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Victims' Participation in Proceedings before the International Criminal Court: Developing an Expressivist Function of the Trial.

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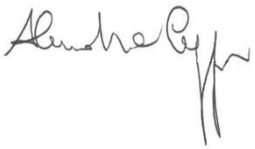
Signed:  Date: 3/05/2019

Abstract

The International Criminal Court (ICC) is the first international criminal tribunal that allows victims to participate in their own rights in criminal proceedings. The ICC Statute offers an opportunity for the meaningful entrenchment of the interests of victims in the international criminal process. However, the provisions of the ICC Statute address only the general principles of victims' participation regime. It is deliberate since the drafters failed to recognise a procedural system that dominates international criminal justice as a full answer to the concerns with victims. The two procedural systems envisaged, mainly the adversarial and inquisitorial procedures, conceive the role of victims in two diametrically opposed ways.

A response to the central question as how to frame a victims' participatory model in proceedings before the ICC, which aim to achieve the goal of giving victims a voice, depends on what framework of justice the ICC adopts. The view taken is that the ICC criminal justice paradigm is a real *sui generis* system. Due to the extensive and serious nature of the atrocities committed the existing theories of criminal justice – retributive, utilitarian and restorative justice models – are not adequate to meet the need for justice of victims, as recognised by the provisions on victims' participation of the ICC Statute. This thesis suggests that the ICC should adopt an expressivist paradigm in order to give meaningful effect to the victims' participatory rights, alongside the defendants' right and the law enforcement functions of the Court and Prosecutor.

The adoption of the expressivist framework to the ICC criminal justice contributes to establish a common grammar to bridge the gap in the languages of the civil law and common law systems. The novelty of this idea of common language is that it is critical and fundamental to move forward the goal of victims' participation and reshape the rights of victims, defendants, judges and prosecutor, going beyond the conflicting languages of the adversarial and inquisitorial systems and allowing to all the provisions to coherently fit together.

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List of Abbreviations

Art.	Article(s)
ACHR	American Convention on Human Rights
ASP	Assembly of States Parties
CLR	Common Legal Representation
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GA	General Assembly
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IGO	Inter-Governmental Organization
IMT	International Military Tribunal (Nuremberg)
NGO	Non-Governmental Organization
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
SC	Security Council
UN	United Nations
VWU	Victims and Witnesses Unit
WWII	World War II

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CHAPTER I

Introduction.

1.1. Research statement.

This thesis aims to frame a model of participation for victims of gross violations of human rights, which can fulfil the aims of the specific statutory provisions on victims' participation, but can also be consistent with the overall goals of the international criminal justice system, with specific reference to the International Criminal Court (hereafter ICC). This study looks at the implications of acknowledging the *sui generis* nature of the ICC system of justice, with the purpose of understanding the challenges and limitations of shaping the participatory rights of victims in international criminal justice, and of the potential contribution to be made to the creation of a consistent and harmonised model of participation. The thesis advances an argument that the traditional retributive, deterrent and restorative theories of criminal justice do not fully serve the nature and aims of provisions on victims' participation contained in the ICC Statute and Rules of Procedure and Evidence (RPE). The thesis develops a theoretical approach to international criminal justice called expressivism, which considers criminal justice as providing a historical narrative of past crimes and also as a forum that impacts on present and future societal understandings of mass violence, promoting an educative message. The view taken within the thesis is that the expressivist theory of criminal justice is able to bridge the gap and harmonize different understandings of the role and rights of victims in proceedings before the ICC.

The Preamble to the Rome Statute of the International Criminal Court is an important reminder of the significance of the plight of victims: "(…) during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."[1] Due to the extent of the gross violations of human rights and humanitarian law that victims suffered, they cannot be relegated to the periphery of the criminal justice system anymore. In order to give meaning to the concerns of victims, alongside the rights of the defendant, and

[1] Preamble of the Rome Statute of the International Criminal Court, U. N. Doc. A/CONF.183/9 of 17 July 1998.

the powers of the prosecutor and judges, it was necessary to give victims a voice. Article 68(3) of the Rome Statute explicitly confer upon victims of gross violations of human rights the possibility to participate in proceedings with an autonomous standing, by presenting their views and concerns when three conditions are satisfied: (1) victims' personal interests are affected by the matter before the court; (2) victims' views and concerns are to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and (3) victims' participation is not prejudicial to the accused's rights. Rules 89, 91 and 93 of the ICC's RPE provide further guidance concerning the victims' right to participate in ICC proceedings, as they relate to the manner in which victims may participate in proceedings. Under Rule 89, victims wanting to participate in proceedings are directed to apply to the Registry, which then passes on the applications to the relevant chamber. Notably, this rule explicitly mentions the possibility of victims making opening and closing statements. Rule 91(2) provides that legal representatives of victims may participate in proceedings. Rule 91(3)(a) specifies that legal representatives of victims may apply to put questions to a witness, the accused, or an expert witness. Rule 93 permits the Chamber to seek the views of victims or their legal representatives on any issue, as appropriate.

As the North Star guided mariners to find their way, in a similar manner, the goal of giving a voice to victims represents the milestone that the provisions of the Statute and RPE on victims' participation should aim to achieve. However, the said article of the ICC Statute addresses only the general principles of victims' participation regime. Similarly, the rules of the ICC's RPE, which should supplement Article 68(3) of the Rome Statute with more detailed procedural provisions, fail to indisputably establish what the specific participatory rights of victims are, and at what stage of the proceeding such participation can be exercised.

The choice of the language of the provisions on victims' participation, which leaves room for different directions about how such provisions should be interpreted and applied, is deliberate. This is because the provisions of Statute and the RPE regulating victims' participation are the outcome of a delicate compromise, achieved after years of negotiation, principally due to the diverging views of common law and

civil law traditions.[2] In the former, victims are not formal parties, and, consequently, they do not have any right to participate in the proceeding.[3] The latter affords victims broad participatory rights under the concept of *partie civile*.[4] The drafters of both the Statute and RPE of the ICC failed to recognise a procedural system that dominates international criminal justice as a full answer to the concerns of victims, because of the lack of agreement in principle on the goals that the international criminal justice system should prioritise. The Preamble of the ICC suggests retribution and deterrence as its main purposes, but the emphasis on human suffering of the Rome Statute makes the victims' right to justice a priority to the extent that the Preamble seeks also to contribute to restoration for victims.[5]

Different Trial Chambers of the ICC have conducted victims' participation in different ways, because different judges have different understandings of the goals of the international criminal justice system and, thus, of the procedural roles of judge, prosecutors, defence and victims. A complete understanding of the position and role of victims in the ICC clearly suffers from an uncertainty related to the procedural model. It is, thus, important for justice purposes, fairness and equality, that judges adopt the same consistent understanding of what victims' participation should look like in proceedings in order to achieve the goal of giving victims a voice.

This study argues that the inclusion of victims' rights calls for the reformulation of the traditional criminal justice paradigms of international criminal justice – as practised by previous international tribunals – in order to encompass an expressivist framework. The expressivist account of criminal justice, which focuses mainly on the normative value of the trial, by serving didactic purposes, as well as symbolic purposes and historic truth-telling, best captures the nature and priorities of international sentencing and its real ability to achieve the goals ascribed to it. The adoption of the expressivist framework shifts the emphasis from punishment to process, because it conceives the trial as a forum for providing a narrative of the

[2] M. Tonellato, 'The Victims' Participation at a Crossroads: How the International Criminal Court Could Devise a Meaningful Victims' Participation while Respecting the Rights of the Defendant', *European Journal of Crime, Criminal Law and Criminal Justice* 20 (2012), 316.
[3] S. Zappalà, 'The Rights of Victims v. the Rights of the Accused', *Journal of International Criminal Justice* 8 (2010), 139.
[4] M. E. I. Brienen & E. H. Hoegen, *Victims of crime in 22 European criminal justice systems*, Wolf Legal Productions (2000), 203.
[5] C. P. Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings', *Michigan Journal of International Law* 29 (2007-2008), 777.

events, and for enunciating societal condemnation of atrocities. Therefore, the position taken within this thesis is that contemplating expressivism as a key rationale for international criminal justice is the most effective means of guaranteeing the statutory provisions on victims' rights, which aim to give victims a voice in criminal proceedings. The author's view is that the expressivist approach to criminal justice empowers victims, as it enables them to contribute to the establishment of the historical record of the events. Expressivism can grant victims an important role as active participants in the quest for justice and for the closure of the impunity gap.

This thesis also endeavours to take account of the implications of the application of the expressivist framework for the nature of the procedure before the ICC. Expressivist approach to the international criminal justice contributes to bridge the gap between common law and civil law with regard to the trial process. The thesis therefore aims to present a common grammar which breaks the gap in the different languages used by different concepts of victims' participatory schemes of civil law and common law systems, and to harmonise those different positions. The novelty of this idea of common language, established through the lens of the expressivist paradigm, is that it is critical and fundamental to furthering the goal of victims' participation.

In this view, this study considers the role and rights of all individuals involved in the criminal process, as victims' participation is intertwined with the roles and rights of the prosecutor, judges and defendants. The thesis therefore sets out to illustrate the author's conceptual application of the expressivist paradigm to the international criminal process in order to delineate a common grammar, which harmonises the procedural understanding of all participants' rights, without tipping the scale in favour of the adversarial or inquisitorial systems. It sets up a *sui generis* system, which involves a synthesis of adversarial and inquisitorial traditions.

1.2. Research background and context.

Victims' right to, and need for justice have become an important consideration in international criminal justice, due to the growing recognition of the impact of mass crimes on victims and communities. A significant amount of literature has focused on highlighting the negative effects of widespread and systematic violence on

victims in conflict situations.[6] Mass violence not only affect victims but also have direct consequences for families and affected communities, as they often represents an attack on the social values and safety of affected communities, setting the scene for a general social collapse in post-conflict societies.[7] Recent studies have paid specifically attention to the crimes of sexual violence, underlining how the scale and enormity of these crimes "appear to be on the rise" in recent conflicts.[8] In fact, cruel acts of sexual violence have been reported in almost every conflict with significant variation of the scale and characteristics,[9] and such violence continues to be inflicted on a massive scale during conflicts across the globe.[10] Fionnuala Ní Aoláin, Catherine O'Rourke and Aisling Swaine rightly note that even after conflict has ended, the impacts of sexual violence persist, including long-term physical and mental harms as well as a myriad of social issues within their families and communities.[11] These crimes strike at the heart of communities by destroying family and larger social bonds and force victims into isolation.[12]

It is against this background that advocates of victims' participation in international criminal justice mechanisms believe that participation has the potential to render the tribunal's work more transparent and accessible for the victims and communities.[13] As Fiona McKay notes, participation could enhance respect, protection and a significant representation of victims of mass violence, whose

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[6] See for instance T. K. Hagen, 'The Nature and Psychosocial Consequences of War Rape for Individuals and Communities', *International Journal of Psychological Studies* 2(2) (2010); J. Mertus, 'Shouting from the Bottom of the Well: The Impact of International Trials for Wartime Rape on Women's Agency', *International Feminist Journal of Politics* 6 (2004); N. Henry, 'The Impossibility of Bearing Witness: Wartime Rape and the Promise of Justice', *Violence against Women* 16(10) (2010); I. Skjelsbæk, 'Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape During the War in Bosnia-Herzegovina', *Feminism & Psychology* 16(4) (2006).

[7] N. E. J. Dijkman, C. Bijleveld and P. Verwimp, 'Sexual Violence in Burundi: Victims, perpetrators, and the Role of Conflict', *Households in Conflict Network Working Paper* (2014), 33.

[8] K. Farr, 'Extreme War Rape in Today's Civil War-Torn States: A Contextual and Comparative Analysis', *Gender Issues* 26 (2009), 1.

[9] E. J. Wood, 'Variation in Sexual Violence during War', *Sage Publications, Politics & Society* 34(3) (2006), 307.

[10] S. Shteir, 'Conflict-Related Sexual Violence and Gender-based Violence: An Introductory Overview to Support Prevention and Response Efforts', *Australian Civil-Military Occasional Papers* (2014), 9.

[11] F. Ní Aoláin, C. O'Rourke & A. Swaine, 'Transforming Reparations for Conflict-Related Sexual Violence', *Harvard Human Rights Journal* 28(1) (2015), 99.

[12] R. Branche et al., 'Writing the History of Rape in Wartime', in R. Branche and F. Virgili (Eds.), *Rape in Wartime*, Palgrave Macmillan (2012), 11. See also: A. Maedl, 'Rape as a Weapon of War in the Eastern DRC? The Victims' Perspectives', *Human Rights Quarterly* 33 (2011), 128–147.

[13] J. de Hemptinne, 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon', *Journal of International Criminal Justice* 8(2010), 167.

perceptions and needs are frequently ignored, presumed, or misunderstood.[14] In her study on the combat of impunity, Diane Orentlicher states that including victims in the design of policies "can help reconstitute the full civic membership of those who were denied the protection of the law" and that participation "may itself contribute to a process in which victims reclaim control over their lives and may help restore their confidence in government."[15] Based on similar assessments, Pena and Carayon argue that victims' participation can convey "factual and cultural elements" that can assist in the comprehension of the context of violence, "bringing a unique perspective to [criminal] proceedings".[16]

As such, the challenge of addressing the needs for justice of victims of international crimes has been subject of increasing normative development in recent years.[17] This can be evidenced by the incorporation of a regime of victims' participation in the framework of the ICC. In addition to victims' rights to respect and dignity, information about proceedings and measures to protect their physical and psychological wellbeing,[18] for the first time within the international criminal procedure the framework of the ICC enshrined the right for victims to present their views and concerns in the course of the criminal proceedings,[19] and the right to reparations.[20]

To understand what model of international criminal justice best clarifies the scope and content of victims' participatory rights before the ICC, enshrined in Art. 68(3) of the ICC Statute, this thesis needs to look to theories of criminal justice, as

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[14] F. McKay, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes Against Humanity, Torture & Genocide*, REDRESS (1999),15. Available at: https://redress.org/wp-content/uploads/2018/01/G.-June-1999-Universal-Jurisdiction-in-Europe.pdf. See also Women's Caucus for Gender Justice, *Recommendations and Commentary for August 1997 PrepCom on the Establishment of an International Criminal Court*, United Nations Headquarters, 4-15 August 1997, 29. Available at: http://iccnow.org/documents/WomensCRecomm.pdf; Y. Danieli, 'Victims: Essential Voices at the Court', *The bulletin of the Victims' Rights Working Group*, Sept. 2004, 6. Available at: http://www.vrwg.org/ACCESS/ENG01.pdf.

[15] D. Orentlicher, Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity, U.N. Doc. E/CN.4/2004/88, 27 February 2004, 11.

[16] M. Pena and G. Carayon, 'Is the ICC Making the Most of Victim Participation?', *International Journal of Transitional Justice* 7(3) (2013), 523.

[17] See also Rule 23 of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC) and Art. 17 of the Statute of the Special Tribunal for Lebanon (STL).

[18] Art. 68(1) of the Rome Statute.

[19] Art. 68 (3) of the Rome Statute.

[20] Art. 75 of the ICC Statute and Rule 85 of the Rules of Procedure and Evidence adopted on 09 September, 2002.

well as it urges to go beyond it. The unprecedented provisions for victims' participation in the proceedings of the ICC have to be set in the context: of domestic criminal law; of international human rights law and, lastly, of criticisms of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) for doing little for victims.

As Chrisje Brants remarks "[d]omestic criminal law theory reflects the roots and historical development of criminal law and procedure, as well as the overarching Enlightenment logic that demands rational public debate on matters of public interest."[21] Historical perspectives of victims' participatory rights illustrate that the concept that victims (who have suffered personal harm or material injury as a result of the perpetrator's criminal conduct) were entitled to actively participate in the criminal proceedings, is, in fact, quite an ancient one.[22] The proponents of the adversarial legal tradition, who see victims as a third party that disturbs the equilibrium of the trial and taints its outcome, forget that historically the criminal trial has always been about victims.[23]

In the context of criminological studies, in the 1960s and 1970s, victimology, a new discipline that deals with the study of victims' physical and psychological reactions to the trauma suffered and victims' experiences of the criminal justice system, started to realize its potential nationally and internationally.[24] This was especially the case in countries of common law tradition, which experienced the raising of victim's rights movements, aimed to enhance the role and rights of crime victims in criminal proceedings.[25] These movements criticized the marginal role of victims in criminal proceedings, in particular, "the fact that victims did not have the right to consult the Prosecutor, did not have any claim in plea bargains and were subject to harsh cross-examination when called to testify."[26] This last feature of criminal justice systems causes the victims to experience what is described by the

[21] C. Brants, 'Emotional Discourse in a Rational Public Sphere: The Victim and the International Criminal Trial', in C. Brants and S. Karstedt (Eds.), *Transitional Justice and the Public Sphere: Engagement, Legitimacy and Contestation*, Bloomsbury Publishing. (2017), 49-50.
[22] C. P. Trumbull IV, *supra* note 5, 781.
[23] C. Brants, *supra* note 21, 50-51.
[24] R. Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes', *Human Rights Quarterly* 26 (2004), 615.
[25] S. Garkawe, 'Victims and the International Criminal Court: Three Major Issues', *International Criminal Law Review* 3 (2003), 347.
[26] C. P. Trumbull IV, *supra* note 5, 781.

United Nations as "secondary victimization";[27] that is, the "harm that may be caused to a victim by the investigation and prosecution of the case or by details of the case being publicized to the media".[28] As response to these concerns, victimological approach have produced a shift from the offender to the victim, with the victim gradually seen as a customer of services that the criminal law by rights should provide for the individual.[29]

The growing victim lobby at the domestic level influenced victims' movements at the international level.[30] Starting from the 1980s, international human rights law started to develop mechanisms to give victims access to justice in cases where they were not able to obtain redress before their national courts.[31] International and regional treaties have highlighted the importance of judicial remedies, in particular criminal justice procedures, as a mechanism to address serious human rights violations. At the international level, a major milestone in obtaining recognition of victims from the international community was the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Declaration for Victims of Crime),[32] which was followed in 2005 by another UN declaration: 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 (the Basic Principles and Guidelines).[33] While the Declaration for Victims of Crime treaty provides victims with a system of compensation and restitution from the offender and the State, and develops standards of victims' access to justice and fair treatment by the police, prosecutors and courts, the Basic Principles and Guidelines stress the importance of

[27] C. P. Trumbull IV, *supra* note 5, 781.
[28] U. N. Office for Drugs Control and Crime Prevention, Handbook on Justice for Victims (1999), 34.
[29] C. Brants, *supra* note 21, 52.
[30] C. P. Trumbull IV, *supra* note 5, 801.
[31] R. Aldana-Pindell, *supra* note 24, 621; J. C. Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations*, (Vol. 12) Martinus Nijhoff Publishers (2013), 37; REDRESS, 'Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecutions', September 2015, 7.
[32] UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Resolution 40/34, 29 November 1985, UN Doc. A/RES/40/34. Available at: http://www.un.org/documents/ga/res/40/a40r034.htm.
[33] UN General Assembly, 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, Resolution No. 60/147, 16 December 2005, UN Doc. A/RES/60/147. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement.

victims' rights to equal and effective access to justice, within the remedies for gross violations of international human rights law and serious violations of international humanitarian law.[34] Both instruments emphasise the need to treat victims with compassion and dignity, to guarantee them access to mechanisms of justice, and to establish or strengthen judicial and administrative mechanisms in order to allow victims to secure redress through procedures that are fair, inexpensive, accessible, and inform victims of their right to justice.

At regional level, treaty-based human rights courts, namely the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) have imposed on States parties the obligation to conduct effective investigations and eventually prosecute those responsible for serious violations of human rights, in recognition of the rights of access to, and participation in, criminal proceedings for victims.[35] The trend of international declarations and regional monitoring bodies shifted to a conception of prosecution as an essential element of the reparations that States owe to victims of violations of human rights.

International standards have been developed to give guidance as to what an effective remedy means to victims, recognising the importance of the criminal proceeding, as well as the outcome of it. These standards, which allow victims' voices to be heard in the process as rights holders with a legitimate interest in such a process and in its outcome, should give helpful guidance to the ICC, while implementing the norms of the Rome Statute and RPE on victims' participations.

Finally, criticisms of the international criminal tribunals – predating the ICC – for leading to a disconnect between the work of the tribunals and the lives of those who suffered most from the atrocities that these institutions were designed to address, were important considerations during the drafting of the Rome Statute for the ICC. The International Military Tribunal at Nuremberg (IMT), the "progenitor" of the ICC, confirms that little attention has been paid to the role and rights of victims in the formation of accountability mechanisms, as this system was primarily based on the idea that international criminal proceedings should punish individual

[34] The Basic Principles and Guidelines, Principle 11(a).
[35] R. Aldana-Pindell, *supra* note 24, 621; J. C. Ochoa, *supra* note 31, 37-38; REDRESS, *supra* note 31, 7.

perpetrators.[36] The prosecution feared that tales of dramatic fates and human tragedies could potentially bring more harm than benefits, as they could represent a distraction.[37] Moreover, victims could have seen events from different points of view and lacked objectivity, given that they had a strong bias against the Nazi regime.[38] IMT underestimated the value of victims' testimonies as a means of representing the vexations, sufferings and genocide of Jews in Europe. The peripheral role played by victims represents a missed opportunity for the IMT to provide a sense of justice and vindication for the millions of victims of the Nazi regime and to educate the international community on war atrocities.

The suffering of victims, even when in large numbers, was barely recognised before the criminal tribunals established by the UN in the early 1990s. The ICTY and the ICTR did little to enhance the position of victims in international criminal justice. The experience of the ICTY and ICTR has essentially brought attention to victims' rights to service, as victims could enjoy access to protective measures, which provided them with assistance and support and contributed to softening the impact of the proceedings.[39] However, the Statutes of the *ad hoc* tribunals did not confer any autonomous legal standing to victims in proceedings, instead giving them a role, which granted them no greater substantive rights than any other witness. While the *ad hoc* criminal tribunals did benefit from the participation of victims as witnesses (because they represented the most frequent evidence), victims did not have any opportunity to participate in their own right.[40]

From the experience of the first international criminal tribunals, modern international criminal justice, with specific reference to the ICC, can learn important lessons about the need to place considerable emphasis on the value of victims' voices

[36] C. McCarthy, 'Victim Redress and International Criminal Justice. Competing Paradigms, or Compatible of Justice?', *Journal of International Criminal Justice* 10 (2012), 352.
[37] L. Jockusch, 'Justice at Nuremberg? Jewish Responses to Nazi War-Crime Trials in Allied-Occupied Germany', *Jewish Social Studies* 19 (2012), 122.
[38] *Ibidem*, 61.
[39] S. Zappalà, *Human Rights in International Criminal Proceedings*, Oxford University Press (2003), 223.
[40] C. Jorda & J. de Hemptinne, 'The Status and Role of the Victim', in A. Cassese, P. Gaeta, & J. R. Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, (Vol. 2) Oxford: Oxford University Press (2002), 1387, 1388; E. Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?' in D. McGoldrick, P. J. Rowe & E. Donnelly (Eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing (2004), 320.

and the message that justice is not only satisfied through the conviction of perpetrators.[41]

Despite domestic, regional and international advances, which have culminated in acknowledging the victim as a participant of the criminal trial process under Article 68(3) of the ICC Statute, issues related to the implementation of victims' participatory rights persist. The language of the procedural rules of the Rome Statute and RPE designed to govern the victims' participation scheme, are subject to judicial discretion, leaving the modalities of such participation up to the Chambers to decide. Who, when and how victims can participate are all crucial questions that are undefined, as are questions about the appropriate stage of participation. As a result, the jurisprudence of the ICC has been fundamental for giving meaning to victims' participation, though a lack of uniformity has meant that this jurisprudence has often created as much confusion as it has clarity.

As Edwards has observed, the debate on victims' participation has often been reduced to a matter of the rights of victims against the rights of the accused that ends in "zero-sum games, in which you are either for or against victims".[42] Instead, it is crucial to acknowledge that the lack of clarity about how the provisions of the ICC Statute on victims' participation unfold in practice, affects the general understanding of the procedural roles and rights of all participants, including judges, prosecutor and defendants.

The author's view is that the issues on victims' participation unveil essential questions about the concept of justice in relation to the goals and function of criminal law and criminal procedure. The shift towards a model of international criminal law that encompasses the rights of victims to participate in proceedings constitutes a departure from purist conceptions of criminal justice, which is focused mainly on the goal of establishing the guilt or innocence of the accused. This thesis, thus, conducts a discussion about what the role of criminal law and procedure are and where the victim's participation regime fits in this. It aims to frame a model of participation for victims, which can fulfil the aims of the specific statutory provisions on victims'

[41] L. Moffett, 'The Role of Victims in the International Criminal Tribunals of the Second World War', *International Criminal Law Review 12(2), 270.*
[42] I. Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making', *British Journal of International Law* 44(2004), 971.

participation, but also be consistent with the overall goals of the international criminal justice system, with specific reference to the ICC. The author provides an insight into the procedural approach of the ICC to illustrate that its nature is *sui generis*. This study, firstly, looks to the implications of the *sui generis* nature of the ICC system of justice with the purpose of understanding the challenges and limitations of incorporating participatory rights for victims in international criminal justice. Secondly, given that now victims have a voice in the sphere of the criminal trial, the thesis explores the potential contribution of the reconsidered goals and functions of the international criminal law and procedure to the pursuit of advancing a consistent and harmonised model of participation.

As the next section will illustrate, despite the energetic academic and professional debate about the nature and aims of the provisions of the ICC Statute and RPE, there are scant studies that provide a theoretical framework of criminal justice, which satisfies the purposes of the provisions on victims' participation, outside of the traditional retributive, deterrent and restorative theories of criminal justice. Not many studies look to a new criminal justice theory, able to bridge the gap and harmonize the different understandings of the role and rights of victims in proceedings before the ICC.

1.3. Research motivations and rationale.

This thesis is motivated by two factors: first, the acknowledgment that, throughout the history of humanity, in times of armed conflicts, but also during tyrannical regimes, millions of victims experienced wide-scale, systematic and heinous atrocities. The second factor is the growing international recognition of victims' rights to access to and participation in criminal proceedings as a significant element of justice responses to mass atrocities. The mass nature and the socio-political context of the atrocities that come under the jurisdiction of the ICC in which victims find themselves in the aftermath of conflict, affect not only their lives. The material infrastructures and the stability of the society, in which victims should try to rebuild their existences, have been disrupted and destroyed because of displacement, destruction of homes, loss of incomes and livelihood and the absence of legitimate authorities. Given these unique connotations of international crimes, over the recent few years, addressing the need of justice for victims has therefore become an

important consideration in international criminal justice. When it comes to the international criminal justice reaction to international crimes and, in particular, to the role of victims, the discourse calls for a reflection on the goals and functions of the international criminal law and procedure, and their contribution to justice. The study of the regime of victims' participation and its legal and practical implications for the international criminal trial, with specific reference to the proceedings before the ICC, is an opportune area in which to gain an insight into how mechanisms of international criminal justice for securing effective and meaningful access to justice for victims can be developed.

Given the absolute novelty of victims' participation in the international criminal justice system, the adoption of Article 68(3) of the ICC Statute, conferring to victims the status of participants in their own rights (rather than that of witnesses), prompted a significant amount of dissent among academics and professionals. Victims' participation at the forefront in international criminal proceedings fuelled scholarly attention to the procedural shortcomings. A significant amount of literature has focused on highlighting the number of potential harms that victims' participation may bring to both the proceedings before ICC and the victims themselves.

With regards to the harms of victims' participation for the proceedings, the main issue is the extent to which the participation of victims beyond the traditional common law role of witnesses might lead to detrimental effects for courtroom decorum and procedure. The ICC Trial Judge Van den Wyngaert argues that

> (…) a criminal trial (…) is not the appropriate forum for victims to express their feelings, as this would detract from the serenity of the trial and would not serve a useful purpose from the perspective of a criminal proceeding.[43]

Jouet has commented that one of the key shortcomings of victims' participation has been with respect to the fairness of the proceedings, where there is a basic tension between proponents of victim-centrism and the rights of the defendants.[44] Zappalà determines that the rights of the accused are "principles of an imperative nature"[45]

[43] C. Van den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', *Case Western Reserve Journal of International Law* 44 (2011), 489.
[44] M. Jouet, 'Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court', *Saint Louis University Public Law Review* 26 (2007), 249.
[45] S. Zappalà, *supra* note 3, 140.

and, likewise other scholars such as McGonigle Leyh[46] and Chung[47], suggests that the participation of victims is a direct challenge to the principle of equality of arms, with even the mere fact that the defence must respond to additional questions and evidence.[48]

The underlying accusation that victims' participation has the potential to undermine the deliberative discourse of the proceedings is shared elsewhere. The literature extensively explains how the large number of victims involved in the situations that the Court deals with, poses a number of organizational challenges. Damaška, Sluiter and De Hemptinne argue that victims' participation in proceedings conducted in regard to situations of mass atrocities would significantly affect the expeditiousness of the proceeding, increase its complexity, and impose an unreasonable burden on both ICC Chambers and defendants.[49] In her comprehensive examination, McGonigle Leyh suggests that victims' participation has proven to be "cumbersome and problematic" and has led to the detriment of "the efficient and effective functioning of the courts".[50] These opinions are borne somewhat from the frustration of witnessing that, as Judge Van den Wyngaert reports, even before the beginning of the hearings in the ICC's *Katanga case* "for several months, more than one third of the Chamber's support staff was working on victims' applications".[51]

As previously observed, it remains for the different ICC Chambers to define the scope of victims' participatory rights and to face the procedural and practical challenges involved in implementing victims' participation schemes. The ICC judges constantly face the above described fundamental tensions, as they wrestle with providing a coherent approach to victim participation, when they interpret and apply

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[46] B. McGonigle Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls', *International Criminal Law Review* 12 (2012), 375.
[47] C. H. Chung, Victim's Participation at the International Criminal Court: Are Concessions if the Court Clouding Promise', *Northwestern Journal of Human Rights* 6(3) (2007), 461.
[48] S. Zappalà, *supra* note 3, 150.
[49] A. Zahar, & G. Sluiter, *International Criminal Law: A Critical Introduction*, Oxford: Oxford University Press (2008), 75; B. McGonigle Leyh, '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(63) (2009), 140; J. De Hemptinne, & F. Rindi, 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings', *Journal of International Criminal Justice* 4(2) (2006), 348; C. H. Chung, *supra* note 47, 461, 497; M. Damaška, 'Problematic Features of International Criminal Procedure', *The Oxford Companion to International Criminal Justice* (2009), 178.
[50] B. McGonigle Leyh, *supra* note 46, 397.
[51] C. Van den Wyngaert, *supra* note 43, 493.

the provisions for victims' participation. In the short lifespan of the ICC, different trial chambers have conducted victim participation in different ways. For instance, in the *Lubanga* case (which will be object of further analysis in chapter VII), the first decision interpreting victims' participation, issued by Pre-Trial Chamber I, found that Article 68(3) of the Rome Statute applies to both "situations" and "cases", meaning that victims would be allowed to participate during the investigation stage before a case is opened against an accused.[52] The decision was later overruled by the Appeals Chamber.[53] These decisions provide useful insight into some of the main different perceptions and understandings of the scope of Article 68(3) of the Rome Statute and, more generally, of role of victims and the ways to make their participation meaningful. The lack of a clear and coherent approach to victim participation should not come as a complete surprise. Friman comments that the ICC has found it difficult to incorporate victims' rights, with the law often taking a back-seat to personal opinion when ruling on important issues.[54] In her interviews with staff of the ICC, Wemmers supports Friman's contentions, as she found that key figures within the Court had different views, perspectives and attitudes towards victims' participation, due to the respondents' role at the Court as well as the legal traditions they belong to (e.g. common law, civil law).[55]

These shortcomings raise the spectre that victim participation may be leading to a number of unintended consequences for victims themselves in criminal proceedings. The different interpretations of the Chambers have created the impression of a confused system and Solange questions "whether this complex and, at times inconsistent, system of victim participation will remain a meaningful and workable system".[56] The key concern for Mohan, and other scholars such as

[52] *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Case No. ICC-01/04, Pre-Trial Chamber I, 17 January 2006.
[53] *The 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, Appeals Chamber, 11 July 2008, Doc. n. ICC-01/04-01/06-1432.
[54] H. Friman, 'The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?', *Leiden Journal of International Law* 22 (2009), 499.
[55] J. A. Wemmers, 'Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate', *Leiden Journal of International Law* 23(3) (2010).
[56] M. Solange, 'Victim Participation at the ICC for Victims of Gender-Based Crimes: A Conflict of Interest?', *Cardozo Journal of International Law* 21 (2013), 628.

SáCouto,[57] Trumbull IV,[58] and Skjelsbæk,[59] is the disempowering effect that the lack of harmonization by the various chambers within the ICC might have on victims of gross violations of human rights, posing a potential risk for their participation to become a mere "rhetorical devise"[60] with the means of its implementation acting to negate its very purpose.

This thesis endeavours to take account of the complexity of the regime of participation for victims of mass atrocities in proceedings before the ICC to investigate how international criminal justice can provide effective responses to the implementation of victims' procedural rights, enshrined in Article 68(3) of the Rome Statute and the related RPE. This study's argument is that the above analysed contradictions and anomalies of the system of victims' participation are such that a great deal of rethinking is needed on essential questions regarding the goals and functions of international criminal law and procedure. The author maintains that the goals of international criminal justice are neither contradictory nor necessarily indicative of a system unconcerned with victims.

This goes back to the understanding of the main purpose behind the entire enterprise of international criminal justice. Research on the application of domestic criminal law models in prosecuting extraordinary crimes of mass violence indicates that there is a gap between practices of criminal prosecution and punishment and their assumed penological goals of retribution and deterrence. Drumbl[61] and Amann[62] express scepticism about the ability of the international criminal justice to serve retributive ends. Their criticisms largely focus on the ICC's selectivity of prosecutions, which limits the amount of retribution it can exact, and on the very serious nature of the crimes that stretches the notion of proportionality, making difficulty to inflict a proportionate punishment for atrocities committed.[63] Additionally, Drumbl found little evidence in support of the rationale for general

[57] S. SáCouto, 'Victim Participation at the International Criminal Court the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?', *Michigan Journal of Gender & Law* 18 (2012), 350.
[58] C. P. Trumbull IV, *supra* note 5, 806.
[59] See I. Skjelsbæk, *supra* note 6.
[60] M. Mohan, 'The Messaging Effect: Eliciting Credible Historical Evidence from Victims of Mass Crimes', *2008 Asian Business & Rule of Law Initiative* (2012), 183.
[61] M. A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press (2007), 151.
[62] D. M. Amann, 'Group Mentality, Expressivism, and Genocide', *International Criminal Law Review* 2(2) (2002), 116.
[63] *Ibidem*; M. A. Drumbl, *supra* note 61, 151.

deterrence of future crimes as a result of punishment, with violence having noticeably recurred in several cases following criminal prosecutions.[64] Likewise, Sloane argues that transposition to international criminal law of the standard justifications for punishment in national law proves deeply problematic in large part because the nature of the crimes addressed by it, and the high selectivity of the prosecution.[65] These differences tend to compromise the coherence or efficacy of conventional retributive and deterrent justifications for punishment.[66]

Much of the discourse around victims' participation schemes at the ICC engages the claim that participatory models introduce restorative justice principles and practices into the criminal justice procedure.[67] Wemmers[68] and Combs[69] suggested, the ICC marks something of a shift away from purely retributive international criminal justice, towards a more expansive model that incorporates elements of restorative justice. According to Findlay, the shortcomings of the retributive justice model mean that the very legitimacy of international criminal justice depends upon a "victim constituency" being centrally recognised, meaning that ultimately, criminal justice has no choice but to embrace restorative practices.[70] However, there is no consensus on these claims. Experts, including McGonigle Leyh, defiantly state that the victim participation scheme at the ICC is not the same as a restorative justice process, and that victims cannot, and do not, experience it as such.[71] Luke Moffett argues that, while the Court can be more victim-orientated with the inclusion of provisions for victims' participation, the ICC should maintain its

[64] M. A. Drumbl, *supra* note 61, 169-170.
[65] R. D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', *Stanford Journal of International Law* 43 (2007), 72-73.
[66] *Idem*, 50-51.
[67] M. Findlay & R. Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process*, Routledge (2005), 275; S. A. Fernández de Gurmendi & H. Friman, 'The Rules of Procedure and Evidence of the International Criminal Court', *Yearbook of International Humanitarian Law* 3(2000), 312.
[68] J. A. Wemmers, *supra* note 55, 630.
[69] N. A. Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach*, Stanford University Press (2007), 141.
[70] M. Findlay, 'Activating a Victim Constituency in International Criminal Justice', *International Journal of Transnational Justice* 3 (2009), 203.
[71] B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, Intersentia (2011), 358.

core retributive goal and remain focused on prosecuting and punishing perpetrators.[72] Similarly, Sergey Vasiliev argues that the ICC should free itself from the "restorative complex".[73]

The thesis advances that combating impunity by prosecuting the atrocities is a purpose clearly laid down in the Preamble of the ICC Statute, but providing a platform for framing the narrative of the atrocities committed, promoting shared moral values and the recognition of redress for the victims may be even more important objectives. With the latter approach, which is also reflected in the Preamble, the active involvement of the victims comes to the forefront. In this perspective, this study points towards the potential for international criminal justice system to succeed by shifting the emphasis to the expressivist approach to the criminal trial. In light of the shortcomings of the retributive, deterrent and restorative models of criminal justice, scholars investigating the role and purpose of international criminal justice have turned to expressivism as a key rationale and justification for international criminal law. This is not to say that the ICC should ignore the other goals discussed above. To be clear, the author does not argue that retribution, deterrence, and restorative justice are irrelevant as rationales for ICC action. On the contrary, each of these theories helps to justify the operation of the ICC, but this thesis advances the argument that the ICC should aim primarily to achieve the expressivist model of criminal justice. The expressivist model of international criminal justice cannot completely supplant the prosecution and punishment of those responsible for grave atrocities. Insofar as retributive, deterrent and restorative justifications of criminal justice remain plausible, it is largely because of the expressive dimension of the international criminal justice system.

The growing body of literature on expressivist model of international criminal justice explains that expressivism is not only concerned with the punishment, but also with the trial, where all the acts and perspectives of the different actors that get voiced throughout proceedings on the international stage that

[72] L. Moffett, 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court', *Criminal Law Forum* Vol. 26(2) (2015), 63-64.
[73] S. Vasiliev, 'Victim Participation Revisited: What the ICC Is Learning About Itself', in C. Stahn, *The Law and Practice of the International Criminal Court*, Oxford University Press (2015), 64.

the court provides.[74] Drumbl[75] and Damaška[76] see the international criminal justice primarily as bearing a normative, didactic endeavour, since the trial is conceived as a site for impacting on present and future societal understandings of mass violence, promoting a particular structuring of thought. According to Luban,[77] deGuzman,[78] and Glasius and Meijers,[79] trials can function as communicative institutions in the post-conflict societies by conveying disavowal about the moral unacceptability of atrocity, narrating an official history of past violence, and reinforcing social norms of respect for the rule of law. More recently, Corrias and Gordon look at the way in which international criminal tribunals, notably the ICTY and the ICC, adjudicate in a select number of cases and argue that the international criminal justice system is engaged in the shaping of an expansive political order, given its potential to confirm and consolidate shared beliefs and declared norms.[80] Mohamed builds on the theory of "aspirational expressivism" to make the normative claim that courts can be more than forums for condemning the world's horrors, as the proceedings can be sites of storytelling, shaping beliefs about the way individuals ought to behave.[81] Houge asserts that expressivism shifts "from a focus on moral and legal facts expressed through judgment and punishment, to stories and explanations expressed throughout the legal process."[82] In line with the expressivist approach to international criminal justice, by means of public hearings and transcripts, the international criminal trial

[74] R. D. Sloane, *supra* note 65, 85; M. Damaška, 'What Is the Point of International Criminal Justice?', *Chicago-Kent Law Review* 83(1) (2007), 353; D. M. Amann, *supra* note 62, 85.
[75] M. A. Drumbl, *supra* note 61, 17.
[76] M. Damaška, *supra* note 74, 345.
[77] D. J. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', *Georgetown Law Faculty Working Papers* (2008), 9. Available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1069&context=fwps_papers.
[78] M. M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', *Michigan Journal of International Law*, 33(2) (2012), 316.
[79] T. Meijers & M. Glasius, 'Expression of Justice or Political Trial? Discursive Battles in the Karadžić Case', *Human Rights Quarterly* 35(3) (2013), 72; T. Meijers, & M. Glasius, 'Trials as Messages of Justice: What Should Be Expected of International Criminal Courts?', *Ethics & International Affairs* 30(4) (2016), 441.
[80] L. D. Corrias & G. M. Gordon, 'Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public', *Journal of International Criminal Justice 13*(1) (2015), 112.
[81] S. Mohamed, 'Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law', *Yale Law Journal* 124 (2015), 1676-1677.
[82] A. B. Houge, 'Narrative Expressivism: A Criminological Approach to the Expressive Function of International Criminal Justice', *Criminology & Criminal Justice* (2018), 7.

"becomes a public theatre of different and contesting ideas – a place to test and rename, pronounce and project, and also, establish history about mass harms."[83]

It is interesting that, while the above observations show that literature exists in the field of international criminal law regarding the ability of the ICC to function as site of generation and reinforcement of didactive message, the potential for victims' participation mechanism to play a similar role in the construction of social values in the post-conflict environment is underappreciated in international criminal justice scholarship. Scholars like deGuzman[84] and Drumbl[85] advance the need of an expressivist approach to the selection of the cases for prosecution before the ICC. Specifically, deGuzman argues that prosecutors and judges, when deciding whether to investigate and prosecute situations and cases, should aim primarily to maximize the Court's expressive impact, because only an expressivist agenda can stimulate a didactive process through which social norms and values are expressed.[86] McCarthy engages with the implications of expressivism for victims of gross violations of human rights, but his analysis focuses on the expressivist approach as a basis exclusively with regards to the system of reparations for victims at the ICC. He suggests that expressivism is a meaningful paradigm of international criminal justice for understanding that reparations for victims (as the punishment of those who commit grave crimes under international law) can serve the purpose of giving expression to social norms and values, by "providing a measure of vindication for victims and denunciation of the barbarities in question."[87]

The present research is therefore intended to make contributions to the literature on victims' participation in international criminal justice, with particular reference to the ICC mechanism of justice, by advancing the idea that the expressivist approach to the international criminal trial is a vehicle for effectively tailoring a meaningful victims' participation scheme at the ICC.

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[83] A. B. Houge, *supra* note 82, 7. See also A. B. Houge, 'Re-presentations of Defendant Perpetrators in Sexual War Violence Cases Before International and Military Criminal Courts', *British Journal of Criminology* 56 (2016).
[84] M. M. deGuzman, *supra* note 78, 319.
[85] M. A. Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law', *George Washington Law Review* (2007).
[86] M. M. deGuzman, *supra* note 78, 319. See also D. M. Amann, *supra* note 62.
[87] C. McCarthy, *supra* note 36, 368.

This thesis considers that the ICC has set an important standard in international criminal law by ensuring effective victim participation. Yet, as outlined above, serious concerns exist as to whether victims should be allowed to participate and whether such participation is in the interests of justice, a fair and efficient trial. The author submits that assessing victims' participation cannot be done superficially. It necessarily involves investigating the object and purpose of the inclusion of victims' participation provisions in the Rome Statute. This thesis contributes to such discussion by assessing the potential benefits that can be drawn from victims' participation for the ICC and its proceedings. The author endorses the arguments of proponents of victims' participation argued that recognition of participatory rights for victims represents a huge victory for international criminal justice. To begin with, victims' participation in proceedings before the ICC can make the international criminal justice system more meaningful to directly victimised populations by fostering a sense of involvement in proceedings and by facilitating entry and granting members a voice there.[88] Granting participation to victims in proceedings may preclude them from "taking justice in their own hands" and end the cycle of violence.[89] Victims' participation can also contribute towards bringing criminals to justice. They are able to provide a perspective that only those who suffered these atrocities can give and "their attendance in person at the trial may help in establishing the truth."[90] Indeed, crimes were committed not only against the international community, but mainly against people, namely victims.[91]

This contribution reflects on to how and why international criminal trials may be expected to contribute to the goal of getting the perspective of the victims voiced throughout the proceedings on the international stage that the ICC provides. In doing

[88] M. A. Drumbl, *supra* note 61, 174; C. L. Sriram, *Globalizing Justice for Mass Atrocities: A Revolution in Accountability*, Routledge (2013); D. Cohen, 'Hybrid Justice in East Timor, Sierra Leone, and Cambodia: Lessons Learned and Prospects for the Future', *Stanford Journal of International Law* 43 (2007); D. Donat-Cattin, 'Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings', in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed. München: C.H. Beck (2008); M. Findlay, *supra* note 70; K. Boon, 'Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent', *Columbia Human Rights Law Review*, 32(3); C. Jorda & J. de Hemptinne, *supra* note 40.

[89] S. Garkawe, *supra* note 25, 349-350.

[90] C. Jorda & J. de Hemptinne, *supra* note 40, 1388.

[91] M. Cohen, 'Victims' Participation Rights within the International Criminal Court: A Critical Overview', *Denver Journal of International Law and Policy* 37(2008), 353.

so, it draws on the expressivist theory. Expressivism in the version presented in this thesis focuses on trial proceedings, rather than punishment. It takes inspiration from the theory of expressivism that holds that international criminal trials can be the *forum* for sending a didactic message, which disseminate norms and values to audiences.[92] The thesis elaborates this claim made for international criminal trials by expressivism, as the author's contention is that international criminal trials begin to send their messages to audiences long before the verdict is out, and, therefore, attention should be given to messaging not only by the prosecution and judges, but also by the victims. This contribution considers that through the expressivist lens the notion of victim participation implies providing individuals a channel to express their independent voice and bring another dimension to the proceedings, the one of suffering.

In terms of the ICC proceedings, the arguments of the victims may constitute a narrative and contribute to, or challenge, the broader arguments of the parties, shaping parts of the larger narratives constructed over time during proceedings. At the ICC, like the ICTY and ICTR, victims' oral evidence makes up the primary evidence base and, as such, their statements constitute the primary source for the historical record and the ascertainment of the truth, that trials produce. The narratives of the victims about charged heinous events, their causes and consequences, should be read through the expressivist approach as constitutive parts of discursive battles about how mass violence is best understood, explained, and responded to. In the particular context of mass violence, the materialities of the victims' sufferings that produce responses such as international criminal trials, matter because the stories of victims about harms suffered in the past, can primarily motivate, maintain, or restrain harmful action in the future.

This study suggests that the adoption of the expressivist theoretical approach to the international criminal justice system has important implications for the model of international criminal procedure of the ICC. As above remarked, one of the greatest practical challenges the ICC faces is the problem rising from the differences

[92] In this regard see: D. M. Amann, 'Message as Medium in Sierra Leone', *ILSA Journal of International and Comparative Law* 7 (2000); M. A. Drumbl, *supra* note 61; M. Glasius, 'It Sends a Message. Liberian Opinion Leaders' Responses to the Trial of Charles Taylor', *Journal of International Criminal Justice* 13(3) (2015); T. Meijers, & M. Glasius, *supra* note 79; A. B. Houge, *supra* note 82.

between the civil law and common law traditions, in particular in relation to the role of victims' participatory rights. The idea of a more harmonized procedural system of the ICC was not a novelty in the academic debate. Judge Antonio Cassese,[93] Safferling[94] and Ambos[95] affirm that international criminal procedure should not uphold the philosophy behind one of the two legal systems to the exclusion of the other; rather, it should combine and fuse them in a fair manner. Nevertheless, this research provides a unique theoretical contribution to the academic debate on the need to harmonise the different legal traditions coexisting in the international criminal procedure of the ICC. The thesis introduces the idea that the narrative and truth-telling capacities of the trial, key elements to achieving the pedagogical aims of expressivism, limit the adversarial nature of criminal trials and contribute to bridge the gap between the common law and civil law systems of criminal justice. Specifically, it develops the concept of the common grammar, which not only entails common technical rules, but by means of the expressivist approach to the trial provides the guiding principles that embody a synthesis between adversarial and inquisitorial procedural models.

The overall motivation of this thesis is grounded in the conviction that rationale for victims' participation is linked to the nature of the judicial mandate of the ICC. As previously pointed out, retributive, deterrent and restorative criminal justice systems only partially meet the overall goal of victims' participation, as recognised by the provisions of the Statute and the RPE, which empower victims to express their views and concerns in proceedings. This thesis therefore aims to present a deep understanding of a new paradigm for the international criminal justice system, namely the expressivist one, which fulfils the purposes of provisions on victims' participation. The study is carried out on the basis of the growing awareness that having a coherent understanding of the fundamental questions of the rationale behind

[93] *The Prosecutor v. Drazen Erdemović*, Separate and Dissenting Opinion of Judge Cassese, Appeals Chamber, 7 October 1997, § 4. Available at: http://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf

[94] Safferling, 'The Role of the Victim in the Criminal Process - A Paradigm Shift in National German and International Law?', *International Criminal Law Review* 11(2) (2011), 212.

[95] K. Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?', *International Criminal Law Review* 3(1) (2003), 34-35.

victims' participatory rights can potentially form the basis for the facilitation and harmonization of different conceptions of victims' participation system.

1.4. Research questions.

The central research question to be addressed in this thesis is:

Considering the *sui generis* context and nature of the international criminal justice system, what model of criminal justice can better achieve the purposes of the norms of the Rome Statute and its RPE on victims' participation as well as the goals ascribed to the ICC and clarify the proper scope and content of victims' participatory rights before the ICC?

This necessitates two secondary questions:

1. Does the case law of the ICC on provisions on victims' participation of the Rome Statute and its RPE present values and elements that can be interpreted as identifying the expressivist paradigm of international criminal justice?
2. How should the implementation of the rights of the defendant, the truth-finding mandate of the judges and the Prosecutor's law-enforcement function play out in order to fairly balance these rights with the participatory rights of victims?

1.5. Research objectives.

The following are, therefore, the objectives of this research:

1. to determine the proper scope and content of victims' participation in international criminal proceedings before the ICC;
2. to identify the framework of criminal justice that best fulfils the aims and goals of the international criminal justice system and meets the needs of justice for victims, as acknowledged by the statutory provisions on victims' participation;
3. to establish a common language that reshapes the roles and rights of victims, defendants, judges and the prosecutor, going beyond the conflicting languages of the adversarial and inquisitorial systems, and allowing for all the provisions to coherently fit together;

1.6. Methodology.

In order to answer the research questions in section four of the present chapter, it is imperative that the methods and methodology utilised stand up to scrutiny. It is often difficult to categorise a thesis, particularly one on the subject of law under any specific headings, as many works of this type involve a hybrid of methods.[96] Henn *et al.* make the important distinction between "method" and "methodology".[97] They argue that

> (…) method refers to the range of techniques that are available to us to collect evidence about the social world. Methodology, however, concerns the research strategy as a whole.[98]

This is important as the research strategy of this thesis encompasses qualitative research of a doctrinal and comparative nature. Qualitative research is defined as "the interpretative study of a specified issue or problem in which the researcher is central to the sense that is made".[99] Specifically, this thesis is a qualitative study of primary and secondary sources of international law. The primary sources are the UN treaties, regional human rights treaties and the procedural rules or statutes and case law of the ICTY, ICTR and ICC mentioned in the preceding sections.[100] The secondary sources are research articles and monographs.

The qualitative research begins with a doctrinal methodology. Doctrinal research has been defined as "a detailed and highly technical commentary upon, and systematic exposition of, the context of legal doctrine".[101] This approach is acceptable as international criminal law, as well as domestic criminal law and international human rights law are largely based on the interpretation of statutes, regulations and cases. However, it is important to note that even though the study of law, in this case international criminal law, is based on logical conclusions, these conclusions are not an exact science. Instead they are formed of judgment, which can

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[96] M. Salter and J. Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research,* Pearson Education (2007), 31.
[97] M. Henn, M. Weinstein and N. Foard, *A Critical Introduction to Social Research*, Sage (2006), 10.
[98] *Ibidem*.
[99] I. Parker, 'Qualitative Research', in P. Banister, E. Burman, I. Parker, M. Taylor, C. Tindall (eds), *Qualitative Methods in Psychology: A Research Guide*, Open University Press (1994), 2.
[100] See sections 1.3. and 1.4. of the present chapter.
[101] M. Salter and J. Mason, *supra* note 96, 49.

be influenced by other factors, such as history, culture, politics and economics.[102] Vick, while describing these overlapping factors as "interdisciplinarity", meaning a convergence of different academic areas of study,[103] notes that "interdisciplinarians perceive doctrinalists to be intellectually rigid, inflexible, and inward looking."[104] The thesis does not aim to be rigid, rather its primary aim is to provide a thorough, in-depth examination of the victims' participation regime at the ICC to develop a new conceptualization model for participation in the proceedings through the adoption of the expressivist framework for the international criminal justice system.

The examination of the victims' participation scheme adopted by the Statute and RPE of the ICC, which have been drafted by delegations from different State-parties, each with its own legal traditions, inevitably lead the researcher to look beyond the black letter law. For example, when examining the wording of Article 68(3) of the ICC Statute as well the decision of the ICC Chambers on the interpretation of the said article, it has been necessary to look at domestic systems of law, namely common law and civil law traditions, to see how this victims' participation is defined, its historical roots, and what social and economic factors may have led to a specific interpretation. However, that is not to say that the thesis is interdisciplinary, it is not seeking to answer the research questions from a socio-legal perspective, instead the researcher is using a set of interpretative tools and methods to bring order and to assess a particular area of the law.[105] Once there is a clear and comprehensive system for assessment in place, the researcher will provide recommendations based on the findings.[106] Therefore, this thesis does not encompass any strong interdisciplinary aspects to the research as this would expand the parameters of the thesis beyond the its intended scope.[107] Instead the thesis is firmly doctrinal in its methodology as it entails a critical, qualitative analysis of legal materials that supports a hypothesis.[108]

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[102] O. W. Holmes Jr, 'The Path of the Law', *Harvard Law Review* 10(8) (1897), 457, 465-466.
[103] D. W. Vick, 'Interdisciplinarity and the Discipline of Law', *Journal of Law and Society* 31(2) (2004), 163-164.
[104] *Idem*, 164.
[105] D. W. Vick, *supra* note 103, 165.
[106] *Ibidem*.
[107] T. Hutchinson & N. Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research', *Deakin Law Review* 17(1) (2012), 83-84.
[108] *Idem*, 118.

This approach involves identifying certain legal mechanism of victims' participation. For example, in chapter I, relevant provisions to be examined are identified, specifically those that deal with victims' participation scheme adopted by the Statute and RPE of the ICC and the connections or disjunctions with the historical evolution of victims' role in the criminal justice systems of Roman law, English law and the first institutions of international criminal justice, namely the International Military Tribunal at Nuremberg, the ICTY and ICTR. With the same spirit, chapter II analyses the broad framework of the emancipation of crime victims, drawn by victimology and the victims' rights movement. These include: how the mechanisms of victims' participation are established, exercised and what the consequences of the constraints of victims' participatory rights. Via examination of the cases, the wording and interpretation of provisions and procedural law, as well as existing literature, this approach enables the researcher to critically analyse the meanings and implications of these rules and legal systems as well as the principles which underpin them. This enables the thesis to identify ambiguities, criticisms and solutions which may exist within the different approach to victims' participation in the criminal process.

The main sources of material for doctrinal research will exclusively refer to sources of qualitative legal research. This includes an interpretation of the Statutes, RPE, relevant case law of the ICC, ICTY and ICTR, UN Security Council resolutions, UN General Assembly resolutions and principles and resolutions on the one hand, and an analysis of secondary sources such as books and journal articles, including reports carried out by non-governmental organizations (NGO), such as Amnesty International, Human Rights Watch, REDRESS and International Federation for Human Rights on the other. It is necessary to look at the wording and legislative history of provisions of the ICC Statute and RPE. Research into the Rome Statute and RPE of the ICC is very accessible, most if not all of the *travaux préparatoires* is available online at website of the ICC.[109] In examining the legislative history of the provisions of the ICC statutes and RPE, the thesis can identify the various debates that took place amongst delegates when they were drafted.

[109] See: https://www.legal-tools.org/en/search/.

However, this is not sufficient to identify the general principles that underpins the regime of victims' participation. Therefore, it is necessary to examine the historical evolution of the Roman and English legal systems and the victimological approach in order to determine how various systems interpret the rights of victims in criminal proceedings and whether or not, and in what way, they reconcile such rights with conflicting legal positions (e.g. the right of the defendant to a fair trial). The purpose of examining existing literature on the subject of victims' participatory rights and fundamental developments in the domestic criminal justice systems and in the victimological approach is to identify similarities and differences that may exist in the theses and the findings of other scholars. Additionally, it demonstrates a wider understanding of the relevant issues on victims' participation and helps to classify the various issues within clearly defined parameters. The thesis will be able to extract the relevant information and apply it to the regime of victims' participation, as regulated in the provisions of the ICC Statute, with the aim of clarifying its meanings. This will be gathered from a variety of sources including textbooks, refereed journals, conference papers, legislative history, reports and other professional publications.

There are certain advantages of using the doctrinal approach to examine this subject area. As a component of this thesis is to determine the meaning of particular provisions of the ICC Statute and RPE on victims' participation and its underlying principles, a doctrinal approach can provide a sound structural basis from which the thesis can proceed. Specifically, it provides continuity and coherence on the subject matter. And yet this work also incorporates a comparative approach, since it engages in "an intellectual activity with law as its object and the comparison as its process."[110] Comparative analysis is used, where appropriate, as a method of research rather than as a methodology. When incorporating a comparative approach in a thesis it is important to identify why the researcher has chosen this approach and how it can be justified as a legitimate method. It is necessary to identify the benefits that can be obtained from comparing laws from different jurisdictions. For example, it can be to identify common principles from different jurisdictions or to compare

[110] K. Zweigert, H. Kötz & T. Weir, *Introduction to Comparative Law* (3rd ed.), Oxford: Clarendon Press (1998), 2. See also: Glanert, S., 'Method?', in P. G. Monateri (Ed.), *Methods of Comparative Law*, Edward Elgar Publishing (2012) 61-81.

legal rules from different jurisdictions to find the best solution.[111] Collins argues that seeking to use comparative law as a means of transplanting that law into another legal system is not always effective.[112] This is supported by Kahn-Freund who argued that legal rules are a product of historical and social development of that country and that a direct transplant of a rule or body of law may not have the same measure of success as it did in its home jurisdiction.[113] In light of these criticisms, Collins proposes that the aim of comparative law should be to improve and understand one's own domestic legal system by analysing how foreign jurisdictions have dealt with the same problem.[114]

With this in mind, the comparative method has been adopted so that the thesis does not focus the research questions on comparing legal systems; rather, comparative analysis is undertaken as a method for three specific purposes related to the overall aim of the thesis. First, the jurisprudence of regional human rights bodies, namely the IACtHR and ECtHR, regarding victims' right to access to and participation in criminal proceedings is compared in order to construct a standard of victims' participatory rights that should guide the international tribunals. The comparative method is adopted as a means of assessing how the normative human rights framework and the decisions by the IACtHR and ECtHR interpret the rights of victims in criminal proceedings and whether or not, and in what way, they convey a system of values that respond to the expressivist framework. Secondly, given that this study aims to develop a new conceptualization of model for victims' participation through the expressivist approach, in the selected case law of the ICC, the different decisions by the ICC Chambers are compared with a view to assessing the practical implication of the application of such framework on victims' participatory rights. With regards to the use of the expressivist model as a constructive reference and background framework for the international criminal justice system, the ICC case law under examination also allows an in-depth analysis of the specific issues of victim participation throughout the proceedings, with the

[111] H. Collins, 'Methods and Aims of Comparative Contract Law', *Oxford Journal of Legal Studies* 11(3) (1991), 396.
[112] *Idem*, 397.
[113] O. Kahn-Freund, 'On Uses and Misuses of Comparative Law', *The Modern Law Review 37*(1) (1974), 1.
[114] H. Collins, *supra* note 111, 399.

intention of investigating whether and to what extent the expressivist approach provides the best medium to create a synthesis between adversarial and inquisitorial traditions. Lastly, as earlier pointed out, the theories of criminal justice provide an important backdrop for understanding the role of victims in criminal proceedings, therefore, the comparative method is used to understand the reason why the solutions adopted at domestic level by means of the retributive, the utilitarian, the restorative paradigms seem not to function in the international criminal justice system.

With regards to the jurisprudence of the regional human rights courts, the author's research includes a range of cases of the ECtHR, advisory opinions and judgments of the IACtHR. The selected material from the international criminal tribunals includes decisions and judgments of the ICTY and the ICTR. As mentioned before, primary sources of legislation, i.e. the Rome Statute and all sources of legal texts stemming from it will be taken into consideration as well as the Statutes and RPE of the *ad hoc* tribunals. The thesis also uses qualitative data for its theory building. For example, secondary sources such as monographs and journal articles will be used to the extent that they can show how retributive, utilitarian, restorative and expressivist frameworks explain criminal justice systems and their purpose and, specifically, shape the rights of victims in the criminal proceedings. By virtue of this analysis, the thesis aims to illustrate a more effective and consistent way in which the procedure at the ICC could be developed in the future.

In conclusion, this study adopts a doctrinal methodology, which carries with it aspects of interpretation, systematization and argumentation techniques.[115] This thesis, in its attempt to analyse the current procedural role afforded to victims in proceedings before the ICC, seeks to identify what shape the victims' participation scheme should take, rather than merely explaining the existing paradigm. Therefore, the study is grounded in the examination of conflicting normative positions and arguments.

[115] J. M. Smits, 'Redefining Normative Legal Science: Towards an Argumentative Discipline', in A. P. M. Coomans, F. Grunfeld & M. T. Kamminga, *Methods of Human Rights Research*, Maastricht Series in Human Rights (2009), 45.

1.7. Research scope and limitations.

In this study the term "victim" is used to refer to individuals who have suffered direct and indirect physical, material, mental or emotional harm as the result of a crime.[116] It is important to stress that this study does not discuss the need for victims of gross violations of human rights and mechanisms to respond to these needs from the standpoint of victims or from victims' perspectives. This thesis aims to frame a model of participation for victims, which, through the conceptual tools of the expressivist framework, can fulfil the aims of specific provisions on victims' participation in the ICC Statute and RPE. This study, therefore, does not address issues pertaining to implementation of the regime of victims' participation within the context of truth and reconciliation commissions.

The subject of victims' rights in international criminal law is too broad to be exhaustively examined in this study. Victims' participation refers to specific aspects of participation within the criminal process. The concept of victim participation in criminal proceedings is not easily defined. However, it has been described as victims being able to directly address the court, being listened to, independently from the defence and the prosecution, or being treated with dignity and respect.[117] This study therefore focuses on victims' participatory rights, without discussing the closely related rights of protection and reparation. This work discusses three main victims' participatory rights in criminal procedure: first, the right of victims to participate at the investigation and pre-trial stages; second, the right of victims to express views and concerns at the trial stage and, third, the possibility for victims to be requested by Chambers to present evidence and to challenge the admissibility and relevance of evidence submitted by the different parties.

Consequently, victims' participation in compliance with the rights identified in this study needs to be set apart from another instance in which victims are involved in criminal proceedings, namely, when they are serving merely as witnesses. The distinction should be clear, since when victims participate in criminal

[116] Rule 85(a) of the ICC Rules of Procedure and Evidence.
[117] J. Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation', *Journal of International Law and Society* 32(2005), 25; I. Edwards, *supra* note 42, 973; M. Heikkilä, *International Criminal Tribunals and Victims of Crime: A Study of the Status Of Victims before International Criminal Tribunals and of Factors Affecting This Status*, Turku: Institute for Human Rights Åbo Akademi University (2004), 141; J. C. Ochoa, *supra* note 31, 7.

proceedings as *per* their participatory rights identified in this thesis, they enjoy an independent initiative to participate in these proceedings. Once victims decide to do so, pursuant to the right to be heard, they cannot only give their versions of events, but they can also express their views on the clarification of facts and the identification and prosecution of the perpetrator. Conversely, when victims serve as witnesses, they are not allowed to take the initiative to speak, as they are limited to answering questions put forth by opposing parties, namely the prosecution and the defence, as well as judges.

While the author acknowledges truth commissions and other forms of non-criminal transitional justice are said to form a satisfactory arena for the victims of mass atrocities,[118] the author does not intend to take a position on whether other transitional justice arrangements are more suitable, nor is her intention to engage with the arguments as to why that is or is not the case. Rather, regarding international criminal justice as one of the possible forms of transitional justice and given that the victims now have a voice in proceedings before the ICC, the author wants to see what the implications are of incorporating the regime of victims' participation and into the sphere of the international criminal trial. For this reason, this study does not address issues pertaining to implementation of the regime of victims' participation within the context of truth and reconciliation commissions. The focus of this thesis is to unravel issues concerning the incorporation of victims into international criminal trials as participants in their own rights (rather than as witnesses) and how this unfolds in practice, by taking a position on the extent to which criminal trial should give victims a voice.

1.8. Structure and outline of this thesis.

This thesis is divided into eight chapters. These introductory comments represent the first chapter, which consists of contextualising the concerns of this study within the field of a fast-paced literature based around international criminal justice, and discusses the rationale, motivations and aims, as well as the objectives of the study. This chapter explains the methodological approach used to address the research

[118] For an overview on victims' participation in transitional justice mechanisms see: D. Taylor, 'Discussion Paper: Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?', April 2014. Available at: https://www.impunitywatch.org/docs/IW_Discussion_Paper_Victim_Participation1.pdf.

questions. Throughout the introduction, limitations of the study and implications for future research and practice are also discussed.

The first part of the second chapter provides an outline of victims' participation schemes, as drawn by the ICC Statute and the RPE. The intention is to illustrate that the wording of provisions on victims' participation is deliberately vague, as the drafter is not clear, in the first instance, what the aim of victims' participatory rights is, and, more generally, what theory of criminal justice best contributes to the understanding of the role of victims in criminal proceedings. Consequently, it is unclear whether victims should be considered participants in a judge-driven fact finding (inquisitorial-type) process or as participants in a party-driven fact finding (accusatorial-type) process.

The second part of this chapter undertakes an historical investigation of the role and rights of victims in domestic criminal process, which is vital for an understanding of the modern development of rights for victims in international law and procedure. The study of victims' participatory rights in domestic proceedings from the historic past until the modern era aims at demonstrating that, first, the concept of victims' procedural rights was not new, but was largely acknowledged in domestic criminal justice systems. Second, the discussion intends to confront those criticisms, typical of the common law tradition, that give victims a marginal role in criminal proceedings because they jeopardise the accused's right to a fair trial and the prosecutor's law-enforcement function. It is argued, instead, that the systematic and gradual exclusion of victims from criminal proceedings is due to a clear historical pattern characterised by sociological and political factors that have positioned victims at the margins of the criminal justice system. Finally, the chapter looks to the practices of the first international criminal tribunals, which have been strongly influenced by the adversarial system. While the Nuremberg Military Tribunal failed to address the concerns of victims, the ICTY and ICTR introduced some developments advanced by victimology, concerning in particular the modality of protection for victims-witnesses.

The third chapter is structured around two main themes. First, it offers an insight into retributive and deterrence theories of criminal justice, which represent the outcome of the historical path analysed in the previous chapter. The discussion

focuses on the nature, primary purposes, structure and procedures of the retributive and deterrent criminal justice system, with the intention of highlighting how these prevailing views affect the role given to victims in criminal proceedings. The second part of this chapter is devoted to investigating whether or not, and to what extent, victimological studies respond to calls for the better integration of victims into systems of criminal justice, and how seeking to reposition the victim has challenged traditional mechanisms of deterrence and retribution. This chapter questions whether or not the most influential victimology's approaches effectively reconfigure the balance between the judiciary, the accused and victims. It specifically looks at the two victims-based approaches developed by victimology: the rights of victims to services which address the victims' physical, psychological and material needs, and victims' procedural rights, whose nature reflects the goals and essence of the criminal process as a legal and social institution. The discussion examines whether these two victims-based approaches are effectively able to reform the criminal justice system and thereby enhance victims' procedural rights. This chapter will pay specific attention to the restorative justice mechanism in order to evaluate the degree to which it represents an effective response to the demands of victims' participation in criminal proceedings.

In chapter four, the study moves from the domestic realm to the international criminal justice system. While the previous chapter analysed retributivism, deterrence and restorative mechanisms in order to criticize the little practical impact they have on victims' participation policy-making, this chapter has a broader outlook, as it questions whether or not retributivism, deterrence and restorative justice are eligible justifications for justice within the international arena. The discussion explores normative differences between international crimes and ordinary crimes, in order to understand to what extent prevailing domestic criminal justice theories can effectively be transplanted to the field of international criminal law, and to what extent the latter should develop its own judicial method. It is argued that the peculiar and complex nature of the international criminal law paradigm raises new challenges to the meaning of justice, which require *sui generis* choices in regard to the structure and goals of the international criminal justice mechanism. The discussion offers a critical evaluation of case law by the ICTY, ICTR and ICC,

which have grounded punishment within these traditional criminal justice frameworks, and the discussion aims to expose the shortcomings in using such theories within the international criminal justice arena. The author argues that retributivism, deterrence and restorative justice are weakened by the *sui generis* nature of the international criminal justice system. Therefore, these criminal justice theories do not meet the purpose of delivery international justice, and more importantly, they are not adequate in meeting the need for justice felt by victims, as recognised by the provisions of the ICC Statute.

Chapter five contends that, given the *sui generis* nature of international criminal justice, expressivism is the most appropriate theoretical ground for the supply of the statutory aims of the Court. The expressivist account of criminal justice, which mainly focuses on the normative value of the trial, by serving didactic purposes as well as symbolic purposes and historic truth-telling, best captures the nature and priorities of international sentencing, as well as its ability to contribute to the goals ascribed to it, given the political and resource constraints that international tribunals inevitably face. Specifically, the expressivist framework fulfils the aims of statutory provisions on victims' participation. This new procedural framework does not relegate victims to the periphery of criminal justice, because expressivism, in turning the criminal proceeding into a forum for providing a narrative of events and for enunciating societal condemnation of atrocities, recognises victims' sufferings and their ability to contribute towards the shaping of a social-pedagogical message at the trial. Victims become the authoritative acknowledgment that the conduct they have been subjected to is a crime under international law, which, in virtue of its seriousness, cannot go unpunished. Once it has been clarified what model of criminal justice should inform the international criminal justice, with specific reference to the ICC, it is possible to address the practical challenges originating from the ideological and structural differences between the civil law and common law traditions, including what is considered the role of victims in terms of participatory rights. This chapter proposes that expressivism can be the mechanism used to bridge the gaps in language between civil law and common law systems of criminal justice. The analysis explores the change of the perspective of the role of judges, prosecutor and of the victims as well, introduced by common grammar within the framework of the

didactic role of the international criminal trial.

The sixth chapter examines regional human rights mechanisms, as the jurisprudence of the IACtHR and ECtHR has been central to the elaboration of victims' rights to participate in criminal proceedings. The study of case law in relation to these two regional human rights bodies on the participatory rights of victims is useful because it suggests ways to operationalise the new ICC victims' regime. The chapter reviews case law that addresses victims' participation in order to identify the rights and principles at the core of victims' participation in proceedings related to the establishment of accountability for serious human rights violations. It is maintained that the IACtHR and the ECtHR have elaborated a case law that conveys a system of values, which responds to the expressivist dimension of the criminal justice system. Specifically, the analysis of case law demonstrates that in their respective Conventions, the IACtHR and the ECtHR have interpreted the provisions related to victims' roles within the conceptual framework of the expressivist function of the trial. The analysis focuses on two basic rights of victims: the right to access justice and obtain an investigation conducted by a competent, impartial and independent authority, and the right to participate in the criminal process in order to provide a reliable historical record of events, with the intention of identifying, prosecuting and punishing the perpetrators.

