

CHALLENGES TO VICTIM INVOLVEMENT AT THE  
INTERNATIONAL CRIMINAL COURT:  
SHEDDING LIGHT ON THE COMPETING PURPOSES OF JUSTICE

by

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Submitted in partial fulfilment of the requirements  
for the degree of Master of Arts

at

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DALHOUSIE UNIVERSITY  
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*This thesis is dedicated to my family, friends and professors without whose patience, support, and continued encouragement it could not have been completed.*

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## **ABSTRACT**

The Rome Statute saw the provision of three statutory rights for victims: the right to participation, protection, and reparations. The addition of these rights is an attempt to incorporate elements of restorative and reparative justice processes into a primarily retributive system. The emerging jurisprudence shows there are competing tensions developing in all areas. The right to participation saw initially broad decisions consistently scaled back by the Appeals Chamber to ensure a more streamlined approach. The right to protection, in contrast, has continued to be upheld by all Court levels resulting in significant trial challenges and delays. While the right to reparations remains untested, it is likely to only partially fulfill restorative aims. This thesis argues that while victim involvement has altered the traditional trial process, restorative aims will remain unmet. However, victim involvement has begun to shed light on the competing purposes of justice within the Rome Statute framework.

## LIST OF ABBREVIATIONS USED

CAR	Central African Republic
CICC	Coalition for the International Criminal Court
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECtHR	European Court of Human Rights
GA	General Assembly
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
KNDR	Kenya National Dialogue and Reconciliation
NGO	Non-Governmental Organization
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
SC	Security Council
UN	United Nations
WCRO	War Crimes Research Office
VRPS	Victims Participation and Reparations Section
VRWG	Victims Right Working Group
VWU	Victims and Witnesses Unit



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# CHAPTER 1

## INTRODUCTION

The International Criminal Court (ICC or the Court) symbolizes the pinnacle in the rise of the retributivist paradigm in international criminal justice. The Rome Statute for the International Criminal Court (the Rome Statute) affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished” and the Court must “put an end to impunity for the perpetrators of these crimes”.<sup>1</sup> However, the Court also marks a watershed for victim involvement within the international criminal trial process. The Rome Statute provides victims with a set of novel procedural rights, which position victims as active participants in the criminal process and as potential beneficiaries of reparations. The Rome Statute incorporated three main statutory rights in this regard: the right to participation, the right to protection, and the right to reparations. These provisions reflected an attempt to mitigate the problems of previous international criminal tribunals along with recognition of the growth of the victims’ rights movement.<sup>2</sup> The Rome Statute Preamble provides a stark reminder that “during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”<sup>3</sup>

This thesis seeks to discern, through a comparative analysis of the Court’s jurisprudence, the emerging trends in the approach to victim involvement and the degree to which restorative and reparative aims are being met in relation to these statutory rights.

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<sup>1</sup> The Rome Statute of the International Criminal Court, 2187 UNTS 90, adopted on 17 July 1998, Preamble, paras. 4-5 [hereinafter Rome Statute].

<sup>2</sup> See articles such as Trumbull, C.P. (2007-8). The Victims of Victim Participation in International Criminal Proceedings. *Michigan Journal of International Law*, 29(4), 777-826; p. 780-784, 786-789.

<sup>3</sup> Rome Statute, Preamble, para. 2.

The ICC recently underwent a stocktaking exercise with respect to the impact of the Rome Statute system on victims and affected communities,<sup>4</sup> making it an opportune time to reflect on the degree to which the Court's activities are, in fact, meeting the needs of victims. As well, there had been initial concerns by some commentators that the ICC might move slowly and prove cautious in its investigatory scope; however, these fears appear to have been unfounded as the Court continues to expand its investigatory and prosecutorial reach.<sup>5</sup> Therefore, the need for continued research and assessment of the ICC's developing jurisprudence, in particular its evolving victims' participation and reparations mandate, remains critical as the Court seeks to fulfill the spirit envisioned by its original drafters.

## **1.1 THE EMERGENCE OF INTERNATIONAL CRIMINAL JUSTICE**

The international criminal justice arena has undergone substantial transformation since its beginnings in the post-World War II era. There have been two distinct movements in this field: (i) the retributive justice paradigm centered on prosecution and punishment; and (ii) the alternative justice realm that has encompassed transitional, restorative, reparative and other justice processes. It is out of these divergent, and often contradictory, streams that a greater space for victims within the newly created ICC was possible. These two movements in international criminal justice are outlined below in

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<sup>4</sup> ICC-ASP, Final Report, Stocktaking of International Criminal Justice: Impact of the Rome Statute system on Victims and Affected Communities, The Hague Working Group of the Bureau, Secretariat of the Assembly of States Parties, Annex V(a), ICC-ASP/9/25, October 2010, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP9/ICC-ASP-9-25-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-25-ENG.pdf). [hereinafter Stocktaking of International Criminal Justice, Impact on Victims and Affected Communities].

<sup>5</sup> Robinson, D. (2010). Implications of the Review Conference for International Justice, in Currie et al., *Taking Stock of the Kampala International Criminal Court (ICC) Review Conference* (Canadian Council on International Law 2010 Annual Conference Materials - International Human Rights Interest Group Breakfast), available at <http://ccil-ccdi.squarespace.com/ccil-conference-papers/2010/>, pp.1-12, p.10.

order to provide a brief background as to why the innovative victims' participation and reparations regime within the Court was indeed possible.

### 1.1.1 *The Rise of Retributivism*

International criminal justice has seen significant growth from the early days of the Nuremberg and Tokyo international criminal tribunals, which sought to provide some minimal form of accountability for the atrocities committed during the Second World War. Although these trials faced harsh criticisms for employing victors' justice,<sup>6</sup> they also provided the founding principles to the fledgling field of international criminal law and sowed the seeds of acceptance for individual criminal responsibility for serious international crimes. The United Nations (UN) General Assembly affirmed international recognition of these Nuremberg principles later in December, 1946.<sup>7</sup> Ruti Teitel, in her genealogy of transitional justice, argues that these trials marked the beginning of a normative framework centered towards prosecution and punishment.<sup>8</sup>

However, the field would then lay dormant until the early 1990s, when the world was once again faced with addressing the mass atrocities caused by the violent breakup of the former Yugoslavia and the Rwandan genocide. These horrific events resulted in broad international consensus for the creation of the two *ad hoc* tribunals for the former Yugoslavia (ICTY) in 1993 and Rwanda (ICTR) in 1994.<sup>9</sup> As Bill Schabas notes, with the creation and operationalization of these two tribunals, a belief arose in the

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<sup>6</sup> Robinson, D. (2008). The Identity Crisis of International Criminal Law, *Leiden Journal of International Law*, 21(4), 925-963, p. 958.

<sup>7</sup> General Assembly Resolution 95(I), Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal, 11 December 1946.

<sup>8</sup> Teitel, R. (2003). Transitional Justice Genealogy, *Harvard Human Rights Journal*, 16, 69-74, pp. 72-73.

<sup>9</sup> Security Council Resolution 827 (ICTY), adopted May 25, 1993; Security Council Resolution 955 (ICTR), adopted November 8, 1994.

international community that it might indeed be possible to see the formation of a permanent international criminal court, which had been foreshadowed much earlier in Article VI of the Genocide Convention of 1948.<sup>10</sup> This belief sparked the political will to begin the necessary discussions for such a momentous step, which led to a renewed interest in preparing a draft statute that was completed by the International Law Commission (ILC) in 1994.<sup>11</sup> The creation of this draft, and further plenary meetings, eventually set the stage for participation by representatives of 160 states, 33 intergovernmental organizations, and a coalition of over 200 non-governmental organizations to come together for the Rome Diplomatic Conference on the ICC in the summer of 1998 where a substantially revised statute was negotiated.<sup>12</sup> On July 17, 1998, the Rome Statute was adopted by a vote of 120 countries in favour, 7 against, and 21 abstentions marking the culmination of the acceptance of individual criminal responsibility for serious international crimes.<sup>13</sup> Apart from several key states, most notably the United States, who were unsupportive of the ICC in its revised structure, the Court's initial broad support remained strong as demonstrated by its remarkably fast ratification process, which saw the Rome Statute enter into force on July 1, 2002.<sup>14</sup> However, while the ICC's creation is a significant milestone in the trajectory of international criminal law and acceptance of the retributivist paradigm, it also provides recognition to the substantial growth that had been made in the parallel alternative justice

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<sup>10</sup> Schabas, W.A. (2011) *An Introduction to the International Court* (4<sup>th</sup> ed.). New York: Cambridge University Press, pp. 11-16.

<sup>11</sup> International Law Commission, Draft Statute for an International Criminal Court, 1994, available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_4\\_1994.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf)

<sup>12</sup> International Criminal Court website, *Chronology of the International Criminal Court*, available at <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Chronology+of+the+ICC.htm>

<sup>13</sup> *Ibid.*

<sup>14</sup> Schabas, *supra* note 10, pp. 23-24.

sphere during the same period. These developments were encapsulated in the novel victims' participation, protection and reparations regime within the Rome Statute system.

### *1.1.2 The Need for Alternative Approaches: An Emphasis on Restoration and Reparation*

Running parallel to the rise in the retributive criminal framework was a concurrent growth in alternative justice mechanisms, which sought to more practically and contextually address the legacies of the gravest international crimes. Marta Valinas, in her consideration of possibilities for restorative-based forms of justice within the ICC, has described these mechanisms as “alternative” as they do not strictly adopt the rules of the “dominant, retributive paradigm.”<sup>15</sup> Teitel notes that these alternative mechanisms arose partially out of political transitions in the 1980s, which required mechanisms that moved beyond criminal trials in light of concerns over the practicalities surrounding the numbers of individuals involved and the need for greater societal and political involvement.<sup>16</sup> Diane Orentlicher, in her consideration of the challenges in meeting the needs of both global norms and local agency, highlights that while there has been “a powerful affirmation of a global norm in support of criminal accountability for atrocious crimes, professional practitioners of transitional justice are more aware than ever before that there cannot be a one-size-fits-all approach to transitional justice.”<sup>17</sup> The above statements highlight the feelings of some local populations regarding the inability of the

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<sup>15</sup> Valinas, M. (2010). Interpreting complementarity and interests of justice in the presence of restorative-based alternative forms of justice, in Carsten Stahn and Larissa van den Herik (eds.) *Future Perspectives on International Criminal Justice*. The Hague: T.M.C. Asser Press, p. 268.

<sup>16</sup> Teitel, *supra* note 8, pp. 75-78.

<sup>17</sup> Orentlicher, D. (2007) Settling Accounts' Revisited: Reconciling Global Norms with Local Agency, *International Journal of Transitional Justice*, 1(1), 10-22, p. 18.

Western retributive criminal process to provide an adequate and effective mechanism for addressing the legacy of mass atrocities.

While the above provides a flavour of the alternative approaches to international criminal justice that developed during this time, a few particular examples need to be considered that proved salient to the ICC's eventual structural framework focused on increased victims' recognition. The Rome Statute attempted to incorporate two alternative justice approaches into its novel victims' participation and reparations regime through the inclusion of certain restorative and reparative justice practices. Robert Howse and Jennifer Llewellyn, in their study of the South African Truth and Reconciliation Commission, argue that restorative practices, grounded in relational theory, have much to offer communities attempting to repair the harms caused by massive crimes that strike at the heart of the community.<sup>18</sup> It is restorative justice's focus on the restoration of fractured relationships to those of equality that is particularly beneficial in cases of widespread and serious crimes that shatter community relationships.<sup>19</sup> However, there has been much fluidity in the use of the term restorative and for the purposes of assessment within this thesis, Llewellyn's relational theory of justice that "takes equality of relationship as its goal" will be used to ground the broader concept of restorative justice. Reparative justice theory, like restorative justice, also sees "a range of institutional reforms designed to place victims in a more central position in the legal process."<sup>20</sup> Both these theories of justice, along with the retributivist approach, are

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<sup>18</sup> Howse, R. and J.J. Llewellyn, (1999a). Institutions for Restorative Justice: The South African Truth and Reconciliation Commission, *University of Toronto Law Journal*, 49(3), 355-388, p. 355.

<sup>19</sup> Llewellyn, J.J., (2007). Truth Commissions and Restorative Justice, in G. Johnstone and D.W. Ness (eds.), *Handbook of Restorative Justice*, Devon: William Publishing, pp. 355-6.

<sup>20</sup> McCarthy, C. (2009). Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory, *The International Journal of Transitional Justice*, 3(2), 250-271, p. 253.

explored in greater detail in Chapter 2, and will offer the framework for analysis of the Court's evolving victim involvement jurisprudence.

## **1.2 THE ICC: A CASE OF A BLENDED APPROACH?**

As a result of the above growth in alternative justice practices, while the ICC remains a primarily retributive based institution, centered on norms of prosecution and punishment, it also incorporated restorative and reparative elements into its overall structure. The Coalition for the International Criminal Court (CICC), a group of over 2,500 civil society organizations, was a powerful driver in the Court's creation with nearly 500 participants at the Rome Conference.<sup>21</sup> The CICC, through its use of thematic caucuses during the negotiations, sought to ensure that the perspectives of normally underrepresented constituencies were heard, "resulting in a treaty that is much stronger than it would otherwise have been from the perspective of women, children, victims, faith-based groups and the anti-nuclear movement."<sup>22</sup> This recognition of the need to move beyond strictly a retributivist framework is illustrated by in a speech given by the CICC's Victims' Rights Working Group (VRWG) during the Rome Conference stressing that "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."<sup>23</sup> As Brianne McGonigle notes the ICC attempted to bridge not only the divide between the common and civil law system, but also the retributive and

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<sup>21</sup> Coalition for the International Criminal Court website, CICC Who We Are & What We Do: Thematic Caucuses, available <http://www.iccnw.org/?mod=caucuses>.

<sup>22</sup> *Ibid.*

<sup>23</sup> Fiona McKay, Victims' Rights Working Group, Address at the Rome Conference, Redress on Behalf of the Victims Rights Working Group (June 16, 1998), available at [http://www.vrwg.org/VRWG\\_DOC/1998\\_Flyer\\_speech.pdf](http://www.vrwg.org/VRWG_DOC/1998_Flyer_speech.pdf).



restorative divide through the adoption of an innovative and novel victims' participation and reparation regime.<sup>24</sup>

For the purpose of this thesis, three areas of statutory rights provided to victims will be considered when analyzing the Court's recent jurisprudence: (i) the right to participation; (ii) the right to protection; and (iii) the right to reparations. The right to participation and protection are each covered in greater detail as these two rights have undergone significant judicial interpretation during the Court's first years. However, as the Court has yet to hold distinct reparations hearings, the potential benefit of the right to reparations is only briefly canvassed in the final concluding chapter. Judge René Blattman, writing in dissent in the Court's first trial, *The Prosecutor v. Thomas Lubanga Dyilo*, (*Lubanga*) found it "necessary to state, first and foremost...that victims' participation is not a concession of the Bench, but rather a right accorded to victims by the Statute."<sup>25</sup> While these rights are enshrined in the Rome Statute system, how they are to be interpreted remains at the discretion of the various Chambers. An assessment of how these statutory rights are being interpreted, within the structural domain of a retributive trial process, offers the opportunity to determine the degree to which restorative and reparative processes are, in fact, compatible with a retributivist approach. A recent Report of the Court stated, "that the ICC has not only a punitive but also a restorative function" suggesting that such a dual mandate is both possible and desirable.<sup>26</sup>

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<sup>24</sup> McGonigle, B. (2009). Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court, *Florida Journal of International Law* 21(1), pp. 93-151, p. 150.

<sup>25</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Separate and Dissenting Opinion of Judge René Blattman to Decision on Victims' Participation, Public, ICC-01/04-01/06-1119, 18 January 2008, Trial Chamber I para. 13 [hereinafter Separate and Dissenting Opinion of Judge Blattman to Trial Chamber I *Lubanga* Decision].

<sup>26</sup> International Criminal Court, Report of the Court on the Strategy in Relation to Victims, ICC-ASP/8/45, 10 November 2009, para. 3 [hereinafter Report of the Court on the Strategy in Relation to Victims].

### 1.2.1 *The Right to Participation*

The first statutory right accorded to victims to be considered is the right to participation as enshrined in Articles 15(3), 19(3), and 68(3) of the Rome Statute. The right to participation allows the involvement of victims and their legal representatives, in a variety of roles, throughout the entire court process: preliminary examination, investigation, pre-trial, trial, sentencing, and possible reparations hearings. The modalities of victim participation will be outlined in greater detail in Chapter 3, but briefly they include access to records and evidence, the opportunity to provide opening and closing statements, the right to challenge and tender evidence, the right to question witnesses, and personal intervention at hearings.

While the initial decisions of the Court suggested a particularly broad interpretation of both the granting of victim status and the scope of participation throughout all phases of the Court process, a consideration of the appeals decisions suggests a tightening in this regard. The initial resistance by Pre-Trial Chambers to allow appeals of interlocutory matters related to victim participation has now subsided and the Appeals Chamber has sought to delineate a more consistent and streamlined approach to victim participation.<sup>27</sup>

Originally, Pre-Trial Chamber I in the *Situation in the Democratic Republic of the Congo (DRC Situation)* had begun to develop a “general right of participation” during the investigation stage, despite significant opposition from the Office of the Prosecution

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<sup>27</sup> *Situation in the Democratic Republic of the Congo*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007, Appeals Chamber, ICC-01/04-556, 19 December 2008 [hereinafter Appeals Chamber *DRC Situation* Judgment of 19 December 2008]; *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation, Appeals Chamber, ICC-01/04-01/06-1432, 11 July 2008 [hereinafter Appeals Chamber *Lubanga* Judgment of 11 July 2008].

(OTP) and Defence counsel.<sup>28</sup> In addition, the Trial Chamber in *Lubanga* ruled that victims of any crime committed in the DRC and within the Court’s jurisdiction could potentially participate in the trial.<sup>29</sup> Certain commentators, such as Christine Chung who served as Senior Trial Attorney in the OTP, were concerned over these first decisions, arguing “the framework for victims’ participation established in the first years of the ICC has proven to be unworkable and is falling short.”<sup>30</sup>

However, it is precisely this broad initial interpretation of victim participation that has been scaled back in subsequent Appeals Chamber’s decisions. The Appeals Chamber in *Lubanga* rejected the Trial Chamber’s approach to granting victim status for the trial and specified that there needed to be a direct link between the harm suffered by victims and the charges as confirmed against the accused.<sup>31</sup> As well, the developing case law related to a general right to participation during the investigation phase of a situation, was overruled by the Appeals Chamber when it stated that the statutory scheme was sufficient and there was no need for victims to be “formally accorded ‘a general right to participate’.”<sup>32</sup> These trends are considered further in Chapter 3, but are provided at this point to illustrate that while the first judicial decisions on victim participation seemed to adopt a more restorative approach later Appeals Chamber decisions have limited these participation rights.

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<sup>28</sup> *Situation in the Democratic Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, ICC-01/04-101, 17 January 2006 [hereinafter Pre-Trial Chamber I *DRC Situation* Decision of 17 January 2006].

<sup>29</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims’ participation, Trial Chamber I, ICC-01/04-01/06-1119, 18 January 2008 [hereinafter Trial Chamber I *Lubanga* Decision of 18 January 2008].

<sup>30</sup> Chung, C.H. (2007-2008). Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?, *Northwestern University Journal of International Human Rights*, 6(3), 459-545, p. 461.

<sup>31</sup> Appeals Chamber *Lubanga* Decision of 11 July 2008, *supra* note 27.

<sup>32</sup> Appeals Chamber *DRC Situation* Decision of 19 December 2008, *supra* note 27, para 53.

These emerging trends support the thesis that while much fanfare was made of the first few examples of victim participation during the *Lubanga* trial, as the scope of these provisions is streamlined, the role of victim participation in later cases has become more restricted. The retributive goal of ensuring efficiency in the criminal trial process is being maintained at the expense of fully meeting the restorative goals regarding the right to participation. Although, one final aspect will be provided where the effects of greater victim involvement is being felt, as the Court has sought to reconcile the need for a more reflective characterization of the charges within a still primarily retributivist system.

### 1.2.2 *The Right to Protection*

The second general statutory right afforded to victims to be considered is the right to protection as enshrined in Article 68(1) of the Rome Statute. It is in this area that the Court has often been viewed as a leader internationally, incorporating the many lessons learned from the ICTY and the ICTR.<sup>33</sup> The practice of ensuring that measures are taken to “protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses” is drawn from restorative and reparative principles that place a greater emphasis on treating all parties with respect and dignity and adopting a contextual approach that allows for individual needs to be considered when assessing an appropriate manner for their involvement.

The Trial Chamber in the *Lubanga* case noted that while participation of anonymous victims is possible, it will “scrutinise carefully the precise circumstances and

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<sup>33</sup> de Brouwer, A-M. (2009). What the International Criminal Court Has Achieved and Can Achieve for Victims/Survivors of Sexual Violence, *International Review of Victimology*, 16(2), pp. 183-209; and Wemmers, J. (2009). Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC With Respect to Victims, *International Review of Victimology*, 16(2), pp. 211-227.

the potential prejudice to the parties and other participants.”<sup>34</sup> However, challenges related to the issues of non-disclosure and the use of anonymous victims, witnesses, and intermediaries has come to a forefront in the *Lubanga* trial where questions concerning the credibility of certain individuals granted these protective measures fueled Defence applications for stay of proceedings motions and more general abuse of process complaints.

To date there has not been the same scaling back of victims’ rights to protection by the Appeals Chamber as there has been with respect to the right to participation and therefore the resulting tension between the two justice approaches remains at its peak. These challenges are discussed further in Chapter 4.

### 1.2.3 *The Right to Reparations*

The final statutory right afforded to victims is the right to possible reparations as enshrined in Article 75 of the Rome Statute. Not only did the Rome Statute foresee an active role for victim participation and protection within the Court, it also marked the first time a reparations regime was included within an international criminal tribunal. Pre-Trial Chamber I in *Lubanga* noted the importance of the reparations regime early when it stated, “The reparation scheme provided for in the Statute is not only one of its unique features. It is also a key feature. In the Chamber’s opinion, the success of the Court is, to some extent, linked to the success of its reparation system.”<sup>35</sup> The Rome Statute provides the Court the power to develop reparation principles, to make reparation orders and to order the forfeiture of the proceeds of crime to the benefit of victims.

