outlined. However, the ICC does not operate in a vacuum and is influenced by several factors. This section identifies that factors such as a growing workload, financial pressure and a growing diplomatic crisis are, although not directly related to victim participation under the Rome Statute regulatory framework, factors that potentially affect the Court's functionality and on a secondary basis affect the victim participation regime before the ICC.

In October 2012, Trial Chamber V in the Kenya cases outlined a new procedure for modalities of victim participation. In doing so, the Chamber indicated that only victims that would present their views and concerns individually by appearing before the Court should file an application form in accordance with Rule 89 of the RPE.¹⁷⁴ Trial Chamber V recognized that other Chambers of the ICC required that all victims who wished to participate in the proceedings followed the application procedure pursuant to Rule 89 and underlined that this might be appropriate in these cases. However, the Chamber in *Prosecutor v. Uhuru Muigai Kenyatta*¹⁷⁵ considered that a different approach was preferred to give effect to the qualifying criteria in

¹⁷² See. McGonigle Leyh (2011), 299.

¹⁷³ Lubanga (ICC-01/04-01-2842), Judgement pursuant to Article 74 of the Statute, 14 March 2012.

¹⁷⁴ Kenyatta (ICC-01/09-02/11-498), Trial Chamber V, Decision on Victims' Representation and Participation, 3 October 2012, para. 24.

¹⁷⁵ Hereinafter "*Kenyatta*".

article 68(3) of the Statute “as they operate in the particular circumstances of this case”.¹⁷⁶ The Chamber noted the large number of victims in the case and that a common legal representative would not be able to present individual views and concerns of identified victims whilst respective of the object and purpose of article 68(3) of the Rome Statute.¹⁷⁷ Therefore, a differentiated procedure for direct individual participation and participation through a common legal representative was the best way to comply with article 68(3).¹⁷⁸ The common legal representative would be the primary contact for victims to present their “views and concerns”. Moreover, Trial Chamber V argued that limiting the application of Rule 89 of the RPE to victims who wished to participate individually and directedly did not conflict with the rights of the accused to a fair and impartial trial.¹⁷⁹ Moreover, the Chamber underlined that the manner and timing of the common legal representative who would be acting on behalf of the victims would be controlled by the Chamber in manner that upheld the rights of the accused. However, as highlighted by Sergey Vasiliev, the procedure adopted by Trial Chamber V is not consistent with the plain text of the Rule 89(1) of the RPE which requires that every victim application is individually treated.¹⁸⁰ Moreover, objections such as the fear that a differentiated approach could divide the victim population “into first and second classes of victims, engendering frustration and resentment” were raised.¹⁸¹

In *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*¹⁸², Trial Chamber V highlights the modalities of victim participation through the common legal representative to include the right to access documents as long as the contents is relevant to victims’ personal interests, victims’ legal representatives making opening and closing statements and the common legal representative presenting evidence after submitting a discrete application.¹⁸³ In contrast to *Lubanga* as mentioned above, which required individual victim participation application, Trial Chamber V in *Kenyatta and Ruto and Sang* adopted a “hybrid” where only victims who wished to appear directly before the Court, needed to submit an individual application.

The Kenyan Trial Chambers, as described above, issued decisions on a new application procedure for victims that wanted to participate in trials in respectively, *Ruto and Sang* and *Kenyat-*

¹⁷⁶ Ibid., para. 22.

¹⁷⁷ Ibid., para. 27.

¹⁷⁸ Ibid., para. 28.

¹⁷⁹ Ibid., para. 33.

¹⁸⁰ Sergey Vasiliev, “Victim Participation Revisited” in *The Law and Practice of the International Criminal Court* edited by Carsten Stahn, 1157.

¹⁸¹ Ibid., 1158.

¹⁸² Hereinafter “*Ruto and Sang*”.

