

ANGLIA RUSKIN UNIVERSITY
FACULTY OF BUSINESS AND LAW

**THE TREATMENT OF VICTIMS IN THE
INTERNATIONAL CRIMINAL COURT CASES OF
LUBANGA AND KATANGA**

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**A THESIS IN PARTIAL FULFILMENT OF THE
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Dedication

This thesis is dedicated to my parents, Justice S.B Oyewole and Dr O.V Oyewole. You have both inspired and supported me throughout this journey. I have always loved you and always will. Your kind and invaluable assistance are appreciated. I would also like to record my heartfelt thanks to my sisters, Toyin and Seun.

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List of Abbreviations

Art.	Article(s)
AC	Appeals Chamber
DRC	Democratic Republic of Congo
FPLC	Patriotic Forces for the Liberation of the Congo
FRPI	Force de Resistance Patriotique en Ituri
GA	General Assembly
HRC	Human Rights Center, University of California, Berkeley
HRW	Human Rights Watch
ICC	International Criminal Court
Ibid	Ibidem
IW	Impunity Watch
LRA	Lord Resistance Army
LRVs	Legal Representatives of Victims
NGO	Non-Governmental Organisation
OTP	Office of the Prosecutor
OPCV	Office of Public Counsel for Victims
OPCD	Office of the Public Counsel for Defense
Par.	Paragraph

Para.	Paragraphs
P.	Page
PP.	Pages
PTC	Pre-Trial Chamber
TC	Trial Chamber
Reg.	Regulations of the Court
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
SGBV	Sexual and Gender-Based Violence
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UPC	Union des Patriotes Congolais
VIS	Victim Impact Statement
VOL	Volume
VPS	Victim Personal Statement
VPRS 1	Victims Participation and Reparations Section
WIGJ	Women Initiatives for Gender Justice

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ABSTRACT

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APRIL 2020

Abstract

This thesis analyses the extent to which victims' rights and interests are respected at the International Criminal Court (ICC). It examines how such rights and interests operate at the ICC through the framework of three themes. These themes are (1) prosecutorial discretion, (2) trial process and (3) sentencing decisions. These three themes are convenient as they enable an examination of victims' rights and interests at the different phases of criminal prosecution at the ICC.

In the available scholarship, researchers have utilised qualitative interviews in assessing victim participation at the ICC. This researcher has decided to complement the available scholarship in this area by using a rarely-used and important data source for evaluating victim participation, namely, case transcripts. The research has undertaken a thematic analysis of the case transcripts to examine the extent to which these rights and victims have been respected. In investigating these questions, I used the decided cases of Lubanga and Katanga cases.

The literature on prosecutorial discretion has highlighted the prosecutor's decision based on 'interests of justice' and 'gravity of crime'. However, there are relatively few studies on prosecutorial discretion's impact on victims' rights and interests. This research, therefore, addresses this gap in the knowledge.

While a large and growing body of literature has focused on victims' participation during the trial process, most of this literature focused on fair trial issues and a comparison of victims' rights with defendants rights. Rather than focusing on a fair trial issue, this research adopts a more victims-focused approach and assesses the extent to which the rights and interests of victims-are respected during the trial process to access justice and express their concerns.

Regarding the degree to which victims' rights and interests are respected in sentencing, to the researcher's best knowledge, very few publications are available in the literature that addresses the issue of victims' rights and interests in the ICC sentencing decision. Here also, therefore, the research makes an essential contribution to the available knowledge on this subject.

Therefore, this thesis provides an exciting opportunity to advance our knowledge on the degree to which the ICC respects the rights and interests of victims by using the thematic analysis of prosecutorial discretion, trial process and sentencing decision, based on a rarely-used and important source of data, namely, case transcripts.

The analysis indicates that victims' rights and interests are generally recognised and given importance by the ICC. However, the findings also suggest that prosecutorial

discretion has a significant influence on victims' rights and interests from the early phase of selection of situations through the commencement of cases to trial proceedings. In addition, the thesis found that the exercise of victims' rights and their interests during the trial remains secondary and subordinate to the defendants' rights, rather than being on an equal stance with the rights of the defendant.

Concerning the third theme, this thesis indicates that victims' rights and interests are respected during sentence hearing. However, such rights and interests remain significantly influenced by judicial discretion and the approaches of different decision-makers. In this context, the thesis makes an original and important contribution to knowledge for shedding more light on the operation of victims' rights and interests at the ICC.

KEYWORDS: victims, international criminal justice, prosecutorial discretion, trial process, sentencing, restorative justice and retributive justice.

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Chapter 1. Introduction

1.1 The Introduction

This chapter will cover the study's background, the research question, significance of the study, research methods and research limitations. Chapter 1 explores these topics because it will help the researcher to lay a foundation for this thesis to address the research questions. This thesis intends to examine the consideration of victims' rights and interests at the ICC. It is structured into three themes or frameworks within which the analysis is undertaken, namely, (1) prosecutorial discretion, (2) trial process and (3) sentencing.

