

# 17 THE VICTIM AS NEW AND CONTROVERSIAL ACTOR OF THE INTERNATIONAL CRIMINAL COURT'S PROCEEDINGS

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## 17.1 VICTIMS IN INTERNATIONAL CRIMINAL JUSTICE

The role of victims has recently seen a progressive development in national legal systems, especially in those of EU Member States.<sup>1</sup> This enhancement has been encouraged by the previous valorization of victims in international criminal justice, where victims have been rediscovered as procedural actors endowed with powers to exercise both in the pre-trial and trial phase.

Indeed, with the exception of the post-World War II International Military Tribunals, where victims were completely neglected,<sup>2</sup> international criminal jurisdictions rest on a victim-centered ideological basis. They were specifically created to satisfy the shared political need to ensure justice to victims of such cruel and widespread crimes which could not be ignored by the international community. It can, therefore, be said that consideration for victims is in a way inherent in international criminal tribunals.

This is true for the temporary *ad hoc* Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR), established in The Hague and in Arusha by the UN Security Council in the early 1990s and having a jurisdiction with a limited scope as to the type of crimes, the geographic area and time of their commission.<sup>3</sup>

But it applies even more to the International Criminal Court (ICC) in The Hague. The ICC is the first<sup>4</sup> permanent<sup>5</sup> international criminal tribunal created on 17 July 1998 with the adoption of its Statute in Rome. The Rome Statute is an international treaty providing the Court international legal personality<sup>6</sup> and the ability to exercise its complementary

1 P.P. Paulesu, 'Vittima del reato e processo penale: uno sguardo d'insieme', in M. Bargis - H. Belluta (Eds.), *Vittime di reato e sistema penale. La ricerca di nuovi equilibri*, Torino, Giappichelli, 2017, p. 127 *et seq.*

2 Y. Danieli, 'Massive Trauma and the Healing Role of Reparative Justice', in C. Fertsman - M. Goetz - A. Stephens (Eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, Leiden, Martinus Nijhoff Publishers, 2009, pp. 67-68.

3 SC Res. 808, 22 February 1993; SC Res. 955, 8 November 1994.

4 The ICC is defined as a 'revolutionary institution' in A. Cassese, 'The Statute of the International Criminal Court. Some Preliminary Reflections', in *European Journal of International Law*, 10, 1999, p. 145.

5 Art. 1 ICC Statute.

6 Art. 4 ICC Statute.

jurisdiction to that of States over genocide, crimes against humanity, war crimes and the crime of aggression.<sup>7</sup> In the light of the mass victimization typically resulting from the crimes falling under the ICC jurisdiction and specifically mentioned in the Preamble of the Rome Statute,<sup>8</sup> one can even argue that to deliver 'justice for victims' (including the right to access to justice, the right to reparations and the right to truth<sup>9</sup> recognized in the 2006 *Basic Principles*<sup>10</sup>) is one of the main goals of the ICC.<sup>11</sup>

While both the indicated *ad hoc* Tribunals and the ICC take in serious account the sufferings of victims, the ICTY and the ICTR have not actively involved victims in the proceedings. The relevant provisions of their Statute and Rule of Procedure and Evidence only let victims testify, receive proper protection where needed and obtain a very limited form of reparation.<sup>12</sup> This choice relies upon the questionable contention that the Prosecutor can adequately represent the interests of all the victims of crimes under the scrutiny of the tribunals.

Differently, victims play a crucial role in the proceedings before the ICC. Various procedural provisions embodied in the main legal instruments of the Court (the Statute, the Rules of Procedure and Evidence (RPE) and the Regulations of the Court) grant those who satisfy the definition of 'victim' laid down in Rule 85 RPE<sup>13</sup> the paramount right to participate in the proceedings and the right to obtain reparation for the damage suffered as a consequence of the crime,<sup>14</sup> as well as specific rights to protection<sup>15</sup> and assistance.<sup>16</sup>

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7 Art. 5 ICC Statute.

8 Preamble to the Rome Statute, para. 2, which reminds that millions of persons were victims of 'unimaginable atrocities' during the twentieth century.

9 D. Donat-Cattin, 'Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings', in O. Triffterer - K. Ambos - C.H. Beck (Ed.), *The Rome Statute of the International Criminal Court. A Commentary*, C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2016, p. 1685.

10 GA Res. 60/147, 16 December 2005.

11 L. Moffet, *Justice for Victims before the International Criminal Court*, London, Routledge, 2014, p. 394.

12 Art. 24 para. 3 ICTY Statute; Art. 23 para. 3 ICTR Statute; Rule 105 ICTY RPE.

13 According to Rule 85, '(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'.

14 Arts. 75 and 79 Statute; Rules 94-99 RPE.

15 Arts. 68, 54 para. 3 lett. F), 57 para. 3 lett. C), 64 para. 2, 93 para. 1 lett. J) Statute; Rules 87 paras. 1 and 3, and 88 RPE.