¹⁸³ *Ruto and Sang*, (ICC-01/09-01/11-460) Trial Chamber, Decision on victims’ representation and participation, 3 October 2012, paras. 63-77.

ta. This was an attempt to make the process simpler.¹⁸⁴ This practice differed from the ICC in previous cases. The *Kenyatta* and *Ruto and Sang* cases following the Prosecutor's decision to use his *proprio motu* powers pursuant to article 15(4) of the Rome Statute to initiate investigations into alleged crimes committed during the violence following the 2007-2008 election in Kenya, increased the tension with some African states.¹⁸⁵ ICC had until 2016 only investigated conflicts in Africa. As Sofie Høgestøl notes, this led to accusations of the ICC having an African bias when selecting cases for prosecution.¹⁸⁶ The indictment of the then sitting President of Sudan, Omar al-Bashir, for crimes against humanity and war crimes in 2009 and genocide in 2010, developed into a political discourse on the ICC's relationship with some African states which resulted in the African Union (AU) adopting an official policy of non-cooperation with the ICC.¹⁸⁷

In November 2012, the ICC issued a Revised Strategy in relation to victims.¹⁸⁸ This was an altered version of the Court's first Strategy regarding victims.¹⁸⁹ However, the Strategy was criticized for being too superficial and most importantly not containing enough detail on how to achieve and implement the goals.¹⁹⁰ Regarding victim participation the Revised Strategy sets out as a strategic objective to:

Ensure that victims are able to fully exercise their right to effectively participate in the ICC proceedings with effective legal representation in a manner that is consistent with their rights and personal interests as well as with the rights of the accused to a fair, expeditious and impartial trial.¹⁹¹

The above mentioned is in line with the Rome Statute. However, the Strategy does not address substantive issues and the role of victims under article 68(3) is still to be determined by Judges in the respective cases. Moreover, with a growing workload this was important issues to address. In 2012 the number of applications the ICC received was "dramatically increased" from previous years.¹⁹² The ICC explained this increase due to the rising number of cases and

¹⁸⁴ See Pérez León Acevedo (2014), 309.

¹⁸⁵ Jean-Baptiste Jeangène Vilmer, "The African Union and the International Criminal Court: counteracting the crisis", *International Affairs*, (2016), 1322.

¹⁸⁶ Sofie Høgestøl, "Er Den internasjonale straffedomstolen afrikafiendtlig?", *International Politikk* (2016), 1.

¹⁸⁷ Jeangène Vilmer (2016), 1321.

¹⁸⁸ Court's Revised Strategy in Relation to Victims, ICC-ASP/11/38, 5 November 2012.

¹⁸⁹ Report of the Court on the Strategy in Relation to Victims, ICC-ASP/8/45, 10 November 2009.

¹⁹⁰ Carayon and O'Donohue, (2017), 570.

¹⁹¹ Court's Revised Strategy in Relation to Victims (2012), para. 20.

¹⁹² *Ibid.*, para. 40.

the scope of the charges in each case.¹⁹³ Unfortunately, the ICC had challenges in processing applications received in a timely manner. This have been especially true when the ICC Chambers have set short time frames for submission of applications and when the number of victims is high. This have led to delays and to victims in some cases not getting the opportunity to participate in the proceedings.¹⁹⁴ Moreover, states parties have been concerned about the efficiency and its high costs. For example, in 2013 the ICC had a budget of 112,039,600 Euros and a staff of 690 persons.¹⁹⁵ In the aftermath of the financial crisis the ASP only partially adopted budgetary increases to “expand its work”.¹⁹⁶ Most victims participating in ICC proceedings participate through their legal representatives and not in person. In practice, budgetary considerations and the growing caseload put pressure on the Chambers to give weight to efficiency as well as cost considerations when making decisions about victims’ legal representatives.

In 2015, Trial Chamber VI in the *Ntaganda* case issued a decision on victims’ participation in trial proceedings.¹⁹⁷ Victims participating solely through the legal representatives would be admitted to participate in the trial after; i) the Registry sent application to the Chamber ii) the Registry separated the applicant into three groups: those who clearly qualified as victims, applicants who clearly did not qualify as victims and applicants that the Registry could not make a clear decision on.¹⁹⁸ The Chamber considered that allowing the Registry to assess victim applications based on clear guidelines provided by the Chamber, was the most “efficient and appropriate way to consider applications in that case.”¹⁹⁹ However, the Chamber underlined that the procedure for victims wishing to participate directly in the proceedings, would be decided upon by the Chamber.