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<sup>34</sup> Trial Chamber I *Lubanga* Decision of 18 January 2008, *supra* note 29, para. 131.

<sup>35</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, Pre-Trial Chamber I, ICC-01//04-01/06, 10 February 2006, para. 136.

Differing Chambers have authorized the parties to question witnesses on the harm suffered by victims as a result of crimes within the Court's jurisdiction and other reparations related evidence. This strategy has been adopted in an attempt to minimize the need for witnesses to further testify at the reparation stage along with limiting re-traumatization due to testimony.<sup>36</sup> However, concerns have been raised that while this meets reparative goals, it may expand the scope of the trial beyond what is strictly required to prove the charges against the accused.

As the ICC's first two trials, *Lubanga* and *Katanga and Ngudjolo*, are expected to finish within the next year, the Court will be required to establish the principles guiding its possible reparations awards. However, numerous points remain unsettled including whether the current sitting judges who have knowledge of the cases should be permitted to continue until reparations hearings are complete, whether they will have the necessary expertise beyond the criminal realm, and whether there will be adequate financial resources to meet the needs and expectations of victims. As reparation hearings are scheduled to occur at the end of the trial process, but prior to sentencing, no reparations hearings have yet been held at the Court. In light of this fact, the right to reparation while potentially holding the greatest potential to meet the restorative and reparative goals of victims still remains only a possibility, and is therefore only briefly canvassed in the concluding chapter.

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<sup>36</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Décision aux fins de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09, Trial Chamber II, ICC-01/04-01/07-2517, 9 November 2010 [hereinafter Trial Chamber II *Katanga and Ngudjolo* Decisions of 9 November 2010]; Appeal Chambers *Lubanga* Judgment of 11 July 2008, *supra* note 27.

### 1.3 EMERGING TRENDS

The ICC incorporated three statutory rights with respect to victim involvement that sought to incorporate lessons gained from the broader justice field and in recognition of “growing concerns that criminal justice systems have marginalized victims.”<sup>37</sup> This thesis assesses the degree to which these restorative and reparative aims are, in fact, being met based on a comparative analysis of the Court’s evolving jurisprudence. As described above, the Appeals Chamber’s interpretation of the right to participation has scaled back the scope of this right to ensure a more consistent and streamlined approach. This has seen the retributive goal of a smoother trial process met, but at the expense of reaching the full restorative aims of victim participation. The right to protection has seen all levels of the Court attempt to maintain the restorative aim of ensuring adequate safety and protective measures for victims and witnesses. Although with the continued safeguarding of these standards, and the particular challenges faced by conducting investigations and prosecutions in areas of ongoing conflict, the ability to balance the right to protection with the rights of the accused and a fair and efficient trial is proving increasingly problematic. The right to reparation potentially holds the greatest restorative and reparative impact for victims, and affected communities more broadly. This is one area where there is less direct tension between restorative and retributive aims, but even here concerns have arisen that the presentation of reparation related evidence might be broadening the scope of the trial process too far.

Incorporating victims into a retributive trial process always meant there would be tradeoffs as the Court sought to reach a workable internal balance. However, it will be

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<sup>37</sup> Trumbull, *supra* note 2, p. 780.

argued that it was inevitable that the restorative and reparative goals of victim participation, protection and reparation, could not fully be met within what remains a traditionally retributive based system. One of the greatest lessons the ICC may, in fact, provide for the broader justice community is the realization that in order to meet wholly restorative and reparative aims a truly transformational view of justice is necessary. It is debatable whether such a global reconceptualization of justice is even possible, but arguably it would need to be gradual, and a consideration of this debate is beyond the scope of this thesis.

Finally, as the ICC is likely to remain a powerful actor in the overall peace and justice arena for some time its approach to alternative national justice mechanisms also remains critical. It is in this role that the Court has substantially strengthened the global norm of accountability. Increased accountability for serious international crimes is a positive trend; however, lessons gleaned from the alternative justice sphere suggest that accountability can successfully be conceptualized beyond just that encapsulated in a criminal trial process. The parallel challenge that is emerging in the ICC's work, only briefly touched upon in the concluding chapter of this thesis, is a similar narrowing in the Court's acceptance of alternative national justice mechanisms. This trend is seen both in the OTP's most recent Prosecutorial Strategy<sup>38</sup> along with the commentaries of the Court's Kampala Review Conference where it was stated that "the establishment of the Court had indeed brought about a paradigm shift" and that "[n]ow, it was acknowledged,

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<sup>38</sup> ICC-OTP, Prosecutorial Strategy 2009-2012, 1 February 2010, para. 15, available at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf> [hereinafter Prosecutorial Strategy 2009-2012].



amnesty was no longer an option.”<sup>39</sup> These external shifts appear to be limiting the room for alternative justice processes, be they restorative, reparative, or some other form, which is potentially problematic as the ICC is a single international institution, with finite resources, unable to wholly meet the needs of the international criminal justice field.

#### **1.4 OVERALL COMPOSITION**

This thesis is composed of five chapters in its assessment of the evolving victims’ participation, protection and reparation regime within the Court. Chapter 2 provides an overview of the competing retributive, restorative and reparative justice principles at play within the Court’s mandate. These conceptions of justice will provide the tools for assessment of the developing jurisprudence of the court. It will outline the comparative case analysis methodology the thesis will employ. Chapters 3 and 4 consider the Court’s jurisprudence with respect to the evolving right to participation and protection, respectively. Both Chapters will provide a brief consideration of the drafting background of the relevant statutory provisions, a presentation of the leading cases, analysis of any emerging trends, and finally an assessment of the degree to which restorative aims, assessed relationally, are being met.

Chapter 5 briefly addresses the right to reparation and will consider the steps the Court is taking to establish reparation principles. It will provide concluding remarks on the Court’s evolving practice with respect to victims’ participation and protection and offer a consideration of the Court’s external activities, and the parallel narrowing of

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<sup>39</sup> ICC-ASP, *Stocktaking of International Criminal Justice, Peace and Justice Moderator’s Summary*, The Hague Working Group of the Bureau, Secretariat of the Assembly of States Parties, ICC- ASP/9/25, October 2010, RC/11, Annex V(b), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/RC-11-Annex.V.b-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.V.b-ENG.pdf), para. 29 [hereinafter *Stocktaking of International Criminal Justice, Peace and Justice*].

scope for alternative justice processes that fall outside the retributivist paradigm. It is within the two most untested areas of the Court's mandate, reparations and allowance for alternative national justice mechanisms, that the Court holds the greatest potential to meet a broader restorative mandate. It will be argued that the ICC can still continue to promote accountability for international crimes; however, the Court must be open to a more expansive conception of accountability.

## CHAPTER 2

### Competing Theories of Justice within the ICC

As described above the creation of the ICC marked the establishment of a permanent international criminal court centered primarily on the retributive goals of prosecution and punishment. However, it also sought to incorporate certain restorative and reparative elements, which were taken from the broader developments in the alternative justice field together with lessons learned from the previous *ad hoc* international tribunals. This chapter sets out the main principles underlying the different theories of justice at work within the Rome Statute system in order to place the three statutory rights (the right to participation, protection, and reparations) in their wider conceptual context. It also seeks to highlight areas where tensions are developing in the Court's jurisprudence along with areas of possible overlap. In particular, the potential overlap in restorative and reparative aims that both place an emphasis on an increased role for victims, albeit with different focuses. Finally, it outlines the comparative case analysis used in this thesis to assess the degree to which restorative and reparative goals are being met in relation to the three statutory rights accorded to victims.

As stated by the Court, the mission of the ICC remains primarily retributive as it will, “fairly, effectively and impartially investigate, prosecute and conduct trials of the most serious crimes” and “contribute to long lasting respect for and the enforcement of international criminal justice, to the prevention of crime and to the fight against

impunity.”<sup>40</sup> However, within its mission statement, it also notes that the “Court is part of an emerging system of international justice” and it is here that other streams have been incorporated.<sup>41</sup> The Court introduced its Strategy in Relation to Victims<sup>42</sup> in November 2009 and two of its four general stocktaking issues at the Kampala Review Conference addressed the Court’s impact more broadly as part of an emerging system of international justice and included (i) Peace and Justice and (ii) The Impact of the Rome Statute system on Victims and Affected Communities.<sup>43</sup> By incorporating victims into an international trial process the traditional purposes of the retributive system have been forced to expand in order to meet the needs of this new group. The addition of this new participant within the trial process has brought to the forefront issues surrounding what the underlying purpose of international criminal justice at the Court ought to be.

## **2.1 MAPPING VICTIMS’ HISTORICAL TRAJECTORY WITHIN THE CRIMINAL JUSTICE ARENA**

In order to consider the effects of the competing justice purposes brought to light through greater victim involvement at the ICC it is helpful to briefly map out the victim’s historical trajectory within the criminal justice arena. The roots of the modern common law retributive criminal process lie in a transition that took place whereby certain acts traditionally viewed as wrongs against individuals came to be conceived as public wrongs punishable under authority of the sovereign, replaced after by the state.<sup>44</sup> Acts of a

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<sup>40</sup> ICC-ASP, Strategic Plan of the International Criminal Court, ICC-ASP/5/6, 4 August 2006, p. 4, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/library/asp/ICC-ASP-5-6\\_English.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-6_English.pdf) [hereinafter Strategic Plan of the ICC].

<sup>41</sup> *Ibid.*

<sup>42</sup> Report of the Court on the Strategy in Relation to Victims, *supra* note 26.

<sup>43</sup> Stocktaking of International Criminal Justice, Impact on Victims and Affected Communities, *supra* note 4, and Stocktaking of International Criminal Justice, Peace and Justice, *supra* note 39.

<sup>44</sup> McCarthy, *supra* note 20, p. 252.

certain level were moved into the public domain, viewed as a threat to the broader social fabric that required punishment. However, while philosophical underpinnings were later added to the retributive system, many criminologists argue this shift was due less to legal principle, than to the utility of prosecution for the sovereign.<sup>45</sup> This transition began in the ninth century and “marked the beginning of the state’s monopoly on criminal punishment.”<sup>46</sup> The role for victims within this system was minimized as the state sought to act in place of victims on behalf of the broader community. This tension between conceptualizing crime as a harm against a specific individual as compared to a harm against society has been a central point of contention between the retributivist, restorative and reparative justice paradigms. This tension is even more problematic within the international criminal sphere as international crimes are defined in part because they “deeply shock the conscience of humanity”<sup>47</sup> and therefore are an affront to the international community. It is this defining characteristic of international crimes, which led to the creation of the concept of universal jurisdiction such that any state would have ‘standing’ to prosecute such crimes.<sup>48</sup> The Court continues to face the pull of competing interests between victims, affected communities, and the broader international community.

It would not be until the early 1980s<sup>49</sup> that there was a reemergence of the prevalence of victims’ interests within both the adversarial and international criminal justice paradigms, through the advancement of restorative and reparative justice theories.

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<sup>45</sup> *Ibid.*

<sup>46</sup> Weitekamp, E. (1993), *Reparative Justice: Towards a Victim Oriented System*, *European Journal on Criminal Policy and Research*, 1(1), 70-93, p. 76. For a detailed survey refer to Schafer, S. (1970), *Compensation and Restitution to Victims of Crime* (2<sup>nd</sup> ed.). Montclair, NJ: Patterson Smith.

<sup>47</sup> Rome Statute, *supra* note 1, Preamble, para. 2.

<sup>48</sup> Schabas, *supra* note 10, pp 64-66.

<sup>49</sup> Teitel, *supra* note 8, pp. 75-78.

However, it must be acknowledged that the inquisitorial civil law system continued to see an active role for victims as *partie civiles* during this period. Restorative and reparative justice theories both sought to reposition the role of victims by granting them a greater degree of ownership within the criminal process.

These trends developed into international recognition for the rights of victims with the adoption of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985 Victims' Declaration) by the UN General Assembly in November of 1985.<sup>50</sup> The Victims' Declaration primarily focused on victims of crime in a domestic setting, but contained a few additional provisions related to victims of abuse of power. These principles would be later applied more explicitly in relation to victims of international crimes with the adoption of the *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* (2005 Basic Principles and Guidelines).<sup>51</sup> This latter document highlighted recognition for the reparative principle of the right to a remedy for victims of serious international crimes, which had also been incorporated into the Rome Statute. These documents provide testament to the widespread agreement on the supposed rights afforded to victims: the right to dignity and equality under the law, the right to know and have the truth acknowledged, the right to combat impunity, the right to reparation and a guarantee of

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<sup>50</sup> General Assembly Resolution 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985 [hereinafter 1985 Victims Declaration].

<sup>51</sup> General Assembly Resolution 60/147, 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. 16 December 2005 [hereinafter 2005 Basic Principles and Guidelines].

non-recurrence, and compliance with internationally accepted human right norms.<sup>52</sup>

However, putting these principles into practice has proven to be much more challenging.

This brief overview of the treatment of victims, within national and international criminal justice systems, is provided to highlight how the purpose and aims of the justice process are likely to differ depending on the presence or absence of victims. The answer to questions such as ‘who is a victim,’ ‘how is harm conceived,’ and ‘what are the goals of the justice process’ are likely to vary substantially depending on the theory of justice one applies. These challenges are beginning to surface within the ICC, as the different Chambers are forced evaluate and demarcate a proper, workable space for victim involvement within the Court. Emily Haslam, in her consideration of victim participation at the ICC, notes that there is much agreement for the premise that “the legal profession should work to ensure the maximum participation of victims in international criminal proceedings provided that their participation is consistent with the rights of the accused and the demands of expediency.”<sup>53</sup> This supports participation to the extent possible within a retributive trial process; however, the right to participation, protection and reparations is likely to force larger theoretical justice debates throughout the Court’s continued evolution as it seeks to meet the needs of victim participants. The Court’s primary theoretical approach to justice, retributivism, is therefore considered first below.

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<sup>52</sup> Zegveld, L. (2010). Victims’ Reparations Claims and International Criminal Courts: Incompatible Values?, *Journal of International Criminal Justice*, 8(1), 79-111, p. 85.

<sup>53</sup> Haslam, E. (2004). Victim Participation at The International Criminal Court: A Triumph of Hope over Experience, in D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Portland, Oregon: Hart Publishing, 315-334, p. 316.

## 2.2 RETRIBUTIVE JUSTICE: THE PERCEIVED POWER OF PROSECUTION AND PUNISHMENT

As described above, retributivism developed out of the shift in view of criminal acts from private to public wrongs. As Howard Zehr, a founding restorative writer, argues retributive justice views crime as “a violation of the state, defined by lawbreaking and guilt.”<sup>54</sup> The retributive system “determines blame and administers pain in a context between the offender and the state directed by systematic rules.”<sup>55</sup> Retributive justice focuses on meting out the appropriate punishment for the accused and has therefore often been characterized as offender-centric.<sup>56</sup>

Retributivism places a central importance on the rule of law that highlights notions of fairness and equality, which seeks to assess punishment based on the seriousness of the crime and the offender’s mental state.<sup>57</sup> This focus on systematic rules has seen the rise in the importance of procedural protections. “The more awful the sanction, the more elaborate need be the safeguards.”<sup>58</sup> Martha Minow, in her study of justice responses to mass atrocity, notes that the norm of punishment “reflects a belief that wrongdoers deserve blame and punishment in direct proportion to the harm inflicted.”<sup>59</sup> As the system derives its legitimacy from guarantees of fairness and equality before the law, justice must be considered blind both to those who appear as accused before it and to the identity of alleged victims.

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<sup>54</sup> Zehr, H. (1995a). *Changing Lenses: A New Focus for Crime and Justice*, Scottsdale, Pennsylvania: Herald Press, p. 181.

<sup>55</sup> *Ibid.*

<sup>56</sup> McGonigle, *supra* note 24, p. 102.

<sup>57</sup> *Ibid.*, p. 100.

<sup>58</sup> Barnett, R.E. (1977) Restitution: A New Paradigm of Criminal Justice, *Ethics*, 87(4), 279-301, pp. 284-285.

<sup>59</sup> Minow, M. (1998). *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston: Beacon Press, p. 12.



It is this perceived judicial blindness that has forced victims out of most common-law retributivist frameworks, as it is feared that a greater role for victims may shift the focus from the alleged crime that has taken place to the harm as experienced by the victim.<sup>60</sup> In most adversarial criminal justice systems, the truth seeking process is narrowly defined as a contest between the prosecution and the defence. Much commentary has developed regarding possible infringements on rights of the accused with the introduction of victims, and their legal representatives, in the international criminal trial process.<sup>61</sup> The traditional outcomes of the retributive trial process, acquittal or punishment, also dealt with society's needs as opposed to those of the victim.<sup>62</sup> These outcomes were tied to broader retributive aims of incapacitation and deterrence. Later restorative and reparative approaches would seek to rectify these limitations by reintegrating victims back into the criminal process.

The Rome Statute, which created a primarily retributivist trial process, guaranteed certain fundamental protections for the defendant including the presumption of innocence (Article 66) and a set of specific minimum rights of the accused (Article 67).<sup>63</sup> The Statute affirms that "the accused shall be entitled to a public hearing" with a well defined list of minimum guarantees to ensure a fair hearing, including the provision for the disclosure of exculpatory material and the right to examine all witnesses presented against the accused.<sup>64</sup> The rights of the accused continue to be balanced against the novel

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<sup>60</sup> Barnett, *supra* note 58, p. 285.

<sup>61</sup> See Zappala, S. (2010). The Rights of Victims v. the Rights of the Accused. *Journal of International Criminal Justice*, 8(1), 137-164; and Friman, H. (2009). The International Criminal Court and Participation of Victims: A Third Party to the Proceedings. *Leiden Journal of International Law*, 22 (2), pp. 485-500.

<sup>62</sup> Villa-Vicencio, C. (2006). Transitional justice, restoration, and prosecution, in D. Sullivan and L. Tiff (eds.), *Handbook of Restorative Justice: A Global Perspective*, London: Routledge, p. 387.

<sup>63</sup> Rome Statute, *supra* note 1, Articles 66-67.

<sup>64</sup> *Ibid.*, Article 67.

statutory rights provided to victims and it is here that areas of tension have emerged, as the Court delineates the proper scope for each set of rights. Helen Brady, in her analysis of the negotiation of the supporting rules related to protection, argues that the Court has been forced to acknowledge that the right to a ‘fair trial’ is not absolute.<sup>65</sup> It must be “conducted in accordance with internationally accepted due process principles and with respect for the rights of the accused,” but also must provide justice for victims and also the wider international community.<sup>66</sup>

As retributive systems place a central importance on the rule of law, the ability to effectively and efficiently investigate, prosecute and see trials through to completion is critical to ensuring its enforcement capacity.<sup>67</sup> In order to meet retributivism’s secondary goals of education and deterrence, a retributivist system must be able to demonstrate the proper functioning of the trial process. It is here that the addition of victims can prove problematic and the Court’s attempt to streamline victim participation seeks to meet the retributive aim of illustrating enforcement capacity at the expense of meeting broader restorative aims.

### **2.3 THE REEMERGENCE OF VICTIMS: ADOPTING A RESTORATIVE AND REPARATIVE APPROACH**

Restorative and reparative justice theories both recognize an expanded role for victims within the criminal process as they draw from the alternative justice sphere that developed outside the narrow criminal trial framework. Villa-Vicencio, while arguing

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<sup>65</sup> Brady, H. (2001), Protective and Special Measures for Victims and Witnesses, in R. Lee (ed.), *ICC: Elements of Crimes & Rules of Procedure & Evidence*, Ardsley, New York: Transnational Publishers, Inc, pp. 451-2.

<sup>66</sup> *Ibid.*

<sup>67</sup> Quinn, J.R. (2008). Transitional Justice, in M. Goodhart (ed.), *Human Rights: Politics and Practice*, London: Oxford University Press, p. 366.

there is space within the retributivist system to meet restorative goals, describes restorative justice as an attempt to recover dimensions of justice often lost within the institutional retributive framework.<sup>68</sup> “Prosecution, while necessary, is insufficient on its own. *More is required*. The more involves the neglected dimension of a holistic theory of justice.”<sup>69</sup> It is this ‘holistic’ theory of justice that has allowed an expansion beyond the offender to consider the restoration and reparation of all affected parties.

The theoretical challenge has been that both theories have been used to describe a variety of general processes and there remains doubt as to where the boundaries of each approach lie. It is possible to consider reparative justice as a subset of the broader restorative regime. Restorative justice adopts a broader approach that considers the restoration, rehabilitation, reparation, and reintegration of *all* parties involved. Zehr highlights that through a restorative approach, crime is essentially viewed as “a violation of people and relationships” and “involves the victim, the offender and the community in search for solutions which promote repair, reconciliation and reassurance.”<sup>70</sup> Restorative justice has seen the adoption of a variety of different practices such as conferencing and circles at the domestic level and Truth and Reconciliation Commissions at the international level. Reparative justice theory, discussed in greater detail below, is more narrow in its stance focusing on providing redress to victims through a variety of measures including restitution, compensation, rehabilitation, and apology.<sup>71</sup>

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<sup>68</sup> Villa-Vicencio, *supra* note 62, p. 388.

<sup>69</sup> *Ibid.*

<sup>70</sup> Zehr (1995a), *supra* note 54, p. 181.

<sup>71</sup> Bassiouni, M.C. (2006). International Recognition of Victims’ Rights. *Human Rights Law Review*, 6(2), 203-279, pp. 231-232, 243-6.

One of the earliest authors to consider these issues was Randy Barnett who proposed a new paradigm of criminal justice, restitution, as a response to a perceived crisis in the old punishment focused paradigm.<sup>72</sup> Barnett argued that the traditional criminal justice paradigm that focused on punishment of an accused, conceived of crime as an offense against the state rather than against the individual.<sup>73</sup> He argued that a crime is an offense by an individual against the rights of another individual and that the restitution of the victim ought to be the main objective of the criminal justice system rather than punishment.<sup>74</sup> In this critique of the retributive system, we see the reconceptualization of crime as harm against a specific individual that requires adequate redress for that specific harm. It is within this reconceptualization of the proper scope of harm that we find the roots of reparative justice theory. While restorative justice has adopted an even broader conception of the repair and restoration needed that includes all of the relationships affected by the harm, beyond solely the victim. As Zehr, and many of his supporters argue, restorative justice marks a “paradigm shift” in how justice is conceived.<sup>75</sup>

An inclusive approach to justice that allows all parties a position is one stark difference from the more traditional adversarial trial process and is one of the primary reasons the adoption of victims’ participation regime within the ICC is viewed as incorporating restorative practices into the Rome Statute system. However, in order to properly assess the degree to which restorative purposes are, in fact, being met within the Court a proper theoretical framework underpinning restorative justice must be used.