16 Rule 17 RPE; Art. 75 Statute.

Participatory rights are the main novelty in the framework of victims' prerogatives before the ICC, causing victims to enjoy a unique procedural *status* compared to the one attributed to them by international criminal tribunals and by national criminal courts.

In fact, according to Article 68 Paragraph 3 of the ICC Statute, victims can play an active part in potentially any stage of the proceedings<sup>17</sup> by presenting their 'views and concerns', thus contributing to the definition of the proceedings against the possible authors of the crimes they have allegedly been harmed by.

This right is distinct and independent from the mentioned right to obtain reparations, which victims can exercise only after the conviction of the accused and irrespective of whether they have participated in the proceedings. This means that victims are engaged in the proceedings as victims *stricto sensu*, namely as peculiar procedural actors, though mostly not considered 'parties'.

They are certainly not mere witnesses, as in previously established international criminal tribunals. They are not even like any of the specific figures known to State criminal proceedings, although the view that the *status* of victims participating before the ICC is akin to the one of victims in civil law criminal systems<sup>18</sup> and is alien to the common law legal tradition is not infrequent.

Indeed, on the one hand, some forms of valorization of victims are also known to some accusatorial legal systems with adversarial proceedings;<sup>19</sup> on the other hand, in inquisitorial systems it is hard to find a model of victims' participation perfectly corresponding to the one adopted by the ICC, given that in those national criminal systems victims can exercise certain relevant powers in the pre-trial phase,<sup>20</sup> but they can be

17 In the ICC proceedings, a preliminary distinction must be drawn between situations and cases: a *situation* is the most embryonal stage of the proceedings, where a suspect has not yet been formally identified through the issuance of a warrant of arrest or a summons to appear, and starts with the referral of crimes allegedly committed in a geographically and temporally limited scenario falling under the ICC jurisdiction or with the initiation of investigations by the Prosecutor *proprio motu* over those crimes. After a case starts with a warrant of arrest or a summons to appear, the phases of the proceedings are as follows: *pre-trial*, ending with the confirmation of the charges hearing; *trial*, subject to the confirmation of the charges and ending with a decision finding the accused guilty or innocent; *sentencing*, only if the accused is convicted; *appeals*, both interlocutory and against the verdict; *reparations*.

18 A. Cassese, 'The Statute of the International Criminal Court. Some Preliminary Reflections', *European Journal of International Law*, Vol. 10, No. 1, 1999, pp. 144-171, at 168; A.-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, p. 1342.

19 For example, in some traditionally common law legal systems (England, Australia, New Zealand, United States) victims can act as private prosecutors, can benefit from compensation orders or can present victims' impact statements. See J. Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation', *Journal of Law and Society*, Vol. 32, No. 2, 2005, pp. 294-316.

20 In Italy, victims' powers in the pre-trial phase include the power to oppose to the Prosecutor's request to dismiss the case or the one to present pleadings (Arts. 410 and 90 of the Italian Criminal Procedure Code). See also Arts. 392 para. 1-bis, 360 and 413. See C. Iasevoli, *Persona offesa dal reato*, in *Enc. Giur.*, XXVI, 2007, p. 2 s.

involved in the crucial trial phase only as civil parties seeking compensation for the damage suffered.<sup>21</sup>

It can, therefore, be concluded that victims' participation before the ICC is unprecedented. The reason for that is the authentically international nature of victims' right to participate.

## 17.2 VICTIMS' PARTICIPATION ACCORDING TO ARTICLE 68 PARAGRAPH 3 OF THE ICC STATUTE

The provision of the ICC Statute envisaging a general right of victims to participate in any stage of the proceedings is not the only one related to participation: Articles 15 Paragraph 3 and 19 Paragraph 3 let victims take part in specific stages of the proceedings,<sup>22</sup> precisely in the procedure regarding the judicial authorization of an investigation initiated by the Prosecutor *motu proprio* and in the proceedings aimed at challenging the jurisdiction of the Court over a case or the admissibility of a case. However, given the very limited scope of these forms of participation and the absence of particular issues related to these provisions, we will concentrate on Article 68 Paragraph 3.

Before analyzing this provision, it must be said that some important practical aspects of participation are specified in Rules 89-93 RPE, pursuant to the final clause of Article 68 Paragraph 3 whereby victims must participate 'in accordance with the Rules of Procedure and Evidence'. In particular, the relevant rules regulate the procedure to obtain the *status* of victim (Rule 89), victims' legal representation by a legal defender (Rule 90), the participation of legal representatives in the proceedings (Rule 91) and notifications (Rule 92); also, they indicate some stages of the proceedings where victims' involvement can be appropriate (Rule 93).