Trial Chamber VI in *Ntaganda* issued a decision on the conduct of the proceedings.²⁰⁰ Examination of witnesses was allowed provided the legal representative had filed a motivated request, and as long as, if permission was given, the legal representative refrained from using leading questions. Moreover, a request had to be made to present evidence and explain how

¹⁹³ Ibid., see footnote 52.

¹⁹⁴ Carayon and O’Donohue (2017), 579.

¹⁹⁵ M. Cherif Bassiouni, “The ICC’s Twelfth Anniversary Crisis: Growing Pains or Institutional Deficiency?” in Charles Chernor Jalloh and Alhagi B. M. Marong (eds), *Promoting Accountability under International Law for Gross Human Rights Violations in Africa*, (2015), 93.

¹⁹⁶ Carayon and O’Donohue, (2017), 570.

¹⁹⁷ *Ntaganda* (ICC-01/04-02/06/499) Decision on Victims’ Participation in Trial Proceedings, 6 February 2015.

¹⁹⁸ Ibid., para. 24.

¹⁹⁹ Ibid., para. 32.

²⁰⁰ *Ntaganda* (ICC-01/04-02/06-619) Decision on the Conduct of Proceedings, 2 June 2015.

this would contribute to the truth.²⁰¹ Concerning presentation of evidence by the legal representatives of victims a motion for leave has to be filed as well as an explanation of how the evidence may contribute towards the truth.²⁰² Furthermore, Pre-Trial Chamber II in *Prosecutor v. Dominic Ongwen*²⁰³, issued a decision on establishing principles on the victims' application process in March 2015.²⁰⁴ The Single Judge points to the *Ntaganda* case where use of a one-page individual application form "led to the successful and expedited proceedings by the VPRS and the admission by the Single Judge of 1120 victims participating in the confirmation of charges hearing and the related proceedings".²⁰⁵ Moreover, the Judge argued that the simplified form did not prejudice participatory rights under the Rome Statute. In September 2015, the Pre-Trial Chamber II issued a decision concerning the procedure for admission of victims to participate in the proceedings in the present case.²⁰⁶ The Registry would assess all victim applications for participation, then transmit them to the Chamber and the parties. All applications which had not been objected to by either party or the Single Judge were subsequently allowed to participate in the proceedings. Any contested applications would be decided upon individually by the Single Judge.²⁰⁷ In November 2015, Pre-Trial Chamber II issued a decision on contested victims' applications for participation, legal representation of victims and their procedural rights.²⁰⁸ Here, the Chamber notes that legal representatives of victims have a general right to documents in the case. Moreover, the legal representative have a right to attend all public and non-public hearings in the case.

In conclusion, the period of 2012-2016 was characterized by external challenges such as a growing workload and number of victims, financial pressures and an increasing diplomatic crisis with the African Union. The adoption of the differentiated procedure for victim participating in *Kenyatta* and *Ruto and Sang* was criticized for not being in conformity with the Rome Statute. Subsequently, the other cases a mentioned in this section have not followed that approach. However, over the last years the ICC has tried to address some of the above-mentioned problems.

²⁰¹ Ibid., para.65.

²⁰² Ibid, para. 70.

²⁰³ Hereinafter "*Ongwen*".

²⁰⁴ Ongwen (ICC-02/04-01/15-205) Decision Establishing Principles on the Victims' Application Process, ICC, 4 March 2015.

²⁰⁵ Ibid., 15.

²⁰⁶ Ongwen (ICC-02/04-01/15-299) Decision Concerning the Procedure for Admission of Victims to Participate in the Proceedings in the Present Case, 3 September 2015.

²⁰⁷ Ibid.

²⁰⁸ Ongwen (ICC-02/04-01/15-350) Decision on Contested Victim's Application for Participation, Legal Representation of Victims and their Procedural rights, 27 November 2015.