The international criminal justice system has witnessed a significant change concerning victim involvement during criminal trial proceedings. Initially, victims' participation in criminal trials was restricted to -participation as witnesses.¹ Christie, in his article, draws our attention to the passive role of victims in criminal trials. He argued that the State and Prosecutor had stolen the property from the victim.² Christie believes the conflict belongs to the victim. However, it has been stolen by the State and the Prosecutor. He submitted that the courts had instrumentalised victims of crimes. From his perspective, the conflict (and resultant criminal trial) ought to be the victims' property. However, the prosecutor has taken over this while the victims are considered

¹Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation', 32(2) *Journal of Law and Society* (2005) 294.

² Nils Christie, 'Conflict as Property' 17(1) *British Journal of Criminology* (1977) 1-15.

instrumentally, merely as witnesses. In his words, 'the conflict' belongs to the victim. One of the significant implications of this is the preclusion of victims' access to justice.

The international criminal justice system(ICJ) is at the heart of our understanding of access to justice for international crimes victims. It also plays a vital role in the administration of justice in the international community. Some of the institutions of the ICJ include the Ad hoc tribunals; the International Criminal Tribunal for Former Yugoslavia(ICTY) and, the International Criminal Tribunal for Rwanda(ICTR), the Special Court for Sierra Leone(SCSL) and the International Criminal Court(ICC). Historically, the advent of the ICJ is traceable to the Nuremberg and Tokyo tribunals.³ However, these tribunals were faulted because they excluded victims from trials. The trial at Nuremberg and Tokyo relied mainly on documentary evidence, which led to the marginalisation of victims and their conflict experiences.⁴

Following the first generation of international tribunals(Nuremberg and Tokyo) and the second generation of international tribunals and courts(the ICTR and the ICTY), the third generation of international criminal tribunals, represented by the ICC, brought about a shift from the role of victims in criminal proceedings to a more active, restricted participation of victims in criminal proceedings. The new approach enhanced victims' access to justice.

³ Frederic Megret, 'The Politics of International Criminal Justice' (2002) *European Journal of International Criminal Justice*,1261-1284.

⁴ Michael Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg*(Caroline Academic Press 1997)340.

Victims' rights are fast becoming a central issue in the international criminal justice system, being influenced in this area by developments in some domestic jurisdictions.⁵ These rights are a reflection of the needs and interest of victims. Some of these rights grant victims the platform to participate in criminal trials. This shift is a gradual development that is evident in the success of domestic victims' rights movement, the emergence of human rights norms, and an international consensus that victim participation is essential to international criminal proceedings' legitimacy and effectiveness.⁶ This thesis will focus on victims' rights and interests because of the growing role that victims have gained in national and international criminal justice. Which, is also the rationale behind their involvement in the ICC.

Victims, as stakeholders in the criminal justice system, require rights to access justice. These rights may be described as a means to an end for them; a tool that empowers them in the criminal process. Their interests also lie in criminal proceedings. Victims' rights and interests could be used to determine what victims want from the criminal justice system. It may also set out their expectations. Studies have shown that if victims were given rights as entitlements, these rights might enhance their access to justice.⁷ However, we should bear in mind that the purpose of these rights is not to create a balance or parity of rights with the defendant's position within sentencing or criminal

⁵ Luke Moffett, 'Elaborating justice for victims at the International Criminal Court: Beyond rhetoric and the Hague(2015) 13(2)*Journal of International Criminal Justice*,281-311.

⁶ Jonathan Doak, *Victims' rights, human rights and criminal justice :Reconceiving the Role of third parties*(Hart publishing 2008)11.

⁷ Jonathan Doak, *Victims' Rights , Human Rights and Criminal Justice: Reconceiving the Role of Third* (Hart Publishing 2008)

justice in general, but rather these rights are needed to access justice and express their concerns.

For this thesis, the ICC's jurisprudence, including court judgements and trial transcripts, shall be accessed and analysed, focusing particularly on two completed cases relating to the DRC situation, namely *Lubanga* and *Katanga*. This is necessary because, since the entry into force of the Rome Statute in 1998, the ICC has been hailed as the benchmark for victims' rights and interests in the arena of international criminal justice.

1.2. Background of the study

This section shall be discussing the background to the study to provide the context to the information of the subsequent analysis. This background also reviews the previous studies about the topic and the recent developments in the area.

Over the years, soft laws like the United Nations Declaration on Basic Principles of justice for victims of crime and abuse of power 1985 (herein referred to as 1985 UN Declaration) and the Basic Principles and Guidelines on the right to a remedy and reparations 2005 (2005 Basic Principles.) have influenced the recognition of victims within the international criminal justice. Although these instruments are not legally binding, nevertheless, they are persuasive. The Rome Statute has duplicated some of its provisions. Jan Van Dijk' writes:

"This Declaration, although not legally binding by itself, is seen as a landmark achievement of the international movement to advance

the interests of crime victims. It can also be used as a benchmark against which progress in domestic policies can be measured."⁸

Victimological studies have established that victims have preferences when encountering the criminal justice system.⁹ These preferences are often examined in connection with the elements of respect, voice, and fair treatment. Some studies confirm that these elements ensure victims' satisfaction with the criminal justice system.¹⁰

According to Garland, victims have become a yardstick for estimating criminal justice systems' effectiveness and legitimacy.¹¹ Doak supports this proposition. He asserts that the involvement of victims in criminal justice systems legitimises the latter.¹²

Also, Wemmers et al. note that victims of crime do get an overall satisfaction if, during participation, they perceive that the proceedings are fair.¹³ It connotes that victims are likely to recognise or accept an outcome if the procedures appear to be fair. This illustrates that procedural approaches to victims' rights and interests may play very

⁸ Jan Van Dijk, "Benchmarking Legislation on Crime Victims: The United Nations Victims Declaration of 1985" in Vetere and David Pedro (Eds), *Victims of Crime and Abuse*.