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<sup>72</sup> Barnett, *supra* note 58, p. 279.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> Zehr, H. (1995b). Justice Paradigm Shift? Values and Visions in the Reform Process, *Conflict Resolution Quarterly*, 12(3), 207-216, p. 207.

## 2.4 GROUNDING RESTORATIVE JUSTICE: APPLYING A RELATIONAL THEORY

### APPROACH

As Llewellyn has noted “[d]espite the rapid and impressive development of restorative justice practices in a range of contexts, the conceptual underpinning and theory of justice at the core of these practices has received significantly less attention.”<sup>76</sup> Highlighting the “significance of relationships” in restorative justice practice, she has outlined a relational theory of justice that “takes equality of *relationship* as its goal.”<sup>77</sup> It is this theoretical framework for understanding restorative justice that will be used to assess the degree to which restorative aims are being met in regard to the three statutory rights considered.

Relational equality “is a more fundamental commitment to the nature of connection... between and among parties.”<sup>78</sup> The just response to a wrong is therefore conceived of as a restoration of the relationship to one in which all parties enjoy equality of relationship. This “[s]ocial equality exists when relationships are such that each party has their rights to dignity, equal concern and respect satisfied.”<sup>79</sup> Restorative practices prioritize the need to affirm the moral worth and dignity of all parties involved, victims, perpetrators, and society as a whole.<sup>80</sup>

While a restorative approach must remain contextual, in order to appropriately understand the harm, there remains a need for standards in order to properly evaluate

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<sup>76</sup> Llewellyn, J.J., (2011). Relational Theory, Restorative Justice: Thinking Relationally About Justice, forthcoming in Jocelyn Downie & Jennifer J. Llewellyn (eds.) *Being Relational: Reflections on Relational Theory and Health Law and Policy*, Vancouver: UBC Press, p. 1.

<sup>77</sup> *Ibid.*, pp. 1, 5.

<sup>78</sup> *Ibid.*, p. 5.

<sup>79</sup> Howse, R. and J.J. Llewellyn, (1999b). *Restorative Justice: A Conceptual Framework*, Paper for the Law Commission of Canada, Ottawa: Government of Canada, p. 40.

<sup>80</sup> Villa-Vicencio, *supra* note 62, p. 387.

whether a practice is restorative.<sup>81</sup> Achieving relational equality “thus requires attention to the particular context, to the parties involved, and to what will be required to ensure respect, concern and dignity in the relations between and among parties.”<sup>82</sup> Relational theory highlights some of the central principles which guide restorative justice processes: they are forward looking, recognize that all parties affected by the harm should be included, and emphasize a contextual approach to understanding justice.<sup>83</sup> Howse and Llewellyn note that “[r]estorative justice looks back at the past, but with a view to transforming the relationship for a better future.”<sup>84</sup>

Where retributive justice mechanisms have focused solely on the offender, restorative practices require a greater role for victims and the community. The role of communities has gained some salience at the Court as illustrated by the fact that the stocktaking exercise in this area was entitled Impact of the Rome Statute System on Victims and *Affected Communities*,<sup>85</sup> an acknowledgment that the ICC’s scope covers more than merely victims and offenders. The explicit involvement of communities is particularly crucial in cases of mass atrocities where the impact of the harm is felt far beyond just those directly harmed. As “affected communities” is not explicitly mentioned in either the Rome Statute or the RPE, the stocktaking exercise confirmed that these communities are understood to include direct victims of war crimes and crimes

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<sup>81</sup> Howse and Llewellyn (1999b), *supra* note 79.

<sup>82</sup> Llewellyn (2011), *supra* note 76, p. 6.

<sup>83</sup> Howse and Llewellyn (1999b), *supra* note 79, pp. 38-42.

<sup>84</sup> *Ibid*, p. 36.

<sup>85</sup> Stocktaking of International Criminal Justice, Impact on Victims and Affected Communities, *supra* note 4.

against humanity, as well as a broader population or group which has been the collective target of an attack.<sup>86</sup>

The challenges of meeting these broader restorative goals are already being felt by the Court in its attempt to meet the needs of victim participants. As will be considered with respect to the right to participation, the Court has sought to delineate a more streamlined approach to participation by negating a general right to participation at the investigative phase, necessitating a linkage requirement for trial participation, and the continued promotion of common legal representation in order to maintain the retributive goal of prosecution and enforcement. In respect to the right to protection, the restorative emphasis of an affirmation of moral worth and dignity for all parties has continued to raise challenges in relation to the specific rights of the accused to be able to prepare a full defence. It is argued throughout that the granting of statutory rights to participation and protection, while novel to international criminal law, have not resulted in a transformation of the overall system into a restorative one. The challenges related to the right to reparations are considered in the context of the narrower goals of reparative justice theory discussed below.

## **2.5 REPARATIVE JUSTICE: RECOGNITION OF THE NEED FOR A REMEDY**

Reparative justice theory also draws its roots in a reemphasis on the role of victims within the criminal process, with a particular focus to providing “a remedy for the suffering and loss that ha[s] occurred.”<sup>87</sup> As no reparations hearings have yet been heard

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<sup>86</sup> *Ibid.*, para. 5.

<sup>87</sup> Quinn, *supra* note 67, p. 371.

by any Chamber of the Court, reparative justice theory is merely described in brief below, as the right to reparations will only be touched upon in the concluding chapter.

Reparations aim to right past wrongs by returning victims, to the degree possible, to their position prior to the harm. While reparative justice recognizes that certain harms can never be fully repaired especially those within the Court's jurisdiction such as rape, torture and loss of a family member, the approach nevertheless seeks to provide partial redress to victims. Reparations can therefore be seen to be part of the broader restorative mandate that seeks the restoration of *all* relationships fractured by crime.

Reparative justice theory also adopts a more inclusive approach to the complexity of the harm suffered and views an "exclusively adversarial trial leading to the custodial punishment of a perpetrator" as a "wholly inadequate response."<sup>88</sup> While the potential scope of reparative justice could be quite broad, like that of restorative justice, it has traditionally adopted a narrower focus that remains compatible within the retributive trial process. McCarthy argues that even amongst supporters of reparative theory there is limited support for a transformative recalibration of criminal justice.<sup>89</sup> Rather, most seek more modest aims for possible reform within the trial process whereby courts are provided with the power "to tailor flexible measures to seek to repair, as far as possible, the harm caused to victims by criminal conduct."<sup>90</sup> It is here that the ICC's novel reparations regime seeks most directly to meet reparative aims.

The ICC marks the first substantive attempt by an international criminal judicial institution to meet the reparative needs of victims. However, the Court will be able to

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<sup>88</sup> McCarthy, *supra* note 20, p. 253.

<sup>89</sup> *Ibid.*, p. 254.

<sup>90</sup> *Ibid.*.



draw from lessons gained in the fields of general international law and international human rights law that have recognized the right to reparation for some time. The Court, under Article 75(1), is required to “establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”<sup>91</sup> However, the article states the creation of principles “including” the three listed forms of redress, which suggests that the Court is not limited to only these types. Previously, regional human rights bodies had thought that reparation should be narrowly conceived as monetary compensation; however, the 2005 Basic Principles substantially expanded the notion of reparation including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>92</sup> The Rome Statute is reflective of the international consensus towards a broader understanding of reparation.<sup>93</sup> As the *Lubanga* trial is expected to finish within the year, the Court is currently in the process of consultations in its establishment of reparations principles. The ICC has recognized that “every effort must be made to ensure that reparations are meaningful to victims.”<sup>94</sup>

The right to reparation holds the greatest potential to meet the reparative needs for victims and affected communities more broadly as well as contribute to the broader restorative goal of ensuring relational equality in respect of victims. While this one area appears to be in less direct tension with retributive aims, even here concerns over the presentation of reparation related evidence during the trial process has been raised. The full scope of the right to reparations remains untested and therefore these issues are

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<sup>91</sup> Rome Statute, *supra* note 1, Article 75.

<sup>92</sup> 2005 Basic Principles and Guidelines, *supra* note 51.

<sup>93</sup> Rombouts, H. and S. Parmentier. (2009). The International Criminal Court And Its Trust Fund Are Coming Of Age: Towards A Process Approach For The Reparation Of Victims. *International Review of Victimology*, 16(2), 149–182, p. 153.

<sup>94</sup> Report of the Court on the Strategy in Relation to Victims, *supra* note 26, para. 51.

canvassed only briefly in the concluding chapter as they mark the next steps in the Court's attempt to move beyond a purely retributivist approach to justice.

## **2.6 THEORIES OF JUSTICE: A CONCEPTUAL FRAMEWORK**

The Rome Statute saw three important rights accorded to victims: the right to participation, protection and reparations, as recognition by the international community of the need to move beyond a purely retributivist system of international criminal justice. The effects of the inclusion of these rights are still being felt as the various Chambers attempt to demarcate a proper role for victim involvement across the different phases of Court proceedings. In order to test the thesis of whether the three statutory rights accorded to victims within the Rome Statute system are meeting the broader theoretical goals of restorative and reparative justice a multi-case analysis of the Court's emerging jurisprudence will be undertaken.

The three statutory rights-- the right to participation, the right to protection, and the right to reparations-- were selected for further study because they are the most explicit examples of the incorporation of restorative and reparative practices into the Court's mandate, in its attempt to move beyond a purely punitive system. These statutory rights also cover the full scope of potential victim involvement within the ICC from investigation through to possible reparations and sentencing. By narrowing the focus to these specific provisions the areas of greatest potential tension and conflict between competing conceptions of justice will be highlighted.

The different theoretical frameworks that underpin each conception of justice, that were described in detail above, will therefore be used to assess the degree to which restorative and reparative goals are being met. Llewellyn's relational theory of restorative

justice will be used for the assessment of the rights to participation and protection. The aims of a relational theory of restorative justice will be matched against traditional retributivist goals to focus on areas of tension in the developing jurisprudence. The narrower focus of reparative justice theory will be used to assess the degree to which the ICC's novel reparations regime is likely to meet the reparative needs of victims.

The multi-case analysis will consider emerging jurisprudential trends related to the right to participation and protection. It will consist of a survey and comparison of the various Chambers decisions across the different situations under investigation by the Court (Uganda, the DRC, Central African Republic (CAR), Darfur, Sudan, and Kenya) and the relevant cases before the Court. This will allow for a comparison of victim involvement across the various stages of Court proceedings in order to determine areas of emerging conflict and tension. An in depth analysis of the relevant *Lubanga* case decisions in relation to the three statutory rights will be considered for its precedent value. It marks the Court's first trial, and with closing submissions scheduled for this July and August, it has been illustrative of some of the central challenges regarding victim involvement, especially the right to protection. These developing trends will be compared against decisions in other ongoing cases before the Court, in particular the *Katanga and Ngudjolo* and *Bemba* trials, and participation at the investigation and pre-trial phases in the Uganda, Darfur, and Kenyan situations. A particular focus will consider the appeals jurisprudence to determine how the rights to participation and protection are being altered in light of the more recent acceptance for key victims' rights issues to be granted leave to appeal. It is here that aspects of an initially more restorative

approach to the right to participation have been scaled back by later Appeals Chamber decisions.

Reparative justice theory, along with trends in broader international law, will be used to consider some of the key questions related to the Court's reparations regime. While the first reparations hearings have yet to take place, several issues have already arisen pertaining to the tendering and challenging of reparation evidence during trial, and the need to establish reparations principles for court-ordered reparations. The degree to which any future reparations awards will be able to meet even the narrower goals of reparative justice theory is considered only briefly in Chapter 5.

A comparative case analysis of the leading ICC jurisprudence, with respect to the rights to protection, participation and reparations, will allow for an assessment of the degree to which these statutory rights have, if at all, broadened the Court's mandate from a purely punitive one.

## **CHAPTER 3**

### **ADOPTING A STREAMLINED APPROACH TO THE RIGHT TO PARTICIPATION**

The first statutory right accorded to victims to be considered is the right to participation as enshrined in Articles 15(3), 19(3), and 68(3) of the Rome Statute. The right to participation allows for the involvement of victims, and their legal representatives, in a variety of roles during the entire court process. This new regime, which positions victims as active participants, has been aptly described as “the promise of justice *for*, not just *with*, the victims.”<sup>95</sup>

This chapter seeks to consider some of the key developments in victim participation that are illustrative of the emerging areas of tension between retributivist and restorative aims. In order to assess the right to participation a few aspects of the Court system need to first be outlined. This includes a brief sketch of the overall ICC process, an explanation of the Rome Statute definition of victim, and an overview of the key statutory victims’ participation provisions. With this background the three major emerging trends in the right to participation can be considered: (i) the reversal of a general right to participation during the investigation phase, (ii) examples of the streamlining of victim participation during the pre-trial and trial phase, and (iii) victims’ challenges to the characterization of facts.

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<sup>95</sup> Mettraux, G. (2010). Victims’ Participation in International Criminal Law, *Journal of International Criminal Justice*, 8(1), p. 75-78, p. 75.

These issues are assessed in light of the competing aims of the different theories of justice presented in Chapter 2. It will be argued that while most of the initial decisions encompassed a broad interpretation of the right to victim participation, this was primarily possible due to the relatively limited numbers of victims in the Court's first years. In light of the need to maintain the efficacy and efficiency of the retributivist system, later Appeals Chamber decisions have consistently scaled back these rights to ensure a more streamlined and demarcated role for victim participation.

### **3.1 A BRIEF SKETCH OF THE OVERALL ICC PROCESS**

In order to properly gauge victim participation in proceedings throughout the Court process it is necessary to understand the stages by which a matter develops and proceeds through to the trial and reparations proceedings. States Parties or the Security Council can refer situations of crimes within the jurisdiction of the Court to the Prosecutor.<sup>96</sup> The Prosecutor then evaluates information and commences an investigation unless it is determined there is no reasonable basis to proceed. The Prosecutor also has the power to commence an investigation *proprio motu* if he finds there is sufficient information.<sup>97</sup>

The Pre-Trial Chamber oversees matters at the investigation stage and, on the application of the Prosecutor, may issue a warrant of arrest or a summons to appear for an accused.<sup>98</sup> Once an individual has been surrendered to or voluntarily appears before the Court, the Pre-Trial Chamber holds a hearing to confirm the charges that will be the basis of the trial.<sup>99</sup> Following the confirmation of charges, a case is then assigned to a Trial Chamber in preparation for the trial and subsequent reparations proceedings. Throughout

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<sup>96</sup> Rome Statute, *supra* note, Articles 13-14.

<sup>97</sup> *Ibid.*, Article 15.

<sup>98</sup> *Ibid.*, Articles 56-60.

<sup>99</sup> *Ibid.*, Article 61.

the process, the accused or the Prosecutor may appeal decisions of the Chambers as specified by the Statute. It is at this stage that the Appeals Chamber is to provide further guidance on the proper interpretation of key statutory provisions. As will be considered below, the Appeals Chamber in its consideration of victim participation has regularly refined or reversed the broader decisions of the lower Chambers.

### **3.2 A QUESTION OF DEFINITION: THE REQUIREMENT OF PERSONAL HARM**

#### *3.2.1 The Need to Provide a Definition (Rule 85)*

The first question that must be addressed, even before considering actual participation rights, is who can apply for victim status within the Rome Statute regime. The Court's Rules of Procedure and Evidence (RPE), in particular Rule 85, established the parameters by which victims were to be defined.<sup>100</sup> This definition marked an expansion from the previous *ad hoc* tribunals' definition that restricted the scope to a direct victim of a crime, described as "a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed."<sup>101</sup> While there was strong NGO pressure to discuss a broad definition based on the 1985 Victims Declaration, there also remained strong opposition from certain states.<sup>102</sup> In the end, the final compromise definition does bear a strong resemblance to this broad approach.<sup>103</sup> One of the more recent ICC decisions, confirmed that Rule 85 establishes the following criteria: (i) the applicant must be a natural person or in certain circumstances an organization or

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<sup>100</sup> International Criminal Court Rules of Procedure and Evidence, ICC-ASP/I/3 (Sept 9, 2002), Rule 85 Definition of Victims [hereinafter ICC Rules of Procedure and Evidence].

<sup>101</sup> Fernandez de Gurmendi, S.A. (2001), Definition of Victims and General Principle, in R. Lee (ed.), *ICC: Elements of Crimes & Rules of Procedure & Evidence*, Ardsley, New York: Transnational Publishers, Inc., p. 428.

<sup>102</sup> *Ibid.*, p. 430-431.

<sup>103</sup> de Brouwer, A-M and M. Groenhuijsen. (2009). The Role of Victims in International Criminal Proceedings, in *International Criminal Procedure: Towards a Coherent Body of Law*, London: CMP Publishing, 149-204, p. 157.

institution; (ii) the applicant must have suffered harm; (iii) the crime must fall within the Court's jurisdiction; and (iv) there must be a causal link between a crime and the harm.<sup>104</sup>

### 3.2.2 A Requirement of Personal Harm

While Rule 85 outlines that victims are those who have “suffered harm as a result of the commission of any crime within the jurisdiction of the Court”<sup>105</sup> it does not provide a definition of harm. However, understanding the scope and conceptualization of harm that the Court is willing to recognize shall provide greater insight into which theory of justice remains paramount to its activities.

The first substantive consideration of the conceptualization of harm was provided in Trial Chamber I's January 18, 2008 decision in *Lubanga* where the Chamber sought to provide general guidelines on all matters relating to the participation of victims throughout the proceedings.<sup>106</sup> Trial Chamber I held that “whereas Rule 85(b) of the Rules provides that legal persons must have ‘sustained direct harm’, Rule 85(a) of the Rules does not include that stipulation for natural persons, and applying a purposive interpretation, it follows that people can be direct or indirect victims of a crime.”<sup>107</sup> The Trial Chamber then sought guidance from the 2005 Basic Principles according to which “a victim may suffer, either individually or collectively, from harm in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights.”<sup>108</sup>

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<sup>104</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, Fourth Decision on Victims' Participation, Pre-Trial Chamber III, ICC-01/05-01/08-320, 12 December 2008, para. 30. See also Pre-Trial Chamber I *DRC Situation* Decision of 17 January 2006, *supra* note 28, para. 79.

<sup>105</sup> ICC Rules of Procedure and Evidence, *supra* note 100, Rule 85.

<sup>106</sup> Trial Chamber I *Lubanga* Decision of 18 January 2008, *supra* note 29, para. 84.

<sup>107</sup> *Ibid.*, para. 91.

<sup>108</sup> *Ibid.*, para. 92.



The Appeals Chamber in its reconsideration of this decision provided further clarification stating that while harm suffered by victims does not necessarily have to be direct, it must be personal.<sup>109</sup> It confirmed that harm could include material, physical, and psychological harm as long as it is suffered personally.<sup>110</sup> The Defence had contended that the Trial Chamber’s decision was too broad, arguing it was open to an interpretation whereby “those who did not suffer harm personally could be considered victims.”<sup>111</sup> While the Appeals Chamber stated the Trial Chamber had not erred in its reference to the language of the 2005 Basic Principles, noting that harm can be both personal and collective in nature; it held that the “notion of harm suffered by a collective is not, as such, relevant or determinative” for the granting of victim status.<sup>112</sup> The Appeals Chamber provided the example of a close relationship between a child soldier and that child’s parents, “[t]he recruitment of a child soldier may result in *personal* suffering of both the child and the parents” and as such the harm can attach to both direct and indirect victims.<sup>113</sup> Moreover, the Appeals Chamber confirmed that those who had suffered harm as a result of the conduct of direct victims (i.e. child soldiers) would not be included and that for the purposes of participation in the pre-trial or trial proceedings in a particular case, the harm alleged must be linked to the charges. This development is discussed in greater detail later.<sup>114</sup>

The above definition limits victims to those who personally suffer harm that is linked to the charges at each stage of the proceedings. While this definition is an

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<sup>109</sup> Appeals Chamber *Lubanga* Judgment of 11 July 2008, *supra* note 27, paras. 29-39.

<sup>110</sup> *Ibid.*, para. 32.

<sup>111</sup> *Ibid.*, para. 36.

<sup>112</sup> *Ibid.*, para. 35.

<sup>113</sup> *Ibid.*, para. 32.

<sup>114</sup> *Ibid.*, para. 2.

expansion from the previous international criminal law jurisprudence, it still fails to meet the aims of a fully relational approach. Restorative justice allows for the inclusion of all parties affected by harm, victim, offender and community. As victims are only those that have suffered harm personally and in relation to the charges as presented, there will remain many victims who are barred from participation within the Rome Statute regime. The notion of collective harm is touched on briefly in the concluding chapter, where the possibility of collective reparations is considered as an option to provide redress for a greater number of the victims affected by the crimes within the Court's jurisdiction.

### **3.3 THE KEY STATUTORY PROVISIONS**

Having considered the definition of victim, it is now possible to assess the actual right to participation afforded to victims within the Rome Statute. Victim participation at the ICC has grown steadily since its first trial where only four victims participated in the confirmation of charges hearing in *Lubanga*<sup>115</sup> to over 1,600 in the *Bemba* trial.<sup>116</sup> It will be argued that with the smaller numbers at the start the Court was able to grant more expansive participatory rights with less consequences on overall trial efficiency and fairness; however, as the number and activity of victim participation has steadily increased these initially broad decisions have later been refined and restricted.

There are three key statutory provisions provided within the Rome Statute, which outline the scope of the right to participation provided to victims. Article 15(3) describes the possible involvement by victims through the provision of information and

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<sup>115</sup> Stocktaking of International Criminal Justice, Impact on Victims and Affected Communities, *supra* note 4, p. 88.

<sup>116</sup> Wairagala. W. (2011). Victims Participating in Bemba Trial Now Reach 1,600, The Trial of Jean-Pierre Bemba Gombo, Open Society Justice Institute, July 14, 2011, available at <http://www.bembatrial.org/2011/07/victims-participating-in-bemba-trial-now-reach-1600/>.

representations during an examination of a Prosecutor's request for authorization to proceed with an investigation.<sup>117</sup> Article 19(3) provides for the submission of observations regarding jurisdiction or admissibility applications.<sup>118</sup> These first two provisions are much more limited in scope and it was the final statutory provision accorded victims that would supply the transformative aspect to the victim participation framework.