3.3 The ICC's evolving practice in answering challenges the last years

The ICC has so far not been able to develop consistent approaches to victim participating to be applied in all cases at the ICC. In 2017 the updated *Chambers Practice Manual* was issued.²⁰⁹ The Manual included agreements by the ICC Judges. Although not a binding instrument, it contains general recommendations and guidelines reflecting best practices based on the experiences of Judges at the Court. This has again highlighted the need to come up with an efficient application procedure for victims' applications. In the section in the Manual relating to various stages of the proceedings some consensus emerged in that a simplified individual approach was incorporated in the Manual.²¹⁰ Moreover, the relationship with several African states have become more constructive over the past few years.²¹¹ In 2016, the ICC Prosecutor authorized to open an investigation into the Georgia situation.²¹² Furthermore, the ICC is conducting several preliminary examinations of situations outside of Africa.²¹³ Thus, the argument of ICC having an African bias is no longer valid.

In the abovementioned, the Courts increasing workload and number of victim participants are described as challenging. However, the ICC has addressed these challenges by designing mechanisms to better handle the number of victims before the Court.²¹⁴ Such mechanisms include the introduction of collective victims' participation applications and simplified individual applications as mentioned above. Moreover, common legal representatives have generally been participating on behalf of victims' due to efficiency considerations.²¹⁵ When analyzing the ICC's caselaw from the last couple of years, it is clear that the Chambers have formulated decisions addressing efficiency considerations. In October 2017, in *Ongwen*, Trial Chamber IX issued preliminary directions for any LRV or defense evidence presentation.²¹⁶ These preliminary directions were given far in advance in order to "facilitate the effective preparation of the LRVs and Defense".²¹⁷ Moreover, the Chamber indicated that the Chamber

²⁰⁹ ICC, *Chambers Practice Manual*, May 2017, available at (last visit on 11 of November 2019): https://www.icc-cpi.int/iccdocs/other/170512-icc-chambers-practice-manual_May_2017_ENG.pdf

²¹⁰ See *Ibid*; Carayon and O'Donohue (2017), 579.

²¹¹ See Manisuli Ssenyonjo "African States Failed Withdrawal from the Rome Statute of the International Criminal Court: From Withdrawal Notifications to Constructive Engagement" *International Criminal Law Review* (2017).

²¹² Decision on the Prosecutor' Request for Authorization of an Investigation, (ICC-01/15-12), 27 January 2016.

²¹³ ICC, Preliminary Examinations, <https://www.icc-cpi.int/pages/pe.aspx>; ICC, Situations under Investigation, <https://www.icc-cpi.int/pages/situation.aspx>. (last visit on 19 of November 2019).

²¹⁴ Juan-Pablo Perez-Leon-Acevedo, "Why Retain Membership of the International Criminal Court? Victim-oriented Considerations", 15 *International Organizations Law Review* (2018), 383.

²¹⁵ *Ibid*.

²¹⁶ *Ongwen* (ICC-02/04-01/15-1021) Preliminary Direction for any LRV or Defense Evidence Presentation, 13 October 2017.

²¹⁷ *Ibid.*, 1.

was “not provisionally inclined to hear victims present unsworn non-evidentiary “views and concerns” before its Judgement”.²¹⁸ In March 2018, in *Ongwen*, the Chamber issued a decision on the presentation of evidence and views and concerns by legal representatives of victims.²¹⁹ Here the legal representatives of victims were granted the right to call a number of witnesses to give evidence. On the other hand, the Chamber rejected the request for two participating victims to present their views and concerns at that point of time.²²⁰ However, the Chamber noted that this decision was made irrespective of potential subsequent requests to present views and concerns at a later stage of proceedings.²²¹

In February 2019, the Registry submitted observations and recommendations on aspects relating to admission of victims for participation in the proceedings filed in the pre-trial phase in the case of *Prosecutor v. Alfred Yekatom*.²²²²²³ The Registry recommended a victim admission process adopted in both *Ntaganda* and *Al Hassan* cases based on considerations to procedural efficiencies and maximizing victims’ access to the Court as well as respecting the accused’s right to a fair trial.²²⁴ In light of this, Pre-Trial Chamber II in *Yekatom*, issued a decision on principles applicable to victims’ applications for participation where it approved the Registry’s proposed form.²²⁵

In March 2019, the Registry issued a decision on principles applicable to victim participation applications, legal representations of victims and the manner of victim participation in the proceedings in *Prosecutor v. Al Hassan Ag Abdoul Ag Mohamed Ag Mahmoud*.²²⁶²²⁷ Pre-Trial Chamber I decided that a collective application form should not be used in *Al Hassan*.²²⁸ The Single Judge noted his willingness to adopt the collective application form “should the victims choose to have an account of the harm they have suffered be given by a single person

²¹⁸ *Ibid.*, para. 2.