Focusing now on Article 68 Paragraph 3, this provision establishes that victims can present their 'views and concerns' and the judges must take them into consideration on the condition that the Court finds that three conditions are met:

- a. in the first place, victims' 'personal interests' must be 'affected';
- b. then, the stage of the proceedings in which victims wish to participate must be deemed 'appropriate';
- c. third, the modalities of participation must not impair the rights of the accused and the fairness or the impartiality of trial.

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21 On the powers on this procedural actor in France, where the origins of the civil party can be traced back to the 1970 Ordonnance Criminelle, see P. Bonfils, 'Partie civile', *Répertoire de Droit Pénal et Procédure Pénale*, Paris, Dalloz, 2011; about the Italian civil party, A. Pennisi, 'Parte civile', *Enciclopedia del diritto*, I, Milano, Giuffrè, 1997, p. 783 *et seq.*

22 C. Stahan – H. Hólasolo – K. Gibson, 'Participation of Victims in Pre-Trial Proceedings of the ICC', *Journal of International Criminal Justice*, Vol. 4, No. 2, 2006, pp. 219-238, at 224.

Moreover, the article under consideration provides that victims may participate through legal representatives, even if, according to Rule 90 RPE, victims' representation by a legal defender is compulsory.<sup>23</sup>

It is apparent that the wording of the provision under examination is very broad and indefinite. This feature is in line with the so-called 'constructive ambiguity' drafting technique of the procedural provisions of the ICC which was adopted as a means to avoid giving precedence to a particular legal tradition of the several States who contributed to the birth of the Court.<sup>24</sup>

Article 68 Paragraph 3 is indeed the result of exceptionally long negotiations led by States with diverging ideas as to the role of victims in criminal proceedings, as confirmed by its drafting history. While participation was disregarded in the 1994 draft of the ICC Statute,<sup>25</sup> it first appeared in an innovative proposal presented by the Egyptian delegation in 1996.<sup>26</sup> It was later developed in a proposal by New Zealand<sup>27</sup> and, eventually, in a provision drafted by Canada,<sup>28</sup> which is almost identical to the currently applicable Article 68 Paragraph 3 and very similar to Article 6, letter. b) of the 1985 *Victims' Declaration*.<sup>29</sup>

Generally speaking, even though this method should ideally enrich the procedure of the ICC and favor the elaboration of the best solutions to the procedural questions related to its very peculiar proceedings, it has often led to the simple adoption on a case-by-case basis of a specific national approach, generally coinciding with the one of the country of origin of the competent judge. This tendency, combined with the lack of the binding precedent rule,<sup>30</sup> can seriously undermine the predictability and fairness of ICC decisions.

With specific regard to victim participation, as a result of the outlined drafting approach, it rests upon the judges of the Court to shape participation in practice that is to determine *if, when* and *how* victims can participate in the proceedings. The sole limit to the extremely wide judicial discretionary power is the need to respect the rights of the accused and the principles governing fair trial. We will then concisely illustrate how the judges of the ICC have interpreted Article 68 Paragraph 3.

23 Also, in practice, the Court appoints one or a few common legal representatives for all the usually numerous victims (Rule 80 of the Regulations of the Court), choosing them among the members of the Office of Public Counsel for Victims (OPCV). This practice is criticized in that it contravenes the principles whereby representation should be effective (Rule 79 of the Regulations of the Court) and the legal representative should be freely chosen by victims. See Donat-Cattin, 'Article 68', p. 1701.

24 C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', *Journal of International Criminal Justice*, Vol. 1, No. 3, 2003, pp. 603-617.

25 Report of the International Law Commission on the Work of its Forty-Sixth Session (2 May-22 July 1994), A/49/10, 1994, Art. 43.

26 Proposal Submitted by Egypt for Art. 43, A/AC.249/WP.11, 19 August 1996.

27 Amended Proposal by New Zealand on Art. 43, Non-Paper/WG. 4/No. 19/Rev. 1, 13 August 1997, para. 3.

28 Proposal Submitted by Canada, A/CONF.183/C.1/WGPM/L.58/REV.1, 6 July 1998, Art. 68, para. 3.

29 GA Res. 40/34, 29 November 1985.

30 According to Art. 21 para. 2 ICC Statute, the judges *may* follow their precedents.

First of all, on the basis of the analysis of the varied decisions of the Court and the related academic studies, it can be stated that victims can take part in the proceedings if their 'personal interests',<sup>31</sup> and mainly those related to victims' rights to protection,<sup>32</sup> reparations<sup>33</sup> and truth,<sup>34</sup> can be affected as a consequence<sup>35</sup> of specific procedural issues or of an entire phase of the proceedings.<sup>36</sup>