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 and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>119</sup>

It was this innovative provision that sparked much debate and interpretation by both academics and commentators alike.<sup>120</sup> Charles Trumbull IV has argued that the scope this provision is afforded will provide guidance on what the Court's overarching aim to victim involvement is.<sup>121</sup> He notes "[a] narrow interpretation of Article 68(3) indicates the Court's principal objective is to bring human rights abusers to justice. A more liberal interpretation, on the other hand, while undoubtedly making prosecutions more cumbersome, will also suggest that the Court believes that giving (*at least some*) victims a voice, and recognizing their suffering, is one of its central objectives.<sup>122</sup> It is Trumbull's recognition that victim participation will likely always conflict with

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<sup>117</sup> Rome Statute, *supra* note 1, Article 15(3).

<sup>118</sup> *Ibid.*, Article 19(3).

<sup>119</sup> *Ibid.*, Article 68(3).

<sup>120</sup> Trumbull, *supra* note 2, p. 794.

<sup>121</sup> *Ibid.*, p. 801.

<sup>122</sup> *Ibid.*, pp. 801-802.

retributivist aims for efficacy of prosecution and fail to meet the full restorative needs of victims that is assessed in this thesis.

The various Chambers, in their determination of victim status, have determined that beyond merely meeting the definitional test for a victim, the right to participation in proceedings as provided for in Article 68(3) must be considered for each stage. This has resulted in the development of four part test for participation in proceedings: (i) qualification of victim within the meaning of Rule 85; (ii) a demonstration that the applicant's personal interests are affected by the proceedings; (iii) that their participation is appropriate at that particular stage; and (iv) that the manner of such participation would not be prejudicial to or inconsistent with the rights of the accused and a fair trial.<sup>123</sup> These provisions have resulted in different interpretations depending on the stage of the proceeding under consideration.

### **3.4 THE INVESTIGATION STAGE: AN INITIALLY BROAD INTERPRETATION REVERSED**

In light of the ICC's multi-stage court process it is unsurprising that the first significant decisions of the Court pertaining to victim participation related to its earliest phase, the investigation. Later decisions confirmed that in order to ensure adequate and effective victim participation throughout all stages of the Court process, proper involvement during these first stages is crucial. Article 68(3) provides that "the Court shall permit views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court."<sup>124</sup> Interpreting the proper

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<sup>123</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled "Decision on Victims' Participation", Trial Chamber I, ICC-01/04-01/06-1335, 16 May 2008, para. 36. See also Trial Chamber I *Lubanga* Decision of 18 January 2008, *supra* note 29, paras. 101-104.

<sup>124</sup> Rome Statute, *supra* note 1, Art. 68(3), emphasis added.

definition for the scope of proceedings covered by this provision and at what stages victim participation was appropriate soon became an issue. A trend emerged that allowed for a general right of participation during the investigation stage. However, once leave to appeal was granted, this expansive interpretation was narrowed to participation only during *judicial* proceedings at the investigation phase.

#### 3.4.1 DRC Situation: *The Starting Point of a Broad Interpretation*

Pre-Trial Chamber I's decision of January 16, 2006 provided the first recognition of the right of victims to participate during the investigation stage of a situation.<sup>125</sup> The Prosecution raised several lines of argument challenging the applicability of Article 68(3) to the investigation phase,<sup>126</sup> all of which Pre-Trial Chamber I rejected. Most importantly from a restorative approach, the Chamber held that a teleological interpretation that allowed for participation during the investigation stage was "consistent with the object and purpose of the victims participation regime established by the drafters of the Statute, which ensued from a debate that took place in the context of the growing emphasis placed on the role of victims."<sup>127</sup> The Chamber held that, "the Statute grants victims an independent voice and role in proceedings before the Court" drawing upon broader international jurisprudence, which had also recognized that often the roles and objectives of the Prosecution and victims do not align.<sup>128</sup> This interpretation resonates with a relational theory that seeks to see the restoration of a relationship of equality. In contrast,

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<sup>125</sup> Pre-Trial Chamber I *DRC Situation* Decision of 17 January 2006, *supra* note 28, para. 54.

<sup>126</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp, OTP, ICC-01/04-84-Conf, 15 August 2005.

<sup>127</sup> Pre-Trial Chamber I *DRC Situation* Decision of 17 January 2006, *supra* note 28, para. 50.

<sup>128</sup> *Ibid.*, para. 51.

a retributivist framework that prioritizes the Prosecution's control over the investigation minimizes victims' power to ensure that all crimes are investigated.

Having determined that Article 68(3) did apply to the investigation phase, Pre-Trial Chamber I sought to address two final conditions for participation: (i) whether victims' personal interests were affected; and (ii) if participation at that stage was appropriate.<sup>129</sup> With respect to the personal interests criterion, the Chamber held that this requirement constitutes an additional condition that must be met, over and above that required for victim status as guided by Rule 85.<sup>130</sup> The Chamber held that victims' personal interests are affected in general at the investigation stage, "since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered."<sup>131</sup> The OTP hereto argued against such involvement; however, the Chamber stressed that participation "does not *per se* jeopardise the appearance of integrity and objectivity of the investigation, but rather the central concern is the extent of participation."<sup>132</sup> It was this approach that saw involvement outside of specific judicial proceedings, which would later prove controversial. However, Pre-Trial Chamber I's initial support of an active role for victims in the earliest phases went far in the direction of meeting restorative aims.

### *3.4.2 The Emergence of a General Right of Participation at the Investigation Phase*

This decision proved highly influential and began a trend of similar decisions, which allowed for a right of participation during the investigation phase. These further

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<sup>129</sup> *Ibid.*, para. 55.

<sup>130</sup> *Ibid.*, para. 62.

<sup>131</sup> *Ibid.*, para. 63.

<sup>132</sup> *Ibid.* paras. 57-58.

decisions confirmed that (i) both the stage of investigation in a situation and the pre-trial stage of a case are appropriate stages of the proceedings for victim participation; and (ii) as a result, there is a *procedural status of victim* in relation to situation and case proceedings before the Pre-Trial Chamber.<sup>133</sup> The December 24<sup>th</sup> decision granted 68 applicants the right to participate confirming it was “not necessary to determine in any great detail at this stage of the proceedings the precise nature of the causal link between the crime and the alleged harm.”<sup>134</sup> A similar approach was also followed in the *Darfur, Sudan Situation*.<sup>135</sup>

### 3.4.3 DRC Situation: A Unanimous Reversal by the Appeals Chamber

The Appeals Chamber’s *DRC Situation* judgment of December 19, 2008 unanimously reversed this developing trend.”<sup>136</sup> It held that what had emerged was “that no need arises at the investigation stage to indicate the nexus between a crime and the harm suffered by a victim, relieving the victims thereby from the obligation to demonstrate affection of personal interests by the investigation as such.”<sup>137</sup> It also highlighted that the notion of procedural status was nowhere defined and lacked a distinct meaning.<sup>138</sup> The Appeals Chamber held that participation could only take place within the context of *judicial* proceedings. “Article 68(3) of the Statute correlates victim participation to ‘proceedings’, a term denoting a judicial cause pending before a

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<sup>133</sup> *Situation in the Democratic Republic of the Congo*, Corrigendum to the “Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo”, Pre-Trial Chamber I, ICC-01/04-423, 24 December 2007.

<sup>134</sup> *Ibid.*, para. 3.

<sup>135</sup> *Situation in Darfur, Sudan*, Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, Pre-Trial Chamber I, ICC-02/05-111, 14 December 2007.

<sup>136</sup> Appeals Chamber *DRC Situation* Judgment of 19 December 2008, *supra* note 27, para. 4.

<sup>137</sup> *Ibid.*, para. 41.

<sup>138</sup> *Ibid.*, para 43.

Chamber. In contrast, an investigation is not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible.”<sup>139</sup>

The Appeals Chamber confirmed many of the Prosecution’s original arguments, when it held “[m]anifestly, authority for the conduct of investigations vests in the Prosecutor.”<sup>140</sup> Despite arguments that their participation would enable them to “‘clarify the facts’ ...and that, following this information, the Prosecutor would investigate the events,” the Appeals Chamber held there was “‘ample scope within the statutory scheme’ for victims to pass information on to the Prosecutor “without first being formally accorded a ‘general right to participate’.”<sup>141</sup> While the Appeals Chamber reiterated that Article 68(3) participation “aims to affording victims an opportunity to voice their views and concerns on matters affecting their personal interests” it stressed that this “does not equate them...to parties to the proceedings before a Chamber.”<sup>142</sup>

#### 3.4.4 DRC Situation: *The Adoption of a New Substantive Framework*

In light of this reversal, the Pre-Trial Chamber was forced to reconsider the appropriate role for victims during investigations and presented a “new substantive and procedural framework for victims’ participation in the situation in the DRC.”<sup>143</sup> The Chamber noted victims could still participate in the various different judicial proceedings

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<sup>139</sup> *Ibid.*, para. 45.

<sup>140</sup> *Ibid.*, para. 46.

<sup>141</sup> *Ibid.*, para. 53.

<sup>142</sup> *Ibid.*, para. 55.

<sup>143</sup> *Situation in the Democratic Republic of the Congo*, Decision on victims' participation in proceedings relating to the situation in the Democratic Republic of the Congo, Pre-Trial Chamber I, ICC-01/04-593, 11 April 2011, para. 8 [hereinafter Pre-Trial Chamber I *DRC Situation* Decision of 11 April 2011].



that can occur during the investigation phase<sup>144</sup> and the framework was applicable to these scenarios.<sup>145</sup> Pre-Trial Chamber I stated that the manner in which new applications will be processed will depend on the time of their filing, if there are no judicial proceedings they are to be held by the VPRS and if there are proceedings under way they will be presented to the Chamber for assessment.<sup>146</sup> This highlights that the ability to have access at all times has been substantially restricted, and reaffirms Prosecutorial control over the investigation phase.

### 3.4.5 Assessing Early Participation Relationally

The original approach of active participation in a variety of forms, including those outside the scope of just judicial proceedings, sought to ensure victims would have a role in shaping the scope and direction of investigations. This is particularly important in that later rights to participation and reparations are linked to the specific charges which are brought against the accused, and the choice over which charges to bring depends primarily on the evidence that arises out of the investigation. This approach had become widespread as a later Appeals Chamber in the *Darfur, Sudan Situation* also reversed this general trend.<sup>147</sup> The confirmation of the Prosecutor's role to determine the appropriate scope of the investigation, thereby shaping which cases will be brought, meets the retributivist need to ensure efficacy of the system by promoting provable cases. However,

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<sup>144</sup> *Ibid.*, para. 10. Pre-Trial Chamber I specified the following: proceedings regarding a review by the Pre-Trial Chamber of a decision by the Prosecutor not to proceed with an investigation or prosecution pursuant to Article 53 of the Statute; proceedings concerning the preservation of evidence or the protection and privacy of victims and witnesses pursuant to article 57(3)(c) of the Statute; and proceedings concerning preservation of evidence in the context of a unique investigative opportunity pursuant to article 56(3) of the Statute.

<sup>145</sup> *Ibid.*, paras. 9-10.

<sup>146</sup> *Ibid.*, paras 11-12.

<sup>147</sup> *Situation in Darfur, Sudan*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007, Appeals Chamber, ICC-02/05-177, 2 February 2009.

it fails to fully meet the needs of victims, which require charges be brought that are reflective of the actual harm suffered. In addition, the loss of a general right to participate has the potential to cause secondary harm and fails to meet the restorative emphasis of ensuring equality of respect, concern and dignity.

### **3.5 EFFECTS OF REVERSAL: A GREATER IMPORTANCE FOR OTHER PROVISIONS**

The Appeals Chamber in its reasoning noted there was ample scope in the Statute to provide information to the Prosecutor at the investigation stage. It referred both to provisions allowing the Prosecutor to receive information from other sources (Articles 15(2) and 42(1)), together with the two provisions allowing for specific representations by victims (Articles 15(3) and 19(3)). With the narrowing of space for victim involvement at this early phase, these other provisions have gained greater salience.

Despite the Appeals Chamber reversal, Pre-Trial Chambers have sought to ensure continued involvement for victims at the earliest phases through the use of these other provisions. Pre-Trial Chamber II's adoption of an innovative consultation process during the Prosecutor's request for authorization of an investigation into the post-election violence in Kenya provides a recent example. While only one example is considered due to space constraints, there are many others that are illustrative of this trend. For example, Pre-Trial Chamber II used Article 19(3) to seek out the involvement of victims and victims rights groups as *amicus curiae* in its reconsideration of the admissibility of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* Case in light of proposed attempts by the Government of Uganda to try crimes locally.<sup>148</sup>

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<sup>148</sup> *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence, Pre-Trial Chamber II, ICC-02/04-01/05-320, 21 October 2008.

### 3.5.1 Kenyan Consultations: Ensuring Article 15(3) Victims' Representations

Article 15(3), as noted, provides for the provision of information and possible representations by victims during a Pre-Trial Chamber's examination of a Prosecutor's request for authorization to proceed with an investigation. Pre-Trial Chamber II in its progressive decision for a proactive consultation process with victims ordered the Victims' Participation and Reparation Section (VPRS) to collect victims representations on a potential investigation into the post-election violence.<sup>149</sup> This Order required the VPRS to (i) identify community leaders of affected victim groups who may wish to make representations, (ii) receive victims' representations, (iii) assess these against the Rule 85 victim definitional requirements, and (iv) summarize the representations into a Report for the Court.<sup>150</sup>

This Court ordered approach stood in contrast to the more limited role originally promoted by the OTP who, out of security concerns, had wished to notify victims by the more general means of a widely publicized general notification. The Prosecutor argued that direct conduct would “pose a danger to the integrity of a future investigation or to the life or well-being of victims and witnesses.”<sup>151</sup> This is reminiscent of the OTP's approach during the *Darfur, Sudan Situation* where after significant delays the Pre-Trial Chamber sought advice from experts on the ability to conduct an investigation despite security concerns.<sup>152</sup> The continued tension between participation and protection is considered further in Chapter 4; however, both examples illustrate that it has been the

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<sup>149</sup> *Situation in the Republic of Kenya*, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, Pre-Trial Chamber II, ICC-01/09-4, 10 December 2009.

<sup>150</sup> *Ibid.*, para. 9.

<sup>151</sup> *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, OTP, ICC-01/09-3, 26 November 2009.

<sup>152</sup> Schabas, *supra* note 10, p. 51.

relevant Pre-Trial Chamber not the OTP that has sought to ensure a more proactive role for victim participation during the earliest phases of Court involvement.

The report filed March 29, 2010 highlighted there was significant room for improvement in victims' awareness of Court procedures.<sup>153</sup> It noted that most victims were unaware of victims' rights to make representations and the few who were aware were confused as to what information should be included.<sup>154</sup> The report canvassed victims' views, but what it illustrated was that an effective outreach program in Kenya was missing. While there was substantial media interest in the Court's potential investigation, there was also a great deal of mixed messaging presented by the different political groups involved. The challenge of providing accurate information and outreach to potential victims remains a problem within the Court, as verified in a study undertaken by several victims groups in advance of the recent stocktaking exercise.<sup>155</sup> The ICC later undertook a more proactive outreach program in an attempt to rectify this gap, which included more regular informational visits and the creation of a Kenyan TV series, *Ask the Court*, to provide answers to the Kenyan population on the Court's investigation and later summonses to appear for six leading figures.<sup>156</sup>

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<sup>153</sup> *Situation in the Republic of Kenya*, Public Redacted Version of Report Concerning Victims' Representations (ICC-01/09-6-Conf-Exp) and Annexes 2 to 10, Registrar, ICC-01/09-6-Red, 29 March 2010.

<sup>154</sup> *Ibid.*

<sup>155</sup> ICC, *Turning the Lens Victims and Affected Communities on the Court and the Rome Statute system*, Registry, RC-ST-V-INF.2-ENG-30052010, 30 May 2010, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Stocktaking/RC-ST-V-INF.2-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-V-INF.2-ENG.pdf) [ICC Turning the Lens 30 May 2010].

<sup>156</sup> ICC Press Release, ICC launches Kenyan-wide TV series *Ask the Court*, ICC-CPI-20110310-PR638, 10 March 2011, available at <http://www.icc-cpi.int/NR/exeres/96659CF9-4605-405B-9985-FB1D94875886.htm>. See also *Ask the Court* video <http://www.youtube.com/watch?v=M04D5M-q1EA> and ICC's Public Information and Outreach in Kenya, Calendar of Activities – January 31, 2011, highlighting certain activities to address misconceptions over Court activities, available at <http://www.icc-cpi.int/NR/rdonlyres/FFD6BCBE-AD58-4FA1-9B92-C94760F6B06E/282993/OutreachRAKKNY201101ENG.pdf>.

The Kenyan example provides not only an example of a more expansive usage of the Article 15(3) representations provision, but also of a more recent trend by the ICC through its Outreach Unit to ensure effective information during the initial stages in order that victims are better aware of their potential rights. The Court has sought to improve its outreach mandate recognizing that “victims must first be aware of their right to participate so that they can take informed decisions about whether and how to exercise it, and must be assisted to apply to participate throughout if they wish to do so.”<sup>157</sup> The use of a comprehensive consultation process supports the argument that despite Appeals Chamber decisions to narrow early participation, different Pre-Trial Chambers through the creative usage of the other statutory provisions are continuing to seek victim engagement at all stages in line with restorative aims to promote inclusion at all phases.

### **3.6 VICTIM PARTICIPATION DURING THE PRE-TRIAL AND TRIAL PHASES**

The second major issue for consideration involves the emerging trends in victim participation during the pre-trial and trial phases. It is here that we find a similar narrowing by the Appeals Chamber in which participation was restricted in pre-trial and trial proceedings only to victims of harms linked to the charges alleged at each phase. Four examples of the evolving approach are addressed: (i) the addition of a linkage requirement; (ii) providing a victims a voice during trial proceedings; (iii) the right to challenge and lead evidence; and (iv) an emphasis on common legal representation. These issues are provided to illustrate that the incorporation of victim participation in these later phases, while novel to international criminal law, has been incorporated relatively smoothly as participation remains acceptable to the degree possible within the

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<sup>157</sup> Report of the Court on the Strategy in Relation to Victims, *supra* note 26, p. 4.

confines of a retributivist framework. However, the primary aim remains the retributivist goal of promoting efficacy of the system through the successful completion of trials.

Participation rates at the trial phase continue to rise, even despite the adoption of a linkage requirement, and as a result victims' roles continue to be streamlined as victims are treated in a uniform manner. In this regard the *Lubanga* trial recognized 118 victims, whereas the second trial, *Katanga and Ngudjolo*, has granted 365 victims participation rights, and the most recent *Bemba* trial has 1,620 victim participants.<sup>158</sup> Similar to the investigation phase, it is argued that while the initial decisions adopted a potentially broad interpretation of certain provisions when numbers remained more manageable, later decisions have also scaled back the scope of trial participation and emphasized common legal representation of even larger victim groups. The addition of a linkage requirement at the pre-trial and trial phases provides the first example of the evolution towards a more streamlined approach to victim participation.

### *3.6.1 The Addition of a Linkage Requirement*

The *Lubanga* trial marked the first opportunity to interpret victim participation during the trial process. As mentioned above, Trial Chamber I attempted to provide general guidelines for victim participation in its January 18, 2008 decision.<sup>159</sup> It was here that Trial Chamber I adopted a broad approach to victim participation during the trial such that victims were not required to show they had suffered harm as a result of the charges confirmed against the accused. Instead, victims of any crime falling within the jurisdiction of the Court could participate provided they could establish one of two

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<sup>158</sup> Wairagala, *supra* note 116.

<sup>159</sup> Trial Chamber I *Lubanga* Decision of 18 January 2008, *supra* note 29.

criteria: (i) a link between the victim and the evidence that would be considered at trial; or (ii) that the victim's personal interest was affected by issues at stake during the trial.<sup>160</sup>

However, this broad approach was not to last long.

While the Appeals Chamber confirmed much of Trial Chamber I's decision, it reversed one significant aspect. The Appeals Chamber held that "the harm alleged by the victim and the concept of personal interests under art. 68(3) must be *linked* with the charges confirmed against the accused."<sup>161</sup> The Appeals Chamber reasoned that only victims of the crimes charged would be able to demonstrate that the trial affects their personal interests. In practice, this meant that only child soldiers and their parents or close relatives could be granted victim participant status at the trial. This reversal resulted in a much narrower view of the harms covered, only reflecting those that have been able to meet the necessary evidential and procedural hurdles for confirmation. *Katanga and Ngudjolo* confirmed that a similar linkage was required during the pre-trial phase such that the harm alleged by a victim must be linked to the offences alleged in the warrant of arrest or summons to appear.<sup>162</sup> Matthew Gillett when considering the decision, in his review of victim participation at the Court, noted that the Appeals Chamber was "unable to avoid making victims' rights entirely dependent on the Prosecution and, thus, has maintained an element of the 'victim as passive object' approach."<sup>163</sup>

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<sup>160</sup> Trial Chamber I *Lubanga* Decision of 18 January 2008, *supra* note 29, para 95.

<sup>161</sup> Appeals Chamber *Lubanga* Judgment of 11 July 2008, para. 65, emphasis added.

<sup>162</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Public Redacted Version of the 'Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case', Pre-Trial Chamber I, ICC-01/04-01/07-579, 10 June 2008, paras. 66-67.

<sup>163</sup> Gillett, M. (2009). Victim Participation at the International Criminal Court, *Australian International Law Journal* 16, 29-46, p. 38.

These two decisions mean that individuals who are granted victim-participant status at the pre-trial stage could then lose their participation benefits if the harm they suffered is not linked to a charge confirmed by the Pre-Trial Chamber. A relational theory requires that justice processes be “inclusive and participatory”<sup>164</sup> in order to see equality of relationship restored by all those affected. The necessity to link participant status with a specific charge means that numerous victims will be arbitrarily prevented from remaining within the court process if the specific harm they are associated with is not confirmed.

The potential to be granted participant status early in the process, only to lose it later also contrasts with relational theory’s emphasis on equality of respect, concern and dignity. In illustrating the concept of dignity, Llewellyn offers the opposite, “[a]n indignity is done to someone when they are not being valued or treated as having value.”<sup>165</sup> A process whereby victims who once offered the potential to voice their personal interests and concerns can then later be denied this opportunity fails to live up to the goal of ensuring dignity for all parties.