²¹⁹ *Ongwen* (ICC-02/04-01/15-1199-Red) Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, 6 March 2018.

²²⁰ *Ibid.*, paras. 77-78.

²²¹ *Ibid.*

²²² Hereinafter “*Yekatom*”.

²²³ Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings, ICC-01/14-01/18-78, 6 February 2019.

²²⁴ *Ibid.*, para. 7.

²²⁵ *Yekatom* (ICC-01/14-01/18-141), Decision Establishing Principles Applicable to Victims’ Applications for Participation, 5 March 2019.

²²⁶ Hereinafter “*Al Hassan*”.

²²⁷ *Al Hassan* (ICC-01/12-01/18-289-Red-tEng-Corr) Decision on Principles Applicable to Victims’ Applications for Participation, to Legal Representations of Victims, and the Manner of Victim Participation in the Proceedings, 20 March 2019.

²²⁸ *Ibid.*, para. 28.

authorized by them to so”.²²⁹ However, after having been informed by the VPRS, the Single Judge as mentioned found that a collective application form should not be applied in the *Al Hassan* case. Moreover, when it came to the legal representation the Chamber noted that none of the victims could afford the cost of the legal representation.²³⁰ Due to the financial budgeted for 2019, in the *Al Hassan* case the Chamber underlined the need to appoint a single team to represent the applicants.²³¹ Thus, budgetary considerations still affects the victim participation regime in 2019.

Regarding modalities of victim participation during the pre-trial stage in *Al Hassan*, the Single Judge allowed victims’ legal representatives access to all public and confidential documents with the exception of those classified as *ex parte*. Also, if the legal representatives of victims wanted to reveal confidential information to their clients they must be permitted to do so by the Chamber.²³² The legal representatives of victims were given the right to make opening and closing statements at the confirmation hearing. Moreover, the legal representatives of victims were allowed to challenge the admissibility of evidence.²³³ On 4 of November 2019, Trial Chamber IX in *Ongwen* issued a decision on legal representatives request to present views and concerns in person.²³⁴ The Single Judge did not allow the two participating victims to present their views and concerns in person in addition to the closing statements to be given by their legal representatives. The Chamber argued that even though such participation would be done without requiring additional time “could create the impression of an imbalance to the detriment of the accused in the presentation of closing statements”.²³⁵

In conducting a legal discussion of the abovementioned decisions, various ICC Chambers the last few years have been mindful in addressing challenges relating to the accused’s rights and the closely related efficiency of proceedings. This is evident in the adoption of collective victims’ participation and simplified individual applications as mentioned above. As the Pre-Trial Chamber in *Ongwen* stipulates “the constant need to improve the victims’ participation system in order to ensure its sustainability, effectiveness and efficiency”.²³⁶

²²⁹ Ibid., para. 27.

²³⁰ Ibid., para. 31.

²³¹ Ibid., para. 36.

²³² Ibid., para. 47.

²³³ Ibid., para. 52.

²³⁴ Ongwen (ICC-02/04-01/15-1655) Decision on Legal Representatives to Present Views and Concerns in Person, 4 November 2019.

²³⁵ Ibid., para. 10.

²³⁶ Ongwen (ICC-02/04-01/15-205) Decision Establishing Principles on the Victims’ Application Process, 4 March 2015, para. 13.

3.4 Concluding remarks

The legal practice of the ICC on modalities of victim participation illustrates that the role of the victims at the ICC has changed from the role pursued by the drafters of the Rome Statute to a more enhanced victim participation regime established through the jurisprudence of the Court. However, the legal practice of the ICC has at times been contradictory and challenged by a diplomatic crisis with the African Union, budgetary deficits and a growing caseload. As highlighted by Cherif Bassiouni, all judicial institutions face difficulties in an initial growth phase.²³⁷ However, it is especially important for the ICC to overcome such issues due to the fact that ICTR, ICTY and several of the mixed-model tribunals are closed or closing down.²³⁸ Consequently, there is a demonstrable requirement for the ICC to determine a proper victim participation regime.