In the second place, the judges of the Court have determined *when* victim participation can take place. They have established that, theoretically, victims can take part in almost every stage of the proceedings before the ICC, even in the very early stage of a *situation*,<sup>37</sup> as suggested by the non-exhaustive list of the proceedings where participation may be deemed appropriate according to the above-mentioned Rule 93. However, as far as the *situation* stage is concerned, victims are not allowed to participate in the entire phase, but only in specific proceedings within that phase having a 'judicial' nature.<sup>38</sup> It is instead not disputed that victim participation is permitted in the confirmation of the charges hearing, given the presence of the 'accused' mentioned by the provision, and in the trial, given that the same provision is included in Part 6 of the ICC Statute dedicated to the trial.

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- 31 Some authors argue that the notion must be confined to 'judicially recognizable personal interests'. See E. Haslam, 'Victim Participation at the International Criminal Court: a Triumph of Hope over Experience?', in D. McGoldrick - P. Rowe - E. Donnelly (Eds.), *The Permanent International Criminal Court. Legal and Policy Issues*, Oxford, Hart Publishing, 2004, p. 326; 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*, Leiden, Martinus Nijhoff Publishers, 2009, p. 664.
- 32 *Situation in Uganda*, Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, PTC II (Single Judge), 10 August 2007, para. 98.
- 33 *Lubanga*, Public Decision on Victims' Participation, ICC-01/04-01/06-1119, TC I, 18 January 2008, para. 98.
- 34 *Katanga*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, PTC I (Single Judge), 13 May 2008, paras. 34-36.
- 35 Some authors and judges give the adverb 'where' as implying a causal nexus between the interests of victims and the crime, but we believe that it is more reasonable to state that a causal link exists between the interests and the proceedings. See Donat-Cattin, 'Article 68', p. 1685; *Lubanga*, ICC-01/04-01/06 OA8, PTC I, Separate opinion of Judge G. M. Pikis, 13 June 2007, para. 13.
- 36 The two alternatives correspond to the so-called 'systematic approach' and 'casuistic approach', respectively adopted for the first time in *Situation in the DRC*, Decision on the Applications for Participation in the Proceedings of VRS 1, VRS 2, VRS 3, VRS 4, VRS5 and VRS 6, ICC-01/04-101-ten-Corr, PTC I, 17 January 2006, para. 63 and in *Lubanga*, Decision on Victims' Participation, ICC-01/04-01/06-1119, TC I, 18 January 2008, para. 96.
- 37 *Situation in the DRC*, 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 Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008, para. 45.
- 38 *Situation in the DRC*, 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 Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008, para. 45.

Finally, the Court has most extensively used its discretionary power in outlining *how* victims can take part in the proceedings. The broad expression 'view and concerns', borrowed from Article 6 letter b) of the 1985 Victims' Declaration, indicates indeed nothing more than a general and generic right of victims to be involved in the proceedings.

Admittedly, certain ICC provisions contain some important indications regarding modalities of participation: the aforementioned Rule 91 Paragraphs 2 and 3 RPE establishes that victims' legal representatives can take part in hearings, present oral or written observations and submissions, and, subject to a request to the Chamber, examine the witnesses and experts presented by the Prosecutor or the defense and question the accused; Rule 89 Paragraph 1 RPE provides the making of opening and closing statements; lastly, Rule 131 Paragraph 2 RPE lets victims consult the record of the proceedings.

Yet, the Court has considerably enriched this catalogue. In fact, in addition to the development of the powers just listed,<sup>39</sup> from the *Lubanga* case on, ICC judges have granted victims remarkable probative prerogatives: they have determined that during the trial victims can not only challenge the admissibility and relevance of evidence presented by the parties but also introduce previously undisclosed evidence pertaining to the guilt or the innocence of the accused and thus relevant to the verdict.<sup>40</sup>

This is an outstanding achievement for victims. Only by presenting evidence they can actually impact on the outcome of ICC trials, whereas other forms of participation cannot be taken into consideration for the purpose of the decision on the guilt or innocence of the accused.

The Court has let victims introduce evidence through an exceptionally extensive interpretation of Article 69 Paragraph 3 ICC Statute, which is perhaps the ultimate expression of the discretionary modelling of participation: the mentioned provision only established that the Chamber can 'request the submission of all evidence that it considers necessary for the determination of the truth', but the Court has concluded that victims

<sup>39</sup> For the possibility to exercise these powers in the trial phase, see *Lubanga*, Decision on Victims' Participation, ICC-01/04-01/06-1119, TC I, 18 January 2008, paras. 101-122. For the same powers in the pre-trial phase, see *Katanga and Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, PTC I, 15 May 2008, paras. 127-143; *Ntaganda*, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/04-02/06-211, PTC II, 15 January 2014, paras. 85-96.