⁹ Judith Herman, "Justice from the Victims' Perspective" (2005) 11(5) *Violence against Women*, 571-602; Joanne Wemmers, Van Deen Leenden and Steensman "What is Procedural Justice? Criteria Used by Dutch Victims to Assess the Fairness of Criminal Justice Procedure" (1995) 8(4) *Social Justice Research*, 325-500

¹⁰ Tom Tyler, "What is Procedural Justice?: Criteria used by Citizens to assess the fairness of Legal Procedures" (1998) 22 (1) *Law & Society Review* p103-136.

¹¹ Matthew Hall, *Victims and Policy-Making: A Comparative Perspective* (First published 2010, Routledge 2010) 10.

¹² Jonathan Doak, "Victims' Rights and the Criminal Process: an analysis of recent trends in regional and international tribunals" (2003) 23 *Legal Studies* 1; Francesca Klug, "Human Rights and Victims in Cape Town" (ed) *Reconcilable Rights? Analysing the tension between victims and defendants* (Legal Action Group 2004) 111-124.

¹³ Joanne Wemmers, Van Deen Leenden and Steensman "What is Procedural Justice? Criteria Used by Dutch Victims to Assess the Fairness of Criminal Justice Procedure" (1995) 8(4) *Social Justice Research*, pp329-350

significant roles in the administration of justice and perceptions of fairness is substantial in the administration of justice. If victims' rights and interests are recognised during the criminal process, it could give them a sense of belonging. In his study, Tyler found that procedural justice impacts victims' satisfaction and evaluation of their contact with legal authorities.¹⁴ Voice and respect for victims' interests have been considered sacrosanct in assessing procedural justice for victims.¹⁵ The ICC grants victims some procedural rights, provided they made appropriate applications, and are qualified as provided for in the Statute and Rules of Procedure and Evidence. These procedural rights ensure that the court hears victim's voices and concerns. It is a pathway to access justice. However, there are varying opinions in the literature about whether these procedural rights succeed in achieving the desired aims. Some have argued(perhaps cynically) that the Rome Statute drafters considered the introduction of victim participation at the ICC as a means to validate the legitimacy of the court.

Victims evaluate legal institutions based on their experiences and contacts with these authorities.¹⁶ Some studies have found that how people and their problems are treated during dispute resolution by the courts have more influence on their perceptions of fairness, than the outcome of such dispute.¹⁷ Therefore, these studies conclude that: 'focusing on procedural justice is an excellent way to build trust and encourage

¹⁴ Tom Tyler, 'What is Procedural Justice?:Criteria used by Citizens to assess the fairness of Legal Procedures (1998) 22 (1)*Law & Society Review* p103-136.

¹⁵ Tom Tyler, 'Procedural Justice and the Courts (2007)*Court Review* Vol 44 p.24.

¹⁶ John Thibaut and Laurens Walker, "A Theory of Procedure' (1978) 66 *California Law Review* 541-566; Tom Tyler, 'Procedural Justice and the Courts (2007)*Court Review* Vol 44 p.24.

¹⁷ Ibid

compliance irrespective of who the people using the courts are'.¹⁸ Thus, the fairness of procedure becomes a yardstick in determining the treatment of people in judicial proceedings.

Wemmers, in one of her studies, posits that to understand how victims are treated within the criminal justice system, we should examine the system of criminal procedure.¹⁹ It is noteworthy that cultural differences exist amongst countries and how they treat victims during criminal proceedings. While the common law jurisdictions' approach, which operates adversarial systems, is restrictive towards victims, civil traditions' judicial systems have a more accommodating policy towards victims. The civil law countries view the victims as a party to the proceedings. They are referred to as *parties civile*.

On the other hand, the most common law countries do not recognise victims as a party to the proceedings. Somewhat, victims' participation in criminal proceedings is restricted, with the adversarial trial being viewed as a contest between the Prosecutor and the accused.²⁰ Therefore, many countries recognise various degrees of victim participation in their criminal proceedings. Within the ICC, the Rome Statute is a

¹⁸ Tom Tyler, 'Procedural Justice and the Courts (2007)*Court Review* Vol 44 p.28.

¹⁹ Jo-Anne Wemmers, *Victims in the Criminal Justice System: A study into the treatment of victims and its effects on their attitudes and behaviour*. (Kluwer Publications)

²⁰ John Langbein & Lloyd Weinreb, *Comparative Criminal Procedure : "Myth" and Reality* (1977) <https://digitalcommons.law.yale.edu/fss_papers/532/>; Jacqueline Ross & Stephen Thaman, 'Introduction: Mapping Dialogue and Change in Comparative Criminal Procedure' in Jacqueline Ross and Stephen Thaman's (eds) *Comparative Criminal Procedure* (Edward Elgar Publishing 2016)

compromise between negotiators from civil law traditions and common law traditions.²¹ Hence, this is reflected in its criminal procedure which is mixed.