The seventh chapter elaborates upon the case law of the ICC on victims' participation in proceedings, with the intention of investigating whether or not, and to what extent, the Chambers have interpreted the aims of the statutory provision on victims' participation as envisaging the expressivist framework. To fully understand the nature of victims' participation, this chapter seeks to explore to what extent the normative value of the trial (aiming at providing a narrative and its pedagogical dissemination) impacts and reshapes not only the procedural rights of victims, but also other relevant provisions, such as the well-recognised defence's right to a fair trial, the fact-finding mandate of the Court and the prosecutor's law enforcement functions. The discussion examines whether the ICC Chambers have contributed towards the development of a common language that reshapes the roles and rights of the victims, the defendant, the judges and the prosecutor, and that goes beyond the conflicting languages of the adversarial and inquisitorial systems, allowing all the

provisions to coherently fit together. This chapter explores to what extent the case law of the ICC, by empowering victims to contribute to the enhancement of the narrative at the pre-trial and trial stages, provides a model of participation capable of softening the adversarial nature of the trial, while at the same time safeguarding the principle of equality of arms for the accused. The study focuses on an analysis of three main themes: the rights of victims to participate in the investigation and pre-trial phase; victims' rights to present views and concerns at trial stage, and the Court's right to request victims to present evidence and to challenge the admissibility and relevance of evidence submitted by the parties. The chapter takes into consideration the *Prosecutor v. Thomas Lubanga Dyilo case*, the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui case* and the *Prosecutor v. Jean-Pierre Bemba Gombo case*, with the aim of highlighting whether they set up a consistent model of victims' participation or if they introduce elements which differ from each other.

Chapter eight, the conclusion, brings together all the major conclusions reached in the study about what mechanisms should be used to ensure an effective participatory rights scheme for victims in proceedings before the ICC. The chapter addresses the specific characteristics of international criminal justice which make participation in such proceedings decidedly different from participation in the domestic context, and discusses concerns and limitations arising from the adoption of a victimological approach and the existing criminal justice framework, namely retributive, deterrent and restorative models. It further addresses the central research question related to the framing of a model of participation for victims in proceedings before the ICC that fulfils the aims of the ICC Statute, with specific reference to the aims of victims' participation, by advancing the argument that to effectively tailor a meaningful victims' participation scheme, it is necessary to adopt a new criminal justice paradigm. This study emphasises that the adoption of the expressivist framework is critical for a better understanding of the purposes and nature of victims' participatory rights, but also of the *sui generis* nature of international criminal justice and specifically of the framework of the ICC, as contemplated by the ICC Statute. This study further suggests that shaping the criminal process through the expressivist framework not only addresses the needs of justice for victims, but also

provides the best basis for an understanding of how all the Statute provisions can coherently fit together, because it provides a common grammar that bridges the gap between conflicting languages of civil law and common law systems of criminal proceedings.

1.9. Research limitations and avenues for future research.

Although this research has attempted to examine mechanisms to ensure a meaningful victims' participatory rights scheme, it cannot explore all aspects related to this subject area. In fact, it is hoped that the critical analysis presented in this study regarding the nature and aims of victims' participation in proceedings before the ICC can provide new insights on avenues for future enquiry in this field of study.

Primarily, as observed in the introduction, this thesis aims at framing a model of participatory rights for victims that fulfils the intentions of the ICC Statute, with specific reference to the goals of the provisions on victims' participation. In light of those specific provisions, mainly Article 68(3) of the ICC Statute, the focus of this study lies on three themes: the right of victims to participate at the investigation and pre-trial stages; the right of victims to express views and concerns at the trial stage; and the possibility for victims to be requested by the Chambers to present evidence and to challenge the admissibility and relevance of evidence submitted by the parties. It was not possible therefore within the limits of this thesis to engage in a deep analysis of challenges pertaining to the implementation of the reparation regimes with respect to victims.[119] It also represents a landmark development of victims' right, as for the first time the Statute allows victims to seek reparations directly from

[119] On victims' right to obtain reparations see: M. C. Bassiouni, 'International Recognition of Victims' Rights', *Human Rights Law Review* 6(2) (2006); D. Shelton, *Remedies in International Human Rights Law*, Oxford University Press (2015); De Greiff, P., 'Justice and Reparations', in P. De Greiff (Ed.), *The Handbook of Reparations*, Oxford University Press (2006); C. Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations', *Leiden Journal of International Law* 15(3) (2002); C. Ferstman, & M. Goetz, 'Reparations Before the International Criminal Court: The Early Jurisprudence on Victim Participation and Its Impact on Future Reparations Proceedings', in C. Ferstman, M. Goetz, & A. Stephens (Eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems In Place And Systems In the Making*, Brill Nijhoff (2009); A. M. De Brouwer, 'Reparation to victims of sexual violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families', *Leiden Journal of International Law* 20(1) (2007); Hirst, M., 'Victims' Participation and Reparations in International Criminal Proceedings', in Sheeran, S., & Rodley, N. (Eds.), *Routledge Handbook of International Human Rights Law*. Routledge (2014).

the ICC. Both the ICTY and ICTR allowed victims to rely on their judgments and bring an action in a national court to obtain compensation.[120]

A further direction for future research identified is the exploration of a broader number of cases tried before the ICC, in order to present a more accurate picture of the practices of the ICC chamber with regard to the victims' participatory rights. That might create a fertile ground to put forwards a core set of participatory rights for victims, which should be granted to victims systematically, rather than caustically. As the ICC legal framework does not envisage a protected core of participatory rights, which always need to be ensured, the main areas of procedural activities of victim representatives can provide some insight about this potential set of victims' rights, which can enhance an overall predictability of the roles of victims, but also of judges. The right to make opening and closing statements at the confirmation of charges and trial proceedings, to access the full case index, to file written submissions, to initiate procedures, by filing applications and requests should be generally granted as mechanisms to express victims' views and concerns. Moreover, given that victims do not have the rights to present evidence and to challenge the admissibility of evidence, but they can rather be requested by the Chamber to do so, the prerogative of the Chambers requires a clarification of the full extent of the Court's powers to call for a submission of evidence *proprio motu*. The relationship between the participatory rights of victims and the truth-finding mandate of the court within the expressivist framework of the international criminal justice system would therefore be an interesting point to explore further.

[120] I. Bantekas, & L. Oette, *International Human Rights Law and Practice*, Cambridge University Press (2013), 532-533.

CHAPTER II

Victims' Rights in Criminal Proceedings: From the Past to the Present.

2.1. Introduction.

Gross violations of human rights have been, and continue to be, perpetrated in several armed conflicts witnessed in recent times as well as in peacetime. While it might have been expected that the extensive nature, seriousness and recurrence of the atrocities committed would have triggered the operation of an effective scheme of victims' participatory rights as a response to those violations, the reality seems to have been the reverse. It was only with the establishment of the International Criminal Court (hereafter ICC) in 1998 that victims of gross violations of human rights have been entitled to participate in proceedings with an autonomous standing. This is an absolute novelty, because, for the first time in international criminal proceedings, the provisions of the Rome Statute and of the Rules of Procedure and Evidence (RPE) set forward a scheme of victims' rights within the proceedings, which aim to give a voice to victims.

However, the lexis of the provisions on victims' participation of the Rome Statute and RPE tends to be imprecise and ambiguous and, as a consequence, they do not succeed in eliciting the precise scope and nature of victims' participatory rights. Neither the ICC Statute, which addresses only the general principles of victims' participation regime, nor the RPE, which should supplement the Statute's principles with more detailed procedural provisions, contribute to indisputable establishing whether victims should be considered as participants in a civil law-inquisitorial or common law-adversarial process. As result, the drafters of the Rome Statute and RPE vest the ICC judges with significant discretion over when and how victims may participate in the criminal proceedings.

The first goal of this chapter is to show that the main obstacle for the clear recognition of victims' rights in the proceedings was represented by failure of the drafter of the Rome Statute and RPE to find a common ground between the adversarial and inquisitorial procedural models. In particular, this chapter will

demonstrate that the drafters inadequately addressed the ingrained reluctance of those advocating an adversarial system for the ICC, who feared that permitting victims' participation in the proceedings could threaten the accused's right to a fair trial, lower the prosecution's burden of proof, interfere with the Prosecutor's strategies and impede the Chamber's ability to effectively manage the proceedings.

To put the new regime of victims' participation in historical perspective, this chapter undertakes an historical investigation of the role of victims in the criminal trial at the domestic level with a twofold goal. First the historical perspective on victims' participatory rights seeks to demonstrate that the rights and powers pertaining to the prosecution can be traced back to the early procedural right of the victim. In fact, even though it might seem a relatively new procedural development, the principle that victims, who have suffered personal harm or material injury as a result of the perpetrator's criminal conduct, were entitled to actively participate in the criminal proceedings is in fact quite an ancient one. This chapter will illustrate that historically victims were in the forefront at participating in criminal proceeding. Since the settlement of the Roman Republic and the Anglo-Saxon communities, which were characterised by the central position occupied by the family or tribe within the political and administrative systems, the justice system acknowledged the general principle that the system must confer to victims' participatory rights to redress the wrong. The chapter focuses on the historical evolution of the English and Roman systems of law as they are the expression of two very distinctive ideological paradigms of criminal law and procedure, respectively the common law and civil law models. Specifically, Roman law represents the historical framework to so many modern aspects of the civil law tradition and provides an invaluable grounding for studying the complex evolution of victims' rights within the criminal justice system. It is central to investigate the English and Roman systems of law in order to show that, through the centuries, both systems had to confront with similar socio-political developments, which affected the structure and operation of their respective criminal justice models, but nevertheless, those traditions have accommodated victims' procedural rights in a different way. The analysis of the historical evolutions of these two systems of law illustrates that both Roman and English law had to face the challenges of operating in a more and more complex society, which, gradually

evolving in national State, urged for a centralized system of the administration of justice in the hands of the State's authorities. In both these systems, the path of victims' rights was influence by those factors and, indeed, the evolution of victims' role in the Roman criminal procedure has few points of convergence with the English law. However, this chapter intends to illustrate that, despite the Roman and English historical socio-political backgrounds present some similarities, the way in which English law and Roman law have constructed victims' roles clearly diverges, as in the first victims cannot act as parties in their own right, while in the latter victims can enjoy participatory rights, under the concept of civil parties.

The second goal of the historical analysis is to confront those criticisms raised by the advocates of the adversarial system that seek to silence victims, claiming that victims should be play a marginal role in the criminal proceeding because they jeopardise the accused's right to a fair trial, interfere with the Prosecutor's strategies and the Chamber's effective management of the proceedings. The discussion intends to demonstrate that the systematic and gradual exclusion of victims from the investigation and trial stage of the criminal proceeding is due to a clear historical pattern characterised by sociological and political factors that have positioned the victims at the margin of the criminal justice system. The evolution of the societal fabric into a more and more complex system, coupled with centuries of State's centralization, led to the development of centralized system of the administration of justice in the hands of the State's authorities, structuring the criminal justice system as a contest between the state and the defendant. The aspiration of the analysis of the historical pattern is to prove that behind the exclusion of victims' participatory rights within the adversarial criminal trial, as they can serve only as witnesses, is due to social and political developments, rather than to the concern that victims' participation could affect the defendant's due process principle and the right to a fair trial. Then the historical investigation moves with a logical progression to the international criminal justice system and institutions created in the contemporary time.

This chapter looks to review the practice of post-World War II tribunals, such as the Nuremberg International Military Tribunal as well as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal

Tribunal for Rwanda (ICTR), to illustrate that they have been largely captured by the domestic adversarial model, which, nevertheless, has emerged to be inadequate to meet the need of victims for securing justice through the criminal justice framework.

This chapter is structured as follows. The second section describes the main features of the victims' participation scheme, as outlined by the Rome Statute and the Rules of Procedure and Evidence of the ICC. The third section highlights the procedural and normative issues of the implementation of victims' participatory rights, due to the vague wording of Article 68(3) of the Rome Statute. The following section in order to explain the reasons behind the inability of Article 68(3) to provide a clear and incontrovertible regime of participation for victims, takes a brief historical detour in the contentious drafting history of the said article. The fifth section deals with the history of the criminal trial and the evolution – and involution – of victim participatory rights in the domestic criminal justice system. This section is composed by five subsections, which analyse the rights of victims within the criminal trial starting from the ancient Roman law, until the consolidation of the adversarial procedural model in England in the XIX century. The sixth section focuses on the international criminal justice system and explores in a critical way the role played by the victims before the Nuremberg International Military Tribunal and successively it deals with the rights conferred to the victims before the ICTY and ICTR.

2.2. The outline of the ICC victims' participation scheme.

For the first time within international criminal justice, the provisions of the ICC's Statute and RPE confer participatory rights to victims. Due to the great seriousness of the gross violations of international human rights and humanitarian law suffered by the victims, the drafters of the Rome Statute and RPE acknowledged that it was necessary to give meaning to the concerns with victims. Therefore, the provisions on victims' participation should be interpreted and implemented as aiming at achieving the overall goal of giving a voice to victims in the proceedings.

Achieving this goal was a clear rationale behind the broad definition of victim enshrined in Rule 85(a) of the RPE, which aims at certifying as a victim to the purposes of participation in the proceedings various categories of victims. Rule 85(a) of the RPE states that victims are "natural persons who have suffered harm as a result

of the commission of any crime within the jurisdiction of the Court".[1] This Rule has been interpreted as including in the definition of victims also indirect victims, who can suffer harm as family members or dependants of the direct victims, or have suffered "whilst intervening to help direct victims of the case or to prevent the latter from becoming victims because of the commission of this crimes."[2] Rule 85(b) of the RPE further broadens the definition of victim, which "may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."[3] However, the wording "may include" of Rule 85(b) clarifies that natural persons should have been considered as those primary entitled to the status of victims.[4] Rule 85 set three-tiered test of victimhood. First the Chambers have to establish whether the victim is a natural or legal person. Secondly, the victim must have suffered harm, which should include the physical and mental injuries, emotional suffering, economic loss, or substantial impairment of fundamental rights.[5] Natural persons can suffer from direct and indirect harm, which however has to be personal, meaning that the victim must have personally suffered the harm.[6] Conversely, legal person can suffer only from direct harm.[7] The third criterion, by requiring that the harm must be the result of the commission of any crime within the jurisdiction of the Court, entails that once the charges are confirmed there must be a connection between the crimes of the indictment and the harm caused.[8] Indirect victims have to demonstrate that the harm they suffered "must arise out of the harm suffered by the

[1] Rule 85(a) of the ICC Rules of Procedure and Evidence.
[2] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6, Pre-Trial Chamber I, 29 June 2006, Doc. n. ICC-01/04-01/06-172-tEN, §§ 7-8. Available at: https://www.icc-cpi.int/CourtRecords/CR2007_03138.PDF.
[3] Rule 85(b) of the ICC Rules of Procedure and Evidence.
[4] A. L. M. de Brouwer, M. Heikkilä, 'Victim issues: Participation, Protection, Reparation, and Assistance', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, & S. Zappalà (Eds.), *International Criminal Procedure: Principles and Rules*, Oxford: Oxford University Press (2013), 1301.
[5] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims' Participation, Trial Chamber I, 18 January 2008, Doc n. ICC-01/04-01/06-1119, § 92. Available at: https://www.icc-cpi.int/CourtRecords/CR2008_00364.PDF.
[6] *The 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, Appeals Chamber, 11 July 2008, Doc. n. ICC-01/04-01/06-1432, §§ 32, 38. Available at: https://www.icc-cpi.int/CourtRecords/CR2008_03972.PDF.
[7] *Idem*, § 38.
[8] *Idem*, §§ 62-64.

direct victims, brought about by the commission of the crimes charged."[9] This study will discuss the definition of victims, however an in-depth analysis of the case law of the ICC on this topic is beyond its scope. This thesis looks to frame a participatory model for victims that achieves the aims of the provisions on victims' participation and the goals of the criminal justice system enshrined in the Statute of the ICC.

The victims' participatory rights scheme, as embodied in the Rome Statute and RPE, establishes a highly complex system, consisting in multiple legal regimes,[10] which is developed around three main features. The first feature includes provisions aimed at protecting victims' well-being and safety. While Article 43 of the Rome Statute set up a Victims and Witnesses Unit to provide protective measures and security arrangements and counselling,[11] Article 68 empowers the Court to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims, with a particular attention to victims of the crime involving sexual or gender violence and violence against children.[12] The second feature involves victims' right to receive reparations, as the Court is entitled, either upon request or on its own motion in exceptional circumstances, to determine the scope and extent of any damage, loss and injury to, or in respect of, victims.[13] The possibility to award reparations to victims was not a novelty, as Rule 106[14] of the Rules of Procedure and Evidence of both the ICTY and ICTR allowed victims to rely on judgments delivered by the *ad hoc* Tribunals and bring an action in a national court to obtain compensation. However, the Rome Statute marks a landmark development, because victims can seek reparations directly from the ICC.[15]

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[9] *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted version of "Decision on 'indirect victims'", Trial Chamber I, 08 April 2009, Doc. n. ICC-01/04-01/06-1813, §§ 42, 52. Available at: https://www.icc-cpi.int/CourtRecords/CR2009_02492.PDF.

[10] S. Vasiliev, 'Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC', in C. Stahn & G. Sluiter (Eds.), *The Emerging Practice of the International Criminal Court*, (Vol. 48) Brill (2009), 638.

[11] Article 43(6) of the Rome Statute, U. N. Doc. A/CONF.183/9 of 17 July 1998.

[12] Article 68(1)(2) of the Rome Statute, U. N. Doc. A/CONF.183/9 of 17 July 1998.

[13] Article 75(1) of the Rome Statute, U. N. Doc. A/CONF.183/9 of 17 July 1998.

[14] Rule 106(B)(C) of the Rules of Procedure and Evidence of the ICTY and ICTR: "(…) (B) Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation. (C) For the purposes of a claim made under Sub-Rule (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury."

[15] C. P. Trumbull, 'The Victims of Victim Participation in International Criminal Proceedings', *Michigan Journal of International Law* 29(4) (2007), 778.

Finally, the third feature represents the "major structural achievement",[16] the "significant step forward"[17] and the "landmark development"[18] within the international criminal justice system, since, for the first time in the history of international criminal law, victims have an autonomous standing in proceedings before the ICC. The *lex generalis*[19] on victims' participation is Article 68(3) of the Rome Statute, which requires that,

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.[20]

This article has been portrayed in the literature as "the most general authority"[21] on victims' participation before the ICC, since it sets out both the criteria for the admission of victims' participation and the modality of such participation. The article at hand confers to the Court great discretionary powers in order to authorize victims to participate in the proceeding. The Court has to evaluate whether the three conditions, set in Article 68(3), are satisfied: first, victims' personal interest must be affected; second, the participation is considered appropriate with regard to the stage of the proceeding and third, such participation would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Victims, who

[16] C. Stahn, H. Olásolo & K. Gibson, 'Participation of Victims in Pre-Trial Proceedings of the ICC', *Journal of International Criminal Justice* 4(2) (2006), 219.
[17] A. Di Giovanni, 'The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?', *Journal of International Law & International Relations* 2(2) (2005), 25.
[18] R.S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers (2001), 456.
[19] Y. McDermott, 'Some are more equal than others: victim participation in the ICC', *Eyes on the ICC* (5) (2008), 27; M. Heikkilä, *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors Affecting This Status*, Turku: Institute for Human Rights Åbo Akademi University (2004), 148; S. Vasiliev, *supra* note 10, 639.
[20] Article 68(3) of the Rome Statute, U. N. Doc. A/CONF.183/9 of 17 July 1998.
[21] C. Stahn, H. Olásolo & K. Gibson, *supra* note 16, 235.

fulfil these three requirements, can exercise their procedural rights by expressing "their views and concerns" through a legal representative.[22]

In addition to Article 68(3), which has provided a generalized victims' participatory right, the ICC Statute contains Articles 15(3) and 19(3), which for their specific nature can be defined as *leges speciales* on victims' participation.[23] The participation regime under Article 15(3) enshrines victims' right to make representations to the Pre-Trial Chamber, in the context of the Prosecutor's request to authorize an investigation. Article 19(3) of the Rome Statute enables victims to submit observations to the Court in proceedings regarding the jurisdiction of the Court or the admissibility of a case. The specificity of the legal text and nature of Articles 15(3) and 19(3) have not given rise to controversy with regard to the modality and stage of the proceeding those articles apply, as they refer respectively to the investigation stage and the pre-trial stage of a case.

The RPE further implement the Articles of the Rome Statute on victims' participation, by specifying the circumstances in which victims may participate. Victims and their legal representatives have the absolute right to attend trial proceedings and a discretionary right to participate in the proceedings, to present oral or written observations,[24] to question a witness, an expert or the accused, subject to the Chamber's authorization.[25] Rule 92 places on the Court the obligation to notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute, in order to allow victims to apply for participation in the proceedings on review of such Prosecutor's decision. Under the new regime of RPE, victims' participation extends over issues on amendment of the charges,[26] conditional release or any condition amending liberty constriction,[27] disclosure of the record of

[22] S. Zappalà, *Human Rights in International Criminal Proceedings*, Oxford University Press (2003), 226; Y. McDermott, *supra* note 19, 34; A. L. M. de Brouwer, M. Heikkilä, *supra* note 4, 1319; C. Jorda & J. de Hemptinne, 'The Status and Role of the Victim', in A. Cassese, P. Gaeta, & J. R. Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, (Vol. 2) Oxford: Oxford University Press (2002), 1405; S. Vasiliev, *supra* note 10, 648-649.

[23] Y. McDermott, *supra* note 19, 27; G. Boas, J. L. Bischoff, N. L. Reid & B. D. Taylor III, *International Criminal Law Practitioner Library: Volume 3: International Criminal Procedure*, Cambridge University Press (2011), 312.

[24] Rule 91(2) of the ICC Rules of Procedure and Evidence.

[25] Rule 91(3a) of the ICC Rules of Procedure and Evidence.

[26] Combined reading of Rules 93 and 128 of the ICC Rules of Procedure and Evidence.

[27] Rule 119(3) of the ICC Rules of Procedure and Evidence.

all proceedings,[28] questioning the admissibility and relevancy of evidence[29] and other decisions of the Court on matters related to sentence and, if applicable, reparations.[30]

2.3. The ambiguous nature and scope and of victims' participatory rights.

The system of victims' participation raises multiple and complex legal issues, with substantive and procedural implications,[31] since the provisions of the ICC Statute and RPE address only the general principles of such participation. For instance, Article 68(3) of the Rome Statute has been often described at vague,[32] because it enables victims to present "their views and concerns", at "stages of the proceedings determined to be appropriate" when their "personal interests" are affected and "in a manner" not prejudicial to the rights of the accused and fair trial, but neither the Rome Statute nor the RPE provide a definition of any of these terms.[33]

This model of victims' participation raises more questions than they answer, since it is not clear the specific degree and rationales of victims' involvement in the proceedings. It has been often claimed that victims' participation could jeopardize the effectiveness and expeditiousness of the proceeding, as well as the law enforcement functions of the prosecutor, the fair trial principle and the defendants' rights. Due to the lack of clarity about the specific participatory rights victims can exercise, some commenters feared that the victims could become a second accuser, in violation of the equality of arms principle and, thus, placing the defendant in a disadvantaged position compared to the prosecutor. In this respect, Donat-Cattin suggested that victims are only potential participants because, unlike the Prosecutor and the defence, they do not have an automatic right to participate, as their

[28] Rule 121(10) of the ICC Rules of Procedure and Evidence.
[29] Rule 72 of the ICC Rules of Procedure and Evidence.
[30] Rules 143-145 of the ICC Rules of Procedure and Evidence.
[31] E. Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?' in D. McGoldrick, P. J. Rowe & E. Donnelly (Eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing (2004), 315, 324; E. Baumgartner, 'Aspects of victim participation in the proceedings of the International Criminal Court', I*nternational Review of the Red Cross* 90(870) (2008), 411.
[32] S. Zappalà, 'The Rights of Victims v. the Rights of the Accused', *Journal of International Criminal Justice* 8(1) (2010), 141; C. P. Trumbull, *supra* note 15, 793; M. Jouet, 'Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court', *Saint Louis University Public Law Review* 26 (2007), 250.
[33] C. P. Trumbull, *supra* note 15, 793-794.

participation is subjected to judicial decision.[34]

Indeed, it must be acknowledged that the provisions of the ICC Statute and RPE on victims' participation have introduced a new dynamic to the international criminal procedure. The proper understanding of this new position and role of victims in the ICC framework suffers from two factors: ambiguity of the fundamental purposes and rationales not only of victims' participation, but also of the international criminal justice system, and the uncertainty relating to the procedural model, in which such participation takes place. The procedural rules adopted by the ICC failed to indisputably establish whether victims should be considered as participants in a civil law-inquisitorial or common law-adversarial process.

At this point, to have a clear understanding of the antithetical features of the roles and rights conferred on judges, prosecutors, the defence and victims by these two legal traditions, it is necessary to briefly compare the criminal procedures of the civil law and common law traditions. The adversarial and inquisitorial systems of criminal procedure originated respectively in the Anglo-American common law and the European or continental civil law traditions.[35] However, no country has ever adopted a pure inquisitorial or adversarial system. The adversarial type of criminal proceeding is a party-driven dispute, where two parties, prosecutor and accused, bear the burden of evidence collection, while the judges, whose primary duty is to reach a verdict, have a relatively passive role. Under the adversarial tradition, victims are not formal parties and, consequently, they do not have any right to participate in the proceeding.[36] Their role is not dissimilar from that of a witness. However, victims have a significant role at the sentencing stage, where they can explain the harm they suffered because of the accused's criminal conduct and demand punishment,

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[34] D. Donat-Cattin, 'Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings', in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed. München: C.H. Beck (2008), 873.

[35] K. Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?', *International Criminal Law Review* 3(1) (2003), 1-5; M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, Yale University Press (1986), 16-17; B. McGonigle Leyh, '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(63) (2009), 97; M. Jouet, *supra* note 32, 253.

[36] M. E. I. Brienen & E. H. Hoegen, *Victims of crime in 22 European criminal justice systems*, Wolf Legal Productions (2000), 245.

financial damages and other forms of compensation.[37] Conversely, in the civil law system of criminal justice, the trial is structured as an inquiry.[38] The inquisitorial-type system is characterized by a judge-driven process, where the public prosecutor has the duty to initiate *ex officio* the procedure and investigate both exculpatory and inculpatory evidence. Judges can also have an active role both in the collection and examination of evidence. Civil law affords victims broad participatory rights under the concept of *partie civile*.[39] Consistent with the judge-driven nature of the inquisitorial criminal proceeding, the accused and prosecutor do not engage in an adversarial contest and victims can participate as a third party, without jeopardizing the interests and rights of the accused.[40]

In absence of provisions, which clearly indicate the nature and the admissible manners of victims' participation, the challenging task of determining the procedural scheme is left to the judges, by means of judicial determination. The ICC Chambers are required to determine the several unknowns of this equation, but because of the lack of principles enlightening the rationales and scope of the victims' participation scheme, they enjoy a high degree of discretion. Judges hold strong beliefs on the nature of justice that are indissolubly linked to their own domestic system. Thus, judges from different legal traditions have different understanding of criminal justice, criminal process and procedural roles of judge, prosecutors, defence and victims.[41] As a matter of fact, judges have the substantial power to expand or restrict victims' participation.[42]

The ICC Chambers advanced solutions to the issues on the scope of victims' procedural rights, which resulted in experimentalism and inconsistencies across different Chambers.[43] This inconsistency originates from the diverging experiences and personal views of judges.[44] Different views can affect how judges interpret and apply the law, and, specifically, the meaning judges give to victims' participation

[37] M. E. I. Brienen & E. H. Hoegen, *supra* note 36, 267-268, 481.
[38] M. Damaška, *supra* note 35, 80.
[39] M. E. I. Brienen & E. H. Hoegen, *supra* note 36, 203.
[40] G. Boas, J. L. Bischoff, N. L. Reid & B. D. Taylor III, *supra* note 23, 307.
[41] B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, Intersentia (2011), 11.
[42] E. Haslam, *supra* note 31, 323; S. Vasiliev, *supra* note 10, 648-638.
[43] S. Vasiliev, 'Victim Participation Revisited: What the ICC Is Learning About Itself', in C. Stahn, *The Law and Practice of the International Criminal Court*, Oxford University Press (2015), 14.
[44] L. Moffett, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague', *Journal of International Criminal Justice* 13(2) (2015), 12.

shapes victims' procedural rights.[45] A crystal clear example of such inconsistency concerns the victims' right to present evidence. In the *Prosecutor v. Jean-Pierre Bemba Gombo*, the Trial Chamber III allowed victims' legal representative to introduce evidence by questioning witnesses. According to the interpretation by the Trial Chamber III, victims' interests extend to questioning persons who should be held liable for those crimes, whether physical perpetrators or others. In this respect, victims have a general interest in the proceedings and in their outcome. As such, they have an interest in making sure that all pertinent questions are put to witnesses.[46] Conversely, in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo*, the Trial Chamber II held that victims' right to question a witness should be limited to questions that have as their purpose to clarify or complement previous evidence given by the witness. Victims' legal representatives may be allowed to ask questions about facts that go beyond matters risen during examination-in-chief, but such right is subject to very strict conditions.[47] This example shows the potential unequal treatment among victims participating in the proceedings, which can also jeopardise the accused rights, in particular the right to legal certainty.[48]

The next section argues that the lack of a fair degree of legal certainty and coherence of the framework of victims' participation is the result of a "constructive ambiguity".[49] The delegations, responsible for drafting the ICC Statute and subordinate Rules, by introducing victims' scheme into the delicate balance between the institutions of the Court – namely Chambers and Prosecutor – and the accused, had to conciliate the divide between the adversarial and inquisitorial procedural traditions. However, in the effort to set up participatory rights for victims, the delegations inevitably and predictably split into two blocs respectively representing

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[45] J. A. Wemmers, 'Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate', *Leiden Journal of International Law* 23(3) (2010), 630.

[46] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision (i) ruling on legal representatives' applications to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses, Trial Chamber III, Doc. n. ICC-01/05-01/08, 9 September 2011, § 15. Available at: https://www.legal-tools.org/doc/a28dec/pdf/.

[47] *The Prosecutor v. Germain Katanga*, Warrant of Arrest for Germain Katanga, Directions for the conduct of the proceedings and testimony in accordance with rule 140, Trial Chamber II, Doc. n. ICC-01/04-01/07, 20 November 2009, §§ 90-91. Available at: https://www.legal-tools.org/doc/ddb123/pdf/.

[48] S. Zappalà, *supra* note 32, 143.

[49] C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', *Journal of International Criminal Justice* 1(3) (2003), 605-606.

common law and civil law traditions.[50] Delegations could only resort to the legal drafting techniques to accommodate uneasy diplomatic compromises and masked their inability of harmonising the common law and civil law systems into an international body of procedural criminal law.

2.4. The drafting history of Article 68(3) of the Rome Statute and of the related RPE.

The drafters of both the Statute and the RPE were fully aware of the incredible opportunity to provide victims with adequate procedural rights, filling the gaps left by the procedure of the *ad hoc* tribunals.[51] The energetic work of several NGOs, such as Amnesty International[52] and Human Rights Watch[53], was fundamental in the terms of supporting the inclusion in the ICC Statute of dispositions on victims' procedural rights.[54] Fiona McKay, as representative of the Victims' Rights Working Group, addressed the plenary of the UN Diplomatic Conference on the Establishment of the International Criminal Court, firmly stated that "it is important that victims are involved in the judicial process as more than mere bystanders. Adequate provision must be made for their effective participation in the proceedings."[55]

Despite the strong commitment of this powerful victim lobby, the drafting process of Article 68(3) was rather problematic, as it was not an easy task to allow a third protagonist to play an active role in the proceeding. One of earliest drafts of Article 68(3) – dated 1995 –, which originally was Article 43 of the ILC Draft Statute for an International Criminal Court, set provisions to protect victims, but it

[50] M. Jouet, *supra* note 32, 253.
[51] D. Donat-Cattin, *supra* note 34, 1277; C. Jorda & J. de Hemptinne, *supra* note 22, 1387-1388.
[52] Amnesty International, 'The International Criminal Court: Ensuring an Effective Role for Victims', 30 June 1999, Index n. IOR 40/010/1999. Available at: https://www.amnesty.org/en/documents/ior40/010/1999/en/.
[53] See 'Section II: Victims in the ICC' of Human Rights Watch Commentary to the Second Preparatory Commission on Rules of Procedure and Elements of Crimes', July 1999. Available at: https://www.hrw.org/legacy/campaigns/icc/docs/prepcom-july99.htm.
[54] E. Haslam, *supra* note 31, 321; G. Bitti, & H. Friman, 'Participation of Victims in the Proceedings.' in R. S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, New York: Transnational Publishers (2001), 459; D. Donat-Cattin, *supra* note 34, 1278; S. Zappalà, *supra* note 22, 225.
[55] Fiona McKay, REDRESS on behalf of the Victims' Rights Working Group, Address to the Plenary, 17 June 1998. Available at: https://www.legal-tools.org/doc/46e5ed/pdf/.

did not provide for a mechanism to allow victims to participate in the proceedings.[56] At the Preparatory Committee meeting, which took place in August 1996, the French delegation advanced the draft of an Article 50 on "The Rights of Victims",[57] while Egyptian delegation suggested adding to Article 43 the following,

> Legal representatives of victims of crimes have the right to participate in the proceedings with a view to presenting additional evidence needed to establish the basis of criminal responsibility as a foundation for their right to pursue civil compensation.[58]

The Preparatory Committee acknowledged that "this article was of a very general nature and should be further elaborated and more precisely formulated"[59] and included the Egyptian suggestion in its Report.[60] However, at the session of August 1997, where the Preparatory Committee drafted the consolidated text of the convention for the ICC, the proposal by Egypt was not included in the final text of Article 43 of the ILC Draft Statute. It had been replaced by the proposal from the New Zealand delegation,[61] which explicitly replicated the wording of Principle 6(b) of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[62] (hereafter Declaration for Victims of Crime). The New Zealand

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[56] See Article 43, Draft Statute for an International Criminal Court: Alternative to the ILC-Draft (Siracusa-Draft), Siracusa/Freiburg, July 1995: "The Court shall take necessary measures available to it to protect the accused, victims and witnesses and may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means, provided that the measures are consistent with the rights of the accused." Available at: https://www.legal-tools.org/doc/39a534/pdf/.

[57] Article 50 of the Draft Statute of the International Criminal Court: Working Paper Submitted by France, UN Doc. A/AC.249/L.3, 6 August 1996. Available at: https://www.legal-tools.org/doc/4d28ee/pdf/.

[58] Proposal submitted by Egypt for Article 43, Proposal concerning the protection and rights of witnesses and victims (article 43 of the ILC draft statute), Doc. n. A/AC.249/WP.11, 19 August 1996. Available at: https://www.legal-tools.org/doc/41a017/pdf/.

[59] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, Proceedings of the Preparatory Committee During March-April and August 1996, Doc. n. A/51/22[VOL.I](SUPP), § 280. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N96/239/27/pdf/N9623927.pdf?OpenElement.

[60] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, Proceedings of the Preparatory Committee During March-April and August 1996, Doc. n. A/51/22[VOL-II](SUPP), 204. Available at: https://www.legal-tools.org/doc/03b284/pdf/.

[61] Proposal by New Zealand on Article 43, Doc n. Non-Paper/WG. 4/No.19, 13 August 1997, § 3: "The Court shall enable victims of the crimes charged and/or their legal representatives to participate in the proceedings in order to *'allow the views and concerns of the victim to be presented and considered at appropriate stages of the proceedings where their personal interests are affected,'* consistent with the rights of the accused and a fair and impartial trial." Available at: https://www.legal-tools.org/doc/658b45/pdf/.

[62] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res. 40/34, 29 November 1985, UN Doc. A/RES/40/34, § 6: "The responsiveness of judicial and

proposal deeply influenced the work of the Preparatory Committee, since it was adopted in the consolidated text of Article 43, which with minor modifications became Article 68(3) of the ICC Statute. Article 43 stated that

> The Court [shall] [may] permit the views and concerns of the victim to be presented and considered at appropriate stages of the proceedings where their personal interests are affected in a manner which is consistent with the rights of the accused and a fair and impartial trial.[63]

Principle 6(b) served as a symbolic legal foundation of the victims' rights to participate in criminal proceedings, as it is the first international legal instrument that specifically set such rights. However, the copy and paste – almost word by word – of this provision into Article 68(3) shows that the drafters preferred to avoid drawing on the model of civil law promoted by the Egyptian and French.[64] The drafters, unable to find an agreement on victims' participation between the systems of civil law and common law, decided at least to align Article 68(3) with the standards of the Declaration for Victims of Crime, which "reflects the collective will of the international community to restore the balance between the fundamental rights of suspects and offenders, and the rights and interests of victims."[65]

However, a closer analysis of Principle 6(b) sheds light on its modest contribution to the establishment of international standards for victims' involvement in criminal proceeding. The rights of victims enshrined in the Declaration are contingent on the domestic law of States.[66] Under Principle 6(b), a judicial mechanism responsive to victims should allow victims to present their views and

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administrative processes to the needs of victims should be facilitated by (…) (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system (…)."

[63] Preparatory Committee on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee at Its Session Held from 4 To 15 August 1997, Doc. N. A/Ac.249/1997/L.8/Rev.1, 14 August 1997, Article 43(4). Available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/N97/224/74/pdf/N9722474.pdf?OpenElement.

[64] S. Vasiliev, *supra* note 10, 652.

[65] UN Office for Drug Control and Crime Prevention, 'Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', New York (1999), 1. Available at: file:///C:/Users/gtb13194/Downloads/UNODC_Guide_for_Policy_Makers_Victims_of_Crime_and_Abuse_of_Power.pdf.

[66] J. C. Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations*, (Vol. 12) Martinus Nijhoff Publishers (2013), 106.

concerns in a way "consistent with the relevant national criminal justice system." The subordination of Principle 6(b) to domestic criminal law means that it was not created to operate as a self-executing norm, since it explicitly reserves the elaboration of a detailed victims' participation scheme to national legislators. The drafters of Article 68(3) neither ponder on this important caveat contained in Principle 6(b), nor developed a provision in a form consistent with the nature and structure of the ICC procedural system.[67] Thus, the uncritical borrowing of paragraph 6 (b) of the Declaration for Victims of Crime illustrated that "drafters to all appearance did not intend anything specific in terms of exact rationales for the victim participation".[68] This originates the unclear scope of the wording of Article 68(3), as explored in the previous section.

Since the last clause of Article 68(3) refers to Rules of Procedure and Evidence for further details on victims' participation framework, the drafting of the Rules represented a new opportunity to clarify the operation of victims' participation in proceeding before the ICC. However, during the negotiations of the Rules, many of the issues face by the drafters of the Rome Statute re-emerged, because delegations expressed different views on whether additional rules on victims' participation were necessary and how they should operate.[69] For instance, the Australian proposal envisaged only one rule, establishing that victims' views should be presented by involving legal representatives.[70] Conversely, the French proposal, by envisaging a broad number of rules dealing with practical aspect of victims' participation, emphasised victims' role in every stage of the proceeding.[71] On the same page, the Colombian delegation affirmed

> The victim was notably absent from the *'penal system'*. The person who suffered harm and prejudice as a result of the crime was an uninvited guest,

[67] S. Vasiliev, *supra* note 10, 653.
[68] *Idem*, 651.
[69] G. Bitti, & H. Friman, *supra* note 54, 457.
[70] See Rule 92 of Draft Rules of Procedure and Evidence of the International Criminal Court: Proposal Submitted by Australia, Doc. n. PCNICC/1999/DP-1, 26 January 1999. Available at: https://www.legal-tools.org/doc/79ba83/pdf/.
[71] Preparatory Commission for the International Criminal Court, Proposal by France, General outline of the Rules of Procedure and Evidence, Doc. n. PCNICC/1999/DP.2, 1 February 1999. Available at: https://www.legal-tools.org/doc/d88229/pdf/.

> a spectator, and this exacerbates the conflict. Thus the victim, the one harmed by the crime, was also victimized by the *'penal system'*.[72]

Therefore, according to the Colombian representatives, "all the rules of investigation and trial which deal with the right of the victim are relevant and necessary. This protects the principle of equality."[73] A comprehensive discussion on victims' participation in proceeding before the ICC was held at the International Seminar on Victims Access in the International Criminal Court, hosted by the French Government in Paris from the 27th to the 29th of April 1999. In the opening speech, Madame Elisabeth Guigou, the French Minister of Justice, clearly illustrated the objective of the seminar:

> Such is the magnitude of our mission: to put the individual back at the heart of the international criminal justice system, by giving it the means to accord the victims their rightful place.[74]

The contribution of this seminar was particularly remarkable because it provided a helpful basis for the negotiations of the Rules to the Preparatory Commission meetings.[75] In particular, "Workshop 2 – Participation and rights of victims in the proceedings"[76] contained the core model for the provisions, which were taken into account for further discussions to develop the Rules 89 to 91.[77] Although the Rules of Procedure and Evidence provide more detailed procedural provisions, they do not

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[72] Proposal by Colombia Comments on the report on the international seminar on victims' access to the International Criminal Court (document PCNICC/1999/WGRPE/INF/2), Doc. n. PCNICC/1999/WGRPE/DP.37, 10 August 1999, 1. Available at: https://www.legal-tools.org/doc/7010ee/pdf/.

[73] *Idem*, § 2.1.

[74] French Justice Minister Elisabeth Guigou, Opening Speech, International Seminar on 'Victims Access in the International Criminal Court', Paris from the 27 April 1999, quoted in E. Haslam, *supra* note 31, 316.

[75] *Idem*, 321; G. Bitti, & H. Friman, *supra* note 54, 458.

[76] Preparatory Commission for the International Criminal Court, Report on the International Seminar on Victims' Access to the International Criminal Court, 6 July 1999, Doc. n. PCNICC/1999/WGRPE/INF/2. Available at: https://www.legal-tools.org/doc/4c4512/pdf/.

[77] See Rule 6.30 A to C of Preparatory Commission for the International Criminal Court Working Group on Rules of Procedure and Evidence, Revised discussion paper proposed by the Coordinator, Rules of Procedure and Evidence related to Part 6 of the Statute, 11 August 1999, Doc. n. PCNICC/1999/WGRPE/RT.5/Rev.1. Available at: https://www.legal-tools.org/doc/5faffb/pdf/. See also Rules 6.30, 6.30 *bis*, 6.30 *ter*, 6.30 *quater* of Preparatory Commission for the International Criminal Court Working Group on Rules of Procedure and Evidence, Outcome of the inter-sessional meeting held at Mont Tremblant, Canada, from 30 April to 5 May 2000, circulated at the request of Canada, 24 May 2000, Doc. n. PCNICC/2000/WGRPE/INF/1. Available at: https://www.legal-tools.org/doc/2ba9b2/pdf/.

contribute to clarify the general principles of the victims' participation regime of Article 68(3).

Due to the difficulties by the diplomatic delegations of finding a shared position between the diverging views of civil law and common law traditions, neither the Rome Statute, nor the RPE, contributed to indisputably establish a clear scheme of participatory rights for victims.[78] The main obstacle for the clear recognition of an active role of victims in the proceedings was represented by the unchallenged and dominant narrative of the common law tradition that places the State as the rightful keeper of the criminal justice system and of all the powers and institutions included in it, while excluding victims as irrelevant to the operation of justice. This narrative justified the removal or at least containment of the victims' participatory rights, as incompatible with the adversarial structure of the proceedings aimed at safeguarding the fairness of the trial and the rights of the accused.[79]

The next sections of this chapter undertake an historical investigation of the role of victims in the criminal trial, in order to confront those criticisms that seek to silence victims and demonstrate to what degree the rights of victims were not only integral to, but significantly constitutive of, the criminal trial in adversarial systems of justice.

2.5. The history of the criminal trial and the containment of victims' rights.

The study of the origins of common law adversarial trial supports the argument that there is nothing new, in the historical context, about the procedural rights of the victim within the criminal trial. The historical analysis shows that the rights and powers pertaining to the public prosecution can be traced back to the early procedural right of the victim. This shift of powers finds its justification only in the rise of the centralised State and its increasing need to secure the realm of the administration of justice.

2.5.1. From the primitive community to a complex social structure.

[78] M. Tonellato, 'The Victims' Participation at a Crossroads: How the International Criminal Court Could Devise a Meaningful Victims' Participation while Respecting the Rights of the Defendant', *European Journal of Crime, Criminal Law and Criminal Justice* 20 (2012), 316.
[79] T. Kirchengast, *Victims and the Criminal Trial*, Springer (2016), 13-14.

Sociological studies[80] on the interaction between victims and offenders after the perpetration of crimes illustrated that the evolution of the politically organized society was not that different from the history of criminal responsibility and of victims' role in the settling of disputes. In primitive Western societies, in the absence of a central State authority, political institutions were largely based on family ties. Considering that the bond of blood was the strongest and most sacred bond, the family, rather than the individual, was the unit of ancient law. Men and women were grouped together into mutually exclusive clans, when all members of each clan were in fact or in fiction bound to each other by the tie of blood.[81]

By borrowing the terminology from the sociological system set by the German sociologist Ferdinand Tönnies, this stage can be named *gemeinschaft*[82] (community), which describes the social interaction between the members as "familistic, sacred, traditional, emotional and personal".[83] In these pre-modern communities, the criminal justice system was structured in a way to allow the immediate parties to participate directly in the resolution of the rising conflicts. The contribution by the Norwegian sociologist and criminologist Nils Christie was particularly remarkable, as by describing the way criminal justice system operated to solve conflicts within a pre-modern and non-industrialised society, he introduced the idea of conflicts as form of property. Conflicts began their existence as a property of the parties directly involved in its inception. The conflict, belonging to offenders and victims, was resolved by them, with the help from their fellows when necessary.[84] A person who suffered a personal harm or a material damage had the possibility to start an action against the offender and forms of punishment like blood-feud were common practices. The victim and his/her family were guided more by the need to safeguard the social power than to prevent future crimes.[85] Because of this need of preservation, the punishment meted out was mainly aimed at revenge, in order to

[80] S. Schafer, *The Victim and his Criminal. A study of functional responsibility*, New York: Random House (1968); F. Tönnies, *Fundamental Concepts of Sociology: (Gemeinschaft und Gesellschaft)*, translated by C.P. Loomis, New York: American Book Company (1940); N. Christie, 'Conflicts as property', *The British Journal of Criminology* 17 (1977).
[81] F. Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I*, Vol. 2, Cambridge: Cambridge University Press (1898), 240.
[82] F. Tönnies, *supra* note 80.
[83] S. Schafer, *supra* note 80, 27.
[84] N. Christie, *supra* note 80, 2.
[85] S. Schafer, *supra* note 80, 8.

impose on the offender or to his/her family the same damage suffered by the victim, rather than by the concept of criminal liability for a criminal action.[86]

The firm establishment of a more complex social structure lead to the transition from the *gemeinschaft* to a contractual *gesellschaft*[87] system. This term, which can be translated as "society", referred to the artificial groups which were held together by common and conscious purposes. In the *gesellschaft* system the bonds between individuals were "voluntary, secular and impersonal".[88] In the *gesellschaft*, criminal justice system aimed at the protection of a given social order, its values and interests.[89] Such socially controlled criminal justice system took the place of the blood feud and of the individual in the maintenance of social order, radically changing the understanding of the criminal responsibility and the position of victims as conceived so far. The crime turned from the violation of victim's interests into a disturbance of society and, more specifically, as a concern of the State, while, the victim was left out of the settlement of the criminal case. Victims did not completely disappear from the criminal proceeding, but their role was designed to evaluate the wrong they suffered, which became a parameter to assess the offender's responsibility.[90]

The next two sections will provide a closer insight of the practical impact of the evolution of the societal structure on the operation of criminal justice system in ancient ages. In fact, the experience of both the Roman law and the mediaeval English law illustrated to what extent the evolution of the societal fabric into a more and more complex system is indissolubly linked to the developed centralized system of administration of justice in the hands of the State's authorities. It is not a negative thing *per se* having a criminal justice system administrated by the State on behalf of the society, but relegating victims, who used to be one of the main characters, at the edge of the criminal justice system, meant to ignore the functional social forces and dynamics of all parts involved in the crime.[91]

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[86] S. Schafer, *supra* note 80, 8-9.
[87] F. Tönnies, *supra* note 80.
[88] L. Wirth, 'The Sociology of Ferdinand Tönnies', *American Journal of Sociology* 32 (1926), 416; S. Schafer, *supra* note 80, 27.
[89] S. Schafer, *supra* note 80, 28.
[90] *Ibidem*.
[91] S. Schafer, *supra* note 80, 29.

2.5.1.1. The victim's role in the criminal trial in ancient Rome.

It is not that easy to draw a clear and comprehensive framework of the early roman criminal justice system, because only few written records of the origins of Rome survived up to the present days and the majority of them, written in later periods, are largely based on legends.[92]

The early roman community was composed by family-groups called *gentes* and the members of each *gens* descended from a common ancestor. The main issues in the administration of justice were related to the surviving, increasing and expansion of the city-state. Generally, the prosecution of offenders was in the hands of the offended party, who redressed the crime through blood feud, or the capture and imprisonment of the offender.[93] However, in some cases allowing the use of violence to redress a crime was too dangerous for the cohesion of the community, especially when numerous groups of citizens were involved. The answer was to turn those crimes into an offence against the community and, specifically against the *pax deorum*, the peaceful relations between the Gods and the *civitas*. The King as the "guardian" of the *pax deorum* was entitled to undertake a repressive action to restore the public order and punish whoever with his/her behaviour exposed the whole community to the fury of the Gods.[94] However this was a very peculiar case, while in general, as confirmed by the *Origines* by Cato, a wrongful conduct causing harm put the offender at the mercy of his victim.[95]

In 509 B.C., the sweeping change from the monarchy to the republican form of government of the city brought about a clear division between religious and political functions. The political and military chief was the *magistratus cum imperio*, who was entitled to prosecute and punish the crimes, which affected the interests of the community.[96] On the contrary, the reaction to crimes damaging the personal interest of a roman citizen was left to the individual, who initiated and conducted the criminal prosecution.[97] This general distinction was confirmed by the introduction of

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[92] B. Santalucia, *Diritto e Processo Penale nell'Antica Roma*, Milano: Giuffrè Editore (1989), 1.
[93] V. Giuffrè, *La Repressione Criminale Nell'Esperienza Romana. Profili*, Napoli: Jovene (1991), 22-23.
[94] B. Santalucia, *supra* note 92, 2.
[95] *Idem*, 3.
[96] *Idem*, 19.
[97] V. Giuffrè, *supra* note 93, 43.

the *Leges Duodecim Tabularum* (the Laws of the Twelve Tables),[98] which established what crimes affected the individual interest, rather than the community, and provided victims with legal tools to seek justice against the offender.

Crime, as a conflict between the victim and the offender, was a private matter outside the State's immediate interest.[99] The victim was entitled to begin and conduct an ordinary legal action against the wrongdoer.[100] The *legis action sacramenti*, the parent of all legal actions arose in this way, as a legal instrument for the impulse of personal vengeance.[101] The main credit of the rules of the Twelve Tables was that they marked a transition from the ancient regime of personal vengeance to a system of monetary compensation either agreed by the parties involved or set by law.

During the II century B.C., the wealth and expansion of Rome marked the decline of the institutions of the city-state and led to the rising of new social groups, mainly tradesmen, who were involved in a variety of economic activities in business with the State. Those factors had an impact on the criminal justice system, which, given the increasing number of trials and their obsolete structure, underwent a gradual change. It became evident that only by setting permanent courts of justice, it was possible to provide an efficient and effective system of criminal justice. Thus, the Senate established by law nine permanent courts of justice called *quaestiones perpetuae*. Each one had the jurisdiction on one single crime: five courts had the jurisdiction on crimes connected with the administration of the *res publica* and the remaining four decided on the crimes affecting only the citizen.

Indeed, this represents a first attempt by the authorities to expand their control to the society, constantly evolving into a more multicultural and advanced system. However, every citizen was still entitled to an active role in the criminal proceeding, which could start only by the *delatio nominis*, a charge filed to the judge by the offended party. After this preliminary stage, the victim could submit the

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[98] The *Leges Duodecim Tabularum*, which was completed by a commission of Ten Men, called the *Decemviri*, and posted on twelve tablets of bronze in the Roman Forum, was the first code of Roman law and formed the core of the *mos maiorum*, the customs of the ancestors.
[99] J. Doak, *Victims' Rights, Human Rights and Criminal Justice. Reconceiving the Role of the Third Parties*, Oxford and Portland: Hart Publishing (2008), 2.
[100] H. Maine, *Ancient Law*, London J. M. Dent & Sons LTD (1960), 217.
[101] W. D. Aston, 'Problems of Roman Criminal Law', *Journal of the Society of Comparative Legislation, New Series* 13 (1913), 216.

formal accusation, the *accusatio criminis*.[102] Once appointed the members of the jury, the trial stage could begin. During the hearings the victims and the defendant presented respectively incriminating and exculpatory evidence. After the parties gave their closing statements, the jury could decide the case.[103]

The transition from the Republic to the Empire probably represented a real turning point for the administration of justice, because the rising role of the Emperor above the republican institutions, gave room to an increasingly firm and deep interference of the central power in the prosecution and punishment of crimes. There are many factors behind this, but the most relevant was the need of emperors to reorder, according to their authoritarian dispositions, roman society, which, at the highest peak of the Roman Empire, was composed of a complex set of relationships, of governmental administrations, institutions and ethnic groups.[104]

In this new social and political structure, the category of crimes affecting private interests of citizens disappeared and all criminal offences became crimes against the State, which were subjected to public prosecution. The *quaestiones perpetuae* were replaced by a new procedure, in which the case was entirely tried and decided by the emperor, or one of his delegates.[105] The *quaestiones perpetuae* never met the favour of the new government, because their structure, based on private prosecution and on decisions by a jury, clearly limited the emperor's influence on the criminal justice system.[106] Conversely, by the new procedure called *cognitio extra ordinem*, it was not necessary anymore the formal *accusatio* by the victim, because a magistrate initiated the trial on his own impulse. Thus, victims lost their procedural rights as private prosecutors; they could press charge, a *denuntiatio*, but they were considered only as informers.[107] For instance, the crime of theft and of personal injuries, which originally were prosecuted by the victim, became a crime against the society and the offender was tried by a public prosecutor. In this way victims lost their rights to initiate and conduct the criminal prosecution and, moreover, they were

[102] B. Santalucia, *supra* note 92, 201-202.
[103] *Idem*, 203.
[104] *Idem*, 210.
[105] *Idem*, 210-211.
[106] V. Giuffrè, *supra* note 93, 96-97.
[107] *Idem*, 223.

not entitled to obtain any monetary compensation, because, under the system of the *cognitio extra ordinem,* the punishment for theft was corporal.[108]

Following the fall of the Roman Empire and in the absence of a central form of government in Europe and in England as well, blood feud became the most frequent tool for the resolutions of private disputes.

2.5.1.2. Victim's status in the Medieval English criminal law.

In England, early mediaeval social organization consisted of units small enough that society could be described as rural. Social classes lived from the land, maintaining estates and farming to some extent.[109] In this early stage, the victim-criminal relationship aimed at the pursuit of either revenge or satisfaction, given that in this system of composition, victims could choose either to taking the blood or to receive monetary compensation.[110] In this system victims occupied a key position, as they were responsible for initiating the criminal proceeding and also for the prosecution of the offender.[111]

In the Anglo-Saxon period (700-1066 A.D.), the introduction of feudalism strengthened the authority of the king and local overlords, who adopted the system, in which the offender had to make two payments as composition for injuries: the *bót* to the victim and the *wíte* that was paid to the King or the lord as fee for negotiating the settlement.[112] The system of fines paid to the king or the local lord had a significant impact on the development of the concept of the criminal justice mechanism. The role of the State slowly began to evolve from a mediating force to eventually a punishing one.[113] Both the *bót* and the *wíte* were aimed at maintaining order and stability, but the former took into consideration the interests of victims and offenders in solving their dispute and pacify the community. Conversely, the

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[108] V. Giuffrè, *supra* note 93, 113-115.
[109] H. Härke, 'Early Anglo-Saxon Social Structure', in J. Hines Eds., *The Anglo-Saxons from the Migration Period to the Eighth Century: An Ethnographic Perspective*, Boydell Press (1997), 137-138.
[110] J. A. Wemmers, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process', *Criminal Law Forum* 20 (2009), 450.
[111] *Idem*, 395.
[112] F. Pollock and F. W. Maitland, *supra* note 81, 451; M. Wright, *Justice for Victims and Offenders: A Restorative Response to Crime*, Waterside Press (1996), 13-14; H. Strang, *Repair or Revenge: Victims and Restorative Justice*, Oxford: Clarendon Press (2002), 3; M. Fry, *Arms of the Law*, London: Gollancz (1951), 31.
[113] R. E. Laster, 'Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness', *University of Richmond Law Review* 5(1) (1970), 77.

payment of a fine to the king or to the overlord was directed at punishing the criminal and increasing the wealth of the State, rather than restoring the victim in his/her original position.[114] The *wíte* system, whereby the king or the overlord took a share of victims' compensation, contributed to shift the focus of the proceeding from the victim to the offender and eradicated the process of community composition.[115] More generally, over time such system encouraged the rise of the kingship, by the setting of a structured court system and, consequently the acceptance of punishment as a purpose of the law and as expression of a centralized authority.[116]

Starting from the late 11th century, as the monarchs and lords consolidated their power, they became increasingly involved in the administration of justice. Criminal conducts became acts breaching the King's peace, under the exclusive jurisdiction of the King's court.[117] The fact that the criminal justice system started to see the offender as having committed crimes against the crown turned the King into an injured party. This prepared the ground for the acceptance of the concept of harm to the State as a justification for a centralised criminal justice system and of the idea of crime as a threat to the social and public order, rather than a private matter between the victim and the offender.[118] Despite the introduction of this new idea of crime as a form of public law enforceable by the King's courts, victims had still the right to start the prosecution by a criminal action called appeal of felony.[119]

By the appeal of felony, victims formally claimed that the offender committed a felony (e.g. homicide, rape, maiming, robbery, burglary, lancer and arson) and, given that this kind of crimes represented a breach of the King's peace, they sought a punishment before King's courts.[120] A conviction for felony, beside death by hanging for the felon, meant also that defendant's goods and lands were confiscated and given to the King. On the contrary, victims did not receive any

[114] R. E. Laster, *supra* note 113, 77.
[115] *Idem*, 76.
[116] *Idem*, 75.
[117] J. Doak, *supra* note 99, 2.
[118] S. Schafer, *supra* note 80, 18; R. E. Laster, *supra* note 113, 79.
[119] J. Doak, *supra* note 99, 3.
[120] D. J. Seipp, 'The distinction Between Crime and Tort in Early Common Law', *Boston University Law Review* 20 (1996), 62.

monetary compensation or restitution, as their main reason to bring an appeal of felony was vengeance.[121]

In the late 13th century, the victim's right to initiate a prosecution gradually decreased.[122] In a society that became larger and more complex the State needed to rigorously regulate the behaviour of its people and to punish offenders. The King did not prosecute wrongdoers for a desire of vengeance, but his interest was to punish whoever breached the King's peace and jeopardized the national security.[123] There was also a financial factor, because the offender, by paying compensation to the State and not to the victim, contributed to increase the power and the wealth of the King. The economic interest of the State displaced the economic interest of the individual.[124]

The appeal of felony was gradually replaced by a new action: the indictment of felony. Victims could not begin any law suit, as they only informed the local sheriff that an alleged wrong was committed. At this point the sheriff referred the accusation to twelve jurors, who decided whether it was the case to indict and prosecute the wrongdoer.[125] Victims lost the right to initiate a case and any form of control over the prosecution.[126] Likewise the appeal of felony, the indictment of felony did not award the victim with any monetary compensation or restitution of goods.[127] In conclusion, the goal of this new form of proceeding was to punish every violations of the King's peace and not to provide victims with legal tools to present their case and possibly get compensation.[128]

The shift from the appeal of felony to the indictment of felony illustrate that the system of fines slowly, but relentlessly, confined the field of community composition and excluded the victims from the criminal proceedings. In fact, when the compensation to the victim has been entirely replaced by a fine to be paid to the Crown, the State took the place of the victim as a prosecuting party as well. This further development, which strengthened the idea of crime as harm to society to the

[121] D. J. Seipp, *supra* note 120, 63.
[122] J. A. Wemmers, *supra* note 110, 396.
[123] D. J. Seipp, *supra* note 120, 74.
[124] G. Davis, *Making Amends. Mediation and Reparation in Criminal Justice*, London; New York: Routledge (1992), 2.
[125] J. H. Baker, *An Introduction to English Legal History*, London: Butterworths (2002), 505.
[126] D. J. Seipp, *supra* note 120, 70.
[127] *Idem*, 73.
[128] *Idem*, 76-77.

detriment of victims' harm, moved the focus from the victims' welfare to the welfare of the whole community.[129] These developments in criminal law reflected the evolution of the social organization. From a rural community, where the wrongs were a matter between the victim and the offender, while the lord or the king could only assist, society became the personification of the Crown.[130] This model of criminal justice, which, being administrated by the State on behalf of the society, relegated victims to a peripheral role, promptly found a systematic organization in criminological theories developed between the late 1700's and the beginning of the 1800's.

2.5.2. The age of the Enlightenment criminology and the decline of victims' rights.

In the 1700's, European thinkers increasingly began elevating the study of criminal law and its implementation to a legal science. The new approach to criminal justice went beyond simply providing justifications for the consolidation of the State's authority, since it focused on the development of theories on the origins of crime and the most effective methods of crime prevention. The concept of the victims as central actors within the criminal justice system became no more than an obsolete trace of an antiquated era.[131]

The work of Enlightenment thinkers, like Locke and Rousseau, on the origin and role of the State deeply influenced the political and criminal theories of the Italian philosopher Cesare Beccaria, whose ideas on criminal justice represent the foundation of classical criminology and modern penology. Beccaria, in his most famous pamphlet *On Crime and Punishment* (1764), drew on the social contract theory to advance a reform aiming to transform the criminal justice system in a "centralized and rational system of justice".[132] According to Beccaria, by means of the social contract the members of society agreed on the establishment of a set of rules and of a central authority, which had to equally apply such rules to all

[129] T. M. Funk, *Victims' Rights and Advocacy at the International Criminal Court*, Oxford University Press (2015), 25.
[130] M. Wright, *supra* note 112, 16; H. Strang, *supra* note 112, 4.
[131] T. M. Funk, *supra* note 129, 25.
[132] C. Beccaria, 'Introduction', in *On Crimes and Punishment and Other Writings*, Cambridge: Cambridge University Press (1995), xii

individuals.[133] In this system, a crime represented a breach of the social contract, which damaged the entire society as a whole.[134] The State, set to defend the public good, was the only one entitled to prosecute and punish.[135] Since the system of criminal justice found its roots in the social contract as a way to repay the society and deter the potential offenders, the interests of the victims were completely overlooked to the advantage of those of the community.[136] In case of conflict between the interest of the society and those of victims, the first had to prevail over the second, because the criminal prosecution was undertaken for social utility.[137]

This model, which reduced the criminal justice system to a dispute between the State and the defendant, contributed to the development of a formalistic and bureaucratic approach to the criminal justice system.[138] There were positive aspects, because the criminal justice system guaranteed formal safeguards for the defendant, but paradoxically this attention to the individual was at the expenses of victim's role. In the new system of criminal justice drew by Beccaria, the victims were reduced to mere witnesses, as they were deprived of any right to start a criminal action and prosecute the offender.[139] Only the harm victims suffered was taken into consideration, but exclusively as a parameter to assess the proper punishment to mete out to the offender.[140]

2.5.3. The professionalization of the criminal justice system in the XIX century.

From the XIX century, the development of an industrialised large-scale society probably represented the conclusive step to the process of marginalization of victims' role in the criminal justice system.[141] Due especially to the extreme degree of division of labour, highly industrialized societies were characterized by fragmentation, meaning that in everyday life people did not relate to other people as

[133] D. B. Young, 'Cesare Beccaria: Utilitarian or Retributivist? *Journal of Criminal Justice* 11 (1983), 319.
[134] *Ibidem*.
[135] I. Kramnick, *The Portable Enlightenment Reader*, New York: Penguin Books (1995), 20-21.
[136] W. F. McDonald, 'Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim', *The American Criminal Law Review* 13 (1975-1976), 655.
[137] J. Doak, *supra* note 99, 5.
[138] S. Schafer, *supra* note 80, 30.
[139] W. F. McDonald, *supra* note 136, 656.
[140] S. Schafer, *supra* note 80, 30-31.
[141] N. Christie, *supra* note 80, 1.

"total persons"[142], but as role players. People became increasingly more dependent on experts and professionals.[143] In the specific field of litigation, when a conflict has arisen, individuals, being less capable to cope with it, were more willing to give away the conflict to professionals, who, on the contrary, were very interested to take it.[144]

The professionalization of the criminal justice system was an important factor of the dispossession of conflicts from the original owners. In modern criminal proceedings, the party represented by the State, generally the victim, was so extensively represented to the point of being left outside the proceeding. The focus of the system rested on one actor only, the defendant.[145] In this mechanism the victims became "double losers", because they lost to the offender and to the State by being deprived of their participatory rights.[146]

Undoubtedly, the State's appropriation of criminal conflicts entailed a significant loss for society.[147] Conflicts represented "a potential for activity and for participation", but segmentation of society drastically reduced the amount of people involved in any activity. Those involved in such activities, defined as "insiders" by Christie, had many interests to leave the "outsiders" out of the activities and eventually to create a monopoly. The criminal justice system was the perfect example of such task-monopolist society, where members lost the opportunity to be involved in activities that could have direct impact to them.[148] Crime victims were the real outcast of this mechanism. They not only suffered material, physical or psychological damage, but also lost the right to participate in their own criminal case. Society, by giving away the property of conflicts, lost the pedagogical opportunity for norm clarification, giving up on the discussion about what the law should represent and what should be relevant.[149]

The decisive reforms of the administration of justice, which took place in the 1800's, were the outcome of the convergence of those social changes and the

[142] N. Christie, *supra* note 80, 5.
[143] *Ibidem*.
[144] *Idem*, 6.
[145] *Idem*, 5.
[146] *Idem*, 3.
[147] *Idem*, 4.
[148] *Idem*, 7.
[149] *Idem*, 8.

philosophical developments introduced by Beccaria's classical school of criminology. In England, the *Metropolitan Police Act of 1829*[150] set a police force with the specific responsibility to safeguard the public order. Very soon this institution replaced the victim's role in overseeing the prosecution. The police received the reports from the victims and investigated the case. If there were relevant evidence to build the case, the police officer initiated the criminal proceeding before a court of justice. At trial stage the police officers acted as an attorney: he stated the case, presented evidence and exanimated witnesses. If the case was particularly complicated the police officers could hire a solicitor as a legal consultant.[151] Regardless of the absence of an official system of public prosecution, magistrates or solicitors received the evidence gathered in the investigation stage by the police and conducted criminal proceedings.[152] In this way the traditional role of the victim as private prosecutor turned into that of an informer and, later at trial stage, of a witness.[153]

The *Prosecution of Offence Act of 1879*, by setting the office of the Director of the Public Prosecution, introduced in England the figure of the public prosecutor, who had the duty

> [u]nder the superintendence of the Attorney General, to institute, undertake, or carry on such criminal proceedings (...)**,** and to give such advice and assistance to chief officers of police, clerks to justices, and other persons.[154]

Both the *Metropolitan Police Act* and the *Prosecution of Offence Act* can be seen as reflecting the spirit of the reforms advocated by the Enlightenment, as well as the increasing need to have professionals dealing with the structure of criminal proceedings, which dictates that trials are characterised by a highly competitive atmosphere. These two factors contributed to the consolidation of a bifurcated structure of the adversarial criminal proceeding, which focused on a "sharp clash of proofs presented by litigants in a highly structured forensic setting".[155] In this

[150] Metropolitan Police Act 1829, chapter 44 10 Geo 4.
[151] J. Cardenas, 'The Crime Victim in the Prosecutorial Process', *Harvard Journal of Law and Public Policy* (1986), 363.
[152] D. Bentley, *English Criminal Justice in the Nineteenth Century*, Bloomsbury Publishing (1998), 7.
[153] J. Doak, *supra* note 99, 5.
[154] The Prosecution of Offence Act of 1879, 42 & 43 Vict., chapter 2.
[155] S. Landsman, *Readings on Adversarial Justice: The American Approach to Adjudication*, West Academic Publishing (1988), 2.

dichotomous nature of proceedings, where the onus rests on the two parties to produce evidence to substantiate their own case, and to defeat the arguments of their opponent, there was no place for victims' interests and procedural rights.[156] Victims' role was relegated to that of a witness, whose testimony must be shaped to bring out its maximum adversarial effect.[157]

2.6. Victims and the genesis of international criminal justice.

The adversarial structure of the proceeding, as consolidated at the domestic level, deeply informed the procedural model adopted at the first international criminal tribunals. The practice of the Nuremberg International Military Tribunal and the two international criminal tribunals for Yugoslavia and Rwanda maximised the adversarial nature of the proceeding at the great detriment of the interests and potential role of the victims in the trial. The next subsections illustrate that, in the adversarial system adopted by these tribunals, victims serving as witnesses were treated as weapons to be used against the other party. Victims were systematically denied the chance to provide their narratives during the trial, since the parties aimed at taking control of the victim-witness, by relying on questioning to elicit only those facts they considered relevant to the case. The practice of the first international criminal tribunals shows that the parties manipulated victim-witness testimony, by carefully framing questions in order to avoid witnesses talking about anything the parties considered could be omitted from the testimony. This form of control over victims-witnesses and, more generally, the party-driven contest feature of the adversarial trial did not promote the participation of individual victims, or listening to their accounts.[158]

2.6.1. Victims before the Nuremberg International Military Tribunal.

In the aftermath of the Second World War, which resulted in millions of victims who lost their life and the equally numerous victims that survived, but were left physically and psychologically affected, international criminal justice became established in

[156] J. Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation', *Journal of Law and Society* 32(2) (2005), 297.
[157] W. T. Pizzi, *Trials Without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It*, NYU Press (1999), 197.
[158] J. Doak, *supra* note 156, 298.

Nuremberg. Despite the sincere and great shock for the large-scale atrocities committed, in the formation of accountability mechanisms dealing with perpetrators before the Nuremberg International Military Tribunal little attention has been paid to the role and rights of the victims of international crimes.[159] The role of victims was essentially overlooked because of two main factors. First of all, under international law, the concept of victim was pretty much unknown at that time. The general position was that when individual suffers harm in consequence of a violation of rules of international law, the injuries resulting are not that of the harmed person, but that of the State.[160] Secondly, the procedural framework of the Tribunal was shaped following the common law adversarial trial model, which prevents victims from participating with an autonomous standing.[161] This is confirmed by the fact that in the Nuremberg Charter, which explained the constitution, jurisdiction and functions of the *Nuremberg* Tribunal, the word "victim" is completely absent. The drafters did not grant victims any procedural right, or protection or support during the trial.[162]

Nonetheless, victims were often evoked in the rhetoric of the prosecutors. For instance, Sir Hartley Shawcross, the Chief Prosecutor for the United Kingdom, urged the tribunal to convict the defendants so that "justice may be done to these individuals as to their countless victims."[163] In a similar way, the Soviet Prosecutor Rudenko declared that the judges

> have no right to leave unpunished those who organized and were guilty of monstrous crimes (…) [i]n sacred memory of millions of innocent victims of the fascist terror (…) May justice be done![164]

[159] M. Bachrach, 'The Protection and Rights of Victims under International Criminal Law', *The International Lawyer* 34 (2000), 12.
[160] C. McCarthy, 'Victim Redress and International Criminal Justice. Competing Paradigms, or Compatible of Justice?', *Journal of International Criminal Justice* 10 (2012), 354.
[161] L. Moffett, 'The Role of Victims in the International Criminal Tribunals of the Second World War', *International Criminal Law Review* 12(2), 247. For the analysis of the features of the common law adversarial trial framework see section 1.3. of this chapter.
[162] S. Garkawe, 'The Role of Victims at the Nuremberg International Military Tribunal', in H. R. Reginbogin, C. J. M. Safferling, *The Nuremberg Trials: International Criminal Law Since 1945: 60th Anniversary International Conferenc*e, München: K.G. Saur (2006), 86.
[163] Sir Hartley Shawcross' Opening Statement, the Chief Prosecutor for the United Kingdom, 26 July 1946, in The Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes, Vol. 7, 434.
[164] General Rudenko's Opening Statement, 2 August 1946, in The Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes, Vol. 7, 193.