### 3.6.2 *Providing Victims With a Voice*

As has been described, victim participation at the ICC has seen a substantial transformation from the previous tribunals’ approaches. One of the most striking features of this new regime has been the opportunity to offer victims a voice through the provision of opening and closing statements<sup>166</sup> and the opportunity for victims to offer evidence

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<sup>164</sup> Llewellyn (2011), *supra* note 76, p. 10.

<sup>165</sup> Llewellyn (2011), *supra* note 76, p. 6.

<sup>166</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, Trial Chamber II, ICC-01/04-01/07-1788, 22 January 2010, para. 68 [hereinafter Trial Chamber II *Katanga and Ngudjolo* Decision of 22 January 2010].



and express their views and concerns directly to the Court. While the testimony of three dual status victims during the *Lubanga* trial garnered significant attention, the practice has continued in later trials in a relatively smooth fashion. It is argued that this is due mainly to the fact that the Court remains focused on ensuring participation does not infringe the rights of the accused and a fair and impartial trial, thereby ensuring only a limited number of individual participants will ever likely be acceptable.

One of the earliest and most vivid illustrations of providing such a voice came with the opening statement by Mr. Luc Walley, a Victims' Legal Representative during the *Lubanga* confirmation hearing. He stated "[t]he presence of victims will remind all the participants that these proceedings are not an intellectual exercise; that it is not an absorbing exchange between the Prosecution and Defence, but that the destruction of thousands of young lives will be at the center of discussions."<sup>167</sup> While this statement attests to the goals of victim participation, the continued restriction and streamlining of victim participation appears to suggest that, in fact, the primary goal of the system does remain a two party exchange between the Prosecution and Defence.

In addition to the ability to provide opening and closing statements, victims have also been provided with the opportunity to present their views and concerns when their personal interests are affected.<sup>168</sup> The Trial Chamber held that "the content and the circumstances of participation must not undermine the integrity of these criminal

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<sup>167</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-30-EN, Transcript, 9 November 2006, page 91, lines 11-17.

<sup>168</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the request by victims a/0225/06,a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, Trial Chamber I, ICC-01/04-01/06-2032-Anx, 26 June 2009 [hereinafter Trial Chamber I *Lubanga* Decision of 26 June 2009] para. 17.

proceedings.”<sup>169</sup> *Katanga and Ngudjolo* narrowed the purpose of participation even further stating that any reason for participation other than reparations must be linked to the determination of the truth and must not have a negative impact on the expeditiousness of proceedings.<sup>170</sup>

The practical concerns of unlimited involvement remained central in *Lubanga*, where Trial Chamber I noted it had “sought to ensure that any personal intervention by victims, particularly if a significant number are participating, does not have a negative impact on the trial.”<sup>171</sup> The Chamber highlighted that if all victims in *Lubanga* were to seek to express their views and concerns it would provide “an extreme example” that would likely be “antithetical to the fair trial of the accused.”<sup>172</sup> In the end three victims were granted the right to present evidence and provided the opportunity to express their views and concerns during the *Lubanga* trial. A schoolmaster who had described how he was beaten when trying to stop the conscription of his students described it as “an opportunity for us to be able to say to the world what happened...and to ask for reparations.”<sup>173</sup> The Court’s second trial, *Katanga and Ngudjolo*, also saw the continued presentation of evidence and personal views and concerns. According to their legal representative, victims who testified at the trial wished to raise the harm they suffered, as well as the ethnic character of the attack, in order to better assist the Court in understanding the family, ethnic and social context.<sup>174</sup> It appears that Trumbull’s earlier

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<sup>169</sup> *Ibid.*

<sup>170</sup> Trial Chamber II *Katanga and Ngudjolo* Decision of 22 January 2010, *supra* note 166, para. 65.

<sup>171</sup> Trial Chamber I *Lubanga* Decision of 26 June 2009, para. 24.

<sup>172</sup> *Ibid.*, para. 27.

<sup>173</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Transcript, ICC-01/04-01/06-T-225-RED, 12 January 2010, page 31, lines 9-10.

<sup>174</sup> Trial Chamber II *Katanga and Ngudjolo* Decisions of 9 November 2010, *supra* note 36.

recognition that the Court will only ever offer a partial voice to victims is indeed the case.<sup>175</sup>

### 3.6.3 *Challenging and Leading Evidence*

Trial Chamber I's victims' participation decision also granted victims the possibility to lead and challenge the admissibility or relevance of evidence in trial proceedings where their personal interests are engaged.<sup>176</sup> The Appeals Chamber confirmed this possibility although it stressed the fact that "the right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence lies primarily with the parties, namely, the Prosecutor and the Defence."<sup>177</sup>

While the majority found in favour of allowing for the possibility of leading or challenging evidence if a victim's personal interests are affected, even the possibility saw a strong dissent by two of the judges. Judge Pikis argued that the Court must strictly preserve the proceedings adversarial nature, in which "two sides are cast in the position of adversaries, in connection with the determination of the only issue raised before the Chamber, the guilt or innocence of the accused."<sup>178</sup> It was for this reason he argued that victims ought to be explicitly limited to presenting their views and concerns, which must be linked to "the cause that distinguishes them from other victims, namely their personal interests."<sup>179</sup> This highlights the fact that even the possibility for the expansion of this

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<sup>175</sup> Trumbull, *supra* note 2, p. 794.

<sup>176</sup> Trial Chamber I *Lubanga* Decision of 18 January 2008, *supra* note 29, paras. 115-116.

<sup>177</sup> Appeals Chamber *Lubanga* Judgment of 11 July 2008, paras. 97,105.

<sup>178</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Partly Dissenting opinion of Judge G.M. Pikis, 23 July 2008, ICC-01/04-01/06-1432, 11 July 2008, para 14.

<sup>179</sup> *Ibid.*, para. 15.

right had less than universal support, and that there remains a strong adherence to the retributivist paradigm. The Appeals Chamber outlined that in order to evaluate the victims' request to tender and examine evidence, the following criteria must be met: "(i) a discrete application by victims to that effect; (ii) notice to the parties; (iii) demonstration of personal interests that are affected by the specific proceedings; and (iv) consistency with the rights of the accused and a fair trial."<sup>180</sup>

These decisions were both presented prior to the actual commencement of the trial in order to provide advance guidance; therefore, later decisions have sought to provide further clarification. In particular, Trial Chamber II in the *Katanga and Ngudjolo* expanded on the *Lubanga* jurisprudence by way of a specific reference to the possibility that witnesses called by victims' legal representatives may "give evidence about the crimes with which the accused has been charged, and about any part played therein by the accused."<sup>181</sup> However, it specified that any questioning "must have as its main aim the ascertainment of the truth, since the victims are not parties to the trial and have no role to support the case of the Prosecutor. Their intervention may potentially enable the Chamber to better understand some of the matters at issue, given their local knowledge and social and cultural background."<sup>182</sup>

Therefore, the right to lead and challenge evidence remains narrowly defined, requiring a specific application, the establishment that their personal interests are affected by the proceeding, and approval by the relevant Chamber. This supports that while new

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<sup>180</sup> Appeals Chamber *Lubanga* Judgment of 11 July 2008, para. 104.

<sup>181</sup> *Ibid.*, para. 86.

<sup>182</sup> Trial Chamber II *Katanga and Ngudjolo* Decision of 22 January 2010, *supra* note 166, paras. 74-75.

procedural rights are being granted to victims during the trial, their scope remains limited by the guarantees of procedural fairness enshrined in a retributivist system of rule of law.

#### 3.6.4 *Emphasis on Common Legal Representation*

The final aspect of victim participation at the trial phase to be considered is the continued emphasis on common legal representation for victims. The need for legal representation was foreseen in the drafting process where it was agreed that representation would be necessary to ensuring effective participation.<sup>183</sup> The two primary provisions are Rule 90 that considers the assignment of legal representatives and Rule 91 that deals with the manner in which a legal representative may participate in the proceedings. Bitti and Friman note that it was agreed by negotiators that the Court would have to facilitate the process of obtaining and sustaining legal representation for victims and therefore “there must exist a substantive incentive for the victims to group together around a common legal representative.”<sup>184</sup> These incentives are specific provisions that allow for greater participatory rights for victims if they are exercised through legal representatives.

This approach was outlined for the first time in *Lubanga* where Trial Chamber I noted “that the personal appearance of a large number of victims could affect the expeditiousness and fairness of the proceedings, and given that the victims’ common views and concerns may sometimes be better presented by a common legal representative (i.e. for reasons of language, security or expediency), the Trial Chamber will decide either *proprio motu*, or at the request of a party or participant, whether or not there should

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<sup>183</sup> Bitti, G. and H. Friman. (2001), Definition of Victims and General Principle, in R. Lee (ed.), *ICC: Elements of Crimes & Rules of Procedure & Evidence*, Ardsley, New York: Transnational Publishers, Inc., pp. 462-469.

<sup>184</sup> *Ibid.*, p. 462

be joint representation of views and concerns by legal representatives.”<sup>185</sup> This confirms Rule 90(3) whereby if victims are unable to agree upon a common representative, the Chamber may request the Registrar to choose one for them.<sup>186</sup>

Trial Chamber II in *Katanga and Ngudjolo* also set out the modalities of the common legal representation of victims for the trial.<sup>187</sup> Here the Chamber separated victims into two groups: the victims of the actual Bogoro attack, and a much smaller second group composed of the child soldiers who were involved. Before the decision, twelve separate lawyers had been representing victims, but the Chamber requested this number be reduced to one, albeit supported by a team both in The Hague and in the field.<sup>188</sup> The Chamber felt that as the child soldiers may have certain interests in conflict with the larger main group it should retain its own separate representation.<sup>189</sup> The Chamber recognized that disagreements may arise between victims during the proceedings and counsel would have to represent these divergent positions. However, if divergences reached the level of a conflict of interest then new arrangements would be considered. While this recognizes that individual victims may have different views and interests, it places a particularly high threshold on when such differences will require separate representation.

The Chamber argued that the need for common legal representation is based on procedural efficiency, arguing that victims’ participation should not harm the rights of the

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<sup>185</sup> Trial Chamber I *Lubanga* Decision of 18 January 2008, *supra* note 29, para. 116.

<sup>186</sup> International Criminal Court Regulations of the Court, ICC-BD/01-01-04, adopted May 26, 2004, Regulation 90(3) [hereinafter ICC Regulations].

<sup>187</sup> Trial Chamber II *Katanga and Ngudjolo* Decision of 22 January 2010, *supra* note 166.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

accused.<sup>190</sup> This once again reinforces the primacy of efficacy and procedural fairness at the expense of restorative aims of individual recognition. In the Court's most recent case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Trial Chamber IV originally had broken victims into two groups both with common representation.<sup>191</sup> However, it accepted requests by legal representatives to allow three groups provided the time afforded to victim participation remains relatively the same as that allotted to the two groups.<sup>192</sup>

The need for legal expertise to ensure effective representation of victims' views is also in contrast to relational theory's goal of reinstating relationships of equal power. In a domestic restorative context there remains debate over the degree of expertise facilitators should have, but the guiding principle is that all parties to the process should maintain a degree of ownership and not be reliant solely on the expertise of others.<sup>193</sup> This remains in opposition to the retributivist focus on expertise to ensure that the complex rules of the system are properly followed.

The consideration of victim participation during the investigation, pre-trial and trial phases has sought to illustrate a reoccurring trend towards an initially broad interpretation of the relevant participation provision by lower Chambers, only to be later refined and restricted by the Appeals Chamber. It has also shown that while it was expected that victim participation would present challenges of interpretation and lengthen the process,

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<sup>190</sup> *Ibid.*

<sup>191</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Order instructing the Registry to start consultations on the organization of common legal representation, Trial Chamber IV, ICC-02/05-03/09-138, 21 April 2011.

<sup>192</sup> *Ibid.*

<sup>193</sup> Gavrielides, T. (2008) Restorative Justice—The Perplexing Concept: Conceptual Fault-lines and Power Battles within the Restorative Justice Movement, *Criminology and Criminal Justice*, 8(2), 165-183, pp. 176-178.

in fact, these issues have not been as significant as originally anticipated due to the continued primacy of the retributivist system into which participation has been placed. There is, however, one final area that has developed where the involvement of victims has exerted significant pressure on the retributivist stance in order that trials are more reflective of the actual harm suffered. This concerns challenges of characterization.

### **3.7 CHALLENGES OF CHARACTERIZATION: THE NEED TO BE REFLECTIVE**

Restorative justice “is flexible in terms of what must be done in response to a wrong” and promotes processes that are reflective of the harm as perceived by victims.<sup>194</sup> Providing recognition for the entire scope of harm suffered also remains a powerful reparative tool, offering partial satisfaction and a step towards documentation of the truth. It is here that the promotion of victim participation and its restorative aims have buttressed against the retributivist goal of narrow trials centered on proving the innocence or guilt of the accused. The Prosecutorial Strategy 2009-2012 adopted a policy that attempts to limit the number of incidents tried by focusing on the “main types of victimization.”<sup>195</sup> However, the first few cases proved rather unrepresentative. It is in light of this failure to try charges that are reflective of the harms suffered that victims have raised concerns over proposed classifications in two separate areas: (i) characterization of charges, and (ii) the practice of cumulative charging.

#### **3.7.1 Lubanga: Concerns Over Characterization**

This issue arose for the first time at the *Lubanga* confirmation of charges hearing where the Prosecutor had charged Thomas Lubanga with committing war crimes

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<sup>194</sup> Howse, R. and J.J. Llewellyn, (1999b), *supra* note 79, p. 36.

<sup>195</sup> Prosecutorial Strategy 2009-2012, *supra* note 38, para. 20.



applicable in an armed conflict not of an international character. However, during the hearing victims' legal representatives argued that there was sufficient evidence presented pertaining to Uganda's involvement in the hostilities that the charges should be re-characterized as an international armed conflict during the period of Ugandan intervention.<sup>196</sup> Victims argued it was important to present the conflict accurately and this required recognition of the additional harm as a result of involvement by another state to the conflict.<sup>197</sup> Pre-Trial Chamber I agreed with this position and amended the charges to include war crimes committed during an international conflict.<sup>198</sup> This decision also supports the need for a comprehensive and representative investigation to ensure that the full scope of crimes are documented so as to allow for later charging that is reflective of the full harm suffered by victims. It also provides a further example of how the Prosecutor's aims cannot be argued to be concurrent with those of victims, providing continued support for the need to allow independent victim participation.

Victims' rights groups had raised concerns from the start of the *Lubanga* case that only laying charges pertaining to the enlistment, conscription and active use of child soldiers failed to recognize the full scope of crimes committed in the Congo, particularly the omission of charges of rape and sexual violence.<sup>199</sup> Schabas notes that the Prosecutor had been under pressure to proceed with an arrest warrant focusing on the narrower charges, which could be supported by the evidence in the Prosecutor's possession, as Thomas Lubanga had already been in detention in the DRC for over a year and there was

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<sup>196</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of the Charges, Trial Chamber I, ICC-01/04-01/06-803, 29 January 2007, paras. 205-226.

<sup>197</sup> *Ibid.*, para. 204.

<sup>198</sup> *Ibid.*, para. 406.

<sup>199</sup> See, e.g., Letter from Brigid Inder, Executive Director, Women's Initiative for Gender Justice to Louis Moreno Ocampo, Prosecutor, International Criminal Court, August 2006, available at [http://www.iccwomen.org/news/docs/Prosecutor\\_Letter\\_August\\_2006\\_Redacted.pdf](http://www.iccwomen.org/news/docs/Prosecutor_Letter_August_2006_Redacted.pdf).

concern he might be released.<sup>200</sup> These challenges resurfaced several months into the trial after substantial testimony relating to rapes committed by commander at the training camps has been presented.<sup>201</sup> Victims' legal representatives requested Trial Chamber I amend the legal characterization of the facts, on the basis of the evidence already presented, to include crimes of sexual slavery and inhuman treatment.<sup>202</sup>

Trial Chamber I held by majority decision that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court.<sup>203</sup> However, Judge Fulford dissented, arguing that the victims' representatives sought to add five new charges rather than just a modification.<sup>204</sup> The Prosecution and Defence were granted leave to appeal this decision. While the Prosecution agreed with victims' legal representatives that such re-characterization was possible under the Statute, it argued that the list of evidence supporting the document containing charges did not support the proposed legal characterization.<sup>205</sup> The Appeals Chamber in its interpretation of Regulation 55(2) held that in order for a re-characterization of the facts to include

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<sup>200</sup> Schabas, *supra* note 10, pp. 278-279.

<sup>201</sup> Irwin, R., Lubanga Trial Transformed by Victims, Institute for War and Peace Reporting, September 4, 2009, available at <http://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/48120.html>.

<sup>202</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, Trial Chamber I, ICC-01/04-01/06-1891, 22 May 2009, para. 42 [hereinafter Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of 22 May 2009].

<sup>203</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, Trial Chamber I, ICC-01/04-01/06-2049, July 14, 2009, para. 33. See also, *Prosecutor v. Thomas Lubanga Dyilo*, Clarification and further Guidance to Parties and Participants in Relation to the Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2093, August 27, 2009.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Application for Leave to Appeal the Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, OTP, ICC-01/04-01/06-2074, 12 August 2009 [hereinafter Prosecution's Application for Leave to Appeal of 12 August 2009].

different charges there would need to be factual evidence of those new charges in the confirmation of charges decision.<sup>206</sup> Trial Chamber I then held that as there was no factual evidence of such treatment in the confirmation of charges decision, the charges could not be re-characterized.<sup>207</sup>

The Appeals Chamber's decision marks yet another disappointment to victims who had hoped these additional crimes would have been accepted in order to provide a more accurate representation of the harm suffered as well as a greater scope for trial participation and possible reparations. Instead the Appeal Chamber's reasoning reaffirms the Prosecutor's power in shaping the scope of proceedings in line with a retributivist approach. Although there was much commentary that at such a late stage this would have been a step too far, echoed by the OTP that such a decision would have required "the parties to investigate, prepare and address incidents and events that were not pleaded."<sup>208</sup> This decision continues to raise the importance of a thorough investigation to ensure evidence of all crimes committed is documented. However, the narrowing of victim participation at the investigation stage appears to have restricted that possibility as well.

### 3.7.2 Bemba: *The Practice of Cumulative Charging*

The second illustration of how victim involvement has exerted further pressure towards a full characterization of the facts arose during the *Bemba* confirmation of charges hearing. It was here that Pre-Trial Chamber II considered the practice of

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<sup>206</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court', Appeals Chamber, ICC-01/04-01/06-2205, 8 December 2009, paras. 88-97.

<sup>207</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Legal Representatives' Joint Submissions concerning the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, Trial Chamber I, ICC-01/04-01/06-2223, 8 January 2010.

<sup>208</sup> Prosecution's Application for Leave to Appeal of 12 August 2009, *supra* note 204, para. 25.

cumulative charging for the first time.<sup>209</sup> The *Bemba* case had undergone numerous delays and postponements; however, this additional time had provided a greater opportunity for victims to provide representations to the OTP and make applications for participation. This significant victim involvement in the *Bemba* case impacted upon the Prosecution, who for the first time took an active focus on sexual violence crimes. It also supports the view made by several commentators that the OTP's approach to victim participation at the Court has evolved over time from one of hostility to support.<sup>210</sup>

The OTP brought a variety of charges based on evidence of Mr. Bemba's role in organizing numerous rapes committed against civilians in the CAR. While Pre-Trial Chamber II found substantial grounds to believe these acts took place, it declined to confirm certain of the charges brought. Pre-Trial Chamber II subsumed the charge of torture as a crime against humanity into the charge of rape as a crime against humanity. It also subsumed outrages upon personal dignity as a war crime into rape as a war crime. These decisions have the effect of removing certain aspects of the crimes as experienced by victims.

The *ad hoc* tribunals had allowed for the cumulative charging of rape and torture once each crime had materially distinct elements, holding that cumulative charging "serves to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct."<sup>211</sup> The War Crimes Research Office (WCRO) in its

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<sup>209</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, ICC-01/05-01/08-424, 15 June 2009 [hereinafter Pre-Trial Chamber II *Bemba* Decision of 15 June 2009].

<sup>210</sup> Pena, M. (2010). Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead, *ILSA Journal of International and Comparative Law*, 16(2), 497-516, pp. 509-10; McGonigle, *supra* note 24.

<sup>211</sup> *Prosecutor v. Mladen Naletilic, a.k.a. "Tuta" and Vinko Martinovic, a.k.a. "Stela"*, Appeals Chamber, IT-98-34-A, 3 May 2006, para. 568 [citing *Kunarac*].

recent paper on cumulative charging noted that “[w]hile the Chamber acknowledged that cumulative charging is practiced by both national courts and international tribunals, it determined that such an approach is unwarranted at the ICC because, in its opinion, in this context it is for the Chamber to determine the most appropriate legal characterization of facts presented by the Prosecutor.”<sup>212</sup> The WCRO reasoned this appeared in contrast to earlier decisions that had promoted the Prosecutor’s role in determining the scope of prosecution and that it likely failed to fully consider the impact on victims.<sup>213</sup>

Pre-Trial Chamber II held that the main elements of torture as a crime against humanity was “severe pain and suffering and control of the perpetrator over the person” and these elements were “also the inherent special material elements of the acts of rape.”<sup>214</sup> As rape as a crime against humanity contained the additional element of penetration, it was the most appropriate charge and therefore the crime against humanity of torture was subsumed into it. A similar approach was adopted wherein the war crime of outrages upon personal dignity was subsumed into the war crime of rape.<sup>215</sup> The Chamber justified this approach because “as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges.”<sup>216</sup> Supporters of a retributivist approach argued that “[t]he Chamber’s restrictive approach to cumulative charging is to be welcomed” as the

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<sup>212</sup> War Crimes Research Office (May 2010). *The Practice of Cumulative Charging at the International Criminal Court*, ICC Legal Analysis and Education Project, p. 3.

<sup>213</sup> *Ibid.*

<sup>214</sup> Pre-Trial Chamber II *Bemba* Decision of 15 June 2009, *supra* note 208, para 312.

<sup>215</sup> *Ibid.*, para. 310.