Ambos posits that the international criminal procedure (especially that of the ICC) has developed from an adversarial system to a '*truly mixed procedure*.'²² A consequence of the Rome Statute drafting which merged civil and common law elements in one international procedure. However, he opined that it is no longer relevant if a rule is '*adversarial*' or '*inquisitorial*', but what is essential is if these rules assist the court in fulfilling their tasks and whether it conforms with the fundamental fair trial standards.²³ While the court cannot compromise fair trial standards, the criminal procedure system may also contribute to the proceedings' structure and normative content

Kress submits that the ICC's procedural law does not take the pure form of an adversarial or inquisitorial criminal procedure model. Neither does it involve a mixed system. He describes it as a '*unique compromise structure*.'²⁴ Hence, creating a fair balance between the adversarial and inquisitorial has been left to judges to decide.²⁵ One can infer that a reasonable amount of judges discretion is required here.

²¹ Philippe Kirsch and John Holmes, 'The Rome Conference on an International Criminal Court' (1999) 93(1) *The American Journal of International Law* 2-12.

²² Kai Ambos, 'International criminal procedure: 'adversarial', 'inquisitorial' or mixed?' 3(1) *International Criminal Law Review*, p.1-37.

²³ Kai Ambos, 'International criminal procedure: 'adversarial', 'inquisitorial' or mixed?' 3(1) *International Criminal Law Review*, p.1-37.

²⁴ Claus Stress, 'The procedural law of the International Criminal Law in Outline: Anatomy of a unique compromise', 1(3) *Journal of International Criminal Justice*

²⁵ Ibid.

Nonetheless, it remains the case that significant portions of the proceedings of the ICC are mainly adversarial. For instance, the judges do not perform truth-finding function equivalent to their civil law counterparts. Besides, victims are not a full party to the proceedings.

It remains the case that, in the aftermath of atrocity, justice is a crucial demand of victims, and it may play a vital role in restoring their dignity and delivering justice,²⁶ Provided, it is conducted in a way that is reflective of victims' needs and expectations.²⁷ However, there is a debate that prosecutions alone cannot achieve this aim, which brings in the question of a complementary mechanism in the national jurisdiction, which will support victims' access to justice. There are other alternative mechanisms of transitional justice, like truth commissions that are not within this research scope.

According to Moffett, procedural and substantive justice complement each other in criminal proceedings; this combination ensures a more effective remedy for victims' harm.²⁸ However, this underscores the significance of the fairness of the procedure and the outcome of the proceedings. Previous studies submitted that most victims prioritise the fairness of the criminal process over the result.²⁹ Therefore, victims' perceptions are

²⁶ ICTJ, 'Criminal Justice' <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice> accessed 22 May 2016.

²⁷ Ibid.

²⁸ Luke Moffett, 'Meaningful and Effective? Considering victims' interests through participation at the International Criminal Court' (2015) 26 *Criminal Law Forum*, 255-289.

²⁹ Tom Tyler, 'Procedural Justice and the Courts' (2007) *Court Review* Vol 44 p.28.

influenced by the degree of fairness and respect accorded to them during the proceedings.

Wyngaert, in her study, has drawn our attention to the attempt of the Rome Statute to strike a balance between restorative and retributive justice approach.³⁰ From her perspective, the Rome Statute indicates a remarkable change in the role and needs of victims.³¹ Therefore, through victim participation, the Rome Statute aims to combine the restorative and retributive justice approaches.³² However, some researchers like Findlay and Henham have submitted that victim participation is ambiguous and that the incorporation of restorative justice is more of an aspiration.³³ Arguably, victim participation does not fully incorporate restorative justice. Simultaneously, some restorative justice elements are present in the victim participation at the ICC. It is not certain if the restorative justice approach can reach its full potential within the ICC's jurisprudence. Given that the ICC is a court responsible for the prosecution of perpetrators of gross violations of human rights, there might be friction in striking a balance between restorative and retributive justice.

In this sense, Moffett propounds that the use of restorative justice should be assigned to the domestic courts. Still, the ICC should focus on the effective use of procedural

³⁰ Christine Van den Wyngaert, 'Victims before the International Criminal Court: Some concerns and views of an ICC Trial Judge', 44 *Case Western Reserve Journal of International Law* (2011) p.475,476.

³¹ Ibid.

³² Vesselin Popovski, 'The International Criminal Court: A synthesis of retributive and restorative justice', (2000) 15(1) *International Relations*, 1-10.

³³ Ralph Henham and Mark Findlay, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process* (Willan Publishing 2005)

and substantive justice to ensure that victims attain justice.³⁴ He reiterated that procedural and substantive justice complement each other as a means and ends to redress harm. Also, he highlighted that the active participation of victims is one of the underlying aims of justice. Through participation, he believes that victims have 'defined role rather than being objects of moral concern.'³⁵

Moffett also recommends that states should complement the ICC in delivering justice for victims of crimes. He argues that this complementarity contributes more to the attainment of justice than if states parties were entirely dependent on the ICC to deliver justice for victims.³⁶

In this respect, it is pertinent to investigate how victims' rights and interests are managed at various stages of the criminal justice process at the ICC; commencing from the charging phase to the sentencing phase.