However, the idea of making justice for victims was only used to rationalise the punishment of the defendants.[165] In fact, the Nuremberg Tribunal was based mainly on the idea that international criminal proceedings should be focused upon the punishment of individual perpetrators.[166]

Victims were implicitly acknowledged by the provision on the crimes under the jurisdiction of the tribunal. Article 6 of the Nuremberg Charter listed the three groups of crimes: crimes against peace, war crimes and crimes against humanity. Specifically, the conception of crimes against humanity, enshrined in Article 6(c) of the Nuremberg Charter,[167] was an innovative offense to the language of international law,[168] as it represented the first attempt to address the needs of communities, who experienced the tragic events of the War World II. It included a wide range of criminal conducts, like murder, extermination, enslavement, deportation, and other inhumane acts, which have been committed against any civilian population, before or during the war. The aspiration was to build through the wording of the provision of crimes against humanity a connection between the claims of justice for the mass atrocities committed during the war and the experience of the victims and their impact on the society.[169] However the broad scope of Article 6(c) of the Nuremberg Charter was restricted by the caveat which stated that crimes against humanity should have been committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal." That means that crimes against humanity had a subsidiarity nature, as they were ancillary to crimes against peace and war crimes.[170]

This influenced the prosecution's strategy, which principally decided to focus on proving that behind the crimes against humanity, crimes against peace and war crimes, there was a conspiracy or common plan to aggression. Proving this link

[165] L. Moffett, *supra* note 161, 248-249.
[166] C. McCarthy, *supra* note 160, 352.
[167] Article 6(c) of the Charter of the International Military Tribunal: "Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."
[168] F. Biddle, 'The Nuremberg Trial', *Proceedings of the American Philosophical Society* 9 (1947), 301.
[169] S. Chakravarti, 'More than "Cheap Sentimentally": Victim Testimony at Nuremberg, the Eichmann Trail, and Truth Commissions', *Constellations* 15 (2008), 223-224.
[170] L. Moffett, *supra* note 161, 250.

became more relevant than dealing with myriad of crimes.[171] In his opening statement, the American Chief Prosecutor Justice Jackson affirmed that it was his purpose

> (…) to deal with the Common Plan or Conspiracy to achieve ends possible only by resort to Crimes against Peace, War Crimes, and Crimes against Humanity. My emphasis will not be on individual barbarities and perversions which may have occurred independently of any central plan. One of the dangers ever present is that this Trial may be protracted by details of particular wrongs and that we will become lost in a 'wilderness of single instances'. Nor will I now dwell on the activity of individual defendants except as it may contribute to exposition of the common plan.[172]

Albeit the Nuremberg trial represented an instance of "victor's justice", for the American Chief Prosecutor Jackson, who played the most prominent role in setting the prosecution's strategy, it was important that the trial did not look like a facade to impose punishment. To prove that Germans were planning aggressive war, the prosecution needed only the kind of witnesses, who could provide evidence of any war crimes that implied conspiracy and planning a war.[173] The prosecution's ideal witness was an "insider", an individual who, because of his political or military role, knew the hierarchical structure of the Nazi regime and the decision-making procedure and eye-witnessed the meetings between political and military leaders, where the main decision regarding planning an aggressive war were taken. It was unlikely for the victims to have copies of the documentation, which provide specific information about the orders the defendants gave. The horrors that survivors endured were mostly linked to perpetrators, who were so much lower in the chain of the Nazi hierarchy, that they were not even indicted before the tribunal.[174]

For this reason, the prosecutor's approach, aimed at providing incontrovertible evidence of the individual responsibility of the 24 defendants, anchored the cases to the detailed material evidence, like documents,

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[171] L. Moffett, *supra* note 161, 250.
[172] Robert H. Jackson United States Chief Prosecutor, Opening speech at the Nuremberg Trail, 21 November 1945, in The Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes, Vol. 1, 103.
[173] B. F. Smith, *Reaching Judgment at Nuremberg*, London: Andre Deutsch (1977), 88.
[174] S. Garkawe, *supra* note 162, 90.

communications and photographs gathered from the Nazis. Documents provided a sounder foundation to the case, while victims and survivors, despite their potentially substantial public impact, under the pressure to perform before the Tribunal at a public hearing could retract their confessions.[175] The American prosecutor was influenced by the assumption, largely widespread in the immediate aftermath of the War World II, that victims, because of the horrible events they experienced, were psychologically unable to testify.[176] Victims ran the risk to be considered counterproductive for the case of the prosecution because they were perceived to be too emotional and, thus, not able to provide objective evidence.[177] The prosecution feared that victims' credibility could be subject of criticism and that witnesses could be charged of perjury, because paradoxically there was a general disbelief of the whole range of the atrocities committed by Nazis, such as, for instance, the Holocaust.[178] Thus, presenting the case through the Nazi's materials reinforced the idea that the trial was based on objective and impartial evidence.[179]

The case of the Jews who survived the Holocaust is a symbolic example of this policy. The representative of Jewish organization – e.g. the World Jewish Congress – requested for participation of Holocaust victims, but the American chief prosecutor partially reject these requests, arguing that "it is intended to have one military trial embracing the whole conspiracy of the Nazis against the world, in which the Jewish should have its place."[180] Jackson feared the risk that, by allowing the Jewish victims to present their case, the trial could turn into a vengeance trial and provoke racial tensions.[181] Moreover, the possibility that other groups of victims, following the Jews precedent, could asked for more representation in the trial, would

[175] D. Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory*, Oxford: Oxford University Press (2001), at 61.
[176] S. Garkawe, *supra* note 162, 90.
[177] *Idem*, 90.
[178] *Ibidem*.
[179] S. Chakravarti, *supra* note 169, 225.
[180] "Minutes of a meeting with Justice Robert H. Jackson, held at the Federal Court House, N.Y.C., Tuesday June 12 from 10 to 11:30 A.M.," Truman Library website , https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-06-12&documentid=C106-16-5&pagenumber=1, 5-6.
[181] D. Bloxham, *supra* note 175, 67.

have made more complicated for the prosecution to focus on the responsibilities of the Nazi leaders.[182]

However, the decision of the prosecution to present the Nazi crimes through a long list of bureaucratic documents and statistics generated a general disinterest towards the trial in the press and public opinion. The main issues discussed during the hearings concerned mostly the admission and relevance of the evidence. Despite the promises, the Nuremberg trial rather than being perceived as memorable, was quite flat most of the time.[183] For such reason, the Prosecutor Jackson decided to present few witnesses to "try out the defence" and to "introduce a little drama into the case".[184] Thirty-three and sixty-one witnesses, respectively for the Prosecution and for the defendants, testified before the IMT.[185] Witnesses were generally military or political leaders of the Nazi regime, while only three of them were actually Jews, who survived the war.[186]

The few Jewish victims admitted as witnesses, had in common that, because of their position, they could provide detailed and objective evidence on the responsibility of the key figures of the Nazi regime, instead of providing the representation of vexations, suffering and the genocide of Jews in Europe.[187] The role of prosecution's witnesses was that of "corroborating evidence" of the documentation on criminal plans of the German leaders, without having the chance to provide their own narrative.[188]

For instance, the first Jewish witness was Abram Gerzevitch Suzkever[189] was called by Soviet Prosecutor Smirnov to testify before the Court to support the charge

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[182] L. Jockusch, 'Justice at Nuremberg? Jewish Responses to Nazi War-Crime Trials in Allied-Occupied Germany', *Jewish Social Studies* 19, (2012), 115.
[183] S. Garkawe, *supra* note 162, 88-89.
[184] B. F. Smith, *supra* note 173, 87.
[185] J. A. Appleman, *Military Tribunals and the International Crimes*, Westport Connecticut: Greenwood Press Publishers (1954), VIII.
[186] L. Jockusch, *supra* note 182, 108.
[187] *Idem*, 122.
[188] A. Tusa and J. Tusa, *The Nuremberg Trial*, London: Macmillan International Criminal Law (1983), 171.
[189] Abram Gerzevitch Suzkever was a Jewish writer who joined the United Partisan Organization and fought under the Soviet command in Vilna. His poetry on the Nazi violence committed in the ghetto of Vilna, represented not only the testimony of the Jewish suffering, but also an impetus of the antifascist resistance. J. Schwarz, 'After the Destruction of Vilna', *East European Jewish Affairs*, 35(2), 211.

of crimes against humanity committed in Vilna (Lithuanian Soviet Republic).[190] Suzkever's testimony matched the evidence needs of the prosecution. Firstly, he revealed names of those responsible for the mass extermination of the Jewish people in Vilna;[191] secondly, he provided a clear picture of the wide scale of the atrocities committed during the German occupation of Vilna. According to Suzkever, in July 1941 80,000 Jews lived in Vilna, while in July 1944, about only 600 Jews remained.[192]

The second Jewish witness was Samuel Rajzman, who was deported to Treblinka extermination camp (Poland).[193] Rajzman's task was to load the clothes of the murdered persons on the trains[194] and, because of his position, he was well acquainted with the rules regulating the treatment of the people in this camp and he was able to provide a detailed description of the conducts of Nazis towards Jewish prisoners.[195] He confirmed that under the control of the camp commander Kurt Franz, "[o]n an average, I believe they killed in Treblinka from ten to twelve thousand persons daily."[196]

Several others Jews submitted affidavits to the prosecution, but they did not testify personally before the court. One of the most relevant affidavits was from Rudolph Kasztner, who

> as one of the leaders of the Hungarian Zionist organization I not only witnessed closely the Jewish persecution, dealt with officials of the Hungarian puppet government and the Gestapo but also gained insight into the operation of the Gestapo, their organization and witnessed the various phases of Jewish persecution.[197]

Kasztner provided a detailed chronological account of the major phases of the persecution of the Hungarian Jews.[198] His position of leader of the Hungarian Zionist

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[190] Abram Gerzevitch Suzkever testimony, 27 February 1946, in The Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes, Vol. 8, 300-301.
[191] *Idem*, 303.
[192] *Idem*, 306.
[193] L. Jockusch, *supra* note 183, 120.
[194] Samuel Rajzman testimony, 27 February 1946, in The Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes, Vol. 8, 327.
[195] *Idem*, 324.
[196] *Idem*, 327.
[197] Rudolph Kasztner's affidavit, document 2605-PS, in Nazi Conspiracy and Aggression, Vol. 5, 313.
[198] *Idem*, 316.

Organization gave him access to data on the number of Jews killed during the German occupation. According to his calculation, in 1940-1941 a census showed that there were 762,000 Jews in the Hungarian territory, but in August 1945 there were only 240,000 Jews still alive.[199] Kasztner also listed the names of German perpetrators and members of Hungarian government, who collaborated with the Nazis.[200]

Quite the opposite, when the victims called to testify before the tribunal tried to provide their own narratives, by expressing their experiences and sufferings, the judges often interrupted them, considering that information irrelevant to the case. For instance, during the testimony of Severina Shmaglevskaya, a Jew who survived to the Auschwitz concentration camp, she was describing the conditions of the camp and the violence she suffered, while she was interrupted by a judge:

> Severina Shmaglevskaya: What I want to say is that in some cases the kitchen utensils and pots contained remains of food, and in others there was human excrement (…) These kitchen utensils, which were sometimes very badly washed, were given to people who had just arrived at the concentration camp. From these pots and pans they had to eat, so that often they caught dysentery and other diseases from the first day.
>
> The President: Colonel Smirnov, I don't think the Tribunal wants quite so much of the detail with reference of these domestic matters.[201]

The peripheral role played by victims represented a lost occasion for the IMT to provide a sense of justice for the millions of victims of the Nazis.[202] Although the emotions of the victims did not seem to fit within the juridical and political context of the Nuremberg trials, nonetheless, they were part of the events the Tribunal had the jurisdiction to try. There were several reasons why victims should have been given a greater role in proceedings. Including the voice to victims represented a way to cope with ethical and political concerns and to reflect about the values that were

[199] Rudolph Kasztner's affidavit, *supra* note 197, 321.
[200] *Idem*, 325.
[201] Testimony of Severina Shmaglevskaya on Treatment of Children, 27 February 1946, in The Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes, Vol. 8, 321.
[202] S. Garkawe, *supra* note 162, 86.

necessary to rebuild society after War World II.[203] Hearing the victims' narratives would have led the Tribunal to trace a broader historical account of the crimes against Jews, Gypsies, Slavs, homosexuals, disabled persons, religious minorities and people of colour, which were a fundamental element of the World War II.[204] Victims' involvement would have counterweighted the focus of the prosecution on waging of, and conspiring to, wage aggressive war.[205] Evidence from victims would have personalized the crimes committed by Nazis and given a more dramatic dimension to the trial, enhancing, thus, the pedagogical message of the IMT in front of the worldwide community.[206] Most importantly, the practise of the Nuremberg tribunal, which underestimated the value of victims' role, influence the patter of the following sixty years of international criminal justice, which was mainly focused on punishing the perpetrators.[207]

2.6.2. Victims' rights before ICTY and ICTR.

The founding instruments of the International Criminal Tribunal for the former Yugoslavia (hereafter ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were deeply influenced by the approach to justice adopted at Nuremberg, characterised by the focus on the punishment of perpetrators. The UN Security Council resolutions setting up the *ad hoc* international criminal tribunals affirmed that they have been established "for the sole purpose of prosecuting persons responsible for serious violations of humanitarian law."[208] The mandates of the ICTY and ICTR were the main reason explaining the role of victims before these tribunals. Despite that, the drafters of the provisions of the ICTY and ICTR introduced a number of innovative measures to assist and protect victims-witnesses. The provisions on victims included in the Statute of both the ICTY and ICTR represented an attempt to increase the effectiveness of victims' involvement, given that they

[203] S. Chakravarti, *supra* note 169, 233.
[204] S. Garkawe, *supra* note 162, 86.
[205] *Idem*, 88.
[206] *Idem*, 88-89.
[207] L. Moffett, *supra* note 161, 248-249.
[208] UNSC Resolution 827 (1993) of 25 May 1993, Doc. n. S/RES/827; UNSC Resolution 955 (1994) of 8 November 1994, Doc. n. S/RES/955.

could be still subjected to intimidations and retaliations, because of their testimonies before the court.[209]

The first positive move was made by Article 20 of the ICTY Statute, according to which the tribunal has to conduct the proceedings with "due regard for the protection of victims and witnesses."[210] The main innovation has been the inclusion of Article 22, entitled "Protection of victims and witnesses", which introduced a number of innovative measures to assist and protect victims, such as *in camera* proceedings or measures to protect the identity of the victim.[211] Following Article 22 of the ICTY Statute, Rule 34 of the Rules of Procedure and Evidence of the ICTY[212] provides for the establishment of the Victims and Witnesses Unit with the general duty to assist and support victims.[213] It directs administrative, financial and practical arrangements to bring victims before the court and also provides them with information about their position and the functioning of criminal proceedings, in order to try to downsize the harshness of the courtroom experience. The Victims and Witnesses Unit provides also counselling, medical and psychological care where needed, especially in cases of rape.[214]

The ICTR's Statute reproduces the same provisions of Articles 20 and 22 of ICTY's Statute and of Rule 34. However, the gravity of the crimes committed in Rwanda required expanding the scope of action of the Victims and Witnesses Unit. The Unit had to "develop short term and long-term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family."[215]

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[209] G. Sluiter, 'The ICTR and the Protection of Witnesses', *Journal of International Criminal Justice* 3 (2005), 964.
[210] ICTY Statute, article 20 (1).
[211] Article 22 of ICTY Statute: "The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity." Similarly, Article 21 of ICTR Statute: "The International Tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."
[212] Rule 34 (A) of the Rules of Procedure and evidence: "There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to: (i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and (ii) provide counselling and support for them, in particular in cases of rape and sexual assault."
[213] S. Zappalà, *supra* note 22, 223.
[214] *Ibidem*.
[215] Rule 34 (A) (iii) of Rules of Procedure and Evidence of ICTR.

Bearing in mind that some steps forward have been done, however, in the normative framework of the ICTY and ICTR victims did not have any independent standing in the criminal proceedings. Victims were granted four ways to participate in proceedings before the ICTY and ICTR: the *amicus curiae*;[216] writing a letter to the Prosecutor;[217] victim impact statement[218] and serving as a witness.[219] The impact of the first two methods of victims' participation is rather questionable because victims generally do not have the necessary expertise, resources and information to advocate their interests by mean of the submission of an application as *amicus curiae* or a letter to the Prosecutor.[220] The submission of a victim impact statement gives victims the chance to participate and express to what extent the crimes have affected their lives and, possibly, have an impact on the Chamber when it determines the severity of the defendant's sentence.[221] The actual possibility for the victim to be able to tell her/his story at trial-stage relied on either one of the parties summoning her/him and the chamber approving the summoning or the chamber itself calling her/him to testify.[222] In practice, since victims were solely allowed to testify as witnesses, their participation was ruled by the norms governing witness's testimony.[223] Victims, as witnesses of the Prosecutor or the defence, could not refuse to give evidence, had to take the oath, could speak only during the examination and cross-examination conducted by the parties. Further, the witness could not be present

[216] Rule 74 of the Rules of Procedure and Evidence of both the ICTY and ICTR: "A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber."
[217] Letter by the ONG Coalition for Women's Human Rights in Conflict Situations to Carla Del Ponte, Prosecutor, regarding the Urgent Need to Include Charges of Sexual Violence in the Indictment against Milosevic. The ONG Coalition for Women's Human Rights in Conflict Situation sent a letter to Prosecutor Carla Del Ponte on August 14, 2001, regarding the urgent need to include charges of sexual violence in the indictment against Slobodan Milosevic at the ICTY. Over 30 international women's groups and individuals signed the letter and in October 2001, they applauded the inclusion of charges of sexual violence in the indictment by Prosecutor Del Ponte. The Coalition for Women's Human Rights in Conflict Situations sent a letter to Prosecutor Jallow regarding the need to step-up sexual violence investigations in the case of former commander Muvunyi, not drop rape charges, February 8, 2005, but at the trial the prosecutor did not present evidence on these crimes.
[218] Rule 92 *bis* (A)(i)(d) of the Rules of Procedure and Evidence of both the ICTY and ICTR: "Factors in favour of admitting evidence in the form of a written statement include, but are not limited to, circumstances in which the evidence in question: (…) concerns the impact of crimes upon victims;"
[219] Rule 90 of the Rules of Procedure and Evidence of both the ICTY and ICTR.
[220] L. Moffett, *Justice for Victims before the International Criminal Court*, Routledge (2014), 72.
[221] J. Doak, *supra* note 99, 150-151.
[222]M. Heikkilä, *supra* note 19, 74-75.
[223] *Idem*, 74.

in the court while other witnesses are testifying and could not have access to the evidence produced by the Prosecutor and the defence and could not be assisted by a lawyer while s/he is testifying. [224]

In this scenario, the scope of victims' participation was constrained because it had to fulfil procedural requirements, as it was shaped according to the evidentiary needs of the prosecution and the defence.[225] Behind this choice there was the idea that it was a specific task of the Prosecutor to represent the interest of the victims in every stage of the proceeding and that the Prosecutor's interest coincides in its entirety with that of the victims.[226] But the experience of the ICTY and ICTR showed that the story telling of the victims was constrained and their testimonies were shaped according to the evidentiary needs of the prosecution and the defence.[227] The case *Prosecutor v. Krstić*[228] represents a clear example where victims as witnesses were objectified by the Prosecutor for the ends to establish the responsibility of the defendant.[229]

General Radislav Krstić was tried for the systematic mass executions of 7,000 to 8,000 Bosnian Muslim men, which occurred in several different locations in and around the Srebrenica area (Bosnia), between the 11th of July 1995 and the 18th of July 1995.[230] The analysis of the transcripts of the victims' testimonies illustrated to what extent victims were objectified.[231] The prosecutor, instead of giving victims the opportunity to tell their story, interrupted victims' testimonies in several occasions when their accounts became irrelevant to assess the responsibility of the defendant.[232] The testimony of witness J, was an example of the frustration and impatience of both the prosecutor and the victim-witness,

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[224] E. Haslam, *supra* note 31, 320.
[225] *Idem*, 318.
[226] C. Jorda and J. de Hemptinne, 'The Status and the Role of the Victims', in A. Cassese, P. Gaeta & J. R. Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary (Vol. 2)*, Oxford: Oxford University Press (2002), 1394-1395.
[227] E. Haslam, *supra* note 31, 318; M. Dembour and E. Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials', *European Journal of International Law* 15 (1) (2004), 154.
[228] *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T.
[229] M. Dembour and E. Haslam, *supra* note 227, 154.
[230] *The Prosecutor v. Radislav Krstić*, Indictment, Case No. It-98-33, §§ 22-23. Available at: http://www.icty.org/x/cases/krstic/ind/en/krs-1ai991027e.pdf; *the Prosecutor v. Radislav Krstić*, Case Information Sheet. Available at: http://www.icty.org/x/cases/krstic/cis/en/cis_krstic_en.pdf.
[231] E. Haslam, *supra* note 31, 319.
[232] M. Dembour and E. Haslam, *supra* note 227, 158.

> Q. Witness, I realise that the trip that you made to Zepa was very difficult and very frightening, but I would just like you to simply confirm a number of points to the Judges by simply answering yes or no. Otherwise, I think we're going to be here a very long time, and I know you want to go home to Bosnia tomorrow. So simply answer yes or no. Do you understand?
>
> A. Why should I say yes or no to your questions?
>
> Q. Did you arrive in Zepa on the 26th of July?
>
> A. On the 26th of July, I arrived in Zepa, about 3.00 in the afternoon.
>
> Q. And then I think, on the 29th of July, Zepa fell, you --
>
> A. On the 29th, Zepa fell.
>
> Q. You left Zepa and you spent a long time -- Witness, listen to my question and simply answer yes or no to the question. I think you left Zepa on the 29th of July and you spent over 40 days wandering in Bosnian Serb territory, and then you eventually made your way to the free territory on the 17th of September of 1995. Is that right? Just yes or no.
>
> A. Yes. Yes. Yes.
>
> Q. Thank you, Witness.
>
> MR. CAYLEY: Mr. President, I have no further questions for the witness.[233]

Victims-witnesses continuously referred to members of family, friends and neighbours they lost because of the mass killings, but the Chamber and the Prosecutor were not interested in details about the lives of the murdered victims. In her testimony witness DD tried to tell her story about her child, but the prosecutor considered this part of the testimony redundant,[234]

> A. I was going to tell you the whole story from Tuesday to Thursday. Can I do it?

[233] *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, transcript of the witness J testimony, 10 April 2000, §§ 2474-2475. Available at: http://www.icty.org/x/cases/krstic/trans/en/000410ed.htm.
[234] M. Dembour and E. Haslam, *supra* note 227, 159.

> Q. Witness, the Judges have already heard quite a lot of evidence in this case about the events in Pocari, so for the purposes of my examination, I'm not going to ask you questions about those days.[235]

In the case *Prosecutor v. Krstić*, the Chamber allowed the victims-witnesses, when the examination was concluded, to speak freely to the court. Most of the victims express how it was difficult to keep on living a normal life, others communicated their desperation and hopelessness. Even in this occasion, the victims' regime under the Statute of the ICTY showed its limits.[236] The case *Prosecutor v. Krstić* showed to what extent the right to service model implemented by the ICTY limited the victims' role in the proceeding and constrained the manner they conveyed their tragic experience. Victims, being used by the prosecutor and the defence as a mean to prove the guilt of the offender, had a little control over their narrative.[237]

In 2000, Carla Del Ponte, the Prosecutor of the ICTY, advanced some proposals for redrafting the Statue and the Rule of Procedure and Evidence of the *ad hoc* tribunals. She aimed at conferring access to and participation in the criminal proceedings to victims,[238] but the Plenary of both ICTY and ICTR rejected such a possibility. The ICTY and ICTR Plenary firmly held that allowing victims to participate in the proceeding would have significantly slowed down the trials and that it would have been complex to implement the amendments *per se*.[239]

2.7. Conclusion.

This chapter demonstrated that, despite of the provisions of the Rome Statute and RPE on victims' participation find their *raison d'être* in the overall goal of giving victims a voice in the proceeding, the ICC Statute addresses only the general principles of victims' participation regime. Neither the RPE of the ICC, which should supplement the Statute's principles with more detailed procedural provisions,

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[235] *The Prosecutor v. Radislav Krstić*, *supra* note 234, § 5752.
[236] M. Dembour and E. Haslam, *supra* note 227, 171-172.
[237] *Idem*, 164.
[238] Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council, 3 November 2000, UN Doc. S/2000/1063, Annex, 3. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/726/74/PDF/N0072674.pdf?OpenElement.
[239] Victims' Compensation and Participation, Report by the Rules Committee, in Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council, 3 November 2000, UN Doc. S/2000/1063, Appendix §§ 47-48; Letter dated 14 December 2000 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2000/1198, Annex, 3. Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2000/1198.

contribute to indisputably establish what are the specific participatory rights of victims and at what stage of the proceeding such participation can be exercised. It has been argued that the picture is broader than the victims' participatory rights, since the proper understanding of the position and rights of victims suffers from the uncertainty relating to the procedural model adopted by the ICC. Under the procedural rules of the ICC Statute and RPE it remains unclear whether victims should be considered as participants in a judge-driven fact finding (inquisitorial-type) process or as participants in a party-driven fact finding (accusatorial-type) process.

The lack of a clear recognition of a procedural system that dominates the international criminal justice, as a full response to the concerns with the victims is deliberate. The drafters of the Rome Statute and RPE did not find a shared position between the different understanding of criminal process and procedural roles of judge, prosecutors, defence and victims of the common law and civil law traditions.

The second part of this chapter put the role of victims in the proceeding in an historical context. The analysis of the historical progression of the role of victims in domestic criminal proceeding, demonstrated that the concept of victims' procedural right was not a novelty. From the early society victims were at the forefront of the criminal justice system, as they could actively participate in the criminal proceeding to redress the wrong suffered. Victims enjoyed an active participatory role in criminal proceedings, as they were responsible not only for initiating, but also for prosecuting offenders.

Most importantly, the historical perspective on victims' participation refuted the dominant narrative of the common law tradition, which excluded, because their participatory rights were incompatible with the adversarial structure of the proceedings, aimed at safeguarding the fairness of the trial and the rights of the accused. The historical investigation undertaken in this chapter demonstrated that the gradual exclusion of victims from both the investigation and the trial stage of the criminal process was rooted in sociological and political factors. The evolution of the societal fabric into a more and more complex system, coupled with centuries of State's centralisation, led to the development of centralized system of the administration of justice in the hands of the State's authorities, structuring the criminal justice system as a contest between the state and the defendant. Therefore,

behind the "adversarialisation"[240] of the criminal proceeding there was the concern that victims' participatory rights could endanger the accused's right to a fair trial, interfere with the Prosecutor's strategies and the Chamber's effective management of the proceedings. Given this historical explanation of the reasons why victims do not have any procedural role to play in the modern adversarial criminal proceeding, other than that of serving as a witness of the events, it can be advanced that those reasons do not necessary constitute a rational justification for the continuation in overlooking victims' rights and interest.

This adversarial structure of the proceeding, as consolidated at the domestic level, deeply informed the procedural model adopted at the first international criminal tribunals. While the Nuremberg International Military Tribunal completely neglected the rights of victims, the issue of victims' role within the international criminal proceeding received some attentions by the drafters of the provisions of the ICTY and ICTR.[241] In fact, Statute of both the ICTY and ICTR included some measures to assist and protect victims-witnesses. By means of this model of protection of victims, the ICTY and ICTR introduce in the international criminal justice system the developments advanced by the victimological studies, as developed at the domestic level. Victimology tried to respond to the need and interests of victims through the development of a right to service prospective [242] and the next chapter aims at evaluate whether the victimological response was adequate to achieve the goal of giving victims a voice in the criminal proceeding.

[240] J. Doak, *supra* note 99, 6.
[241] S. B. Garkawe, 'Victims and the International Criminal Court: Three Major Issues', *International Criminal Law Review* 3 (2003), 345-348; S. Zappalà, *supra* note 22, 220.
[242] S. Zappalà, *supra* note 22, 221.

CHAPTER III

A Critical Overview on Victimology within the Domestic Criminal Justice System.

3.1. Introduction.

In the modern age, the centralised and State-provided criminal justice consolidated what Shafer called the "correctional ossification" of the criminal justice system, as the criminal law and its penal sanctions aimed at protecting the public interest and not the private interests of individual parties, leaving very little room to the role of victims in criminal proceedings.[1] It is on this ground that retributivist and deterrent paradigms of punishment, which shape the structure and values of the criminal justice system, have been largely conceived. However, as in the 1700's the Enlightenment's developments in criminology and penology relegated victims to a peripheral role, in the mid 1900's the rise of victimology, as an academic discipline, responded to the removal of the victims in the context of the domestic criminal justice system.

Based on this view, this chapter is developed around two main goals. The first is to provide an insight into retributive and deterrence theories to offer a better understanding of the nature, primary purposes, structure and procedure of the retributive and deterrent criminal justice system, since such analysis contributes to shed a light on the role and rights of all individuals, including victims, involved in the criminal process.[2] The first part of the chapter investigates the retributive and deterrence paradigms in connection with both the functioning role of the criminal justice system and the role these theories grant to victims.

The second goal of this chapter is to investigate whether victimological studies advanced effective responses to make the criminal justice mechanism more responsive to the concerns of victims. The analysis aims to explore the extent to which the victimological response to calls for the better integration of victims into

[1] S. Schafer, *The Victim and His Criminal. A Study of Functional Responsibility*, New York: Random House (1968), 37-38.
[2] B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, Intersentia (2011). 33.

systems of criminal justice, seeking to reposition the victim, has challenged the traditional mechanisms of deterrence and retribution. Without radical reform, the existing procedural models, which are informed by the retributivist and deterrent paradigm, could not easily be adopted to accommodate the meaningful participation of the victims. In order to grant victims substantive and enforceable procedural rights, this chapter questions whether the most influential victimology approaches effectively reconfigure the balance between the judiciary, the accused and victims as well.

This chapter aims at examining the path embraced by the different strands of victimology and victim advocacy in response to victimhood to understand whether, despite the widespread agreement that something had to be done to ameliorate the status of victims, they share a common ground about the position of the victim, the treatment victims were entitled to and how much encouragement should be given to their alleged demands.

This chapter is not focused only on exploring the theoretical foundations of victimology, but also introduces the debate on needs and rights of victims. In order to provide victims with a more extensive role within criminal proceeding, victimology developed two victims-based approaches: the rights of victims to services, which address the victims' physical, psychological and material needs and victims' procedural rights, whose nature reflects the goals and essence of the criminal process as a legal and social institution. The discussion looks at the way victimological perspective has addressed these two victims-based approaches in order to establish whether they are effectively able to reform the criminal justice system to enhance victims' procedural rights. In doing so, this chapter will take into consideration the restorative justice mechanism to evaluate to what degree it represents an effective response to the demands of victims' participation in criminal proceedings.

As final remark on this chapter, the rationale for relying on the domestic victimological experience must be established, given that this work deals with issues related to the role and position of victims within the international criminal justice system. The reason of this choice originates in the acknowledgement that the legitimation of the victims' role in the criminal proceeding had mainly to follow the path already drawn by victimology at the domestic level. In fact, the developments of

victimology at the national level largely informed the victims' position in the international criminal justice system. As illustrated in chapter II,[3] the experience of the ICTY and ICTR has given attention to victims' rights to services, as victims could enjoy access to protective measures, which provided them with assistance and support and contributed to softening the impact of the proceedings.[4] Thus, in order to understand the factors which led to the recognition of victims as participants of the international criminal justice system, there is the need to look at the achievements made so far by domestic victimology.

This chapter proceeds as follows. The second section deals with the main feature of retributivist and deterrent theories of punishment to provide a clear understanding of the role conferred to victims in the procedural systems entailed by these paradigms of criminal justice. The third section explores the advent of victimology from the first approaches characterised for blaming the victim, to an overall and unitary understanding of the criminal justice system, which should achieve the need for atonement of the offender and the victim's need for retribution their joint need for reconciliation. This section looks also at the contributions of the heterogeneous nature and demands of victims' movement, seeking to enhance of the role of crime victims within the criminal justice system. The fourth section explores the debate on victims' rights and victims' needs and, in particular, analyses what victim-based approach between victims' procedural rights and victims' rights to service, as developed by the victimological discourse, effectively integrates victims into systems of criminal justice. The last section examines the features and limitation of the restorative justice system in connection with the role it grants to victims in the criminal justice system.

3.2. Criminal justice theories and the role of victims in criminal proceedings.

In domestic criminal justice, the central question on criminal law is which justifications underpin punishment.[5] Traditionally the justifications behind

[3] See section 2.6.2. of chapter II.
[4] S. Zappalà, *Human Rights in International Criminal Proceedings*, Oxford University Press (2003), 223.
[5] D. J. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', *Georgetown Law Faculty Working Papers* (2008), 7. Available at

punishment fall into two broad categories: the retributivist theories and the crime-control or utilitarian school.[6] The first approach looks at punishment as an end in itself, emphasizing the connection between punishment and moral wrongdoing.[7] Conversely, utilitarian theories regard punishment as a tool to achieve other justifiable ends, which are: specific and general deterrence, incapacitation and rehabilitation.[8]

3.2.1. Retributive theories.

Retributive theories have a long tradition in criminal law, but they found their philosophical formulation with Immanuel Kant's characteristic discourse of "just deserts".[9] According to the German philosopher, retribution intends that criminals should be punished because they deserve it. On this view, punishment becomes a categorical imperative.[10] Such a standpoint is reinforced by another prominent German philosopher, Hegel, who in his *Philosophy of Right* holds that "as the criminal has done, so should it be done to him."[11]

In the literature there are several different retributive theories to explain when and why punishment can be deserved,[12] but in my study I will not provide an exhaustive analysis of the many possible variants of retributivism, instead I focus on general standards of the retributivist account. Generally, retribution can be defined as a form of criminal justice involving the infliction of punishment upon a perpetrator who, as result of his/her wrongful behaviour, is considered to be deserving

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http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1069&context=fwps_papers. This open-access article is published also in S. Besson and J. Tasioulas (eds), *The Philosophy Of International Law*, Oxford University Press (2010); R. D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', *Stanford Journal of International Law* 43 (2007), 40; M. Heikkilä, *International Criminal Tribunals and Victims of Crime: A Study of the Status Of Victims before International Criminal Tribunals and of Factors Affecting This Status*, Turku: Institute for Human Rights Åbo Akademi University (2004), 23.

[6] R. D. Sloane, *supra* note 5, 69.

[7] M. Heikkilä, *supra* note 5, 23.

[8] D. J. Luban, *supra* note 5, 8; M. Heikkilä, *supra* note 5, 23.

[9] R. A. Duff, D. Garland Eds, *A Reader on Punishment*, Oxford University Press (1994), 1-3.

[10] I. Kant, trans. J. Ladd, *The Metaphysical Elements of Justice. Part I of the Metaphysics of Morals*, Indianapolis: Bobbs-Merrill (1965).

[11] G. W. F. Hegel, trans. T. M. Knox, *Philosophy of Right*, Oxford: Oxford University Press (1967), 71.

[12] J. Cottingham, 'Varieties of Retribution', *The Philosophical Quarterly* 29(116) (1979); N. Walker, 'Even More Varieties of Retribution', *Philosophy*, 74(04) (1999).

punishment.[13] As Cottingham outlined, the etymology of the word retribution comes from the Latin *re+tribuo*, which means "to pay back". One way retributivists have interpreted the concept of paying back is that criminals have taken unfair advantage of the law-abiding and therefore, in order to be appropriately punished, they have to pay their debt to society. In this perspective punishment is conceived as paying back for the unfair advantage and restoring the *status quo* as it was before the perpetration of the wrongful action.[14]

The core of retributive theories on crime and punishment rests on the link between punishment and moral wrongdoing without any regard to any possible effect or benefit that the punishment could reasonably have.[15] The central concern is providing the offender with a consistent treatment and a proportional punishment.[16] Thus, the specific focus of the retributive approach lies on the perpetrators themselves and this explains the emphasis on the rights and procedural safeguards for the accused, such as a public prosecutor that runs the proceedings, so that victims' subjective experience of suffering does not affect the trial outcome.[17] As Cragg affirms, retributive approaches depersonalize the process because justice is concerned with wrongs and not with persons, except for the perpetrators.[18] Although the wrongdoing affecting the victims is the inception of the retributive thinking, however, victims lose their central role in the drama, whose focus is on the wrong committed and not the person wronged.[19]

Retributive thinkers rarely discuss the role of victims in criminal proceedings because they hold the punishment as a response to the wrong suffered by the victim, rather than a response to the harm experienced by the victim. They claim that it is

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[13] B. McGonigle Leyh, *supra* note 2, 37; M. Heikkilä, *supra* note 5, 25; R. Nozick, *Philosophical Explanations Cambridge*, Harvard University Press (1981), 374–384; D. Cooper, 'Hegel's Theory of Punishment', in Zbigniew Pelcynski (ed.), *Hegel's Philosophy: Problems and Perspectives*, Cambridge University Press (1971); A. Von Hirsch, 'Punishment, Penance and the State', in M. Matravers (ed.), *Punishment and Political Theory*, Oxford: Hart Publishing (1999), 69; C. Morris, 'Punishment and the Loss of Moral Standing', *Canadian Journal of Philosophy* 53 (1991).
[14] J. Cottingham, *supra* note 12, 238-239.
[15] M. Heikkilä, *supra* note 5, 26; B. Wringe, 'Why Punish War Crimes? Victor's Justice and Expressive Justifications of Punishment', *Law and Philosophy*, 25(2) (2006), 167; R. Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press (2007), 19.
[16] M. Heikkilä, *supra* note 5, 26.
[17] *Idem*, 28.
[18] W. Cragg, *The Practice of Punishment: Towards a Theory of Restorative Justice*, London: Routledge (1992), 19.
[19] *Ibidem*.

difficult to grasp the subjective suffering experienced by victims, thus, what becomes central is the degree of suffering that can be objectively established.[20] For retributivists, in order to assess the wrongfulness of criminal actions and mete out a proportional punishment to the offender, there are two parameters to take into account: the gravity of the offence and the state of mind of the offender, meaning the degree of intentionality in his/her actions.[21]

In criminal proceedings the public prosecutor is the counterpart of the defendant, while the victim serves simply as a witness among the prosecution's witnesses, enjoying very limited measures, mainly related their protection and the guarantee to treat witnesses with compassion and respect during the trial. Such measures are very important, but they do not empower the victims.[22]

3.2.2. Utilitarian theories.

Utilitarian theories can be described as forward-looking, because of their focus on the future benefits of punishment – conversely retributivism is backward-looking, as it focuses on the wrongfulness of the crime – and also consequentialist, since they justify punishment by linking it to its foreseeable consequences.[23] The difference between several utilitarian theories rests in the identification of the consequences that punishment can produce, which can be specific and general deterrence, rehabilitation and incapacitation.[24] However the common point of utilitarian theories is that punishment must be imposed to prevent the offender and, more generally, the population from engaging in prohibited conducts.[25] As will be explored in chapter IV, international criminal tribunals invoke as a prominent rationale for punishment the goal of deterrence, while the place of rehabilitation and incapacitation is

[20] M. Heikkilä, *supra* note 5, 27.
[21] *Idem*, 27; M. A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press (2007), 15; M. M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', *Michigan Journal of International Law*, 33(2) (2012), 301; A. Von Hirsch & N. Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis', *Oxford Journal of Legal Studies*, 11(1) (1991), 1-3.
[22] M. Heikkilä, *supra* note 5, 28.
[23] *Ibidem*; B. McGonigle Leyh, *supra* note 2, 41; A. Fatić, *Punishment and Restorative Crime-Handling*, Aldershot: Avebury (1995), 1; R. Cryer et al., *supra* note 15, 20.
[24] M. Heikkilä, *supra* note 5, 28; B. McGonigle Leyh, *supra* note 2, 42.
[25] R. Cryer et al., *supra* note 15, 20.

marginal.[26] Therefore, this section concentrates on the deterrence, both general and specific, as a justification of sentencing in criminal justice.

General deterrence suggests that the goals of punishment is to dissuade the public at large from committing crimes in the future,[27] while specific deterrence seeks to avoid a particular offender repeating a criminal action.[28] The dominant model of deterrence assumes that the rational community's members should be able to calculate whether the possibility and severity of punishment for a criminal action would outweigh or not any benefits.[29] Criminal law infers that criminals undertake in their rational minds a cost-benefits analysis that impacts their decision about whether or not to commit the criminal action.[30] The rational cost-benefit analysis is basically grounded on two parameters: the first is the likelihood of being caught and second the severity of the punishment, generally intended as the length of imprisonment.[31] Therefore, from the point of view of deterrence, punishment is meted out not simply because the perpetrator deserves it, but, actually, in order to fulfil the utilitarian and consequentialist effects of the punishment itself, namely undertaking a social engineering function, by building a safer world.[32] However, from the perspective of a victim-friendly response to crime, the limit of deterrence theories is represented by the goals of the punishment, which are principally focused on society and offender.[33] Deterrence overlooks victims' role in the criminal proceeding, because a victim-friendly response to crim might not be enough of a deterrent or preventative approach to meet the interests of society or offenders.[34] On this view, society becomes the principal victim of crime and, therefore, the interest of society always

[26] M. A. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', *Northwestern University Law Review* (2005), 559-560; G. Dingwall & T. Hillier, 'The Banality of Punishment: Context Specificity and Justifying Punishment of Extraordinary Crimes', *International Journal of Punishment and Sentencing*, 6(1) (2010), 7-8; M. A. Drumbl, *supra* note 21, 169; R. D. Sloane, *supra* note 5, 71-72; R. Cryer et al., *supra* note 15, 20-21.
[27] M. A. Drumbl, *supra* note 26, 560; M. M. deGuzman, *supra* note 21, 306; G. P. Fletcher, *The Grammar of Criminal Law: American, Comparative, and International: Volume One: Foundations*, Oxford University Press (2007), 247.
[28] M. M. deGuzman, *supra* note 21, 306; G. P. Fletcher, *supra* note 27, 247.
[29] J. Andenaes, 'The General Preventive Effects of Punishment', *University of Pennsylvania Law Review*, 114(7) (1966), 964.
[30] M. M. deGuzman, *supra* note 21, 306.
[31] *Ibidem*.
[32] M. A. Drumbl, *supra* note 26, 589.
[33] *Ibidem*.
[34] M. Heikkilä, *supra* note 5, 31.

prevails over the interest of the victims.[35]

3.3. Victimology: a challenge to the traditional criminal justice theories.

3.3.1. Victims in the spotlight: the birth of victimology.

Academic interest in crime victims arose in search for the understanding and solution to crime problem, expanding victims' rights into areas beyond its initial compensatory focus.[36] The first academics that considered themselves victimologists were the French-Israeli lawyer Benjamin Mendelsohn, who began to research the offender victim relationship in rape cases in his book *Rape in Criminology* (1940); the German criminologist Hans von Hentig, who in his master piece *The Criminal and His Victims* (1948) argued that the vulnerability of certain categories of people had some responsibilities in becoming victimized and the German psychiatric Fredric Wertham, who was one of the first to use the term victimology in his book *The Show of Violence* (1949), while referring to the people harmed by criminals in murder cases.

It is still debated who first coined the word "victimology", as some authors claimed the term should be attributed to Frederick Wertham,[37] while according to others, Benjamin Mendelsohn referred to victimology as a new science at his presentation at a conference in Bucharest (Romania) in 1947.[38] Despite the disagreement on the genesis of the word victimology, it is widely recognized[39] that Mendelsohn and Hans von Hentig are its founding fathers, as they profoundly contributed to the establishment of victimology as an independent academic

[35] B. McGonigle Leyh, *supra* note 2, 43-44; L. Moffett, *Justice for Victims before the International Criminal Court*, Routledge (2014), 17.
[36] S. Schafer, *Restitution to Victims of Crime*, London: Stevens & Sons (1960), 8.
[37] M. Hall, *Victims and Policy-Making: A Comparative Perspective*, Routledge (2012), 16.
[38] H. Boutellier, *Crime and Morality the Significance of Criminal Justice in Post-Modern Culture*, London: *Kluwer* (2000), 52.
[39] See M. Maguire and J. Pointing, eds., *Victims of Crime: A New Deal?*, Milton Keynes: Open University Press (1988); A. Karmen, *Crime victims: An introduction to Victimology*, Wadsworth Publishing, 6th edition (2006); S. G. Shoham , P. Knepper and M. Kett eds., *International Handbook of Victimology*, CRC Press 2010; R. Mawby and S. Walklate, *Critical Victimology: International Perspectives*, Sage (1994); J. J. Van Dijk, 'Introducing victimology', in J. J. Van Dijk, R. G. H. Van Kaam and J. A. Wemmers (comps.) *Caring for Crime Victims-Selected Proceedings of the 9th International Symposium on Victimology*, New York: Criminal Justice Press (1999); M. Hall, *supra* note 37; B. E. Turvey, *Forensic Victimology: Examining Violent Crime Victims in Investigative and Legal Contexts*, Academic Press (2013).

discipline.[40] Before that moment, the focus of criminological studies relied on the offenders who infringed the law: who they were, why they violated the law, how the criminal justice system dealt with them, whether it was appropriate to incarcerate them and whether and how it might be possible to rehabilitate them.[41] Thanks to their early pioneering scientific studies, Mendelsohn and von Hentig proved the existence of a legal, ethical, moral and psychological link not only between the criminal and society, but also between the criminal and his/her victim.

The first research projects mainly sought to understand the individualistic criminal-victim relationship.[42] This approach was focused understanding victims' nature as a factor of the crime, their physical and psychological reaction to the trauma suffered and their experience of the criminal justice system.[43] Thus, crime studies could not rely anymore only on the static theories that dominated criminology until then, but had to consider a dynamic approach where the offender, the victim and the criminal behaviour were joined elements of the event. The genesis of victimization did not have to be sought only in the traits and features of the offender, but had to consider a complex model of interaction between victim and offender, who both had a role in actuating the criminal event.[44]

In his masterwork *The Criminal and His Victims*[45] von Hentig, by observing the sociological and psychological circumstances of crimes, suggested there was a form of reciprocity between victim and perpetrator. Such relationship was more complex than the representation by criminal law could suggest.[46] The victim could paradoxically shape the criminals and their crimes; thus, it would have been misleading to label the victim as the completely passive part, opposed to offender, who bore the burden of the responsibilities for the crime committed.[47]

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[40] See H. Boutellier, *supra* note 38; M. Maguire and J. Pointing, *supra* note 39; S. Schafer, *supra* note 1.
[41] A. Karmen, *supra* note 39, 12.
[42] R. Mawby and S. Walklate, *supra* note 39, 70.
[43] H. Boutellier, *supra* note 38, 50-51.
[44] E. A. Fattah, 'The Evolution of a Young, Promising Discipline. Sixty Years of Victimology, a Retrospective and Prospective Look', in S. G. Shoham, P. Knepper and M. Kett eds., *International Handbook of Victimology*, CRC Press 2010, 47.
[45] H. Von Hentig, *The Criminal and His Victim: Studies in the Sociobiology of Crime*, Yale University Press (1948).
[46] S. Schafer, *supra* note 1, 40-41.
[47] H. Von Hentig, *supra* note 45, 384.

The American sociologist and criminologist Marvin Wolfgang further developed von Hentig's approach, introducing the concept of "victim precipitation".[48] Some individuals were more prone to victimization and to consciously or unconsciously "precipitate" the crime through their lifestyle choices. Consequently, the distinction between victims and offenders was not as clear cut as it seemed.[49]

3.3.2. Victims' movement.

Although the introduction of the concept of "victim precipitation" by the first victimologists was meant to describe the dynamics of criminal behaviours, such notion was used to defend the offender and partially to shift the blame on victims.[50] For this reason, early victimology theories attracted serious public attention and, in particular, feminist groups opposed "victim precipitation", as they felt it encouraged the blaming on female victims of sexual abuse.[51]

The emerging crime victims' movement was a multifaceted reality, because it included groups and individuals with interests in various features of victimization.[52] Maguire and Pointing successfully described the nature of victims' movement, as composed by

> (…) feminist groups calling for the extension of death penalty, state prosecutor's offices, mental health professionals, criminologists, prominent politicians, groups interested in restitution or compensation, others promoting the welfare of the children and elderly, relatives of victims of drunk drivers, survivors of Nazi concentration camps or capture in Vietnam, as well as 'generalist' service organizations (…).[53]

Among all those groups, the law-and-order movement, the feminist movement, the civil rights movement and the civil liberties movement, each with their own motives and perspectives, have contributed to an unprecedented degree of discussion about victims and on action on their behalf.

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[48] M. E. Wolfgang, *Patterns in Criminal Homicide*, Oxford, England: University of Pennsylvania Press (1958).
[49] M. Hall, *supra* note 37, 16.
[50] J. J. Van Dijk, *supra* note 39, 2-3.
[51] H. Boutellier, *supra* note 38, 52.
[52] M. Maguire and J. Pointing, eds., *supra* note 40, 2.
[53] *Ibidem*.

The law-and-order movement paid serious attention to the plights of victims of street crimes and thefts. The supporters of this movement claimed that the criminal justice system was more in favour of the offender rather than the victim and advocated for the adoption of a harsher punishment for criminals who breached society's rules.[54] The law-and-order movement looked at dismissing those practices and technicalities of the criminal justice system, which, at the expense of the victims, weakened the efforts to arrest, convict and punish the defendants.[55]

The feminist movement focused on providing protection to a specific group of victims: women who suffered harm inflicted by men. Feminist groups undertook anti-rape and anti-battering initiatives in order to awake the social consciousness to the fact that the plights of women-victims were not personal troubles, but an outgrowth of societal and institutional problems. Their principal aim was to eradicate the patriarchal tradition that put the blame for sexual abuse and violence on women.[56]

In a similar way, the civil rights movement fought for the interests and rights of minority groups, aiming to oppose racist beliefs and discriminatory behaviours by the white majority, which intimidated, harassed and attacked Afro-American people. The civil rights movement, on one hand, lobbied for imposing harsher punishment to offenders whose criminal behaviour was fomented by racial prejudice, and, on the other hand, demanded for an impartial administration of justice since minorities were more likely to be victims of misconducts by police, false accusations, frame-ups, and wrongful convictions.[57]

The civil liberties' movement main purpose was to preserve constitutional guarantees and, in particular, to safeguard the due process principle, which protects suspects, defendants and prisoners from State's abuses. Nonetheless crime victims gained a twofold benefit from victories of civil liberties movement: first, by improving police professionalism, victims can benefit from a prompter response, effective services and more sensitive and respectful treatment. Secondly, by strengthening the principle of equal protection under the law, a broader number of

[54] A. Karmen, *supra* note 39, 27.
[55] *Idem*, 28.
[56] *Ibidem*.
[57] *Idem*, 29.

people, including victims, could ask for help, get access to police and to prosecutorial assistance.[58]

The term victims' movement, as an umbrella for several pro-victim movements, underlines a wide range of rationales, but the guiding principle of those different strands was the enhancement of the role and rights of crime victims within the criminal justice system.[59] The next section illustrates that, thanks to the impact of victims' movement, which lobbied for a more victim-oriented court proceeding and for including victims' compensation, victimology began to move away from the archetype of "victims precipitation", focusing instead on the moral and emotional interactions originated by the crime between the offender and the victim.[60]

3.3.3. Formalistic-individualistic vs. universalistic approach to criminal law.

The Dutch criminologist Willem Nagel still argued that victim and offender have a special relationship that endures even after the commission of the crime, but the novelty, which differs from "victims precipitation" theories, was that the judicial decisions should lead this relational background into the right path. The criminal process should channel victim's feeling of revenge into the need of a more moderate punishment, aimed at reconciliation.[61]

Similarly to Nagel, Stephen Shafer in his influential *The Victim and his Criminal*[62] sustained that criminal justice system should achieve the need for atonement of the offender, the victim's need for retribution and their joint need for reconciliation.[63] An overall and unitary understanding of the crime demanded the victim to be included as the injured party and as a participant. Shafer's concept of the universalistic orientation of the crime entailed the determination of a general perspective of the criminal problem, by involving the normative organization and values of society, where the offender and the victim live, and the victim-offender

[58] A. Karmen, *supra* note 39, 29.
[59] S. Garkawe, 'Victims and the International Criminal Court: Three Major Issues', *International Criminal Law Review* 3 (2003), 347.
[60] J. J. Van Dijk, 'Ideological Trends within The Victims Movement: An International Perspective', in M. Maguire and J. Pointing, eds., *supra* note 40, 119.
[61] W. H. Nagel, 'The Notion of Victimology in Criminology', *Excerpta Criminologica* 3 (1963), 245.
[62] S. Schafer, *supra* note 1.
[63] J. J. Van Dijk, *supra* note 39, 2.

relationship, rather than focusing only on the conduct of the criminal.[64] By proposing the universalistic approach of criminal justice, Shafer tried to take steps towards bridging the gap between crime-victims and criminal justice and provide a more exhaustive understanding of crime. Shafer did not mean to dissolve the individual in the ocean of the community, but he proposed a revision of the idea of the individual guilty. The role of the victim became important because it entailed the idea of considering the victim and the offender as a social phenomenon that can be understood only through their relationship to each other and to their social environment.[65]

The change in the view of addressing the criminal issue as a phenomenon concerning not only the community and the defendant, but also the affected individual, heavily impinged on the academic discourse supporting victim's rights. The latter focused on proposing a reform of the interrelation between victims and criminal justice to improve the situation of victims at two levels, first, before a court of justice by promoting procedural rights and, secondly, by advocating services to victims within the operation of criminal courts.[66]

The next section and its subsections engage with the victims' rights to services and victims' procedural rights approaches in order to illustrate the merits of each specific method, but also to explore their limits in developing a valid system of participation for victims in the criminal process.

3.4. Responding to the interests of crime victims.

Providing victims with a more extensive role within the criminal proceeding has to face the dilemma of what criteria should underpin victims-based approach. The alternatives are two: basing victims' rights to services that State's agencies have to provide for meeting victims' needs, or arguing that victims have specific procedural rights and, therefore, are entitled to see their role acknowledged in the criminal process.[67]

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[64] S. Schafer, *supra* note 1, 32.
[65] *Idem*, 33.
[66] M. Heikkilä, *supra* note 5, 35.
[67] R. I. Mawby, 'Victims' Needs or Victims' Rights: Alternative Approaches to Policy-Making', in M. Maguire and J. Pointing, eds., *Victims of Crime: A New Deal?*, Milton Keynes: Open University Press (1988),127.

3.4.1. Determining victims' needs to develop a right to services perspective.

The rights of victims to services aim at addressing the victims' physical and psychological needs in the period following the offence. They are designed to deal with the emotional and financial impact of the crime and to prevent or minimise any "secondary victimisation" resulting from exposure to the criminal process.[68] Those rights are: the right to be kept informed and to be treated with respect and sympathy by law enforcement agents during the investigation process; the right to be treated with respect and understanding before and during court proceedings and the right to compensation for victims of criminal violence.[69]

Several scholars have been attracted by the powerful appeal of the rights of victims to services as a way to tackle the issues of victim-based policies within the criminal justice system.[70] However it is a slippery position, because it means to justify victims' role only relying on the identification of needs that have been continuously ignored by the State in favour of other welfare needs. If it were possible to enunciate a straightforward, neutral objective definition of needs, the goals of the social services would equally be set in an objective way, avoiding a disputable appeal to social and political values. Matching needs with social services would be a technical rather than an ideological issue.[71] But the problem at stake is still an ideological one because whether or not a need exists inextricably depends on the kind of definition used and on the definer.[72] Assuming that need is what is necessary to survive, the ideological problem is still in the picture because there is no agreement on the quality of survival. It is even more difficult to agree on the minimum necessary to ensure human survival.[73]

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[68] A. Ashworth, 'Victim Impact Statements and Sentencing', *Criminal Law Review* (1993), 499; S. Zappalà, *supra* note 4, 221.
[69] A. Ashworth, *supra* note 68, 499.
[70] J. Shapland, 'The Victims, the Criminal Justice System and Compensation', *The British Journal of Criminology*, (1984); M. Maguire, 'Victims' Needs and Victim Services: Indications from Research', *Victimology*, 10 (1985); M. Maguire and C. Corbett, *The Effects of Crime and the Work of Victims Support Schemes*, Aldershot: Gower (1987).
[71] R. Plant, P. Taylor-Gooby, and A. Lesser, *Political Philosophy and Social Welfare: Essays on the Normative Basis of Welfare Provisions*, London: Routledge & K. Paul (1980), 21.
[72] R. I. Mawby, *supra* note 67, 131.
[73] *Ibidem*.

Identifying victims' needs by asking individuals how much the crime affected their life and what issues it brought about, apparently provides a solution. Nonetheless, even this approach can be controversial for a few reasons. First, the victims can either overestimate or underestimate their needs. Second, social expectations of what the victim must need can influence the concept of needs.[74] Needs are to some degree culturally based, as they are intertwined with the expectations of victims, to the potential effects of the offence and to their knowledge of what remedies exist.[75] When the criminal justice system translates individual needs to demands, the actual risk is to cope only with the demands coming from the victims, who have the capacity and determination to make their voices heard, and to leave unmet the needs of the most vulnerable.[76]

To rely on an expert to provide a definition of needs can be a thorny problem too, since definitions by experts, being based on specific serviced, ideal norms or minimum standards, are subjective and controvertible.[77] Grounding the definition of needs on general consensus within a society means that "victims experience needs where the problems of crime reach levels intolerable to the majority of the citizens of a country."[78] However, this perspective has to face the risk of falling into relativism, as citizens are left subject to expectations based on their tolerance of the unacceptable.[79]

The difficulties to provide an indisputable definition of needs does not mean to undermine their importance, but it rather aims to demonstrate that criminal justice policies cannot rest in the "comfort zone" where the needs of victims are easily identified and broadly accepted.[80] Victims are in need of financial and emotional support, however criminal justice policies cannot sprout out of a short-term pragmatism, as a means to plaster over an embarrassing anomaly in the system or to stem the political and social unrest.[81] Basing the approach on victims' rights only on the matter of meeting needs can produce an individualized discretionary response to

[74] R. I. Mawby, *supra* note 67, 132.
[75] J. Shapland, *supra* note 70, 143.
[76] R. I. Mawby, *supra* note 67, 132.
[77] *Ibidem*.
[78] *Idem*, 133.
[79] *Ibidem*.
[80] *Ibidem*.
[81] *Idem*, 128.

victims and likely marginalize and exclude groups of victims that do not meet the requirements of the moment.[82]

3.4.2. Victim as consumer of public services.

Despite the difficulties of identifying an objective definition of victims' needs, the emphasis on victims' rights to services channelled the criminal justice mechanism towards services that individuals expect to receive.[83] Joanna Shapland introduced the concept of criminal justice as a public service, which is characterized by the acknowledgment of the multiple responsibilities and accountabilities of criminal justice institutions, of victims and offenders as well. These different parties are seen as holding responsibilities at each step of the criminal justice process for the suitability of the decisions taken and the services delivered.[84]

This new conception of justice produced some major changes especially for victims, as the participation of victims within the criminal justice system is built around the key idea of accountability. This term implies that the relationship between criminal justice and victims is a reciprocal one, each having rights and responsibilities in relation to the other, as responsibilities and rights are two faces of the same coin.[85] First, accountability of the criminal justice system means that the latter should be responsible not only to the State, but also to every person who seeks to use it, including victims. To conform to their responsibilities, the criminal justice agencies "should comply with standards which are publicly stated and which are, by that society at that time, judged to be fair."[86] Those standards guaranteed that all participants have to be equitable, but not to the extent of neglecting that parties in the criminal process have different needs and roles. "Equitable standards" does not mean that everyone should have delivered exactly the same service in the same way.[87]

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[82] R. Mawby and S. Walklate, *supra* note 39, 178.
[83] *Idem*, 181; B. Spalek, *Crime Victims: Theory, Policy and Practice*, London: Palgrave Macmillan (2006), 127.
[84] J. Shapland, 'Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies', in A. Crawford and J. Goodey Eds., *Integrating a Victim Perspective within Criminal Justice: International Debates*, Dartmouth Publishing Company (Vol. 3) (2000), 159.
[85] *Idem*, 150.
[86] *Idem*, 149.
[87] *Ibidem*.

Secondly, with regards to victims, accountability entails that victims turned into active participants of the criminal justice system.[88] The implementation of the service delivery policy, redefined the nature of the role of individuals in terms of active citizenship and consumerism.[89] Victims as "consumers" of the criminal justice system are conceived as having individual needs that the criminal justice system has to satisfy, but, at the same time, they are also considered as being equal and equally capable to choose the service they need.[90] While the notion of active citizens emphasises the role of individuals, as carrying responsibilities, since they should be involved in the delivery of community justice and offer their skills and knowledge to public service.[91] More practically, victims carry the responsibility of helping, by providing evidence to the police during the investigations and at the trial stage before the court. Nevertheless, they cannot take the responsibility as to whether or not the defendant should be prosecuted, convicted and sentenced.[92] There is not any change in the way the decision-making process occurs, but, criminal justice institutions should be under the obligation to explain its decisions and be held responsible for the way it treats victims and their dispute.[93]

The model of criminal justice system as a public service contributed to breach the traditional concept of criminal justice system as the owner of the conflict-solving process, by bringing in the concerns of victims. Criminal justice would be more transparent, accessible and visible, because there would be the obligation on the agents practicing criminal justice to explain their decisions and to welcome victims to bring their cases before a court of justice by means of a criminal justice process.[94] This model attempts to heal the separation between victims and criminal justice agencies. In this particular context, the idea of victims as consumers of the criminal justice system and of active citizenship paid attention to the oppressive structural conditions and practices that victimize a broad part of society, thus, expanding the notion of victimization to include the victims of the social system. Although this

[88] J. Shapland, *'Victims and the Criminal Process: A Public Service* Ethos for *Criminal* Justice?' In S. Doran and J. D. Jackson (Eds.), *The Judicial Role in Criminal Proceedings*, Hart Pub Limited (2000), 154.
[89] R. I. Mawby and S. Walklate, *supra* note 39, 181.
[90] B. Spalek, *supra* note 83, 127.
[91] *Idem*, 128.
[92] J. Shapland, *supra* note 84, 151.
[93] *Idem*, 154.
[94] *Idem*,161.

wider perspective on victimization is praised for challenging the societal structures that affected crime victims, nonetheless, some criticisms can be levelled against it.

In the first instance, the view of active citizenship, when it is associated with victims' rights, seems to put more emphasis on the obligations of the individuals rather than those of the State. Conversely, a fair enforcement of the citizens' obligations should be grounded on the recognition and strengthening of their rights.[95] Secondly, the assimilation of victim-consumer within the relationship between the victim and criminal justice is controversial.[96] Consumers have freedom of choice in the market, while the victims-consumers of criminal justice are generally captive to use such service.[97] Moreover, the notion of consumers sees the individual as belonging to a politically neutral community and it does not consider structural inequalities related to class, gender, race and so forth. Differences within the social and political context frequently shape victims' expectations of the requirements of the services provided by the criminal justice system and deeply affect the experiences of individuals.[98]

The prevailing bureaucratic and political goals of the State, being focused "on value for money, performance measurement for individual agencies and individual services to customers/users",[99] can potentially exclude from the criminal justice mechanism the most vulnerable members of society.[100] Applying the language of liberalization of the market economy to victims, before having established a substructure of rights, means that only some victims as consumers have full access to the services they need.[101] The threat of the exclusion of the most vulnerable from the criminal justice mechanism

[95] R. I. Mawby and S. Walklate, *supra* note 82, 181.
[96] P. Dunn, 'Matching Service Delivery to Need', in S. Walklate ed., *Handbook of Victims and Victimology*, Cullompton, Devon: Willam Publications (2007); B. Spalek, *supra* note 83; R. Zauberman, 'Victims as Consumers of the Criminal Justice System?' in A. Crawford and J. Goodey Eds., *Integrating a Victim Perspective within Criminal Justice: International Debates*, Dartmouth Publishing Company (Vol. 3) (2000).
[97] R. Zauberman, *supra* note 96, 40.
[98] B. Spalek, *supra* note 83, 123.
[99] A. Crawford and J. Goodey Eds., *Integrating a Victim Perspective within Criminal Justice: International Debates*, Dartmouth Publishing Company (Vol. 3) (2000), 6.
[100] B. Spalek, *supra* note 83, 130.
[101] J. Goodey, *Victims and Victimology: Research, Policy and Practice*, Pearson Education (2005), 136, 149.

> (…) has the perverse effect of emphasizing the unequal purchasing powers with respect to this service, thus seriously damaging the legitimacy of the provider, the state, which in a democracy is based precisely on the equality of citizens.[102]

Although the criminal justice system is rooted in the demand of justice by society, it should be mainly conceived as a public function, because its legitimacy relies on the fact that criminal justice is complementary to the exercise of power, rather than to the services provided to people. In other words, there is an ideological difference between victims-consumers of the criminal justice system and consumers of other public services, because the ancient notion of public "authority" still informs the criminal justice system, which is "extrinsically tied to its sovereignty and not coming under the category of public services provided to individuals."[103]

3.4.3. Advancing victims' rights at the procedural level.

The procedural rights of victims in the criminal process are of a different nature as they confer means of making an impact on the process itself. Procedural rights change the position of victims within the criminal justice system, since they enable victims to contribute to the prosecution and to obtain restitution or reparation.[104] While rights of victims to services attempt to meet victims' needs and to ameliorate the criminal process for the victim by providing various services, the cornerstone for setting procedural rights should be the nature and goals of the criminal process as a legal and social institution, rather than the wishes of victims.[105]

The attribution to victims of certain procedural rights places the State under the obligation to recognize those rights without regard to the welfare.[106] As acknowledged by Rob Mawby, the justification for victim-based policies should be rooted in

[102] R. Zauberman, *supra* note 96, 40.
[103] *Ibidem*.
[104] H. Fenwick, 'Procedural 'Rights' of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?', *The Modern Law Review*, 60(3) (1997), 318; S. Zappalà, *supra* note 4, 221.
[105] A. Ashworth, *supra* note 68, 499; H. Fenwick, *supra* note 104, 318.
[106] R. I. Mawby, *supra* note 67, 133.

> A just society [which] should aim to recognize and meet needs, to set standards on the rights and entitlement of the population irrespective of needs, and to balance this against the requirement of merit.[107]

However, a political objection to the acknowledgment of victims' procedural rights has been put forward, since judges and policy-makers did not recognise the interests and wellbeing of victims as paramount.[108] On the contrary, financial compensation awarded to victims is evidence of the paramount importance of victims' rights. In fact, victims' compensation should be seen not only as a means of meeting their needs, but also and, perhaps, mainly as their entitlement by the State to have rights in the criminal proceeding.[109] Compensation represents the expression of the victims' sufferings and it should be regarded

> as making a statement about the offence, the victim and the position that the criminal justice system was prepared to give to the victim. Even the element of payment in proportion to suffering and loss was subordinated to this symbolic function.[110]

A fair criminal justice system should go beyond the acknowledgment of victims' financial, psychological and social needs and include victims' procedural rights, which should exist irrespective of needs and all victims. Even those who did not suffer a serious harm are entitled to participatory rights.[111]

The only danger arising from the recognition of victims' procedural rights within the criminal justice system is to forget that victims' rights must be applied alongside the rights of the offender. The Canadian criminologist André Normandeau[112] in his proposal for a Canadian and International Charter of Rights for Crime addresses this issue, aiming at "radically overturn[ing] the 'old' system of justice we now know".[113] He advanced an historical and symbolic parallel with the prisoners' rights movement, whose demands were implemented through several

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[107] R. I. Mawby, *supra* note 67, 119.
[108] D. Watson, 'Welfare Rights and Human Rights', *Journal of Social Policy*, 6(1) (1977), 33; R. I. Mawby, *supra* note 67, 134.
[109] *Ibidem*.
[110] J. Shapland, *supra* note 70, 144.
[111] R. I. Mawby, *supra* note 67, 135.
[112] A. Normandeau, 'For a Canadian and International Charter of Rights for Crime Victims', *Canadian Journal of Criminology* 25(4) (1983).
[113] *Idem*, 463.

regulations by the Canadian government during the 1980's. As with the development of prisoners' rights, the victims' rights movement had to acknowledge that rights and responsibilities are two faces of the same coin and that the legal framework should try to achieve a balance between the rights and responsibilities of both victims and defendants.[114]

Normandeau, by referring to the necessity to strike a balance between "rights and personal and collective responsibilities",[115] meant that the acknowledgment of the rights of victims contributes to include the victim as part of the resolution of the conflict, but, at the same time, from those rights rises a corollary of responsibilities. This is valid for victims, accused, prisoners and agents of the criminal justice system and of social affairs and, in this perspective the rights of victims do not jeopardize nor reduce the rights of accused. The incorporation of victims' role within the criminal proceeding is a matter of justice and a question of balance.[116]

Victims' participation at the sentencing process is one of the first responses to victims' procedural rights approach, but it is also probably still the most employed particularly in countries of common law traditions. Thus, the following section evaluates the desirability of victims' participation at the sentencing process in terms of whether such participation represents an effective victimological response to calls for a better integration of victims into systems of criminal justice,

3.4.4. Victims' participation in the sentencing process as the expression of the community's interest.

The acceptance that the trial had to engage with victims' procedural rights in a positive sense expanded the "battle" for victims' rights into areas beyond compensation.[117] It is peculiar that, mainly in the USA and Canada, the academic debate initially introduced victims' participation at the final stage of the criminal process, rather than at its beginning.[118]

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[114] A. Normandeau, *supra* note 112, 463-464.
[115] *Idem*, 464.
[116] *Idem*, 467-468.
[117] E. Erez, 'Victim participation in sentencing: Rhetoric and reality', *Journal of Criminal Justice* 18(1) (1990), 20-21; H. C. Rubel, 'Victim Participation in Sentencing Proceedings', *Criminal Law Quarterly* 28 (1985), 226.
[118] L. N. Henderson, 'The Wrongs of Victim's Rights', *Stanford Law Review* (1985), 986.