<sup>40</sup> *Lubanga*, Judgment on the Appeals of the Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, AC, paras. 3, 92-98; *Katanga*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial', ICC-01/04-01/07-2288, AC, 16 July 2010, paras. 1, 37-40; *Bemba*, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, TC III, 22 February 2012, para. 18; *Banda*, Decision on the Participation of Victims in the Trial Proceedings, ICC-02/05-03/09-545, TC IV, 20 March 2014, para. 24; *Ntaganda*, Public Redacted Version of 'Decision on the Request by the Legal Representative of the Victims of the Attacks for Leave to Present Evidence and Victims' Views and Concerns', ICC-01/04-02/06-1780-Red, TC VI, 15 February 2017, paras. 8-9; *Ongwen*, Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, TC IX, ICC-02/04-01/15-1199-Red, 6 March 2018, paras. 15-17.

can lead evidence by inviting the Chamber to exercise the *ex officio* power enshrined in the same article.

It has, therefore, been questioned whether victims are entitled to a proper *right* to introduce evidence.<sup>41</sup> Technically, it is not victims who introduce evidence, but the Chamber. Furthermore, the introduction of evidence is subject to the leave of the Court. It follows that victims have not an unfettered right to present evidence<sup>42</sup> – not least because they are not, strictly speaking, parties to the proceedings – but they are rather entitled to a *power* whose effective exercise ultimately rests upon a judicial determination.

### 17.3 THE POSSIBLE CONFLICT BETWEEN VICTIMS' PARTICIPATION AND THE RIGHT TO A FAIR TRIAL

#### 17.3.1 Participation in General: The Presumption of Innocence and the Right to Expedient Proceedings

Victims' participation as a whole has been strongly criticized, especially with regard to the right to a fair trial,<sup>43</sup> despite Article 68 Paragraph 3 specifically prescribing that 'the rights of the accused and a fair and impartial trial' are respected. Two preliminary observations must be made about the employed formula.

First, it is in a way repetitive, since the rights of the accused and the impartiality of the trial – or, better, of the judge – can be seen as two of the various components of the more general right to a fair trial. Indeed, broadly speaking, in criminal judicial proceedings this right encompasses a set of procedural rules granting the accused a body of minimum rights and guarantees and ensuring that both the judge and the overall proceedings are

41 A.M. Plevin, 'Beyond a 'Victims' Right': Truth-Finding Power and Procedure at the ICC', *Criminal Law Forum*, 2014, Vol. 25, No. 3-4, pp. 441-464.

42 See, e.g., *Lubanga*, 11 July 2008, para. 4.

43 S.T. Johnson, 'Neither Victims nor Executioners: the Dilemma of Victim Participation and the Defendant's Right to a Fair Trial at the International Criminal Court', *ILSA Journal of International & Comparative Law*, Vol. 16, No. 2, 2010, 489-496; B. Mcgonigle Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls', *International Criminal Law Review*, Vol. 12, 2012, 375-408; L. Smith-van Lin, 'Victims' Participation at the International Criminal Court: Benefit or Burden?', in W. A. Schabas – Y. Mcdermott – N. Hayes (Eds.), *The Ashgate Research Companion to International Criminal Law. Critical Perspectives*, London, Routledge, 2013, p. 181 *et seq.*; C.P. Trumbull, 'The Victims of Victim Participation in International Criminal Proceedings', *Michigan Journal of International Law*, Vol. 29, No. 9, 2008, 777-826; 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*, Vol. 44, No. 1, 2011, pp. 475-496; S. Zappalà, 'The Rights of Victims v. The Rights of the Accused', *Journal of International Criminal Justice*, Vol. 8, No. 1, 2010, pp. 137-174; E. Haslam, R. Edmunds, 'Whose Number is it Anyway? Common Legal Representation, Consultations and the "Statistical Victim"', *Journal of International Criminal Justice*, Vol. 15, No. 5, 2017, pp. 931-952; L. Walley, 'Victims' Participation in ICC Proceedings: Challenges Ahead', *International Criminal Law Review*, 2016, Vol. 16, No. 6, pp. 995-1017.



impartial. The final purpose of these rules is to warrant the respect of those interests involved in criminal proceedings which may be in conflict with the interest to ascertain the criminal responsibility of the accused and subsequently to punish him.<sup>44</sup>