The debate about prosecutorial powers and discretion has gained new prominence with many arguing about checking the prosecution's powers. However, there is a limited, if growing, the body of research that examines how prosecutorial discretion affects the rights and interests of victims at the ICC. The research on this subject has been mostly focused on the parameters of prosecutorial powers. Not so much literature has treated in details how prosecutorial discretion affects victims at the ICC. Therefore. This

³⁴ Luke Moffett, 'Elaborating justice for victims at the International Criminal Court: Beyond rhetoric' (2014) *Journal of International Criminal Justice*, 681-703

³⁵ Ibid .

³⁶ Ibid .

research would contribute to knowledge by analysing the role of victims within the context of prosecutorial discretion.

As maintained by Doak, the criminal justice system should see victims' rights as entitlements rather than privileges granted to balance out the dichotomy between the accused and the victims.³⁷ These rights entitlements are viewed on merit, which supports the framework of victims inclusion in the criminal proceedings as opposed to the balanced approach.

In the opinion of Zedner, Dignan and Bednarova, a framework that pits victims' rights against defendants' rights tends to polarise the debate and risks presenting the narrative as a zero-sum game.³⁸ In their words:

'The metaphor of balance creates tension in criminal justice, simplifying the issues, and allowing complex controversies to be situated within a zero-sum game, in which you are either for or against victims, on the side of the offender or willing to take a stand against.'³⁹

³⁷ Jonathan Doak, *Victims' rights, Human Rights and Criminal Justice :Reconceiving the Role of Third Parties*(Hart Publishing ,2008)

³⁸ James Dignan, *Understanding Victims and Restorative Justice* (Maiden head Open University 2005); Jana Bednarova 'The heart of the criminal justice :a critical analysis of the position of the victim' (2011) *International Journal of criminology*; L.Zedner , *Criminal justice* (Oxford University Press 2004); L.Zedner, "Securing Liberty in the face of terror: reflections from criminal justice' (2005) 32(4), 507-533

³⁹ James Dignan, *Understanding Victims and Restorative Justice* (Maiden head Open University 2005); Jana Bednarova 'The heart of the criminal justice :a critical analysis of the position of the victim' (2011) *International Journal of criminology*; Lucia Zedner , *Criminal justice* (Oxford University Press 2004); Lucia Zedner, 'Securing Liberty in the face of terror: reflections from criminal justice' (2005) 32(4)*Jouranl of Law and Society*. 507-533

The above excerpts collaborate Doak's assertion on granting victims' rights based on merit rather than using the balanced approach. One could infer that the 'balance approach' dichotomises the victims and the defendant, without addressing victims' rights and interests. One can assume that these victims' rights are due process rights that flow from their status as victims, and should be examined on their own merits, rather than by reference to the accused's rights. They are a means of achieving fairness of outcome and, also, a pathway to access justice.

Arguably, the victim participation regime was intended to transform victims into stakeholders in the criminal proceedings at the ICC. The procedural rights may sanction their involvement in the proceedings. This empowerment could be in terms of voice and an extent of control in decision making. In this respect, Christie points out that as the conflict initially belonged to the victims, the justice system should restore the 'property' to them.⁴⁰ A viable approach to accessing justice for victims.

Some researchers studied the effectiveness of victim' participation at the ICC.⁴¹ However, there is a scarcity of research on the role victims' rights and interests play during sentence hearing at the ICC. Little is known about the impact of victim

⁴⁰ Ibid.

⁴¹ Christine Chung, Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise ? (2008) 6(3) pp.459-545; Anushka Sehmi, 'New Victim Participation Regime in Kenya,(2013)22 REDRESS, VRWG Bulletin, accessible at <<http://www.vrwg.org/ACCESS/ENG-22Sehmi.pdf>>Last accessed 22 January 2020; Mouthaan Solange, 'Victim Participation at the ICC for Victims of Gender-Based Crimes:A Conflict of Interests?(2013) 21*Cardozo Journal of International Law*, 619-651;Chris Tenove, 'Victim Participation at the ICC-What's the Deal (2013) accessible at <<https://justiceinconflict.org/2013/11/22/victim-participation-at-the-icc-whats-the-deal/>>Last accessed 12 January 2020.

participation on sentence decision. Therefore, this indicates a need to understand whether and how victims' rights and interests are engaged during sentencing and how victim participation may influence the sentence decision.

This section has analysed the background to the study. The following section sets out the research questions of this current study.

1.3 The research question, its aims and rationale

The central question of this thesis is:

- To what extent have victims' rights and interests been respected in Lubanga and Katanga's cases at the ICC?

In order to address this central research question, I have structured and broken down my analysis across three main temporal stages in the ICC criminal process, reflected in three sub-questions below:

1. To what extent are the rights and interests of victims respected in the context of prosecutorial discretion?
2. To what extent are the rights and interests of victims respected during the trial process.
3. To what extent are the rights and interests of victims respected in sentencing decisions?

These themes represent the pathways of victims' contact with the ICC, starting from the Prosecutor as the gatekeeper of the ICC via prosecutorial discretion, the trial proceedings, sentence hearing and decisions. Therefore, it assesses the progression of

victims' rights and interests as they advance through different ICC stages. The researcher three themes will examine the three themes in more details in the following four chapters.