The academic debate likely focused on the interrelation between victims and community specifically at the sentencing stage because the shift from the fixed sentence term to an open-ended imprisonment term brought about an "estrangement from influence by what I will refer to as the interests and values of the community."[119] The fixed sentencing process embodied the link between the punishment inflicted by judges and the public wishes, because, by setting the term for punishment by a law passed by the parliament, it represented the expression of people sovereignty.[120] Conversely, the open-ended imprisonment terms, which was defined only by a maximum statutory term, or by a non-judicial agency (such as parole commissions), granted a rather broad judicial discretion in sentencing.[121]

Several scholars[122] argued that the operation of the open-ended imprisonment term within the criminal justice system justifies the involvement of representatives of the society in the sentencing process, as a form of interrelation between the criminal behaviour and the social revulsion of it.[123] The role of victims in the criminal proceedings "may be viewed as a symbolic act bringing the hearing back into the context of social condemnation on a moral as opposed to a legal level."[124]

The establishment of victims' rights before a criminal court at the sentencing process represented the attempt to accommodate the interrelation between victims and social community and, at the same time, to alleviate the social dissatisfaction because of the limited involvement of victims in the resolution of conflicts.[125] More simply, the acknowledgment of the sentencing process as the condemnation by the public of criminal conducts is embodied by the inclusion of victims' input in the courts' decisions.[126]

Eve Kunen discussed the influence of victims and public on the sentencing process in the USA and stressed the importance of the interrelation between them. Public opinion "often parallels the voices of those least heard by the criminal justice

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[119] J. W. Little, 'The Law of Sentencing as Public Ceremony', *University of Florida Law Review* 35(1) (1983), 1.
[120] H. C. Rubel, *supra* note 117, 228.
[121] *Idem*, 230.
[122] H. C. Rubel, *supra* note 117, 228-229; E. Kunen, 'The Effect of External Pressures on Sentencing Judges', *Fordham Urban Law Journal* 11(2) (1983), 266-268; J. W. Little, *supra* note 119, 7-9.
[123] *Idem*, 230-231.
[124] *Idem*, 231.
[125] *Idem*, 247.
[126] E. Erez, *supra* note 117, 23.

system: the victims".[127] Thus behind the demands for victims' participation there was the demand for a broader public influence. The victim became an instrument, through which the community can realize its goal of representation and participation. The choice of the victim as a means for the expression of public influence was made by taking into consideration the fact that the government already gave to victims some standing in criminal trial through the right to claim compensation.

The further development of victims' role was "necessary for the victim to become a reification of the public desire to have input into and be part of the sentencing process."[128] Conceived in terms of a reflection of the public attitudes, victims' participation became necessary to relieve public concerns with the criminal justice system. Moreover, because of their proximity to the criminal conduct, victims were more entitled to participate in the sentencing process than the public. Kunen concluded that "increasing judicial awareness of the impact of crime on a victim's life is one step toward giving voice to large segments of the community who are routinely targeted for specific types of crimes."[129] Victims' participation in the sentencing process represented the public input and could contribute to the realization of the society's demands of expressing its values in the offender's sentencing process.[130]

Similar to Kunen, Joseph Little concluded that victims' participation in the sentencing process in the operation of the open-ended imprisonment term could express society's sense of abhorrence by imposing a minimum term for punishment. However, Little notes that it would be poor policy to do so, since the majority of the discretion is in the hands of judges or parole commissions.[131] The little impact of victims' participation in the sentencing process made the criminal justice system more distant than it should be, attenuating community values and interests and unnecessarily estranging the process from public view and more importantly from victims' participation.[132]

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[127] E. Kunen, *supra* note 122, 265.
[128] H. C. Rubel, *supra* note 117, 231.
[129] E. Kunen, *supra* note 122, 266.
[130] J. W. Little, *supra* note 119, 28; E. Kunen, *supra* note 122, 232.
[131] J. W. Little, *supra* note 119, 28.
[132] *Ibidem*.

Although, the inclusion of victims' standing in the sentencing process clearly represents a step forward in the path of the acknowledgment of victims' rights within the criminal proceeding, victims were still at the periphery of the criminal justice system.

3.5. A restorative response to crime victims. Does restorative justice enhance victims' participatory rights?

Another response to the issues raised by the victimological discourse, which advocated a reform of the criminal justice system by improving victims' procedural rights and the standards of treatment and services provided to them, was the development of restorative justice thinking. Modern restorative justice theories called for the replacement of the traditional retributive and utilitarian paradigms with a so-called victim-offender reparation model, which, by emphasizing the reconciliation between the victim and the offender, empowers the victims.[133]

Generally, a common understanding of the restorative justice paradigm involves two key features, which are reciprocally linked: conflict resolution and compensation.[134] The conflict resolution aspect sees crime as a conflict between the offender and the victim and the goal of the criminal justice process should be reconciling these parties, by facilitating their active participation.[135] Restorative practices consist of a negotiated process, involving a face to face meeting with a victim, an offender, their respective supporters and often community members, as representatives of the community's interest. Prior to the beginning of the restorative justice procedure, it was imperative for the offender to admit his/her guilt. During the restorative procedure the victim has the chance to explain to what extent the criminal conduct harmed her/him, while the offender has the opportunity to acknowledge the consequences of the harm they provoked, they sympathize and sincerely apologize to the victim.[136]

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[133] M. Heikkilä, *supra* note 5, 37.

[134] M. J. Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice', *Harvard Human Rights Journal* (2002), 77.

[135] *Ibidem*.

[136] L. Moffett, *supra* note 35, 42; D. M. Gromet & J. M. Darley, 'Restoration and Retribution: How Including Retributive Components Affects the Acceptability of Restorative Justice Procedures', *Social Justice Research*, 19(4) (2006), 396.

The compensation feature, on the contrary, is more attentive to compensate the victim, since crime originated a harm that restorative justice process should overturn.[137] The offender should offer material restitution or pay compensation to redress his/her wrongdoing and heal the victim.[138] Restorative mechanism is a more informal process that draws on the knowledge and active participation of the parties and, in particular, victims carry a more active role.[139]

However, there is a certain degree of confusion around the concept of restorative justice, which generated a wide discussion on what practices are restorative; how restorative justice can fit within the established criminal justice system and whether restorative justice should be conceived as a process or an outcome.[140] First, as Dignan observed, the different definitions of restorative justice restrict themselves to the scope of criminal justice, but restorative practices have been applied beyond this context. Restorative justice extends to victim-focused initiatives carried outside the criminal justice context, such as victim compensation schemes, victim-offender mediation, crime repair crews, victim intervention programs, family group conferencing, peace-making circles, sentencing circles, community reparative boards before which offenders appear, victim empathy classes for offenders, community-based support groups for crime-victims and community-based support groups for offenders.[141]

Secondly, restorative justice theories deal with several variants of the restorative process, but they do not engage with specific reference to the outcome of such process. There is a debate as to whether the negotiated outcome of restorative process should only be purely symbolic and simply reparative or include punitive measures.[142] In the practice, some restorative outcomes can be pure reparative, but others may mete out additional obligations to the offender, which can be as punitive

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[137] M. J. Aukerman, *supra* note 134, 77.
[138] L. Moffett, *supra* note 35, 42.
[139] K. Daly, 'The Limits of Restorative Justice', 2. Available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.595.9278&rep=rep1&type=pdf. This open-access article is published in D. Sullivan & L. Tifft (Eds.), *Handbook of Restorative Justice: A Global Perspective*, New York: Routledge (2006). See also UNITED NATIONS OFFICE ON DRUGS AND CRIME, *Handbook on Restorative Justice Programmes*, (2006), 7. Available at: https://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf.
[140] K. Daly, *supra* note 139, 1-2; M. M. deGuzman, *supra* note 21, 310.
[141] J. Dignan, *Understanding Victims and Restorative Justice*, McGraw-Hill Education (2004), 2; M. Heikkilä, *supra* note 5, 39.
[142] J. Dignan, *supra* note 141, 3; B. McGonigle Leyh, *supra* note 2, 56; M. Heikkilä, *supra* note 5, 39.

as the sentencing imposed by a judge at a traditional criminal trial. That raises doubts about the fairness and proportionality of restorative justice because the application of two different standards relies on the arbitrary decision to refer either to a restorative justice process or to a more traditional paradigm.[143]

This sort of "twin-track"[144] system creates a diversion of cases from the formal criminal process that seems reasonable for non-serious offences committed by young offenders; nonetheless, restorative justice thinkers remained unclear whether or not restorative justice process should also be applied to serious crimes.[145] This particularly crucial point at the level of international criminal justice, as one of the features that distinguishes international crimes is their seriousness. This issue will be investigated in the next chapter.

A third weakness of the restorative paradigm is the failure to specify the level of victims' participation necessary in order for it to be considered as restorative practice. In other words, it is not clear whether there is a minimum acceptable level for victims' participation or, conversely, there is any restriction for such participation.[146] Moreover, as stated in the previous paragraphs, restorative justice comes into play only after offenders accept and acknowledge their guilt or, at least, the wrongness of their actions. Therefore, when offenders do not accept this crucial aspect, victims' participation within the criminal proceeding can be an effective way to express emotional suffering, but, it is not a sufficient feature to make the process restorative.[147] This last remark illustrates that procedural rights for victims and restorative systems are two very distinctive concepts.[148] Those two concepts can overlap, but it is also possible to confer participatory rights to victims within a traditional criminal justice system, without converting this system into a restorative one. In a similar way, it is possible, but probably less likely, to develop a restorative

[143] J. Dignan, *supra* note 141, 4.
[144] *Ibidem*.
[145] A. Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure', in A. Crawford and J. Goodey Eds., *Integrating a Victim Perspective within Criminal Justice: International Debates*, Dartmouth Publishing Company (Vol. 3) (2000), 193-194.
[146] J. Dignan, *supra* note 141, 4-5.
[147] B. McGonigle Leyh, *supra* note 2, 57.
[148] *Idem*, 63; A. Ashworth, *supra* note 145, 192; J. Dignan, & M. Cavadino, 'Towards a Framework for Conceptualizing and Evaluating Models of Criminal Justice from a Victim's Perspective', *International Review of Victimology* 4(3) (1996), 153.

system, which provides practical support to victims, but does not grant substantial participatory rights to victims within the framework of the criminal trial.[149]

Andrew Ashworth argues that the restorative paradigm faces those difficulties, because restorative practices are wrongly held as a concern of the criminal justice system. There is a conceptual difference between right to services for victims, guaranteed by restorative practices, and victims' procedural rights and their relationship with the criminal justice system. Services for victims are concerned with the support, assistance and respect for crime victims, who have to cope with the demands of the criminal process.[150] Such services should take the form of emergency health care or social services, because they have to provide practical support to victims at a time when they are traumatized by the offence and subject to financial and emotional pressures. For instance, law enforcement agents are expected to treat victims with respect and sympathy in all stages of the proceedings from the investigations to the trial phase and also afterwards.[151] The overall purpose of the services for victims is to reduce the risk or minimize the secondary victimization, by alleviating the distress and hardship that can result from exposure to the criminal process. These services are in the nature of social service entitlements, because, as they are mainly concerned with support, assistance and respect for crime victims, they are rooted on the same justifications of health care and social services for the suffering and the disadvantaged.[152]

On the contrary, procedural rights for victims within the criminal process have a different nature, as they are "justified by reference to the rationale for the criminal process."[153] The difference is that the wants and needs of victims should be the basis of victims' services, while, they cannot have the same relevance when it comes to shape the procedural rights that victims should enjoy in the criminal process. [154]

These remarks do not mean to undermine the contribution of the restorative theories to cope with the needs and interests of crime victims. Conversely, it is

[149] A. Ashworth, *supra* note 145, 192.
[150] A. Ashworth, 'Some Doubts About Restorative Justice', *Criminal Law Forum* Vol. 4 No. 2 (1993), 282.
[151] *Idem*, 281.
[152] *Idem*, 282.
[153] *Ibidem*.
[154] *Ibidem*.

important to acknowledge the role of the victims' services – such as victim compensation schemes, victim-offender mediation and many other initiatives listed in the previous paragraphs –, which, by addressing victims' emotional, practical, financial, psychological and social needs, have placed new obligations on criminal justice agencies to make their practice more inclusive of victims' concerns.[155] Nevertheless, it is fundamental to be aware of some shortcomings of the restorative justice paradigm at the domestic level, since such limitations are magnified when restorative practices are applied to the international criminal justice system, as it will be explored in the following chapter.

3.6. Conclusion.

This chapter demonstrated that the victimological response to the demands of victims' participation in the criminal proceedings has been only partially satisfactory. Accommodating victims' participatory rights in the context of a retributive and deterrent criminal justice system urged a radical reform of the existing procedural models, by effectively reconfiguring the balance between the role and rights of the judiciary, the accused and victims. Since the retributivist and deterrent theories of criminal justice relegated the victims to a marginal role, as they can only serve as witnesses, the victimological approach was expected to challenge and break down those mechanisms which prevent victims from exercising participatory rights.

While there was a general agreement on the need to give a meaningful response to the concern with crime victims, the different strands of victimology showed that they were at odds about how best to enhance victims' rights in the criminal justice system. Victimology acknowledged that victims had expectations and demands that had to be met if the criminal justice system was to continue function. But, at the same time, there was not agreement on the degree and modality of the involvement of the victims in the criminal justice system.

The victimological response to the calls for a better integration of victims into systems of criminal justice has resulted in a range of modest mechanisms seeking to reposition the victim. The systems implemented by the both the victims' procedural rights and victims' right to service approaches are limited as they relegated the

[155] B. Spalek, *supra* note 83, 92.

victims at the periphery of criminal justice. These approached failed to reform the traditional criminal justice system and to effectively reconfigure the balance between the roles of the judiciary, the defendants and the victims.

The victims-based approach grounded in the victims' procedural rights – mainly developed in US and Canada –, primarily directed towards influencing the sentencing, allowed victims to make a statement at the sentencing process. This mechanism reflected the sense of reluctance in common law countries to afford victims a greater say in criminal process, due to the potentially disruptive effects of such steps, which were considered to pose a threat to the expeditiousness and fairness of the trial. With the inclusion of victims' standing in the sentencing process victims were still at the periphery of the criminal justice system.

In order to provide victims with a more extensive role within the criminal proceeding, victimology focused on needs rather than on the rights of victims. Victimologists preferred to develop a victims' right to service approach, which justify victims' role only relying on the identification of physical, psychological and financial needs. Victims, having individual needs that the criminal justice system has to satisfy, became consumers of criminal justice system. However, it has been argued that matching victims' needs with social services is rather complex, as the notion of need is inextricably dependent on welfare ideology and, thus, it is difficult to provide a straightforward, neutral and objective definition of need. As a consequence, it is equally hard to set an objective system of victims' services. There is an actual risk to fall into relativism, since the victims' right to service approach can produce an individualized discretionary response to victims and likely marginalize and exclude groups of victims that do not meet the requirements.

The victims' emerging status as consumers of the criminal justice services was largely agreed because it did not jeopardize the adversarial character of the criminal justice system or the due process rights of the accused. The orientation of victims' right to service approach demonstrated that it tended to manage victims away from the criminal justice system into alternative pathways to justice in order to meet this policy directive. In fact, the victims' emerging status as consumers of the criminal justice services was largely agreed because it did not jeopardize the adversarial character of the criminal justice system.

The fact that the innovation can be found at the periphery of the criminal justice system, is confirmed by the restorative justice paradigm that works alongside normative trial processes. Indeed, restorative practices have the merit of having placed new obligations on criminal justice agencies to make their practice more inclusive of victims' concerns. However, since restorative justice addresses victims' emotional, practical, financial, psychological and social needs, by means of a negotiated process – e.g. victim-offender mediation, peace-making circles, victims' intervention programs – the restorative practices go beyond the strict scope of criminal process. Moreover, the lack of agreement on whether the outcome of restorative justice is pure reparative or punitive makes questionable to consider this model belonging to the sphere of the criminal proceeding. The nature of the rights conferred to victims by restorative justice is controversial, as they appear to relate more strongly to rights to services than participatory rights. Having a clear understanding of the limitations of the mechanisms elaborated by victmology to the demands of victims' participatory rights is important because international criminal justice has in its development relied, and continues to rely, quite substantially on the victimological experience. The next chapter deals with the effects for victims' position in the criminal proceedings of the transplant of retributive, deterrent and restorative justice mechanisms to international criminal justice, considering the constitutive differences between the domestic and the international criminal justice systems.

CHAPTER IV

Limits of Retributivism, Deterrence and Restorative Justice in the International Criminal Justice System.

4.1. Introduction.

While the previous chapter explored the limited contribution of victimology to deconstruct the consolidated retributive and deterrent theories and confer to victims an effective standing within the criminal proceeding at the domestic level, this current chapter shifts the focus to the international criminal justice system. The latter has drawn deeply on domestic criminal justice theories, since retributivism, deterrence and restorative justice theories informed the international criminal justice system. However, as the previous chapter analysed retributivism, deterrence and restorative mechanism to criticize their little practical impact on the victims' participation policy-making, this chapter will take a broader look, since it questions whether or not retributivism, deterrence and restorative justice are eligible justifications for justice within the international arena. The transplant of these criminal justice theories to the international field is problematic because there are constitutive differences between the domestic and the international criminal justice system. In particular, as will be explored in this chapter, the distinctive features of the international criminal justice system raise new challenges to the meaning of justice, which can eventually result in multiple and contradictory understandings and practices of justice at the ICC.[1] This scenario, characterized by uncertainty, also undermines the consistency and predictability for victims' participatory rights. Having a clear understanding of the purposes of international criminal justice is fundamental, because the adopted criminal justice framework contributes to shape the structure of the proceedings as well as the role of all individuals involved in the criminal process.

Thus, this chapter's main goal is to expose the drawbacks produced by such transplant from the domestic to the international forum in terms of principled

[1] C. Hoyle and L. Ullrich, 'New Court, New Justice? The Evolution of Justice for Victims at Domestic Court and at the International Criminal Court', *Journal of International Criminal Justice* 12 (2014), 702.

justification for punishment and break down the retributivist, deterrent and restorative approaches of the international criminal justice system. I intend to challenge those approaches to criminal justice, seeking to expose the shortcomings in using these theories within the international criminal justice arena. I intend to show that these crime-control justifications, which reasonably work in domestic criminal justice systems, are weakened by the contingency of the process of international criminal law. To be clear, the author does not argue that retribution, deterrence, and restorative justice are irrelevant as rationales for ICC action. These criminal justice theories should not be entirely rejected as a justification for the ICC's work as they may nonetheless provide a partial justification for international criminal justice.

This chapter develops around a second goal, which is ancillary to the main one. It aims to provide a general understanding of the difference between the domestic and international criminal justice. These legal paradigms originate from two distinct socio-political contexts and, consequently, the international criminal justice system presents some constitutive characteristics which are unique. The author advances that it is important to mark the normative differences between extraordinary crimes against the world community and ordinary crimes against local communities in order to understand the extent to which the prevailing domestic criminal justice theories can be effectively transplanted to the international criminal law field and to what degree the latter should develop its own judicial method.

The sentencing of individuals convicted of genocide, crimes against humanity, and war crimes is a novel exercise and the recently established ICTY and ICTR remain at the forefront of developing a sentencing policy and practice for the most heinous mass crimes. The *ad hoc* tribunals have come a long way in short time and their approaches to sentencing have become more settled and predictable over time. The two *ad hoc* tribunals have issued hundreds of decisions and in many of them they advance what judges see as the most appropriate justification for sentencing. The same thing cannot be said on sentencing practices of the ICC, because the Court has not issued yet enough decisions to express a clear vision about its own role within the global legal order. Nevertheless, it appears that the sentencing practices of the ICTY and ICTR provide a guide for the ICC judges, although they

are not legally bound by these practices.[2] Therefore, in order to address the goals of this chapter, the discussion will mainly consider decisions delivered by the two *ad hoc* tribunals.

The chapter is structured into five sections which follow. The second section draws the distinctive characteristics of the international criminal justice system. A first remarkable departure of international criminal justice from the domestic system is embodied by the specific features of the international crimes under the jurisdiction of the ICC and the nature of the community involved in it. Secondly, compared to the domestic paradigm, international criminal justice is rooted on an overabundance of goals, however these do not express any priority in the operation of the ICC and, actually, such different justifications can come into conflict. Lastly, the criminal procedure of the ICC represents a unique procedural system which is *sui generis* in the sense that it would depart from the dominant adversarial and inquisitorial systems of justice. Sections three and four of this chapter explore the shortcomings of using respectively retributive and deterrent theories as justification for international criminal justice. This section analyses the extent retributive and deterrence theories are undermined by the inevitable selectivity of the prosecution among hundreds of potential cases, the lack of proportionality between the gravity of the offence and the severity of punishment, and the financial restraints and the political contingencies which affect the work of the ICC. The last section tries to illustrate the reasons why the restorative justice paradigm does not properly fit the nature of the adjudication process before the ICC, even though it acknowledges the importance of involving victims in the proceedings.

4.2. Distinctive features of the international criminal justice system.

This section points out the ideological and structural features of international criminal justice that have to be considered in trying to work out a clear distinction between the international and domestic systems of criminal justice.

[2] M. A. Drumbl & K. S. Gallant, 'Sentencing Policies and Practices in the International Criminal Tribunals', *Federal Sentencing Reporter* 15(2) (2002), 143.

4.2.1. The nature of the international crimes and the meaning of "community" involved.

The paradigms of international criminal law and domestic criminal law diverge in two ways that focus on the distinctive nature of the communities involved and of the crimes implicated. First, while domestic criminal law can be appraised in terms of concerning the community of a State's citizens, international criminal law aims to serve the international community, entailing in a literal sense multiple and heterogeneous communities composed by different ethnic or national communities that uphold competing and diverging interests the international bodies have to mediate.[3] International criminal law intends to also serve the figurative international community, as stated in the preamble of the ICC Statute, according to which the ICC aims to prosecute "the most serious crimes of concern to the international community as a whole".[4]

The figurative international community conceived as a community of mankind, echoing ideas of natural law, is an ambiguous concept because it hides and dissimulates the fact that there is not a world community, but rather several international constituencies, such as communities of national States (UN members, Security Council members, NATO countries, and so on), communities of non-governmental organizations, and communities of other actors (corporations, academics and so on).[5] In order to advance a consistent and principled system of international criminal justice, it is necessary to establish which community, either the literal or the figurative, should be the main referent. In other words, a regime of international sentencing needs to identify whether an international crime is a concern of the international community because it affects the interests of States and national communities or it threatens fundamental values of all mankind.[6] However, as this section only aims to outline the difference between domestic and international criminal law, this will not be addressed here. Instead, this topic will be discussed in

[3] R. D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', *Stanford Journal of International Law* 43 (2007), 41.
[4] UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF. 183/9; Preamble.
[5] L. A. Dickinson, 'The Promise of Hybrid Courts', *The American Journal of International Law* 97(2) (2003), 303.
[6] R. D. Sloane, *supra* note 3, 53.

the following parts of this chapter which specifically address the theoretical paradigms of international criminal justice.

The second relevant feature that divides international criminal law from domestic criminal law crimes is the peculiar nature of international crimes under the jurisdiction of the ICC. It is fundamental to understand such difference because the provisions of the ICC Statute conferred participatory rights on victims for the first time within international criminal justice because of the extent of the gross violations of international human rights and humanitarian law victims suffered.

International crimes concerning the ICC, namely war crimes, genocide and crimes against humanity harm specific communities and cultures.[7] International crimes generally involve five features: (1) mass victimisation, (2) large-scale organized participation (3) ideologically driven perpetration, (4) impact of the crimes and impunity on victims and (5) state involvement.[8] Mass scale victimisation means that international crimes are not a single crime perpetrated against a singular individual, but generally involve a wide number of criminal actions committed against a group of individuals over a certain amount of time. The collective nature of the victim is well expressed by the wording of the norm of both crimes against humanity, which involve "a widespread or systematic attack directed against any civilian population",[9] and genocide meaning "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".[10] The article on war crimes, by referring to acts against persons or property protected under the provisions of the relevant Geneva Conventions of 12 August 1949,[11] seems not to involve collective victims in the sense above discussed in respect to crimes against humanity and genocide. In fact, those conventions require the criminal action be committed against a member of one protected group, such as wounded and sick in armed forces in the field, wounded, sick and shipwrecked members of armed forces at sea, prisoners of war, and civilians who find themselves

[7] M. Findlay, 'Activating a Victim Constituency in International Criminal Justice', *International Journal of Transnational Justice* 3 (2009), 190.
[8] L. Moffett, *Justice for Victims before the International Criminal Court*, Routledge (2014), 10.
[9] UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF. 183/9, Article 7
[10] *Idem*, Article 6.
[11] *Idem*, Article 8.

under the rule of a foreign power in the event of international conflict.[12] However, the same article of the Rome Statute on war crimes, stating that the ICC has jurisdiction on war crimes "when committed as part of a plan or policy or as part of a large-scale commission of such crimes",[13] clearly expresses the need to prosecute such crimes in a systematic, rather than in an isolated way.[14]

The second specific feature of international crimes, that is large-scale organized participation, is linked to the feature of collective victims, because mass-scale victimisation can involve a highly organized number of groups or individuals who have perpetrated international crimes.[15] Indeed a collective perpetrator is not a mandatory element of international crimes, but in the vast majority of cases it represents an invariable feature because criminals act on behalf of a collective criminal project such as eliminating an ethnic, religious, national or racial group, or undertaking systematic attacks against civilians and so on.[16] Using the words of Dworkin, collective action "is a matter of individuals acting together in a way that merges their separate actions into a further, unified act that is together theirs."[17] As a consequence of that, international crimes involve a collective mental state. As a practical matter it means that the perpetrators are conscious of being part of a common project, of sharing a specific intent and of acting as a group.[18]

The third aspect to take into consideration is that international crimes can be ideologically driven. Individuals are a target because of their race, ethnicity, religion, political beliefs and, as part of the ideology, they are dehumanized to legitimize the

[12] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287; International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135.
[13] UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF. 183/9, Article 8.
[14] R. D. Sloane, *supra* note 3, 57.
[15] L. Moffett, *supra* note 8, 10.
[16] R. D. Sloane, *supra* note 3, 56.
[17] R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Oxford: Oxford University Press (1999), 20.
[18] R. D. Sloane, *supra* note 3, 56.

violence.[19] The fourth characteristic is the impact of the crime and impunity on the victims and their family. It goes to the core of the heinous nature of international crimes because they involve mutilations and brutal killing that cause suffering and metal trauma to the victims, but also to those who simply witnessed these events. Impunity affects victims as well, since they are denied the recognition of their suffering and access to justice.[20]

The last distinguishing element of international crimes is that they occur in a widespread and organized scale because of the action or inaction of the State.[21] Perpetrators of international crimes operate in an instable normative framework, characterized by war, ethnic conflicts and social deterioration. The basic social norms against violence are undermined and gradually removed to the detriment of specific ethnic, political, religious, and national groups.[22]

4.2.2. Plurality of goals ascribed to the international criminal justice system.

As it has been explored in the previous chapter, at domestic level the philosophical debate surrounding the competing justifications behind criminal justice and the resulting approaches towards victims of crime fall into two broad categories: the retributivist theory[23] and the utilitarian school.[24] The scholarship seeking to elucidate the philosophical underpinnings of international criminal justice, focuses on the purposes of punishment. Moffett[25] and Vasiliev[26] assert that the ICC should be focused on its retributive purpose of prosecuting and punishing perpetrators of international crimes. In a similar way, McGonigle Leyh espouses retribution as justification for international criminal law, with the ICC's primary role and function being the investigation and prosecution of individuals for the most serious crimes of

[19] L. Moffett, *supra* note 8, 11.
[20] *Idem*, 12.
[21] *Idem*, 11.
[22] R. D. Sloane, *supra* note 3, 41.
[23] See chapter III, section 3.2.1
[24] See chapter III, sections 3.2.2.
[25] L. Moffett, 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court', *Criminal Law Forum* Vol. 26(2) (2015), 63-64;
[26] S. Vasiliev, 'Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC', in C. Stahn & G. Sluiter (Eds.), *The Emerging Practice of the International Criminal Court*, (Vol. 48) Brill (2009), 635–690, 677.

concern to the international community.[27] Additionally, other commentators have suggested that the international criminal justice system has some deterrent effect, along with retribution.[28] Chamey states that consistently prosecuting leaders can eventually deter those who provoke the circumstances that encourage international crimes.[29] According to May, the threat of punishment may at least lessen the likelihood of harmful behaviours, if not completely eliminating such behaviours.[30]

International criminal institutions have been largely influenced by deterrence and retributivism. These two predominant traditional criminal law approaches have been invoked by both the UN Security Council resolutions establishing the ICTY and ICTR, which emphasize the goals of prosecution "to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them" and "to ensuring that such violations are halted and effectively redressed".[31] In a similar way, the Preamble of the ICC Statute suggests retribution and utilitarianism as its main purpose, by asserting that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures" and that the Court is "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute

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[27] B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, Intersentia (2011), 358-359. See also: M. Dembour and E. Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials', *European Journal of International Law* 15 (1) (2004), 152; J. Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation', *Journal of Law and Society* 32(2) (2005), 295; J. D. Jackson, 'Transnational Faces of Justice: Two Attempts to Build Common Standards Beyond National Boundaries', in J. D. Jackson & M. Langer (Eds.), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška*, Bloomsbury Publishing (2008), 239; G. Boas, 'Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility', *Criminal Law Forum* 12(1) (2001); K.S. Gallant, 'The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court', *International Lawyer* (2000), 21; D. Markel, 'The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States', *The University of Toronto Law Journal* 49(3) (1999), 61.

[28] R. Henham, 'The philosophical foundations of international sentencing', *Journal of International Criminal Justice* 1(1) (2003), 72; B. McGonigle Leyh, *supra* note 27, 61.

[29] J. I. Charney, 'Progress in International Criminal Law?', *American Journal of International Law* 93(2) (1999), 452, 462.

[30] L. May, 'Defending International Criminal Trials', in L. May & J. Brown (Eds.), *Philosophy of Law: Classic and Contemporary Readings* (Vol. 31), John Wiley & Sons (2009), 427. See also P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', *The American Journal of International Law* 95(1) (2001), 7, 10.

[31] UN Security Council, Resolution 827, 25 May 1993, UN Doc. S/RES/827, Preamble. Available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf; UN Security Council, Resolution 955, 8 November 1994, UN Doc. S/RES/955 (1994), Preamble. Available at: http://unictr.unmict.org/sites/unictr.org/files/legal-library/941108_res955_en.pdf.

to the prevention of such crimes".[32] The primary place in which ICTY, ICTR and ICC have discussed the rationale behind criminal justice is in relation to their sentencing practice. As it will be further explored in the following sections of this chapter, the two main aims that the above-mentioned international criminal justice institutions have asserted for their practice are retribution[33] and deterrence.[34]

While substantial agreement exists that deterrence and retribution also apply to international criminal law, certain additional aims for international criminal justice tend to be grafted onto those which are postulated for domestic systems of criminal justice. In addition to retributive and deterrent attributes, international criminal justice is viewed as a "technique or instrument"[35] that can be used by the international community to achieve goals, which relate in some ways to the future of the societies in which international crimes are committed. Antonio Cassese suggests that these goals include to foster reconciliation of communities in conflict and thus long-term peace and security; establish individual responsibility over collective assignation of guilt, establish a fully reliable record of atrocities so that future generations can be made fully aware of the events happened.[36] The UN Security Council provided significant support for the interconnection of restoration, reconciliation and justice. Such determination is reflected in the Security Council's creation of the *ad hoc* tribunals under its Chapter VII mandate to take actions to restore and promote international peace and security.[37] In its Preamble, the Rome Statute urges the ICC to contribute to "the process of national reconciliation and to the restoration and maintenance of peace".[38]

The view that the work of the ICC can contribute to reconciliation has been developed into a narrative focusing on the needs of affected local populations, that is

[32] Preamble of the Rome Statute, U. N. Doc. A/CONF.183/9 of 17 July 1998.
[33] See chapter IV, section 4.3.
[34] See chapter IV, section 4.4.
[35] B. McGonigle Leyh, *supra* note 27, 61.
[36] A. Cassese, 'Reflections on International Criminal Justice', *The Modern Law Review*, *61*(1) (1998), 5-6. See also R. Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press (2007), 22, 30.
[37] UN Security Council, Resolution 827, 25 May 1993, UN Doc. S/RES/827, Preamble. Available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf; UN Security Council, Resolution 955, 8 November 1994, UN Doc. S/RES/955 (1994), Preamble. Available at: http://unictr.unmict.org/sites/unictr.org/files/legal-library/941108_res955_en.pdf.
[38] Preamble of the Rome Statute, U. N. Doc. A/CONF.183/9 of 17 July 1998.

often described as restorative justice.[39] According to McGonigle Leyh, the ICC aims to foster the restoration of the victims of the crimes it adjudicates, by allowing victims to participate in the proceedings.[40] By the same token, Funk and Guhr suggest that restorative justice encouraged the shift towards incorporating victims' participation within the ICC. Enabling victims to participate in international criminal justice indicates a broader construction of justice than retribution and deterrence, towards a more reparative approach that seeks to restore victims.[41]

Despite the growing interest in the philosophical underpinnings of international criminal justice, neither commentators nor decision makers found an agreement about the priorities among the goals of the international criminal justice institutions. The absence of agreed goals and priorities can be due to the fact that the horrendous nature of international crimes and the devastating background of brutal violence, in which these crimes are perpetrated, lead to an intuitive and moralistic answer that makes the debate on justifications for punishing serious human rights violations appear disparagingly academic.[42]

To be sure, international criminal justice, like most criminal justice systems, can be rooted through a plurality of goals synergistically, including deterrence, retribution, and restoration. However, Damaška commented that such overabundance of goals is rather problematic for international criminal tribunals, because they can pull in different directions and eventually come into conflict.[43] For instance, with regards to the relationship between the objective of producing an accurate historical record and individualizing responsibility, the case of the genocide in Rwanda illustrates that individualization of responsibility can produce distortions of events occurred. Despite it is estimated that more than a million people were involved as perpetrators, it has been claimed that the widespread atrocities were provoked by a

[39] On restorative justice see section 4.5. of the present chapter.
[40] B. McGonigle Leyh, '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(63) (2009), 93, 96.
[41] T. M. Funk, *Victims' Rights and Advocacy at the International Criminal Court*, Oxford: Oxford University Press (2010) 4; A. H. Guhr, 'Victim Participation During the Pre-Trial Stage at the International Criminal Court', *International Criminal Law Review* 8 (2008),109-110.
[42] R. D. Sloane, *supra* note 3, 39.
[43] M. Damaška, 'What Is the Point of International Criminal Justice?', *Chicago-Kent Law Review* 83(1) (2007), 331.

small group of nationalist leaders.[44] Similarly, Alvarez describes the goals of international criminal justice "as ambitious as they are contradictory", since they aim: to equally protect the rights of victims and defendants; to provide equal measures of deterrence, punishment and rehabilitation, and to avoid scapegoating the few, while not falling into the trap of collective guilt.[45]

Moreover, given that criminal justice theories have been developed to be implemented at the domestic level, it is questionable whether the traditional justifications for punishment commonly accepted in domestic criminal justice may take on different configurations in the international criminal justice than those familiar from domestic criminal justice. It has been argued by Drumbl that the justifications for punishment may differ, or at least be differently interpreted, between international criminal law and domestic criminal law.[46] This is due to the fact that the general situations in which international criminal justice is invoked are those of mass criminality, which are not the normal case in domestic criminal law enforcement and, secondly, the international society involved is not the same as national society.[47] More generally, domestic criminal law cannot be easily transferred to the legal and institutional context of an international criminal tribunal because such transplant tries to match the contrasting histories, assumptions and paradigms of two different legal branches.[48] As the next section of this chapter will further discuss,[49] domestic criminal law, as a coercive body of law which concretely represents the basic values and norms of the single nation-state,[50] is a product of continuity, while international criminal law is a product of discontinuity, of upheaval and political rupture.[51]

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[44] M. A. Drumbl, 'Punishment, Postgenocide: From Guilt to Shame to *Civis* in Rwanda', *New York University Law Review* 75(2000), 1221, 1250.
[45] J. E. Alvarez, 'Trying Hussein: Between Hubris and Hegemony', *Journal of International Criminal Justice 2*(2) (2004), 321.
[46] M. A. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', *Northwestern University Law Review* (2005), 539.
[47] See section 4.2.1 of the present chapter.
[48] S. R. Ratner, 'The Schizophrenias of International Criminal Law', Texas International Law Journal 33(2) (1998), 251.
[49] See section 4.3. of the present chapter.
[50] R. D. Sloane, *supra* note 3, 40.
[51] D. J. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', Georgetown Law Faculty Working Papers (2008), 8.

Considering the different features of international criminal law and the diversity of interests it serves,[52] it is questionable if the ICC is able to carry on its shoulders the responsibility of achieving these objectives. Therefore, while trying to answer the foundational question about what justifies punishment within international criminal law, we have to consider that in domestic legal systems the standard justifications underpinning criminal justice may raise difficult justificatory problems, which are no less acute in the framework of international criminal justice.

4.2.3. The *sui generis* approach to the procedural law of the ICC.

The ICC Statute is a treaty, which is the fruit of negotiations conducted between State-parties that represent different legal systems, mainly the common law and civil law traditions. Participants to the negotiations characterised the discussions on the procedural model of the ICC as a "clash of cultures between the civil law and the common law."[53] This is due to the fact that each legal tradition has developed a procedural model that accords best with the objectives that have been set by its own social and political background. As Damaška clarifies, the adversarial procedure, originated in the common law context, sees justice as a means of conflict-resolution and, consequently, the proceedings are conceived as a contest between prosecution and defence, aiming to ascertain the innocence or guilt of the defendant.[54] Conversely, within the civil law tradition, the inquisitorial model of procedure is focused on the notion of inquiry and develops around the concept of justice as a means for implementing policy within an activist state dedicated to the "material and moral betterment of its citizens."[55]

In the absence of international structures of government that can assist in the choice of the procedure, delegations had to develop a procedure that is best suited to achieve the purposes of international criminal justice. As previously explored, a number of fundamental goals, which should guide the procedure of the ICC, have been advanced, including punishing those guilty of crimes, truth-telling,

[52] See section 4.2.2. of the present chapter.
[53] P. Lewis, 'Trial Procedure', in R. S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, New York: Transnational Publishers (2001), 547-550.
[54] M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, Yale University Press (1986), 73.
[55] *Idem*, 80.

reconciliation and establishing a historical record of the events.[56] Because of the multiple objectives ascribed to the international criminal justice system, delegations struggled to draft a procedural model for the ICC that could be situated into either an adversarial or inquisitorial spectrum. Pizzi suggests that the particular goals of the international criminal justice call for an inquisitorial form of procedure rather than an adversarial one as the former gives overriding priority to truth-seeking.[57] Conversely, the features of the adversarial mode of procedure are not suited to provide an accurate historical record. In first instance, mechanisms such as plea bargaining or negotiated sentences, which allow the parties to bargain outcomes without the need for oral presentation of evidence, can silence the voices of victims and community affected by the crimes. As result, the charges bear little relation to the bargained reality.[58] Secondly, even at trial stage, victims as witnesses are hampered from giving a full version of events, by the constraints of examination and cross-examination.[59] Jackson also questions whether the adversarial mode of procedure can serve the aim of reconciliation, since the notion of the proceeding as a contest between prosecution and defence, excludes the interests of victims and others in the community affected by international crimes.[60]

Despite during the drafting of the procedural rules of the ICC "[d]elegations were often tempted to push discussions in a certain direction in order to obtain [...] an interpretation of the Statute that would alter the balance in favour of a particular view or particular legal system",[61] huge efforts were made towards finding solutions satisfactory to the different legal traditions.[62] The extensive debates on the procedural rules of the ICC suggested that the Statute, while reflects a basically

[56] See section 4.2.2. of the present chapter.
[57] W. Pizzi, 'Overcoming Logistical and Structural Barriers to Fair Trials at International Tribunals', *International Commentary on Evidence* 4(1) (2007), 2-3.
[58] J. Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial–Inquisitorial Dichotomy', *Journal of International Criminal Justice* 7(1) (2009), 22.
[59] W. Pizzi, *supra* note 57, 3.
[60] J. Jackson, *supra* note 58, 22.
[61] S.A Fernández de Gurmendi, 'Elaboration of the Rules and Procedure of Evidence' in R.S. Lee, et al., eds., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers (2001), 235.
[62] On the ICC negotiations see: S.A Fernández de Gurmendi, 'International Criminal Law Procedures: The Process of Negotiations' in R.S. Lee, eds, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results*, Martinus Nijhoff Publishers (1999), 217–227; S.A Fernández de Gurmendi & H. Friman, 'The Rules of Procedure and Evidence of the International Criminal Court', *Yearbook of International Humanitarian Law 3* (2000), 289.

adversarial approach, associated with common law jurisdictions, incorporates some significant civil law features, including a greater system of victim's participation.[63] Thus, the procedural law is neither based on a pure adversarial model nor on a pure inquisitorial model. Instead, it is based on what Kress describes as a "fundamental compromise formula", where the judges have to determine a balance between competing adversarial and inquisitorial elements.[64]

Several commentators, like Ambos[65] and McLaughlin[66] argue that the ICC has a unique procedural system which is *sui generis* in the sense that it would depart from the dominant adversarial and inquisitorial systems of justice, although inevitably, the ICC has elements from the two major legal traditions.[67] Triffterer describes the *sui generis* nature of the procedure of the ICC as

> the 'melting pot' of the most adequate and fortunate tendencies of criminal procedures stemming from all families of legal systems, forming thus a 'highest common denominator' attainable by all legal models.[68]

In this respect, a cursory examination of terminology of the Rome Statute already shows that the aspirations of the drafters of the Rome Statute to devise a procedure that best assists the Court in accomplishing its tasks as an international judicial body far outweighed the desire to strictly follow either an accusatorial or inquisitorial judicial approach. Legal terms like "juge d'instruction" (investigating judge), or

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[63] S. Zappalà, *Human Rights in International Criminal Proceedings*, Oxford University Press (2003), 24; C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', *Journal of International Criminal Justice* 1(3) (2003), 605; M.C. Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court', *Cornell International Law Journal* 32 (1999), 464; A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', *European Journal of International Law* 10 (1999), 168; R. Cryer et al., *supra* note 36, 428; J. Jackson, *supra* note 58, 14; S. R. Ratner, J. S. Abrams, and J. L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3rd ed), Oxford University Press (2008), 240–241; C. Kreß, 'The Procedural Texts of the International Criminal Court', *Journal of International Criminal Justice* 5(2007), 540; B. McGonigle Leyh, *supra* note 27, 227.

[64] C. Kress, *supra* note 63, 605.

[65] K. Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?', *International Criminal Law Review* 3(1) (2003), 34-35.

[66] C. T. McLaughlin, 'The *Sui Generis* Trial Proceedings of the International Criminal Court', *The Law & Practice of International Courts and Tribunals* 6(2) (2007), 343-345, 353.

[67] G. Kirk McDonald, 'Trial Procedures and Practice' in G. Kirk McDonald, O. Swaak Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Kluwer (2000), 556; G. Boas, J. L. Bischoff, N. L. Reid, *Elements of Crimes in International Criminal Law*, Cambridge University Press (2008), 8; R. Cryer et al., *supra* note 36, 425, 429.

[68] O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed. München: C.H. Beck (2008), 904.

"cross-examination" have been replaced by neutral terms, such as respectively Pre-Trial Chamber and right of the defendant "to have examined the witnesses against him or her",[69] in order to avoid the terminology language from carrying too much influence from one particular legal tradition.

The ICC procedural law is a macrocosm, as the proceedings follow the sequence of investigation, confirmation hearing, trial, and, as the case may be, appeals and revision of proceedings. It would be beyond the scope of this thesis to engage with an analysis of the whole procedure, therefore, the analysis will focus on those articles of the Rome Statute, which, from the author's point of view, are considered to be able to best illustrate the *sui generis* nature of the procedure of the ICC. It is important to clarify that the role assigned to victims in international criminal proceedings before the ICC is extremely innovative, as it is indicative of the acceptance of a fundamental feature of civil law system within a procedure basically grounded in the adversarial system typical of common law countries. However, this section will not deal with the procedural role accorded to victims by the Rome Statute, as observations on the *sui generis* nature of victims' participation has been previously discussed in this thesis.[70]

First of all, at the pre-trial stage of the proceeding the roles of the Prosecutor and the Pre-Trial Chamber and the interplay between them constitute one of the most striking examples of the unique nature of the ICC procedural law. A first important procedural issue which requires interaction between the Prosecutor and the Pre-Trial Chamber is the scrutiny of the Prosecutor's *proprio motu* power to initiate investigations under Article 15(3), which requests the Pre-trial Chamber to authorise the commencement of the investigation. Secondly, according to Article 18(2) of the Rome Statute, when a State having jurisdiction over a crime requests the Prosecutor to defer to the State's investigation, the Pre-trial Chamber is nevertheless responsible, upon a request of the Prosecutor, for authorizing the investigation. Similarly, in extraordinary circumstances, the Pre-trial Chamber can authorize the Prosecutor to take steps for the purpose of preserving evidence, in the case the Prosecutor has deferred an investigation to a State.[71] The last remarkable procedural

[69] Article 67(e) of the Rome Statute.
[70] See chapter II, sections 2.2. and 2.3.
[71] Article 18(6) of the Rome Statute.

issue which shows the interplay between the Prosecutor and the Pre-Trial Chamber is the Prosecutor's decision not to initiate an investigation. In that event, Article 53 confers to the Pre-Trial Chamber, at the request of the State making a referral[72] or *propriu motu*,[73] the authority to review the Prosecutor's decision and, potentially, may request the Prosecutor to reconsider that decision. Additionally, prior to the confirmation of the charges, the Pre-Trial Chamber is entitled to decide on the challenges to the admissibility of a case or challenges to the jurisdiction of the Court.[74]

Now turning to the role of the Prosecution at the pre-trial stage, Article 54(1)(a) of the ICC Statute gives the Prosecutor a more explicit truth-finding duties, stating that

> the Prosecutor shall in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute and, in doing so, shall investigate incriminating and exonerating circumstances equally.

From the wording of the said article, it is evident the attempt to tilt the balance of prosecutorial powers towards an inquisitorial approach, in which the Prosecutor is responsible for an impartial search for the truth. However, it is critical to clarify that the Prosecutor is not only an impartial truth-seeker, as s/he acts also as a party to the proceedings that presents the facts and evidence in order to accuse and to obtain the defendant's conviction. The above analysis illustrates the drafter's attempt to introduce elements of the inquisitorial model into the adversarial system at the pre-trial stage, as the Pre-Trial Chamber is given greater control over the pre-trial proceedings, while the Prosecutor has more explicit truth-finding duties.

With regards to the trial stage, Article 64, which governs the functions and powers of the Trial Chamber, incorporates civil law concepts. Specifically, Article 64(8)(b) confers a great discretion to the judges, as they can "give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner."[75] The directions of the Trial Chamber may pertain to the manner

[72] Article 53(3)(a) of the Rome Statute.
[73] Article 53(3)(b) of the Rome Statute.
[74] Article 19(6) of the Rome Statute.
[75] Article 64(8)(b) of the Rome Statute.

in which witnesses are questioned, the content and the length of the questioning of witnesses.[76] Another example of the discretion granted to the Trial Chamber in tailoring the trial proceedings is Article 64(6), which states that the Trial Chamber has the ability to summon witnesses and to admit documentary or material evidence *proprio motu*. Those powers of the Trial Chamber are relevant to ascertain the truth, as the judges have the ability to intervene in a context where finding the truth might not always be the main concern of parties who litigate in an adversarial manner.[77] Article 64 is not the only article of the Rome Statute that confers upon the judges the discretion to, not only govern the presentation of the parties, but also admit evidence *proprio motu* by the Chamber itself. Article 69(3), which outlines the evidentiary procedures, entrusts the Trial Chamber with a pro-active role typical of civil law system with regard to evidence.[78] The judges are allowed to ask the parties for additional evidence in order to achieve the truth-finding mandate. Indeed Article 69(3) goes beyond the pure adversarial model, since the active determination of the truth is not entirely left to the Prosecution and the defence. Although the trial judges are not conceived as passive arbiters anymore, however, the language of Article 69(3) does not properly embody a pure inquisitorial model in which the trial judges are under the strict duty to determine the truth.[79] The debate over Article 69(3) is one of the key differences between civil law and common law systems and it will be object of special attention later on in this thesis, as this article can confer to the Trial Chamber the power to request victims to present evidence and to challenge the admissibility and relevance of evidence submitted by the parties.[80]

Article 65, governing the proceedings on an admission of guilt, is another good example of the constructive approach, which blends the common law "plea of guilty" and the civil law "admission of the facts".[81] Under Article 65, where the accused makes an admission of guilt, the Trial Chamber is required to determine whether the three conditions have been met. The first two conditions, respectively

[76] C. T. McLaughlin, *supra* note 66, 346.
[77] S. Kirsch, 'The Trial Proceedings before the ICC', *International Criminal Law Review* 6(2) (2006), 286.
[78] A. Cassese, *supra* note 63, 169.
[79] C. Kress, *supra* note 63, 612.
[80] See chapter VII, section 7.4.
[81] C. T. McLaughlin, *supra* note 66, 348.

the admission must be informed[82] and must be voluntary,[83] reflect the common law system whereby the court needs to satisfy itself that the accused understands the nature and consequences of the admission of guilt and that such admission is free and voluntary. The third condition requires the admission of guilt to be supported by facts contained in: the charges and admitted by the accused; any material or evidence presented by the Prosecutor or the accused.[84] Such condition comes from the civil law tradition where the plea is not simply the result of consensus between the parties, but it requires the judges to consider the evidence.[85]

Lastly, one of the most remarkable shift towards the civil law system is represented by the accused's right "to make an unsworn oral or written statement in his or her defence" at trial stage.[86] In fact, in common law systems, the accused can participate in the proceedings only as witness in his own behalf during the defence case and, therefore, like any other witness, the accused has to give his/her testimony under oath.

In this *tour de force* through the procedural law of the ICC, the author has emphasized the articles of the Rome Statute that better illustrate that the ICC does not simply replicate a particular legal model. There is not a specific legal system that prevails over another. Instead, the ICC represents a *sui generis* body of law that places on the judges the heavy burden of giving to the ICC's procedural structure its final shape. The ICC judges responsible for crafting that framework have to increasingly face the difficulties associated with the nature of the international crimes adjudicated by the Court and the diversity of interests that the ICC is called to serve. The next sections of this chapter will specifically focus on discussing the theories that clarify the philosophical motivations behind the criminal justice system and that inform the criminal procedures utilized by the ICC. In considering what goals international criminal law should serve and what values it should have, it is fundamental to bear in mind that one of the major challenges in examining international criminal law theories is that existing theories almost exclusively pertain

[82] Article 65(1)(a) of the Rome Statute.
[83] Article 65(1)(b) of the Rome Statute.
[84] Article 65(1)(c) of the Rome Statute.
[85] W. A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press (2004), 149.
[86] Article 67(1)(h) of the Rome Statute.

to the domestic criminal law of nation states, rather than to the international context in which the ICC operates.

4.3. Limitations of retributive justice.

In the international criminal justice arena, the retributive penal theory represented the main impetus at the Nuremberg trials and, afterwards, the practice of the *ad hoc* Tribunals kept on marking a preference for retributive account.[87] The jurisprudence of the ICTY and ICTR pointed out an important aspect of retributivism that is the notion of proportionality. In fact, those Tribunals upheld the principle that the gravity of the punishment should mirror the gravity of the offences as pivotal.[88] A valid example of this orientation is the *Prosecutor v. Zdravko Mucić et al*. case,[89] better known as the *Čelebići* case. In this case, the three defentants, Zdravko Mucić, Hazim Delić and Esad Landžo, were convicted in their respective capacities as commander, deputy commander and guard, at the Čelebići camp in Central Bosnia and Herzegovina, for killing, torturing, sexually assaulting, beating and otherwise subjecting detainees in that camp to cruel and inhumane treatment.[90] The Trial Chamber affirmed that the "touchstone of sentencing is the gravity of the offence for which an accused has been found guilty, which includes considering the impact of the crime upon the victim."[91]

In the case of the *Prosecutor v. Kupreškić et al.*,[92] the Trial Chamber confirmed a similar approach. The six accused were held responsible for the well-planned and well-organised killing of Muslim civilians in Ahmici, a small village in

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[87] M. A. Drumbl, *supra* note 46, 560; R. D. Sloane, *supra* note 3, 66; D. B. Pickard, 'Proposed Sentencing Guidelines for the International Criminal Court', *Loyola of Los Angeles International and Comparative Law Review* 20(1) (1997), 123, 129-130; W. A. Schabas, 'Sentencing by international tribunals: a human rights approach', *Duke Journal of Comparative & International Law* 7(2) (1997), 500-501; W. A. Schabas, 'International Sentencing: From Leipzig (1923) to Arusha (1996)', in M.C. Bassiouni (ed.), *International Criminal Law, Vol. III,* 2nd ed., New York: Transnational Publishers (1999), 189.

[88] R. Cryer et al., *supra* note 36, 19; G. Dingwall & T. Hillier, 'The Banality of Punishment: Context Specificity and Justifying Punishment of Extraordinary Crimes', *International Journal of Punishment and Sentencing* 6(1) (2010), 11.

[89] *The Prosecutor v. Zdravko Mucić et al.*, Judgement, Appeals Chamber, 20 February 2001, Case No. IT-96-21-A. Available at: http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf.

[90] *Idem*, §§1-3.

[91] *The Prosecutor v. Zdravko Mucić et al.*, Judgement, Trial Chamber, 16 November 1998, Case No. IT-96-21-T, § 1260. Available at: http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf.

[92] *The Prosecutor v. Kupreškić et al.*, Judgement, Trial Chamber, 14 January 2000, Case No. IT-95-16-T. Available at: http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf.

central Bosnia and convicted for crimes against humanity, namely persecution, murder and other inhumane acts. The Trial Chamber, when considering the factors relevant to sentencing, stated that

> [t]he sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[93]

In several decisions, like the above mentioned *Čelebići* case, the ICTY and ICTR not only acknowledged the mere importance of the proportionality between the gravity of the offences committed by the defendant and the punishment meted out, but also declared such principle as the primary consideration in imposing sentence.[94]

Nonetheless, the international criminal justice system cannot be fully grounded on retributivism, because such a theoretical account emerges as problematic when it faces some of the specific features of international criminal law previously outlined.[95] First, retributive theories, by relying on the concept of punishment and justice in terms of paying back the debts that a criminal owes to society as a consequence of the unfair advantage of the law-abiding, require a more stable, univocal and coherent community that international law can provide.[96] International criminal justice aims to serve the interests of multiple communities, as

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[93] *The Prosecutor v. Kupreškić et al.*, *supra* note 92, § 852. See also on the same point: *the Prosecutor v. Dragan Nikolić*, Judgement on Sentencing Appeal, Appeals Chamber, 4 February 2005, Case No. IT-94-2-A, § 21. Available at http://www.icty.org/x/cases/dragan_nikolic/acjug/en/nik-jsa050204e.pdf; *the Prosecutor v. Milomir Stakić*, Judgement, 31 July 2003, Case No. IT-97-24-T, § 903. Available at: http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf; *the Prosecutor v. Simon Bikindi*, Appeals Chamber Judgement, Trial Chamber II, 18 March 2010, Case No. ICTR-01-72-A, § 145. Available at: http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-01-72/appeals-chamber-judgements/en/100318.pdf; *the Prosecutor v. Joseph Serugendo*, Judgement and Sentence, Trial Chamber I, 12 June 2006, Case No ICTR-2005-84-I, § 39. Available at: http://hrlibrary.umn.edu/instree/ICTR/SERUGENDO_ICTR-05-84/SERUGENDO_ICTR-2005-84-I.pdf.

[94] *The Prosecutor v. Zdravko Mucić et al.*, supra note 88, § 731; *the Prosecutor v. Juvénal Kajelijeli*, Judgment and Sentence, Trial Chamber II, 1 December 2003, Case No. ICTR-98-44A-T, § 963. Available at: http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-98-44a/trial-judgements/en/031201.pdf; *the Prosecutor v. Laurent Semanza*, Judgment and Sentence, Trial Chamber III, 15 May 2003, Case No. ICTR-97-20-T, § 555. Available at: http://www.ictrcaselaw.org/docs/doc37512.pdf.

[95] See section 4.2.1. of the present chapter.

[96] R. D. Sloane, *supra* note 3, 79.

understood in both a literal and figurative sense. International criminal tribunals tend to represent an amorphous international community rather than the local community whose *status quo* has been unbalanced by the wrongful actions of the perpetrators. Moreover, those international institutions, by promoting international rather than local norms, render inappropriate the retributive paradigm of justice as a value that rises in a single and coherent community.[97]

The specific idea of retributivism, which holds punishment as a debt to be paid to the community by those individuals who acquire an unfair advantage through the criminal acts, is particularly problematic in the context of international criminal justice because it posits a quasi-contractual relationship between individual and society.[98] A contract model of retributive justice makes sense in the domestic criminal field, where crimes represent a deviation from generally accepted social norms in the time and place they are perpetrated. The same, however, cannot be said about international crimes, which deviate less from social norms, given that such crimes are committed in places characterized by political and social breakdown.[99] In other words, in the scenario where international crimes are perpetrated, those who commit such crimes are conforming to social norms, while those who do not are considered to have deviant behaviour.[100] A specific feature of international crimes is that perpetrators do not act individually as the offender in the domestic context, but on the contrary, they generally are part of a collective that shares ethnic, national, racial or religious values. In such circumstances, perpetrators are less likely to breach social values.[101] The case of Rwanda provides a valid example of this phenomenon.

The genocide in Rwanda was marked by the support of the majority of Rwandans and by the suspension of pre-existing social norms that were replaced with norms that normalized ethnic elimination. In the Rwandan case study genocide became a civil duty.[102] The quasi-contractual paradigm of retributive justice also seems misplaced when applied to international crimes because one of the features of international crimes, outlined in the previous paragraph, requires the action or

[97] R. D. Sloane, *supra* note 3, 79.
[98] *Idem*, 80.
[99] M. A. Drumbl, *supra* note 46, 567.
[100] I. Tallgren, 'The Sensibility and Sense of International Criminal Law', *European Journal of International Law* 13(3) (2002), 573.
[101] *Ibidem*.
[102] M. A. Drumbl, *supra* note 46, 569-570.

inaction of the State, which confers on individuals a collective cloak of authority. This means that international crimes, most of the time, involve States as an entity that share culpability for the crimes, rather than an entity aimed to ensure the proper distribution of benefits and burdens in the community.[103]

Other important criticisms about the ability of international criminal justice to serve retributive goals are mainly centred, firstly, on the selectivity of international criminal law, which punishes only few of the alleged perpetrators, while the majority of them escape prosecution and, secondly, on the difficulty of inflicting a proportionate punishment for the atrocity perpetrated.[104]

Selectivity raises a significant challenge to the retributive approach to international criminal justice. On one side, retributivism, by basing the justification for punishment on the moral "just deserts"[105] of the offenders' actions, provides some justifications for the adjudication in international criminal law, but, on the other side, retributive theories fail to justify selecting some perpetrators and not others.[106] In fact, the imperative of retributivism requires that all persons deserving a punishment have to be punished.[107] Selectivity is deeply-rooted in international criminal law since the creation of the *ad hoc* tribunal for former Yugoslavia and Rwanda, showing how it is difficult to ascribe a retributive approach to international criminal law as a whole.[108]

The contingency does not undermine the force of the retributive value of punishment in Yugoslavia or Rwanda; nevertheless, those *ad hoc* tribunals are the product of a random confluence of political concerns "for just two out of a number of conflicts that warranted such treatment."[109] Even in their operation, however, the ICTY and ICTR have been compelled to select a small number of cases from potentially thousands. Such selectivity had a discretional nature since prosecution

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[103] R. D. Sloane, *supra* note 3, 81.
[104] *Ibidem*; M. A. Drumbl, *supra* note 46, 578; M. M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', *Michigan Journal of International Law* 33(2) (2012), 302; M. A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press (2007), 150.
[105] R. A. Duff, D. Garland Eds, *A Reader on Punishment*, Oxford University Press (1994), 1-3.
[106] M. T. Cahill, 'Retributive Justice in the Real World', *Washington University Law Review* 85 (2007), 870.
[107] *Idem*, 826.
[108] M. A. Drumbl, *supra* note 104, 151.
[109] D. M. Amann, 'Group Mentality, Expressivism, and Genocide', *International Criminal Law Review* 2(2) (2002), 116.

was exercised in those cases where there was a better chance of getting a conviction because the gravity, the planning, the brutality and wide scope of crimes provided greater means of evidence.[110] In this scenario, the creation of a permanent international criminal court seemed to reduce the selectivity which afflicts the *ad hoc* tribunals, but, as Mark Drumbl notes, "it is impossible to squeeze out the political contingency of criminal liability in the ICC practice."[111] According to Drumbl, *de facto* there are two main factors influencing the prosecutorial discretion: the first is the limited resources availability, meaning that only few situations of crises are selected for investigation and prosecution; the second factor is political consensus, which is necessary to the ICC to maintain the resource support. Such elements boost the ICC to investigate situations involving perpetrators from politically weak countries and show to what extent the ICC's decision to investigate a situation (or not) is influenced by concerns regarding how the eventual prosecution can affect the political standing, sources and support among States.[112] Therefore, the high selectivity first of the ICTY and ICTR, and now of the ICC, undermines their capacity to achieve retributive justice and shows the inadequacy of such accounts of criminal justice, because too few persons received the just deserts, while many powerful states and organization have escaped the grasp of international criminal justice.[113]

As mentioned above in this section, the proportionality between the gravity of the offence and the severity of the punishment is a second factor that questions the validity of the retributive paradigm of the international criminal justice system. The retributive feature of international proceedings should be greater than that of national trials because of the extraordinary nature of international crimes, nonetheless, the sentences of international tribunals are not lengthier than the sentences inflicted by domestic jurisdictions.[114] Indeed, as explored in this section, the length of the sentence is not the only parameter of retributivism; nevertheless, the proportionality

[110] M. A. Drumbl, *supra* note 104, 151.
[111] *Idem*, 152. See also H. Olásolo, 'The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body?', *International Criminal Law Review* 3(2) (2003), 142.
[112] M. A. Drumbl, *supra* note 104, 152; D. Chuter, *War Crimes: Confronting Atrocity in the Modern World*, Lynne Rienner Publishers (2003), 132.
[113] M. A. Drumbl, *supra* note 46, 588.
[114] *Idem*, 578; S. Beresford, 'Unshackling the Paper Tiger - The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda', *International Criminal Law Review* 1(1) (2001), 90.

element represents an important tool to assess the retributive account of international criminal law.

One of the major constraints to the proportionality aspirations to punishment are the developments in international human rights standards, which rendered the retributive feature of the international criminal law ideologically and practically problematic. These standards aspire to abolish the death penalty and, more generally, to emphasize rehabilitation as a fundamental goal of punishment.[115] The seriousness of the atrocities can become unintelligible and immeasurable and, from a retributive account, to truly punish such international criminals, the right punishment should exceed anything ordinary.[116] Probably in a retributive sense, torture, reciprocal elimination or death are the punishments which would best fit the most serious international crimes. However, allowing this sort of punishment within the framework of international criminal law would undermine the efforts of international human rights law to abolish them.[117]

Moreover, there is another issue linked to proportionality of punishment in retributive terms. Sentences for international crimes, which are supposed to be greater than those from national courts, in reality are not lengthier than the decisions meted out by national tribunals whose jurisdiction prescribes international crimes. To clarify this point, it is useful to briefly analyse the sentencing practices of the ICTY and ICTR. The maximum term in the sentencing practice of the ICTY is often a twenty years sentence, while in the maximum term adopted by the States that emerged from the former Yugoslavia is between forty and forty-five years. Very similarly, the defendants convicted by the ICTR, mainly senior officials, received a sentence which is milder than the one they would be meted out in Rwanda, where death penalty is still contemplated by Rwandan domestic criminal law. This aspect, in the Rwandan case in particular, creates a paradox because leaders who committed

[115] R. D. Sloane, *supra* note 3, 66. For example, the International Covenant on Civil and Political Rights in article 6(2) limits the application of the death penalty: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. Article 6(6) calls for death penalty ultimate abolition: "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant." Articles 10(3) states "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."
[116] M. A. Drumbl, *supra* note 104, 157.
[117] R. D. Sloane, *supra* note 3, 67.

international crimes are punished by the ICTR with a lower sentence than the lower-level offenders prosecuted by Rwandan national tribunals.[118] Such shortcomings of the proportionality between the gravity of the offence and the severity of the punishment in the practice of domestic and international criminal institutions clearly weaken the retributive account of international criminal law.

While assessing the retributive value of international criminal justice system, besides the quantitative length of the punishment meted out by international criminal institutions, the conditions of the incarceration must be considered. Looking again at the experience of Rwanda, the conditions of imprisonment at the international level are much better than those of the perpetrator sentenced at the national level.[119] This specific aspect raises a paradox that underlines the limitation of retributivism within international criminal justice in regard to victims. Such a paradox emerges in the case of many perpetrators of violence in Rwanda who were HIV-positive and deliberately infected their victims. At the ICTR, prisoners who were HIV-positive received an excellent level of health care and access to medication that few, if any, of the victims could ever claim. Although prosecuting and punishing these perpetrators was supposed to express retribution, in fact, punishment kept perpetrators alive and able to enjoy a quality of life that exceeded that of their victims and may also exceed the conditions in which they would live, whether they were or not sentenced to detention. In this case, it is evident how the retributive value of punishment is controversial.[120]

4.4. Limits of deterrence.

International criminal institutions acknowledged deterrence as an important justification for punishment when determining the sentence. In the *Prosecutor v. Jean-Paul Akayesu*,[121] the Trial Chamber found the defendant guilty of genocide, direct and public incitement to commit genocide and crimes against humanity, including extermination, murder, torture, rape and other inhumane acts, occurred in

[118] M. A. Drumbl, *supra* note 104, 157-158. For a more detailed data analysis of the punishment of international crimes before national criminal justice institutions see chapter 4 of the same book.
[119] *Idem*, 160.
[120] M. A. Drumbl, *supra* note 46, 579.
[121] *The Prosecutor v. Jean Paul Akayesu*, Trial Chamber I, Judgement, 2 September 1998, Case No. ICTR-96-4-T. Available at: http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf.

the Taba commune (Rwanda),[122] where, as mayor, Akayesu was actually responsible for the performance of executive functions and the maintenance of public order.[123] When the Trial Chamber had to imposed a penalty on the convicted defendant, it affirmed that the punishment

> must be directed (…) at deterrence, namely dissuading for good those who will be tempted in future to perpetrate such atrocities by showing them that the International community was no longer ready to tolerate serious violations of International humanitarian law and human rights. The Chamber recalls however that in the determination of sentences (…) to also take into account a number of factors including the gravity of the offence (...).[124]

The Trial Chamber held that the penalties imposed on those convicted must be aimed at achieving deterrence, since they should dissuade those who might be tempted in future to commit crimes under the jurisdiction of the ICTR. However, it also acknowledged that other factors, like the gravity of the offence, which suggests retributivism, should be taken in consideration by the ICTR.

The ICTY and ICTR generally accepted the importance of the substantial deterrent factor in the sentencing process, however, their jurisprudence is rather contradictory with regard to the role deterrence should play in relation to retributive justifications for punishment. In the *Prosecutor v. Duško Tadić*,[125] the defendant, who was the President of the Local Board of the Serb Democratic Party, was convicted for wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health and sentenced to 20 years imprisonment. The defendant appealed this decision on the ground that the total sentence of 20 years was unfair[126] as the Trial Chamber erred in placing excessive weight on deterrence in the assessment of the appropriate sentence to be imposed upon him.[127] The Appeals Chamber argued that it should not be accorded undue weight to

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[122] *Idem*, § 14.
[123] *Idem*, § 4.
[124] *The Prosecutor v. Jean Paul Akayesu*, Sentencing Judgment, Trial Chamber I, 2 October 1998, Case no. ICTR-96-4-T, 4. Available at: http://www.refworld.org/pdfid/402790524.pdf.
[125] *The Prosecutor v. Duško Tadić*, Judgement in Sentencing Appeals, Appeals Chamber, 26 January 2000, Case No. IT-94-1-A and IT-94-1-Abis. Available at: http://www.icty.org/x/cases/tadic/acjug/en/tad-asj000126e.pdf.
[126] *The Prosecutor v. Duško Tadić*, *supra* note 125, § 14.
[127] *Idem*, § 41.

deterrence as a factor in the determination of the appropriate sentence. Specifically, the Appeals Chamber

> accepts that [deterrence] is a consideration that may legitimately be considered in sentencing, a proposition not disputed by the Appellant. Equally, the Appeals Chamber accepts that this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.[128]

This orientation was confirmed in the already mentioned *Čelebići* case. In appealing the decision by the Trial Chamber, Mucić claimed that it placed too much emphasis on the deterrent element in sentencing him and that the lack of impact of deterrence cannot be more self-evident than to look at the situation in Kosovo.[129] The Appeals Chamber element of deterrence plays an important role in the functioning of the Tribunal,[130] because one of the purposes of the Tribunal, in bringing to justice individuals responsible for serious violations of international humanitarian law, is to deter future violations.[131] However, the Appeals Chamber specified that the importance of deterrence is subject to the clause expressed – and quoted above – in the *Prosecutor v. Duško Tadić* case, according to which that it should not be accorded undue weight to deterrence.[132]

In other cases, the ICTY and ICTR affirmed that deterrence and retribution have equal importance since they should be regarded as the underlying principles in relation to the sentencing of an individual by the Tribunal. In the case of the *Prosecutor v. Jean Kambanda*,[133] the defendant, who was the Prime Minister of the caretaker government of Rwanda, pleaded guilty to all the six counts set forth in the indictment against him, namely genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against

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[128] *Idem*, § 48.
[129] *The Prosecutor v. Zdravko Mucić et al.*, *supra* note 88, § 799.
[130] *Idem*, § 800.
[131] *Idem*, § 801.
[132] *Ibidem*.
[133] *The Prosecutor v. Jean Kambanda*, Judgement and Sentence, Trial Chamber, 4 September 1998, Case No. ICTR-97-23-S. Available at: http://crc.unictr.org/sites/unictr.org/files/case-documents/ictr-97-23/trial-judgements/en/980904.pdf.

humanity (murder) and crimes against humanity (extermination).[134] In determining the sentence, the Chamber considered that

> the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on other hand, at deterrence, namely dissuading for good those who will attempt in future to perpetrate such atrocities by showing them that the international community was not ready to tolerate the serious violations of international humanitarian law and human rights.[135]

In the *Prosecutor v. Zlatko Aleksovski* case,[136] the Trial Chamber expressed a similar approach to the sentencing process. Aleksovski was the prison commander of Kaonik prison in Busovača municipality (Bosnia), where he received several hundred Bosnian Muslim civilians from the Croatian Defence Council (HVO).[137] He was convicted for three individual counts of inhuman treatment, wilfully causing great suffering or serious injury to body or health and outrages upon the personal dignity.[138] At the Appeal proceeding, the Prosecutor submitted that a sentence of two and a half years of imprisonment was manifestly disproportionate to the crimes committed by the defendant because it defeated one of the main purposes of the ICTY, namely to deter future violations of international humanitarian law.[139] The Appeals Chamber stated that deterrence and retribution are equally important factors and that

> a sentence of the International Tribunal should make plain the condemnation of the international community of the behaviour in question and show that

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[134] *The Prosecutor v. Jean Kambanda*, *supra* note 133, § 3.
[135] *Idem*, § 28; *the Prosecutor v. Georges Rutaganda*, Judgement and Sentence, Trial Chamber I, 6 December 1999, Case No. ICTR-96-3-T, § 456. Available at: http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-3/trial-judgements/en/991206.pdf.
[136] *The Prosecutor v. Zlatko Aleksovski*, Judgement, Trial Chamber, 25 June 1999, Case No.: IT-95-14/1-T. Available at: http://www.icty.org/x/cases/aleksovski/tjug/en/ale-tj990625e.pdf.
[137] *Idem*, § 5.
[138] *Idem*, § 228.
[139] *The Prosecutor v. Zlatko Aleksovski*, Appeals Chamber Judgement, Appeals Chamber, 24 March 2000, Case No. IT-95-14/1-A, § 179. Available at: http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf.