²³⁷ M. Cherif Bassiouni, “The ICC’s Twelfth Anniversary Crisis: Growing Pains or Institutional Deficiency?” in *Promoting Accountability under International Law for Gross Human Rights Violations in Africa* (ed. Charles Chernor Jalloh and Alhagi B. M. Marong), 93.

²³⁸ *Ibid.*, 98.

4 THE WAY FORWARD FOR THE VICTIM PARTICIPATION REGIME AT THE ICC

The victim participation regime at the ICC has given victims of international crimes a voice. However, concerns about to what extent victims should be allowed to participate have been interpreted differently in decisions and cases before the Court. With this in mind, the role of victims at the ICC is likely to be a contentious point that will be brought up in future prosecutions before the Court. The Rome Statute's regulatory framework consist of the Assembly of States Parties (ASP) which can make amendments to Rome Statute as long as it is proposed, adopted and ratified in accordance with articles 121 and 122 of the Statute.²³⁹ The following will consider how the role of victims should evolve in years to come in light of the right of the accused and the interests of victims themselves.

4.1 Victim participation as the drafters of the Rome Statute envisioned?

The participation regime drafted at the Diplomatic Conference in Rome represented a major breakthrough for victims' procedural rights in international criminal proceedings. However, as this study has highlighted, the Statute entrusted the Judges to determine the modalities of participation of victims in the proceedings on a case-by-case basis. The drafters of the Rome Statute tried to balance the importance of victims' right to participate and the rights of the accused. Moreover, when analyzing the drafting period of the Statute the legal representatives of victims were allowed to present additional evidence to establish the basis for criminal responsibility. However, this provision was deleted during the Diplomatic Conference in Rome. It is therefore fair to assume that the drafters envisioned a victim participatory regime that was not identical to victims as *partie civile*. However, the jurisprudence of the ICC has established an expanded victim participation regime. In *Lubanga*, the first seminal decision on victim participation during trial, victims were allowed to introduce evidence pertaining to the accused's guilt or innocence as well as challenge the admissibility and to make opening and closing statements which were already provided for under the RPE.²⁴⁰

With regard to the rights of the accused to a fair and impartial trial, the principle of legal certainty is closely linked.²⁴¹ This principle entails the notion that legal rules must be sufficiently clear and precise.²⁴² Thus, the procedural uncertainty that sometimes has recognized the victim participation regime at the ICC²⁴³ could, arguably, infringe the rights of the accused to a fair and impartial trial. However, as scholars have noted, practical difficulties arising out of

²³⁹ The Rome Statute, articles 121 and 122.

²⁴⁰ ICC RPE, rule 89.

²⁴¹ McGonigle Leyh (2011), 256.

²⁴² Ibid.

²⁴³ See Zappalà (2010).

involvement of victims, should not automatically imply that the involvement of victims should be restricted at a minimum.²⁴⁴ When introducing a victim participation regime for the first time it was an understandable choice to leave the modalities of victim participation to be determined by the Court on a case-to-case basis. However, in light of the experience of operating as an international court for nearly 20 years, the content and scope of victim participation regime before the ICC needs to be clearly defined both as regards victims themselves and the rights of the accused.

4.2 Expanded victim participation regime as confirmed by the ICC's jurisprudence?

Judicial decisions rendered by the Court have shaped the victim participation regime before the ICC. In analyzing the role of victims in the jurisprudence of the ICC it is clear that the role of victims is enhanced pursuant to the Rome Statute regulatory framework. Thus, the rights of victims are in practice expanded. As mentioned above, this includes the rights of victims to, in addition to make opening and closing statements,²⁴⁵ the right to introduce evidence pertaining to the guilt or innocence of the accused. Thus, in practice the status of victim participation at the ICC has moved towards rights victims as civil parties/*partie civile* enjoy. Although, victims at the ICC cannot initiate prosecutions or file appeals at the ICC, as civil parties can in some national jurisdictions. Article 68(3) of the Rome Statute clearly affirms that victims present their views and concerns “in a manner not prejudicial or inconsistent with the rights of the accused”. The drafters of the Rome Statute granted victims explicitly the right to present “views and concerns”. Arguably, it is legitimate to ask whether “views and concerns” can be considered prejudicial or inconsistent with the rights of the accused when international and regional human rights bodies “have not found the role of victim as private prosecutors in some national systems to be *per se* contrary to international human rights standards”.²⁴⁶ However, the victim participation regime has been criticized for being inefficient and infringing the rights of the accused to an expeditious trial.²⁴⁷ Thus, the need for the ICC to find a balance between victim participation and the rights of the accused is crucial. As Salvatore Zappalà notes, there are numerous areas where the rights of the accused potentially can conflict with victim participation.²⁴⁸ However, standards of fairness in international criminal procedure does not necessarily translate to those fairness demands identical to those applied in domestic