The overall aim of this thesis is to critically analyse how the rights and interests of victims of international crimes have been managed during criminal proceedings at the ICC with particular reference to the *Lubanga* and *Katanga* cases. Most previous literature mainly focused on victim participation during these cases based on qualitative interviews and court decisions. This thesis is intended to complement those studies by extensively examining whether and the extent to which the rights and interests of victims have been respected based on an analysis of trial transcripts. One of the advantages of this approach is that it allows for a more detailed and richer analysis of the actual submissions of the legal Representatives of Victims(LRVs) and the court's response to them, during the various stages of the criminal process. However, this approach has certain limitations, which will be discussed below.

This thesis aims to make a significant contribution to knowledge by shedding more light on how prosecutorial discretion affects victims' access to justice, particularly their rights and interests.

Moreover, while there have been several studies on sentencing in international criminal trials, literature is scarce on victims' role during sentencing and if their roles influence the sentencing decision. Baumgartner emphasised the need for more research in this

area.⁴²This thesis responds to that call by examining the specific role played by victims in sentencing.

1.4 Significance of the study /original contribution to knowledge

This study intends to provide a significant opportunity to advance our understanding of how ICC has managed victims' rights and interests during criminal proceedings. While there is a growing body of scholarship examining victim participation at the ICC, this is the first thesis to explore the extent to which the rights and interests of victims are respected in the process based on data gathered from the trial transcripts of two ICC cases, namely, *Lubanga* and *Katanga*. As noted, It undertakes this analysis within three themes or stages:(1)prosecutorial discretion;(2)trial proceedings and (3)sentencing stage. It is noted that structuring my analysis under these themes enabled me to better address the overall research question. These themes provide a convenient and broadly sequential progression of victims' rights and interests at different ICC phases in the same vein. This use of transcripts as my primary data source is justified because it examines the various interactions between victims, their representatives, and other ICC stakeholders.

Furthermore, the study aims to contribute to a growing area of research by exploring the extent of applicability of victims' rights and interests in criminal trials at the ICC. While the ICC has been hailed as the benchmark of victim participation in international criminal justice, this thesis will seek to establish, on the basis mainly of transcript data

⁴² Elizabeth Baumgartner, 'Aspects of victim participation in the proceedings of the International Criminal Court' (2008) 90(870) *International Review of the Red Cross*,409-440.

from the above two cases, to what extent the rights and interests of victims have been considered and respected in two trials (*Lubanga* and *Katanga*).

Exploring how victims' rights and interests have been managed in prosecutorial discretion and sentencing provides a more holistic approach to viewing victims.

Recent developments in the field of victimology and human rights have led to a renewed interest in victims' roles and scope in the international criminal justice system.⁴³ There is a growing body of literature on victim participation in international criminal justice, especially at the ICC. This thesis aims to complement the literature by focusing mainly on whether, and to what extent, victims' rights and interests have been respected at three stages of the ICC trial, and based on a relatively innovative source of information, namely, trial transcripts. While there has been a considerable amount of research done in the area of victims' rights during the trial, there is less research on victims' rights in the context of prosecutorial discretion and significant scarcity of such research on victims' rights and interests in sentencing. The treatment of victims during these stages of the ICC is a significant issue, because, as Tyler argues in conflict resolution, citizens tend to judge their contact with legal authorities based on how they were treated during the trial process, which is at least as important as the outcome or decision.⁴⁴

⁴³ Ibid .

⁴⁴ Tom Tyler, 'What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988)22(1) *Law and Society Review* ,103, 125-127.

He further hypothesised a direct connection between how disputes are handled by the courts and the people's evaluation of their experiences in the court system.⁴⁵ Tyler believes that parties in conflict resolution tend to assess system based on procedural justice rather than the substantive outcome or decision. Therefore, how people are managed during conflict resolution has more influence than the verdict of the court. This hypothesis is contrary to the popularly held view that the court's decision or judgment goes a long way in satisfying the parties. Interestingly, this theory is supported by Moffett's article, which suggests that more attention should be given to procedural justice/fairness in criminal trials, rather than on restorative justice at the ICC.⁴⁶ Additionally, Strang and Sherman also hold a similar opinion, emphasising on the significance of procedural fairness.⁴⁷

Hence, it is imperative to assess how victims are treated during criminal proceedings at the ICC from these commentators' studies. While a significant amount of attention in the scholarship has been given to the specific rights of victim participation, considerably less attention has been paid to how victims are being treated at the ICC. This study intends to shed more light on this particular subject.

⁴⁵ Tom Tyler, 'Procedural Justice and the Courts' (2007)44 *Courts Review* 22; Tom Tyler, 'Procedural Justice, legitimacy and effective rule of law'(2003) 30(1) In Tory (ed) *Crime and Justice :A review of Research*(First Edition, University of Chicago Press 2003) 253-257.

⁴⁶ Luke Moffett, 'Elaborating Justice for Victims at the International Criminal Court : Beyond Rhetoric and the Hague' (2015) 13(2) *Journal of International Criminal Justice*, 281-311.