Second, the concern expressed in Article 68 Paragraph 3 that the participation of victims in the proceedings might prejudice the accused is typical of common law legal systems with adversarial proceedings. Nevertheless, those who express these worries seem to ignore that the respect for the due process of law developed in Anglo-American systems is currently common to the most advanced jurisdictions in the world.<sup>45</sup> Besides, it cannot be overlooked that victims might also be deemed entitled to a right to a fair trial, as recognized by the ECtHR, yet referring to the civil party,<sup>46</sup> and as claimed on a number of occasions by the legal representatives of victims.<sup>47</sup>

Taking now into consideration the allegedly most serious aspects of victims' participation, it must be said that there is particular concern that the granting of the *status* of victim before the accused is found guilty might jeopardize the presumption of innocence enshrined in Article 66 Paragraph 1 ICC Statute. Also, there is fear that the participation of a great number of victims<sup>48</sup> might excessively prolong the proceedings, thus violating Article 64 Paragraphs 2 and 3 letter a) ICC Statute.

The first preoccupation can be easily dismissed because the procedure to be recognized as a victim rests only on a *prima facie* assessment by the competent Chamber of the conditions laid down in Rule 89 RPE.<sup>49</sup>

The second concern is instead to some extent justified, given that both the application process and the actual participation of victims might require a considerable amount of time. In fact, the procedure to allow victims to take part in the proceedings is extremely

44 G. Ubertis, 'Giusto processo (dir. Proc. Pen.)', *Enc. Dir., Annali II-1*, t. 1, 2008, p. 424 *et seq.*; 'Procedural Due Process - Criminal', in Legal Information Institute, US Constitution annotated, Amendment XIV, [www.law.cornell.edu/constitution-conan/amendment-14/section-1/procedural-due-process-criminal#fn1081amd14](http://www.law.cornell.edu/constitution-conan/amendment-14/section-1/procedural-due-process-criminal#fn1081amd14).

45 A.M. De Brouwer, M. Heikkilä, 'Victim Issues: Participation, Protection, Reparation, and Assistance', in Sluiter - Friman - Linton - Vasiliev - Zappalà (Eds.), *International Criminal Procedure*, p. 1342.

46 *Perez v. France*, ECHR (2004), at 67; *Gorou v. Greece*, ECHR (2009), GC, at 24. M. Chiavario, 'Giusto processo', *Enciclopedia giuridica Treccani*, XVII, Roma, 2001, pp. 3-4; *Il 'diritto al processo' delle vittime dei reati e la Corte europea dei diritti dell'uomo*, in *Rivista di diritto processuale*, 2001, p. 938 *et seq.*; B. Mcgonigle Leyh, *Procedural justice? Victim Participation in International Criminal Proceedings*, Cambridge, Intersentia, 2011, pp. 109-111; Paulesu, *Vittima del reato*, p. 146; *but see* 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*, Vol. 13, No. 5, 2015, 951-972.

47 *See, e.g., Ntaganda*, Joint Response by the Common Legal Representative for the Victims of the Attacks and the Common Legal Representative for the Former Child Soldiers to the Defence 'Request for Stay of Proceedings with Prejudice to the Prosecutor', ICC-01/04-02/06, 2 May 2017, para. 43.

48 These are the numbers of victims participating in some of the main cases before the ICC: 146 in *Lubanga*, 366 in *Katanga*, 5.229 in *Bemba*, 4.107 in *Ongwen* and 2.123 in *Ntaganda*.

49 *See, e.g., Situation in Darfur*, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, ICC-02/05-110, PTC I (Single Judge), 3 December 2007, para. 8.

articulated, and the defense and the Prosecutor can present their own observations to every request of victims to participate<sup>50</sup> and to every single procedural act performed by the victims. Although the Court has been experimenting with solutions to accelerate the processes connected to victims' participation,<sup>51</sup> reconciling the involvement of victims with the need to ensure expeditious proceedings remains a very hard task.

### 17.3.2 *Victims' Power to Present Evidence: Judicial Impartiality, Equality of Arms and the Right to an Effective Defense*

Despite the outlined general critical issues, the most significant and controversial aspect of participation is undoubtedly the power of victims to present evidence. Some scholars and judges<sup>52</sup> of the ICC fear that this particular form of participation might undermine some fundamental guarantees of the proceedings, such as the impartiality of the judge, the principle of equality of arms between the accused and the Prosecutor, and the right to an effective defense.

Actually, the second principle is not autonomously considered, but is strictly connected to both the other two principles in the reasoning of most authors. Starting with the impartiality principle, it is believed that by letting victims present the requested evidence – which would be mostly, if not exclusively, against the accused – the judge would end up taking the side of the Prosecutor, thus losing his indispensable impartial attitude and rendering the task of the defense much more burdensome.<sup>53</sup>

A reasonable solution to this supposedly problematic matter can be found by making a comparative reference to some reflections developed in the Italian criminal procedural system about Article 507 of the Italian Criminal Procedure Code, which is the provision approximately corresponding to Article 69 Paragraph 3 ICC Statute. This choice is not dictated by the groundless belief that the Italian legal system is superior to others, but by the proximity of the system in question to the author and by the hybrid character of Italian criminal proceedings, given that their relatively recent reshaping into proceedings with a predominantly accusatorial nature overlaps with a long-standing inquisitorial tradition.