²⁴⁴ Carsten Stahn, Hector Olasolo and Kate Gibson “Participation of Victims in Pre-Trial Proceedings of the ICC” 4 *Journal of International Criminal Justice* (2006), 238.

²⁴⁵ ICC RPE, rule 89.

²⁴⁶ Olasolo (2009), 518.

²⁴⁷ Zappalà (2010), 145.

²⁴⁸ *Ibid.*, 162.

proceedings.²⁴⁹ International criminal courts operate in another environment than national courts and the “(...) crimes in their jurisdictions are factually and legally much more difficult to process than typical municipal crimes, and the other is that international criminal justice aspires to achieve objectives exceeding those of national criminal courts”.²⁵⁰ Thus, fairness to defendants and the interests of victims can be balanced. That the accused receives a fair trial is essential in international criminal proceedings. However, it is legitimate to ask how to best interpret the right to a fair trial in light of the special circumstances international criminal courts operate in.²⁵¹

In light of the above, this thesis argues that the expanded victim participation regime confirmed by the jurisprudence of the Court is the way forward for the victim participation regime before the ICC. However, the need to define a more comprehensive and concrete approach to the modalities of victim participation is present. If not, the procedural uncertainty that at times have recognized the ICC’s legal practice on victim participation could infringe the rights of the accused to a fair trial. As pointed out by Carolyn Hoyle and Leila Ullrich: “in this context of legal and normative uncertainty and diversity coupled with the ICC’s status as a new international criminal justice institution, the judicial organ of the ICC has been reluctant to establish overall principles, especially with regard to the victims’ mandate”.²⁵² This thesis take the position that is time for the ICC to *now* establish overall principles with regard to the role of victims’ before the Court.

4.3 More ambitious victim participation – victim participation as *partie civile*?

A decade after the establishment of the ICC, a participation scheme allowing victims to participate *as partie civiles*/civil parties was established in respectively, the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Extraordinary African Chambers in the Senegalese Courts (EAC) following civil law tradition. Furthermore, victims could participate before the Special Tribunal for Lebanon (STL), but without the right to claim reparations.²⁵³

²⁴⁹ Mirjan Damaka, “Reflections on Fairness in International Criminal Justice”, 10 *Journal of International Criminal Justice* (2012), 612.

²⁵⁰ *Ibid.*, 613.

²⁵¹ See Joanna Nicholson, ““To High”, “Too Low”, or “Just Fair Enough”? Finding Legitimacy Through the Accused’s Right to a Fair Trial”, 17 *Journal of International Criminal Justice* (2019).

²⁵² Carolyn Hoyle and Leila Ullrich, “New Court, New Justice?” 12 *Journal of International Criminal Justice* (2014), 701.

²⁵³ Jérôme de Hemptinne, “Challenges Raised by Victims’ Participation in the Proceedings of the Special Tribunal for Lebanon”, 8 *Journal of International Criminal Justice* (2010), 167.