⁴⁷ Heather Strang and Lawrence Sherman,' Repairing the Harm :Victims and Restorative Justice' (2003) 15*Utah Law Review* 15-42, 15.

Having discussed that, it is essential to define the treatment of victims within this research context. According to Oxford Dictionary, treatment is defined as '*how someone behaves towards or deals with someone or something*'⁴⁸ Wemmers suggests that the treatment of victims in a particular criminal justice system is highly dependent on the criminal procedure of that country.⁴⁹ At the same time, most civil law jurisdictions treat victims as parties with their rights during the criminal justice procedure. Common law countries do not generally treat victims as parties to the trial.⁵⁰ Moreover, treatment during the trial proceedings is only one, albeit important aspect of victims' experience in the criminal justice system.

1.5 Research Method

Watkins and Burton describe the research methodology as the procedure a researcher takes to enhance his/her knowledge and test his/her thesis.⁵¹ The aim of it is to attempt to answer the research question(s). Watkins and Burton highlight the importance of research methodology:

'Every legal research project begins from a theoretical basis or bases, whether such bases are articulated or not. The theoretical basis of a project will inform how the law is conceptualised in the project, which in turn will determine what kinds of research

⁴⁸ Oxford Mini Dictionary & Thesaurus(Oxford University Press)707. Available at www.Oxforddictionaries.com> last accessed 24 April 2017.

⁴⁹ Jo-Anne Wemmers, *Victim in the Criminal Justice Systems* (1st Edition, Kluger Publications 1996) 39.

⁵⁰ Ibid .

⁵¹ Dawn Watkins and Mandy Burton, 'Introduction to Research Methods in Law' in *Research Methods in Law*, in Dawn Watkins and Mandy Burton (eds) (First published 2013, 1st Edition, Routledge 2013)2.

questions are deemed meaningful or useful, what data is examined, and how it is analysed.(method)....'⁵²

The methodological approach taken in this study is purely qualitative. The research undertakes a qualitative, thematic analysis of the trial transcripts of two ICC cases, namely, *Lubanga* and *Katanga*. Transcript analysis is a verbatim record of victims' verbal expressions during the trial. In this sense, this research's analysis and findings aim to complement other studies in the area, which have relied on other primary sources, such as statutes, court judgments, and empirical methods such as interviews and surveys. Transcript analysis is not often used as a data source for the thesis. In undertaking this research, the researcher read and analysed approximately 70 case transcripts from Lubanga and 80 case transcripts from Katanga, focusing primarily on the submissions of victims, prosecutor, defendants, and judges.

The researcher chose these two cases because they were the two completed cases at the ICC, which address the development of victims' rights and interests in ICC's jurisprudence. They also explore issues within the same context(DRC). However, there were decided cases of *Al-Mahdi*⁵³ and *Bemba*.⁵⁴ In the *Al-Madhi* case, the accused was charged with, convicted, and sentenced for the destruction of cultural world heritage in

⁵² Ibid (n 51).

⁵³ Situation in the Republic of Mali, The Prosecutor v Ahmad Al Faqi Al- Mahdi, ICC-01/12-01/15-1-Red, 28 September 2015, Pre-Trial Chamber 1 Decision; Prosecutor v Ahmad Faqi Al- Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence , September 27 ,2016, available at < https://www.icc-cpi.int/CourtRecord/CR2016_07244.PDF>

⁵⁴ Situation in the Central African Republic, The Prosecutor v Jean-Pierre Bemba Gombo, ICC-01/05-01/08

Timbuktu Malia.⁵⁵ The only charge in the *Al-Madhi* case was the destruction of cultural heritage.⁵⁶ The researcher could not use the *Al-Madhi* case because the one-count charge against the convicted person was crimes against property. The Bemba's trial is not also suitable for this thesis because the Appeals Chamber acquitted the accused from the charges of war crimes and crimes against humanity.

For purposes of this research, the researcher reviewed the pre-trial, trial, and appeal transcripts for the *Lubanga* case and *Katanga* case. Each transcript ranged from 32 pages to 650 pages; the researcher read focusing on submissions relating to victims, prosecutor, defendants, and judges. She identified themes, patterns, and relationships via words and phrase repetitions emerging from these submissions. Eventually, the researcher narrowed down the various submissions and decided to organise them into three broad themes: (1) Prosecutorial discretion; (2) Trial process; and (3) Sentencing. It is found that structuring the analysis around these three broad themes would allow the researcher to better address the overall research question, namely, to what extent have the rights and interests of victims been respected in the cases of *Lubanga* and *Katanga* at the ICC?

This qualitative research explores victims' interaction, observations, representations, and experiences via written texts and documents. These documents are the product of verbatim transcription of audio recordings. "A transcript is a text that represents an

⁵⁵ Prosecutor v Ahmad Faqi Al-Mahdi

⁵⁶ Prosecutor v Ahmad Faqi Al-Mahdi.

event; it is not the event itself."⁵⁷ The written texts and documents are comprehensible and meaningful.⁵⁸ The researcher relies mainly on narratives and conversations contained in the transcript. Ochs notes that transcripts are "the result of a series of choices in need of explication."⁵⁹ Examining the interpretative process of transcript is essential for the outcome of transcript analysis.