> the international community was not ready to tolerate serious violations of international humanitarian law and human rights.[140]

In another strand of decisions, it has been claimed that deterrence is the most important parameter to take in consideration when determining a sentence. In the *Prosecutor v. Alfred Musema*,[141] the defendant played a decisive role in the extermination of Tutsi refugees in the region of Bisesero (Rwanda). He took part in the massacres of that region that went on continuously during the months between April and June 1994 and caused tens of thousands of deaths.[142] The Chamber also found that he committed various acts of rape and that he ordered and encouraged others to rape and kill Tutsi women.[143] For these acts, the Trial Chamber found Musema guilty of genocide,[144] crimes against humanity, such as extermination,[145] murder[146] and rape[147] and sentenced him to life imprisonment.[148] In determining the sentence, the Trial Chamber maintained that

> [t]he penalties imposed by this Tribunal must be directed at retribution, so that the convicted perpetrators see their crimes punished, and, over and above that, at deterrence, to dissuade for ever others who may be tempted to commit atrocities by showing them that the international community does not tolerate serious violations of international humanitarian law and human rights.[149]

In the *Prosecutor v. Emmanuel Ndindabahizi* case,[150] the Trial Chamber held a similar position. Ndindabahizi, the Minister of Finance in the Interim Government of Rwanda, was found guilty of instigating genocide, extermination and murder as crimes against humanity in connection with the Gitwa Hill massacres, which resulted

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[140] *The Prosecutor v. Zlatko Aleksovski*, *supra* note 139, § 185.
[141] *The Prosecutor v. Alfred Musema*, Judgment and Sentence, Trial Chamber I, 27 January 2000, Case No. ICTR-96-13-A. Available at: http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-13/trial-judgements/en/000127.pdf.
[142] *Idem*, § 366.
[143] *Idem*, § 798.
[144] *Idem*, § 936.
[145] *Idem*, § 951.
[146] *Idem*, § 958.
[147] *Idem*, § 967.
[148] *Idem*, § 1008.
[149] *Idem*, § 986.
[150] *The Prosecutor v. Emmanuel Ndindabahizi*, Judgment and Sentence, Trial Chamber I, 15 July 2004, Case No. ICTR-2001-71-I. Available at: http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-01-71/trial-judgements/en/040715.pdf.

in the death of thousands of Tutsis,[151] and for his role in killings that took place at various roadblocks along the Kibuye-Gitarama road in April and May 1994.[152] To decide on an appropriate sentence to be imposed on the defendant, the trial Chamber affirmed that

> [s]pecific emphasis is placed on general deterrence, so as to demonstrate that 'the international community [is] not ready to tolerate serious violations of international humanitarian law and human rights.'[153]

This last strand of decisions is in evident contrast with the decisions analysed in the previous section of this chapter, according to which the prevailing justification for international criminal law punishment should be grounded on retributivism.

Deterrence is subject to several criticisms,[154] but the principal challenging arguments are that international criminals do not rationally calculate the cost-benefits effects of the criminal actions and that the probability to be punished and seriousness of the punishment itself by international courts are too low to deter.[155] First, the chance of getting caught should deter individuals from committing crimes, but such eventuality is rather problematic in the context of international crime, actually, as a matter of fact, "behind much of the savagery of modern history lies impunity".[156] Indeed, the chances to get caught for committing international crimes are currently higher than before the setting of international criminal tribunals, nevertheless, these chances are still small. Deterrence depends on enforcement "to communicate a

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[151] *The Prosecutor v. Emmanuel Ndindabahizi*, *supra* note 150, §§ 482-485.
[152] *Idem*, §§ 489-490.
[153] *Idem*, § 498; *the Prosecutor v. Eliézer Niyitegeka*, Judgment and Sentence, Trial Chamber I, 16 May 2003, Case No. ICTR-96-14-T, § 484. Available at: http://www.refworld.org/pdfid/48abd5a3d.pdf; the *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Judgment and Sentence, 21 February 2003, Cases No. ICTR-96-10 & ICTR-96-17-T, § 882. Available at: http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-17/trial-judgements/en/030221.pdf.
[154] For general critics on utilitarian theories see: M. Heikkilä, *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors Affecting This Status*, Turku: Institute for Human Rights Åbo Akademi University (2004), 30-31; B. McGonigle Leyh, *supra* note 27, 42-43; A. Fatić, *Punishment and Restorative Crime-Handling*, Aldershot: Avebury (1995), 87; E. Luna, 'Punishment Theory, Holism, and the Procedural Conception of Restorative Justice', *Utah Law Review* (2003), 210-215; W. Cragg, *The Practice of Punishment: Towards a Theory of Restorative Justice*, London: Routledge (1992), 35-37.
[155] M. M. deGuzman, *supra* note 104, 308; M. A. Drumbl, *supra* note 104, 169; R. Cryer et al., *supra* note 36, 20; G. Dingwall & T. Hillier, *supra* note 88, 8-9.
[156] K. Roth, 'The Case for Universal Jurisdiction', *Foreign Affairs* (2001), 150.

credible threat authoritatively"[157] and the failure to achieve this goal is due to the institutional and resources constraints that afflict international criminal institutions. International criminal institutions do not clearly communicate the potential prospect of getting caught, as they are culturally foreign and geographically distant and, most importantly, lack their own police force. International criminal tribunals face many difficulties to get accused under custody, because they completely rely on the cooperation of States authorities.[158] Diane Amann provocatively affirmed that "because [the tribunals] have no power to arrest, defendants come to them by chance."[159]

Moreover, the scarcity of resources urges international criminal institutions to make the choice to investigate and prosecute certain defendants to the exclusion of others that should deserve the same consideration.[160] This kind of selectivity seems to present a certain degree of randomness, or at least of indeterminacy, because deterrence does not provide sufficient criteria for making selection decisions. Deterrence theories do not explain how to identify which crimes determine greater or lesser setbacks to social welfare.[161] The lack of criteria to rank the value of different criminal conducts represents an important issue when it comes to allocating prosecutorial resources to make the most of deterrence.[162] Selectivity and randomness erode the deterrent theories of punishment because they narrow down the breadth of the risk of being punished, which is supposed to discourage a rational perpetrator.[163]

The ICC tried to address the issue of selectivity and established parameters to apply it in order to maximise deterrence. In the decision on the admissibility of documents into the record in the *Prosecutor v. Thomas Lubanga Dyilo*,[164] the Pre-Trial Chamber interpreted the additional gravity threshold, enunciated in article 17 (1) (d) of the Statute, as intended to ensure that the Court only initiates cases against

[157] M. A. Drumbl, *supra* note 46, 590; R. D. Sloane, *supra* note 3, 75.
[158] R. D. Sloane, *supra* note 3, 72; M. A. Drumbl, *supra* note 46, 590.
[159] D. M. Amann, *supra* note 109, 116.
[160] *Ibidem*.
[161] M. M. deGuzman, *supra* note 104, 308.
[162] *Idem*, 309.
[163] D. M. Amann, *supra* note 109, 117; M. A. Drumbl, *supra* note 46, 589.
[164] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 February 2006, Pre-Trial Chamber I, Case No. ICC-01/04-01/06-8-Corr. Available at: https://www.icc-cpi.int/CourtRecords/CR2007_00196.PDF.

the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court, because only by concentrating on this type of individual can the deterrent effects of the activities of the Court be maximised.[165] However, the Appeals Chamber in the *Prosecutor v. Bosco Ntaganda*,[166] challenged the assertion by the Pre-Trial Chamber, according to which the deterrent effect is highest if all the categories of perpetrators including the most senior leaders are brought before the Court. From the point of view of the Appeals Chamber, it seems more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators *per se* is excluded from potentially being brought before the Court. The exclusion of many perpetrators on the grounds proposed by the Pre-Trial Chamber could severely hamper the deterrent role of the Court by announcing that any perpetrators other than those at the very top are automatically excluded from the exercise of the jurisdiction of the Court.[167] Even if the ICC acknowledges that the deterrent role of the Court is a cornerstone of its own creation,[168] it is very controversial how to set up a framework for selecting cases for prosecution based on deterrence.

The second basic idea underpinning general deterrence is presumption of a certain level of rationality of perpetrators while committing gross violation of human rights.[169] However, the rational-perpetrator model of deterrence, in the chaos of large-scale violence, provocative propaganda, and overturned social order, may be unlikely in calculating the cost-benefit effects of their actions.[170] Drumbl identifies two factors that compromise such assumption: gratification and survival. Many perpetrators want to be part of violent groups because membership of such groups provides them with a feeling of solidarity and comfort.[171] They may be hooked in by social norms inciting anger and violence or they believe they act for the general wellness of the community, rather than for their personal benefits.[172] Some criminals

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[165] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 164, §§ 50-54.
[166] *The Prosecutor v. Bosco Ntaganda*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, Appeals Chamber, Case No. ICC-01/04-169. Available at: https://www.icc-cpi.int/CourtRecords/CR2006_01807.PDF.
[167] *Idem*, §§ 73-75.
[168] *Idem*, § 75.
[169] M. A. Drumbl, *supra* note 46, 590.
[170] R. D. Sloane, *supra* note 3, 72; M. A. Drumbl, *supra* note 104, 171.
[171] R. D. Sloane, *supra* note 3, 72.
[172] J. Malamud-Goti, 'Transitional Governments in The Breach: Why Punish State Criminals?', *Human Rights Quarterly* 12(1) (1990), 1.

can distort the cost-benefit calculation of their criminal conduct (on which the deterrence model depends) because they "may be so idiosyncratically devoted to genocide or ethnic cleansing as to be undeterrable by anything short of massive military force, and maybe not even that."[173] Megalomaniac dictators tend to show a sense of infallibility and invulnerability that make them less likely to rationally weigh the eventuality of being prosecuted and convicted against the immediate benefits of political power, territorial acquisitions and elimination of ethnic groups.[174] Against this backdrop, where perpetrators believe that violent behaviours are morally justified, even necessary and sometimes also gratifying, it is unlikely that the chances of being punished may deter people from committing such actions.[175]

However, not every criminal necessarily belongs to such a psychosocial profile. Perpetrators responsible for mass atrocities can be also defined as "conflict entrepreneurs" who manipulate values and the tools of State power as a means to increase their own social, economic, or political power.[176] In this case, the value of killing oversteps the benefits of living in peace without the risk of a future punishment by a distant international criminal court.[177]

The second factor that challenges the assumption of a rational perpetrator among mass violence events is the necessity to survive. Often, individuals need to join a violent group because being isolated makes them more likely to be perceived as "other" and be victimized. In this scenario, committing a crime might not bring any gratification, but it may be a guarantee of survival. When individuals are acting in this way, it is unlikely they will be deterred by the chance being punished by a distant international criminal tribunal.[178]

4.5. Limitations of the restorative justice paradigm.

Given the core elements of restorative theories briefly outlined in the previous chapter,[179] it is not surprising that such an account gained room in the development

[173] G. J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press (2000), 294.
[174] *Idem*, 291; R. D. Sloane, *supra* note 3, 74.
[175] M. Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, Edinburgh: Edinburgh University Press, (2005), 121.
[176] R. D. Sloane, *supra* note 3, 73.
[177] M. A. Drumbl, *supra* note 104, 171.
[178] *Idem*, 172.
[179] See Chapter III, section 3.5.

of victims' participatory rights under international law. Indeed, the drafters of Rome Statute had some restorative rationale on their minds while setting up the legal framework of victims' participation and reparation.[180] In its *Report of the Court on the Strategy in Relation To Victims*, the Assembly of States Parties affirmed that the drafters, by recalling in the preamble of the Rome Statute "that during the last century, millions of children, women, and men have been victims of unimaginable atrocities", acknowledged the importance of understanding the devastating effect that crimes can have on victims. They also recognized that a positive engagement with victims can contribute to their healing process.[181] Thus, according to the Assembly of States Parties, the ICC has not only a punitive function, but also a restorative one and such feature of the ICC system reflects the growing importance that participation and reparations play in achieving justice for victims.[182]

As quickly as the discourse on restorative justice has entered the scene of the ICC Assembly of States Parties, in the same way, the academic debate engaged on the *vexata questio* whether or not the ICC could achieve any of these restorative purposes. While few academics have called for a transformation of the international criminal justice process to better accommodate restorative justice values,[183] the author supports the opposite thesis, according to which it might be fallacious to ascribe a restorative character to the criminal justice system of the ICC and to qualify victims' participation in the proceeding as a restorative mechanism.[184] Indeed, the

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[180] War Crimes Research Office, American University Washington College of Law, *Victim Participation Before the International Criminal Court*, November 2007, 2. Available at: https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-1-victim-participation-before-the-international-criminal-court/; S. Vasiliev, 'Victim Participation Revisited: What the ICC Is Learning about Itself', in C. Stahn, *The Law and Practice of the International Criminal Court*, Oxford University Press (2015), 64.

[181] Report of the Court on the strategy in relation to victims, Doc. N. ICC-ASP/8/45, 10 November 2009, § 2. Available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf.

[182] *Idem*, § 3.

[183] N. A. Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach*, Stanford University Press (2007), 141; M. Findlay & R. Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process*, Routledge (2005), 275; S. A. Fernández de Gurmendi & H. Friman, 'The Rules of Procedure and Evidence of The International Criminal Court', *Yearbook of International Humanitarian Law* 3 (2000), 312; B. McGonigle Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls', *International Criminal Law Review* 12 (2012), 380.

[184] C. McCarthy, 'Victim Redress and International Criminal Justice Competing Paradigms, or Compatible Forms of Justice?', *Journal of International Criminal Justice* 10 (2012), 362-364; S. Vasiliev, *supra* note 180, 64; S. Vasiliev, *supra* note 26, 676; M. J. Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice', *Harvard Human Rights Journal* (2002), 79-80; M. M. deGuzman, *supra* note 104, 310.

rights of victims to obtain reparations and to a more active role in the proceeding can enhance restorative justice values, such as protecting the victims' interests in truth, justice and participation.[185] However, rooting victim's participation and more generally the criminal procedure of the ICC in the restorative justice paradigm can exceed the purposes and functions that the ICC can reasonably fulfil.[186]

In the *Court's Revised Strategy in Relation to Victims*, the Assembly of States Parties held that victims' participation in the justice process is one step in the process of healing for individuals and societies,[187] but it is less clear how this process in the context of the ICC can be restorative for the individual and reunite splintered communities. At the individual level, the healing and restorative effects of the court proceedings for the victims are not mandatory or a regular outcome, but, on the contrary, those effects are strictly individual and subject to variables that are difficult to foresee in advance.[188]

Little has been written about the cathartic and therapeutic experience of victims expressing their views and concerns before the ICC.[189] The findings by Kathleen Daly – although the scope of her study is restorative justice practices in juvenile criminal justice in domestic courts – provide an interesting insight on the capacity of the restorative justice process to assist victims in recovering for the disabling effects of crime. Whether victims seek to achieve mutual understanding with offenders or to be treated well as individuals from restorative justice process, both these goals are related to the character and experience of their victimization. Moderately distressed victims are more inclined to restorative behaviours and it is easier for this group to find common ground with offenders because the criminal action has not deeply affected them. Conversely, Daly's study shows that highly distressed victims are more likely to remain angry and fearful of offenders and to be

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[185] J. C. Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations*, Martinus Nijhoff (2013), 173-174.
[186] S. Vasiliev, *supra* note 180, 64.
[187] Court's Revised Strategy in Relation to Victims, ICC-ASP/11/38, 5 November 2012, § 10. Available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf.
[188] S. Mouthaan, 'Victims Participation at the ICC for Victims of Gender-Based Crimes: A Conflict of Interest?', *Cardoso Journal of International and Comparative Law* 21 (2012-2013), 648.
[189] M. L. Perlin, 'The Ladder of the Law Has No Top and No Bottom: How Therapeutic Jurisprudence Can Give Life to International Human Rights', *International Journal of Law and Psychiatry* 37(6) (2014), 535; D. Olowu, 'Therapeutic Jurisprudence: An Inquiry into Its Significance for International Criminal Justice', *Revista Juridica Universidad de Puerto Rico* (76) (2007), 130.

negative toward them. Even one year after the restorative process, 95% of the high distressed victims had not recovered.[190] Therefore, the restorative justice process may be of little help in the recovery of the most highly distressed victims. This key finding is interesting because it allows the building of a nexus of the victims of international crimes. Given the heinous and widespread feature of international crimes and the violent, social, and institutional background where such atrocities occur, it is very likely that victims will suffer a high degree of distress. In this scenario, it is rather questionable whether the ICC can effectively fulfil restorative goals.

The healing and restorative effects for the individual does not depend on only the character of the victimization and how deeply it affects victims, but they are also contingent on the degree to which offenders are genuinely sorry for what they have done and can communicate their remorse effectively.[191] The apology process entails, first, a call for an apology from those who regard themselves as wronged and acknowledge their culpability, then the apology itself, where the defendants acknowledge their culpability and express their willingness to make good and, finally, an expression of forgiveness from the victim to the wrongdoer.[192]

In the practice of international criminal tribunals, the requirement of a fully accomplished and sincere apology, which underpins the whole restorative process, is rather unlikely to occur,[193] since in only a few cases the defendants have expressed profound regret and convincingly apologised for their wrongdoing.[194] The analysis of

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[190] K. Daly, 'The Limits of Restorative Justice', 9. Available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.595.9278&rep=rep1&type=pdf. This open-access article is published also in D. Sullivan & L. Tifft (Eds.), *Handbook of Restorative Justice: A Global Perspective*, New York: Routledge (2006).

[191] K. Daly, *supra* note 190, 10.

[192] A.E. Bottoms, 'Some Sociological Reflections on Restorative Justice', 94, in A. von Hirsch, J. V Roberts, A. E. Bottoms, K. Roach, M. Schiff (Eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms*, Bloomsbury Publishing (2003).

[193] B. McGonigle Leyh, *supra* note 183, 380.

[194] *The Prosecutor v. Georges Ruggiu*, Judgement and Sentence, Trial Chamber I, 1 June 2000, Case No. ICTR-97-32-I, §§ 69-72. Available at: http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-97-32/trial-judgements/en/000601.pdf; *the Prosecutor v. Tihomir Blaškić*, Judgement, Trial Chamber, 3 March 2000, Case No. IT-95-14-T, § 775. Available at: http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf; *the Prosecutor v. Dražen Erdemović*, Sentencing Judgement, Trial Chamber, 29 November 1996, Case No. IT-96-22-T, §§ 96-98. Available at: http://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj961129e.pdf; *the Prosecutor v. Dražen Erdemović,* Sentencing Judgement, Trial Chamber, 5 March 1998, Case No. IT-96-22-Tbis, § 16. Available at: http://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj980305e.pdf; *the Prosecutor v. Omar Serushago*, Sentence, Trial Chamber I, 5 February 1999, Case No. ICTR-98-39-S, §§ 40-41.

the experience of the ICTY and ICTR shows that the expression of fake remorse is a very common phenomenon. The reasons behind this can be found in the practices of both the ICTY and ICTR, which treat the expression of apology and remorse as a mitigating factor. Indeed, granting discounts for remorse and apology creates a strong incentive to deceive.

A paradigmatic example of this phenomenon is the case of the *Prosecutor v. Biljana Plavšić*.[195] The defendant was a leading Serb politician and, in her role as Co-President of the Serb leadership, she planned, instigated, ordered and aided and abetted persecutions of the Bosnian Muslim, Bosnian Croat and other non-Serb populations of 37 municipalities in Bosnia and Herzegovina.[196] During the trial she pleaded guilty and released a statement in which she accepted her responsibility and expressed "her remorse fully and unconditionally, Mrs. Plavšić hopes to offer some consolation to the innocent victims – Muslim, Croat and Serb – of the war in Bosnia and Herzegovina."[197] The Court in the sentencing judgment acknowledged that this step by Plavšić was "undertaken under circumstances requiring considerable courage" and it eventually represented "an unprecedented contribution to the establishment of truth and a significant effort toward the advancement of reconciliation."[198] Her guilty plea allowed Plavšić to receive a mild judgment, because the court dropped the charge of genocide against her. However, after a period of time she retracted her statement of remorse, explicitly stating she still felt she had done nothing wrong.[199] This is – so far – the only case when the defendant recanted her expression of remorse and apology.

Available at: http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-98-39/trial-judgements/en/990215.pdf.

[195] *The Prosecutor v. Biljana Plavšić*, Case No. IT-00-39 & 40/1.

[196] *The Prosecutor v. Biljana Plavšić*, Case No. IT-00-39 & 40/1, Summary of the Sentencing Judgement rendered on Thursday 27 February 2003 by Trial Chamber III. Available at: http://www.icty.org/x/cases/plavsic/tjug/en/030227_Plavsic_summary_en.pdf.

[197] ICTY Press Release, 'Statement on Behalf of Biljana Plavšić / Statement by Robert Pavich, Lead Counsel for Biljana Plavšić (PIS/697e), 2 October 2002. Available at: http://www.icty.org/en/press/statement-behalf-biljana-plavsic-statement-robert-pavich-lead-counsel-biljana-plavsic.

[198] *The Prosecutor v. Biljana Plavšić*, Sentencing Judgment, Trial Chamber, 27 February 2003, Case No. IT-00-39&40/1-S, § 67. Available at: http://www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf.

[199] J. Subotić, 'The Cruelty of False Remorse: Biljana Plavšić at the Hague', *Southeastern Europe* (36) (2012), 48; Interview in English with the Swedish newspaper 'Vi Magazine', January 2009. Available at: http://www.thelocal.se/17162/20090126.

Nevertheless, there are several cases in which the apology statements appeared calculated, carefully scripted and exactly tailored in order to receive a milder sentence. Radovan Karadžić was one of the founding member and President of the Serbian Democratic Party (SDS) and later became the sole President of Republika Srpska. He was found guilty of genocide in relation to the massacre in Srebrenica, of crimes against humanity and war crimes including torture, rape and killing of thousands, aiming at systematically removing the Bosnian Muslim and Bosnian Croat populations from territories claimed by Bosnian Serbs.[200]
In his Final Brief, he

> expresses his deep regret and sympathy to the victims (…) and to their families. *Regardless of the issue of his individual criminal responsibility for those crimes* (emphasis added), he understands that as President of Republika Srpska, he bears moral responsibility for any crimes committed by citizens and forces of Republika Srpska. He knows that any expression of regret or sympathy is inadequate to compensate for the suffering that took place during the war. Nevertheless, he offers his heartfelt expression of regret and sympathy to the victims and their families.[201]

The apology statement by Karadžić entailed the main features requested by the ICTY for a genuine and sincere expression of remorse, such as sincere regret, acceptance of some measure of moral blameworthiness for personal wrongdoing, sympathy, compassion or sorrow for the victims of the crimes.[202] With this specific statement, Karadžić apologised to the victims and their families and expressed regret, but he did not acknowledge his culpability. This is inconsistent with the apology process, as outlined by restorative justice theories, because the perpetrator has to acknowledge his/her culpability and then ask for forgiveness to the victims.

The courtrooms of both the ICTY and ICTR have witnessed defendants who have not expressed any remorse because of their actions; instead they showed

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[200] *The Prosecutor v. Radovan Karadžić*, Trial Judgement Summary for Radovan Karadžić, 24 March 2016, Case No. IT-95-5/18. Available at: http://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement_summary.pdf.
[201] *The Prosecutor v. Radovan Karadžić*, Public Redacted Version of Judgement Issued on 24 March 2016 Volume I of IV, Trial Chamber, 24 March 2016, Case No. IT-95-5/1, § 6059. Available at: http://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf.
[202] *The Prosecutor v. Pavle Strugar*, Judgement, Appeals Chamber, Case No. IT-01-42-A, 17 July 2008, §§ 364-365. Available at: http://www.icty.org/x/cases/strugar/acjug/en/080717.pdf.

indignation and anger for being indicted. In the case *Prosecutor v. Jean Kambanda*, the defendant did not express any contrition, regret or sympathy for the victims in Rwanda, even when given the opportunity to do so by the Chamber during the hearing of 3 September 1998.[203] Particularly symbolic is the trial of Slobodan Milošević, who showed neither signs of remorse nor attempted to apologize. Milošević, who died during his trial, appeared impassive to the atrocities occurred to the victims, while he strongly expressed his resentment for being indicted and constantly accused the tribunal of being the aggressor, presenting himself and the Serbians as the real victims.[204] In the restorative justice approach, apology and forgiveness require sincerity and authenticity as a first step towards reconciliation. Conversely, the described experience of both the ICTY and ICTR revealed a remarkable gap between the dynamics of the trial in the tribunals' everyday work and the restorative justice paradigm, which can hardly contribute to reconciliation.[205]

To understand, at least partially, the lacking of sincere apology in the practice of the ICTY and ICTR, it is useful to look at the theory of "neutralization" of community norms. This theory, which is meant to address ordinary juvenile criminality, explains that young criminals acting in groups have their own normative universe and use "neutralization techniques" within the group to erode general social norms and foster criminality.[206] Studies identified five "neutralization techniques": denial of personal responsibility, denial of injury of others, denial of victims, condemnation of condemners, and requirement of loyalty to higher ranked decision-makers.[207] By these techniques criminal groups invalidate general social norms and create the group's value system and identity. The nature of these groups reduces the sense of responsibility and, thus, people tend to conform to the norms of the group regardless if those norms are antisocial. Eventually the loss of individuality in a group with a strong identity leads to high responsiveness to group norms and group

[203] *The Prosecutor v. Jean Kambanda*, *supra* note 132, § 51.
[204] O. Diggelmann, 'International Criminal Tribunals and Reconciliation: Reflections on the Role of Remorse and Apology', *Journal of International Criminal Justice* 14(5) (2016), 1087.
[205] *Idem*, 1086.
[206] S. Harrendorf, 'How Can Criminology Contribute to an Explanation of International Crimes?', *Journal of International Criminal Justice* 12(2) (2014), 249.
[207] A. Alvarez, 'Destructive beliefs: Genocide and the role of ideology', in A. Smeulers & R. Haveman (Eds.), *Supranational Criminology: Towards a Criminology of International Crimes*, *Antwerp: Intersentia* (2008), 216.

pressure.[208] As explored previously in this chapter,[209] international crimes are generally committed by formal or informal organizations, which use "neutralization techniques" to recode the group's morality and transform the normally criminal behaviour into conformed conduct. As the criminal conduct is not perceived as wrong, members of the group are expected to behave in a specific way. It often happens that high-ranking perpetrators formulate and spread a specific ideology and exercise pressure on the group's members to strengthen their own system of norms.[210]

The theory of "neutralization" applied to the context of international criminal justice explains the reason why perpetrators of international crimes seem to be completely lacking in remorse or even understanding of the gravity and consequences of their actions. As such, the difficulty in achieving a sincere apology suggests, as consequence, that the restorative justice paradigm might appear less than restorative. The level of restorativeness includes, on one hand, the degree to which the offenders are remorseful, aware of the impact of the crime on the victim and spontaneously apologetic to the victim and, on the other hand, the degree to which victims understand the offender's situation and forgive him/her.[211] The lack of a fully accomplished apology jeopardises the restorativeness of the process that should emerge in the relationship between the victim and the offender and requires a degree of empathic concern and perspective-talking.[212]

Selectivity of the prosecution, as already explored in the previous section on retribution and deterrence,[213] represents another important factor curtailing effective restoration. Despite the large number of victims and offenders involved in crimes under the jurisdiction of the ICC, the Prosecutor and the judges have direct control on who are the defendants, for what crimes they are prosecuted, and who are the victims entitled to express their views and concern before the Court.[214] For instance,

[208] S. Harrendorf, *supra* note 206, 243.
[209] See section 4.2.2. of this chapter.
[210] O. Diggelmann, *supra* note 204, 1093.
[211] K. Daly, *supra* note 190, 5.
[212] *Idem*, 6.
[213] For the selectivity of the prosecution within retributivism and deterrence see respectively sections 4.3. and 4.4. of this chapter.
[214] S. Mouthaan, *supra* note 188, 648.

in the *Prosecutor v. Jean-Pierre Bemba Gombo* case,[215] the judges instructed the Legal Representatives on the criteria to narrow down the list of 17 victims included in the applications into a short list of no more than eight individuals.[216] In the *Prosecutor v. Thomas Lubanga Dyilo* case,[217] the court limited the participation of victims because, despite victims' claims, sexual violence was not included in the charges as forming an intrinsic part of the recruitment and use of child soldiers and, when Lubanga was convicted for the recruitment of child soldiers, any consideration on the effects of sexual violence suffered by victims was not acknowledged.[218] These two examples show the extent to which selectivity can jeopardize the healing and restorative effect on an individual level. In the *Bemba* case, only a few victims received access to the restorative mechanism, while in the *Lubanga* case, victims who suffered crimes of sexual violence found partial restoration, because their experiences of sexual violence were not recognized.[219]

The financial aspect of restoration is also affected by the selectivity. In fact, the selection operated by the Prosecutor and Judges, as explained in the previous paragraph, and the limited amount of resources available for reparations, which can satisfy only a small number of victims, show that the ICC falls short in addressing the reparative effect of the restorative paradigm.[220] The position of victims seeking reparations is rather unstable.[221] In the *Lubanga* case, the judges decided that the financial situation of the defendant exempted him from making any contributions to the Trust Fund for Victims.[222] Financial compensation for the harm suffered by the victims seeking reparation would be funded by States contributions to the Trust Fund, rather than by Lubanga, who did not bear any of the financial cost. This contradicts the restorative justice paradigm, according to which the perpetrator has to

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[215] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Second Order Regarding the Application of the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, Trial Chamber III, 21 December 2011, Case No. ICC-01/05-01/08-2027. Available at: https://www.icc-cpi.int/CourtRecords/CR2011_22610.PDF.

[216] *Idem*, §§ 11-12. Available at: https://www.icc-cpi.int/CourtRecords/CR2011_22610.PDF.

[217] *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06.

[218] *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Case Information Sheet. Available at: https://www.icc-cpi.int/drc/lubanga/Documents/LubangaEng.pdf.

[219] S. Mouthaan, *supra* note 188, 648.

[220] *Idem*, 649.

[221] M. M. deGuzman, *supra* note 104, 312.

[222] *The* Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76 of the Statute, Trial Chamber I, 10 July 10 2012, Case No. ICC-01/04-01/06-2901, § 106. Available at: https://www.icc-cpi.int/CourtRecords/CR2012_07409.PDF.

offer reparation and restoration to those victimized and harmed by his/her wrongdoing.

At the community-level, it is even more difficult to ascertain the extent the participation of the individual victim can contribute to the reconciliation and restoration of the society.[223] In the aftermath of mass violence, societies are characterized by complex politicized issues and, at a basic level, prosecution can effectively remove public figures whose presence impedes reconciliation,[224] but it is still questionable whether and how the ICC can undertake the ambitious task of providing social catharsis.[225] The capacity of restorative justice of transforming the relationship between victims, perpetrators and society requires a close interaction between people

> who have been bitter and murderous enemies, upon victims and perpetrators of terrible human rights abuses, upon groups of individuals, whose very self-conceptions have been structured in terms of historical and often state sanctioned relations of dominance and submission.[226]

The experience of the ICTY and ICTR showed that these tribunals, instead of being vehicles for public catharsis and promoting reconciliation, in some cases deepened the contrasts within ethnically divided communities and confirmed existing biases.[227] For instance, Payam Akhavan reported that Yugoslav ethnic groups each thought that the tribunal favoured the other and were biased against it.[228]

Lastly, there is a conceptual difficulty that the restorative justice paradigm has to face when entering in the criminal procedure. It is questionable whether restorative justice deals with the fact-finding phase of the criminal process. Typical forms of restorative justice practices can be successfully and effectively employed when the defendant accepts and acknowledges his/her guilt or, at least, the wrongness of his/her acts,[229] implying that restorative practices do not address if a

[223] S. Vasiliev, *supra* note 180, 65.
[224] Anonymous, 'Developments in the Law: International Criminal Law', *Harvard Law Review* 114(7) (2001), 1970.
[225] C. McCarthy, *supra* note 184, 364.
[226] M. J. Aukerman, *supra* note 184, 80 quoting S. Dwyer, 'Reconciliation for Realists', *Ethics & International Affairs*, 13 (1999), 82.
[227] Anonymous, *supra* note 224, 1971.
[228] P. Akhavan, *supra* note 30,16-17, 21-22.
[229] B. McGonigle Leyh, *supra* note 183, 380.

crime occurred or not and whether the defendant is guilty or innocent. The restorative justice paradigm is concerned with what a justice practice should be after a person has admitted committing an offence.[230] It does not mean that the restorative process does not hold the offenders responsible, but restorative accountability needs the offenders to acknowledge their culpability and willingness to amend for their wrongdoing.[231] Restorative justice mechanism does not provide any method of adjudication because it is participatory and consensually based.[232] It is difficult to reconcile such restorative features with the goals of the criminal justice system, enshrined in the Preamble of the Rome Statute, which affirm that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured (…)".[233]

The lack of a mechanism for adjudication in the restorative justice system raises a contradiction. During the proceedings and before the accused is found guilty, the contribution to the general goals of restorative justice of any of the victims' participation procedures is limited.[234] To some extent the ICC should contribute to restorative justice values with the goal of providing the foundations for rebuilding societies after mass violence, but the proceedings before the ICC are not the appropriate venues to run a therapeutic process for social catharsis. All these aspects have to be considered while assessing whether the criminal justice system of the ICC has the procedural tools and resources to satisfy the features characterizing restorative justice.[235] This section has clearly cast doubts on the pertinence of labelling the Court as a restorative justice institution.

4.6. Conclusion.

This chapter has tried to determine whether the dominant theories of criminal justice – retribution, deterrence, and restorative justice – provide an adequate basis to justify the ICC's goals, despite they can take on different configurations in the international criminal justice than those familiar from domestic criminal justice. In doing so, two

[230] K. Daly, *supra* note 190, 3.
[231] M. J. Aukerman, *supra* note 184, 84
[232] K. Daly, *supra* note 190, 3.
[233] Preamble of the Rome Statute, U. N. Doc. A/CONF.183/9 of 17 July 1998.
[234] S. Mouthaan, *supra* note 188, 647.
[235] C. McCarthy, *Reparation and Victims Support in the International Criminal Court*, Cambridge University Press (2012), 58-59.

main challenges need to be faced: the first one is the peculiar and complex nature of the international criminal law paradigm, which requires *sui generis* choices with regard to the structure and function of international criminal courts; the second challenge is the absence of victims in traditional penal theories, despite being conferred an autonomous standing in the administration of criminal law. As showed in this chapter, these two aspects are clearly linked because the distinctive features of international criminal law call for the adoption of a *sui generis* procedural framework, reflecting the international criminal justice order, which has combined elements from traditional theories of criminal justice.

The first part of this chapter has exposed the three main ways in which international criminal law differs from domestic criminal law in order to prove that the application of domestic law to the international context is particularly problematic because it attempts to combine two different legal paradigms. The international criminal justice system is characterized by an overabundance of goals, given that besides the traditional justifications for punishing, it seeks to provide historical records of mass atrocities, to promote social reconciliation, to disseminate human rights values and to achieve peace and security by stopping ongoing conflicts. The legal framework of the ICC does not set a hierarchy that clarifies its primary goals and some critiques have questioned the capacity of the ICC to fulfil these purposes, considering that some of them can potentially come into conflict.

The two other significant departures from the domestic system of criminal justice engage with the distinctive nature of community and crimes within the international criminal law field. In domestic law, the concept of community is rather clear as criminal law applies to the national community of a singular State, but in the scenario of international law such a concept is more ambiguous. It is difficult to answer the question as to whether international criminal law has to mediate the interests of multiple communities, such as different ethnic and national groups, or it has to serve the figurative international community conceived as a community of mankind. Lastly, international crimes differ from the most similar crimes of violence in the domestic field because of the collective nature of both victims and perpetrators. The former implies victims may be of a specific racial, national or ethnic group, while the latter involves highly organized numbers of groups or

individuals having a status in regard to a nation-State, a military organization or some other collective organization. Moreover, this kind of crime generally occurs during wars or social breakdowns such as ethnic conflicts, when basic norms against violence are undermined and gradually removed to the detriment of specific ethnic, political, religious, and national groups.

The foregoing observations call for greater attention to the impact that the specific features of international criminal law generate on the existing theoretical framework on which the criminal justice system of the ICC is currently rooted. Since the core elements of international crimes differ from domestic crimes, it would be a mistake to downplay the debate on the suitability of the transplant of criminal justice theories of the domestic systems to the context of mass atrocities in international law. The ICC was established without clearly outlining its main goals and priorities under the banner of generic concepts expressed in the Preamble of the Rome Statute, such as ensuring effective prosecution, putting end to impunity for the perpetrators and contributing to the prevention of crimes. Therefore, in order to maintain the ICC's important role in the international legal order, this chapter has engaged with the task of throwing light on the goals that this court can reasonably achieve.

Given that the ICC is a rather young institution and has issued few decisions so far, I have advanced a critique of the main two criminal justice approaches, retribution and deterrence, which have been put forward as theoretical justification to the international criminal justice system in numerous decisions by the ICTY and ICTR. These two approaches of criminal justice are already problematic with respect to victims' participation in criminal proceedings, since they marginalise the role of victims. Moreover, the *ad hoc* international criminal tribunals, when borrowing retribution and general deterrence, did not effectively acknowledge that the distinctions between extraordinary international crime and ordinary domestic criminal law deeply affect those criminal justice accounts. The selectivity of prosecution, caused by financial constraints, political contingency or simply by the decision to prosecute those cases where there was a better chance of getting a conviction, decrease the deterrent effect of punishment by lowering the chances of being punished or of getting caught. But selectivity also undermines the imperative of retributivism that requires all persons deserving a punishment have to be punished.

There is another factor that does not serve retribution, which is the lack of proportionality between the gravity of the offence and the severity of punishment. The punishment inflicted by the ICTY and ICTR has often been more modest than the punishment inflicted by domestic criminal courts and this reality has weakened the retributive aspirations of the international criminal justice system. Similarly, in the deterrent perspective, the lack of proportionality negatively influences the cost-benefits analysis undertaken by criminals because the benefits of the crime outweigh the seriousness of the punishment.

A special mention needs to be made in regard to the restorative justice approach. This section has clearly cast doubts on the capacity of the proceedings before the ICC to run a therapeutic process for social catharsis and restore individuals and society as well. In particular, victims might believe that the ICC can heal the trauma and wounds they suffered, while, in reality, it is highly unlikely for the ICC to achieve such goal. The restorative justice mechanism diverges from the goals of the criminal justice system enshrined in the Preamble of the Rome Statute, because it does not provide any method of adjudication. The restorative justice paradigm holds the offender responsible, but restorative accountability is participatory and consensually based, as it needs the offenders to acknowledge their culpability and willingness to amend for their wrongdoing. The experience has been that defendants before the international criminal tribunals have mostly been unwilling to do this. Instead, they typically challenge the legitimacy of the trial process and, even at the point of the conviction, reject offers to demonstrate or declare remorse. This effectively undermines the restorative goals of the international criminal tribunals.

In conclusion, although international criminal justice has traditionally been conceptualised almost exclusively in terms of the prosecution and punishment of individual perpetrators, there is no reason why this must necessarily be so. In principle, there is nothing which prevents the ICC from aspiring to the ideals of retributive, deterrent or restorative justice, however, there exists a diversity of goals that criminal justice can fulfil in addition to the prosecution and punishment of individuals, significant as the latter may be. Indeed, given the particular context in which international criminal justice institutions exist, including the phenomenon of

mass participation and (likely) responsibility, the selectivity of international prosecutions, and the seeming inadequacy, or worse irrelevance, of individual punishment in the face of the grave harm caused by mass atrocity, a broader, more diverse approach to the paradigm of international criminal justice may seem desirable. There is, thus, a critical need to reconceive or reformulate the criminal justice paradigm that underpins the international criminal justice system.

CHAPTER V

Expressivism: A Change of Paradigm in the International Criminal Justice System.

5.1. Introduction.

This chapter puts forward a potentially significant shift from the way international criminal justice has been conceptualized so far, as it advances the need to go beyond the confines of traditional criminal justice models. The previous chapter illustrated that international criminal trials should not be expected to be "magical vessels of catharsis";[1] neither retribution nor deterrence is fully adequate to supply the specific features of the international criminal justice. Therefore, the present chapter proposes that the expressivist paradigm of criminal justice should inform the international criminal justice system. This chapter builds on the expressivist theoretical approach to international criminal justice, which refers to expressivism as a key rationale that focuses on the ability of international criminal law and its adjudication process to consolidate and share ideals and norms. Specifically, the author looks to the branch of expressivism, which is not only concerned with the normative potential of criminal punishment, but with the didactic and narrative and story-telling functions that the international criminal trial can facilitate. The present chapter aims to make a contribution to the literatures on victims' participation at proceedings before the ICC, as it advances the idea that the expressivist approach, by shifting the emphasis on the acts and perspective of the different actors that get a voice throughout the proceeding, becomes a vehicle for effectively tailoring a meaningful victims' participation scheme at the ICC. It is important to highlight that that it is impossible for one conceptual framework of criminal justice to facilitate the multiple goals of international criminal justice.[2] With this in mind, the first goal of the current chapter is to clarify the meaning of international criminal justice and to establish what goals

[1] M. S. Groenhuijsen & A. Pemberton, 'Genocide, Crimes Against Humanity and War Crimes: A Victimological Perspective on International Criminal Justice', in R. M. Letschert, R. Haveman, A. M. de Brouwer, & A. Pemberton (Eds.), *Victimological Approaches to International Crimes: Africa, Supranational Criminal Law* (13), Antwerp: Intersentia, 33.

[2] For a discussion on the plurality of goals ascribed to the international criminal justice system see section 4.2.2. of chapter IV,

the ICC can and should realistically serve. The author contends that, given the *sui generis nature* of the ICC framework, expressivism is the most appropriate theoretical ground to supply the statutory aims of the Court. The expressivist account of the criminal justice, which is mainly focused on the normative value of the trial, by serving didactic purposes as well as symbolic purposes and historic truth-telling, best captures the nature and priorities of international sentencing and its real ability to contribute to the goals ascribed to it, given the political and resource constraints that international tribunals inevitably face.

As stated in the previous chapter, identifying the purposes of international criminal justice contributes to shape the structure of the proceedings as well as the role of all individuals involved in the criminal process. This is particularly relevant because one of the greatest practical challenges the ICC faces is the problem rising from the differences between the civil law and common law traditions, in particular in relation to the role of victims' participatory rights.

It is an interest of justice to adopt a conceptual framework of criminal justice that fulfils the aims of the international criminal justice because the different views of judges decrease the predictability of the rule of law. The second goal of this chapter is to demonstrate that expressivism can be the mechanism to bridge the gap in the language between civil law and common law systems of criminal justice. This means that this chapter aims to establish a common grammar through the adoption of the conceptual approach of the expressivist goals of the trial. It is not acceptable that some cases before the ICC lean towards a common law approach, while others towards a civil law approach, because there is no rule of the ICC legal framework, which establishes a preference between these legal traditions. For justice to be achieved, expressivism should be adopted to supplement the aims of the international criminal trial.

The third goal of this chapter is to look at the impact of the common grammar on the regime of victims' participation within the international criminal justice and, specifically to what extent it fulfils the aims of the statutory provisions on victims' participation. Indeed, clarifying the goals of international criminal justice would shed a new light on the nature of victims' participatory rights, however, it is important to emphasise that this chapter does not intend to engage with the modalities of victims'

participation in the proceeding before the ICC, as this topic will be addressed in chapter VII of this thesis

This chapter is structured as follows. The second section introduces the discourse about the role of expressivism within the criminal justice system and specifically, after drawing the main characteristics of the different expressivist branches, it individuates that the normative value of expressivism can hold a greater importance within the international criminal justice system. The third section argues that norm expression through punishment is a particularly appropriate function to convey the expressivist message of censure of the wrongdoing, educates the society about the unacceptable nature of the actions condemned, and demonstrates societal intolerance and stigmatization of certain conducts. The next section advances that the expressivist potential lies in the international criminal trial. Expressivism suggests that the trial should convey a social-pedagogical message aimed at providing a reliable, authoritative and impartial narrative, its pedagogical dissemination to the public and enhancing the importance that society confers to serious violations of human rights. In the fifth section, the discussion emphasises that the expressivist approach to the trial is a vehicle for the provisions on victims' participation to achieve the important goal of giving a voice to victims. The expressivist framework, by conceiving the proceeding as a forum for providing a narrative of the events and enunciating condemnation of the atrocities committed, acknowledges the important role of the victims in criminal proceedings for communicating the denunciation of those heinous conducts. The sixth section deals with the development of the common grammar through the lens of the expressivist paradigm of criminal justice. Specifically, this section investigates how the procedural roles of the judges, victims and prosecutor evolve to reflect the aims of expressivism. The following section of this chapter takes into consideration the structural limitations of the expressivist paradigm, which may erode the effective fulfilment of the expressivist potential within the international criminal justice system. The eighth section shows that expressivist paradigm of international criminal justice is not that far from reality, as both decision by the *ad hoc* international criminal tribunals and the operation of the prosecutors introduced some acknowledgment of the expressivist features.

5.2. The expressivist theory of law: between descriptive and normative claims.

The expressivist model draws on several disciplines, including sociology, anthropology, philosophy, psychology, law and economics.[3] The article *Expressive Theories of Law: A General Restatement* by Elizabeth Anderson and Richard Pildes is essential to understand the core nature of expressivist theories. At the most general level, theories of expressivism "tell actors – whether individuals, associations, or States – to act in ways that express appropriate attitudes toward various substantive values."[4] After a general analysis of the nature of expression, intended as the ways an action or a declarative sentence or statement (speech or writing or any other vehicle of expression) manifest a cognitive state of mind (a belief, idea, or theory, moods, emotions, attitudes, desires, intentions and personality trait),[5] the authors engage with a discourse on how expressive theories figure into normative theories of conduct. Actions, by definition, express intentions, and therefore they always carry expressive meaning.[6] The normative expressivist theories of action should evaluate "actions in terms of how well they express certain intentions, attitudes, or other mental states."[7] In short, this theory, firstly prescribes norms for regulating the adoption of certain mental states, and, secondly, requires actions and statements to express these states.

The main concern of normative expressivist theories of action is not only achieving certain ends, nor prescribing or proscribing certain means (types of action), but whether or not performing act A for the sake of goal B expresses rational or morally right attitudes toward people.[8] More simply, expressivism can tell that a harmful message in itself causes harm and a good message causes good, but it does not determine what is good or bad. It is the society that has to evaluate whether an action is good or bad,[9] by interpreting the way in which such action suits the

[3] D. M. Amann, 'Group Mentality, Expressivism, and Genocide', *International Criminal Law Review* 2(2) (2002), 118; A. Strudler, 'The Power of Expressive Theories of Law', *Maryland Law Review* 60(3), 492.
[4] E. S. Anderson & R. H. Pildes, 'Expressive Theories of Law: A General Restatement', *University of Pennsylvania Law Review* 148(5) (2000), 1503.
[5] *Idem*, 1506.
[6] *Idem*, 1508; C. R. Sunstein, 'On the Expressive Function of Law', *University of Pennsylvania Law Review* 144(5) (1996), 2021.
[7] E. S. Anderson & R. H. Pildes, *supra* note 4, 1508.
[8] *Idem*, 1509.
[9] D. M. Amann, *supra* note 3, 119.

practices in the community and other relevant norms. In this sense, the meaning of an action is socially constructed because it relies on the values of society. By affirming that, expressivist theorists do not mean that the social meaning of actions is definitive.[10] Expressivist thinkers rather acknowledge a degree of dynamism of societal norms, as they are not seen as static, but, conversely, they undergo constant change.[11] Therefore, the societal interpretation has to take into consideration the full context in which a norm is adopted, including the community practices, its shared values and its history.[12]

The application of normative expressivist theories of conduct to the field of law posits that the latter, like other forms of expression, by manifesting beliefs, attitudes and intentions, has a social meaning.[13] The identification of the social meaning of the law comes from the ways in which a community interprets and understands the law in the context of the existing social norms, or in other words, it originates from the message communities get from the law.[14] Expressivism conceives law as reflecting the values of a specific society, what norms should be esteemed and what should be abhorred.[15] However, the expressivist approach to the function of the law is rather heterogeneous. Matthew Edwards distinguishes two branches of expressivism, which he respectively defines revelatory and instrumental. The first affirms that the law, by expressing fundamentally normative commitments to certain pre-existing political, moral or constitutional norms, represents only the dominant moral attitude in society.[16] On the contrary, instrumental expressivism evaluates what regulatory choices can trigger desired changes in norms, social meanings and

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[10] E. S. Anderson & R. H. Pildes, *supra* note 4, 1525.
[11] *Idem*, 1539-1568; D. M. Kahan, 'The Secret Ambition of Deterrence', *Harvard Law Review* 113 (1999), 486.
[12] E. S. Anderson & R. H. Pildes, *supra* note 4, 1525.
[13] C. R. Sunstein, *supra* note 6, 2021-2022; E. S. Anderson & R. H. Pildes, *supra* note 4, 1504-1505; D. M. Amann, *supra* note 3, 118-119; M. M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', *Michigan Journal of International Law* 33(2) (2012), 312-313.
[14] D. M. Amann, 'Message as Medium in Sierra Leone', *ILSA Journal of International and Comparative Law* 7 (2000), 238; D. M. Amann, *supra* note 3, 118-119; M. M. deGuzman, *supra* note 13, 313; C. R. Sunstein, *supra* note 6, 2022-2024; M. A. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', *Northwestern University Law Review* (2005), 592.
[15] D. M. Amann, *supra* note 3, 118.
[16] M. A. Edwards, *Legal Expressivism: A Primer*, (2009), 24. Available at *Social Science Research Network*: http://ssrn.com/abstract=1361101; T. Meijers & M. Glasius, 'Expression of Justice or Political Trial? Discursive Battles in the Karadžić Case', *Human Rights Quarterly* 35(3) (2013), 724.

behaviour.[17] Additionally, within the branch of instrumental expressivism, a distinction should be made between its descriptive and normative claims. The descriptive claim posits that law can be used to transform moral attitudes in society,[18] while, according to the normative claim, transforming moral attitudes in society should be the function of law.[19]

The normative value of legal expressivism, which encompasses crafting law to convey a valued social message and employing the law as an instrument to alter social norms, is of particular relevance within criminal justice in light of the sanctions it metes out. Criminal law sets norms, which reflect the values of society, condemns the breaches of those norms and conveys the changes within them.[20] In this view, the normative claim underlying instrumental expressivism can hold a greater importance within the international criminal justice system. International criminal tribunals should seek to provide beneficial effects to societies in transition[21] and, therefore, their normative agenda should interpret and apply the law to express a valued social message and, eventually operate as mechanisms for altering social norms.[22]

Expressivist thinkers initially have developed an expressivist value of the punishment,[23] but more recently an expressivist value of the criminal trial has begun to stand out.[24] Without undermining the importance of punishment in the expressivist paradigm, the main interest of this study is on the expressivist dimension of the trial,

[17] M. A. Edwards, *supra* note 16, 6.
[18] E. S. Anderson & R. H. Pildes, *supra* note 4, 1525.
[19] T. Meijers & M. Glasius, *supra* note 16, 724; C. R. Sunstein, *supra* note 6, 2021; F. O'Regan, 'Prosecutor vs. Jean-Pierre Bemba Gombo: The Cumulative Charging Principle, Gender-Based Violence, and Expressivism', *Georgetown Journal of International Law* 43(4) (2012), 1352.
[20] M. A. Drumbl, *supra* note 14, 592; D. M. Amann, *supra* note 3, 118,120.
[21] T. Meijers & M. Glasius, *supra* note 16, 724.
[22] M. M. deGuzman, *supra* note 13, 313.
[23] R. D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', *Stanford Journal of International Law* 43 (2007); J. Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility*, Princeton: Princeton University Press (1970); B. Wringe, 'Why Punish War Crimes? Victor's Justice and Expressive Justifications of Punishment', *Law and Philosophy* 25(2) (2006); R. Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press (2007).
[24] T. Meijers & M. Glasius, *supra* note 16; F. O'Regan, *supra* note 19; D. M. Amann, *supra* note 3; D. M. Amann, *supra* note 14, 238; D. M. Amann, 'Assessing International Criminal Adjudication of Human Rights Atrocities', *Third World Legal Studies* (2000); M. A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press (2007); M. A. Drumbl, *supra* note 14; M. Damaška, 'What Is the Point of International Criminal Justice?', *Chicago-Kent Law Review* 83(1) (2007); D. J. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', *Georgetown Law Faculty Working Papers* (2008).

because – as the author argues in the following sections – it seems to be the most appropriate approach to provide a valid and consistent understanding of the goals of international criminal justice.

5.3. The expressivist aspiration of punishment.

The foundations for the theory of the expressivist function of criminal justice can be traced in the work of Emile Durkheim. Durkheim's central claim related to the role of punishment has been developed from the concept of collective conscience, which represents a set of collective beliefs that can be found in all healthy individuals of a given society, as the base of social cohesion.[25] A conduct does not shock the common conscience because it is criminal *per se*, but rather because its commission shocks and contradicts the deeply rooted and defined collective conscience. Punishment, as the "soul of penality", is a "passionate reaction of graduate intensity", which indicates that the conscience of the collectivity is not changed regardless the choice of the offender to diverge from it.[26] Thus, punishment is a tool through which society of law-abiders disapproves and condemns deviant criminals and asserts what cannot be tolerated. In Durkheim's theory, punishment does not serve primarily to correct the culprit or to deter potential followers. Punishment's authentic function "is to maintain social cohesion intact, while maintaining all its vitality in the common conscience."[27] The lack of reaction from the community would result in a breakdown of social solidarity. The only way to affirm the common conscience of society is to express the unanimous aversion that crimes bring to society, by means of infliction of suffering upon the criminal.[28]

A number of theorists picked up Durkheim's argument and referred to a theory of expressivism as justification for criminal punishment. For instance, Mark Drumbl affirmed that the focus of expressivism rests in the way "punishment internalizes – and even reinforces – social norms and thereby promotes law-abiding behaviour."[29] Punishment is considered to be as a response to the wrongful

[25] É. Durkheim, *The Division of Labour in Society*, translated from the French edition of 1893 by W.D. Halls with an introduction by L. Coser, London: MacMillan (1984), 80.
[26] *Idem*, 97-98.
[27] *Idem*, 84.
[28] *Ibidem*.
[29] M. A. Drumbl, *supra* note 24, 174.

expression inherent in the criminal conduct.[30] Yet, there is more to punishment. It can also be understood as social institution, because the conviction of the defendant does not mean only that s/he is subjected to punishment, but it also conveys a formal and public message of censure of the wrongdoing, educates the society about the unacceptable nature of the actions condemned, demonstrates societal intolerance and stigmatization of certain conducts and, ultimately, reaffirms the community's common identities.[31]

This concept of expressivist function of the punishment is effectively illustrated by Elizabeth Anderson and Richard Pildes with the following example of how condemnation without punishment would have a reduced symbolic effect. They suppose the case of a defendant, who is convicted for a heinous crime. The judge, while sentencing, declares that the defendant's crime is horrific and wrong and that the State condemns him for it, but then he releases the convict without punishment. The society would feel outraged and would think that the judge did not really mean what he said. A meaningful condemnation requires not simply "a mere utterance, even in the form of a stern lecture from the bench, but a practice of punishment socially understood to express condemnation effectively (…)".[32] Punishment is not meted out simply and only to inflict suffering to the perpetrator, to achieve deterrence and to require the criminal to pay his/her debt to society.[33] Rather, punishment can serve an expressivist purpose. Joel Feinberg in his seminal *The Expressive Function of Punishment*, argues that:

> punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted. Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.[34]

He further identifies several functions of the expressivist account of punishment. Firstly, punishment of a criminal allows expressing an authoritative disavowal

[30] M. M. deGuzman, *supra* note 13, 313.
[31] R. D. Sloane, *supra* note 23, 71; M. M. deGuzman, *supra* note 13, 313; R. Cryer et al., *supra* note 23, 23; S. Mohamed, 'Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law', *Yale Law Journal* 124(2015), 1670.
[32] E. S. Anderson & R. H. Pildes, *supra* note 4, 1567.
[33] R. D. Sloane, *supra* note 23, 70.
[34] J. Feinberg, *supra* note 23, 98.

because it "is an emphatic, dramatic and well-understood way of condemning and thereby disavowing its act."[35] As such, on the one hand punishment affirms that the criminal did not have any right to commit the criminal action and, on the other hand, represents the recognition of the violated rights.[36] Secondly, punishment also indicates a symbolic non-acquiescence in crime, vindicates the law.[37] Finally, when the perpetrator is part of a group, by punishing the guilty individual, the others are absolved.[38]

Following this line of argument, norm expression through punishment is a particularly appropriate function within the field of international criminal justice. Due to the serious and heinous nature, international crimes are particularly worthy of condemnation.[39] The strikingly heinous nature of crimes the international criminal justice deals with and the fact that often these crimes are perpetrated during arm conflicts by governments against their own populations firmly urge expressions of condemnation, especially because those crimes had been historically tolerated by international community.[40] By punishing the perpetrators of gross violation of human rights, expressivist punishment aims to peremptorily repudiate such conduct, to symbolically reject the acquiescence of the international community to those crimes, to vindicate international human rights and to absolve ethnic or national communities, as collectives, from guilt by punishing individual perpetrators.[41]

To have a better understanding of how expressivist punishment can represent a counterweigh approach that balances the conflicting aims and goals of international criminal law, as established in the Preamble of the Statute of Rome, it is important to understand the place of expressivism in relation to retributivism and deterrence. Expressivism can transcend retributivism and deterrence by focusing on the inherent value of norm expression, but it can also supplement those paradigms.[42] In particular, expressivism and retributivism share the idea that the punishment of the perpetrator is the consequence of the crime s/he committed. However, while retributivism

[35] J. Feinberg, *supra* note 23, 101.
[36] *Idem*, 102.
[37] *Idem*, 102-104.
[38] *Idem*, 105.
[39] For a discussion on the peculiar nature of international crimes see section 4.2.1. of chapter IV.
[40] M. M. deGuzman, *supra* note 13, 316
[41] R. D. Sloane, *supra* note 23, 71.
[42] M. M. deGuzman, 'Giving Priority to Sex Crime Prosecutions: The Philosophical Foundations of a Feminist Agenda', *International Criminal Law Review* 11 (2011), 525.

struggles to mete out a punishment which is proportionate to the extraordinary gravity of the international crimes, expressivism is less focused on this aspect and it rather emphasizes that the perpetrator deserves to be punished when his/her conducts convey disrespect with important values.[43] Thus expressivism highlights "the visibility and symbolic power of international criminal justice as a value of its own."[44]

Expressivism can supplement deterrence as it allows criminal law to intimidate potential offenders not only by threatening a punishment (as deterrence approach does), but also by the expression of the moral condemnation of society.[45] This could lead to a decrease of international crimes, because of the society's internalization and support of given norms and moral and legal values. It would be a desirable result for utilitarian supporters. However, the fact that so far international criminal justice has largely failed deterring the commission of crimes should not undermine the normative function of expressivism, which aims to form and reinforce social perceptions and norms, by serving as a symbolic affirmation that repudiates criminal conducts, rejects the acquiescence of the international community and vindicates human rights.[46]

This symbolic significance can have a real effect in the context of the ICC, because it reflects and contributes to fulfil some of the goals of the international criminal justice system enshrined in the Preamble of the Stature of Rome. Expressivist account of punishment is a particularly vivid symbol of the existence of a real community,[47] in which "peoples are united by common bonds, their cultures pieced together in a shared heritage".[48] It also conveys the message "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured" and that it is necessary "to put an end to impunity."[49]

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[43] M. M. deGuzman, *supra* note 42, 525.
[44] H. Van der Wilt, 'Why International Criminal Lawyers Should Read Mirjan Damaška', D. Robinson, C. Stahn, & L. van den Herik, *Future Perspectives on International Criminal Justice*, TMC Asser Press The Hague (2010), 55.
[45] M. M. deGuzman, *supra* note 42, 525.
[46] H. Van der Wilt, *supra* note 44, 55; E. M. Wise, 'The International Criminal Court: A Budget of Paradoxes', *Tulane Journal of International and Comparative Law* 8 (2000), 267.
[47] E. M. Wise, *supra* note 46, 268.
[48] UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, Preamble.
[49] *Idem*.

Nonetheless, expressivist account of punishment should not be granted a self-sufficient role as a justification for punishment, because it only partially supplies the quest for purpose of international criminal justice that is not satisfied by deterrence, retributivism and restorative justice. As previously illustrated,[50] international criminal justice features goals which seem "extrinsic to purely legal and forensic values",[51] which include: providing historical records of mass atrocities to prevent the past to be denied by revisionists; giving victims a voice; promoting social reconciliation and disseminating human rights values. Although punishment is still a fundamental part of any criminal justice system that aims to express a no-impunity norm, it cannot alone fulfil these aims. This limit of expressivist punishment calls for a shift of the centre of gravity in international criminal justice from punishment to the trial.[52] Luban identifies a distinctive role for criminal trials, as continuous with the purposes of criminal punishment, but not reducible to it. Trials do not only aim to identify those who deserve to be punished, but they also have an independent, non-instrumental significance, which is best captured by the norm expression function of the criminal trial.[53] It is fundamental to clarify that when using the expression "expressivist function of the trial", the term "trial" refers to the whole criminal proceedings, including the investigation and pre-trial stages. The next section will delve into the expressivist function of the trial in the context of the ICC.

5.4. The expressivist function of the criminal trial.

The ICC represents a particularly powerful vehicle for norm expression, because when it decides to prosecute a specific case, it implicitly affirms that the criminal conducts it deals with are "the most serious crimes of concern to the international community"[54] and that those unimaginable atrocities, which deeply shock the conscience of humanity, affected a broad number of victims.[55] Luban further explains the trial's role as "norm projection: trials are expressive acts broadcasting

[50] For an analysis of the goals of the international criminal justice system see section 4.2.2. of chapter IV.
[51] D. J. Luban, *supra* note 24, 8.
[52] *Idem*, 10; A. Duff, 'Authority and Responsibility in International Criminal Law', in in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law*, Oxford University Press (2010), 593.
[53] D. J. Luban, *supra* note 24, 9. See also: A. Duff, *supra* note 52, 593.
[54] UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, Preamble.
[55] *Ibidem*.

the news that mass atrocities are, in fact, heinous crimes and not merely politics by other means."[56]

The value of employing the international criminal trial to express norms rests in its ability to contribute to the goals ascribed to the ICC, including these extrinsic to purely legal and forensic values. The norm expression value of the trial contributes to imbue the general public with core values and with the faith in the rule of law.[57] Mirjan Damaška, in his preeminent article *What Is the Point of International Criminal Justice?*, defines the norm-expressive role of the trial as a didactic function. He argues that international criminal tribunals should place the greater emphasis on the exposure of these extreme forms of violence and of those who committed them. The denunciatory and condemnatory aspects of the trial, thus, strengthen the sense of accountability and inflict shame and stigma on perpetrators of mass violence.[58] The trial conceived as "a forum for enunciating societal condemnation of atrocities"[59] successfully performs its socio-pedagogical role because it becomes a mechanism to reaffirm the importance of human rights and educate the public about the respect of those rights.[60] According to Damaška, "to the extent that international criminal courts are successful in this endeavour, humanitarian norms would increasingly be respected."[61]

The expressivist or didactic role of the international criminal trial is particularly valuable because it satisfies the goal of providing historical records of mass atrocities to prevent the past to be denied by revisionists. While enunciating societal condemnation of atrocities, reaffirming the importance of human rights and educating the public, the trial fosters the development of a narrative and its pedagogical dissemination.[62] To properly appreciate the pedagogical and communicative values of the narrative in the context of different perspectives on the

[56] D. J. Luban, *supra* note 24, 8.
[57] H. Van der Wilt, *supra* note 44, 55.
[58] M. Damaška, *supra* note 24, 345.
[59] D. M. Amann, *supra* note 24, 175.
[60] M. Damaška, *supra* note 24, 339.
[61] *Idem*, 345.
[62] T. Meijers & M. Glasius, *supra* note 16, 725-726; S. Mohamed, *supra* note 31, 1670; R. Cryer et al., *supra* note 23, 23; A. Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', *European Journal of International Law* 9(1) (1998), 10; M. A. Drumbl, *supra* note 24, 17, 173-175; J. C. Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (Vol. 12) Martinus Nijhoff Publishers (2013), 60-61.

events surrounding mass atrocities, expressivism envisages the trial as "theatre for the clash of ideas."[63] The performative and pedagogical value of the narrative is strengthened by taking the form of judicial process, which is governed by the fair trial principles and the rules of evidence that guarantee impartiality, reliability and authority to the whole process.[64] For instance, at the trial stage the defendant and the prosecutor confront each other in a process directed at the determination of the criminal conducts perpetrated in a specific situation, while witnesses give their testimony under a solemn oath. Finally, the trial identifies those who committed a crime.[65] This function is particularly important because it holds guilty only the effective perpetrator, rather than all the members of an ethnic or social group. Such individuation of criminals, by removing guilt from others, can promote the reconstruction of the social fabric.[66]

For Drumbl, the expressivist potential of the trial does not simply mean that trial can be seen as the forum for the creation of an authoritative historical record, it rather has

> a better chance of becoming a kind of 'popular trials' that define a debate, remind us of the content and value of the law or serve an intergenerational 'signpost' in history.[67]

This is the key point that distinguishes expressivist theories from consequentialist theories, in particular deterrence. They both seek to discourage future criminals, but they operate differently. While expressivism is interested in evaluating a justification for the means-end connection, deterrence is principally focused on prescribing any means, which can produce the best results.[68] In other words, deterrence targets those individuals who may commit a crime in the near future and it tries to dissuade them from doing that by the fear of getting caught and the threat of punishment. Expressivism, instead, is meant to speak also and mainly to those individuals that are

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[63] M. Osiel, *Mass Atrocity, Collective Memory, and the Law*, Transaction Publishers (1999), 52, quoted in M. Damaška, *supra* note 24, 346.
[64] M. A. Drumbl, *supra* note 24, 17.
[65] D. M. Amann, *supra* note 24, 178.
[66] *Ibidem*.
[67] M. A. Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law', *George Washington Law Review* (2007), 1197.
[68] E. S. Anderson & R. H. Pildes, *supra* note 4, 1511.

not yet in the position of committing a crime in the near future. Expressivism can serve as an intergenerational approach, as the message conveyed by the trial can speak to those not yet assimilated in the mechanism of mass violence and aims at preventing the indoctrination phase. In the context of international criminal law, it can be more difficult to deter violence once it is imminent or has already started, while, it seems somewhat more plausible to decelerate indoctrination of hate-mongering rhetoric and build up a social consensus regarding the moral unacceptability of mass violence. In this sense, trial operates as moral educator.[69]

By introducing the metaphor of the trial as a theatrical spectacle, it is very tempting for expressivist thinkers to rely only on the trial and conviction to convey the socio-pedagogical message. For instance, William Schabas suggests that the thirst for justice of victims and the public can be satisfied by the condemnation of anti-social behaviours by society, because the main desires are a judgment and the identification of the perpetrators and their stigmatization. According to Schabas, those aspects alone are more satisfying than punishing the perpetrator.[70] However, as argued in the previous section, punishment also plays an important role in the expressivist paradigm. Indeed, the validity of the expressivism depends on the effectiveness in delivering the message of denunciation to the intended audience, but such denunciation would hardly occur without any punishment.

5.5. Victims' participation through the lens of the expressivist approach of the trial.

The provisions of the ICC Statute, by conferring participatory rights on victims for the first time within international criminal justice, acknowledge that, because of the extent of the gross violations of international human rights and humanitarian law victims suffered, they cannot be relegated at the periphery of the criminal justice system anymore. In order to give meaning to the concerns of victims, alongside the right of the defendant and the powers of the prosecutor, it was necessary to give victims a voice. Giving a voice to victims represents the goal that the provisions of the Statute and RPE on victims' participation should aim to achieve.

[69] M. A. Drumbl, *supra* note 67, 1183-1184.
[70] W. A. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach', *Duke Journal of Comparative & International Law* 7(2) (1997), 502.

In light of this overall goal, the definition of victim of Rule 85(A) of the RPE, by establishing that "victims" mean natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court,[71] recognised that the status of victims goes beyond the simple recognition of the harmful character of the crime. The victim is not anymore "the outcome of hardship and adversity", [72] instead victims represent the authoritative acknowledgment that the action they were subjected to, is a specific and extremely serious kind of wrong, strictly speaking a crime under international law. This definition, which links the status of victim to the harm suffered as a result of any crime under the jurisdiction of the Court, includes direct victims as well as indirect victims, who suffer harm because of their close relationship with the direct victims. Moreover, since the status of victim is not dependant on any prosecutorial activity, victims' status encompasses also those individuals who suffered harm regardless their perpetrator will never be brought to trial. This broad definition of victims aims at achieving the goal of giving the possibility to every victim to express his/her story and suffering. This belief is reflected in the provision granting victims the right to express views and concerns. The fact that the Statute in two autonomous provisions distinguishes the right of victims to participate in the proceeding from the right to receive recompense confers on participation an intrinsic value, irrespective of whether victims can obtain reparation.[73]

The picture is broader than the victims' participation scheme. Victims are given a voice not to act in the vacuum, but to participate in a criminal proceeding, which involves other actors like the prosecutor, defendant and judges as well. Thus, the provisions regulating those other participants' rights and powers, which are related to victims' role, should also be implemented in order to achieve a goal of giving victims a voice.

The real novelty introduced by the ICC Statute is not only that the provisions on victims' participation must be approached in a way that achieves the aim of

[71] Article 85(A) of Rules of Procedure and Evidence, Official Records ICC-ASP/1/3, 3-10 September 2002.
[72] C. McCarthy, 'Victim Redress and International Criminal Justice. Competing Paradigms, or Compatible Forms of Justice?', *Journal of International Criminal Justice* 10(2) (2012), 366.
[73] C. H. Chung, 'Victim's Participation at the International Criminal Court: Are Concessions if the Court Clouding Promise', *Northwestern University Journal of International Human Rights* 6 (2007), 463-464.

victims' participation of giving victims a voice to raise in proceedings, but also all the provisions related to the concerns of victims should follow the same approach. However, the main problem (as demonstrated in chapter II of this thesis)[74] is that the language of the provisions of the ICC statute and RPE is vague and it is deliberate choice, because the drafters failed to recognise a procedural system that dominates international criminal justice as a full answer to the concerns of victims. Chapter II extensively illustrated that the two systems of criminal justice envisaged by the ICC, mainly the adversarial and inquisitorial procedures, conceive the role of victims in two diametrically opposed ways.[75] It is, thus, important for justice purposes, fairness and equality that the judges adopt the same consistent understanding of how victims' participation should look like in the proceeding to achieve its goal. For this reason, there is the need to adopt a common language in order to harmonise those different positions.