<sup>216</sup> *Ibid.*, para. 202.

practice that developed at the *ad hoc* tribunals “blows up the prosecution case unnecessarily and creates a difficult situation for the defence.”<sup>217</sup>

While this approach is in line with a retributivist stance, it fails to consider the impact of recognizing the distinct aspects of the differing crimes as experienced by victims. In an interview with Maitre Marie-Edith Douzima, one of the Victims’ Legal Representatives in the *Bemba* case, she stressed that “[i]ndeed, recognition of torture as part of the suffering endured by the rape victims is important to them as most of these rapes were carried out collectively and in public, under threat of arms...Manner in which these collective rapes were carried out comprises an element of torture as well as additional harm intended by the perpetrator.”<sup>218</sup> Therefore, while the Appeals Chamber may argue “as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach” this approach appears to minimize the different aspects of the harm as experienced by the victims in this case.

### **3.8 EMERGING TRENDS IN VICTIM PARTICIPATION ASSESSED RELATIONALLY**

This chapter sought to assess some of the emerging trends related to victim participation within the ICC. It provided evidence that while many of the initial decisions of the lower Chambers appear to have adopted a broad interpretation of the statutory provisions these have later been scaled back by the Appeals Chamber, as it has attempted to streamline victim involvement in light of the ever increasing number of victim participants.

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<sup>217</sup> Ambos, K. (2009). Critical Issues in the Bemba Confirmation Decision, *Leiden Journal of International Law*, 22(4), 715–726, p. 724.

<sup>218</sup> Goetz, M., (2010). Interview with Maitre Marie-Edith Douzima, Lawyer and Victims’ Representative in the Bemba in ACCESS: Victims’ Rights before the International Criminal Court, Victims’ Rights Working Group Bulletin, Issue 17, Winter 2010, p. 3, available at <http://www.vrwg.org/ACCESS/ENG17.pdf>.

The definition of victim within the Rome Statute saw an expansion over that of the *ad hoc* tribunals' definition; however, the Appeals Chamber clarified the definition can include indirect victims as long as the harm is suffered personally. The first major trend, and subsequent reversal, was found in the Court's approach to participation at the investigation phase. Later judgments have continued to reinforce the principle that if victims are to ensure their full right to participation and possible reparations, their active involvement is required from the beginning. This is necessary to guarantee that a more complete truth is discovered and documented with respect to all crimes committed. Originally, Pre-Trial Chamber I had begun to develop a 'procedural status' for victims that granted them a general right to participation in this phase. The Chamber's reasoning, in line with a restorative approach, suggested that victims have a crucial role to play in clarifying the facts and discovering the truth.

While this had begun in early 2006 it was not until the close of 2008 that the Appeals Chamber finally had the opportunity to rule on this trend and ordered a complete reversal. The Chamber held that Article 68(3) only allows for victim participation during judicial proceedings, to which the investigation phase was not included. This has substantially reduced the involvement of victims in this increasingly important phase in order to meet a retributivist approach that favours prosecutorial control during the investigation phase in order that charges that are provable are chosen, thereby supporting the efficacy of the system. This later decision also had the impact of removing the rights that had previously been granted to numerous victims and risked secondary victimization in the process.

The Appeals Chamber noted there was ample scope in the statutory provisions to allow for full involvement during the investigation phase. This reversal of a general right led to an increased emphasis on the other statutory victim participation provisions. The progressive decision by Pre-Trial Chamber II, in the *Kenya Situation*, to order consultations with victims in advance of the Prosecutor's request for the authorization of an investigation into the post-election violence provided one such example. This active engagement with the broader victim community by the Pre-Trial Chamber II went against the OTP's originally more cautious approach. This highlighted that there can be tensions even between the two rights provided to victims. It also illustrates that there remains room for engagement by victims at the earliest phases, but as the report concluded, often victims' knowledge of their rights within the Rome Statute system remain limited and therefore adequate and active outreach is crucial.

The second major area that underwent consideration was the pre-trial and trial phases of the victim participation regime. Examples were provided to illustrate that while victim participation has sought to add a new element to the international criminal trial process, such participation remains limited to the degree possible within a retributivist framework. The Appeals Chamber in *Lubanga* reversed Trial Chamber I's broad two part criteria for the type of crime a victim may have suffered in order to gain trial participation rights. The Appeals Chamber instead adopted a linkage requirement, such that the harm suffered must be related to the confirmed charge. This is pragmatically understandable as the scope of participation otherwise could have become quite broad, and even with its adoption participation numbers continue to increase; however, it reflects the basic reality that a retributive based court system will never be able to meet



the needs of all victims. Instead, what the decision does do is once again risk that individuals who gained participant status at the pre-trial stage may lose such status if the crime to which they are linked is not confirmed. This may result in further victimization, as individuals feel that the harm they have suffered is no longer recognized.

A brief consideration of the most visible aspect of the victim participation regime, the opportunity for Legal Representatives to provide opening and closing statements and for individual victims to voice their views and concerns in court, was provided. While the few who have been granted this opportunity have expressed appreciation at the opportunity to tell their stories and shed further light on the cultural realities of the situation,<sup>219</sup> this too will only ever be possible for a few. The Court, in both the *Lubanga* and *Katanga and Ngudjlo* trials, highlighted concerns over potentially unlimited involvement, and emphasized that the rights of the accused and efficiency will determine numbers admitted, ensuring only a token space will be granted.

The opportunity to challenge and lead evidence is a further modality of participation that has been approved by all Chambers of the Court. However, in each decision there have been strong dissents by leading judges to the effect that such rights should be limited to the parties in order to preserve the strictly adversarial nature of the trial process. While the Court approved the possibility, they continued to stress that the right remains primarily that of the parties. Victims must always submit a prior application, which requires approval of the relevant Chamber, ensuring that a streamlined approach is adopted.

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<sup>219</sup> ICC Turning the Lens 30 May 2010, *supra* note 155, p. 3.

The final aspect of victim participation considered during the trial phase was the growing emphasis on common legal representation. Even though the drafters anticipated the need for legal representation, as numbers have grown, the focus on common legal representation for larger victims groups has become the norm. However, within such a process the restorative aim of a contextual approach that views all individuals as active participants is negated. A uniform approach that ensures efficiency is favoured over a more individualized process that sees the promotion of relationships of equality instead of reliance solely on legal expertise.

The third and final major area of consideration with respect to the right to participation was one that appears to contrast with the overall trend towards streamlining. It assessed the increase pressure victims, and their legal representatives, are placing on the OTP and the relevant Chambers to ensure that characterization of the underlying facts is reflective of the full scope of harm suffered by victims. The first attempt involved the *Lubanga* trial where victims were successful in requesting that the charges be recharacterized to include crimes committed during an international armed conflict. However, the second attempt at recharacterization came several months into the trial and proved unsuccessful. Despite significant witness testimony to support charges of sexual slavery and inhuman treatment, the Appeals Chamber held that Regulation 55(2) only allows for recharacterization if evidence to support the charges was presented at the confirmation of charges hearing and in the *Lubanga* case it had not. This marked another disappointment to victims who had sought a more reflective charge, which would have increased the scope for trial participation and possible reparations. The final example dealt with the Court's first consideration of cumulative charging in the *Bemba* trial. It

was here that Pre-Trial Chamber II departed from previous international criminal jurisprudence in its decisions to subsume certain charges into other broader charges. The full scope of the harm experienced was no longer represented. This was a further disappointment to many victims who felt that charging rape as a crime against humanity and torture as a crime against humanity separately was more reflective of the additional harm experienced by the public nature of many of the rapes committed.

This chapter has therefore shown that the emerging trend with respect to the right to participation appears to be a reversal of the broader initial decisions by the lower Chambers, which were more in line with a restorative approach, in order that the efficacy and efficiency required of a retributivist framework is maintained. This included the reversal of general right of participation during the investigation phase, the addition of a linkage requirement in the pre-trial and trial phases, and an increased emphasis on common legal representation for larger groups of victims. In contrast, there was one area where the ability to streamline victim participation appears to have been less successful. It is here that victims' pressure for more reflective classification of the harms suffered, both through the characterization of charges and the practice of cumulative charging, has seen the Court address the competing purposes of justice. The right to participation, while increasingly uniform and streamlined, also provides an example of how victims' pressure for a more reflective characterization of the harm suffered has seen a slight expansion from a purely retributivist focus.

## CHAPTER 4

### The Challenges of a Paramount Right to Protection

The second statutory right accorded to victims to be considered is the right to protection as enshrined in Articles 68(1), (2), and (5), of the Rome Statute. These provisions arose out of the greater emphasis placed on ensuring adequate protective measures for both victims and witnesses within the international criminal justice process. In recognition that victim and witness participation is critical to ensuring the necessary evidential support for trials, the retributivist approach has had to adopt protective measures in order to guarantee their continued involvement. However, these lessons were often hard learned and the ICC has marked a significant step forward in the realm of protective measures for vulnerable groups.<sup>220</sup> The use of protective measures meets the relational goal of ensuring “ that each party has their rights to dignity, equal concern and respect satisfied.”<sup>221</sup> However, the use of protective measures has buttressed up against the need to ensure the rights of the accused and a fair trial are not breached, particularly the principle of public hearings and the right to know one’s accuser.

This chapter first provides a review of the negotiations surrounding the relevant provisions related to the right to protection, including a brief survey of the different approaches to anonymity measures. It will then consider the *Lubanga* trial where the Court has faced numerous challenges pertaining to disclosure requirements and the use of protective and anonymity measures. These issues have resulted in two stay of proceedings and repeated abuse of process allegations against the Prosecutor. The

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<sup>220</sup> de Brouwer, *supra* note 33, pp. 183-209.

<sup>221</sup> Llewellyn (2011), *supra* note 76, p. 6.

Prosecutor has continually sought to minimize disclosure in order to protect the identities of victims, witnesses and intermediaries out of security concerns for those persons. The Defence, on the other hand, has repeatedly countered that fuller disclosure is necessary to properly assess credibility concerns. The trial is in the process of closing submissions by parties and participants and therefore provides the best illustration of the emerging challenges in meeting the restorative aim of ensuring adequate protection within a retributivist notion of a fair trial. The trial will also be used to illustrate the increased focus on special measures for vulnerable groups such as children and victims of sexual violence.

Finally, the *Kenya Situation* and the upcoming confirmation of charges hearings in *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (Ruto, Kosgey, and Sang)* and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Muthaura, Kenyatta, and Ali)* cases will illustrate the challenges the Court faces in meeting the goals of the right to participation and protection simultaneously. In particular, Pre-Trial Chamber II's eventual decision not to proceed with *in situ* hearings will provide an example of where there can be tensions even within each theoretical approach to justice as the restorative goal of expanding the justice process may conflict with the requirement for adequate security for this broader pool of participants.

It will be noted throughout this chapter that, with respect to the right to protection, the ICC has learned from previous failures at the *ad hoc* tribunals and has consistently attempted to meet the highest international human rights standards in this area. In contrast to the right to participation, it will be argued that as the Court has sought more

proactively to meet the restorative aim of a thorough protection regime, this has repeatedly resulted in confrontations with the retributivist need for a fair and public trial in which the defence can fully examine the witnesses presented against the accused.

#### **4.1 ACKNOWLEDGING PROTECTION AS THE COMPLEMENT TO PARTICIPATION**

The increased recognition of the right to protection is also found in the growth of alternative justice mechanisms that sought to reposition victims as active participants, while acknowledging that this must be done in a manner that would minimize any potential for additional harm to victims. Three reasons are often cited in support of the need for protective and special measures for victims and witnesses: (i) minimization of serious risks to their security, (ii) avoid serious incursions of their privacy and dignity, and (iii) reduce the trauma associated with participation or testimony, the roots of which can be found in Article 6(d) of the 1985 Basic Principles.<sup>222</sup> Brady highlights that the different delegations involved in the drafting of the protection regime realized a much more practical reason for ensuring adequate protective measures in line with retributivist thought, protection as a tool to guarantee participation.<sup>223</sup> This additional reason is particularly salient in the international criminal law context, where documentary evidence of the crimes can often be limited, and therefore trials are unlikely to proceed absent the participation of victims and witnesses.<sup>224</sup> It is the guarantee of adequate protective and security measures, which proves critical in ensuring continued victim and witness support throughout the trial process.

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<sup>222</sup> 1985 Victims Declaration, *supra* note 50, Article 6(d).

<sup>223</sup> Brady, *supra* note 65, p.434-435.

<sup>224</sup> *Ibid.*

The right to protection, while less often referred to strictly as ‘a right’ as compared to the right to participation, remains a statutory right that ought to be conceived of as the partner to participation. Trial Chamber I affirmed the position that “protective measures are not favours but are instead the rights of victims, enshrined in Article 68(1) of the Statute. The participation of victims and their protection are included in the same statutory provision, namely Article 68 in its paragraphs 1 and 3, and to a real extent they complement each other.”<sup>225</sup> It is the pairing of these two rights that supports an argument that in order for effective participation, proper protection must first be proffered. Trial Chamber I accepted the victims’ submission that “protective and special measures...are often the legal means by which the Court can secure the participation of victims in the proceedings, because they are a necessary step in order to safeguard their safety, physical and psychological well-being, dignity and private life in accordance with Art. 68(1).”<sup>226</sup> Article 68(1) also provides that the Court shall pay particular attention to crimes which “involve sexual or gender violence or violence against children”<sup>227</sup> in line with the restorative aim of adopting a contextual approach that is fluid enough to provide for the needs of specific individuals.

Brady, in her detailed analysis of the negotiation of Rules 87 and 88 of the RPE that support the right to protection, describes the development of “two rules with two different purposes.”<sup>228</sup> Rule 87 pertains to protective measures which can be ordered to prevent the release of the identity or location of a victim or witness from the public or media and

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<sup>225</sup> Trial Chamber I *Lubanga* Decision of 18 January 2008, *supra* note 29, para. 129

<sup>226</sup> Trial Chamber I *Lubanga* Decision of 18 January 2008, *supra* note 29, para. 128.

<sup>227</sup> *Ibid.*

<sup>228</sup> Brady, *supra* note 65, p. 438-440.

includes a non-exhaustive list of possible measures.<sup>229</sup> On the other hand, Rule 88 describes special measures that may be used to facilitate the testimony of certain vulnerable victims and witnesses, such as traumatized persons, children, victims of sexual violence and the elderly.<sup>230</sup> Gioia Greco, in her overview of victims' rights at the ICC, notes that the entire court process "can make an already traumatic experience even more upsetting and stressful" and therefore special measures may be ordered, in consultation with the Victims and Witness Unit (VWU), to minimize risks of possible secondary victimization.<sup>231</sup> The VWU with its statutory mandate to provide protection, support and other appropriate assistance to victims and witnesses who appear before the Court marks another targeted attempt at improved protection for those involved in Court activities.<sup>232</sup>

The protection regime, like the right to participation, remains balanced against the retributivist emphasis on the necessity of a fair and public trial. When considering the scope of possible protective measures, there was much discussion amongst the delegations surrounding the principle of "open justice" and reference was made to Article 64(7) that requires the trial be held in public, with the exception of Article 68 measures.<sup>233</sup> While the retributivist notions of fairness and integrity of the trial require that witnesses provide evidence in "a full, accurate, and impartial manner" this must remain balanced against the need to ensure the adequate protection of such victims and witnesses.<sup>234</sup> Carla Ferstman, in her study of the victim's role at the ICC, notes that it is not that the process becomes completely victim focused, but rather "that an equitable

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<sup>229</sup> ICC Rules of Procedure and Evidence, *supra* note 100, Rule 87.

<sup>230</sup> *Ibid.*, Rule 88.

<sup>231</sup> Greco, G. (2007). Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis, *International Criminal Law Review* 7 (2/3) 531–547, pp. 545-6.

<sup>232</sup> Rome Statute, *supra* note 1, Article 43 (6).

<sup>233</sup> Brady, *supra* note 65, p. 440.

<sup>234</sup> *Ibid.*, p. 456.



justice requires that they are heard in dignity.”<sup>235</sup> Therefore, the challenge of meeting the restorative goal of improved protection within a retributivist framework, centered on public hearings, was central in the drafters’ minds.

#### **4.2 ANONYMITY: THE MOST CONTROVERSIAL PROTECTIVE MEASURE**

The area that has proven to be the most challenging in the Court’s first cases has centered on the proper role to be played by anonymous victims and witnesses. This dilemma also proved to be one of the most intense areas of debate during the drafting of the rules. Those delegations opposed to the possibility argued, “it is fundamental that an accused knows his accusers.”<sup>236</sup> In opposition were those who felt the Court should retain discretion in light of the types of cases it was likely to face, arguing the potential effects to the accused could be mitigated through other safeguards.<sup>237</sup> There was even debate amongst the acceptability of such a provision between the different NGOs present.<sup>238</sup> In the end the debate was never settled and neither rule makes specific reference to anonymous witnesses; those against argued the rules suggest anonymity is only permissible prior to the commencement of trial<sup>239</sup> and those who supported the possibility relied on the fact there was no specific rule prohibiting such use. The latter argument would quickly gain favour during the Court’s first trial.

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<sup>235</sup> Ferstman, C. (2005). The Role of the Victims at the International Criminal Court: Key Prospects, in E. Vetere and D. Pedro (eds.), *Victims of crime and abuse of power: Festschrift in Honour of Irene Melup*. United Nations: Vienna, Austria, p. 156.

<sup>236</sup> Brady, *supra* note 65, p. 451.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*, p. 452.

<sup>239</sup> Article 68(5) reads as follows, “Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted *prior to the commencement of the trial*, withhold such evidence or information and instead submit a summary thereof.” Emphasis added.

This debate mirrored the controversy that had surrounded anonymity at both the *ad hoc* tribunals and in the international human rights jurisprudence. The *Tadic* decision at the ICTY marked the first, and only, time anonymous witness testimony was accepted. However, credibility concerns developed over one of the witnesses who provided testimony and the practice was abandoned in later cases.<sup>240</sup> In contrast, the ECtHR has held that anonymous witness testimony is permissible as long as the conviction is not based either solely or to a decisive extent on anonymous statements.<sup>241</sup>

### **4.3 A FOCUS ON THOSE MOST VULNERABLE: SEEKING RELATIONAL EQUALITY**

The ICC marks a specific development towards adequate protection for sexual and gender based violence. The *ad hoc* tribunals approach in this area gradually improved over time, but was scarred by some poor initial treatment towards victims, particularly survivors of rape and sexual violence. De Brouwer notes that one of the significant developments of the ICC relates to the special evidentiary rules that were incorporated to better meet the needs of victims of sexual violence.<sup>242</sup> These include rules such that victim testimony does not need to be corroborated, consent has been removed as an element of the crime, and evidence of other sexual conduct may not be admitted.<sup>243</sup> She argues that these rules are a significant improvement over numerous national jurisdictions and that through the process of implementing legislation this may see advancement more broadly in this regard.<sup>244</sup>

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<sup>240</sup> de Brouwer and Groenhuijsen, *supra* note 103, p. 179.

<sup>241</sup> *Case of Doorson v. the Netherlands*, European Court of Human Rights, Judgment (Merits), 20 February 1996, 20524/97, para. 76.

<sup>242</sup> de Brouwer, *supra* note 33, p. 191.

<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid.*, p. 192.

The Court has repeatedly stressed how critical these protective measures are to ensuring the security of victims and witnesses. After a private session was accidentally broadcast to the full courtroom, Judge Fulford stated “[i]f any of their identities were to become known, the whole purpose of the protection which has been afforded to the witnesses would be undermined, and they, together with their families would be at risk for an indefinite period of time.”<sup>245</sup> This is an illustration of the Court’s attempt to improve from the mistakes of the previous tribunals. Two witnesses who testified in the *Akayesu* and the *Ruzindana* cases from the ICTR were killed when their names were leaked, and it is in order not to repeat these failures that the Court is diligently implementing its protection regime.<sup>246</sup>

The challenges the negotiators faced in attempting to define the limits of a proper protection regime are illustrative of the hurdles faced in attempting to reconcile these competing aims. The ICC in its attempt to meet these goals has repeatedly faced challenges in maintaining protection while respecting the right of a fair and public trial. Just as the debate over anonymity could not be reconciled during the drafting of the rules, so too has it proven to be a significant stumbling block to the Court’s retributive aim of seeing fair and public trials through to completion.

#### **4.4 PRE-TRIAL CHAMBERS’ ACCEPTANCE OF ANONYMOUS PARTICIPATION**

Similar to the right to participation, the use of protective and special measures first arose in the context of the investigation and pre-trial phases. It was held in both the *DRC Situation* and the *Lubanga* pre-trial phase that anonymous participation would be

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<sup>245</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-105-ENG, Transcript, 22 January 2009, Status Conference, page 53, lines 22-25.

<sup>246</sup> McLaughlin, C.T. (2007). Victim and Witness Measures of the International Criminal Court: A Comparative Analysis, *The Law and Practice of International Courts and Tribunals* 6 (1) 189–220, p. 199.

acceptable, but that such participation would come with a resultant restriction on victims' procedural rights. Trial Chamber I held that anonymous witnesses would only be able to access public documents and be present at public hearings.<sup>247</sup> The Chamber held that anonymity measures, granted from the start and continued up to and including the confirmation of charges hearing, were in light of the security situation in certain regions of the DRC "at present the only protective measures available and which might be implemented to duly protect them."<sup>248</sup>

The early phases of the *Katanga and Ngudjolo* case would also follow this approach, specifying that anonymous victims were not permitted to add any point of fact or evidence nor question witnesses through their legal representatives unless they were willing to identify themselves.<sup>249</sup> While this approach limited participation slightly, the differences between anonymous and non-anonymous victims remained minimal during these early phases. Moreover, these measures ensured their security was protected without substantially impacting on the rights of the accused to a fair trial. However, the most significant challenges were to come to the forefront with the broader use of anonymous victims and witnesses during the actual trial phase and related refusals of disclosure in order to protect the identities of victims, witnesses, and intermediaries.

#### **4.5 LUBANGA: THE CHALLENGES OF ANONYMOUS VICTIMS AND WITNESSES**

Trial Chamber I in *Lubanga* was then faced with the possibility of whether to allow the continued participation of anonymous victims during the trial phase, after victims had

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<sup>247</sup> *Prosecutor v. Lubanga*, Decision on the Arrangements for Participation of Victims a00001/06, a00002/06 and a00003/06 at the Confirmation Hearing, Trial Chamber I, ICC-01/04-01/06-462-tEN, 22 September 2006, para. 6.