Victims' as civil parties support the prosecution and seek reparations.²⁵⁴ All these tribunals were established after the ICC and therefore bring legitimate questions about which victim participation regime should be pursued for trials prosecuting international crimes. The ECCC is a hybrid criminal tribunal and was established by the Security Council and the Royal Government of Cambodia to bring the senior leaders of the Khmer Rouge to justice.²⁵⁵ Victims at ECCC have the right to file complaints with the Co-Prosecutors at the ECCC.²⁵⁶ On the other hand, victims are not allowed to initiate prosecutions as they can in ordinary Cambodian courts.²⁵⁷ The Extraordinary Chambers in the Courts of Cambodia and the Extraordinary African Chambers in the Senegalese Courts are both hybrid criminal courts and thus established to deal with particular conflicts. On the other side, the ICC is an international criminal court dealing with situations and cases it has jurisdiction over.²⁵⁸ Thus, this thesis argues that victim participation as *partie civile* at the ICC would, arguably, infringe the rights of the accused to a fair and impartial trial due to efficiency considerations and the scope of the situations and potential number of victims the Court has jurisdiction over.

In light of the above, this thesis argues that to respond to the particular environment the ICC operates in, victims should not be full civil parties to the proceedings. As clarified by a Report of the UN Secretary-General "the possibility for victims to present their views does not imply that they are recognized as "parties civiles".²⁵⁹ However, this thesis argues as mentioned above that the enhanced victim participation regime established by the ICC is the way forward.

4.4 Concluding remarks

In conclusion, this thesis argues that best way forward for the victim participation regime at the ICC is to continue with the enhanced victim participation regime. However, in doing so the modalities of participation has to be revised to establish a clear and comprehensive victim participation regime taking into account the rights of the accused and the interests of victims themselves.

²⁵⁴ Johanna Herman, "Realities of Victim Participation: The civil party system in practice at the Extraordinary Chambers in the Courts of Cambodia (ECCC), 16 *Contemporary Justice Review* (2013), 464.

²⁵⁵ Brianne McGonigle, "Two for the Price of One: Attempts by the Extraordinary Chamber in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles", 22 *Leiden Journal of International Law*, (2009), 128.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*, 139.

²⁵⁸ See Rome Statute, Part 2 (Jurisdiction, Admissibility and Applicable Law).

²⁵⁹ See footnote 58 in Zappalà (2010); Report of the Secretary-General. UN Doc. S/2006/893 (15 November 2006).

5 Conclusion

This thesis has studied the role of victims at the International Criminal Court. The aim has been to answer the following research question: *How has the role of victims at the ICC changed and what should be the way forward?* In approaching this question *the past*, being the role of victims pursued by the drafters of the Rome Statute, has served as basis for analyzing the role of victims before the ICC. This study has illustrated that the drafting of article 68(3) was ambiguous in the way that it established a participation regime for victims. However, the modalities of such a participation regime were to a large extent to be determined by the Judges in respective ICC Chambers. Thus, the legal practice of the ICC has been pivotal in identifying *how* the role of victims has changed. In examining *the present*, the legal practice at the ICC from 2006 until today, it is evident that ICC' jurisprudence has enhanced the victim participation regime. Thus, the role of victims before the ICC has *indeed* changed compared to the role assigned victims under the Rome Statute regulatory framework. However, different Chambers have interpreted the extent of victims' rights differently. The seminal decision in *Lubanga* established an approach largely followed by other Chambers. Victim participants were allowed to introduce evidence pertaining to the accused's guilt or innocence, to challenge the admissibility of evidence, to attend hearings and to file submissions. Victims has procedural and participatory rights in practice before the ICC, not explicitly recognized in the Rome Statute. In light of this, this thesis argues that the way forward, respecting both the rights of the accused and the interest of victims, is to continue with the expanded victim participation regime established by the jurisprudence of the Court. However, due to procedural uncertainty the victim participation regime has to be revised and clarified in order to respect the rights of the accused to a fair trial. Nevertheless, reflections about procedural fairness and how to best interpret the right to a fair trial in international criminal proceedings is essential in order to address the particular circumstances of being an international criminal court.

This thesis started with an excerpt from the Preamble of the Rome Statute drawing attention to the reality leading to the establishment of a permanent international criminal court. The victim participation regime is there to give those "victims of unimaginable atrocities that deeply shock the conscience of humanity" a voice. As this study has shown, the ICC is not a perfect institution, nor has the victim participation regime at the Court been implemented without flaws. However, if the ICC manages to provide clear and comprehensive directions on modalities of enhanced victim participation and to elaborate on fairness considerations in international criminal proceedings, hopefully victims' participation will be active and meaningful in a system that provides more procedural certainty.

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