The idea of a more harmonized procedural system of the ICC was not a novelty in the academic debate. However, the concept of a common grammar is more advanced and radical because it does not entail a simple unilateral transplantation of common law and civil law elements within international criminal proceedings. The common law and civil law systems have divergent legal grammars and a mere transposition of their procedural elements cannot guarantee the efficiency and, eventually, the legitimacy to international criminal justice. The development of a common grammar, which successfully merges common law and civil law, should not only entail common technical rules, but also provide "the guiding and meta principles that structure the system."[76] As result a real *sui generis* international criminal justice system would gradually become autonomous from its "national parents".[77]

The need of a common grammar which marks a point of departure from the traditional distinction between common law and civil law systems, urges us to put an end to the "obstinate adherence" to differing legal traditions in the operation of a

[74] See sections 2.3. and 2.4. of chapter II.
[75] See section 2.3. of chapter II.
[76] M. Delmas-Marty, 'Reflections on the 'Hybridisation' of Criminal Procedure', in J. Jackson & M. Langer (Eds.), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška*, Hart Publishers Oxford (2008), 258.
[77] *Ibidem*.

vital international court like the ICC.[78] The issue that needs to be addressed "is not to determine which legal system is superior, but rather to develop a functional international criminal justice process based on international human rights."[79] In the *Prosecutor v. Drazen Erdemović*, an early case before the ICTY, Judge Antonio Cassese affirmed that international criminal procedure should not uphold the philosophy behind one of the two legal systems to the exclusion of the other; rather, it should combine and fuse them in a fair manner.[80] Combining these legal systems does not mean to mechanically incorporate into international criminal proceedings ideas, legal constructs or concepts which only belong to common law or civil law traditions.[81] The mechanical importation of notions from national systems would be inappropriate, because such a process may alter or distort the specificity of international criminal proceedings and ultimately generate great confusion and misapprehension.[82] International provisions include notions and terms originating in national criminal law, however, once transposed onto the international level, they can acquire a new lease of life, absolutely independent of their original meaning.[83] Thus, judge Cassese concluded that international criminal procedure should result from the "gradual decanting" of two different legal systems – common law and civil law – into the "international receptacle".[84]

5.6. Expressivism as the key to a common grammar between adversarial and inquisitorial systems.

The novelty of the idea of common language lies in its potential of achieving the goal of full victims' participation. It is against this background that the expressivist

[78] C. Safferling, 'The Role of the Victim in the Criminal Process - A Paradigm Shift in National German and International Law?', *International Criminal Law Review* 11(2) (2011), 212.
[79] *Ibidem*. Similarly: R. May, M. & Wierda, 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha', *Columbia Journal of Transnational Law* 37(1999), 753, 764; P. L. Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia', *European Journal of International Law* 11(3) (2000), 569; R. Dixon, 'Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals', *Transnational Law & Contemporary Problems* 7(1997), 98; K. Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?', *International Criminal Law Review* 3(1) (2003), 34-35.
[80] *The Prosecutor v. Drazen Erdemović*, Separate and Dissenting Opinion of Judge Cassese, Appeals Chamber, 7 October 1997, § 4. Available at: http://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf.
[81] *Ibidem*.
[82] *Idem*, § 5.
[83] *Idem*, § 6.
[84] *Idem*, § 4.

approach to the trial represents the framework that best, firstly, fulfils the aims of the provisions of victims' participation and, secondly, enhances the formulation of this common grammar.

With regard to the first point, the provisions of the ICC Statute, by allowing victims to have a voice in the proceedings, confer a remarkable symbolic significance on them, as victims gain "historical and semantic authority over themselves and over others."[85] The concept of semantic authority suggests an expressivist approach to victims' participation, because it endows the normative function of the trial, as the narrative of the past catastrophe and of the past devastation is legally articulated and combined with the rule of law. Victims' voice enhances the quality of the narrative shaped during the proceeding and ultimately the establishment of the truth, carrying on an effective prosecution of perpetrators and putting an end to impunity. It is on the victim, who suffered harm, that the didactic and pedagogic message is formed, sent and, hopefully, received. Victim's participation in proceeding can play an important role for communicating the denunciation of heinous conducts. The message that impunity will not be tolerated would be send to those who think they can engage with these criminal conducts, not only through punishment, but also through the mechanism of victims' participation.

The exposure of victims' previously unheard, unknown and unarticulated narrative within the proceedings allows the legal force to endow the didactic function of international criminal justice. The articulation of victims' narrative as living, historical and legal records of the events is, therefore, in itself an unprecedented act of justice for victims.[86] In consequence, the expressivist approach to the trial is a vehicle for the provisions on victims' participation to achieve the important goal of giving a voice to victims.

After a careful reading of the documents of the Assembly of the States Parties, it is possible to identify values that can be connected to the expressivist approach to victims' rights. In the *Report of the Bureau on the impact of the Rome Statute system on victims and affected communities*, one of the panellists emphasized "that victims' participation was significant for the historical record and legacy of the

[85] S. Felman, 'Theatres of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust', *Critical Inquiry* 27(2) (2001), 233.
[86] *Idem*, 213.

Court, as well as for the international criminal justice system, in general."[87] Similarly, the more recent *Court's Revised strategy in relation to victims* affirms that

> victims' participation empowers them, recognises their suffering and enables them to contribute to the establishment of the historical record, the truth as it were of what occurred. Victims play an important role as active participants in the quest for justice and should be valued in that way by the justice process. Moreover, their participation in the justice process contributes to closing the impunity gap (…).[88]

Concerning the need to establish a common grammar, the need to bridge the gap in the language by adopting a common grammar is particularly evident with regards to the different concept of victims' participation of the civil law and common law systems. Victims are not only those who have been oppressed and harmed by the criminal conducts, but they are also and mainly the ones who are not provided with a language to articulate their victimization. The common grammar, established through the adoption of expressivist model, enhances the "legal subject-hood"[89] conferred to victims' by the Statute provisions, because it facilitates the goal of getting the victims' views expressed at the trial, by articulating a new syntax for them. The expressivist approach to victims' participation harmonises the procedural understanding of those rights involved, without tipping the scale in favour of the adversarial system or inquisitorial one, but looking to set up a *sui generis* system.

On this account, expressivism challenges the adversarial nature of the proceeding. The normative value of the trial, which aims at providing a narrative and its pedagogical dissemination, seems to clash with the proceedings structured as a contest between two parties. In an ideal type of adversarial mode of procedure, where the parties dominate proof-taking process, the litigants may not be always motivated or able to disclose the whole historical truth.[90] As observed by Damaška, the

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[87] Assembly of the States Parties, Report of the Bureau on the impact of the Rome Statute system on victims and affected communities, Final report by the focal points (Chile and Finland), Annex II, Appendix II, 22 November 2010, Doc. ICC-ASP/9/25, 17. Available at: https://www.legal-tools.org/doc/343f96/pdf/.

[88] Assembly of the States Parties, Court's revised strategy in relation to victims, 5 November 2012, Doc. ICC-ASP/11/38, § 10. Available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-38-ENG.pdf.

[89] S. Felman, *supra* note 85, 228.

[90] M. Damaška, *Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, Yale University Press (1986), 122; B. Swart, 'Damaška and the Faces of International Criminal

adversarial procedural system designed to maximise the goal of dispute resolution between the defendant and the prosecutor cannot concurrently aim at maximizing accurate fact-finding, because a "[s]kilful orchestration of proof may obscure rather than clarify what has actually happened."[91] Defendants have the right to have a defence (which represents an essential feature of the fair trial principle), however, opposing narratives pose a threat to the expressivism. The capacity of the defendant to provide a competing and coherent narrative can interfere with the potential of the expressivist role of the trial.[92] Defendants can use the trial to destabilize the authentication of the narrative and disseminate ideas alien to the culture of human rights, which can easily take root within the audience among many communities.[93] The two alternative narratives both suffer from their clash, as they become relativized and weakened, but, eventually, the ultimate "victim" of that dynamic is the expressivist socio-pedagogical message. The expressivist paradigm suggests the need for a more flexible procedural system. Damaška holds that one of the procedural implications of the didactic function of the trial is the "desirability of relaxing the bipolar pressures that arise from the proceedings organized as a contest of two partisan cases."[94]

Loosening the adversarial model and its nature of a contest between parties provides a strong argument for introducing the key components of the "common grammar", which tailor the structure of the legal process throughout the investigation, pre-trial and trial stages in a way that reflects the norm expression function of the trial. One of the main elements of the common grammar is, thus, the adoption of a more active role of the judges. A judicially directed trial, by entitling the judges to direct more of the procedural action, can decrease the damage of a defence using the direct examination and cross-examination to distort the expressivist function of the trial. Since judges are entitled to operate as active searchers for the truth, they require advance knowledge of a case to build their own

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Justice', *Journal of International Criminal Justice* 6(1) (2008),112; J. Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial–Inquisitorial Dichotomy', *Journal of International Criminal Justice* 7(1) (2009), 22.

[91] M. Damaška, *supra* note 90, 123-122.

[92] T. Meijers & M. Glasius, *supra* note 16, 751.

[93] *Idem*, 726; M. Damaška, *supra* note 24, 357.

[94] M. Damaška, *supra* note 24, 357.

"meta-story".[95] In this way a judge-driven process will contain the accused's attempts to use the trial to make political speeches and promote his/her persona, without having the appearance of restraining the defendant's right.[96]

Judges' active engagement in establishing the truth poses a serious challenge to the fairness of the adjudication process. From the epistemic perspective, judges' advance knowledge may conduct them to form some premature hypotheses about the events, making judges more receptive to information more consistent to their tentative theories than to information, which departs from them.[97] It may be potentially difficult for the judges to prevent the – either conscious or subconscious – development of premature conclusions on the merits of a case.[98] Partisans of adversarial systems hold that the neutrality of judges and the accuracy of their ruling are independent variables. A judge can either pronounce the right decision on the merit but s/he may have treated parties unequally, or else s/he has treated litigants equally, but took the wrong decision. The potential tension between these two values is solved by placing the impartiality of the process above the accuracy of the decision.[99] In other words, an adversarial system, by valuing fairness above justice, promotes the view that the passive attitude of a judge is the greatest guarantee of his/her impartiality and of a fair trial. However, in a truly *sui generis* system of justice, which embodies a synthesis between adversarial and inquisitorial traditions, the judicial activism in the pursuit of the truth, impartiality and fairness cannot and should not mutually exclude one other. Impartiality of the judges cannot correspond to passivity; it should rather be associated with absence of personal prejudice and bias.[100] A possible antidote to avoid partiality of the judges is their willingness to explain to the parties the reasons of their initiative and, more specifically, a reasoned judgement which obliges them to make their decisions clear and consistent and subjected to a close scrutiny in appeal.[101]

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[95] M. Damaška, *supra* note 24, 357-357; M. Damaška, 'Epistemology and Legal Regulation of Proof', *Law, Probability and Risk* 2(2) (2003), 121.
[96] M. Damaška, *supra* note 24, 357.
[97] M. Damaška, *supra* note 95, 121; M. Damaška, *supra* note 90, 162; B. Swart, *supra* note 90, 112.
[98] B. Swart, *supra* note 90, 112.
[99] M. Damaška, *supra* note 90, 136.
[100] *Idem*, 114.
[101] *Idem*, 113.

The implications of the harmonisation of the adversarial and inquisitorial procedure with regard to the powers of the prosecutor are more controversial. It is problematic to balance between the Prosecutor's intent to preserve his/her prosecutorial discretionary powers and the expressivist approach, which seeks to incorporate the views and interests of the victims in the prosecutorial strategy. Neither the ICC Statute nor the RPE explicitly require the Prosecutor to take into consideration the view and interests of victims in the exercise of his/her prosecutorial function. But, at the same time, the Prosecutor's exercising his/her prosecutorial discretionary powers can be at odds with the emerging expressivist approach to victims' participation. In fact, the decision to concentrate on certain crimes while excluding others implies that the Prosecutor acknowledges some victims and rejects others on the base of /based on his/her prosecutorial strategy.[102]

Like the prosecutor at the domestic level, the ICC prosecutor is expected to exercise his/her discretionary powers in the public interest. However, since the notion of public interest is unsettled, it can be assumed that the prosecutor has to keep balance between two often opposing concerns: the concerns for human rights and the concern for international security. Thus, the discretionary powers of the prosecutor should come with the responsibility correlated to the concerns of those who suffered gross violations of international human rights and humanitarian law.[103] Even if Prosecutor cannot be held responsible for rendering justice to every victim, however, s/he should acknowledge that victims represent one of the constituencies s/he has to serve. Therefore, the prosecutor, while exercising his/her discretionary powers, should be sensitive to the victims' expectations for justice.[104]

5.7. Challenges to the expressivist function of the trial.

Despite the encouraging premises for an expressivist approach to the international criminal justice system, expressivism is not immune to criticisms. Thus, this section explores the structural limitations of this theory, which may erode the effective fulfilment of the expressivist potential within the international criminal justice system.

[102] C. Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap', *Journal of International Criminal Justice* 10(5) (2012), 1372.
[103] *Idem*, 1374.
[104] *Ibidem*.

5.7.1. The selectivity of the prosecution.

The high degree of selectivity of the prosecution that operates in the context of the international criminal justice system can undermine its ability to achieve the expressivist potential of establishing and disseminating historical truths.[105] In the case of mass violence, the selectivity of the prosecution puts historical truth-telling goal in jeopardy, because the prosecutor focuses on proving the responsibility of a single perpetrator or of a small group of them, while one of the main characteristics of international crimes is the large-scale organized participation of perpetrators.[106] Therefore, since "the trial achieves only a partial truth, it might not properly fulfil the expressivist potential".[107] Moreover, by investigating, trying and punishing only few perpetrators, the international criminal justice system risks sending an unintended message to the victims and the defendants as well. Victims can consider the lack of the prosecution of crimes which affected them as a defeat because those conducts are not taken seriously. While for defendants, the fact that only members of a specific group in the conflict are on trial, can be perceived as a bias.[108]

First of all, we must acknowledge the limits of international criminal justice. It is a partial justice, because it will not be feasible to successfully try all perpetrators or indeed all those people who were necessary for the atrocities to come about.[109] Thus, there will always be an inevitable tension between criminal procedure and historical truth telling in the case of mass violence.[110] The enhancement of expressivism does not require the international criminal justice system to prosecute all violations of human rights, since the emphasis is on norm expression. Expressivism can still fulfil its didactic function, because even with a limited number of illustrative prosecutions, the trial successfully conveys shared social norms.[111] The sentencing of the international criminal justice system can "influence the practice and

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[105] M. A. Drumbl, *supra* note 14, 593; M. J. Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice', *Harvard Human Rights Journal* (2002), 88-89.
[106] For further analysis of this topic see section 4.2.2. of chapter IV.
[107] T. Meijers, & M. Glasius, 'Constructions of Legitimacy: the Charles Taylor Trial', *International Journal of Transitional Justice* 6(2) (2012), 251.
[108] T. Meijers, & M. Glasius, 'Trials as Messages of Justice: What Should Be Expected of International Criminal Courts?', *Ethics & International Affairs*30(4) (2016), 441.
[109] M. S. Groenhuijsen & A. Pemberton, *supra* note 1, 33.
[110] T. Meijers, & M. Glasius, *supra* note 107, 251.
[111] M. M. deGuzman, *supra* note 13, 316; D. M. Amann, *supra* note 3, 95; T. Meijers, & M. Glasius, *supra* note 108, 441.

policy of states by acting as an engine of jurisprudential and normative development where it matters the most, within nation-states."[112] In other words, expressivist trial can manage selectivity because its focus on the exemplification of widespread crimes can potentially represent a wider class which, because of the gravity of the offence, is worthy, and actually in need of expression of condemnation.[113] However, expressivism can deal with selectivity without sending a wrong message only if there is a general consensus between the victims and society that the focus on a specific crime represents a wider class of crimes that the Court intends to condemn.[114] A general consensus on the socio-pedagogical message of the trial has important implications in terms of successfully building a general consensus around the work of the international criminal justice system.[115] Conversely, its failure to achieve retributivism, deterrence and restorative justice frustrates the possibility to increase the agreement on its operation.[116]

There is another aspect of the selectivity of the prosecution that may negatively impact the expressivist function of the trial. Selectivity is perceived to be influenced more by political constraints, rather than by the effective capacity of the Court. This aspect is particularly problematic in light of the inability of the ICC to pursue any non-African case. For instance, despite the situation in Palestine being under preliminary examination since 16 January 2015, the Prosecutor is still evaluating factual and legal information in order to establish whether there is a reasonable ground to proceed with an investigation.[117] Nevertheless, it has to be remarked that there has been some progress, because in January 2016 the Prosecutor began investigating situations in Georgia.[118] The focus of the prosecutions on African cases has originated accusations of double standards, neo-colonialism and "white justice".[119] In particular, over the last ten years, the African Union (hereafter

[112] R. D. Sloane, *supra* note 23, 93.
[113] T. Meijers, & M. Glasius, *supra* note 108, 441.
[114] *Ibidem*.
[115] M. M. deGuzman, *supra* note 13, 316-317.
[116] See chapter IV for criticism on retributivism, deterrence and restorative justice within the international criminal justice system.
[117] Report on Preliminary Examination Activities 2016, Office of the Prosecutor, 14 November 2016, §§ 109, 145. Available at: https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.
[118] See Situation in Georgia, Doc n. ICC-01/15. Available at: https://www.icc-cpi.int/georgia.
[119] J. B. J. Vilmer, 'The African Union and the International Criminal Court: Counteracting the Crisis', *International Affairs* 92(6) (2016). This article outlines the context of the diplomatic crisis between the AU and the ICC since 2005.

AU) has strongly criticised the ICC, as its exclusive focus on prosecuting African cases was seen as an attempt at meddling in the domestic affairs of African States.[120] As a response to the "afro-centrism" of the ICC, in January 2017 the AU adopted a strategy for collective withdrawal from the International Criminal Court (ICC).[121] There is little room for manoeuvre to rebut perceptions of bias due to political constraints. To fight such a perception the ICC could only focus on other situations outside the African continent. It is a political issue that goes beyond the framework of criminal justice adopted by the ICC.

5.7.2. The content of the expressivist message.

Among expressivists, there is a general consensus that the main goal for international criminal justice is norm expression. However, expressivism does not give any guidance on which norms are the most appropriate to convey a didactic message. As previously illustrated[122], expressivism states that a harmful message in itself causes harm and a good message causes good, but it does not determine what is good or bad. In other words, expressivism suggests that the international criminal justice system should pay attention to the message sent by its operation, but it does not illustrate which message should have the priority. Expressivism depends on the capacity to convey the right message, but its meaning can be rather different amongst the various societies, states and cultures that constitute the international community.[123] There is no easy answer to this issue, because international agreement is unlikely to occur in the short period.

To approach this issue, it might be useful to briefly recall the goals fulfilled by the expressivist functions of the criminal trial[124] and of punishment,[125] which are:

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[120] 'Africa: Exodus will crimp ICC', Oxford Analytica Daily Brief Service 07 Nov 2016, 1; K. Ambos, 'Expanding the focus of the "African Criminal Court"', in W. A. Schabas, Y. McDermott and N. Hayes eds, *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, Burlington: Ashgate, (2013), 499.

[121] African Union, Withdrawal Strategy Document, 12 January 2017. Available at: https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf. See also African Union, Assembly of the Union, Twenty-Eighth Ordinary Session, 30-31 January 2017, Addis Ababa, Ethiopia, Doc n. Assembly/AU/Draft/Dec.1(XXVIII)Rev.2. Available at: https://www.hrw.org/sites/default/files/supporting_resources/assembly_au_draft_dec._1_-_19_xxviii_e.pdf.

[122] See section 5.2. of the present chapter.

[123] R. D. Sloane, *supra* note 23, 84.

[124] See section 5.4. of the present chapter.

[125] See section 5.3. of the present chapter.

providing historical records of mass atrocities to prevent the past to be denied by revisionists; giving victims a voice; promoting social reconciliation; disseminating human rights values disowning criminal conducts; rejecting the acquiescence of the community to those crimes and punishing individual perpetrators. These functions suggest that the general message of the trial is about the veracity of a certain crime, given that the evidence presented by the Prosecutor and, to a certain extent, by the defence demonstrates that some specific criminal conducts occurred. Once the truthfulness has been proved, even in case the defendant cannot be proven guilty beyond reasonable doubt, the fact that these conducts have happened remains true.[126] The simple fact that a trial takes place by appealing to the law, even if it does not end in conviction of the defendant, strongly demonstrates that the crime and laws are taken seriously.[127]

Deeply fractured societies, like those in which international crimes were committed, are in special need of a message of disavowal and non-acquiescence to the crimes. But there is more at stake. When Duff notes that "[t]o remain silent in the face of crime would be to betray the values which the law expresses, and to which we are committed,"[128] he implies that trial should send a message, not only about the guilt of a defendant, but also about the value of the rule of law.[129] The same goes for the concept of punishment. If punishment was a mere display of power of one over the other, it would represent the continuation of a conflict by using other means. Enforcing a punishment requires to a certain extent the use of power, but it should be exercised by an authority legitimate for sending a message of disapproval as well as reaffirming legal norms.[130]

The acknowledgment that the message conveyed by the didactic function of the criminal trial is not only about the crimes, but also about the overall system of justice, calls for the need to identify a comprehensive set of legal principles that can guide the international criminal justice system.[131] This lacuna can be bridged by drawing on human rights principles, which represent the foundational model of

[126] T. Meijers, & M. Glasius, *supra* note 108, 435.
[127] *Ibidem.*
[128] R. A. Duff, *Trials and Punishments*, New York: Cambridge University Press (1986), 236.
[129] T. Meijers, & M. Glasius, *supra* note 108, 436.
[130] *Idem*, 437; A. J. Skillen, 'How to say things with walls', *Philosophy* 55(214) (1980), 512, 522.
[131] G. Boas, J. L. Bischoff, N. L. Reid & B.D. Taylor III, *International Criminal Law Practitioner Library: Volume 3: International Criminal Procedure*, Cambridge University Press (2011), 12.

international criminal law.[132] International criminal procedure is grounded not only in the founding treaties of the international criminal tribunals, but also in "the principles underlying the framework of the human right regime, and the adherence of these rules [of international criminal procedure] to that regime."[133]

Thus, the content of the didactic message of the trial should look at affirming a common commitment to international human rights standards and the authority of the rule of law, which are eventually the key tools for re-establishing a well-functioning society.[134] By declaring that certain kinds of behaviour are violations of human rights in the context of a public process,[135] the trial can convey the message that the international crimes are the most serious crimes concerning the international community.[136] This relationship is fundamental because the human rights standards provide legitimacy to the international criminal proceeding. Human rights principles are the main elements which instil legitimacy to the international criminal justice system, but they are also the "glue" that keeps together the rules of international criminal procedure.[137]

The goals of the pedagogical message of the trial, which mainly focus on crafting of an historical narrative and its pedagogical dissemination to the public, raise concerns with regards to the defendants. International criminal trials represent an antagonistic contest, where two opposing narratives challenge each other, by putting forward its own truth. However, expressivism seems to overlook defendants' role in the trial, since their story generally clashes with the pedagogical narrative and often contests the legitimacy of the trial itself.[138] This claim should be rejected though. The internal logic of the expressivist message imposes on the criminal procedure a mandatory constraint: the fair trial principle. If a defendant is convicted as result of an unfair trial, the expressivist message itself loses its credibility and legitimacy, because such trial would be in breach of the imperative human rights'

[132] A. Cassese, *International Criminal Law*, Oxford university press 2nd ed. (2008), 378.
[133] G. Boas, J. L. Bischoff, N. L. Reid & B.D. Taylor III, *supra* note 131, 12.
[134] T. Meijers, & M. Glasius, *supra* note 108, 437-438; R. D. Sloane, *supra* note 23, 93.
[135] W. A. Schabas, *supra* note 70, 516.
[136] S. Mouthaan, 'Victim Participation at the ICC for Victims of Gender-Based crimes: A Conflict of Interest?', *Cardozo Journal of International and Comparative Law* 21 (2009), 648-649.
[137] G. Boas, J. L. Bischoff, N. L. Reid & B.D. Taylor III, *supra* note 131, 464.
[138] T. Meijers, & M. Glasius, *supra* note 107, 251.

standard, which guarantees a fair trial to defendants.[139] However, the issue of the defendants' role and rights within the expressivist trial will be addressed further on in this chapter.

5.7.3. The audience.

A final question to be addressed concerns the nature of the audience of the pedagogical message of the expressivist trial. The international community has an interest in countering international crimes, because they represent a threat to its identity. The risk of a breakdown of the community's identity requires an expression of condemnation of atrocities perpetrated, not only directed to the wrongdoer, who is the main focus in the retributive and deterrence theories, but also directed to "[e]veryone of most interest to expressive theorists: the law-abider and the lawmaker, the activist and the private citizen, and even the potential victim, today and tomorrow."[140] This includes the directly afflicted populations, which are also a fundamental audience of the didactic message of the trial.[141] However, the audience conceived in this way is a rather heterogeneous entity. It is composed by different national and ethnic groups with distinct historical and cultural background, and, therefore, the message can resonate differently with different groups.[142] The local response to the norm expression function of the international trial has to be taken into consideration while conveying the didactic message. However, adapting the message to meet the local legal traditions, moral sensibility and variety of experiences, jeopardizes the coherence of international criminal justice, since it can lead to a potential excessive fragmentation.[143]

Despite those challenges, which show some structural limitations to the expressivist approach, the latter is still a valid paradigm able to fulfil the goals of the criminal justice system. The next section will illustrate that the ICTY and ICTR introduced some acknowledgments of the expressivist features.

[139] T. Meijers, & M. Glasius, *supra* note 108, 437.
[140] D. M. Amann, *supra* note 3, 124.
[141] M. A. Drumbl, *supra* note 24, 175.
[142] T. Meijers & M. Glasius, *supra* note 16, 750.
[143] M. Damaška, *supra* note 24, 349.

5.8. "Expressivist flavour"[144] of international criminal justice.

Slowly, a growing number of academics have embraced expressivism as the paradigm informing international criminal justice and in very similar way international criminal tribunals seemed to endorse this approach.[145] Despite expressivism did not inform the paradigm of the ICTY and ICTR, which mainly relied on the retributivist and deterrent approach to criminal justice system,[146] Diane Marie Amann argued that in some decisions by the *ad hoc* tribunals it is possible to identify values having an "expressivist flavour."[147] In the first decision by the ICTY, regarding the case *Prosecutor v. Dražen Erdemović*,[148] the Chamber held that one of the essential functions of punishment is "public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators".[149] The understanding of retribution by both the ICTY and the ICTR is not only conceived as fulfilling a desire for revenge but as duly expressing the outrage of the international community for international crimes.

In the case of the *Prosecutor v. Jean Kambanda*,[150] the ICTR affirmed that penalties imposed on accused persons found guilty by the Tribunal should make plain the condemnation of the international community of the behaviour in question and show that "the international community was not ready to tolerate the serious violations of international humanitarian law and human rights."[151] In the *Prosecutor*

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[144] D. M. Amann, *supra* note 3, 123.
[145] M. M. deGuzman, *supra* note 13, 314.
[146] See in this regard Chapter III.
[147] D. M. Amann, *supra* note 3, 123.
[148] *The Prosecutor v. Dražen Erdemović*, Sentencing Judgement, Trial Chamber, 29 November 1996, Case No. IT-96-22-T. Available at: http://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj961129e.pdf.
[149] *Idem*, § 65.
[150] *The Prosecutor v. Jean Kambanda*, Judgement and Sentence, Trial Chamber, 4 September 1998, Case No. ICTR 97-23-S. Available at: http://crc.unictr.org/sites/unictr.org/files/case-documents/ictr-97-23/trial-judgements/en/980904.pdf.
[151] *Idem*, § 28. See also: *the Prosecutor v. Zlatko Aleksovski*, Judgement, Appeals Chamber, 24 March 2000, Case No. IT-95-14/1-A, § 185. Available at: http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf; *the Prosecutor v. Zdravko Mucić et al.*, Judgement, Trial Chamber, 16 November 1998, Case No. IT-96-21-T, § 1234. Available at: http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf; *the Prosecutor v. Georges Rutaganda*, Judgement and Sentence, Trial Chamber I, 6 December 1999, Case No. ICTR-96-3-T, § 456. Available at: http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-3/trial-judgements/en/991206.pdf; *the Prosecutor v. Alfred Musema*, Judgment and Sentence, Trial Chamber I, 27 January 2000, Case No. ICTR-96-13-A, § 986. Available at: http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-13/trial-judgements/en/000127.pdf; *the Prosecutor v. Jean Paul Akayesu*, Sentence, 2 October 1998, Case No. ICTR-96-4-T, § 19. Available at:

v. Kordić and Čerkez case,[152] the Appeal Chamber explicitly refers to the educational function of a sentence, which aims

> at conveying the message that rules of humanitarian international law have to be obeyed under all circumstances. In doing so, the sentence seeks to internalise these rules and the moral demands they are based on in the minds of the public.[153]

The didactic function of the trial was emphasized by Judge Antonio Cassese, who affirmed that through the tribunal proceedings "a fully reliable record is established of atrocities so that future generations can remember and be made fully cognisant of what happened."[154] Similarly, in decision of the *Prosecutor v. Anto Furundžija* case,[155] the Trial Chamber stated the *ius cogens* nature of the prohibition of torture is one of the most fundamental standards of human rights and, therefore, its prohibition "signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate."[156]

In the context of the ICC, elements bringing back to the expressivist paradigm can be recognised in the language used by the ICC Office of the Prosecutor while justifying its operation. The former ICC Prosecutor Moreno Ocampo, while explaining his decision to bring charges of recruiting child soldiers in the *Prosecutor v. Thomas Lubanga Dyilo*,[157] affirmed that this case goes beyond bringing the

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http://jrad.unmict.org/webdrawer/webdrawer.dll/webdrawer/rec/204106/view/AKAYESU%20-%20SENTENCE.PDF; *the Prosecutor v. Omar Serushago*, Sentence, Trial Chamber I, 5 February 1999, Case No. ICTR-98-39-S, §§ 40-41. Available at: http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-98-39/trial-judgements/en/990215.pdf; *the Prosecutor v. Dario Kordić & Mario Čerkez*, Judgment, Trial Chamber, 26 February 2001, Case No. IT-95-14/2-T, § 852. Available at: http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf.

[152] *The Prosecutor v. Dario Kordić and Mario Čerkez*, Appeal Judgment, Appeals Chamber, 7 December 2004, Case No. IT-95-14/2-A. Available at: http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf.

[153] *The Prosecutor v. Dario Kordić and Mario Čerkez*, *supra* note 153, §§ 1080-1081.

[154] A. Cassese, 'Reflections on International Criminal Justice', *The Modern Law Review*, 61(1) (1998), 6.

[155] *The Prosecutor v. Anto Furundžija*, Judgement, Trial Chamber, 10 December 1998, Case No. IT-95-17/1-T. Available at: http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf.

[156] *Idem*, § 154.

[157] *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06. For a thorough analysis of the *Lubanga case* see sections: 7.2.1.; 7.3.2.; 7.4.1. and 7.5. of chapter VII.

defendant to justice, "this case will help to draw the attention of the world to this illegal practice and stimulate co-operation to stop it."[158] He concluded that

> [t]he Lubanga case is of historic magnitude for the fight against impunity and accountability for the commission of these crimes against children. This case will inevitably resonate far beyond the courtroom.[159]

In a similar way, on the same case, the (by then) Deputy Prosecutor Fatou Bensouda stated that "the abuse of child soldiers has gone largely unrecognized and unpunished for too long", therefore, "[r]egardless of the outcome of these proceedings, the hearing represents an unprecedented opportunity to shine a spotlight on this abuse of children worldwide."[160] In following statements by Fatou Bensouda, now acting as the Chief Prosecutor of the ICC, it is possible to find elements that can be interpreted in a way that connects with an expressivist orientation to the selection of charges to prosecute. At the Annual Meeting of the American Society of International Law,[161] Bensouda acknowledged that one of the functions of the ICC within the global legal order should be sending messages about the types of offenses the international community will not tolerate.[162] A more comprehensive evaluation of the operation of the ICC, in order to assess whether expressivist values can be traced in the practice by the Chambers on the implementation of the Statute's procedural provisions on victims' participation, will be the theme of discussion of chapter VII.

5.9. Conclusion.

Expressivism provides a better answer to the challenges of victims' participation in international criminal justice and the role expected of the ICC. While the retributive, deterrent and restorative approaches to criminal justice fall short when addressing victims' participatory rights and the purposes and goals of international criminal justice system as well, the expressivist theory best captures both the nature of

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[158] L. Moreno Ocampo, 'A Word from the Prosecutor', *International Criminal Court Newsletter* n. 10, November 2006, 2. Available at: https://www.icc-cpi.int/NR/rdonlyres/2AD04DD6-6E18-4B9B-9477-4DFCD8D607A4/278462/ICCNL10200611_En.pdf.

[159] *Ibidem*.

[160] F. Bensouda, Statement of Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, at the OTP monthly media briefing, 28 August 2006, 3. Available at: https://www.icc-cpi.int/NR/rdonlyres/AFD13ED5-315B-4393-9D30-E80C5583462E/277236/FB_20060828_en5.pdf.

[161] 105th *Meeting of the American Society of International Law,* 23-26 March 2011, Washington, DC.

[162] M. M. deGuzman, 'Bensouda on ICC prosecutions', *IntLawGrrls*, 31 March 2011. Available at: http://www.intlawgrrls.com/2011/03/bensouda-on-icc-prosecutions.html.

international sentencing and its real ability to contribute to the goals ascribed to it, given the political and resource constraints that international tribunals inevitably face. The normative claim underlying instrumental expressivism, according to which, by crafting rules to express valuable social message, law operates as a mechanism for altering social norms, can hold a greater importance within the international criminal justice system.

Expressivism imposes a change in the perspective of the international criminal justice system: it advances a distinctive role for criminal justice system, continuous with, but not reducible to the purposes of criminal punishment. In particular, as opposed to punishing simply because the perpetrators deserve it or because potential perpetrators will be deterred, the expressivist potential rests in the didactic function of the trial and its capacity to create historical narratives as representations of truth and their pedagogical dissemination to the audience.

There is a tension between the reality of the selectivity of the prosecution and expressivist aims of establishing and disseminating historical truths, attaching stigma to perpetrators and strengthening faith in the rule of law. Nevertheless, it has been argued that expressivism, even though it is not able to completely overcome those limitations, responds to those structural obstacles in a more effective way, compared to other classical criminal justice framework analysed in the previous chapter.

The international criminal trial, when rooted in the expressivist approach, has a strong impact on the articulation of the goals and procedural role of individuals involved in the proceedings. Establishing a common grammar within the framework of the didactic role of the international criminal trial leads to a change of the perspective of the role of judges and of the victims as well. The fact-finding aim calls for a more active role of the judges. The development of evidence is still the primary responsibility of the parties; however, the judges are empowered to intervene in the development of evidence, to prevent defendants from distorting the didactic function of the trial. Most importantly, the common grammar, by bridging the gap between civil law and common law contributes to developing a legal language and, perhaps in the future a legal culture, essential for the articulation of victims' participatory rights in manner consistent with the rationales of the goals of the ICC and the framework of article 68(3) of the Rome Statute. By empowering victims to tell their stories,

expressivism acknowledges their historical and semantic authority and, thus, their ability to contribute to shaping the social-pedagogical message of the trial. Victims represent the authoritative acknowledgment that the conducts they have been subjected to are crimes under international law, which, in virtue of their seriousness, cannot be left unpunished.

Expressivism might be perceived only as a theoretical criminal justice framework, but actually it is not a complete novelty. In particular, the conceptual application of expressivism, which reflects the aims of victims' participation, as conceived by the ICC, is not new. The analysis of the practices of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) provides a valid contribution to enhance the expressivist approach to victims' participatory rights within the criminal proceeding. Thus, the next chapter identifies victims' right to participate in proceedings related to establish accountability for serious human rights violations before these human rights tribunals. The case law of the IACtHR and ECtHR has held, as legal justifications for victims' participatory rights at the investigation, pre-trial and trial stages of the criminal proceeding, values that reflect the expressivist account of the criminal justice system, brought to light in this current chapter. For this reason, the jurisprudence elaborated by the IACtHR and ECtHR can illuminate the interpretation of the victims' participation regime of the ICC.

CHAPTER VI

The Expressivist Approach to Victims' Right to Access to and Participation in Criminal Proceedings in the Practice of Regional Human Rights Monitoring Bodies.

6.1. Introduction.

This chapter explores victims' rights under the main regional human rights treaties, namely the European Convention of Human Rights[1] (ECHR) and the American Convention of Human Rights[2] (ACHR). Although these treaties do not contain any specific reference to victims of crime, their oversight monitoring bodies, respectively the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) have progressively interpreted certain key provisions as including participation for victims of human rights violations. The focus on the case law of IACtHR and ECtHR is due to the fact that similar research of the case law of the African Court on Human and Peoples Rights did not yield any cases interpreting analogous provisions of the African Charter on Human and Peoples' Rights as creating victims' rights in the criminal process.[3]

The goal of this chapter is to review jurisprudence relevant to victims in order to identify the rights and principles relating to the core of victims' participation in

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[1] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms,* as amended by Protocols Nos. 11 and 14, 4 November 1950. Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf.

[2] Organization of American States, *American Convention on Human Rights, "Pact of San Jose",* Costa Rica, 22 November 1969. Available at: https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm.

[3] Only in the case *African Commission (Ogiek Community) v Kenya*, App. No. 6/ 2012, 26 May 2017, §§ 14, 27, 29, the representative of the original complainant (Minority Rights Group) was allowed make representations. Available at: http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf. See also: F. Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights', *International and Comparative Law Quarterly* (1) (2018); J. P. Perez-Leon-Acevedo, 'Victims at the Prospective International Criminal Law Section of the African Court of Justice and Human and Peoples' Rights', *International Criminal Law Review* 17(3) (2017); J. C. Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations*, (Vol. 12) Martinus Nijhoff Publishers (2013), 131-133; G. Bekker, 'The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations', *Human Rights Law Review* 13(3) (2013), 502-512; M. P. Pedersen, 'Standing and the African Commission on Human and Peoples' Rights', *African Human Rights Law Journal* 6(2) (2006).

proceedings related to establishing accountability for serious human rights violations. The second goal is to illustrate that the IACtHR and ECtHR have elaborated a case law that conveys a system of values, which responds to the expressivist dimension of the criminal justice system. Specifically, the analysis seeks to demonstrate that the case law of IACtHR and ECtHR can be interpreted in a way that correspond to the expressivist framework of criminal justice, with specific reference to the victims' right to participate in criminal proceedings. The investigation focuses on two basic rights of victims: the right to access to justice to obtain an investigation by a competent, impartial and independent authority and the victims' right to participate in criminal process in order to provide a reliable historical record of the events, to identify, prosecute and punish the perpetrators.[4]

This chapter explores the rights of victims in the jurisprudence of these two regional human rights bodies with a view to suggesting ways of operationalising the new ICC victims' regime. The reason for relying on the suggested experiences to develop the ICC victims' regime must be established. First of all, we need to be aware of two conceptual differences between regional human rights mechanisms and international criminal justice. While the former is based on the state responsibility framework and, by addressing gross violations of human rights, especially in case of isolated violations, entail the recognition of fundamental human rights, the latter is based on individual responsibility and the prosecution of international crimes results in the criminalization of particularly heinous conducts. Nevertheless, both bodies are underlain by common principles. International criminal tribunals showed the close relation among international criminal law, international human rights and international humanitarian law. Conducts that international criminal law recognises as international crimes, also embody violations of human rights sanctioned under international human rights treaties.[5] Several international crimes have been drawn to guarantee the fundamental rights of civilians in time both of peace and conflicts. For instance, conduct amounting to crimes against humanity is essentially premised on

[4] J. C. Ochoa, *supra* note 3, 112.
[5] REDRESS, *Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecutions*, September 2015, 7. Available at: http://www.redress.org/downloads/1508victim-rights-report.pdf.

violation of international human rights law.[6] The elaboration of the right to life, the right to be free from torture and other inhuman or degrading treatment, the right to equality and thus to be free from discrimination and prosecution based on political, racial or religious reasons, contributes to clarify the scope of crimes against humanity.[7] Similarly, the case law on international crimes throw a light on the way fundamental human rights should be protected in times of conflicts or exceptional circumstances.[8]

More importantly, pursuant to Article 21 of the Rome Statute, the Court has to apply as secondary sources (the Rome Statute and the RPE being the primary sources) treaties and the principles and rules of international law, whose "application and interpretation (…) must be consistent with internationally recognized human rights". This article by requiring an interpretation of the Statute in conformity with recognised human rights, opens to the application of the expressivist paradigm to the international criminal trial, as values and elements reflecting such model of criminal justice have been identified in the decisions adopted by IACtHR and ECtHR. The jurisprudence by these regional human rights courts has proved to be relevant to the elaboration of victims' rights in the Rome Statute itself, since different Chambers of the ICC have so far referred to human rights and jurisprudence of the IACtHR and ECtHR in their interpretation of specific aspects of victims' right to participate in the proceedings.

With these aims in mind, this chapter proceeds as follows. Section 2 deals with the jurisprudence of the IACtHR and ECtHR on State's obligation to undertake an effective investigation and attempts to investigate to what extent this case law reflects expressivist values of the criminal justice system. The third and the fourth section explore respectively the jurisprudence of the IACtHR and ECtHR concerning the development of the victims' right to access to justice to obtain an investigation and the right of victims to participate in criminal proceedings. The sixth section

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[6] A. Cassese, G. Acquaviva, M. Fan and A. Whiting, *International Criminal Law: Cases and Commentary*, Oxford University Press (2011), 41.

[7] *Idem*, 42. See: *the Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment of 14 January 2000, §§ 562-566. Available at: http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf. In this case, the Trial Chamber in order to determine the scope of crimes against humanity and, specifically the various categories of conducts that amount to such crimes, established the meaning of "other inhumane acts" by recurring to human rights provisions.

[8] A. Cassese, G. Acquaviva, M. Fan and A. Whiting, *supra* note 6, 42.

investigates the theoretical and practical lessons that can be drawn from the case law of the IACtHR and ECtHR, which can help the ICC to orientate the development of a model of participation for victims in the international criminal process.

6.2. The State's obligation to undertake an effective investigation in the case law of the IACtHR and ECtHR.

The historical records of civil disorders and repressive governments in Central and South America were brought before the IACtHR, which dealt with cases involving States' commission of, or at least acquiescence of, acts of torture, extra-judicial executions, massacres and forces disappearances, for which the perpetrators were very often left unpunished.[9] Therefore, the first concern in the practice of the IACtHR has been fighting against impunity and – since its first decisions – the Court clearly showed its commitment to prosecute those responsible for human rights violations. In the first "trilogy" of cases involving systematic forced disappearances occurred in Honduras during the 1980's, the IACtHR interpreted the ACHR as imposing upon States the obligation to effectively investigate any alleged human rights violations and to prosecute the perpetrators.[10]

The first case, in which the IACtHR upheld such interpretation of the ACHR, is the case of *Velásquez-Rodríguez v. Honduras.*[11] This case dealt with the disappearance of Angel Manfredo Velásquez-Rodríguez, a university student, who was violently detained without a warrant for his arrest, by the Armed Forces of Honduras. The IACtHR recognised that the forced disappearance of human beings is an arbitrary deprivation of liberty, in violation of Article 7 of the Convention which recognizes the right to personal liberty.[12] The Court in its decision on this case argued for a combined reading of the above mentioned Article 7 and Article 1(1) of the ACHR, which requires States to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full

[9] R. Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes', *Human Rights Quarterly* 26(3) (2004), 623.
[10] *Ibidem*; J. C. Ochoa, *supra* note 3, 112; REDRESS, *supra* note 5, 37-38; M. C. Bassiouni, 'International Recognition of Victims' Rights', *Human Rights Law Review* 6(2) (2006), 226.
[11] IACtHR, *Velásquez-Rodríguez v. Honduras*, Judgment, 29 July 1988, Series C No. 4. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf.
[12] *Idem* § 155; M. C. Bassiouni, *supra* note 10, 226.

exercise of those rights and freedoms, without any discrimination.[13] The judges held Article 1(1) of the ACHR, as prescribing upon State a legal duty to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible and to impose the appropriate punishment.[14]

The Court furthermore pointed out that States' obligation to investigate is not breached merely because the investigation does not produce a satisfactory result, however, the latter must be undertaken in a serious manner and not as a mere formality preordained to be ineffective.[15] Given that Article 1(1) imposes on States the obligation to investigate and prosecute those responsible for violations of the ACHR, whether the State leaves such violations unpunished, it fails to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.[16]

In *Godínez Cruz v. Honduras*[17] and *Fairén Garbi and Solís Corrales v. Honduras*,[18] which complete the trilogy of cases involving systematic forced disappearances, occurred in Honduras, the IACtHR confirmed the orientation expressed in the *Velásquez-Rodríguez* case. The Court indicated that, under Article 1(1) of the ACHR, two obligations can be imputed to a State Party. The first obligation is to respect the rights and freedoms recognized by the Convention and to 'ensure' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction.[19] The second obligation arises as a consequence of the first one, since the States must prevent, investigate and punish any violation of the rights recognized by the Convention.[20]

In a similar way, the European Court of Human Rights interpreted the ECHR as requiring States Parties to prosecute violations of the right to life and allegations to inhumane treatment. Specifically, in the case *McCann and Others v. the United*

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[13] Article 1(1), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, OAS General Assembly, Resolution No 447.
[14] IACtHR, *Velásquez-Rodríguez v. Honduras*, *supra* note 11, §174.
[15] IACtHR, *Velásquez-Rodríguez v. Honduras*, *supra* note 11, § 177.
[16] *Idem*, § 176.
[17] IACtHR, *Godínez Cruz v. Honduras*, Judgment (Merits), 20 January 1989, Series C No. 5. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_05_ing.pdf.
[18] IACtHR, *Fairén Garbi and Solís Corrales v. Honduras*, Judgment (Merits), 15 March 1989, Series C No. 6. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_06_ing.pdf.
[19] IACtHR, *Godínez Cruz v. Honduras*, *supra* note 17, §§74-175.
[20] *Idem*, §175; IACtHR, *Fairén Garbi and Solís Corrales v. Honduras*, *supra* note 18, § 152.

Kingdom,[21] from the joint reading of Article 2 of the ECHR, which set forth the right to life, along with the general obligation of Article 1 to impose on States the duty to respect and secure the rights and freedoms of the ECHR, the ECtHR concluded that States have an imperative mandate to undertake an effective investigation in order to prosecute and punish perpetrators.[22] Likewise, in the case in the *Assenov and Others v. Bulgaria*,[23] the ECtHR interpreted Article 3, which set forth the prohibition of torture, in conjunction with the State's general duty under Article 1 of the Convention, as requiring that, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other agents of the State, there should be an effective official investigation.[24]

The IACtHR and ECtHR acknowledged the States' obligation to investigate and prosecute violations of human rights is closely linked to the rights of victims to a prosecution, as well as the right to access criminal proceedings. Since the State's duty to investigate constitute a part of the reparation of the consequences of the violation of rights or freedoms and not a part of the indemnity. The failure of States to carry out a prompt, effective, impartial and independent investigation into allegations of serious human rights violations infringes victims' right to an effective remedy. This orientation was strongly sustained by the ECtHR and IACtHR, when dealing with situations characterised by the unwillingness of the States to investigate, prosecute and punish those responsible for serious human rights violations. The practice of the ECtHR and IACtHR, in assessing the States compliance with their obligations to investigate and prosecute violations of the human rights, acknowledged victim's right of access to and participation in criminal proceedings as a remedy for such violations.

The emphasis of the IACtHR and ECtHR on the States' obligation to investigate and prosecute violation of human rights reaffirmed the important role of criminal procedure in addressing such infringements. The official and public nature of the criminal proceeding and its specific characteristics, which allow carrying on an

[21] ECtHR, *McCann and Others v. the United Kingdom*, App. No. 18984/91, 5 September 1995. Available at: http://hudoc.echr.coe.int/eng?i=001-57943.
[22] *Idem*, §161. See also R. Aldana-Pindell, *supra* note 9, 634.
[23] ECtHR, *Assenov and Others v. Bulgaria*, App. No. 24760/94, 28 October 1998. Available at: http://hudoc.echr.coe.int/eng?i=001-58261.
[24] *Idem*, § 102.

independent and effective investigation and to identify, prosecute and punish those responsible for the crimes, contribute to play a critical role in bringing to light the truth and are also pivotal means for public acknowledgment of the events occurred. But the picture is broader than that. The IACtHR and ECtHR have taken the view that, because of its specific features, criminal proceeding aimed at fulfilling two overall goal of the criminal justice system. Firstly, criminal proceeding served to reaffirm the importance that society places on those serious infringements. Given the values that those rights protect – which cannot be derogated or limited by law –, human rights violations involve breaches of rights that have a special status within the ECHR. For example, in the case *Aksoy v. Turkey*,[25] the ECtHR held that States have the obligation to undertake effective investigations into the allegations of ill-treatment, because of the importance of the Article 3 of the ECHR, which forbids torture.[26] The same foundation was used to derive States' procedural obligation in the field of criminal justice in cases, like the *Kaya v. Turkey*,[27] concerning alleged violation to the right to life. In this case the Court emphasized the special status of such a right granted by Article 2 of the ECHR.[28] The ECtHR dealt also with gender-based crimes, such as rape. It held that the recourse to criminal procedure is requested, when dealing with such conducts, because of the fundamental values and essential aspects of private life are at stake.[29] The IACtHR has also emphasised the special status of these infringements, which affect not only the society, but the fundamental rights of the individual as well. In *La Cantuta v. Peru*,[30] the judges affirmed that the duty to investigate and eventually conduct trials in case of crimes against humanity and forced disappearance "becomes particularly compelling and

[25] ECtHR, *Aksoy v. Turkey*, App. No. 21987/93, 18 December 1996. Available at: http://hudoc.echr.coe.int/eng?i=001-58003.
[26] *Idem*, § 98.
[27] ECtHR, *Kaya v. Turkey*, App. No. 22729/93, 19 February 1998. Available at: http://hudoc.echr.coe.int/eng?i=002-7748.
[28] *Idem*, §§ 105-107.
[29] ECtHR, *X and Y v. The Netherlands*, App. No. 8978/80, 26 March 1985, § 27. Available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-57603"]}. See also: ECtHR, *M.C. v. Bulgaria*, App. No. 39272/98, 4 December 2003, § 150. Available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-61521"]}.
[30] IACtHR, *La Cantuta v. Peru*, Judgment (Merits, Reparations and Costs), 29 November 2006, Series C No. 162. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_162_ing.pdf.

important in view of the seriousness of the crimes committed and the nature of the rights wronged (…)."[31]

Secondly, the criminal proceeding aimed at reaffirming the importance of the rule of law. The IACtHR stated that right to effective recourse to a competent court is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society.[32] On the same page the ECtHR held the great importance of the expression "rule of law", which should elucidate the right to a fair hearing (Article 6(1) of the ECHR), given that the principle that prohibits the denial of justice ranks as one of the universally recognised fundamental principles of law.[33]

These aims of the criminal proceedings illustrate that the goal of the criminal justice is not simply to identify and punish the perpetrator. In light of the seriousness of the violations of the rights, enshrined in the ECHR and ACHR, impunity is not a satisfactory outcome. The criminal proceeding therefore, becomes the mechanism to express disavowal and condemnation of those conducts violating human rights to reaffirm the importance of human rights and educate the public to the respect of those rights. The norm expression value of the trial contributes to imbue the general public with core values and with the faith in the rule of law. Therefore, it can be maintained that the State's obligation to undertake an effective investigation is informed by the conceptual application of the expressivist values.

The next sections illustrate that the interpretation by IACtHR and ECtHR of the provisions of the ACHR and ECHR, related to the rights of victims in the proceeding, is framed through the conceptual approach to the expressivist goal of the trial. The relevant case law for our purposes relates to two broad issues: victims' right to recourse to the administration of justice to obtain an investigation by a competent, impartial and independent authority. The second one is the victims' right to participate in criminal process in order to provide a reliable historical record of the events, to identify, prosecute and punish the perpetrators and to grant victims reparation.

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[31] IACtHR, *La Cantuta v. Peru*, *supra* note 30, § 157.
[32] IACtHR**,** *Castillo Páez v. Peru*, Judgment (Merits), 3 November 1997, Series C No. 34, § 82. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_34_ing.pdf.
[33] ECtHR, *Golder v. the United Kingdom*, App. No. 4451/70, 21 February 1975, §§ 34-35. Available at: http://hudoc.echr.coe.int/eng?i=001-57496.

6.3. The Inter-American Court of Human Rights.

This section explores the jurisprudence of the IACtHR with regard to the right of victims to access to justice to obtain an investigation and to participate in the criminal proceedings. This section will deal with the case law of the IACtHR. As will be analysed below, this court has found that a failure to carry out a prompt, thorough, effective, impartial and independent investigation into allegations of serious violation of human rights violates the victims' right to an effective remedy, victims' right to a fair trial, victims' right to the truth.[34]

6.3.1. Victims' right to access to justice to obtain an investigation.

Over the years, the evolving jurisprudence of the IACtHR rooted victims' right to access to justice to obtain an investigation in three legal bases: victims' right to truth; victims' right to effective remedy, set forth in Article 25[35] of the ACHR and the fair hearing principle, established in Article 8(1)[36] of the ACHR.[37]

6.3.1.1. Victims' right to truth.

The IACtHR sustained the right of victims to know the truth as a legal justification to the victims' right to access to justice to obtain an investigation. The IACtHR has systematically held that the State has "the duty to reach the truth through judicial proceedings"[38] and that there is a link between the denial of the State to provide victims with access to criminal justice mechanism – specifically to criminal trials –

[34] REDRESS, *supra* note 5, 37-38.
[35] Article 25, ACHR, "1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted."
[36] Article 8(1), ACHR, "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature."
[37] J. C. Ochoa, *supra* note 3, 112; R. Aldana-Pindell, *supra* note 9, 625-626.
[38] IACtHR, *Almonacid-Arellano et al., v. Chile*, Preliminary Objections, Merits, Reparations and Costs, 26 September 2006, Series C No. 154, § 150. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf; IACtHR, *Gómez Palomino v. Peru*, Judgment (Merits, Reparations and Costs), 22 November 2005, Series C No. 136, §§ 78-79. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_136_ing.pdf.

and victims' right to learn the truth.[39] The right to the truth included the right of victims or their next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 25 and 8 of the Convention.[40]

6.3.1.2. Victims' right to a judicial remedy.

The second legal basis for the victims' rights to access to justice to obtain an investigation is the right to judicial protection incorporated in Article 25 of the ACHR. The Court stressed the importance of Article 25, as the right to judicial protection "is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention."[41]

The IACtHR advanced the interpretation of Article 25, as a base for the victims' rights to access to justice to obtain an investigation and, if supported by evidence, the prosecution in two cases: *Loayza Tamayo v. Peru*[42] and *Castillo Páez v. Peru*,[43] both dealing with the kidnap and disappearance of two Peruvian university students believed by the Peruvian security forces to be members of subversive terroristic groups. In both cases, the Inter-American Court interpreted the right to judicial protection along with Article 1(1) of the ACHR, which confers upon States the obligations to guarantee the protection and fulfilment of the rights enshrined in the ACHR, and, in the event of violations of such rights, to investigate and prosecute those responsible. The joint interpretation of these two articles of the ACHR obliges the State to guarantee to every individual access to the administration of justice and,

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[39] R. Aldana-Pindell, *supra* note 9, 627.
[40] IACtHR, *Bámaca Velásquez v. Guatemala*, Judgment (Merits), 25 November 2000, Series C No. 70, § 201. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_70_ing.pdf. See also: IACtHR**,** *Castillo Páez v. Peru*, Judgment (Reparations and Costs), 27 November 1998, Series C No. 43, §§ 105-106. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_43_ing.pdf; IACtHR**,** *Trujillo Oroza v. Bolivia*, Judgment (Reparations and Costs), 27 February 2002, Series C No. 92, §§ 100-112-116. Available at: http://www.corteidh.or.cr/docs/casos/articulos/Seriec_92_ing.pdf; IACtHR**,** *Barrios Altos v. Peru*, Judgment (Merits), 14 March 2001, Series C No. 75, § 48. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf.
[41] IACtHR, *Loayza Tamayo v. Peru*, Judgment (Reparations and Costs), 27 November 1998, Series C No. 42, § 169. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_42_ing.pdf.
[42] *Idem*.
[43] IACtHR, *Castillo Páez v. Peru*, *supra* note 40.

in particular, to simple and prompt recourse, so that those responsible for human rights violations may be prosecuted.[44]

However, the Court marked a divide between *Loayza Tamayo v. Peru* and *Castillo Páez v. Peru*. In this latter case the Court read Article 25 in conjunction also with Article 8(1), which establishes the right to a fair hearing. Their combined reading upheld the right of every person to a hearing within a reasonable time and with the due guarantees before a competent, independent and impartial tribunal for the determination of his rights of any nature.[45] The interpretation of Article 25 of the ACHR charged States with the obligation to guarantee the right of all persons under its jurisdiction to an effective judicial remedy against violations of their fundamental rights. The mere availability of judicial remedies is not enough.[46] The IACtHR insisted upon this orientation in several decisions, in which it underpinned that judiciary bodies must ensure the right of the victim or his or her next of kin to learn the truth about what happened and for those responsible to be punished.[47]

The IACtHR took a deeper look into the concept of effectiveness of a judicial remedy. The latter to be effective has to be "suitable to fight the violation, its application by the competent authority must be effective"[48] and it should give "a person a real opportunity to pursue a simple and prompt recourse which, if

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[44] IACtHR, *Castillo Páez v. Peru*, *supra* note 40, §106; IACtHR, *Loayza Tamayo v. Peru*, *supra* note 41, § 169.

[45] IACtHR, *Castillo Páez v. Peru*, *supra* note 40, §106

[46] IACtHR, *Baldeón García v. Peru*, Judgment (Merits, Reparations and Costs), 6 April 2006, Series C No. 147, § 144. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_147_ing.pdf. See also IACtHR, *Claude Reyes et al. v. Chile*, Judgment (Merits, Reparations and Costs), 19 September 2006, Series C No. 151, § 131. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_147_ing.pdf; IACtHR, *Ximenes Lopes v. Brazil*, Judgment (Merits, Reparations and Costs), 4 July 2006, Series C No. 149, § 192. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_149_ing.pdf; IACtHR, *Acevedo Jaramillo et al. v. Peru*, Preliminary Objections, Merits, Reparations and Costs, 7 February 2006, Series C No. 144, § 213. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_144_ing.pdf.

[47] IACtHR, *Bulacio v. Argentina*, Judgment (Merits, Reparations and Costs), 18 September 2003, Series C No. 100, § 114. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_100_ing.pdf. See also: IACtHR, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment (Merits, Reparations and Costs), 21 June 2002, Series C No. 94**,** §§ 142-144. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_94_ing.pdf; IACtHR, *Suárez Rosero v. Ecuador*, Judgment (Merits), 12 November 1997, Series C No. 35**,** §§ 71-72. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_35_ing.pdf.

[48] IACtHR, *López Álvarez v. Honduras*, Judgment (Merits, Reparations and Costs), 1 February 2006, Series C No. 141, § 139. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_141_ing.pdf.

applicable, will secure the judicial protection sought from the competent authority."[49] Therefore, to implement victims' right to access to justice to obtain an investigation and, if supported by evidence, the prosecution in accordance with Article 25 of ACHR, the judicial mechanism has to take every necessary step to ensure, within a reasonable time, the right of the alleged victims or their next of kin to learn the truth about what happened and to punish those who may be responsible.[50]

However, the victims' right to access to justice to obtain an investigation and, if supported by evidence, the prosecution of the offender does not imply that the prosecution turned into a pure private victim's right. On the contrary, according to the orientation expressed by the IACtHR, the duty of States to investigate, prosecute and punish is independent from the right of the victim to access to justice.[51]

6.3.1.3. Victims' right to a fair hearing.

As the further justification for victims' rights to access to justice to obtain an investigation, the IACtHR, in its decision of the case of *Genie Lacayo v. Nicaragua,*[52] advanced the right to a fair hearing, contained in Article 8(1) of the ACHR. In this case the Court held that to establish a violation of Article 8, it is

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[49] IACtHR, *Palamara Iribarne v. Chile*, Judgment (Merits, Reparations and Costs), 22 November 2005, Series C No. 135, § 184. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_ing.pdf.

[50] IACtHR, *the "Mapiripán Massacre" v. Colombia*, Judgment (Merits, Reparations and Costs), 15 September 2005, Series C No. 134, § 216. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_ing.pdf. See also: IACtHR, *Myrna Mack Chang v. Guatemala*, Judgment (Merits, Reparations and Costs), 25 November 2003, Series C No. 101, § 209. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_101_ing.pdf; IACtHR, *19 Merchants v. Colombia*, Judgment (Merits, Reparations and Costs), 5 July 2004, Series C No. 109, § 188. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_109_ing.pdf; IACtHR, *Serrano Cruz Sisters v. El Salvador*, Judgment (Merits, Reparations and Costs), 1 March 2005, Series C No. 120, § 66. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_120_ing.pdf; IACtHR, *La Cantuta v. Peru*, *supra* note 30, § 149; IACtHR, *Bulacio v. Argentina*, *supra* note 47, § 114; IACtHR, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, *supra* note 47, §§ 142-144; IACtHR, *Suárez Rosero v. Ecuador supra* note 47, §§ 71-72.

[51] IACtHR**,** *Trujillo Oroza v. Bolivia*, *supra* note 39, § 99. See also: IACtHR**,** *Caracazo v. Venezuela*, Judgment (Reparations and Costs), 29 August 2002, Series C No. 95, § 115. Available at: http://www.corteidh.or.cr/docs/casos/articulos/Seriec_95_ing.pdf; IACtHR**,** *Heliodoro-Portugal v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, 12 August 2008, Series C No. 186, § 146. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_186_ing.pdf; IACtHR**,** *García Prieto et al. v. El Salvador*, Preliminary Objections, Merits, Reparations, and Costs, 20 November 2007, Series C No. 168, § 103. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_168_ing.pdf; IACtHR, *Cantoral Benavides v. Peru*, Judgment (Reparations and Costs), 3 December 2001, Series C No. 88, § 69. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_88_ing.pdf.

[52] IACtHR, *Genie Lacayo v. Nicaragua*, Judgment (Merits, Reparations and Costs), 29 January 1997, Series C No. 30. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_30_ing.pdf.

necessary, first of all, to establish whether the accusing party's procedural rights have been respected to identify those responsible for the death of Genie-Lacayo.[53] Since the IACtHR, when referring to the "accusing party", meant the role of private prosecutor that the victims generally have in criminal proceedings in South America, it argued that the victims enjoy the right to a fair hearing as well as the defendant. This is confirmed by the fact that IACtHR implicitly expanded the scope of article 8(1) in order to include the rights of victims' relative to judicial guarantees. In fact, when the IACtHR stated that "there is no record that Mr. Raymond Genie-Peñalba, the victim's father, behaved in a manner incompatible with his role as private accuser",[54] it acknowledged that the victims' relatives can have an active role in the investigations.

Similarly, in the decision on the case *Blake v. Guatemala*,[55] the IACtHR interpreted Article 8(1) as providing victims and their next to kin with the right to a fair hearing. It elaborated a broad interpretation of Article 8(1) based on both its letter and spirit, which, however, must be appreciated in accordance with Article 29 (c). This Article prescribes that no provision of the ACHR should be interpreted as precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.[56] The Court included the rights of victims' relative to judicial guarantees within the scope of the right to a fair hearing, because any act of forced disappearance places the victim outside the protection of the law and causes grave suffering to him and to his family.[57] The broader application of Article 8(1), advanced by the Court, recognised the rights of Blake's relative to have his disappearance and death to effectively investigated by the Guatemalan authorities and to have those responsible prosecuted and punished for committing unlawful acts.[58]

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[53] IACtHR, *Genie Lacayo v. Nicaragua*, *supra* note 52, § 75.
[54] *Idem*, § 79.
[55] IACtHR, *Blake v. Guatemala*, Judgment (Merits), 24 January 1998, Series C No. 36. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_36_ing.pdf.
[56] *Idem*, § 96.
[57] *Idem*, § 97.
[58] *Ibidem*. See also: IACtHR, *Paniagua Morales et al. v. Guatemala (the case of the "White Van")*, Judgment (Merits), 8 March 1998, Series C No. 37, §§ 155-156. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_37_ing.pdf; IACtHR, *Durand and Ugarte v. Peru*, Judgment (Merits), 16 August 2000, Series C No. 68, § 130. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_68_ing.pdf.

6.3.2. The right of victims to participate in criminal proceedings.

The Inter-American Court has systematically upheld the right of victims to participate in criminal proceeding. Such right was grounded on the same legal basis put forward by the Court for the victims' right to access to justice to obtain an investigation, which are Articles 8(1) and 25 of the ACHR.[59]

6.3.2.1. The right of victims to a fair hearing.

The letter and spirit of Article 8(1) of the ACHR, which requires the observation of the right to a fair hearing for the determination of everyone's "rights and obligations of a civil, labour, fiscal, or any other nature", provide a broad scope for the right to fair hearing for victims. Specifically, the caveat "or any other nature" leaves room to include into the scope of the right to a fair hearing the victims' right to participate in the criminal proceedings. The *travaux préparatoires* of the ACHR confirms such interpretation of Article 8(1). The draft of this Article, which originally narrowed down the scope of the right to a fair hearing "in the determination of [everyone's] civil rights and obligations",[60] was modified to entail the current broader phrasing of Article 8(1).[61]

In the case *Villagrán-Morales et al. v. Guatemala*,[62] better known as the *Street Children* case, the IACtHR confirms this extensive interpretation of Article 8(1) of the ACHR. In its decision on this case the Court read the wording of the right to a fair hearing, as formulated by the ACHR, as giving to victims of human rights violations or their next of kin substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible.[63]

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[59] J. C. Ochoa, *supra* note 3, 117-118.
[60] Draft of the Inter-American Convention on Human Rights, OAS Doc. OEA/Ser.K/XVI/1.1 doc 13, 22 September 1969, in T. Buergenthal and R. E. Norris (Eds.), 'Human Rights, the Inter-American System', (Vol. 3) Oceana Publications (1982).
[61] J. C. Ochoa, *supra* note 3, 121.
[62] IACtHR, *Villagrán-Morales et al. v. Guatemala*, Judgment (Merits), 19 November 1999, Series C No. 63. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf.
[63] *Idem*, § 227. See also: IACtHR, *Durand and Ugarte v. Peru*, supra note 58, § 129; IACtHR, *Las Palmeras v. Colombia*, Judgment (Merits), 6 December 2001, Series C No. 90, § 59. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_90_ing.pdf.

6.3.2.2. Victims' right to judicial remedy.

With regard to the second legal justification of the right to victims to participate in criminal proceedings, it is worth to mention that the right to judicial protection, provided in Article 25 of the ACHR, initially has been interpreted in a restrictive way by the IACtHR. This restrictive interpretation was based on the wording of the first part of Article 25(1) of the ACHR, which established that "[e]veryone has the right to simple and prompt recourse". In several decisions the Court held that victim's right to judicial protection only "governs the simple and prompt recourse for the protection of persons injured by violations of their rights enshrined in the Convention."[64]

In the 1980's, the IACtHR in two Advisory Opinions, respectively the *Habeas corpus in Emergency Situations*[65] and *Judicial Guarantees in States of Emergency*,[66] shed a light on the meaning of the expression "simple and prompt recourse". According to the Court, Article 25 of the ACHR gives expression to the procedural institution known as "amparo", which is a simple and prompt remedy designed for the protection of all of the rights recognized by law of States and by the ACHR.[67]

The Judge Cecilia Medina Quiroga in her Partially Dissenting Opinion to the decision of the case *19 Merchants v. Colombia*[68] endorsed this orientation and explained what remedies for victims fall in the scope of simple and prompt remedy. Judge Medina Quiroga affirms that

> Article 25 embodies the right of the individual to have his human rights protected in the domestic sphere, simply, promptly and effectively. In our

[64] IACtHR, *Genie Lacayo v. Nicaragua*, *supra* note 52, § 89. See also: IACtHR, *Suárez Rosero v. Ecuador*, *supra* note 47, §§ 65-66.
[65] IACtHR, *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, Advisory Opinion OC-8/87, 30 January 1987, Series A No. 8. Available at: http://www.corteidh.or.cr/docs/opiniones/seriea_08_ing.pdf.
[66] IACtHR, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*, Advisory Opinion OC-9/87, 6 of October 1987, Series A No. 9. Available at: http://www.corteidh.or.cr/docs/opiniones/seriea_09_ing.pdf.
[67] *Idem* § 23; IACtHR, *Habeas corpus in Emergency Situations*, *supra* note 63, § 32.
[68] IACtHR, *19 Merchants v. Colombia*, *supra* note 48.

> hemisphere, this is known as the right to the remedy of amparo [protection].[69]

However, by maintaining that Article 25 of the ACHR covers only those remedies that are simple, prompt and effective, the Court deprived of any meaning the expression "any other effective recourse" contained in the said Article.[70] In fact, Article 25 of the ACHR, along with "simple and prompt recourse", set forth "any other effective recourse" in order to protect the fundamental rights recognized by the constitutions or laws of the State concerned or by the ACHR.[71] The *travaux préparatoires* of the ACHR show that the expression "any other effective recourse" is very far from being meaningless and accidental. The original version of the Article 25 stated that "toda persona tiene derecho a un recurso efectivo, sencillo y rápido (…)".[72] Initially the part "any other effective recourse" was not intended. After the representatives from the Dominican Republic observed in their comments to the draft of the ACHR that in some cases the judicial protection could be effective, without being simple and prompt, the effectiveness became the only mandatory requirement of a legitimate recourse.[73] Eventually, the text adopted in the final version of Article 25 included the expression "otro recurso efectivo".[74]

The IACtHR progressively acknowledged the difficulty to reconcile the narrow concept of remedies as simple and prompt with the wording of article 25 and it expanded its own view on this matter in several following cases. It stated that Article 25 of the ACHR "does not only establish the recourse of a writ – simple and

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[69] IACtHR, *19 Merchants v. Colombia*, *supra* note 48, Partially Dissenting Opinion of Judge Medina Quiroga**,** § 1. See also: IACtHR, *Gómez Paquiyauri Brothers v. Peru*, Partially Dissenting Opinion of Judge Medina Quiroga, 8 July 2004, Series C No. 110, § 1. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_110_ing.pdf; IACtHR, *Salvador Chiriboga v. Ecuador*, Partially Dissenting Opinion of Judge Medina Quiroga, 6 May 2008, Series C No. 179, § 2. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_179_ing.pdf; IACtHR, *Genie Lacayo v. Nicaragua*, *supra* note 52, § 89; *Suárez Rosero v. Ecuador supra* note 47, §§ 65-66.

[70] J. C. Ochoa, *supra* note 3, 120.

[71] Article 25(1), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, OAS General Assembly, Resolution No 447.

[72] Specialized Inter-American Conference on Human Rights, Proceedings and Documents, San José, Costa Rica, November 7/22, 1969, (OEA/Ser.K/XVI/1.2), 22 [Available only in Spanish]. Translation: "every person has the right to an effective, simple and prompt recourse". Available at: https://www.oas.org/es/cidh/docs/enlaces/Conferencia%20Interamericana.pdf. See also: IACtHR, *Salvador Chiriboga v. Ecuador*, Partially Dissenting Opinion of Judge Medina Quiroga, *supra* note 67, § 3, in which the Judge Medina Quiroga cited the hereby Specialized Inter-American Conference.

[73] Specialized Inter-American Conference on Human Rights, Proceedings and Documents, San José, Costa Rica, November 7/22, 1969, (OEA/Ser.K/XVI/1.2), 66.