Specifically, according to some esteemed Italian scholars, the judicial power to introduce evidence envisaged by the mentioned Article 507 does not deprive the judge of his impartiality even when additional evidence is introduced *ex officio* rather than upon request of another procedural actor, provided that the introduced evidence is merely sub-

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50 Rule 89 para. 1 RPE.

51 Report of the Court on the implementation in 2013 of the revised strategy in relation to victims, ICC-ASP/12/41, 11 October 2013.

52 *Lubanga*, Partly Dissenting Opinion of Judge Georghios M. Pikis e Partly Dissenting Opinion of Judge Philippe Kirsch, ICC-01/04-01/06-1432-Anx, 23 July 2008.

53 Zappalà, *The Rights of Victims*, pp. 147-148.

sidary to that previously introduced by the parties, in accordance with the wording of the article at hand.<sup>54</sup> Therefore, *a fortiori*, one can contend that the impartiality of the judge remains unimpaired when those probative powers are exercised upon requests of victims, as in the case of Article 69 ICC Statute as interpreted by the Court.

Moreover, Article 69 Paragraph 3 allows the Trial Chamber to introduce evidence when 'necessary for the determination of the truth', and the connected Article 64 Paragraph 6 letter d) appears to require that the judges can present additional evidence only after the parties have introduced their own evidence. Nonetheless, these requisites are intended in a broad sense by the ICC. Instead, in line with the Italian approach, to best maintain judicial impartiality, it might be appropriate to interpret those conditions more strictly and, accordingly, to let victims present evidence through the Chamber only if there are serious loopholes in the evidentiary framework resulting from the previous initiative of the parties.

This restrictive approach would be especially appropriate if considering one of the main reasons probably lying behind the choice to recognize victims probative powers: the weakness of the Office of the Prosecutor (OTP) and its inability to conduct effective investigations. This situation can be explained by the absence of an ICC police force and by the consequent need to largely rely on the assistance of the usually uncooperative local authorities, as well as by organizational deficiencies of the OTP.<sup>55</sup>

Turning now to the right of the accused to effectively defend himself, uncertainties about the rules governing the disclosure to the defense of victims-led evidence can prevent the accused and his counsel from disposing of the time and material to adequately prepare the defense,<sup>56</sup> and, ultimately, can preclude the accused from defending himself on an equal footing with the Prosecutor.<sup>57</sup>

Indeed, there is no specific discipline of disclosure of evidence for victims, given that their power to present evidence is not recognized by any provision. Therefore, according to a now well-established practice of the ICC, victims are subject to the same disclosure

54 H. Belluta, *Imparzialità del giudice e dinamiche probatorie ex officio*, Torino, Giappichelli, 2006, pp. 81-82; E. Fazzalari, *l'imparzialità del giudice*, in *Rivista di diritto processuale*, 1972, p. 201 *et seq.*; P. Ferrua, *Il giusto processo*, Bologna, Zanichelli, 2012, p. 104; Ferrua, *La difesa nel processo penale*, Torino, Utet, 1988, p. 11; P.P. Paulesu, 'Presunzione di non colpevolezza', *Digesto delle discipline penalistiche*, Torino, Utet, 1995, p. 671 *et seq.*

55 C. M. De Vos, 'Investigating from Afar: The ICC's Evidence Problem', *Leiden Journal of International Law*, 2013, Vol. 26, No. 4, pp. 1009-1024.

56 Art. 67 para. 1 lett. B) ICC Statute.

57 Plevin, 'Beyond a "Victim's right"', p. 459 *et seq.*; Smith-van Lin, 'Victims' participation', p. 189; Trumbull, 'The Victims of Victim participation', p. 823; Van den Wyngaert, 'Victims before', p. 488.

obligations incumbent upon the Prosecutor,<sup>58</sup> but only as far as *incriminating* evidence is concerned, whereas the Prosecutor has to disclose also *exculpatory* evidence.<sup>59</sup>

It follows that the matter of disclosure is not just about victims, but is primarily about the Prosecutor. Considering that this is a very complex topic which should be addressed in a separate paper, we will here make only a few remarks about the judicial discretion governing disclosure.