<sup>248</sup> *Ibid.*

<sup>249</sup> Trial Chamber II *Katanga and Ngudjolo* Decision of 22 January 2010, *supra* note 29, paras. 92-93.

benefited from such protection up until that point. Both the Prosecution and Defence voiced strong opposition to the possibility. The Victims' Legal Representatives stressed that, like certain delegations had during the negotiations, nowhere in the statutory provisions was anonymity prohibited.<sup>250</sup> The Chamber rejected the submission that anonymous victims should never be permitted, although it recognized that "it is preferable that the identities of victims are disclosed in full to the parties, the Chamber is also conscious of the particularly vulnerable position of many of these victims, who live in an area of ongoing conflict where it is difficult to ensure their safety."<sup>251</sup>

The Chamber did stress that it would carefully consider the circumstances of such participation in order to "determine whether steps that fall short of revealing the victim's identity can sufficiently mitigate the prejudice."<sup>252</sup> The Chamber highlighted "extreme care must be exercised" when considering such anonymous victim participation. It stressed that "[w]hile the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial. The greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself."<sup>253</sup> Once again victims' rights remain permissible only to the extent there is no infringement on the rights of the accused. It should be noted that the

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<sup>250</sup> Trial Chamber I *Lubanga* Decision of 18 January 2008, *supra* note 29, para. 36.

<sup>251</sup> *Ibid.*, para. 130.

<sup>252</sup> *Ibid.*, para. 131.

<sup>253</sup> *Ibid.*, para. 131.

Defence sought to appeal the issue of whether anonymous victims should be allowed to participate in the proceedings, however, leave to appeal this issue was denied.<sup>254</sup>

The Chamber also had to resolve the question of whether victims would lose such status if they were to also appear as witnesses in the proceedings. The Chamber held that “a general ban on their participation in the proceedings if they may be called as witnesses would be contrary to the aim and purpose of Article 68(3) and the Chamber’s obligation to establish the truth.”<sup>255</sup> Therefore, the Chamber confirmed that victims could hold a dual victim-witness status if they also appear as witnesses in proceedings, three such dual status participants were granted during the *Lubanga* trial. This decision, which laid out the framework for protective and special measures and the possible anonymous participation of victims, would not be implemented for a further year with the commencement of the *Lubanga* trial on January 26, 2009.

From the beginning of the first victim’s testimony, it quickly became apparent that the protective measures regime would be a work in progress as the Court was faced for the first time with putting these measures into practice. The first witness to testify was a former child soldier who soon after his testimony began, froze and recanted his previous statements. While certain special protective measures were in place, he was still in plain view of the accused and was read the rules on possible self-incrimination that all together proved to be highly traumatic.<sup>256</sup> After a day’s adjournment, the witness returned to complete his testimony with additional protective measures in place including limiting

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<sup>254</sup> *Prosecutor v Lubanga*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, Trial Chamber I, ICC-01/04-01/06-1191, 26 February 2008, paras. 35-37.

<sup>255</sup> Trial Chamber I *Lubanga* Decision of 18 January 2008, *supra* 29, para. 133.

<sup>256</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-110-Red-ENG CT WT (Oral Decision 21 January 2010), Transcript, 28 January 2009, ICC-01/04-01/06-T-111-ENG, Transcript, 29 January 2009.

the number of people in the courtroom, extending the curtain so the witness would not be able to see the accused, providing a screen to Mr. Lubanga so that he could see the witness, and guidance on the type of questioning.<sup>257</sup> Judge Fulford noted when considering these revised protection measures, “I think it needs to be remembered that particularly for those who are not used to court proceedings, coming into this room with the number of people who are present and the particular procedures that are used in order to receive the evidence of a witness can be extremely intimidating, and we’re going to need to look at this not only for this witness but in relation to other witnesses who may be similarly placed.”<sup>258</sup> It is therefore apparent that the Court has strongly emphasized the need for the proper implementation of protective and special measures, to ensure the right of protection of both victims and witnesses is preserved. In the end, Trial Chamber I granted anonymity privileges to 20 witnesses in the *Lubanga* trial.<sup>259</sup>

While implementing the protective and special measures regime brought with it practical problems surrounding its implementation in the early days, the greatest challenge would surround issues of disclosure and the use of anonymity measures. These issues would repeatedly plague the Court throughout the *Lubanga* trial, and it is argued that the root of these problems lies in the inherent conflict in attempting to meet the restorative aims of protection within a trial system focused on principles of a fair and public hearing.

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<sup>257</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-111-ENG, Transcript, 29 January 2009, page 2, lines 9-14.

<sup>258</sup> *Ibid.*

<sup>259</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-111-ENG, Transcript, 29 January 2009.

#### 4.5.1 A First Stay – The Question of Non-Disclosure Out of Security Concerns

This problem first became apparent when Trial Chamber I ordered a stay of proceedings on June 13, 2008 in light of the Prosecutor’s continued failure to disclose numerous documents and materials to the accused. These documents had been provided to the OTP under confidentiality agreements with several information providers, most prominently the UN.<sup>260</sup> This led to a lengthy legal debate over the interpretation of two competing legal provisions: Article 54(3) that allows the Prosecution to agree with a person or entity to the provision of documents provided they remain confidential, even to the Defence, and Article 67(2) that provides a strict obligation on the Prosecutor to disclose any exculpatory material to the Defence in order to guarantee a fair trial.<sup>261</sup> The Trial Chamber held that the Prosecution had used this possibility “routinely, in inappropriate circumstances, instead of resorting to it exceptionally” and failed to provide the documents despite repeated warnings and therefore issued a stay of proceedings, and subsequent release order which would be later overturned on appeal.<sup>262</sup>

The Prosecutor argued that the confidentiality of these materials was necessary to the security of the NGOs, intermediaries, and victims in the region. However, the Prosecutor was able to renegotiate with several of the information providers to allow for the release of some of the exculpatory documents. The Victims’ Legal Representatives had supported the Prosecution arguing that the “Defence’s right to obtain disclosure of any exculpatory evidence in the Prosecutor’s possession is not an absolute right, and may

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<sup>260</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Trial Chamber I, ICC-01/04-01/06-1401, 13 June 2008 [hereinafter Trial Chamber I *Lubanga* Decision of 13 June 2008].

<sup>261</sup> Rome Statute, *supra* note 1, Article 54(3) and 67(2).

<sup>262</sup> Trial Chamber I *Lubanga* Decisions of 13 June 2008, *supra* note 260.



conflict with other rights which must be protected, in particular, the rights of victims and witnesses as guaranteed by the Statute and other international human rights instruments.”

<sup>263</sup> The Victims’ Legal Representatives argued that the “Chamber’s position is too absolute” and that the “principle of fair trial does not exclude the possibility that protection of victims and witnesses may argue against the disclosure of some material, exculpatory though it may be, to the Defence.”<sup>264</sup>

This line of reasoning promoted by Victims’ Legal Representatives supported the Prosecution’s argument that protection of vulnerable victim and witness groups may force a reconsideration of the traditional notion of ‘fair trial’ requirements. The addition of victims, as independent participants in the retributivist trial system, has seen the blurring of these concepts as the Court attempts to address their “views and concerns” alongside the rights of the accused. Restorative justice practices, grounded in relational theory, developed a more flexible approach out of the recognition that universal notions of formal equality will not always be able to meet the individual concerns of those directly affected by harm.<sup>265</sup>

#### ***4.5.2 A Second Stay – The Need for Protection of Intermediaries***

The issue of proper disclosure and anonymous participation by victims and witnesses did not end with the first stay of proceedings; in fact, it would mark just the beginning of a long and complex challenge related to issues over the proper scope of protective measures within the Court. These are only canvassed here briefly in order to

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<sup>263</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Victims’ Observations on the Prosecutor’s Appeal of the Decision of 13 June 2008 Ordering a Stay of the Proceedings, Legal Representatives of Victims a/0001/06 to a/0003/06, Victims; Legal Representatives, ICC-01/04-01/06-1456-tENG, 20 August 2008, para. 3.

<sup>264</sup> *Ibid.*, para. 16.

<sup>265</sup> Howse, R. and J.J. Llewellyn, (1999b), *supra* note 79, p. 36.

highlight the main areas of debate and arguments raised by the relevant parties and participants. It is within the *Lubanga* trial that the challenges of ensuring adequate protection of victims, witnesses and intermediaries came up squarely against the Defence's need to be able to properly examine witnesses in a manner that would meet the strict procedural requirements of a retributivist trial.

Not only had anonymity been granted for certain victims and witnesses within the trial, additional intermediaries who had not been called to testify, were also originally protected. The Defence had presented several witnesses who contradicted the previous testimony of certain Prosecution witnesses and had suggested they had lied under the coaching of certain intermediaries.<sup>266</sup> In response, Trial Chamber I ordered two intermediaries to testify and the disclosure of the identity of a third, Intermediary 143.<sup>267</sup> The Prosecutor refused to do this requesting further time to ensure adequate protective measures were in place. The OTP argued that in order to conduct investigations in areas of ongoing conflict they often had to rely on intermediaries to liaise with victims and witnesses. However, Trial Chamber I held this additional delay was unnecessary as the disclosure would be strictly limited to the Defence.<sup>268</sup> The OTP argued that while it was aware of its obligation to follow the Chamber's decision, "it also has an independent statutory obligation to protect persons put at risk on account of the Prosecution's actions... The Prosecutor accordingly has made a determination that the Prosecution would rather face adverse consequences in its litigation than expose a person to risk on

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<sup>266</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, Trial Chamber I, ICC-01/04-01/06-2434-Red2, 31 May 2010.

<sup>267</sup> *Ibid.*

<sup>268</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, Trial Chamber I, ICC-01/04-01/06-2517-Red, 8 July 2010.

account of prior interaction with this Office.”<sup>269</sup> The Prosecutor stressed its independent duty of protection for all individuals that are put at risk due to involvement with the OTP.

The Appeals Chamber in its October 8, 2010 judgment reversed the stay of proceedings while holding that “[o]rders of the Chambers are binding and should be treated as such by all parties and participants” a stay of proceedings was matter of last resort.<sup>270</sup> By this point the Prosecutor had disclosed Intermediary 143’s identity with the necessary protective measures in place so the trial was able to recommence. However, this situation illustrates the competing approaches to protection between the different organs of the Court.

#### *4.5.3 Accusations of Abuse of Process – One Final Challenge*

However, this too did not mark the end of challenges raised, in light of the significant defence witness testimony challenging the credibility of Prosecution witnesses and concerns over proper disclosure, the Defence filed a final application for a permanent stay of proceedings.<sup>271</sup> The Defence argued that the Prosecution’s behaviour had rendered a fair trial impossible relying on five central elements: (i) the role of intermediaries, (ii) the Prosecution’s failure to properly investigate his own evidence, (iii) Prosecutor’s failure to properly discharge his disclosure obligations, (iv) the part played by certain participating victims, and (v) failure of the Prosecutor to act fairly and

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<sup>269</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Urgent Provision of Further Information Following Consultation with the VWU, to Supplement the Request for Variation of the Time-Limit or Stay, OTP, ICC-01/04-01/06-2516, 7 July 2010, para. 6.

<sup>270</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, Appeals Chamber, ICC-01/04-01/06-2582, 8 October 2010, para. 1.

<sup>271</sup> The abuse of process allegations marked the first limb of a two pronged defence strategy. The second limb, which was argued after Trial Chamber I’s oral reasons of refusal on the abuse of process allegation, relates to a substantive defence that Mr. Lubanga was not personally involved in the enlistment and conscription child soldier. The Defence did not argue that child soldiers had been used during the conflict.

impartially.<sup>272</sup> While the scope of these arguments goes beyond solely the use of protective measures, it is argued that the uncertainty of the proper scope of these provisions underlies most of the charges. The Prosecutor has continually stressed the need for thorough protective measures for victims, witnesses, and most recently, intermediaries in order to best guarantee their safety. Trial Chamber I provided its written decisions rejecting the Defence's claim arguing that "[n]ot every example of suggested prosecutorial misconduct will lead to a permanent stay of proceedings" and that in light of the seriousness of the crime the high threshold required for a stay had not been met.<sup>273</sup> The Chamber held that it would be able "to reach final conclusions on the alleged impact of the involvement of the intermediaries on the evidence in this case, as well as on the wider alleged prosecutorial misconduct or negligence" and therefore the trial was able to continue with closing submissions expected to be complete by the end of this month.<sup>274</sup>

The above provides a brief overview of the troubled history of the *Lubanga* trial, which provided the Court with the first opportunity to determine the proper scope of the expanded ICC protection regime. Throughout the *Lubanga* trial all levels of the Court confirmed that there was, in fact, a need for anonymous participation by victims, witnesses, and intermediaries due to the security concerns of the DRC. However, it was the Prosecutor who proactively argued that Rome Statute provided a duty of protection for individuals who were put at risk on account of interaction with his office. It is argued that the continued debates over disclosure and guarantees of anonymity stem from the inherent conflict presented by adopting a thorough protection regime within a retributivist

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<sup>272</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings", Trial Chamber I, ICC-01/04-01/06-2690-Red2, 7 March 2011, para. 23.

<sup>273</sup> *Ibid.*, para. 195.

<sup>274</sup> *Ibid.*, para. 198.

framework. Restorative practices emphasize the need not to cause further indignity to individuals on account of their involvement in a justice process, while the retributivist system requires the defence to fully know the evidence presented against the accused even if this may place certain witnesses at heightened risk. These are the competing tensions that plagued the Court during its first trial.

In comparison, the Court's second trial, *Katanga and Ngudjolo*, saw a stepping back from this approach that has arguably allowed for a smoother progression as less challenges related to victim and witness credibility have arisen. While Trial Chamber II did not expressly rule out the possibility of anonymous victims participating in proceedings, it did emphasize that it would not authorize victims who wish to remain anonymous to the Defence to testify as witnesses.<sup>275</sup> This marks a significant shift in approach from that of Trial Chamber I in *Lubanga* and once again supports a retributivist approach in areas of conflict. The challenge of balancing these competing interests remains an ongoing area of debate and discussion within the Court.

#### 4.5.4 *Anonymity Gone Too Far: Victims' Applications*

It is arguable that the emphasis on protective measures, including anonymity, while necessary has on occasion been interpreted too strictly by the Court. There have been several instances where Victim's Legal Representatives have not been able to access their clients' redacted applications or confidential documents that relate to their specific cases. In one such example, the Victims' Legal Representatives had requested redacted versions of their clients' applications for participation together with other materials in the VPRS' possession that directly related to their clients' cases. In response to a position by the

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<sup>275</sup> Trial Chamber II *Katanga and Ngudjolo* Decision of 22 January 2010, *supra* note 166, paras. 92-93.

VPRS that there was no legal basis for such a request, the victims argued that this “is not only incorrect but also a legal absurdity since the documents relate to the interests of the victims the Legal Representatives represent” and eventually the materials were disclosed.<sup>276</sup>

While it is inevitable that there will be challenges in the implementation of such measures, this example is provided to illustrate the seriousness with which all organs of the Court appear to be taking in the adoption of the protection regime. This is particularly important in light of the significant security concerns that remain in most areas under investigation by the Court. One area that received heightened attention in the Rome Statute, and during the ICC’s first trials, has been the need for the implementation of special measures to address the unique needs of vulnerable groups, especially children and survivors of rape and sexual violence.

#### **4.6 PROTECTION AGAINST RE-TRAUMATIZATION**

While anonymity measures proved to be a significant challenge during the *Lubanga* trial, which from a retributivist perspective may have been improved with the *Katanga and Ngudjolo* approach, other protective and special measures adopted by the Court that seek to prevent re-traumatization of victims participating or giving testimony must continue to be supported. It is here that the Court has actively learned from the lessons of the *ad hoc* tribunals and is often described as a leader.<sup>277</sup>

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<sup>276</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Observations of the legal representatives of victims on the access to standard applications forms for victims’ participation and related documents, Victims’ Legal Representatives, ICC-01/04-01/06-1882, 18 May 2009, para. 13.

<sup>277</sup> Wemmers, *supra* note 33, pp. 211-212.

The Court provides for a variety of possible special measures in order to minimize the potential for secondary victimization of individuals who participate or testify at the Court. The Court's first two trials, *Lubanga* and *Katanga and Ngudjolo*, involved ex-child soldiers and *Bemba* has seen significant involvement by survivors of rape and sexual violence. The Court, as has been described, allows for the avoidance of direct confrontation with the accused in Court through the use of closed circuit television, screens and/or the removal of the accused. It has also provided for the use of psychologists and/or counselors. In particular, in *Lubanga* a child psychologist was present during the testimony of an ex-child soldier who broke down several times while giving his testimony. The Rome Statute provides that ICC judges and staff are to include individuals with expertise on both gender violence and violence against children as well as that the VWU is to include staff with expertise in trauma.<sup>278</sup> It was felt that only by ensuring staff and judges with knowledge and expertise in these areas could victim and witness protection be properly guaranteed.

However, there remains one area where both the OTP and Victims' Legal Representatives have argued that further developments could be made to ensure the dignity and respect of such persons is maintained and this is the Court's policy on victim familiarization.<sup>279</sup> Pre-Trial Chamber I adopted a strict policy whereby only VWU officials are able to speak with witnesses prior to their giving of a testimony, in an attempt to ensure there is no possibility of coaching by either side in advance of

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<sup>278</sup> Rome Statute, *supra* note 1, Articles 42, 43(6), and 36(8).

<sup>279</sup> ICC-OTP, *Policy Paper on Victims' Participation*, April 2010, available at <http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/281751/PolicyPaperonVictimsParticipationApril2010.pdf>

testifying.<sup>280</sup> While the ICC marks a significant step forward from its predecessors, this example illustrates that there continues to be space for further improvement in ensuring that victim and witness participation does not result in re-traumatization.

#### **4.7 KENYA SITUATION: CONSIDERING *IN SITU* HEARINGS**

As has been illustrated throughout this thesis, the Court has faced innumerable challenges in balancing competing aims in its attempted incorporation of a greater space for victims, particularly in its attempt to meet victims' right to both participation and protection. One final manner by which meeting the restorative goal of ensuring the broad participation of all parties is through the possibility of *in situ* hearings. The recent Kenyan example will be provided to illustrate how not only retributivist and restorative aims can be in competition, but so too can the right to participation and protection.

The Court has traditionally held its hearings off site, thousands of kilometers away from where the crimes actually took place, in The Hague. This has met the retributivist goal of an impartial and procedurally fair setting for the trials to be held, one that is much less prone to local political manipulation. However, it has led certain commentators and NGOs to argue that the Court should, whenever possible, attempt to hold *in situ* hearings in order to bring the Court's activities closer to the affected communities. This recognition that any harm, but particularly harms related to international crimes, has a much broader effect than just the offender and victim is concordant with a restorative emphasis on incorporating all parties. Moreover, within each theoretical conception of

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<sup>280</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Practices of Witness Familiarisation and Witness Proofing, Pre-Trial Chamber I, ICC-01/04-01/06-679, 8 November 2006.



justice there is the possibility for areas of internal tension, and the possible use of *in situ* hearings provides such an example.

As has been presented throughout this chapter, a relational theory of restorative justice seeks the restoration of relationships of equality and this is violated if victims are placed in areas of potential further harm. Therefore, proper protective measures are central to restorative justice practices and if *in situ* hearings promote greater insecurity for victims and witnesses, the benefit to greater participation is outweighed. It is here that Pre-Trial Chamber II's June 3, 2011 request for observations from the prosecution, the defence, and the victims on holding *in situ* confirmation of charges hearings in the two Kenyan cases, *Ruto, Kosgey, and Sang* and *Muthaura, Kenyatta, and Ali*, is illustrative.<sup>281</sup>

As discussed in Chapter 4, Pre-Trial Chamber II had ordered the Registry to produce an innovative report for the Court related to the victims' knowledge of and possible representations pursuant to the Prosecutor's request for an authorization of an investigation. This went against the Prosecutor's original suggestion that such direct contact was potentially too dangerous in light of ongoing security concerns. The report did confirm that there remained valid security concerns for victims who were perceived to have been in contact with ICC officials.<sup>282</sup> Despite this finding and not at the request of the Prosecution, Pre-Trial Chamber II issued a decision requesting observations from

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<sup>281</sup> *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, Pre-Trial Chamber II, ICC-01/09-01/11-106, 3 June 2011 [hereinafter Pre-Trial Chamber II *Ruto, Kosgey and Sang* Decision of 3 June 2011]; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, Pre-Trial Chamber II, ICC-01/09-02/11-102, 3 June 2011.

<sup>282</sup> *Situation in the Republic of Kenya* Registrar's Report of 29 March 2010, *supra* note 153.

the parties and participants on the desirability of holding the upcoming confirmation of charges hearings in Kenya. The Chamber confirmed that Rule 100(1) allows for the Court to sit elsewhere if it “considers that it would be in the interests of justice” to do so and therefore sought observations from all those involved.<sup>283</sup>

In *Ruto, Kosgey, and Sang* all the parties, with the exception of Counsel for Kosgey, including the OPCV raised concerns with respect to holding the confirmation of charges in hearing in Kenya, and the Chamber confirmed it would no longer consider such a possibility.<sup>284</sup> Similarly, in *Mutharua, Kenyatta, and Ali* the Chamber confirmed that as all the parties, including the OPCV, had also raised concerns with respect to the security situation in Kenya and the confirmation of charges in this case would also take place in The Hague.<sup>285</sup> It is interesting to note that while both the OPCV and the Victims’ Legal Representatives did not support the prospect of *in situ* hearings, not all victims groups were of the same view. Both Human Rights Watch and Amnesty International had argued in favour of hosting the hearing in the territorial state in an attempt to bring justice home.<sup>286</sup>

However, it appears that Pre-Trial Chamber II may have made the cautiously correct decision when it decided to continue the proceedings in The Hague. The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project’s June 2011 Review

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<sup>283</sup> Pre-Trial Chamber II *Ruto, Kosgey and Sang* Decision of 3 June 2011, *supra* note 281, paras. 6-7.

<sup>284</sup> *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing, Pre-Trial Chamber II, ICC-01/09-01/11-153, 29 June 2011, para. 14.

<sup>285</sup> *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing, Pre-Trial Chamber II, ICC-01/09-02/11-181, 20 July 2011, para. 14.

<sup>286</sup> Mutua, M. (25 June 2011). No, Ekaterina, Don’t Try the Ocampo Six in Kenya, *The Nation*, available at <http://www.nation.co.ke/oped/Opinion/No++Ekaterina++don+t+try+the+Ocampo+Six+in+Kenya++/-/440808/1188928/-/13amkj8z/-/index.html>.