[74] *Ibidem*.

prompt – but also, a second type of recourse that, though not simple or prompt, is effective."[75] In light of this broad notion of judicial remedy for victims, the IACtHR conceived a rather comprehensive scope for victims' participation in the proceedings. In the decision on Reparation and Costs in *Caracazo v. Venezuela*,[76] while addressing the violation of the victims' right to a fair hearing and to judicial protection, the IACtHR affirmed that

> The next of kin of the victims and the surviving victims must have full access and the capacity to act during all stages and levels of said investigations, pursuant do domestic law and to the provisions of the American Convention.[77]

This decision shows two relevant views of the Court. The first one is that the IACtHR, by referring to domestic law and to the ACHR as legal sources, seems to express the belief that victims' right to participation in criminal proceeding is directly based, besides the local law, on the dispositions of the ACHR and its relative interpretation. Secondly, it is significant that the Court use the expression "must have full access and the capacity to act" in order to entitle victims' to take part to all stages and levels of investigations on the infringements of the rights protected by the ACHR.[78] While the *Caracazo v. Venezuela* case refers to "all stages and levels of said investigations", in *Baldeón García v. Peru*[79] the Court further expand the degree of participation for victims. It expressly acknowledged that

> The next of kin of the victim or his representatives shall have full access to and participate in all stages and instances of the domestic criminal

[75] IACtHR, *Salvador Chiriboga v. Ecuador*, Partially Dissenting Opinion of Judge Medina Quiroga, *supra* note 67, § 3.
[76] IACtHR**,** *Caracazo v. Venezuela*, *supra* note 49.
[77] *Idem*, § 118. See also: IACtHR**,** *Juan Humberto Sánchez v. Honduras*, Preliminary Objection, Merits, Reparations and Costs, 7 June 2003, Series C No. 99, § 186. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_99_ing.pdf; IACtHR**,** *Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, 5 July 2006, Series C No. 150, § 139. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_150_ing.pdf; IACtHR**,** *Blanco Romero et al v. Venezuela*, Judgment (Merits, Reparations and Costs), 28 November 2005, Series C No. 138, § 97. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_138_ing.pdf; IACtHR**,** *Vargas Areco v. Paraguay*, Judgment (Merits, Reparations and Costs), 26 September 2006, Series C No. 155, § 155. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_155_ing.pdf.
[78] J. C. Ochoa, *supra* note 3, 118.
[79] IACtHR, *Baldeón García v. Peru*, *supra* note 46.

> proceedings initiated in relation to the instant case, in accordance with domestic laws and the American.[80]

Therefore, the Inter-American Court fully recognised the victims' right to actively participate in the criminal proceedings, requiring States to grant to victims

> substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation.[81]

Based on this view, in the case *Goiburú et al. v. Paraguay*[82] the Inter-American Court took a step forward and for the first time has proposed the conception of access to justice for victims of human rights violations as "a peremptory norm of international law".[83] The idea of access to justice for victims as a peremptory norm of international law gives rise to a State's obligation *erga omnes* to adopt all necessary measures to ensure that human rights violations do not remain unpunished, either by exercising their jurisdiction, or by collaborating with other States that do so or attempt to do so.[84] It is worth to analyse the Separate Opinion on the *Goiburú et al. v. Paraguay* case of Judge Cançado Trindade, who widely developed the findings of the Inter-American Court, putting forward an expansion of the substantial content of *jus cogens*.[85]

The reasoning followed by Judge Cançado Trindade is quite articulate and provides a strong ground to the victims' right of access to justice as an imperative of *jus cogens*. The starting point of the Judge's argumentation is that, in the case of *Goiburú et al. v. Paraguay*, the Court has reaffirmed its consistent case law in the sense that certain human rights violations are breaches of *jus cogens*, entailing, therefore, the State's obligation to investigate them and punish those responsible to end impunity.[86] The right to a legal system that effectively safeguards fundamental

[80] IACtHR, *Baldeón García v. Peru*, *supra* note 46, § 199.
[81] IACtHR, *Villagrán-Morales et al. v. Guatemala*, *supra* note 62, § 227.
[82] IACtHR, *Goiburú et al. v. Paraguay*, Judgment (Merits, Reparations and Costs), 22 September 2006, Series C No. 153. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_153_ing.pdf.
[83] *Idem*, § 131.
[84] *Ibidem*.
[85] *Idem*, §§ 62-67.
[86] *Idem*, §§ 62-63.

human rights is an essential requirement of *jus cogens*.[87] The indivisibility between Articles 8(1) and 25 of the ACHR, which set forth respectively the fair hearing requirement and the right to judicial protection, leads to characterise access to justice as the full realization of justice and as forming part of the sphere of *jus cogens*. The inviolability of all the judicial rights established in Articles 8(1) and 25 belongs to the sphere of *jus cogens*. The fundamental guarantees, common to Articles 8(1) and 25, have a universal vocation because they are applicable in any circumstance. They constitute a peremptory right, belonging to *jus cogens*, and entail obligations *erga omnes* of protection.[88]

In conclusion, Judge Cançado Trindade argued that, in the same way as the Inter-American Court had expanded the substantial content of *jus cogens* to include the basic principle of equality and non-discrimination, the moment had come to take another qualitative leap forward in the development of its case law, by proceeding to expansion of the substantial content of *jus cogens* through recognizing that this also encompasses the right of access to justice *lato sensu*.[89] The right of access to justice should be not reduced to formal access, *stricto sensu*, to the judicial remedy, but also includes the right to a fair trial and the interrelated Articles 8(1) and 25, in addition to the domestic law of the States Parties. The right of access to justice means, *lato sensu*, the right to obtain justice.[90]

6.4. The European Court of Human Rights.

This section looks to the jurisprudence of the ECtHR, which, while assessing the States' compliance with their obligations to investigate and prosecute violations of the right to life and prohibition of inhumane treatment, acknowledged victim's right of access to and participation in criminal proceedings as a remedy for such violations. In particular, based on the right to an effective remedy, enshrined in Article 13 of the ECHR, the Court granted victims the right to be informed regarding how the proceeding is progressing and about the decisions made therein; the right to be heard and the right to have access to the case files.

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[87] IACtHR, *Goiburú et al. v. Paraguay*, *supra* note 82, § 65.
[88] *Ibidem*.
[89] *Idem*, § 66.
[90] IACtHR, *Pueblo Bello Massacre v. Colombia*, Separate Opinion of Judge Antônio Augusto Cançado Trindade, 31 January 2006, Series C No. 140, § 61. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_140_ing.pdf.

6.4.1. The victims' right to access and participation in the criminal proceedings.

The ECtHR has examined Article 2 (right to life), together with Article 3 (prohibition against torture and inhuman and degrading treatment), Article 13 (right to a remedy) and Article 6 (fair trial rights) to find that a state's violation of its duties may also violate the private rights of victims. The European Court of Human Rights has held that the State failure to investigate and prosecute violations of the rights to life and of the prohibition of inhumane treatment breached the victims' right to an effective remedy, as set forth in Article 13 of the Convention. The jurisprudence of the ECtHR specifically grounded on Article 13 the right of victims to be informed regarding how the proceeding is evolving and about the decisions made therein; the right to be heard and the right to have access to the case files. This orientation was strongly sustained by the ECtHR while dealing with situations characterised by the unwillingness of the States to investigate, prosecute and punish those responsible for serious human rights violations that occurred in Southeast Turkey and the UK (more precisely Northern Ireland) in the late 1990's and early 2000's.[91]

6.4.1.1. The Turkish cases on victims' right to an effective remedy.

The first judgments, which recognised victim's right to an effective remedy as conferring on victims the right of access to the investigation and prosecution, occurred when the Court considered several cases against Turkey. The majority of these cases alleged extrajudicial executions, forced disappearances, inhumane treatments and tortures committed by the Turkish forces against persons, who were alleged involved with the Kurdish Worker's party (PKK). The common feature of these cases was that alleged victims of gross violations of human rights appealed to the ECtHR claiming that Turkey was not complying with its duty to conduct an effective investigation, leaving unpunished those responsible.[92] The ECtHR argued that, given the pivotal relevance of the right to life and prohibition of inhumane treatment, Article 13 of the ECHR, which provides for victims the right to an

[91] J. C. Ochoa, *supra* note 3, 120.
[92] R. Aldana-Pindell, *supra* note 9, 634.

effective remedy, required States to grant effective access to the investigation into such violations for victims.

In relation to the right to life, enshrined in Article 2 of the ECHR, in many cases the Court found an infringement of such right because States did not comply with the obligation to effectively involve victims in the investigation, pursuant to the right to an effective remedy. In the case *Kaya v. Turkey*,[93] concerning the extrajudicial execution of Abdülmenaf Kaya by Turkish security forces and failure of the authorities to carry out effective investigation into killing, the ECtHR stated that the notion of an effective remedy, for the purposes of Article 13, entails a thorough and effective investigation capable of leading to the identification and punishment of those responsible. In the view of the Court, effective remedy includes also the effective access for the relatives to the investigatory procedure.[94] On the same page, in the cases *Güleç v. Turkey*[95] and *Oğur v. Turkey*,[96] the ECtHR acknowledged a violation of Article 2 on two accounts: the first one was the lack of effective investigations capable of leading to the identification and punishment of those responsible for the events in question.[97] The second was the fact that during the investigation the case file was inaccessible to the victim's close relatives, who had no means of learning what was in it.[98] The Court found a violation of Article 13 of the ECHR because the Turkish authorities did not notify to the applicant's lawyer the decision on the case by the Turkish judicial body, with the result that the applicant was deprived of the possibility of lodging an appeal.[99]

In particular in the *Oğur v. Turkey* case, the ECtHR put forward the victims and their next to kin right to be informed regarding measures taken by the state after

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[93] ECtHR, *Kaya v. Turkey*, *supra* note 27.
[94] *Idem*, § 107. See also: ECtHR, *Ergi v. Turkey*, App. No. 23818/94, 28 July 1998, § 98. Available at: http://hudoc.echr.coe.int/eng?i=001-58200; ECtHR, *Yaşa v. Turkey,* App. No. 22495/93, 2 September 1998, § 114. Available at: http://hudoc.echr.coe.int/eng?i=001-58238; ECtHR, *Salman v. Turkey*, App. No. 21986/93, 27 June 2000, § 121. Available at: http://hudoc.echr.coe.int/eng?i=001-58735; ECtHR, *Tumurtas v. Turkey*, App. No. 23531/94, 13 June 2000, § 111. Available at: http://hudoc.echr.coe.int/eng?i=001-58901; ECtHR, *Orhan v. Turkey*, App. No. 25656/94, 18 June 2002, §§ 383-385. Available at: http://hudoc.echr.coe.int/eng?i=001-60509.
[95] ECtHR, *Güleç v. Turkey*, App. No. 21593/93, 27 July 1998. Available at: http://hudoc.echr.coe.int/eng?i=001-58207.
[96] ECtHR, *Oğur v. Turkey*, App. No. 21594/93, 20 May 1999. Available at: http://hudoc.echr.coe.int/eng?i=001-58251.
[97] *Idem*, § 93; ECtHR, *Güleç v. Turkey*, *supra* note 95, §§ 82-83.
[98] ECtHR, *Oğur v. Turkey*, *supra* note 96, § 82.
[99] *Idem*, § 92.

notice of violation, as Turkey violated Article 2 when it failed to inform victims or close relatives of the state's decision not to prosecute. This lack of information was particularly problematic because it prevented the next of kin from the possibility of appealing the decision not to prosecute to a higher authority.[100] The European Court took also the view that when an investigation is commenced the right to be informed would require the investigating authorities to allow victims access to the investigation and court documents. In this regard, the ECtHR found violations of Article 2 against Turkey, since the next of kin was not given access to the investigation and court documents.[101] The *Oğur v. Turkey* case is particularly relevant because the ECtHR affirmed that the right to access was held to have been breached where the decision of the relevant national tribunal was based solely on the record prepared by state prosecutors, and where next of kin had had no opportunity to introduce evidence. The ECtHR required the next of kin to have access to the investigation files and to be able to introduce evidence to substantiate the record.

It is worth to add that, in the case *Gül v. Turkey*,[102] the Court held that the State violated the victims' right to life (Art 2 of the ECHR) because the applicant and his family members, not only were not informed on the proceedings, but also they were not given the opportunity of telling the court of their very different version of events.[103] This point is particularly important because the ECtHR concluded, on the basis of the lack of involvement of victims and/or their next to kin in the investigatory procedure, that victims' right to an effective remedy and State obligation to protect the right to life, respectively set forth in Article 13 and 2 of the ECHR have been violated.[104]

In relation to the prohibition of inhumane treatment, set in Article 3 of the ECHR, the ECtHR also upheld that the State has the duty to investigate such violations, grounding its argumentation on the victims' right to remedy. In the case *Aydin v. Turkey*,[105] the Court maintained that, due the fundamental importance of the

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[100] ECtHR, *Oğur v. Turkey*, *supra* note 96, § 92.
[101] *Ibidem*.
[102] ECtHR, *Gül v. Turkey*, App. No. 22676/93, 14 December 2000. Available at: http://hudoc.echr.coe.int/eng?i=001-59081.
[103] *Idem*, § 93.
[104] J. C. Ochoa, *supra* note 3, 122. See also: ECtHR, *Orhan v. Turkey*, *supra* note 94, § 384.
[105] ECtHR, *Aydin v. Turkey*, App. No. 23178/94, 25 September 1997. Available at: http://hudoc.echr.coe.int/eng?i=001-58371.

prohibition of torture and the vulnerable position of victims of torture, Article 13 imposes on States an obligation to carry out a thorough and effective investigation of such tortures.[106] In this case, the ECtHR consolidated the concept of effective remedy as formulated in its jurisprudence on the violation of the right to life and acknowledged that such notion entails a thorough and effective investigation in order to identify and punish those responsible and it includes effective access for the complainant to the investigatory procedure as well.[107]

6.4.1.2. The British cases on the victims' right to an effective remedy.

More recently, the ECtHR dealt with numerous cases against the UK, which, like the Turkish cases, involved disproportionate use of force and inhuman treatment of alleged criminals or terrorists, committed in Northern Ireland by State agents.[108] In dealing with these cases the European Court expanded the significance of Article 2 to include victims' rights. This provision, which protects the right to life, has also been interpreted as conferring on victims certain participatory rights in criminal proceedings. For instance, in the case *Hugh Jordan v. the United Kingdom*,[109] the applicant alleged the use of disproportionate force by the RUC British police officers when they arrested as suspected terrorist his son Pearse Jordan, who, during this police operation, had been unjustifiably shot and killed by a police officer. The claimant alleged, furthermore, that, subsequently, there had been no effective investigation into, or redress for, his son's death.[110] The ECtHR recognised a violation by the State of its obligation to protect victim's right to life, laid down in article 2 of the ECHR, for denying certain participatory rights to victims in the criminal proceeding. The Court found that there was not an effective investigation into the death of the applicant's son and, for this reason, outlined the requirements of an effective investigation. Among these requirements, it is included as well the

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[106] ECtHR, *Aydin v. Turkey*, *supra* note 105, §103.
[107] *Ibidem*. See also: ECtHR, *Aksoy v. Turkey*, *supra* note 25, § 98; ECtHR, *Menteş And Others v. Turkey*, App. No. 23186/94, 28 November 1997, § 89. Available at: http://hudoc.echr.coe.int/eng?i=001-58120; ECtHR, *Selçuk and Asker v. Turkey*, App. No. 23184/94 and 23185/94, 24 April 1998, § 96. Available at: http://hudoc.echr.coe.int/eng?i=001-58162; ECtHR, *Tekin v. Turkey*, App. No. 22496/93, 9 June 1998, § 66. Available at: http://hudoc.echr.coe.int/eng?i=001-58196.
[108] R. Aldana-Pindell, *supra* note 9, 666.
[109] ECtHR, *Hugh Jordan v. the United Kingdom*, App. No. 24746/94, 4 May 2001, § 3. Available at: http://hudoc.echr.coe.int/eng?i=001-59450.
[110] *Idem*, § 3.

involvement of victims and their next to kin in investigations. The Court interpreted article 2 of the ECHR to require "a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory",[111] because, in cases where authorities investigate a use of lethal force, it is "essential maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."[112] Although the degree of public scrutiny required may well vary from case to case, nevertheless the Court maintained that in all cases "the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."[113]

In the case *Paul and Audrey Edwards v. the United Kingdom*,[114] the ECtHR specified that the legitimate interests of victims in the criminal proceedings is a rationale for victims' involvement in criminal investigation and subsequent criminal prosecution because it is grounded on "their close and personal concern with the subject matter of the inquiry (…)."[115] These statements by the European Court are very relevant for several reasons. First of all, the Court expressly conferred to victims and their next of kin the right to take part to the investigatory proceedings for alleged violation of the right to life, since it is a necessary requirement of the States' duty to protect the right to life as established in Article 2 of the ECHR. Second, the Court stated that the rationale for victims' right to participate in criminal proceeding is grounded in their legitimate interests and, of course, in the legitimate interests of the victims' next to kin. Last, but definitely not least, it is pivotal to remark that the ECtHR has recognised that victims' rights within investigatory proceedings for alleged violation of the right to life, has to be acknowledged by those States, where the criminal justice system is based on the common law tradition. Hence, the victims and their next of kin right to participate to the investigations into alleged violation of the right to life and subsequent criminal proceedings, it is a necessary requirement of

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[111] ECtHR, *Hugh Jordan v. the United Kingdom*, *supra* note 109, § 109.
[112] *Idem*, § 108.
[113] *Idem*, § 109. See also: ECtHR, *Kelly and Others v. the United Kingdom*, App. No. 30054/96, 4 May 2001, § 98. Available at: http://hudoc.echr.coe.int/eng?i=001-59453; ECtHR, *McKerr v. the United Kingdom*, App. No. 28883/95, 4 May 2001, § 115. Available at: http://hudoc.echr.coe.int/eng?i=001-59451; ECtHR, *Shanaghan v. the United Kingdom*, App. No. 37715/97, 4 May 2001, § 92. Available at: http://hudoc.echr.coe.int/eng?i=001-59452.
[114] ECtHR, *Paul and Audrey Edwards v. the United Kingdom*, App. No. 46477/99, 14 March 2002. Available at: http://hudoc.echr.coe.int/eng?i=001-60323.
[115] *Idem*, § 84.

the States' duty to protect the right to life, which is applicable to States based on civil law and common law criminal justice system.[116]

The ECtHR has explored to what extent victims can exercise their rights within the investigations and subsequent criminal proceedings. In the case of *Kelly and Others v. the United Kingdom*,[117] the Court limited the victims' access to police reports and, more generally, to investigative materials because such disclosure may involve sensitive issues with possible prejudicial effects to private individuals or other investigations. Victims' access to investigative materials during the investigation stage cannot be regarded as an automatic requirement under Article 2, nevertheless, victims' access has to be granted in other stages of the available procedures.[118]

With regard to the disclosure of investigatory material and, specifically, witnesses' statements, the Court affirmed that the non-disclosure of such statements places the victims and his/her family at a disadvantage. The impossibility to have access to the witnesses' statements prejudiced the ability of the applicants to participate in the inquest and contributed to long adjournments in the proceedings.[119] The European Court specifically considered that families' lack of access to witness statements before the appearance of the witness placed them at a disadvantage in terms of preparation and ability to participate in questioning.[120] Most importantly, the Court held in *McKerr v. United Kingdom*[121] that the invocation of 'public interest immunity' to prevent the posing of certain questions or the disclosure of certain documents that were material to the investigation also hindered an effective investigation.[122]

In the case of *Kelly and Others v. the United Kingdom*, the European Court also criticised the British criminal justice system for not requiring the prosecutor to justify the decision not to prosecute and for not subjecting such decisions to judicial review. The ECtHR established that, in the event that the prosecutor did not provide a reason to his/her decision not to prosecute, the lack of reasons for such a decision

[116] J. C. Ochoa, *supra* note 3, 124.
[117] ECtHR, *Kelly and Others v. the United Kingdom*, *supra* note 113,
[118] *Idem*, § 115.
[119] *Idem*, §§ 128-136.
[120] *Idem*, § 128. See also: ECtHR, *Hugh Jordan v. the United Kingdom*, *supra* 109, § 300.
[121] ECtHR, *McKerr v. the United Kingdom*, *supra* note 113.
[122] *Idem*, § 151.

denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision.[123] Therefore, the European Court held that the lack of reasons for the Prosecutor's decision not to prosecute cannot be compatible with the requirements of Article 2.[124]

6.4.2. Victims' right to a fair hearing in criminal proceedings.

As the cases against Turkey and UK have expanded the significance of Article 2 of the ECHR to include victims' rights, the ECtHR also began to explore the inclusion of the concerns of victims in the criminal justice system in its interpretation of Article 6(1) of the ECHR,[125] which had previously been interpreted as protecting defendants' rights exclusively. The European Court interpreted very restrictively the said legal principle formulated in Article 6(1) though. Despite the jurisprudential advancements with regard to victims' right to participate to the investigations into alleged violation of the right to life, the ECtHR held a narrow interpretation of the expression "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing" contained in Article 6(1) of the ECHR. The scope of the fair hearing right encompasses almost exclusively those rights characterised by a private nature and, more specifically, by a pecuniary content.[126] In other words, the view of the ECtHR is that in those States where victims enjoy the right to participate in criminal proceedings by mean of the institution of the *partie civile*, victims are granted the fair hearing right in criminal

[123] ECtHR, *McKerr v. the United Kingdom*, *supra* note 113, § 117.
[124] *Idem*, § 118.
[125] Article 6(1) of the ECHR, "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."
[126] J. C. Ochoa, *supra* note 3, 156. See also: ECtHR, *Editions Périscope v. France*, App. No. 11760/85, 26 March 1992, § 33-44. Available at: http://hudoc.echr.coe.int/eng?i=001-57790; ECtHR, *Benthem v. The Netherlands*, App. No. 8848/80, 23 October 1985, § 36. Available at: http://hudoc.echr.coe.int/eng?i=001-57436.

proceeding only whether the proceedings are determining for the compensation for damages they suffered as result of the crime.[127]

This orientation of the ECtHR is a consequence of the vagueness surrounding the scope of the right to a fair hearing for victims in criminal proceedings, as it has been outlined by the wording of Article 6(1). However, despite the little guidance of Article 6(1), the operation of the right to a fair hearing in criminal proceedings for victims of gross violations of human rights in those proceedings not related to the compensation for damages can be grounded on a systematic interpretation of the case law of the ECtHR on several related matters.

In first place, such a restrictive view of the right to a fair hearing is not consistent with the orientation of the case law of the ECtHR analysed in the previous section. The Turkish and British cases held that victims' participation in criminal investigations is a States' procedural requirement in cases dealing with the violation of the right to life regardless of whether the victims' participation is decisive for compensation for damages.[128] The ECtHR clarified this point in the case *Slimani v. France*.[129] The Court, in confirming that an investigation to be effective has to involve in the procedure the victim's next-of-kin to the extent necessary to safeguard their legitimate interests, specified that when the authorities start an investigation of their own motion, the deceased's next-of-kin should automatically be involved in it.[130] It entails, therefore, that, once the authorities start the investigation, victims and their next to kin have the right to be involved in criminal proceeding without the need to file a complaint and join the procedure as *partie civile*, or in other words, regardless the pecuniary nature of the action. In this regard, the ECtHR do not provide a rationale for conferring to victims the right to a fair hearing in the investigation stage regardless the pecuniary feature, while in the following stages of the criminal proceeding victims can enjoy such right only if their participation exclusively aims at determining compensation.

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[127] ECtHR, *Perez v. France*, App. No. 47287/99, 12 February 2004, § 70. Available at: http://hudoc.echr.coe.int/eng?i=001-61629; ECtHR, *Antunes Rocha c. Portugal*, App. No. 64330/01, 31 May 2005, § 43. Available at: http://hudoc.echr.coe.int/eng?i=001-69174.

[128] J. C. Ochoa, *supra* note 3, 127.

[129] ECtHR, *Slimani v. France*, App. No. 57671/00, 27 July 2004. Available at: http://hudoc.echr.coe.int/eng?i=001-61944.

[130] *Idem*, § 47.

A second relevant pitfall is the concept of victims' legitimate interests in criminal proceedings, as it has been outlined by the case law against Turkey and UK analysed in the previous section of this chapter. In the case of *Paul and Audrey Edwards v. the United Kingdom*,[131] the Court interpreted victims' personal interests as a rationale for victims' involvement in criminal investigation, because such interest is based on "their close and personal concern with the subject matter of the inquiry (…)."[132] This interpretation of victims' personal interests should broaden the scope of the right to a fair hearing in criminal proceedings, because the wording use in the said case goes beyond a complaint for compensation for damages.

Thirdly, in several cases, the ECtHR seemed to deny the narrow scope of the fair hearing principle. This strand of decisions has interpreted States' obligation to comply with Article 6(1), as a requirement of instances related to the determination of rights enshrined in the ECHR, which do not involve a pecuniary feature. Specifically, ECtHR acknowledged the States' obligation to guarantee the fair hearing right to victims in disputes involving the right to liberty, the right to a good reputation and the right to a family life.[133]

In regard to the right to liberty, in the case *Golder v. the United Kingdom*,[134] Golder was a prisoner who was refused permission by the Home Secretary to consult a solicitor with a view to bringing libel proceedings against a prison officer. The applicant lodged a complaint under Article 6(1) of the ECHR contending that the refusal of the Home Secretary to permit him to consult a solicitor was in violation of his right to access to justice. The ECtHR stated that there is an overlap between the expression "in the determination of his civil rights (…) everyone is entitled to a fair (…) hearing" contained in Article 6(1) and the notion of right to an effective remedy, by Article 13, according to which of "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy rights."[135] Although the right of access to courts was not expressly stated in art 6(1), it formed an aspect of the basic right contained in the article. The principle whereby a civil claim should be capable of being submitted to a judge ranked as one of the

[131] ECtHR, *Paul and Audrey Edwards v. the United Kingdom*, *supra* note 114.
[132] *Idem*, § 84.
[133] J. C. Ochoa, *supra* note 3, 128-129.
[134] ECtHR, *Golder v. the United Kingdom*, *supra* note 33.
[135] *Idem*, § 33.

universally recognised fundamental principles of law. Accordingly, Article 6(1) secured to the applicant the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. It followed that in denying the applicant access to the courts, there had been a violation of art 6(1).

Concerning the right to good reputation, in the case *Fayed v. the United Kingdom*,[136] the Court established that, despite the lack of the of the pecuniary character, the right to good reputation was included in the expression "in the determination of his civil rights (…) everyone is entitled to a fair (…) hearing", formulated in Article 6(1) of the ECHR.[137]

With respect to the right to family life, in cases involving the parents' rights *vis-à-vis* their children, the Court found a violation of the fair hearing principle in a dispute related to the right to family life. In the case *Keegan v. Ireland*,[138] the Court grounded the breach of Article 6(1) of the ECHR on the fact that the applicant did not have any right to challenge the decision on the placement of the child for adoption, either before the Adoption Board or before the courts, nor any standing in the adoption procedure generally.[139] In a similar way, in the case *W v. the United Kingdom*,[140] ECtHR held that the parents' access to their children is a "civil right" under Article 6(1) of the ECHR, since it is a fundamental part of the right to a family, even though this right does not any pecuniary aspect.[141]

Now it can be argued that the above-mentioned cases have a non-criminal character and that their findings cannot be applied to the criminal justice arena. On the contrary, the Court's position, according to which States are obliged to guarantee the fair hearing right to victims in disputes involving the non-pecuniary rights, can be also applied to the right to a fair hearing in criminal procedures. The first reason is that the Court did not provide any argument to justify its decision to guarantee the fair hearing right to applicants in disputes involving only the right to liberty, the right

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[136] ECtHR, *Fayed v. the United Kingdom*, App. No. 17101/90, 21 September 1990. Available at: http://hudoc.echr.coe.int/eng?i=001-57890.

[137] ECtHR, *Fayed v. the United Kingdom*, *supra* note 136 §§ 58-61. See also: ECtHR, *Aerts v. Belgium*, App. No. 25357/94, 30 July 1998, § 59. Available at: http://hudoc.echr.coe.int/eng?i=001-58209.

[138] ECtHR, *Keegan v. Ireland*, App. No. 16969/90, 26 May 1994. Available at: http://hudoc.echr.coe.int/eng?i=001-57881.

[139] *Idem*, § 59.

[140] ECtHR, *W v. the United Kingdom*, App. No. 9749/82, 8 July 1987. Available at: http://hudoc.echr.coe.int/eng?i=001-57600.

[141] *Idem*, §§ 77-78. See also: J. C. Ochoa, *supra* note 3, 129.

to a good reputation and the right to a family life. Secondly, criminal proceedings dealing with victims of serious human rights violations, involve the breach of the very fundamental rights which are protect in the ECHR as well.[142] There is no reason why the reasoning applied to the right to liberty, the right to a good reputation and the right to a family life to elaborate participatory rights should not be extended to other serious violations of the ECHR when the opportunity arises. In fact, in more than one decision ECtHR stated, because Article 6(1) aims at forbidding the denial of justice, the right to fair hearing ranks as one of the universally recognised fundamental principles of the rule of law.[143] Consequently, based on the argumentations explored, victims of serious human rights violation should enjoy the fair hearing right, under Article 6(1) of the ECHR, within the criminal proceedings, without regard if their participation is connected to the compensation for damages as a consequence of the crime.

6.5. A lesson for the ICC.

The previous sections of this chapter have appraised the developments at the level of regional human rights courts with regard to the rights of victims in judicial processes, with particular emphasis on criminal justice processes. It is clear that the changes to the role of victims in the criminal process have been one part of a larger, more profound transformation of criminal justice. From the approaches of the IACtHR and ECtHR to victims' rights in criminal justice processes the ICC can draw relevant lessons. To begin with, the case law elaborated by the IACtHR and ECtHR can represent a valid contribution to enhance the expressivist approach to victims' participatory rights within the criminal process. Secondly, this section will appraise whether, and to what extent, the developments by the IACtHR and ECtHR can impact the call for greater rights for victims in the international criminal justice system.

6.5.1. The expressivist value of the victims' right to remedy.

Due to the fact that the history of the South-American States has often been turbulent with many instances of civil unrest, much of the cases adjudicated by the IACtHR

[142] J. C. Ochoa, *supra* note 3, 158.
[143] ECtHR, *Golder v. the United Kingdom*, *supra* note 33, §§ 34-35.

dealt with state commission of torture, murder, and forced disappearances. Against this background the evolution of the jurisprudence of the IACtHR on the victims' right to access to and participation in criminal proceeding has been clearly marked by the Court's battle against impunity. In particular, the Court's broad mandate with respect to remedies as previously discussed,[144] by endorsing victims' right to truth, seemed to recognise that it would be too narrow to constrain the goal of criminal justice to the identification, prosecution and punishment of the perpetrator of gross violations of human rights. The analysis of the case law of the IACtHR provides values that can be interpreted as responding to the expressivist dimension of the criminal justice system, therefore, going beyond the traditional retributivist model.

The IACtHR acknowledged that, due to the serious nature of the violation of human rights suffered by the victims, the criminal proceeding should also contribute to the ascertainment of the truth, by providing a narrative of the events and to convey a message of denunciation and repudiation of those heinous infringements. The joint reading of the legal justifications for victims' right to access to and participation in criminal proceeding indicates that the Court considered victims fundamental to achieve this goal. In fact, by rooting victims' right to access to and participation in criminal proceeding on the victims' right to truth, to remedy and to a fair hearing reflects the view of the IACtHR that victims' voice contributes to the enhancement of the quality of the narrative, carrying on an effective prosecution of perpetrators and putting an end to impunity. Thus, the mechanism for victims' access to and participation in criminal proceeding developed by the IACtHR can be interpreted as reflecting the expressivist framework of the criminal justice system in particular with regard to the victims' role in criminal proceedings.

Differently from the context in which the IACtHR operates, the deep-rooted culture of human rights in most of Europe limited the ECtHR caseload relating to the category of cases of gross human rights violations (Turkey and United Kingdom being the main sources). Compared to the jurisprudence of the IACtHR, the case law of the ECtHR represents a much less elaborated body of jurisprudence on the rights of victims of serious violations of human rights. Although the idea of an ends focused process of justice aimed to fight impunity and effectively provide an

[144] See sections 6.3. and 6.4. of the present chapter.

impartial history in judgments is marginally developed by the ECtHR, some key elements of the expressivist paradigm can be traced in the ECtHR's elaboration of the rights of victims of serious violations of human rights.

According to the ECtHR, because of the serious nature of the violations of the right to life and prohibition of inhumane treatment, the criminal process should to express rejection of any appearance of collusion in or tolerance of those criminal conducts. Specifically, the European Court recognised that the criminal process can play the important function of imbuing the general public with core values and with the faith in the rule of law. Additionally, given the importance of the rights to life and humane treatment, the ECtHR read the right of victims to an effective remedy as requiring States not only to undertake investigation and prosecution, but also to grant effective access to the process for victims. The European Court has held that victims' rights in the criminal process have been violated when their participation in the criminal process to ensure public accountability has been curtailed. The rationale is that the public scrutiny that victims would bring to the criminal process could decrease the likelihood the states would wilfully or through omission taint the prosecution in favour of the accused. This point is particularly important because the Court acknowledged that victims have legitimate interests in the criminal proceedings. In this orientation of the ECtHR, it is possible to recognise features corresponding to the expressivist model of criminal justice, since the rationale for victims' involvement in criminal investigation and subsequent criminal prosecution lies in their close and personal concern with violation at stake. Victims have personal interests in participating in criminal trials, as they can express the condemnatory message when the States' institutions of justice are unable or unwilling to prosecute.

In conclusion, the decisions of the IACtHR and ECtHR have evolved to consider effective prosecutions an essential part of the remedy states must guarantee victims of right to life or humane treatment violations. States not only have a duty to the public but also to the victims to prosecute grave human rights abuses. Victims' participation could improve the public's identification with the plight of victims, because the more societies accept the justificatory story for the atrocities, the greater prosecutions is less likely. The IACtHR and ECtHR have begun to require States to grant victims standing to meaningful participation, since they espouse the idea that

only the effective prosecution of human rights violations will yield the goals of truth and justice and prevent future violence and further victimisation.

6.5.2. The influence of the case law of the IACtHR and ECtHR in the international criminal process.

Apart from conclusions reached in the discussion in the preceding section, the case law relating to key entitlements in relevant human rights instruments as elaborated by the IACtHR and ECtHR is relevant to the ICC victims' regime in several specific ways. Case law from the IACtHR and ECtHR has influenced the decision to provide participatory rights for victims in the ICC, since over the past two decades this case law

> has developed to create norms that respond to many of the concerns expressed by surviving human rights victims about their exclusion from the criminal proceedings, especially when states rampantly refuse to comply with their duty to prosecute.[145]

The substantial jurisprudence relevant to victims relates not only to their interpretation of the right to access to justice or the right to be heard and the right to an effective remedy, but also to other key rights (such as the right to life and personal integrity), the violation of which is considered serious and may in itself amount to an international crime (such as torture), or relate to elements constitutive of ICC crimes. This case law is significant to the theory and content of victims' rights, as it can respond to several concerns raised by the ICC participation regime, including nature, extent of participation as response to victims of mass atrocity.

In general, the IACtHR and ECtHR have interpreted certain provisions in comprehensive human rights treaties as creating victims' right to prosecutions. These provisions include those that codify the right to access justice or to be heard and the right to obtain an effective remedy. The case law of the IACtHR and ECtHR specifically supports two propositions: State's duty to prosecute serious crimes is also a private right that is owed to victims, and the participation of victims is necessary to enforce this private right. With regard to the first instance, the

[145] R. Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes', *Vanderbilt Journal of Transnational Law* 35 (2002), 1413.

jurisprudence affirms the duty of states to prosecute perpetrators of violent crime as part of an effective remedy due to victims. This duty finds expression in the mandate of the ICC and the obligation the Rome Statute requiring states to prosecute perpetrators of genocide, war crimes and crimes against humanity.

The second development in victim rights case law is the emerging principle that victims should have greater access to the criminal process to ensure that criminal prosecutions are effective and that States are accountable to victims. The case law of the IACtHR and ECtHR asserts the right of individuals whose basic entitlements to life and to bodily integrity are violated to participate in related criminal proceedings to articulate their concerns and to learn the truth about criminality. This instance is particularly relevant, because the case law of these human rights bodies orientates the manner in which the ICC can enhance victims' rights, as they have articulated with clarity the right to participate and why victims should have access to proceedings.

In particular, the case law of the IACtHR and ECtHR put emphasis on victims' participation in the investigation stage of the preceding. Victim participation in investigations has been established by the IACtHR and ECtHR as a fundamental part of ensuring its effectiveness and countering impunity.[146] This position is justified on the ground that the participation of victims as independent parties can provide oversight of prosecutorial discretion in the selection of perpetrators and charges, which can more accurately identify those responsible. The role of victims in this stage is necessary to safeguard their interests, as well as to provide public scrutiny and accountability. The IACtHR and ECtHR found that victims' participation as a vital part of ensuring an effective investigation is necessarily connected to the rule of law in ensuring individuals have a right to review decisions.

A closer look to the jurisprudence of the IACtHR shows that the Convention has been interpreted to accommodate developing norms on victims' participation. The relevant case law discloses several key entitlements of victims: the affirmation of a victim's right to an effective prosecution; victims' right to participate in proceedings; victims' right of standing to monitor the state's actions and to advance their interests; and the right to truth related to duty to investigate. The Inter-American Court has determined that victims in an investigation should have

[146] See sections 6.3.1. and 6.4.1. of the present chapter.

"substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation."[147] The jurisprudence of the Inter-American Court not only reinforces the stand represented by the ICC that certain serious human rights violations – those that amount to international crimes – must attract criminal sanction, but also holds that victims' participation would serve an accountability function.

In a similar way, the ECtHR has acknowledged that investigations are a significant point in the determination of truth and justice, since the selection of charges and perpetrators for trial takes place at this stage of the proceeding. According to the jurisprudence of the ECtHR, the duty to conduct an effective investigation has a bearing on victims' rights to participate, attaching these procedural rights to fundamental rights, such as the right to life. Victims' right to participate is facilitated by effective right to obtain information regarding measures taken by the state after notice of violation. To ensure their meaningful participation, this includes the modalities of victims being informed of a decision not to prosecute, to request information about the investigation or trial, to have access to the investigation and case file, including witness statements, and to present their interests. Issues relating to the right to be informed are easily some of the most difficult in the ICC, where the prosecutor is likely to plead confidentiality and the integrity of investigations among other reasons to prevent victim access to the files. In this view, the rationale and extent of the right to be informed established in the decisions from the European Court can inform the way in which the ICC applies the said victims' right. The ECtHR has noted that the right to access the record was not an automatic one, and that it may happen later in the proceedings if the State can demonstrate that the contents must be kept confidential until later stages of the prosecution to safeguard the efficiency and efficacy of the procedures. The ECtHR argued that the justification for making it a conditional right is in the concerns that may arise to access to sensitive documents and protect the defendants' rights.

[147] IACtHR, *Villagrán-Morales et al. v. Guatemala*, *supra* note 62, § 227. See section 6.3.2.2. of the present chapter.

The ICC found persuasive the trend in cases from the IACtHR and ECtHR to grant victims the right to participate in proceedings during the investigation stage.[148] In particular, the Pre-Trial Chamber I noted that the ICC had been created as a result of "a debate that took place in the context of a growing emphasis placed on the role of victims by the international body of human rights law and by international humanitarian law".[149] For example, in the same decision, the Pre-Trial Chamber I relied on rulings from the IACtHR and ECtHR in making its central determination of conferring a general right to participate in an ICC investigation, as it acknowledged that the goal pursued by those Courts was to grant victims an independent voice and role.[150] In line with the jurisprudence established by the human rights courts, the Pre-Trial Chamber I recognised that victims are important in an investigation "to clarify the facts and to punish the perpetrators of crimes",[151] and that their participation is not inconsistent or prejudicial to the "integrity and objective of the investigation" nor to "efficiency and security".[152]

Apart from stating why victims should have access to and play a role in the criminal process, with an emphasis on the investigation stage of proceedings, the IACtHR and ECtHR have not prescribed the extent that participation should take. It can be argued that this holding back to prescribe modes of participation should be considered as indicative of the deference of the IACtHR and ECtHR to national systems, which have specific procedure laws applicable in Member States in terms of victims' role in the criminal process.[153]

In general, in relation to the victims' participation at trial stage both the IACtHR and ECtHR held that such participation can offer victims the opportunity to have their interests considered by the Court in relation to clarifying the facts and determining the responsibility of the accused. Victims are afforded an opportunity to

[148] For a discussion on the case law of the ICC on victims' right to participate in the investigations see section 7.2. of chapter VII.
[149] *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public Redacted Version), 19 January 2006, Doc n. ICC-01/04-101-tEN-Corr, § 50. For a further analysis of this decision see section 7.2.1. of chapter VII.
[150] *Idem*, §§ 50-54.
[151] *Idem*, §§ 57-58.
[152] *Idem*, §§ 58-59.
[153] R. Aldana-Pindell, *supra* note 9, 668.

advance their own interests. As stated in the discussions above,[154] victims have the right to articulate their personal interests before the Court or do so through a designated legal representative. Victims' rights to participate at trial stage and to be heard to obtain an effective remedy are consistent with the type of victim standing in the criminal process of the ICC Statute that acknowledges victim participation is a necessary part of the ICC achieving its goals of ending impunity and delivering justice to victims under the broader heading of accountability. With regards to victims' right to justice and truth, the judges have emphasised the role of victims in helping a Chamber to determine it.[155]

Despite the IACtHR and ECtHR have articulated only the general principle that victims must have full access and standing to participate in all the phases before courts investigating human rights violations, when the right to participate is understood within the context of these two human rights courts' jurisprudence on the more developed right to truth and of an effective prosecution, it could be argued that victims must have an active role in criminal processes in which such violations are addressed. Moreover, if the ICC is the highest mark for victims of international crimes, it should be striving to ensure procedural best practices with the transparency of its investigations through the participation of victims as independent parties.

6.6. Conclusion.

This chapter has appraised the developments at the international level with regard to the rights of victims in judicial processes. Despite the fact that no explicit rights of victims are provided for in the regional human rights conventions, international human rights bodies have developed an assortment of rights for victims of crime together with corresponding obligations for states.

Regional human rights mechanisms, as can be discerned from the jurisprudence of the IACtHR and ECtHR, are central to the elaboration of victims' rights to participation in criminal proceedings. More importantly, the interpretative clause of Article 21 of the Rome, requiring the ICC's interpretation and application of treaties, the principles and rules of international law to be "consistent with internationally recognized human rights" means that the ECHR and ACHR, as

[154] See sections 6.3.2. and 6.4.1. of the present chapter.
[155] For a further discussion on this topic see sections 7.3. and 7.4. of chapter VII.

interpreted by the respective courts, serve as the framework of principles within which the interpretation and application of the ICC provisions should take place.

The case law by the IACtHR and ECtHR relating to key elements underpinning victims' rights in the criminal proceedings is relevant to the ICC victims' regime in several specific ways. Both the IACtHR and ECtHR held the duty of states to prosecute perpetrators of violent crime as part of the victims' right to an effective remedy. This duty finds expression in the mandate of the ICC to prosecute perpetrators of genocide, war crimes and crimes against humanity.

The Courts acknowledged that, because of values that their respective Conventions protect, human rights violations involve breaches of rights that have a special status. Thus, the criminal proceeding should serve to reaffirm the importance that society places on those serious infringements. It can be maintained that the State's obligation to undertake an effective investigation is informed by the conceptual application of the expressivist values, since criminal proceeding becomes the mechanism to express disavowal and condemnation of those conducts violating human rights to reaffirm the importance of human rights and educate the public to the respect of those rights.

The case law of the IACtHR and ECtHR also held the right of the victims, whose basic rights to life and of prohibition to inhuman treatment are violated, to participate in related criminal proceedings to express their concerns and to learn the truth about the events. The case law of the IACtHR and ECtHR have articulated two basic rights of victims: the right to access to justice to obtain an investigation and the right to participate in criminal proceedings. As regards the first victim's right, both the ECtHR and IACtHR hold the right of victims and their next to kin to be involved at the investigation stage as condition to fulfil victims' right to an effective remedy. Victims have the right to complain and resort the administration of justice to obtain an impartial, independent investigations by the State's authorities within a reasonable time, to actively participate to the investigations, to be informed about its developments and to be heard.

The case law on the right of victims to participate in criminal proceedings has been more controversial. The IACtHR broadly acknowledges the right to victims to take part to the criminal proceeding and grounds it on the fair hearing principle, the

right to judicial protection and victims' right to truth. On the contrary, the orientation of the ECtHR set a condition *sine qua non* to allow victims to participate as a civil party in criminal proceeding: such participation has to be determining for victims' compensation. It has been argued, though that if one of the parameters to guarantee the right to a fair hearing to victims is that the criminal proceeding must deal with the determination of a right enshrined in the ECHR, the fair hearing right should be granted to victims regardless the proceeding is criminal or not.

This system of legal bases advanced by the ECtHR and IACtHR to justify the role of victims can be interpreted as consistent with the framework of the expressivist function of the trial. In view of the seriousness of such infringements suffered by the victims, the system of criminal justice should not only seek to punish the perpetrators, but also to ascertain the truth, by providing a narrative of the events. The victims' right to access to and participation in criminal proceeding reflects the ECtHR and IACtHR view that victims' voice contributes to the enhancement of the quality of the narrative, carrying on an effective prosecution of perpetrators and putting an end to impunity.

Although the practice of the ECtHR and IACtHR guarantee access to and participation in criminal proceedings to victims on the ground of a systematic interpretation of the rights to an effective remedy and to a fair hearing, the IACtHR does not seem to prescribe what 'form' or 'modes' such participation must take. Conversely, the ECtHR advanced that the right to an effective remedy should include the right to submit a complaint to the competent authorities, the right to have an effective and impartial investigation carried out, the right to be informed of the conduct of the procedures and of major decisions taken in this procedure, the right to be present at the trial and to be heard at the key stages of the procedure, the right to offer and examine evidence and to challenge their admissibility or relevance. On this account, the jurisprudence of the ECtHR seems more helpful in the elaboration of the broad and multifaceted right of victims to participate under the Rome Statute and the RPE. The next chapter will discuss the operationalisation of various elements of this right as contained in the Rome Statute and RPE.

CHAPTER VII

Expressivism and the Participatory Rights of Victims in the Jurisprudence of the International Criminal Court.

7.1. Introduction.

This chapter looks at the case law of the ICC on victims' participation in the proceedings, paying specific attention to Article 68(3) of the Statute, with the intention of investigating whether and to what extent in the decisions by the ICC Chambers it is possible to identify elements that can be interpreted as envisaging the expressivist framework. To fully understand the nature of victims' participation, this chapter seeks to explore to what degree the normative value of the trial (aiming to provide a narrative and its pedagogical dissemination) impacts and reshapes not only the procedural rights of victims, but also other relevant provisions, entailing the well-recognised defence's right to a fair trial, the fact-finding mandate of the Court and the prosecutor's law enforcement functions.

One of goals of this chapter is, thus, to examine whether the Chambers has contributed to developing, through the lens of the expressivism, a common language that reshapes victims' participatory rights, the defendant's right to a fair trial, the fact-finding mandate of the Court and the prosecutor's law enforcement functions, going beyond the conflicting languages of the adversarial and inquisitorial systems and allowing to all the provisions to coherently fit together. The analysis of the case law of the ICC is focused on discussing those specific features related to the roles of the victims, judges, prosecutor and defendants, which the previous chapters have identified as founding elements of the common grammar.[1]

The analysis of the case law of the ICC looks at the participatory rights of victims at the investigation and pre-trial stage and at victims' right to express views and concerns at the trial stage. What is at stake here is to understand whether in the decisions by the ICC Chambers concerning the implementation of Article 68(3) of the Statute, the arguments advanced by the Court can be read as connected to values which envisage a model of participatory rights for victims informed by the didactic

[1] See sections 5.5. and 5.6. of chapter V.

function of the trial. As Article 68(3) provides for victims' participation "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial", the analysis of the case law of the ICC looks into how the interpretation of victims' participatory rights successfully manages to achieve a fair balance between the competing rights of the accused. This chapter explores to what extent the case law of the ICC, by empowering victims to contribute to the enhancement of the narrative at the pre-trial and trial stages, provides a model of participation able to smooth the rough edges off the adversarial nature of the trial, but at the same time, safeguard the principle of equality of arm for the accused.

Secondly, this chapter goes over the Court's right to request victims to present evidence and to challenge the admissibility and relevance of evidence submitted by the parties. It considers the criticalities emerged at the trial stage, especially focusing on the extent of victims' possibility to lead evidence in respect of the guilt or innocence of the accused. As concerns the modalities of participation of victims in the proceedings, the discussion, therefore, focuses on the possibility for victims to lead evidence at almost the exclusion of other participatory rights, because this issue appears particularly sensitive in the light of two important reasons. First, it is not clear the scope of Chambers' powers, neither whether they can autonomously require new evidence nor if participants can exercise the same request when judges have to assess a specific submission. Secondly, the ICC Statute does not give indication on the modalities to balance the victims' active role in the proceedings as concerns evidentiary submissions with the Defence's right to receive disclosure of all evidence to be presented at trial. This chapter reconsiders whether the right of victims to make submissions on evidentiary issues, particularly if to present and challenge evidence, risks affecting the essential guarantees of the accused. Ultimately, this specific modality of victims' participation requires a more judge-led procedure at least in the phase of submitting evidence, yet keeping in mind the need to find a balance between the civil law institution of victims' participation and the adversarial character of ICC litigation. In this perspective, the prerogative of the Chambers represents the most powerful element of the common grammar developed through adoption of the conceptual lens of the expressivist goals of the trial. The evaluation of the case law of the ICC on this topic investigates whether the

Chambers acknowledge that the expressivist paradigm is able to fulfil the aims of the provision of the ICC establishing a truth-finding mandate for the Court. The discussion aims to assess to what degree the chambers' interpretation of the fact-finding power of the Court has reduced the tension between the adversarial and inquisitorial systems. In other words, what is under investigation is the willingness of the Chamber to provide a model which, by allowing victims to present evidence, enhances the victims' ability to contribute to the didactic function of the trial, as envisaged by expressivism, with due regard for the accused's right to a fair trial.

The ICC faces the challenge of making the mechanism of participation accessible to a wide number of victims; therefore, it is relevant to explore the way the Chamber attempted to solve this issue. The case law of the ICC developed two modalities of participation: the case-by-case approach to victims' exercise of their participatory rights and the victims' common legal representation. The discussion on these two modalities is extremely useful to illustrate how the Chambers deal with the need to guarantee participator rights to a wide number of victims and safeguard the expeditiousness of the trial. The analysis of the case law aims at considering if the case-by-case approach and the victims' common legal representation, as developed by the Chambers, are able to fulfil the normative value of expressivism and offer a valid model for providing participatory rights to a broad number of victims.

The jurisprudence of the ICC on the right of victims to participate in the proceedings provides a valuable insight into the Chambers' perceptions of the overarching purpose of victims' participation, but it is particularly vast. Since the ICC started operating the number of victims applying to the Court has increased from 267 applications received in 2006, to 1,491 in 2014. In total – from 2006 to 2016 – more than 17,000 applications for participation have been received.[2] According to the *Second Court's report on the development of performance indicators for the International Criminal Court*, by 2016, 3,957 victims have been accepted to participate at the pre-trial stage, while 8,593 victims participated at the trial stage

[2] Assembly of States Parties, Report of the Bureau on the Study Group on Governance, Annex I, Report on Cluster D(1): Applications for Victim Participation, ICC-ASP/14/30, 16 November 2015, 24. Available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-30-ENG.pdf.

before the Court.[3] Given that, the analysis of this chapter narrows down its focus on three cases conducted before the ICC. It firstly analyses the *Prosecutor v. Thomas Lubanga Dyilo case*, which, being the first case tried by the ICC, set the first model of victims' participatory rights in the investigation, pre-trial and trial stages of the proceedings. Then the analysis of the case law of the ICC moves to the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui case* and the *Prosecutor v. Jean-Pierre Bemba Gombo case*. The reason for choosing to analyse these two cases is twofold. In the first place, in adjudicating these cases, the ICC Chambers had to face and address similar procedural issues with concern to the victims' participatory rights. Therefore, the study of these two cases aims to highlight whether they confirm the mechanisms of victims' participation established in the *Lubanga case*, or if they introduce elements of departure. Secondly, at the *Katanga and Ngudjolo case* and the *Bemba case* a higher number of victims (compared to the *Lubanga case*), have been allowed to participate by the ICC Chamber, thus, it is central to understand to what extent (if any) this has affected the manner in which the chamber have interpreted the victims' participation regime. This second reason is closely linked with the first one, as the fact that the ICC had to deal with a growing number of victims calls to a special attention on how the Chambers at the *Katanga and Ngudjolo case* and the *Bemba case* accommodated victims' participation, taking in consideration that a broader number of victims participating can endanger the rights of the defendant to a fair and expeditious trial.

This chapter proceeds as follows. The second section will analyse the manner in which each of the three cases has interpreted the scope of victims' participatory rights during the investigation and the pre-trial stage. The subsequent section will look at how in these three cases, the trial Chambers have elaborated the scope of victims' right to express "views and concerns" at trial stage, by, firstly, clarifying the conceptual difference between the victims' right to fairness and the defendant's right to a fair and impartial trial. Secondly, it will critically observe the relationship between the right of the defendant and the rights of victims. The fourth section will compare the interpretations issued by the Chambers with regards to the possibility

[3] Second Court's report on the development of performance indicators for the International Criminal Court, Annex IV, 11 November 2016, 63. Available at: https://www.icc-cpi.int/Pages/item.aspx?name=second-courts-report-of-performance-indicators.

for victims to be requested by the Chambers to present evidence and challenge their admissibility. The fifth section will examine the limitations of two specific mechanisms of victims' participation implemented by the Chambers in the three cases considered in this chapter, namely the case-by-case approach and the Common Legal Representation. These modalities have to face the problem of making the mechanism of participation accessible to a wide number of victims.

7.2. The right of victims to participate at the investigation and pre-trial phase.

This section will analyse the orientations held by the ICC Chambers in the *Prosecutor v. Thomas Lubanga Dyilo case*, the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui case* and the *Prosecutor v. Jean-Pierre Bemba Gombo case* with concern to the right of victims to participate at the investigation and pre-trial stages of the proceeding.

7.2.1. The case of the *Prosecutor v. Thomas Lubanga Dyilo*.

The *Prosecutor v. Thomas Lubanga Dyilo* (hereafter the *Lubanga case*) was the first case to come before the ICC. Thus, it represented the first opportunity for the ICC to demonstrate its commitment to international justice and most specifically to respect victims' dignity, to give them a voice and to show the extent of victims' participation. Since the beginning of the investigation phase of the *Lubanga case*, the Pre-Trial Chamber I had to face issues concerning victims' access to justice. On the 26th of May 2005, before the arrest of Lubanga, the legal representative of six alleged victims submitted applications to allow the views and concerns of those victims to be presented and considered at the investigation stage, pursuant to Article 68 (3) of the Statute.[4] In its first decision on victims' participation, the Pre-Trial Chamber I was requested to answers three important questions: whether the Rome Statute and the RPE accord victims the right to participate at the investigation stage; whether the conditions of application of Article 68 (3) are fulfilled during the stage of

[4] *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public Redacted Version), 19 January 2006, Doc n. ICC-01/04-101-tEN-Corr, § 23. Available at: https://www.icc-cpi.int/CourtRecords/CR2006_01689.PDF.

investigation and, if so, what modalities such participation should take.[5]

With regard to the first question, the Pre-Trial Chamber I, relying on terminological, contextual and teleological standpoints, concluded that at the investigation stage victims had "a general right of access to the Court."[6] From a terminological perspective, the Pre-Trial Chamber provided a number of examples where Statute's provisions include the stage of investigation within the meaning of the terms "proceedings" and "la procédure".[7] With regard to the contextual argument, the Pre-Trial Chamber observed that paragraph 1 of article 68 – which imposes on the Court the obligation to take appropriate measures to protect victims and witnesses –, refers to the investigation stage and that paragraph 3 of the same article does not contain any explicit exclusion of victims' participation from the investigation stage.[8] The teleological argument presented by the Pre-Trial Chamber held that the application of Article 68 (3) to the investigation stage is consistent with the object and purpose of the victims' participation regime, which ensued from the *dicta* of both the ECtHR and IACtHR. These international bodies of human rights have interpreted the respective provisions on the right to access to a judicial process, as granting victims certain participatory rights at the investigation stage and prior to confirmation of the charges.[9]

In addressing the second issue, the Pre-Trial Chamber I gave leave to victims' participation during the stage of investigation, because the two conditions for such participation, set in Article 68 (3), are fulfilled. Victims' interests are affected in general at the investigation stage, because, even though in this stage the proceedings are not related to specific crimes, the participation of victims can serve to clarify the facts, to identify and punish the perpetrators of crimes.[10] The participation of victims during the investigation stage is appropriate, since it does not *per se* jeopardise the integrity, objectivity, efficiency and security of the investigation.[11] The Pre-Trial Chamber answered the third question by interpreting Article 68 (3) as imposing a twofold positive obligation on the Court vis-à-vis victims: to permit victims to

[5] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 4, § 22.
[6] *Idem*, § 46.
[7] *Idem*, §§ 32-38.
[8] *Idem*, § 45.
[9] *Idem*, §§ 50-53.
[10] *Idem*, §§ 63, 72.
[11] *Idem*, § 57.

concretely and effectively present their views and concerns and to examine them. Specifically, victims can address the Chamber in order to present their views and concerns and to file documents pertaining to the current investigation.[12]

However, this decision by the Pre-trial Chamber's was overruled by the Appeals Chamber, which considered the victims' general right to participate in the investigation ill-founded on several grounds.[13] The wording of Article 68 (3), referring to victims' participation in "proceedings", does not include the investigation stage, which is not a judicial proceeding, but an inquiry conducted by the Prosecutor into the commission of a crime.[14] The Appeals Chamber also rejected the broad concept of victims' personal interests, previously elaborated by the Pre-Trial Chamber I. Victims' personal interests are affected by a specific issue, legal or factual, arising at the stage in hand, rather than by the entire proceeding.[15] Whether the personal interests of victims are affected in relation to particular proceedings will require an assessment on a case-by-case basis.[16] This means that victims can only be allowed to request authorisation to participate in those specific procedural activities that the Chamber identified as having a direct impact on their personal interests. Acknowledging that Article 68(3) grants victims the right to participate in any proceedings jeopardizes the domain and powers of the Prosecutor, as outlined in Article 42[17] of the Statute, which manifestly recognized that the authority to conduct investigations lies in the Prosecutor.[18] Lastly, the Appeals Chamber seems also to contradict article 21(3) of the Statute of Rome, which provides that the Court shall interpret the law in a manner consistent with internationally recognized human rights. In fact, this decision disregarded the standards established by the ECtHR and

[12] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 4, § 71.
[13] *The Prosecutor v. Thomas Lubanga Dyilo*, 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 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial, Appeals Chamber, 19 December 2008, Doc n. ICC-01/04-556, § 3. Available at: https://www.legal-tools.org/doc/dca981/pdf/.
[14] *Idem*, § 45.
[15] *Idem*, §§ 45, 56.
[16] *Idem*, § 28.
[17] Article 42 of the ICC Statute, "The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not see or act on instructions from any external source."
[18] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 13, § 52.

IACtHR, which urge States to ensure an effective remedy to victims and to put end to impunity. That means imposing a twofold obligation on States: to conduct investigations of prosecution of those responsible for violation of human rights and to grant victims full access and the capacity to participate in all the stages of the investigation.[19]

The first decision on victims' participation is particularly encouraging because it emphasised the important role that victims can play from the early stage of a proceeding. The Pre-Trial Chamber I gave victims a general right to participate at the investigation stage, because it acknowledged that in this phase the decisions most important for the victims are made. The decision to open a formal investigation, the choice of the defendants to be prosecuted, the events to be investigated, the confirmation of charges, the admissibility or not of a case all have major consequences for victims' participation in the proceedings.[20] Victims, by presenting their views and concerns and filing documents pertaining to the investigation, fully contribute to shape the narrative and identify and punish the perpetrators. This represents a valid attempt to develop the common grammar by the adoption of the conceptual approach of the expressivist goal of the trial to the regime for victims' participation at the investigation.

On the contrary, the approach of the Appeals Chamber considerably downsized the role of victims, who can still have an input at the investigation stage, but their role is more to inform rather than to participate. The approach of the Appeals Chamber represents a step back for victims' right to participate in the proceedings *per se*. But mainly this decision does not present any argument which can be identified as corresponding to the expressivist value of the international criminal trial, as well as to victims' participation as a feature of the ICC, which contributes to sending a socio-pedagogical message. From a procedural point of view, the Appeals Chamber failed to develop the common grammar between civil law and common law traditions. The position of the Appeals Chamber upholding the role of the Prosecution as the sole organ to conduct investigation represents a more

[19] For a discussion on the case law of the ECtHR and IACtHR see chapter VI.
[20] L. Walleyn, 'Victims' Participation in ICC Proceedings: Challenges Ahead', *International Criminal Law Review* 16(6) (2016), 999; L. Moffett, 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court', *Criminal Law Forum* Vol. 26(2) (2015), 270-271.

common law approach to criminal procedure. This is not to argue that the Prosecutor should not be independent, since a victim-led prosecution would undermine the impartiality of the ICC, but s/he should be accountable when s/he exercises his/her discretionary powers. In this regard, Article 54(1)(c) of the Rome Statute, which requires the Prosecutor to "fully respect the rights of persons arising under [the] Statute", leads to the conclusion that the Prosecutor should balance the prosecutorial discretion with the respect and protection of the rights of victims and defendants.

Victims should be entitled to challenge the Prosecutor's decisions not to prosecute an alleged perpetrator or to limit the charges against an accused and the Court is obliged to examine if the Prosecutor's decisions are legitimate in view of the evidence, victims' interest and fair trial principle. Given that the judges are responsible for reviewing the decisions of the Prosecutor and, if need be, to remedy such decisions, it is hard to uphold that victims' participation at the investigation stage undermines the fairness and impartiality of the proceeding.[21]

A symptom of the limited understanding of this proper role of victims at the investigation stage and, more generally, of the failure of the ICC to envisage a common grammar is portrayed by the narrow approach to charges in the *Lubanga case.* Lubanga was charged with the offence of enlisting and conscripting children under the age of fifteen years and using them to participate actively in both international and not-international hostilities.[22] This showed the commitment of the ICC to condemn and put an end to this kind of heinous crime, but the Prosecutor failed to take into consideration many offences that Lubanga allegedly committed in the Democratic Republic of the Congo. Victims expressed their indignation for the limited set of charges, which did not mirror the events experienced by the victims. Despite the widespread documentation of gender-based crimes, including rape, sexual violence and sexual slavery,[23] such crimes were not effectively investigated in

[21] L. Moffett, *supra* note 20, 273-274.

[22] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, Pre-Trial Chamber I, 3 February 2007, Doc n. ICC-01/04-01/06-803, § 156. Available at: https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF.

[23] Letter from the Secretary-General addressed to the President of the Security Council, Special report on the events in Ituri, Democratic Republic of the Congo, January 2002-December 2003, 16 July 2004, UN Doc. S/2004/573, § 80. Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/573; United Nations General Assembly, Report of the International Criminal Court, UN Doc. A/60/177, 1 August 2005, § 37. Available at https://www.icc-cpi.int/NR/rdonlyres/EDBEBEC0-7896-46EC-9AD6-

the *Lubanga case*. The Prosecutor, based on the prosecutorial discretion, decided to focus on charges of recruitment and use of child soldiers, closing the door to participation of victims of gender-based crimes. As argued in chapter V,[24] the need to harmonise the criminal procedure through the expressivist lens suggests the prosecutor, in the exercise of his/her discretionary powers, acknowledges that victims represent one of the constituencies s/he has to serve.

In a later decision, the Trial Chamber I seemed to broaden the narrow approach to the charges of the Prosecutor, since it affirms that it would have greater consideration of the allegations of rape, sexual violence and sexual slavery for the purposes of sentencing and reparations.[25] This may open to some recognition of the sufferings of victims of gender based crimes, but it is hard to reconcile this opening of the Trial Chamber I with the goal of the provisions of victims' participation of giving a voice to victims in the proceedings.

7.2.2. The case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

With regard to victims' right to participate during the investigation and pre-trial stage, the approach of the Pre-Trial Chamber I in the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (hereafter the *Katanga and Chui case*) marked a positive change compared to the *Lubanga case.* The Pre-Trial Chamber interpreted the aim and scope of Article 68(3) advancing a system of values that can be identified as referable to the conceptual cornerstones of the expressivist function of the trial, going beyond the existing approaches of civil law and common law within the domestic realm.

In the *Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case* of the *Katanga and Chui case,*

7C867F67CF1B/278503/ICC_Report_to_UN.pdf; Assembly of States Parties, Fourth Session, 28 November to 3 December 2005, Report on the activities of the Court, ICC-ASP/4/16, 16 September 2005, § 53; Amnesty International, "Democratic Republic of Congo - Mass Rape: Time for Remedies", Index n. AFR 62/018/2004, 26 October 2004. Available at: https://www.amnesty.org/en/documents/afr62/018/2004/en/; Human Rights Watch, "Seeking Justice: The Prosecution of Sexual Violence in the Congo War", March 2005, 19-20. Available at: https://www.hrw.org/reports/2005/drc0305/drc0305.pdf.

[24] See sections 5.5. and 5.6. of chapter V.

[25] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, Doc n. ICC-01/04-01/06, §§ 630-631. Available at: https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF.

Judge Sylvia Steiner, sitting as a Single Judge for the Pre-Trial Chamber I, rejected the casuistic approach of the Lubanga case, which required a case-by-case analysis to evaluate the relationship between victims' personal interests and a particular procedural step or activity during the proceeding. The casuistic approach caused significant delays in the proceedings, greatly limited the role of victims and, as result, it contributed to the uncertainty in relation to which participatory rights victims can exercise.[26] The Single Judge preferred to opt for a systematic approach, which consisted of two features. Firstly, it entailed the development of the definition of victims' personal interests affected, pursuant to Article 68(3), and, secondly, a clear determination of the set of procedural rights granted to victims at the pre-trial stage.[27] The concept of victims' interests is elaborated through the adoption of the conceptual approach of the expressivist goal to the trial. Judge Steiner acknowledged that

> victims' core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility is at the root of the well-established right to the truth for the victims of serious violations of human rights.[28]

More specifically, Judge Steiner observed that the satisfaction of victims' right to truth through criminal proceedings entailed that their central interests are in the outcome of such proceedings, the clarification of the events that occurred and bridging the potential gaps between the factual findings resulting from the criminal proceedings and the actual truth.[29] Thus, the determination of the guilt or innocence of the defendant "is not only relevant, but it also affects the core interests of those granted the procedural status of victim in any case before the Court, because this issue is closely linked to the satisfaction of their right to justice."[30] It follows that the interests of victims are affected under Article 68(3) in relation to stages of the proceedings, rather than in relation to each specific procedural activity at a given

[26] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Pre-Trial Chamber I, 13 May 2008, Doc n. ICC-01/04-01/07-474, § 48. Available at: https://www.icc-cpi.int/CourtRecords/CR2008_02407.PDF.
[27] *Idem*, §§ 45, 49.
[28] *Idem*, § 32.
[29] *Idem*, § 34.
[30] *Idem*, § 42.

stage of the proceedings, including the pre-trial stage. This specific stage of the proceedings aims to ascertain if "there is sufficient evidence providing substantial grounds to believe that the suspects are responsible for the crimes which they have been charged."[31]

The most relevant contribution of the systematic approach embraced by the Judge Steiner is the formulation of a set of victims' procedural rights, since it envisaged the pre-trial stage as a vehicle for norm expression, which contributes to the important goal of international criminal justice of giving a voice to victims, by providing the legal language to victims. Judge Steiner analysed, in first place, the procedural rights of victim at the pre-trial stage in domestic systems of criminal justice of the Romano-Germanic tradition and their relationship with the rights of the accused and a fair and impartial trial principle. She concluded that the respect of the rights of the accused and a fair and impartial trial was not dependent on the adoption at a national level of a specific model of victims' participation in criminal proceedings, but it depended on the existence of sufficient safeguards to ensure that the defendant's' rights can be satisfied through the relevant national criminal proceedings.[32] Those safeguards required a criminal justice system to be based on a comprehensive investigation, where the Prosecutor investigates the incriminating and exculpatory evidence and the case file created by the investigative body is placed at the disposal of the defence and of those granted the procedural status of victim, after the completion of the investigation.[33] Secondly, she drew heavily on the internationally recognised standards concerning the rights of victims of serious violations of human rights to truth and justice. She observed that the jurisprudence of the European and Inter-American Courts of Human Rights never found that procedural rights of victims in the pre-trial stage constitute *per se* a violation of internationally recognised standards of the rights of the accused and to a fair and impartial trial.[34]

In light of this, Judge Steiner identified six groups of specific procedural rights for victims pursuant to article 68(3) of the Statute.[35] The first group embraced

[31] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* note 26, § 45.
[32] *Idem*, §§ 73-75.
[33] *Idem*, §§ 62-63.
[34] *Idem*, §§52-75.
[35] *Idem*, §§ 126-127.

the right to be notified and to have access, prior to and during the confirmation hearing, to the record of the case kept by the Registry, including to the evidence filed by the Prosecution and the defence and to all filings and decisions contained in the record of the case.[36] The second group conferred upon victims the right to submit observations concerning the admissibility and probative value of the evidence, which the Prosecution and the Defence intend to present at the confirmation hearing and, consequently, the right to examine such evidence.[37] The third group concerned the victims' right to examine witnesses at the confirmation hearing.[38] The fourth group included the right to attend all public and closed hearings leading to and during the confirmation hearing, with the exception of those hearings held *ex parte*.[39] The fifth group entitled victims to participate through oral motions, opening and closing statements at the confirmation hearing, responses and submissions to the hearings in which they have the right to attend.[40] The last group of victims' participatory rights included the right to file written motions, responses and replies concerning all matters other than those in which the victims' intervention has been excluded by the Statute and the Rules.[41]

This decision by the Single Judge of the *Katanga and Chui case* had many credits. It granted victims a meaningful role in criminal proceedings since the pre-trial stage and, by adopting the lens of the expressivist framework of criminal justice, the Single Judge drew the key elements of a procedural grammar that bridges the gap between the common law and civil law systems. The formulation of a set of procedural right for victims' participation at the pre-trial stage guarantees the legal certainty to all parties and participants, but it also ensure that victims' role is consistent with the main features of the pre-trial phase and meaningful, and not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[42] This approach by Single Judge helped to strengthen the legitimacy of the court proceedings in the areas affected by the crimes and increase the effectiveness

[36] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* note 26, §§ 127-129.
[37] *Idem*, § 134.
[38] *Idem*, §§ 137-138.
[39] *Idem*, §§ 140.
[40] *Idem*, § 141.
[41] *Idem*, §142.
[42] *Idem*, § 57.

of the Court's function to disseminate a culture of accountability for human rights violations.