Firstly, the details of the procedure to be followed for disclosure by victims – as well as by the Prosecutor, sometimes derogating from that established in the RPE with a view to ensuring the fairness and expeditiousness of the proceedings – are established by the Court on a case-by-case basis<sup>60</sup> in specific decisions.<sup>61</sup>

Besides, the existing rules fail to impose adequate sanctions in the event of violation of disclosure obligations, with the exception of Rule 121(8) RPE providing that the Court should disregard lately disclosed evidence.<sup>62</sup> It follows that it rests on the Chambers to decide the appropriate sanction in case of late disclosure and non-disclosure.<sup>63</sup>

Broadly speaking, the ICC tends to avoid imposing real sanctions for violations of disclosure obligations committed by the Prosecutor, such as the exclusion of evidence or the termination of proceedings. Rather, when the right of the accused to prepare an effective defense has been prejudiced by non-compliance with disclosure obligations, the Court prefers to adopt mere remedies, like allowing the defendant to recall prosecution witnesses for further cross-examination or granting him extra time in order to review lately disclosed material.<sup>64</sup> Another example of the indicated prevailing approach is the stay of proceedings ordered in the *Lubanga* case with a view to obtaining the disclosure of allegedly confidential exculpatory material from the Prosecutor.<sup>65</sup>

Though, consistent well-established practice is lacking. Instead, a uniform approach should be adopted depending on the objective that the Court decides to pursue: either to reach a decision on the merits of the case, according to the inquisitorial idea whereby to

58 About the *disclosure* obligations for the purposes of the confirmation of the charges hearing, see Arts. 61 para. 3 and 67 para. 2 ICC Statute, Rules 77 and 121 RPE; about those for the purposes of the trial, see Rules 76-78 RPE.

59 On disclosure at the ICC in general see H. Brady, 'Disclosure of Evidence', in R.S. Lee (Ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, Transnational Publishers, 2001, p. 403 *et seq.*; K. Gibson – C. Lussiaa-Berdou, 'Disclosure of Evidence', in K.A.A. Khan – C. Buisman – C. Gosnell (Eds.), *Principles of Evidence in International Criminal Justice*, Oxford, Oxford University Press, 2010, 306 *et seq.*

60 *Lubanga*, 11 July 2008, paras. 100 and 104; *Katanga*, 16 July 2010, para. 55.

61 Rule 121 para. 2 RPE. See, e.g., *Ongwen*, 6 March 2018, paras. 79-84.

62 On the inadequacy of sanctions, M. Caianiello, 'Disclosure before the ICC: The Emergence of a New Form of Policies Implementation System in International Criminal Justice?', *International Criminal Law Review*, Vol. 10, No. 1, 2010, pp. 23-42; X. J. Keita, 'Disclosure of Evidence in the Law and Practice of the ICC', *International Criminal Law Review*, Vol. 16, No. 6, 2016, pp. 1018-1047.

63 Non-disclosure is governed by Art. 54 para. 3 lett. E) ICC Statute and Rules 81-82 RPE.

64 K. Pitcher, *Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings*, Berlin, Asser Press-Springer, 2018, p. 416 *et seq.*

65 *Lubanga*, ICC-01/04-01/06-1401, TC I, 15 June 2008.

exclude evidence, as required by Rule 121, might render the establishment of the relevant facts incomplete and inaccurate,<sup>66</sup> or to sanction the unfair procedural conduct of one of the parties, as in adversarial proceedings.

#### 17.4 CONCLUSION

The concise analysis of victims' participation conducted above has shown that this is not just one of the most original aspects of the already revolutionary ICC, but also one of the potentially most problematic ones, especially when it comes to the right to a fair trial.

Nevertheless, we have demonstrated that there are not insurmountable obstacles to the involvement of victims in the ICC proceedings. Instead, victims can give a fundamental contribution to the best ascertainment of the relevant criminal facts allegedly committed by the accused, thus partially remedying ineffective investigations pursued by the Prosecutor.

It has also emerged that the deepest concerns are linked to judicial discretion governing victims' participation and the criminal procedure of the ICC overall. In the early years of the life of the Court, this was a precious instrument to shape at best the new and unique ICC proceedings. But it has now turned into one of the main weak points of the Court. A proper response to the urgent need for the adoption of certain written procedural rules would surely help overcome the unresolved issues of victims' participation, thus meeting the mostly unjustified concerns for the right to fair trial. Eventually, this would let the ICC obtain recognition and collaboration by States that are still reluctant to give full support to this unprecedented and precious instrument of international justice.

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<sup>66</sup> It is indeed contended that the rules about disclosure – as well as those about the admissibility of evidence – are aimed not only at protecting the rights of the suspect or of the accused but also at ensuring to achieve the best knowledge of the criminal acts under scrutiny. See M.L. Di Bitonto, *Profili dispositivi dell'accertamento penale*, Torino, Giappichelli, 2004, p. 65 *et seq.*