Report noted there appears to be increasing public anxiety in light of the upcoming 2012 election.<sup>287</sup> While 51% of respondents remain happy with the ICC pursuing the six suspects, there has been a jump in those that are not happy to 38% from 15% in December 2010.<sup>288</sup> The Review Report notes that “[n]ational political discourses linking succession politics to the ICC intervention in the Kenya situation have increased public anxiety around uncertainties regarding the ICC outcome and the 2012 General Election” which supports the parties and participants’ views that security concerns remains significant as the current peace remains fragile.<sup>289</sup> Kenyan academic, Makua Mutua, commenting in an op-ed, “I think witnesses would be most at risk in a hearing held in Kenya. They would be intimidated out of their wits. We know that in the past witnesses have disappeared or been eliminated. Does the ICC want to risk that? Amnesty International supports the hearings in Kenya. I am afraid Amnesty needs to take a step back, and stop putting ideology and principle over reality and facts on the ground. Kenya is a fragile state that cannot take such stress. Try the Ocampo Six at The Hague — let’s stop romanticising justice.”<sup>290</sup> Both the Review Report and commentary piece seem to suggest that the Kenyan situation remains volatile, and therefore the potential risks to victims and witnesses remains too high. However, it is apparent that even within the restorative realm there can be competition between the rights to participation and protection that must be reconciled.

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<sup>287</sup> The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project, June 2011 Review Report, Executive Summary, pp. v – vii, available at <http://www.dialoguekenya.org/docs/June2011ReviewReport.pdf>.

<sup>288</sup> *Ibid.*

<sup>289</sup> *Ibid.*

<sup>290</sup> Mutua, M., *supra* note 286.

#### **4.8 THE PARAMOUNT RIGHT OF PROTECTION**

This chapter sought to assess the degree to which the right to protection was meeting restorative justice goals, assessed relationally, and where the promotion of such provisions has buttressed against the retributivist need for a fair and public trial.

In the promotion of the right to protection, we have seen the Court build upon the lessons learned from the failures of the past and attempt to meet the highest international human rights standards. In this area the Court has been viewed as a leader, and its actions are in accord with restorative emphasis on protecting the dignity of all participants involved in the justice process. There has not been the concordant scaling back of the right to protection that was seen with respect to the right to participation. Instead, all Chambers and organs of the Court have actively sought to promote a thorough protection regime for victims, witnesses, and more controversially, intermediaries.

Trial Chamber I in *Lubanga* described the right of protection as the complement to the right to participation and it is in this regard that protection was considered throughout the chapter. As a retributivist approach also recognizes the need for protection, out of a pragmatic need to guarantee the ongoing involvement of victims and witnesses, arguably the Court has been less willing to scale back the protective measures it has granted. However, protective measures, especially anonymity, have continued to conflict with the retributivist focus on a right to a public hearing and the right to know one's accuser in order to mount a full and fair defence.

The *Lubanga* trial was considered in detail as it has provided the clearest example of where these areas of tension have emerged. Pre-Trial Chamber I adopted a policy of allowing anonymous victim participation during the investigation and pre-trial phases as it was felt that in light of the security concerns this was the only protective measure that would adequately meet the needs of victims. Trial Chamber I was then faced with the decision of whether to continue with a similar approach. As described above, anonymity has had a checkered past in international criminal law and no consensus could be reached during the negotiation phase of either the Rome Statute or the RPE. Despite strong opposition from both the Prosecution and Defence, Trial Chamber I held that anonymous victim and witness participation may be possible during the trial, but would require the careful scrutiny of the relevant Chamber.

The resulting challenges of anonymous witness and victim participation quickly became apparent. The first stay of proceedings resulted from the Prosecutor's refusal to disclose exculpatory documents, which the Victims' Legal Representatives supported under the argument that security concerns may necessitate non-disclosure in certain circumstances, suggesting a substantial shift in the traditional procedural balance. The involvement of anonymous intermediaries who were used by the OTP to communicate with victims and witnesses in the field that had been raised as an issue by the Defence at the outset of the case would continue to plague the attempted progression of the trial. The second stay of proceedings occurred when the Prosecutor refused to disclose intermediary 143's identity, once again out of security concerns, during which the Prosecutor strongly relied on his Office's statutory duty of protection. The final Defence application incorporated the many concerns and challenges that anonymity and non-

disclosure have had on Mr. Lubanga's ability to mount a full and proper defence. While Trial Chamber I rejected the application, it acknowledged there may have been instances of abuse of process, but the Chamber remained capable of assessing these in its final assessment of the merits of the case.

This long saga of Court challenges, it is argued, is primarily the result of the tension posed by upholding the necessarily high level of protection required in areas of insecurity, while at the same time attempting to meet the needs of a fair and public trial in which the accused can make proper examinations. It is here that we see the restorative aim for increased protection competing with the need for public trials. The *Katanga and Ngudjolo* trial has sought to mitigate many of these problems and has run notably smoother than its predecessor. It is argued that this is due to Trial Chamber II's scaling back of full anonymity measures, having learned the lessons of both *Tadic* and *Lubanga*, and allowing anonymity only if victims chose not to testify as witnesses.

The final issue considered exemplifies how ensuring the full scope of these rights can highlight the inherent tensions within each theory of justice. The recent debate over proposed *in situ* confirmation of charges hearing in the two Kenyan cases illustrates this clearly. The restorative aim of promoting involvement of all parties affected within the justice process supports the argument for the need to bring the Court's activities closer to the affected communities. This would allow for greater involvement and awareness of the ongoing judicial proceedings than if they remained in The Hague. However, there remained significant security concerns if the matter was brought to Kenya where the political situation remains fragile, particularly as the 2012 election approaches. While Pre-Trial Chamber II on its own initiative requested observations by all parties and

participants, after almost unanimous opposition to the suggestion it has sought to continue proceedings at The Hague. The Court led initiative to consider such a possibility is promising that in future cases where the security situation permits, it will be able to act more locally, thereby allowing for much greater direct involvement as restorative aims promote.

This chapter has shown that in contrast to the right to participation there has not been the same concordant scaling back of the right to protection. Therefore, the challenges by meeting restorative aims of a thorough protection regime within a retributivist system resulted in a long saga of challenges in *Lubanga* as the Court attempted to reconcile these tensions. It appears that unless there is a scaling back the ability to ensure the efficacy of the trial system is significantly hampered, and it is this lesson that the *Katanga and Ngudjolo* trial appears to have learnt. In addition, the attempted *in situ* confirmation hearings in the two Kenyan cases highlighted that not only can there be competition between the two theories of justice within the Court, but that there can also be internal conflict within each approach. This recognition resulted in the Pre-Trial Chamber reverting back to The Hague to ensure the safety and security of victims and witnesses is maintained.

## CHAPTER 5

### CONCLUSION

As has been discussed throughout, the ICC marked a momentous step forward for victim involvement in the field of international criminal law. The Court has for the first time provided victims with the right to participation, protection, and reparations. While the right to participation and protection were considered in detail in Chapters 3 and 4 respectively, the right to reparation is considered briefly below, as it remains the one untested right within the Rome Statute system.

This thesis sought to assess the degree to which the adoption of these rights, particularly participation and protection, has added a restorative element to the Court's approach to justice. The right to participation illustrated that while there had initially been a trend towards a much more active and expansive approach to victim participation by the lower chambers, this has repeatedly been scaled back in later Appeals Chamber decisions. The streamlining of victim participation has allowed for the incorporation of victims into the Court process in a relatively smooth manner as the narrow and uniform approach afforded victims has not posed a substantial challenge to the retributivist trial process. In contrast, the right to protection has seen all levels of the Court uphold what has been viewed as a significant step forward in the use of protective and special measures. Although the absence of a similar scaling back with respect to the right to protection has posed a substantial challenge to the retributive requirement of a fair and public hearing. The *Lubanga* trial provided the most salient example of the effects of the



underlying tension between the restorative need for protection within a retributivist system of disclosure and full examination, as its progression was repeatedly plagued by court challenges. Therefore, these two rights have seen competing trends emerge in the Court's preference for either a retributive or restorative focus, which has often meant that both approaches fail to be met.

### **5.1 THE RIGHT TO PARTICIPATION: A STREAMLINED APPROACH**

The right to participation saw a transition from one of initially broad decisions, when the number of victim applicants remained relatively limited, to a much more uniform and narrowly defined approach as victim participant numbers continued to rise. The development of a general right to participate at the investigation phase saw the Court begin to adopt a conception of justice more in line with restorative thinking. Victims were granted a greater degree of equality of relationship with the Prosecutor, whereby they could potentially influence the scope and direction of investigations. This afforded a degree of ownership within the justice process as victims were granted space to ensure that more reflective charges would be brought. In the Appeals Chamber's review, it quickly reversed such an expansive approach determining that Article 68(3) was only applicable to judicial proceedings from which the investigation phase was excluded. This decision confirmed the retributivist stance for Prosecutorial control over the investigation phase thereby maintaining the Prosecutor's ability to determine the breadth and direction of the early Court process. It also had the effect of removing participatory rights granted previously to a number of victims, thereby risking additional possible victimization. In response to this restriction, differing Pre-Trial Chambers placed an increased emphasis on the use of the other statutory provision as illustrated through the innovative consultation

regime in the Kenyan case. The consultative process also served to highlight the fact that without proper information and outreach the right to participation remains a largely theoretical right for many potential victims.

The investigation phase did not mark the only example of a later reversal of an initially expansive interpretation. The *Lubanga* Trial Chamber adopted a view that allowed for trial participation depending on whether there was an evidential link to the victim or if a victim's personal interests were affected. However, the Appeals Chamber quickly narrowed this approach when it required that a victim must have suffered harm related to the confirmed charges. In practice, this meant that despite the wide range of crimes committed in the Ituri region only direct and indirect victims of the enlistment, conscription or active use of child soldiers were able to apply for participant status. While the most recent Prosecutorial Strategy describes a policy of focused investigations and prosecutions that is reflective of the gravest incidents and main types of victimization, the actual trend has been towards much narrower trials. As *Lubanga* dealt solely with child soldiers, there was significant criticism that the Court was failing to live up to its supposed leadership role in the prosecution of crimes of gender and sexual violence. In response, the *Bemba* trial has swung in the opposite direction only focused on these types of crimes. These trials illustrate the inherent limitations of a retributivist process that will only ever be able to handle a sliver of the crimes committed. Although even within these few cases, the Prosecutor has had a poor track record in trying crimes of a representative nature.

The area of characterization of charges, therefore, provided one example of where victims' participation has brought the competing purposes of justice to light. While a

retributivist system seeks to ensure the Prosecutor retains discretion over the early phases so that only provable cases are brought, victims in contrast also seek recognition of the full harms suffered and a right to discover the complete truth. Victims' participation saw the charges expanded slightly in *Lubanga* to also include war crimes of an international character as a result of the Ugandan intervention. Victims proved unsuccessful though in their later attempt to add crimes of sexual slavery and inhuman treatment, as it was determined that amending the charges at that stage was only possible if evidence of those crimes had been presented at the confirmation of charges hearing, which it had not. Once again, this underscores the need for a more active role for victims from the start.

The overall trend for participation during the trial phase has been towards a more uniform and streamlined approach to ensure the continued efficacy of the trial process. Even the most vivid illustration of participation, the ability for victims to provide evidence and express their views and concerns saw the Trial Chambers in both *Lubanga* and *Katanga and Ngudjolo*, stress that such involvement must always be measured against the rights of the accused and overall trial efficiency, suggesting that only a token space will ever be possible. While all levels of the Court recognized the ability for victims to lead and challenge evidence, these decisions have included strong dissents emphasizing this right ought to remain a privilege of the parties to the adversarial process, namely the Prosecution and the Defence. The majority held that the exercise of this modality can only occur upon prior application and after a demonstration that victims' personal interests are affected and that it is not prejudicial to the rights of the accused and a fair trial, thereby retaining strict Court control over its use. The final illustration was found in the expanded use of common legal representation for victim

groups that continue to grow negating the possibility for an individualized approach. The Court continues to mandate that victim participation be made to fit within the confines and purposes of a retributivist framework.

## **5.2 THE RIGHT TO PROTECTION: CHALLENGES OF IMPLEMENTATION**

In contrast to the right to participation, all levels of the Court have repeatedly upheld the right to protection. Protection provides an example of an area where restorative processes have been implemented to the detriment of the successful progression of trials. The Court has worked to ensure that the respect, concern and dignity of all victims, witnesses, and even intermediaries is maintained and that the potential for further harms as result of Court involvement is minimized. Although, it was the OTP's continued defence of its statutory duty to ensure protection of individuals involved with its office that saw significant hurdles during the *Lubanga* trial. These included two stay of proceedings, one rejected permanent stay, and a yet to be determined final decision on whether any of the Prosecutor's actions will result in a finding of abuse of process. Even though many of the delays and abuse of process allegations move beyond strictly protection concerns, it is argued that at the root of these challenges lies the tension involved in incorporating a thorough protection regime within a retributivist trial process centered on a fair and public hearings.

While the recognition for greater protection drew partially from the developing international human rights jurisprudence that was encapsulated in the 1985 Victims' Declaration and the 2005 Basic Principles and Guidelines, it can also be explained through a retributivist need for ongoing victim and witness participation. The Court rightly described that protection remains the complement to participation. As most

international criminal trials occur during ongoing conflict or in the fragile phase of post-conflict peace, most victims and witnesses remain vulnerable to continued threats and are therefore often unwilling to participate unless their security is guaranteed. So the lack of a concurrent scaling back of the right to protection can be explained either as a recognition of the adoption of a restorative element into the Court's mandate or another example of the fulfillment of its guiding retributivist approach. However, it is argued the continued recognition of the right to protection remains suggestive of a shift beyond the traditional retributivist approach whereby victims and witnesses were viewed solely as sources of information that required significantly less attention to their safety both during and after the trial process.

Even if upholding the right to protection does serve to illustrate an area where the “ICC has not only a punitive but also a restorative function,”<sup>291</sup> it represents only a small fragment of the full scope of restorative practices. One further restorative process the Court has considered is the recognition of the benefits of greater involvement of all affected parties through the use of *in situ* hearings. This was illustrated by Pre-Trial Chamber II's attempt, on its own initiative, to implement its ability to hold trials outside The Hague if it is deemed to be in the “interests of justice.”<sup>292</sup> In the end protection trumped participation, as the local situation remained too volatile, but it is suggestive that the Court may in future seek to meet the restorative goal of increased involvement by all those affected.

The emerging trends, in both the right to participation and the right to protection, support a finding that the overarching principle shaping the Court's attempt to demarcate

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<sup>291</sup> Report of the Court on the Strategy in Relation to Victims, *supra* note 26, p. 1, para. 3.

<sup>292</sup> Pre-Trial Chamber II *Ruto, Kosgey and Sang* Decision of 3 June 2011, *supra* note 281.

a proper role for victim involvement has been the maintenance of a ‘fair trial’ process. The incorporation of victims has, however, seen a blurring of some of the traditional conceptions of what is required for a fair trial, confirming the negotiators’ belief that a fair trial within the international criminal context must accommodate not only the rights of the accused, but also the needs of victims and the broader international community. Examples of such readjustments were found in the challenges that have arisen over the ability to lead and challenge evidence, the reconsideration of proper disclosure requirements and use of anonymity measures, and the ability for possible reclassification of charges at various stages of the Court process. However, it is the third right afforded to victims, the right to reparations, that seeks to import a previously absent aspect of justice to international criminal law - the possibility of a remedy to victims for harm suffered. The ICC marked the first time a reparations regime was incorporated within an international criminal tribunal, although it has since been followed by the Extraordinary Chambers in the Courts of Cambodia (ECCC).

### **5.3 THE RIGHT TO REPARATIONS: UNTESTED POTENTIAL**

As noted in Chapter 2, the Court, under Article 75(1), is required to “establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”<sup>293</sup> A brief consideration of these three specific types of reparations is given to illustrate the broader goals the Court is attempting to meet through its reparation mandate.

The first form, restitution, has a narrow meaning within general international law to “reestablish the situation which existed before the wrongful act was committed.” This is

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<sup>293</sup> Rome Statute, *supra* note 1, Article 75(1).

likely only possible for a small number of cases within the ICC's jurisdiction, particularly those crimes related to property destruction. Therefore, where restitution is not possible, the Court may need to look to international human rights jurisprudence. The second listed form, compensation, has been widely recognized; however, a significant challenge facing the Court is related to the fact that most accused either are indigent or have been able to successfully hide their assets, such that there are limited monies for seizure and forfeiture.<sup>294</sup> Rehabilitation, the final form specifically listed, involves measures designed to alleviate the physical, psychiatric or social harm suffered by victims.<sup>295</sup> Given the crimes within the ICC's jurisdiction deal with devastating cases of mass atrocity, rehabilitation is likely to prove a particularly salient form of victim reparation. Although it is here that the Court's judiciary will likely need to rely on the Trust Fund for Victims (TFV), which has greater expertise in this area as its dual mandate is to implement Court-ordered reparations awards and provide general assistance to victims. The TFV has established three categories of programs, reflecting its mandate to provide victim support, physical rehabilitation, psychological rehabilitation and material support.

As the *Lubanga* trial's closing submissions are scheduled for completion at the end of this month, the Court's first reparations hearings are expected sometime before the end of 2011. The right to reparations remains a substantial advancement over the previous *ad hoc* tribunals who were largely silent, although it too is likely to be plagued by practical limitations surrounding the Court's ability to enforce such orders, the effects of limited funds to draw from, and whether the judiciary has the proper expertise to move beyond the subject matter of criminal law.

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<sup>294</sup> Trumbull, *supra* note 2, p. 807.

<sup>295</sup> Rombouts and Parmentier, *supra* note 93, p. 153.

Even if it is possible to surmount the practical hurdles discussed above, the goals of reparative justice remain much more muted than a fully restorative approach and it is for this reason the right to reparation, much like the right to participation, may pose less of a direct challenge to the retributivist paradigm. As has been argued throughout the Court has consistently adopted the mantra that victims' rights are acceptable *only* to the degree they do not infringe upon the rights of the accused and the notion of a fair trial. Therefore, as reparative justice has historically adopted a narrower focus, normally in the form of additional hearings at the close of the substantive portion of the trial, its accommodation is not likely to conflict with the Court's guiding principle. McCarthy noted there remains limited support for a transformative recalibration of criminal justice among reparative supporters; however, it is this transformative requirement that remains much more in line with a restorative approach.<sup>296</sup>

As mentioned previously, restorative justice remains a rather new field, and it was for this reason that Llewellyn developed her relational theory to better ground these developing processes. Relational theory focuses on restoring a relational equality that moves beyond formal conceptions of equality and requires "attention to the particular context, to the parties involved, and to what will be required to ensure respect, concern and dignity in the relations between and among parties."<sup>297</sup> It is within such a theoretical framework that restorative justice marks a "paradigm shift" in how justice is conceived and why its goals will fail to be met within the Rome Statute system, even if a full and effective reparations regime is implemented.<sup>298</sup> Zehr argues "the situation cannot be changed by simply providing compensation to victims, by providing the possibility of

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<sup>296</sup> McCarthy, *supra* note 20, p. 254.

<sup>297</sup> Llewellyn (2011), *supra* note 76, p. 6.

<sup>298</sup> Zehr, *supra* note 54, p. 3.



alternative sanctions for offenders, or by other sorts of ‘tinkering.’ We have to go to the root understandings and assumptions.”<sup>299</sup> It is this transformative element that cannot be accommodated within a primarily retributive criminal trial process.

Therefore, while victim involvement will not see the ICC system transformed into a wholly restorative one, what it has begun to do, and will arguably continue to do, is challenge the dominant justice paradigm in a much more public setting. Victims have exerted significant pressure on the need for more reflective and accurate charging, the consideration of *in situ* hearings highlights justice processes need greater involvement by affected communities, and possible reparations suggests there needs to be some form of redress for victims beyond just punishment of offenders. While the system will remain a retributivist one, the addition of victims may shed light on the inherent limits to a retributivist approach, and support a reopening of space at the national level for other possible justice mechanisms. Victim participation has continued to illustrate that there is not just one purpose to justice, and therefore the Court must be open to providing space for mechanisms better suited to meeting the broader community affected by the crimes within its jurisdiction. This does not mean forsaking accountability for impunity, but rather reflects the view that accountability can be found in mechanisms beyond the formal trial process.

#### **5.4 THE NEED FOR CONTINUED FLEXIBILITY IN EXTERNAL APPROACHES TO JUSTICE**

As the ICC remains centered around the trial process, the Court needs to remain cognizant of the structural limitations this approach imposes. The drafters recognized that

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<sup>299</sup> *Ibid.*

the Court would always be limited by its finite resources, and it was for this reason its founding principle is one of complementarity. In contrast to the *ad hoc* tribunals that had primacy over national jurisdictions, the ICC is meant to be a court of last resort only acting where states are unable or unwilling to act. This originally appeared to provide the Court with space to promote a retributivist conception of accountability internationally, while still allowing for more flexibility in accountability mechanisms at the national and local levels. It was felt there would remain space for certain restorative justice processes, such as Truth and Reconciliation Commissions, within the newly adopted Rome Statute framework. The discourse emanating from the Review Conference suggests, however, that there has been a parallel narrowing in this regard as well. It was noted at the Review Conference that “the establishment of the Court had indeed brought about a paradigm shift” and that “[n]ow, it was acknowledged, amnesty was no longer an option for the most serious crimes under the Rome Statute.”<sup>300</sup>

It is argued that the Court must recognize the retributivist trial process only addresses a narrow slice of what justice can entail and does not allow for the adoption of more contextually relevant processes. The ICC needs to maintain greater flexibility in its acceptance of alternative domestic justice mechanisms. This is not to argue that impunity should be promoted, but rather that accountability can be conceptualized in a much broader fashion if the type of justice sought moves beyond a purely retributive vision.

While victim participation through the right to participation, protection and reparations has arguably seen a blurring in the traditional notion of what a ‘fair trial’ process ought to entail, this will never see the system wholly transformed, as restorative

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<sup>300</sup> Stocktaking of International Criminal Justice, Peace and Justice, *supra* note 39, para 29.

justice would require as the ICC remains wedded to a retributivist criminal trial process. Instead, victim participation throughout the Court process will continue to bring light to the different purposes justice can serve and it is in this regard that the Court needs to reopen space for alternative justice mechanisms that still promote accountability.

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