7.2.3. The case of the *Prosecutor v. Jean-Pierre Bemba Gombo*.

The authentic value of the model of victims' participation at the pre-trial stage set in the *Katanga and Chui case* can probably be better appreciated in light of the analysis of the decisions on the same matter issued in the *Prosecutor v. Jean-Pierre Bemba Gombo* (hereafter *Bemba case*). In the *Bemba case*, the Pre-Trial Chamber III drew heavily on the scheme of victims' participatory rights at the pre-trial stage of the *Katanga and Chui case*, reiterating those arguments that can be classified as corresponding to a model of victims' participation which informed by expressivist approach. In the *Bemba case*, the Pre-Trial Chamber III issued several decisions concerning the victims' participation at the pre-trial stage,[43] however, this analysis focuses on the *Fourth Decision on Victims' Participation,*[44] since it better illustrated the key features of the approach to victim's role at this stage of the proceeding. Like in the *Katanga and Chui case*, Judge Hans-Peter Kaul, acting as Single Judge on behalf of Pre-Trial Chamber III, considered appropriate to take a systematic approach when determining the participatory rights of victims at the pre-trial stage.[45] He considered that the analysis of whether victims' personal interests have been affected had to be carried out in relation to the stage of the proceedings, like the investigation stage, the pre-trial stage or trial stage, and not in relation to specific

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[43] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Victim Participation, Pre-Trial Chamber III, 12 September 2008, Doc. n. ICC-01/05-01/08-103-tENG. Available at: https://www.icc-cpi.int/CourtRecords/CR2008_05265.PDF; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Second Decision on the question of victims' participation requesting observations from the parties, Pre-Trial Chamber III, 23 October 2008, Doc. n. ICC-01/05-01/08-184. Available at: https://www.icc-cpi.int/CourtRecords/CR2008_06008.PDF; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Third Decision on the Question of Victims' Participation Requesting Observations from the Parties, Pre-Trial Chamber III, 17 November 2008, Doc. n. ICC-01/05-01/08-253. Available at: http://www.worldcourts.com/icc/eng/decisions/2008.11.17_Prosecutor_v_Bemba3.pdf; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims, Pre-Trial Chamber III, 16 December 2008, Doc. n. ICC-01/05-01/08-322. Available at: https://www.icc-cpi.int/CourtRecords/CR2008_07868.PDF; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Sixth Decision on Victims' Participation Relating to Certain Questions Raised by the Office of Public Counsel for Victims, Pre-Trial Chamber III, 08 January 2009, Doc. n. ICC-01/05-01/08-349. Available at: https://www.icc-cpi.int/CourtRecords/CR2009_00069.PDF

[44] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Fourth Decision on Victims' Participation, Pre-Trial Chamber III, 12 December 2008, Doc. n. ICC-01/05-01/08-320. Available at: https://www.icc-cpi.int/CourtRecords/CR2008_07861.PDF.

[45] *Idem*, § 99.

procedural activities.[46] To define victims' personal interests, Judge Kaul recalled the jurisprudence of the ECtHR on the right to a remedy for victims of violations of human rights, which provided guidance for the interpretation of Article 68(3).[47] The meaning of victims' personal interests mainly stems from the right to justice. Judge Kaul stated that the personal interests of victims should include the pursuit of justice as one of the motives of victims to apply for participation.[48] Specifically, the Single Judge held that victims' personal interests are affected at the pre-trial stage of the proceedings because a trial can only begin if the charges against the suspect are confirmed at this stage.[49] The procedural rights of victims at the pre-trial stage followed the set of rights established in the *Katanga and Chui case.*[50]

However, even though the Judge Kaul explicitly stated that he applied a systematic approach when determining the participatory rights of victims,[51] in reality it can be observed that he took a mixed approach. In the specific instance of victims' rights to submit oral or written submissions, the Single Judge adopted a case-by-case approach, as he pointed out that victims have to successfully demonstrate that their specific personal interests were affected by a specific issue of law or fact.[52] The main problem with such a settlement was that Judge Kaul did not provide any reason or legal basis to justify the application of a casuistic approach for the right to present oral or written submission, while the systematic approach was appropriate for the other rights of victims. In this way, Judge Kaul arbitrarily constrained some of the victims' participatory rights at the pre-trial stage, but, most importantly, such differentiation is not particularly consistent with the concept of victims' personal interests as delineated in this decision. The decision of the Pre-Trial Chamber III still has merit as it emphasises the important contribution of victims to ascertain the truth. From this point of view, this decision presents an important feature that can be read as a basic value of the expressivist framework of the criminal justice system which orientates the interpretation of the provisions on victims' participation.

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[46] *The Prosecutor v. Jean-Pierre Bemba Gombo*, supra note 44, §§ 92-93.
[47] *Idem*, §§ 87-88.
[48] *Idem*, § 90.
[49] *Idem*, §§ 91-92.
[50] Idem, §§ 101-106, 108, 110.
[51] *Idem*, § 99.
[52] *Idem*, §§ 108-110.

7.3. Victims' right to present views and concerns at trial stage.

The interpretation of the ambiguous wording of Article 68(3), according to which victims can participate by expressing their "views and concerns" at the trial stage is heavily charged with implications with respect to the challenges as well as the potentials of victims' participation scheme. Several commentators considered this regime of victims' participation to be unsustainable as large numbers of victims-applicants reduced the Chambers' ability to conduct expeditious trials and to deal with other parts of the proceedings.[53] However, victims' participation scheme did not come at a price to the ICC operations only. The implementation of victims' procedural rights can be greatly prejudicial to the accused right to a fair and impartial trial, as set in Articles 64 and 67 of the Rome Statute, which respectively require that the Trial Chamber ensures that proceedings are conducted in a fair and expeditious manner and that the accused is tried without undue delay.[54] Article 68(3) did not remain deaf and blind to the imperative of guaranteeing the defendant's right to a fair and impartial trial. It provides, as condition that triggers the existence of victims' participatory rights, that victims' "views and concerns must be presented and considered (…) in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." However, reconciling the victims' procedural rights, as prescribed in Article 68(3) and accused right to a fair trial is a difficult task.

Before embarking on the analysis of the decisions on victims' right to present "views and concerns" at the trial stage, it is necessary to reflect on the meaning of the common grammar in this context characterised by the tension between victims' participatory rights and the defendants' right. Thus, the next section considers

[53] C. Stahn, 'Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice?' *Leiden Journal* of *International Law* 25(2) (2012), 268; B. McGonigle, '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(63) (2009), 140; R. Holden, 'Victim Participation within the International Criminal Court', *King's Inns Student Law Review* 3 (2013), 64; W. A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press (2011), 348; C. Kaoutzanis, 'Two Birds With One Stone: How The Use Of The Class Action Device For Victim Participation In The International Criminal Court Can Improve Both The Fight Against Impunity And Victim Participation', *U.C. Davis Journal of International Law & Policy* 17 (2010), 128.

[54] See also Rule 101 (1) of the ICC Rules of Procedure and Evidence, which further requires that "In making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims."

whether the adoption of the conceptual approach of the expressivist goals to the trial can reduce this tension.

7.3.1. The accused's right to a fair trial and victims' right to general fairness.

The search for equilibrium between the rights of victims and the accused's right urges first to clarify that there is a conceptual and ideological distinction between the right to a fair trial and the right to general fairness. The right to a fair trial has been created for the benefit of the accused and it does not simply represent a human right guarantee, but it is "part and parcel of the epistemological mechanism for fact finding in criminal proceedings".[55] Any violations of the fair trial principle shows the inadequacy to guarantee the accused against abuse of power and arbitrariness, but it is also a failure in achieving an accurate and truthful fact finding, compromising the credibility of the whole criminal proceeding before the ICC.[56]

Article 68(3), by allowing victims to present their views and concerns, unless it is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial, does not confer any right to a fair trial onto victims. It would be paradoxical to hold that victims' participation is guaranteed by the fair trial right and simultaneously such participation can also jeopardise it. Nonetheless, victims are entitled to a general component of fairness within the criminal proceeding. The principle of general fairness to the victims is entailed in the international human rights law and in the decisions by regional human rights supervisory bodies, whose standards bind the operation of the ICC chambers, pursuant to Article 21(3) of the Rome Statute. The jurisprudence of the ACtHR and ECtHR refers to the victims' right to obtain a remedy, rather than to general fairness. However, the right to obtain a remedy – which includes the right to justice and access to it, the right to the truth, the right to be heard – shares with the right to general fairness the same goal, that is to preserve the benefits of all victims participating in the proceedings.

[55] S. Zappalà, 'The Rights of Victims v. the Rights of the Accused', *Journal of International Criminal Justice* 8(1) (2010), 145.
[56] *Ibidem*; M. Cohen, 'Victims' Participation Rights within the International Criminal Court: A Critical Overview', *Denver Journal of International Law and Policy* 37(2008), 373-374.

Two important UN declarations set forth a right to general fairness for victims. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[57] (Declaration for Victims of Crime), adopted by the UN General Assembly in 1985, which is the first international legal instrument that specifically focuses on the interests and rights of crime victims within the criminal justice system, "reflects the collective will of the international community to restore the balance between the fundamental rights of suspects and offenders, and the rights and interests of victims."[58] Part A of the Declaration for Victims of Crime sets out recommendations that States should comply with in order to provide victims of crimes, committed by individuals, access to the mechanism of justice, a fair treatment, restitution from the offenders, compensation from the State and assistance for recovery.[59] According to Principle 4 of the Declaration for Victims of Crime, victims "are entitled to access to the mechanisms of justice and to prompt redress (…)".

The more recent (2005) UN 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 (the Basic Principles and Guidelines)[60] aimed at setting a rather broad concept of victims right to a remedy. The preparatory works to the Basic Principles and Guidelines explicitly suggested integrating victims' access to criminal investigation and their participation to the following proceeding within the right of victims to an effective judicial remedy. At the Consultative Meeting on the draft Basic Principles and Guidelines,

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[57] UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Resolution 40/34, 29 November 1985, UN Doc. A/RES/40/34. Available at: http://www.un.org/documents/ga/res/40/a40r034.htm.

[58] UN Office for Drug Control and Crime Prevention, 'Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', New York (1999), 1. Available at: file:///C:/Users/gtb13194/Downloads/UNODC_Guide_for_Policy_Makers_Victims_of_Crime_and_Abuse_of_Power.pdf.

[59] Principles 4-17 of the UN Declaration for Victims of Crime. See also: R. Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes', Human Rights Quarterly 26(3) (2004), 655; M. C. Bassiouni, 'International Recognition of Victims' Rights', Human Rights Law Review, 6(2) (2006), 247.

[60] UN General Assembly, 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, Resolution No. 60/147, 21 March 2006, UN Doc. A/RES/60/147. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement.

the "representative of the European Court of Human Rights (…) encouraged inclusion of guarantees for access by victims to investigative machinery."[61] The NGOs International Service for Human Rights, the International Commission of Jurists and REDRESS jointly advanced an amendment to Principle 25 (b), which set forth "the right to full access to information and the truth as an element to avoid recurrence of violations."[62] According to these NGOs

> An appropriate amendment to the text could include: "the participation of the victims, their representatives and experts designated by them should be facilitated in order to contribute to ensuring transparency in the process and satisfaction to the victims (…).[63]

The Basic Principles and Guidelines, by establishing the right of victims to an effective judicial remedy, specifically provide those who claim to be victims of such violations with equal and effective access to justice.[64] Principle 11 includes the victim's right to equal and effective access to justice within the remedies for gross violations of international human rights law and serious violations of international humanitarian law.[65] Principle 12 stands out to provide to victims of gross violations of international human rights law or of serious violations of international humanitarian law equal access to an effective judicial remedy, as provided for under international law.[66] Principle 22 (f), by affirming that satisfaction for victims should include, where applicable, judicial and administrative sanctions against persons liable for the violations,[67] acknowledges that an impartial investigation, followed by criminal prosecution and punishment of perpetrators are elements of the reparation due to victims.[68] In the event that the State fails to carry on an effective prosecution,

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[61] Chairperson-Rapporteur: Ambassador Alejandro Salinas (Chile), Report of the consultative meeting on the draft Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law, 27 December 2002, UN Doc. E/CN.4/2003/63, Annex I, 21, § 35. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/128/53/PDF/G0312853.pdf?OpenElement.
[62] *Idem*, § 143.
[63] *Ibidem*.
[64] The Basic Principles and Guidelines, Principle 3(c).
[65] *Idem*, Principle 11(a).
[66] *Idem*, Principle 12.
[67] *Idem*, Principle 22(f), "Satisfaction should include, where applicable, any or all of the following: (…) Judicial and administrative sanctions against persons liable for the violations".
[68] J. C. Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations*, (Vol. 12) Martinus Nijhoff Publishers (2013), 108.

it breaches along with the general obligation to respect and enforce human rights, but also the State violates the right of victims to an effective remedy.[69]

The accused's right to a fair trial and victims' right to general fairness represent the bedrock of the international criminal procedure, as they are genuine standards to assess the quality of the criminal justice system.[70] The achievement of a fair balance between these two competing rights demands moving from the traditional mandate of exclusively ascribing individual criminal responsibility for international crimes. The practice of the ICC on victims' right to present their "views and concerns" at the trial stage should be developed in the knowledge that the overarching purpose of the international criminal justice system should be the expressivist didactic function of the trial.[71] This understanding of the scope and the legal nature of the accused right to a fair trial and victims' right to general fairness is not linked anymore with the idea of a civil law or common law criminal justice system.[72]

The following sections investigate whether the interpretation of the expression "views and concerns", elaborated in the three cases under examination, respects the accused's right to a fair right in light of the acknowledgment of the victims' right to general fairness and in doing that in what measure the Chamber contribute to the development of a common legal syntax that bridges the gaps between the common law and civil law systems.

7.3.2. The case of the *Prosecutor v. Thomas Lubanga Dyilo*.

In its *Decision on Victims' Participation*,[73] the Chamber clarified that, pursuant to Article 68(3), victims have the right to participate directly in the proceedings[74] and defined the scope of the expression "views and concerns", by elaborating five modalities of victims' participation. Firstly, victims have the right to consult and be notified of the record of the case and public documents filed, as well as of

[69] M. C. Bassiouni, *supra* note 59, 264
[70] S. Zappalà, *supra* note 55, 143.
[71] See chapter V.
[72] S. Zappalà, *supra* note 55, 143.
[73] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims' Participation, Trial Chamber I, 18 January 2008, Doc n. ICC-01/04-01/06-1119. Available at: https://www.icc-cpi.int/CourtRecords/CR2008_00364.PDF
[74] *Idem*, § 115.

confidential documents, unless such documents are subject to any restrictions concerning confidentiality and the protection of national security information.[75] Secondly, victims are entitled to participate in hearings, status conferences, to file written submissions and to make confidential or *ex parte* written submissions.[76] Thirdly, victims can express opening and closing statements.[77] Fourthly, whenever an issue arises that affects their interests, victims are granted the right to initiate procedures, by filing applications and requests.[78] Lastly, victims can make submissions on matters of evidence, present evidence and challenge the admissibility and relevance of evidence submitted by the Prosecutor and defence, question witnesses, including experts and testify as witnesses or to appear in person before a Chamber.[79] Given that the right to present evidence and challenge the admissibility and relevance of evidence submitted by the other Prosecutor and defence, question witnesses, including experts and testify as witnesses is grounded on Article 69(3) of the Rome Statute, this matter will be object of distinct analysis in section 7.4. of this chapter. The Chamber made also clear that it would grant participation to victims on an applicant-by-applicant approach,[80] on the basis of the evidence or issue under consideration at any particular point in time.[81]

This broad scheme of victims' participation can potentially alter the principle of fair trial for the accused. The mere fact that victims can file written submissions, express opening and closing statements and presenting evidence poses a real challenge to the equality principle, which sets up the imperative right of the accused "to be assisted by public authorities in the best possible way to ensure that he or she is not disadvantaged compared to the Prosecution.[82] What is particularly questionable is the interpretation of "views and concerns" as including the right of victims to make "submissions on matters of evidence".[83] The ICC Statute makes clear that the burden of proof rests only on the Prosecutor,[84] but the Chamber failed to define the

[75] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 73, §§ 105-107.
[76] *Idem*, §§ 108-110.
[77] *Idem*, § 117.
[78] *Idem*, § 118.
[79] *Idem*, §§ 108-111.
[80] *Idem*, § 85.
[81] *Idem*, § 101.
[82] S. Zappalà, *supra* note 55, 149.
[83] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 73, § 109.
[84] Article 66(2) of the ICC Statute.

expression "submissions on matters of evidence", and it left unclear whether they amount to evidence. It appears *prima facie* that the accused is not treated on an equal footing, as s/he has to potentially face a second prosecutor.

In a following *Decision on the request by victims to express their views and concerns in person and to present evidence during the trial*,[85] the Trial Chamber revisited the victims' participatory rights scheme and elaborated a more comprehensive definition of the term "submissions on matters of evidence". The Chamber drew a critical distinction between the process of victims' "submissions on matters of evidence" and giving testimony. These represent two possible means of placing material before the Chamber, however, the former correspond to the presentation of submissions, which assist the Chamber in its approach to the evidence in the case, but are not evidence.[86] Given that the Court may base its decision only on evidence, "submissions on matters of evidence", unlike testimony, do not have a probative value for the purpose of the decision.[87] In other words, by the presentation of "submissions on matters of evidence", which assist the Chamber in its approach to the evidence in the case",[88] victims can only make suggestions as to how to orientate the fact-finding powers of the judges. Victims do not become parties to the proceedings because the distinctive feature of a party, that is the right to present evidence, is missing. Therefore, their participation neither violates the principle of equality nor the right to a fair trial, as the defendant would not confront more than one party.[89]

The procedural role granted to victims in this decision shows specific features that correspond to the expressivist model of criminal justice. This confirms the efficiency of expressivism as a framework which is able to fulfil the goals of the international criminal justice system and provides the conceptual elements to achieve a synthesis between element of common law and civil law. This model of participation is shaped in the acknowledgment that the trial should serve as a forum

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[85] *The 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, Public Annex, Trial Chamber I, 09 July 2009, Doc n. ICC-01/04-01/06-2032-Anx. Available at: https://www.icc-cpi.int/RelatedRecords/CR2009_05016.PDF.
[86] *Idem*, § 25.
[87] *Ibidem*.
[88] *Ibidem*.
[89] S. Zappalà, *supra* note 55, 162.

for disseminating a didactic message. The Trial Chamber by means of submissions of views, concerns and opinions, implicitly empowers victims to contribute to the enhancement of the narrative at the trial stage and, thus, to forge the didactic message that the trial should convey. This model of participation also smooths the rough edges off adversarial nature of the trial. Victims do not become a third party, but as participants they can actually exercise monitoring over the accuracy of the work of the Prosecution and the judges.[90]

7.3.3. The case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

In the *Decision on the Modalities of Victim Participation at Trial*,[91] the Trial Chamber II departed from the modalities of victims' participation, as set in the *Lubanga case*, since it rejected the distinction between the victims' expression of "views and concerns" and victims giving testimony. This showed a different understanding of the nature and scope of the participatory rights of victims at trial stage. In the *Katanga and Chui case*, the Trial Chamber II considered that the requests by victims to submit incriminating or exculpatory evidence is a means to express their "views and concerns" within the scope of Article 68(3) of the Statute. In the *Lubanga case*, the victims' expression of "views and concerns" was treated like a self-standing procedural action, whereby victims can suggest to the judges how to orientate their fact-finding powers. On the contrary, in this decision of the *Katanga and Chui case*, the Trial Chamber II appears to understand the expression of "views and concerns" as a non-autonomous function, which merely serves as a tool for victims to request the submission of incriminating or exculpatory evidence.[92] Indeed, the possibility for victims to present evidence is an important mechanism, which allows victims to craft the narrative of the events. However, the Chamber seems to underestimate that "views and concerns", as a mechanism without probative value aiming at suggesting to the judges how to orientate their fact-finding, can still

[90] S. Zappalà, *supra* note 55, 161.
[91] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, Trial Chamber II, 22 January 2010, Doc. n. ICC-01/04-01/07-1788-tENG, §§ 68-125. Available at: https://www.icc-cpi.int/CourtRecords/CR2010_01277.PDF.
[92] S. Vasiliev, 'Victim Participation Revisited: What the ICC Is Learning About Itself', in C. Stahn, *The Law and Practice of the International Criminal Court*, Oxford University Press (2015), 35-36.

achieve the same goal. This suggested that Trial Chamber excluded that victims could exercise monitoring over the accuracy of the work of the Prosecution and the Judges, through submissions of views, concerns and opinions.

In the *Katanga and Chui case*, the Trial Chamber II missed the opportunity to consolidate the path traced by the *Lubanga case*. The concept of "views and concerns" elaborated in the *Lubanga case* represented a solid element of the language seeking to break down the barriers between the conceptual procedural framework of civil law and common law. The interpretation of "views and concerns", as not bearing a probative value, did not turn the victim into a second prosecutor, safeguarding the due process and equality of arms principle.

7.3.4. The case of the *Prosecutor v. Jean-Pierre Bemba Gombo*.

In the *Bemba case*, the Trial Chamber III framed the regime of victims' participation at trial stage which fulfils the intentions of the Rome Statute by means of the expressivist framework, demonstrating that victims through their participation can corroborate events and enhance the narrative by presenting a different side of the story. In doing that, the Trial Chamber III showed its willingness to follow the path traced by the *Lubanga case*, but because of the exponential increasing number of victims applying to participate, the Trial Chamber III seems more aware of the difficulties to grant a meaningful participation to a growing number of victims, without jeopardizing the fair trial principle and the defendant's rights.

In its *Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims*, the Trial Chamber III embraced the distinction between the process of victims "expressing their views and concerns" and giving testimony, as delineated by the Trial Chamber I in the *Lubanga case*.[93] The former is the equivalent of presenting submissions, which can assist the Chamber in its approach to the evidence in the case, but they do not form part of the trial evidence.[94] In essence, "views and concerns" are conceived as

[93] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, Trial Chamber III, 22 February 2012, Doc. n. ICC-01/05-01/08-2138, § 19. Available at: http://www.worldcourts.com/icc/eng/decisions/2012.02.22_Prosecutor_v_Bemba.pdf.
[94] *Ibidem*.

an autonomous manner of participation in the form of unsworn statements.[95] The Chamber further elaborated this distinction and the different requirements to allow these two modalities of victims' participation. It affirmed that the threshold victims need to meet to give evidence is significantly higher than the threshold applicable to submissions requesting to express views and concerns. Thus, when victims are not authorised to give evidence, they might still be allowed to express their views and concerns in person.[96] This characterization which differentiates the victims' expression of "views and concerns" from the process of victims giving testimony, by setting the limits of such modality of participation, has merit as it suggests some procedural elements of the common grammar, which should inform the proceedings before the ICC. The conception of victims' expression of "views and concerns" here loosens the strict bipolar structure of the proceeding, because victims, by means of submissions can assist the Chamber in its approach to the evidence, but, at the same time, the Trial Chamber III is also extremely careful not to cross the boundaries of the accused's right to a fair trial. It refused to elevate the role of victims to that of a party in the proceeding, together with the prosecutor and defense, since it did not acknowledge any probative value to the expression of "views and concerns".

While acknowledging the positive contribution of this model of victims' participation informed by the expressivist framework of criminal justice, there are some important remarks to be made. The effort of Trial Chamber III to grant participation to a constantly growing number of victims, and, at the same time, to ensure that the proceedings are expeditious and that participation is not prejudicial to the right of the accused's rights to a fair trial, undermines to a certain extent the role of the victims. The imperative of granting an expeditious trial for the accused requires that the determination of which victims can present their views and concerns relies on "fact-specific decisions [...] taking into account the circumstances of the trial as a whole."[97] For that purpose, Trial Chamber III should evaluate two factors: "whether the personal interests of the *individual* [emphasis] victims are affected", and "whether the accounts expected to be provided are representative of a larger

[95] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Order regarding applications by victims to present their views and concerns or to present evidence, Trial Chamber III, 21 November 2011, Doc. n. ICC-01/05-01/08-1935, § 3(c). Available at: https://www.icc-cpi.int/CourtRecords/CR2011_19958.PDF.
[96] *The Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* note 93, § 20.
[97] *Idem*, § 22.

number of victims."[98] In other words, the Trial Chamber III emphasized that, "views and concerns" must be sufficiently reflective of the personal interests of broader classes of victims and make a contribution to the effective and efficient establishment of the truth.[99] This interpretation of the concept of victims' personal interests is contradictory because the chambers are called to assess the personal interests of individual victims, but at same time such "individual interest" has to represent a larger number of victims. As a result, victims seem to lose their individuality towards an abstract concept of victimhood. This conception of victims does not find any validation in any dispositions of the Rome Statute or of the RPE. Broadly speaking, it is questionable to what extent an abstract victimhood can effectively contribute to the truth-find mandate of the ICC. More thorough considerations on the concept of abstract victimhood will be addressed further on in this chapter, while dealing with the common legal representation of victims.[100]

7.4. Court's right to request victims to present evidence and to challenge the admissibility and relevance of evidence submitted by the parties.

The current section will look at the way the ICC Chambers developed the possibility of victims to be requested by the Court to submit evidence in the tree cases under scrutiny in this chapter.

7.4.1. The case of the *Prosecutor v. Thomas Lubanga Dyilo*.

The emergence of the possibility for the victims to present evidence and to challenge the admissibility and relevance of evidence submitted by the other participants, independent of the Prosecutor' strategy is a new, but, at the same time, controversial development.[101] Neither the wording of Article 68(3), nor any other provision of the

[98] *The Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* note 93, § 22.
[99] S. Vasiliev, *supra* note 92, 43.
[100] See section 7.5.2. of this chapter.
[101] Y. McDermott, 'Some Are More Equal Than Others: Victim Participation in the ICC', *Eyes on the ICC* 5(23) (2008), 46; S. Vasiliev, *supra* note 92, 39; H. Friman, 'Participation of Victims in the ICC Criminal Proceedings and the Early Jurisprudence of the Court' in G. Sluiter and S. Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law*, London: Cameron May (2009); H. Friman, 'The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?', *Leiden Journal of International Law* 22 (2009); S. Zappalà, *supra* note 55; M. Pena, 'Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying

ICC Statute and RPE explicitly grant victims such a right, which was formulated for the first time in the *Lubanga case* by the Trial Chamber I in its – first – *Decision on Victims' Participation*.[102] The Chamber did not base the right to present evidence and to challenge the admissibility and relevance of evidence on Article 68(3). It rather held that this right followed from Article 69(3) of the Statute, which acknowledges the Court's general right – independent of the cooperation or the consent of the parties – to request the presentation of all evidence necessary for the determination of the truth.[103] Therefore, the Courts permitted victims to present evidence and to challenge the admissibility and relevance of evidence when it considers that this kind of participation is necessary to assist the Court in its truth-finding task.[104]

This decision was appealed by both the Prosecutor and defence on the ground that the burden of proof lies squarely with the Prosecutor and that the role of the Chamber should be exclusively to balance out the Prosecution and the defence and to guarantee a fair trial.[105] The Appeals Chamber rejected the objections of both the Prosecutor and defence, by advancing an analysis of the two sentences composing Article 69(3)[106] "as operating somewhat independently of each other."[107] The first sentence of Article 69(3), which states "[t]he parties may submit evidence relevant to the case (…)", is considered categorical by the Appeals Chamber, since it made clear that only the parties and not the victims can submit evidence relevant to the case. However, the Appeals Chamber also affirmed that this entitlement is neither exclusive, nor sufficient to dismiss the residual powers of the Court. The second sentence of Article 69(3), by declaring that "[t]he Court shall have the authority to

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Ahead', *ILSA Journal of International and Comparative Law* 16 (2010); M. Pena and G. Carayon, 'Is the ICC Making the Most of Victim Participation?', *International Journal of Transitional Justice* 7(2013).

[102] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 73.

[103] *Idem*, §§ 108-109.

[104] *Idem*, § 108.

[105] *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Document in Support of Appeal against Trial Chamber I's 18 January 2008 Decision on Victims' Participation, Office of the Prosecutor, 10 March 2008. Doc n. ICC-01/04-01/06-1219, §§ 41-42, 45-46. Available at: https://www.icc-cpi.int/CourtRecords/CR2008_01132.PDF; *The Prosecutor v. Thomas Lubanga Dyilo*, Defence Appeal Against Trial Chamber I's 18 January 2008 Decision on Victims' Participation, Defence, 10 March 2008, Doc n. ICC-01/04-01/06-1220-tENG, §§ 48-50. Available at: https://www.icc-cpi.int/CourtRecords/CR2008_01584.PDF.

[106] Article 69(3) of the ICC Statute: "The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth."

[107] A. M. Plevin, 'Beyond a "Victims' Right": Truth-Finding Power and Procedure at the ICC', *Criminal Law Forum* 25 (No. 3-4) (2014), 444.

request the submission of all evidence that it considers necessary for the determination of the truth" suggested that it is ultimately a responsibility of the Court to convince itself of the guilt of the accused beyond reasonable doubt.[108] Article 69(3) should reflect the spirit and intention of article 68(3) of the Statute and therefore it must be interpreted as aiming to make victims' participation meaningful. The combined reading of Article 68(3) and the second sentence of Article 69(3), allowing victims to propose and challenge the submission of evidence, prevent the potential ineffectiveness of victims' participation.[109] However, the intention of the Appeals Chamber was not to create an independent and unfettered right for victims to lead and challenge the admissibility of evidence.

This decision of the Appeals Chamber has certainly given food for thought with regard to the controversial possibility for victims to present and challenge evidence. The arguments of the Prosecutor and defence convinced Judge Pikis and Judge Kirsch, who, in their dissenting opinions, upheld that leading or challenging evidence is exclusively a right of the parties, while victims are not parties. Both judges agreed that allowing victims to lead evidence can considerably slow down the proceedings, causing inefficiency, and violate the principle of the equality of arms and more generally with the overall right to a fair trial.[110]

One of the first misunderstandings surrounding this decision lies in the unfortunate lexical choice of the Appeals Chamber. It refers to the "right for victims to lead or challenge evidence."[111] The wording used by the Appeals Chamber risked masking the true nature of Article 69(3), as it clearly described in its decision. When the Chamber is not satisfied by the evidence submitted by the parties for the purpose of unveiling the truth, it can exercise its residual power, which gives victims the possibility of being requested to submit evidence. The mechanism of Article 69(3) is not the expression of a victims' right, it rather embodies the truth-finding procedural

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[108] *The 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, Appeals Chamber, 17 July 2008, Doc n. ICC-01/04-01/06-1432, § 95. Available at: https://www.icc-cpi.int/CourtRecords/CR2008_03972.PDF. See also A. M. Plevin, *supra* note 108, 444.

[109] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 109, §§ 97-98.

[110] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 109, Separate Opinion of Judge Georghios M. Pikis, § 13; *The Prosecutor v. Thomas Lubanga Dyilo*, Partly Dissenting Opinion of Judge Philippe Kirsch, 23 July 2008, Doc n. ICC-01/04-01/06-1432-Anx, § 30. Available: https://www.icc-cpi.int/RelatedRecords/CR2008_04269.PDF.

[111] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 109, § 99.

powers of the Court, which has the authority to request the submission of additional evidence. Therefore, instead of using the expression of victims' right to present evidence during the trial, it would be correct to refer to the possibility of victims to be requested to submit evidence, or *mutatis mutandis* the Court's right to request the presentation of all evidence necessary for the determination of the truth.[112]

This truth-seeking mandate of the Court has raised criticisms, since sharing the burden of proof between the prosecution and the judges collectively might violate the right to a fair trial.[113] It is harder for the defence to challenge evidence requested by the judges, who are requesting the evidence as an impartial tribunal, rather than the evidence submitted by the Prosecutor. To overcome this impasse, it is necessary first to observe that there is a conceptual difference between the right of the parties to present evidence relating to the innocence or the guilt of the defendant and the Court's task of establishing a substantive truth.[114] Those two aspects can overlap, but proceedings focused in determining the accused's innocence or guilt does not necessarily provide an accurate account of the events. Allowing victims to present evidence, casting therefore a sort of 'third perspective', might be necessary for the Trial Chamber, because parties calling evidence are driven by partisan interests, which do not always coincide with the goal of establishing the truth.[115]

The fact-finding power of the Court broadens the traditional models of international criminal justice, directed at the determination of guilt or innocence of the defendant. The Court, through the exercise of its fact-finding power, enhances the normative function of the trial and also contributes to the crafting of a useful narrative for post-conflict societies and the international community as well. The fact-finding mandate of the Court is probably the most powerful element of the common grammar between the adversarial and inquisitorial criminal process, that is built through adoption of the conceptual values that can be interpreted as associated to the expressivist goals of the trial. That demonstrates that a criminal proceeding to be considered fair and consistent with the rights of the accused "does not require that

[112] A. M. Plevin, *supra* note 107, 448.
[113] Y. McDermott, *supra* note 101, 46; H. Friman, *supra* note 101, 496; S. Zappalà, *supra* note 55, 148; B. McGonigle Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls', *International Criminal Law Review* 12 (2012), 401.
[114] A. M. Plevin, *supra* note 107, 450.
[115] S. Vasiliev, *supra* note 92, 44.

the criminal process should be a bipolar procedure between the defence and the prosecution."[116]

After having clarified the nature of the truth-finding mandate of the Court, to have an overall understanding of its impact on the modalities of victims' participation scheme, it is worthy to have a look at the requirements victims have to satisfy when the Court requests the submission of additional evidence. The requirements drew on the conditions victims have to satisfy in order to present their views and concerns, pursuant to Article 68(3), since victims have to demonstrate that their personal interests are affected by the specific proceedings and the appropriateness of their requests.[117] This seems consistent with the view of Trial Chamber, according to which views and concerns, as set in Article 68(3), do not have a probative value for the purpose of the decision.[118] This discrepancy reflects the uncertainty about the concept of evidence presented by victims, and more generally about the proper scope of victims' participatory scheme in the context of the proceedings before the ICC. Behind this choice there was probably the intention of the Court to avoid the case-by-case approach to victims' rights reflects a utilitarian approach towards the role of victims before the Court.[119] It is important to remind that the *ad hoc* tribunals have been highly criticised for using victims as evidentiary source.[120]

Another issue, deserving to be addressed, is the potential conflict of the victims' disclosure regime with the accused's right to a fair trial and equality of arms. In its decision, the Appeals Chamber affirmed that "the regime for disclosure contained in rules 76 to 84 of the Rules (…) is directed towards the parties and not victims."[121] It is a responsibility of the Chamber to rule on the modalities for the proper disclosure of this kind of evidence and, thus, seems to reject the idea of imposing any sort of general disclosure obligation on victims. While it might seem to breach the accused's right to a fair trial, it is consistent with the nature and purpose

[116] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, Separate Opinion of Judge Sang-Hyun Song, Appeals Chamber, 13 June 2007, Doc n. ICC-01/04-01/06-925, § 25.
[117] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 108, § 104.
[118] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 87, § 25.
[119] S. Vasiliev, *supra* note 92, 45.
[120] See chapter II, section 2.6.2.
[121] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 108, § 93.

of the mechanism of truth-finding of Article 69(3).[122] As a matter of fact, it is hard for the Trial Chamber in advance of the proceedings to have a clear understanding of what evidence in the hands of victims is needed to determine the truth. This is consistent with the wording of Article 64(6)(d), which states that

> [i]n performing its functions (…) during the course of a trial, the Trial Chamber may, as necessary:(…) [o]rder the production of evidence in addition to that already (…) presented during the trial by the parties.

Therefore, the Chamber has the power to allow victims' presentation of evidence, even if the disclosure of such evidence has not occurred before the beginning of the trial.[123]

7.4.2. The case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

The analysis of the debate surrounding the possibility for victims to present and challenge the admissibility of evidence in the *Lubanga case* illustrated to what extent such issue is controversial in the practice of the ICC. In the *Katanga and Chui case*, the Trial Chamber II endorsed the approach by the *Lubanga case*, which linked the victims' role in truth-finding to the Chamber power *ex officio* to request additional evidence. Nonetheless, the decisions of the *Katanga and Chui case* have some merits, which mark a distance from the *Lubanga case*.

Trial Chamber II tried to narrow down the broad discretion of the Trial Chamber I in the *Lubanga case* by outlining a set of conditions to evaluate the victims' applications for participation through oral testimony. Specifically the Chamber, when evaluating applications for participation through oral testimony by victims, has to consider whether: (a) the proposed testimony relates to matters that were already addressed by the Prosecution or would be unnecessarily repetitive; (b) the topic(s) on which the victim proposes to testify is sufficiently closely related to issues which the Chamber must consider in its assessment of the charges against the accused; (c) the proposed testimony is typical of a larger group of participating victims, who have had similar experiences (d) the testimony will likely bring to light

[122] A. M. Plevin, *supra* note 107, 460.
[123] *Ibidem*.

substantial new information relevant to the Chamber in its assessment of the charges.[124]

At the first reading of these conditions, it can be immediately noticed that there is no mention of 'personal interests' as the element that needs to be satisfied in order for the victims to present evidence. The Trial Chamber I in the *Lubanga case* seems to limit its own truth-finding mandate set in Article 69(3), by subordinating it to the personal interests of the victims. Conversely, the Trial Chamber II of the *Katanga and Chui case* rejected such limitation, as it clearly stated that the possibility for victims to propose the submission of evidence aims at assisting the Court in its implementation of article 69(3) of the Statute, and hence in its search for the truth.[125] From this point of view, the Trial Chamber II confirms to embrace those values that in a more comprehensive way can be read as representing the expressivist function of the trial, which aims at the establishment of the truth and its pedagogical dissemination to the international community. In fact, this approach by the Trial Chamber II suggests an interpretation of the victims' role as fundamental to contribute to shape the expressivist message. But still it did not overlook that victims are not parties to the trial and certainly have no role to support the case of the Prosecution.[126]

This decision was appealed and the Appeals Chamber did not confirm this disclosure regime for victims. It took the view of the *Lubanga case* when it explicitly rejected the idea of imposing any sort of general disclosure obligation on victims. It considered that victims and the parties in the proceeding, namely the Prosecutor and the defence, play a different role when presenting evidence and, therefore, it would be inappropriate to extend the Prosecutor's statutory obligations to victims. More generally, it would disregard the role of victims, who are participants and not parties, to impose a general disclosure obligation on the victims to disclose evidence to the accused.[127]

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[124] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Directions for the conduct of the proceedings and testimony in accordance with rule 140, Trial Chamber II, 20 November 2009, Doc. n. ICC-01/04-01/07-1665, § 30. Available at: https://www.icc-cpi.int/pages/record.aspx?uri=784378.
[125] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* note 91, §§ 82-87.
[126] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* note 124, § 82.
[127] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the

7.4.3. The case of the *Prosecutor v. Jean-Pierre Bemba Gombo*.

The mechanism of the Article 69(3) of the ICC Statute, which empowers the Court to request victims to submit additional evidence, can be considered as settled law, because, since its first formulation Chamber in *Lubanga case,* it has been confirmed in the *Katanga and Chui case* – as previously analysed – and by the Trial Chamber III in the *Bemba case* as well. The following decisions illustrated that the Trial Chamber III departed from the model traced in the *Lubanga case,* which required victims to demonstrate their personal interests were affected by the evidence that they intend to submit. It rather followed the path of the *Katanga and Chui case,* which did not include the personal interests of the victim among the criteria victims have to satisfy to present evidence.

In the *Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings*, the Trial Chamber III endorsed the interpretation of Article 69(3), which confers to the Chamber the authority to request the submission of all evidence it considers necessary for the establishment of the truth, emphasising that the determination of the truth is the only general precondition that guides its discretion.[128] In this framework traced by the Trial Chamber III, victims' requests to submit evidence would assist the Court in the implementation of article 69(3) and, hence, in its search for the truth.[129]

In the *Decision (i) ruling on legal representatives' applications to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses,* the Chamber emphasized that the interests of victims should not be limited to the physical commission of the alleged crimes under consideration, since victims have a general interest in the proceedings and in

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Modalities of Victim Participation at Trial", Appeals Chamber, 16 July 2010, Doc. n. ICC-01/04-01/07-2288, § 75. Available at: https://www.icc-cpi.int/CourtRecords/CR2010_05115.PDF.

[128] *The Prosecutor v. Jean-Pierre Bemba Gombo, Corrigendum* to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, Trial Chamber III, 12 July 2010, Doc. n. ICC-01/05-01/08-807-Corr, §§ 35-36. Available at: https://www.icc-cpi.int/CourtRecords/CR2010_04833.PDF.

[129] *Idem*, § 32.

their outcome.[130] Thus, any evidence relevant to the outcome of the case affects the personal interests of the victims.

Despite this broad definition of victims' personal interests, the Trial Chamber III is aware that the wide number of victims applying to present evidence might have a negative impact on the expeditiousness of the proceedings. For this reason, in the subsequent *Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims*, the Trial Chamber III subjected the possibility for victims to present evidence to the fulfilment of some criteria. When assessing which victims should be authorised to present evidence, the Trial Chamber III must consider on a case-by-case basis whether the evidence is: a substantial new information that is relevant to make a genuine contribution to the ascertainment of the truth; typical of a larger group of participating victims, who have had similar experiences as the victim who wishes to testify and is consistent with the rights of the accused and a fair and impartial trial.[131] Notably, those requirements guiding the identification of those victims best placed to present evidence are comparable to those outlined in decisions of the *Katanga and Chui case*.[132]

The most relevant merit of the *Bemba case* lies in its elaboration of the concept of victims' personal interest affected. The Trial Chamber III suggested that victims' personal interests cannot be limited to the physical commission of the alleged crimes under consideration, as they have a general interest in the truth. Therefore, the truth-finding mandate of the Court cannot be constrained by circumstantial conditions, quite the opposite the Court should have the power to request the presentation of any evidence that it considered necessary for achieving the truth. In doing so, the Chamber also acknowledged the relevant role of victims, who play a part in crafting a narrative during the trial and. The model set up by the Trial Chamber III reflects those features that can be read as belonging to the expressivist paradigm of the international criminal justice. More specifically those

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[130] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision (i) ruling on legal representatives' applications to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses, Trial Chamber III, 09 September 2011, Doc. n. ICC-01/05-01/08-1729, § 15. Available at: https://www.icc-cpi.int/CourtRecords/CR2011_15698.PDF.
[131] *The Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* note 93, §§ 23-24.
[132] See section 7.4.2. of this chapter.

expressivist values have proven to be able to fulfil the aims of the provisions of the ICC on victims' participation as well as on the accused's right to a fair trial and on the Court's truth-finding mandate. The *Bemba case* successfully shapes the elements of the common grammar in order to bridge the gap in the understanding of the role of victims in the common law and civil law systems.

7.5. The two-tier process of victims' participation: the case-by-case approach and the common legal representation.

The current section will examine the limitations of two specific mechanisms of victims' participation, namely the case-by-case approach and the Common Legal Representation which have been implemented in the three cases considered in this chapter by the ICC Chambers to face the problem of making the mechanism of participation accessible to a wide number of victims.

7.5.1. Limitations of the case-by-case approach to victims' exercise of their participatory rights.

As observed in the above exanimated decisions of the three cases study, the ICC has preferred to rely on the case-by-case approach, when granting victims participatory rights with due respect to the accused right to a fair and impartial trial. The case-by-case approach has been an ineluctable path for the Court at the beginning of its operation and to a certain extent contributed to the development of the case law.[133] It is a rather flexible method, which effectively ensures the protection of the defendant's right to a fair trial. The Court is called to determine with regard to every specific procedural activity whether the personal interests of victims are affected, the appropriateness of their participation and what modality of participation can successfully secure a fair trial for the accused.[134] However, such approach can be a double-edged sword. The study of the three cases law showed that the Chambers had to repeatedly address the same issues and often their interpretations were different from each other.

[133] B. McGonigle Leyh, *supra* note 113, 404.
[134] A. Pues, 'A Victim's Right to a Fair Trial at the International Criminal Court? Reflections on Article 68(3)', *Journal of International Criminal Justice*, 13(5) (2015), 963.

The lack of harmonization transfigures the nature of victims' participatory rights, which seem to reflect the characteristic of a privilege. The conferral of rights depends on the specific factual circumstances of the case and upon the judicial discretion on every specific proceeding. Victims are entitled to a general right to fairness, however, due to the lack of a clear definition of such right, victims' participation relies essentially on the exercise of the Chambers' discretion.[135] *Mutatis mutandis* the case-by-case approach had a prejudicial impact on the defence as well. The lack of harmonization jeopardises the defendant's right to legal certainty. When the rules are not sufficiently clear and precise, it is hard to keep an acceptable degree of predictability of the possible outcome of decisions.[136] The contribution of the case-by-case approach to the successful development of an effective common grammar, aiming at the harmonization of the procedural element of the common law and civil law system of criminal justice is questionable.

Conversely, the development of the common grammar might benefit more from the systematic approach to victims' participation. This kind of method represented an exception to the case-by-case approach, since it has been adopted the early decisions of the Pre-Trial Chamber I and III, respectively in the *Katanga and Chui case* and in the *Bemba case.* These Chambers preferred to take a systematic approach to victims' participation at the pre-trial stage and determined a set of procedural rights for victims participating at a particular stage of the proceeding.[137] The adoption of a systematic approach has the great merit of establishing a core of participatory rights for victims, and, consequently, it enhances the guarantee of legal certainty to all parties and participants in the proceedings. It also ensures that those procedural rights are meaningful rather than purely symbolic and, at the same time, systematically consistent with the main features of the proceedings at the pre-trial stage.[138]

7.5.2. Inadequacy of victims' common legal representation.

A relevant practical development of the victims' participation scheme is the opportunity for victims to exercise their participatory rights by means of the

[135] A. Pues, *supra* note 134, 964.
[136] S. Zappalà, *supra* note 55, 138.
[137] See sections 7.2.2. and 7.2.3. of this chapter.
[138] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *supra* note 26, § 51.

Common Legal Representation (hereafter CLR), based on Rule 90(1) and (2) of the RPE. In the *Lubanga case*, judges were fully aware that the large number of victims could affect the defendant's right to an expeditious and fair proceeding.[139] The Trial Chamber I, therefore, reserves the right to decide either *proprio motu*, or at the request of a party or participant, whether or not victims' views and concerns should be presented through a joint presentation of views and concerns by joint legal representatives.[140] The Chambers' prerogative of setting groups of victims under more manageable legal teams has been confirmed in the *Bemba case* and the *Katanga and Chui case.* In the *Bemba case*, the Trial Chamber III emphasised that the common legal representation,

> is the primary procedural mechanism for reconciling the conflicting requirements of having fair and expeditious proceedings, whilst at the same time ensuring meaningful participation by potentially thousands of victims, all within the bounds of what is practically possible.[141]

Likewise, in the *Katanga and Chui case* the Trial Chamber held that this modality of participation is closely related to issues of the fair trial right, such as efficiency, appropriate expeditiousness of the proceedings, and therefore the necessity to avoid repetition or multiplication of similar arguments and submissions.[142]

Common legal representation has become a settled feature of the proceedings, despite neither the Rome Statute nor the RDP considered it as mandatory. In the *Lubanga case*, but also in the *Katanga and Chui case* and *Bemba case*, the Court held that the evaluation of victims' personal interests is necessarily fact-dependent and, therefore, it has to be conducted on a case-by-case basis.[143] The Chambers further clarified that victims' interests must relate to a specific evidence and issues that the Chamber will be considering. Thus, for participating at different stages of the

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[139] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 73, § 116.
[140] *Ibidem*.
[141] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on common legal representation of victims for the purpose of trial, Trial Chamber III, 11 November 2010, Doc. N. ICC-01/05-01/08-1005, § 15. Available at: https://www.icc-cpi.int/CourtRecords/CR2010_10388.PDF. See also: *The Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* note 129, § 27.
[142] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order on the organisation of common legal representation of victims, Trial Chamber II, 22 July 2009, Doc n. ICC-01/04-01/07-1328, §§ 10-11. Available at: https://www.icc-cpi.int/CourtRecords/CR2009_05319.PDF.
[143] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 73, § 96; *The Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* note 128, §§ 27-28.

proceedings, victims are requested to demonstrate that their specific personal interests are affected in that part of the proceedings.[144] Based on this view, it is meaningful to question whether it is even possible for the CLR to demonstrate what victims' specific personal interests are affected in a specific part of the proceedings, when operating on behalf of hundreds or thousands of victims. For instance, in the *Bemba case*, when the Trial Chamber III addressed the requests for anonymity by a victim who had applied to participate, it designed a more restrictive approach to participation to avoid anonymous accusations.[145] Distinguishing between the personal interests of anonymous and identified victims is extremely relevant because anonymous victims have been granted more limited participatory rights compared with identified victims. The Chamber affirmed that in those cases it "will scrutinise carefully the precise circumstances and the potential prejudice to the parties and other participants."[146] However, where anonymous and non-anonymous victims are grouped and represented by one CLR, the latter is the unique voice, through which victims can speak, nullifying, therefore, the concept of victim's personal interest. For this reason, the CLR casts several doubts with regard to its consistency with the victims' right to fairness.

It can be said that the CLR has the task of condensing victims' personal interests into "generalizable interests".[147] The consolidation of the practice of victims' participation through a CLR

> produces the "oracle effect" of representation identified by Bourdieu: When appearing on behalf of absent constituents – the victims of a particular case – the representative "gives voice" to an abstract collectivity.[148]

In practice, the CLR enjoys considerable discretion, because, in drawing the victims' "generalizable interests", the representative filters, weighs and selects the diverging personal interests of the victims. This evaluation risks damaging some of the interests of individual victims, because of the diversity of interests that CLR represent, which

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[144] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 73, § 96.
[145] *The Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* note 128, §§ 70-71.
[146] *The Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 73, § 131.
[147] S. Kendall & S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', *Law* and *Contemporary Problems* 76(2013), 250.
[148] *Ibidem*. See also P. Bourdieu, *Language and Symbolic Power*, Harvard University Press (1991), 119.

sometimes may be paradoxically in conflict with each other. Bruno Latour referred to CLR as a "mediator", rather than an "intermediary". The difference is that, while "intermediaries" merely channel views, "mediators" "transform, translate distort, and modify that meaning of the elements they are supposed to carry."[149]

The CLR changes drastically the nature of the role of victims within the proceedings before the ICC, because it contributes to developing the idea of an "abstract collectivity" or, better, an abstract concept of victimhood. The participation through the CLR, which merges the interests and views of the individual victim within thousands of views of a broad number of victims, does not enhance effective victims' participation.[150] In fact, this mode of operation of the CLR conflicts with the emerging victims' right to general fairness during the trial, which, on the contrary, grants participatory rights to individual victims.

The CLR clashes with the expressivist account of the international criminal justice. The role of the common legal representative as a mediator, who weighs and selects the views and concerns of victims is compatible with the practices of the restorative paradigm of criminal justice. However, it has been demonstrated that restorative justice is not adequate to fulfil the goal and aims of the international criminal justice, because it does not capture its *sui generis* nature.[151] Conversely, this thesis demonstrated that expressivist paradigm should inform international criminal justice, since it provides a conceptual framework that better matches its peculiarity and aims.[152]

7.6. Conclusion.

The case law of the ICC suggests that ICC Chambers are aware of the need to harmonise in a consistent pattern the victims' right to participate in the proceeding together with other relevant provisions, entailing the well-recognised right to fair trial of the defence, the fact-finding mandate of the Court and the prosecutor's law enforcement functions. However, the decisions analysed showed that not always the Chambers interpreted the aims and scope of those provisions in a way that achieves

[149] B. Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory*, Oxford University Press (2005), 39.
[150] A. Pues, *supra* note 134, 963.
[151] See section 4.5. of chapter IV.
[152] See chapter V.

the interests of victims in light of the goal to give them a voice in the proceedings. In this mixed picture, the positive aspect is that in those decisions where the Chambers implement the rights of victims in a manner that fulfils the goal of the statutory provisions on victims' participation, the judges demonstrated that they are aware of the need to go beyond the strict boundaries of the common law and civil law systems of criminal procedure. While trying to build a common language that bridges the gap between these two legal systems, the judges endorsed an interpretation of the provisions on victim's participation, but also of those provisions related to the rights of the defendant and to the powers of the prosecutor and the Chambers, through the conceptual lens of the expressivist goals of the trial.

The right of victims to participate at the investigation and pre-trial stage is perhaps the most controversial issue in the case law of the ICC. In the *Lubanga case*, the Pre-Trial Chamber I acknowledged only in part the important role that victims can play at preliminary phase of the proceedings. The judges preferred to rely on the well-established common law narrative, which sees the prosecutor as the absolute *dominus* of the investigation stage, while victims' participation jeopardises the integrity, objectivity, efficiency and security of the investigation.

In the following *Katanga and Chui case* and *Bemba case*, the orientation of the Pre-Trial Chambers towards the role of victims at the investigation and pre-trial stage changed. The Pre-Trial Chambers smoothed the rough edges off the adversarial nature of the trial, by introducing a set of rights for victims. Specifically, in *Katanga and Chui case*, the Pre-Trial Chamber I seemed to understand the providing of a mechanism of participation for victims which harmonises the criminal proceeding, successfully achieves the goal of the provisions of the ICC statute, which aims at giving a voice to victims. In the *Katanga and Chui case*, the common grammar takes forward an expressivist form, because the Pre-Trial Chamber I interpreted the provisions on victims' participation emphasising the important contribution of victims to ascertain the truth. In this specific stage of the proceedings, victims' rights serve as an important check on the prosecutorial discretion, especially in those circumstances where the Prosecutor decides not to carry on an investigation or a prosecution. In the *Bemba case*, the Pre-Trial Chamber III appears to understand the relevance of having a harmonised system of victims' participation, which approaches

the provisions of the ICC Statute in light of the goal of giving victims a voice. In fact, the Pre-Trial Chamber III, even with some minor differentiations, maintained the model outlined in the *Katanga and Chui case.* At the trial stage, the Chambers recognised it important for the participation of victims to be meaningful in consideration of a general fairness for victims.

Of the three cases analysed, *Lubanga case* best demonstrated the adoption of a common grammar, by the interpretation of the victims' right to express views and concerns. The model adopted by the Trial Chamber I should be consolidated upon because it explained the term "views and concerns" within the expressivist framework, as they are conceived as a means to empower victims to contribute to the enhancement of the narrative at the trial stage and, thus, to forge the didactic message that the trial should convey. The right of victims to present views and concerns by means of submissions of views, concerns and opinions, breaks the stiff bipolar structure of the proceedings, dominated by the prosecutor and defence. In the *Lubanga case,* "views and concerns", become a mechanism aiming at suggesting to the judges how to orientate their fact-finding, however, the Chamber did not go too far to confer victims the role of a second prosecutor, since the presentation of views and concerns do not have any probative value.

The three cases consolidated the mechanism of introducing evidence based on Article 69(3) of the Rome Statute, which represents a significant step forward to the development of a more comprehensive common grammar that rejects the divide between adversarial and inquisitorial tradition to the presentation of evidence. The presentation of evidence is only a prerogative of the prosecutor and defence, but when the chamber is not satisfied with the evidence presented by the party, it can exercise its truth-finding mandate and request victims to produce further evidence. The spirit of this mechanism is ingrained in the expressivist approach of the trial, because it demonstrated that the goal of the international criminal justice is not only the determination of guilt or innocence of the defendant, but it also seeks to ascertain the truth. The possibility for victims to be requested to present evidence achieves the goals of the provisions of the Statute which seek to give victims a voice.

The analysis of the decisions of the three cases illustrated that the right of victims to general fairness is undermined by the current case-by-case approach and

the CLR. Both these two modalities of victims' participation clash with the expectation of the ICC provision to achieve the goal of giving a voice to the victims. In fact, the case-by-case approach seems to turn victims' participatory rights into a privilege, while the CLR overlooks victims' interest to participate in the proceeding to provide their narrative, in favour of a collective and rather abstract concept of victimhood. In particular, the violation of the general component of fairness occurs because the ICC legal framework does not envisage a protected core of participatory rights, which should be ensured. It has been argued that case-by-case approach does not contribute to the development of an effective common grammar, aiming at the harmonization of the procedural element of the common law and civil law system of criminal justice. Implementing victim's participatory rights in a manner more consistent with right of victims to general fairness, but also with accused's right to a fair trial, requires to put forwards a core set of participatory rights for victims, which should be granted to victims systematically, rather than caustically. This potential set of victims' rights can enhance an overall predictability of the roles of victims and guarantee legal certainty to the defendants as well. Establishing a set of victims' rights can clarify the nature of victims' participatory rights, but if we look at the broader picture, it can contribute to the recognition of a harmonised procedural system that dominates the international criminal justice, as a full response to the concerns of the victims.

CHAPTER VIII

Conclusions and Implications.

8.1. Introduction.

This study has aimed to provide critical insight into the question of how to frame a model of participation for victims of gross violations of human rights and humanitarian law, which can fulfil the aims of the specific provisions on victims' participation of the ICC Statute and RPE, in light of the *sui generis* context and nature of the criminal justice system of the ICC. This was accomplished through an extensive analysis of existing literature, largely the existing body of jurisprudence on distinct approaches to victims' participatory rights, to understand the nature and extent of such participation in the context of the international criminal justice system. The study also critically examined the challenges and limits of the traditional theoretical framework of international criminal justice in dealing with a victims' participation scheme in proceedings before international criminal tribunals, and provides critical insights on how such limitations can be addressed through the adoption of the conceptual framework envisaged by expressivism.

This concluding chapter commences with a discussion of the key points to have emerged from this study. It also discusses the study's contribution to the growing discourse in transitional justice responses to mass atrocities as well as the research's implications. Finally, the chapter concludes with a discussion about the limitations of this research and suggests potential areas for future research.

8.2. Summary of key points.

The study explored the mechanisms to implement the provisions on victims' participation of the ICC Statute and RPE, in order to meaningfully address victims' participatory rights. The thesis highlights that, due to the *sui generis* nature and goals of the international criminal justice system, the retributive, deterrent and restorative justice models adopted by the international criminal tribunals are not adequate to meet the purpose of delivery international justice and the needs of justice for victims, as recognised by the provisions of the ICC Statute. Framing a model of participation

for victims in proceedings before the ICC that fulfils the aims of the ICC Statute, with specific reference to the aims of victims' participation, without a broader reconsideration of the framework of justice adopted by the ICC would fall short of providing an effective response to the need of justice for victims. To effectively tailor a meaningful victims' participation scheme, it is necessary to depart from both the victimological approach and the existing criminal justice framework adopted by the international criminal tribunals so far, which still relegate victims at the periphery of the criminal process. It is critical to adopt a new concept of justice within international criminal justice which achieves the goal of the provisions on victims' participation, namely to give a voice to victims in criminal proceedings before the ICC. This must be done in a way that the criminal justice framework not only addresses the needs of justice for victims, but also provides the best basis to understand how all the Statute provisions can coherently fit together.

The new regime of victims' participatory rights regime as read together with other relevant provisions in the ICC Statute and RPE, provide a normative framework for an expressivist paradigm of criminal justice. This framework is a mechanism through which victims of international crimes can be entrenched as participants in the proceedings before the ICC. A unifying thread running throughout the analysis in this thesis is the idea that the regime of victims' participation, as outlined in the ICC Statute and RPE, must be implemented through the conceptual lens of a criminal justice framework that fulfils the overall goal of victims' participation, namely to give victims a voice in the criminal process and harmonise the diverging understandings of victims' role, as recognized by the common law and civil law traditions.

The historical investigation of the role of victims in domestic criminal justice, with a specific attention to the English system, invalidates the common law position that justified the removal of the victims' participatory rights, as incompatible with the adversarial structure of the proceedings aimed at safeguarding the fairness of the trial and the rights of the accused. The concept of victims' procedural right was broadly accepted in the ancient and mediaeval system of criminal justice, including in those systems which later evolved as common law systems. The gradual exclusion of victims from the criminal process was rooted in sociological and political factors.

The evolution of the societal fabric into a more and more complex system, coupled with centuries of State's centralization, led to the development of centralised system of the administration of justice in the hands of the State's authorities, structuring the criminal justice system as a contest between the state and the defendant. These factors should not constitute a rational justification for the continued exclusion of victims' rights and interest in the context of international criminal justice.

Victimological studies did not produce a radical reform of the existing procedural models, informed by the retributivist and deterrent paradigms. Victimology did not break down those mechanisms which prevent victims to exercise participatory rights, since the victimological response to the calls for a better integration of victims into systems of criminal justice has resulted in a range of modest mechanisms seeking to reposition the victim. In fact, the victims' procedural rights approach and victims' right to service approach relegated the victims at the periphery of criminal justice. The victims-based approach grounded in the victims' procedural rights, which envisaged victims' statement at the sentencing process, reflected the sense of reluctance in common law countries to afford victims a greater say in criminal process, due to the potentially disruptive effects, since victims were considered to pose a threat to the expeditiousness and fairness of the trial. The victims' right to service approach, by justifying victims' role only relying on the identification of their physical, psychological and financial needs, demonstrated that it tended to manage victims away from the criminal justice system into alternative pathways to justice. In a similar way, restorative practices have the merit of having placed new obligations on criminal justice agencies to make their practice more inclusive of victims' concerns. However, negotiated process of restorative practices goes beyond the strict scope of criminal process and the nature of rights conferred to victims in such mechanism appear to be more similar to right to service than participatory rights.

Victimology failed in reforming the existing procedural models and the same dynamics of retributive, deterrent and restorative justice systems, which marginalised victims' role at domestic level, have been transposed in international criminal justice. This transplant is problematic not only because retributive, deterrent and restorative systems do not fulfil the goal of the victims' participation scheme, but also because

they do not meet the purpose of delivery international justice. The ICTY, ICTR and ICC, in putting forward as theoretical justification to the international criminal justice system these frameworks, downplayed the suitability of such transplant in the context of mass atrocities in international law.

Crimes under the jurisdiction of the ICC are characterised by the collective nature of both victims and perpetrators, as the former may be a racial, national or ethnic group, while the latter involve highly organized number of groups or individuals having a status with regard to a nation-State. Moreover, this kind of crimes generally occurred during wars, social breakdowns, like ethnic conflicts, when basic norms against violence are undermined and gradually removed to the detriment of specific ethnic, political and religious groups. Against this background, ensuring justice requires more than just punishing offenders. The *sui generis* nature of international criminal justice system broadens the list of goals and objectives of international criminal institutions, including providing the historical record of mass atrocities, maintenance of peace, bringing justice to victims and giving them a voice, promoting social reconciliation, to disseminate human rights values as well as ending impunity for serious violations of human rights and humanitarian law.

Retribution and deterrence, being focused on meting out a punishment respectively because the offender deserves the punishment and to dissuade the public at large from committing crimes in the future, fell short in addressing these complementary goals of international criminal justice. The high selectivity of the prosecution lowers the chances for the perpetrators of gross violations of human rights to be caught and punished and therefore it decreases the deterrent effect of punishment and invalidates the imperative of retributivism, requiring that all persons deserving a punishment have to be punished. Furthermore, it is not possible for the international criminal tribunals to mete out a punishment commensurate with the extensive nature, seriousness and recurrence of the atrocities committed. Indeed, this factor does not serve retribution, but it also weakens deterrence as the benefits of the crime outweigh the seriousness of the punishment.

Restorative justice has proved more attentive to the needs of victims; however, the specific nature of international criminal justice has also downsized the restorative goals of the international criminal tribunals. Restorative justice

mechanism diverges from the goals of the criminal justice system enshrined in the Preamble of the Rome Statute, because it does not provide any method of adjudication. Moreover, since restorative accountability is participatory and consensually based, it needs the offenders to acknowledge their culpability and willingness to amend for their wrongdoing. The experience has been that defendants before the international criminal tribunals have mostly been unwilling to do that.

The inclusion of the victims' rights regime in the ICC Statute and RPE in light of the multiple nature of goals and objectives of international criminal justice, calls for the adoption of expressivist justice paradigm in order to give full effect to victims' rights to participation. There is, thus, a critical need to reformulate the criminal justice paradigm that underpins the international criminal justice system. An expressivist paradigm offers the best way of understanding how the provisions of the Rome Statute fit together. Expressivism imposes a change in the perspective of the international criminal justice system, as it advances a distinctive role for criminal justice system, which rests in the didactic function of the trial and its capacity to create historical narratives as representations of 'truth' and their pedagogical dissemination to the international community. The expressivist approach to the trial is a vehicle for the provisions on victims' participation to achieve the important goal of giving a voice to victims. The expressivist framework of international criminal justice, by conceiving the proceeding as a forum for providing a narrative of the events and enunciating condemnation of the atrocities committed, acknowledges the important role of the victims in criminal proceedings for communicating the denunciation of those heinous conducts. The message to those who think they can engage with these criminal conducts that impunity will not be tolerated, can be expressed not only through punishment, but the mechanism of victims' participation makes possible to convey the repudiation of such crimes. In fact, within the expressivist paradigm victims' voice contributes to the enhancement of the quality of the narrative shaped during the proceeding and ultimately to the establishment of the truth, carrying on an effective prosecution of perpetrators and putting an end to impunity.

As it is focused on the normative function of the proceeding, rather than on the prosecutor-defendant contest, the expressivist approach smoothens the rough

edges off the adversarial nature of the criminal process. Reconceiving the paradigm of criminal justice through the conceptual approach of the expressivist function of the proceeding contributes to harmonising the procedural understanding of the rights and role not only of the victims, but also of the other participants Adoption of the expressivist framework is possible to establish a common grammar that breaks the gap in the languages of the different concept of the criminal process of the civil law and common law systems, in light of the overall goal of giving victims a voice. A truly *sui generis* system of justice, which embodies a synthesis between adversarial and inquisitorial traditions, calls for a more active role for the judges in the pursuit of the truth. Expressivism, while it does not affect the Prosecutor's exercise of his/her prosecutorial discretionary powers, requires that s/he acknowledges that victims represent one of the constituencies s/he has to serve.

The ICC Statute requires that, pursuant to Article 21, the application and interpretation of law "must be consistent with internationally recognized human rights". A proper reading of Article 21, in its requirement that interpretation of the Statute must conform to recognised human rights, provides an entry point for the Court to apply expressivist paradigm that have been embraced by the regional human rights monitoring bodies, namely the ECtHR and IACtHR, which jurisprudence is relevant to the elaboration of victims' rights in the ICC Statute itself. The various Chambers of the ICC have so far referred to human rights and cited the ECtHR and IACtHR jurisprudence in their interpretation of specific aspects of victims' right to participate in proceedings. Both the IACtHR and ECtHR held the duty of states to prosecute perpetrators of violent crime as part of the victims' right to an effective remedy. This duty finds expression in the mandate of the ICC to prosecute perpetrators of genocide, war crimes and crimes against humanity. These Human Rights Courts acknowledged that, because of values that their respective Conventions protect, human rights violations involve breaches of rights that have a special status. Thus, the criminal proceeding should serve to reaffirm the importance that society places on those serious infringements. It can be maintained that the State's obligation to undertake an effective investigation is informed by the conceptual application of the expressivist values, since criminal proceeding becomes the mechanism to express disavowal and condemnation of those conducts violating

human rights to reaffirm the importance of human rights and educate the public to the respect of those rights.

The case law of the IACtHR and ECtHR also recognised the right of the victims, whose basic rights to life and of prohibition to inhuman treatment are violated, to participate in related criminal proceedings to express their concerns. The case law of the IACtHR and ECtHR have articulated two basic rights of victims: the right to access to justice to obtain an investigation and the right to participate in criminal proceedings. In view of the seriousness of the infringements suffered by the victims, the system of criminal justice should not only seek to punish the perpetrators, but also to ascertain the truth, by providing a narrative of the events. The victims' right to access to and participation in criminal proceeding reflects the ECtHR and IACtHR view that victims' voice contributes to the enhancement of the quality of the narrative, carrying on an effective prosecution of perpetrators and putting an end to impunity.

On reviewing the existing jurisprudence of the ICC, this study investigated the extent to which the ICC judges offered a model of victims' participation, which, by providing justice for victims, embodies a synthesis between adversarial and inquisitorial traditions. First of all, the analysis of the *Lubanga case, Katanga and Chui case* and *Bemba case* illustrated that, in the view of the Chambers, the extent of regime of victims' participation and not their participation *per se* is the core consideration in determining what model of victims' participation to implement.

The right of victims to participate at the investigation and pre-trial stage is perhaps the most controversial issue in the case law of the ICC. While in the *Lubanga case*, the Pre-Trial Chamber I preferred to rely on the well-established common law narrative, which sees the prosecutor as the absolute *dominus* of the investigation stage, in the *Katanga and Chui case* and *Bemba case*, the Pre-Trial Chambers held a broader interpretation of the role of victims at the investigation and pre-trial stage. In *Katanga and Chui case* and *Bemba case,* the judges interpreted the provisions on victims' participation emphasising the important contribution of victims to ascertain the truth, since at the investigation and pre-trial stages victims' rights serve as an important check on the prosecutorial discretion. The chambers

specifically attempted to consistently harmonise the victims' right to participate in the investigation and pre-trial stages, by introducing a set of rights for victims.

With regards to the right of victims to participate at the trial stage, the jurisprudence of the ICC showed that the Chambers struggled to provide a consistent interpretation of victims' right to express views and concerns. Among the three cases under exam, only in the *Lubanga case* the Trial Chamber conceived the term "views and concerns" as a means that empowers victims to contribute to the enhancement of the narrative at the trial stage and, thus, to forge the didactic message that the trial should convey. The right of victims to present views and concerns breaks the stiff bipolar structure of the proceedings, dominated by the prosecutor and defence, as they become a mechanism aiming at suggesting to the judges how to orientate their fact-finding. The most significant step forward in providing a meaningful model of victims' participation in light of the aim of giving a voice to victims is represented by the mechanism that allows victims to introduce evidence based on Article 69(3) of the Rome Statute. The spirit of this mechanism presents elements and values that can be read as ingrained in the expressivist approach of the trial, because it demonstrated that the goal of the international criminal justice is not only the determination of guilt or innocence of the defendant, but it also seeks to ascertain the truth and to give victims a voice.

The analysis of the case law of the ICC also uncovered two important limitations of the regime of victims' participation delineated in the three cases tried by the ICC. Firstly, to the extent that victims' participation in proceedings is subject to judicial determination on a case-by-case basis, the victims' participatory rights are turned into a privilege. Secondly, this study argued that the legal representation to a certain extent negates the essence of the victims' right to participate in proceedings. While the principles embodied in the expressivist approach would require a process where the majority of victims participate directly, the common legal representation, which pools victims together for purposes of participation, overlooks victims' personal interest to participate in the proceeding in order to provide their narrative, in favour of a collective and rather abstract concept of victimhood.

To conclude, in proposing an expressivist approach to the international criminal justice, it has been demonstrated that the provisions on victims'

participation of the ICC Statute can be interpreted as envisaging elements corresponding to the said expressivist approach. In this regard, it was argued that expressivism provides the best basis of understanding the manner in which the provisions on victims' participation and those related to the rights of the defendant and to the powers of the prosecutor and the Chambers coherently fit together.

8.3. Contribution to scholarship and research implications.

The analysis in this thesis proceeded from the standpoint that the endeavour to shape a model of participation for victims in proceedings before the ICC urges an in-depth reflection on the nature of the framework of justice adopted by the ICC. To provide an effective and meaningful response to the need of justice for victims, it is crucial to adopt a new concept of justice, namely the expressivist model, which achieves the goal of giving a voice to victims in criminal proceedings before the ICC, as enshrined in Article 68(3) of the Rome Statute.

This thesis has sought not only to explore the purposes and nature of victims' participatory rights, but also to investigate the challenges and limitations of the traditional frameworks of international criminal justice in addressing the mandate of the ICC. It offers critical insights into how the limitations of the retributive, deterrent and restorative model of international criminal justice can be addressed through the adoption of the complementary conceptual approach of expressivism. This thesis, therefore, is a significant contribution towards a better understanding of the *sui generis* nature of international criminal justice and specifically of the framework of the ICC, as contemplated by the ICC Statute.

This study also argues a case for the need to adopt the expressivist framework to the ICC criminal justice in order to contribute to bridge the divide between the common law and civil law with regard to the trial process. Crucially, this study suggested that through the adoption of the conceptual approach of the expressivist goal of trial is possible to establish a common grammar to break the gap in the languages of the different concept of victims' participatory scheme of the civil law and common law systems and to harmonise those different positions.

It is intended that the outcome of the thesis will be valuable in drawing the attention to the nature and purposes of victims' participation regime, as outlined by the norms of the ICC Statute. Particularly the study underlines the critical need to

reformulate the criminal justice paradigm that underpins the international criminal justice system, with specific reference to the ICC, in order to implement the existing norms on victims' participation in consideration of the overall purpose of giving a voice to victims in the proceedings. As expounded throughout this thesis, the international criminal justice system in relying on traditional paradigms of criminal justice drastically overlooked the nature of the role of victims, or at the best-case scenario, only partially provided a meaningful model of participation for victims. The analysis presented in this thesis has important implications for enhancing victims' participatory rights in the proceedings before the ICC to address the complex and serious dimension of the gross violations of human rights and humanitarian law suffered by victims.

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