With transcript analysis, the researcher can collect and analyse documents(transcripts) by making excerpts directly from the transcripts. One advantage of this qualitative is that it enables the researcher to preserve the integrity of the documents.

To analyse qualitative data, there are two types of qualitative analysis: inductive and deductive analysis.⁶⁰ Inductive qualitative analysis is divided into thematic analysis and narrative analysis.⁶¹ The inductive qualitative analysis requires obtaining data from an unstructured approach. ⁶²This type of qualitative analysis enables the researcher to make a connection between the research objectives and the findings from the transcripts. The thematic analysis requires the researcher to identify and recognise the

⁵⁷ Judith Green, Maria Franquiz and Carol Dixon, "The Myth of the Objective Transcript :Transcribing as a Situated Act" (1997) 31(1) *Tesol Quarterly* ,172-176.

⁵⁸ Judith Green, Maria Franquiz and Carol Dixon,"The Myth of the Objective Transcript :Transcribing as a Situated Act" (1997) 31(1) *Tesol Quarterly* ,172-176.

⁵⁹ Elinor Ochs, Transcription as Theory in Elinor Ochs and Bambi Schiefflin (eds), *Developmental Pragmatics* (New York 1979)43-72.

⁶⁰ Douglas Ezzy,*Qualitative Analysis :Practice and Innovation* (Routledge 2002);Theophilus Azungah, 'Qualitative Research :deductive and inductive approaches to data analysis'(2018) 18(4) *Qualitative Research Journal* ,383-400.

⁶¹ Christian Herzog, Christian Handke and Erik Hitters, "Analysing Talk and Text II:Thematic Analysis In Puppis Manuel , Karen Donders , Micova Broughton and Frank Esser (Eds) In *The Palgrave Handbook of Methods for Media Policy Research* (Palgrave Macmillan 2019)161-177; Virginia Braun and Victoria Clarke, *Successful Qualitative Research :A Practical Guide for Beginners*(Sage 2013)45-50.

⁶² Virginia Braun and Victoria Clarke, "Using thematic analysis in psychology" (2008) 3(2) *Qualitative Research in Pyschology*, 77-101;Alan Bryman and Robert Burgess, *Analysing qualitative data*(London Routledge 1994).

pattern of themes. These themes are analysed from the data's recurring patterns- the interaction between the LRVs, parties, and other participants. The narrative analysis is focused on stories and accounts of personal experience.⁶³ The researcher could not use this narrative analysis because it is more useful for face-to-face interviews.

Nevertheless, some of the submissions of the LRV reflect victims' narratives and personal experiences. The deductive qualitative analysis enables the researcher to have a structured approach in advance of the analysis. Hence, the inferential analysis is the connection of the pre-structured approach to the data from the transcript.⁶⁴

The use of trial transcripts as a primary source for this analysis is innovative and intended to complement other existing studies in victims' rights at the ICC. Most academic studies of victim participation are based on final decisions and judgments, more extensive studies using empirical methods.

The use of transcripts as a primary data source is justified on the basis that it provides a rich and detailed account of the various interactions between victims and their representatives and other stakeholders at the ICC. This detailed account includes but is not limited to story-telling/narratives, testimonies, examination and cross-examination of victims/witnesses, and other procedural contents of the trial proceedings. It should also be noted that transcripts are easily accessible from the ICC database (freely available on the ICC's website). One shortcoming of transcript analysis is the issue of

⁶³ William Labov and Joshua Waletzky, 'Narrative Analysis: Oral Versions of Personal Experience' (1997) 7(1) *Journal of Narrative and Life History*, 3-38.

⁶⁴ Ibid.

redaction and confidentiality of records. It is almost certain that these restrictions might affect the data's accuracy to create a gap in the data because the redacted documents are inaccessible. In a similar vein, there is a probability that meanings may get lost in language translations. As such, the intended interpretation may not be worded in the translation.

The researcher started a collection of transcripts from the ICC website. Transcript included pre-trial, confirmation hearing, trial, judgment decision, sentence hearing, and sentencing decision. This qualitative data consisted of 87 transcripts for *Lubanga* and 90 transcripts for *Katanga*. Concerning the analysis, the researcher observed the submissions of victims, judges' comments, and rulings and decisions. The researcher addresses the questions by building on theories of retributive and restorative justice. The data collection preceded the data analysis; both were not done simultaneously. This approach of data analysis is sought from broader literature, which is based on textual analysis. With textual analysis, the researcher can interpret the texts in multiple ways, rather than a single approach. Multiple meanings could be inferred via ideological, genre, narrative, rhetorical, gender, or discourse analysis.⁶⁵ Multiple interpretations connote that the text is situated within a theoretical background is open to several meanings. Given this, the research conducted the thematic study by identifying the texts within a theoretical context. This method of analysis uncovered the findings effectively through inductive qualitative analysis.

⁶⁵ Elfriede Fursich, *Textual Analysis and Communication* ;Roland Barthes, *Mythologies*(New York:Hill and Wang 2013)

While providing such a rich resource of victims' interactions, transcripts are not often used as extensively as the researcher had used them in this thesis in international criminal legal research. Transcripts also give a detailed and authentic account of the conversations, questions, and answers between the Prosecutor and victims, judges and the Legal Representatives of Victims and the Office of Public Counsel for Victims. With thematic analysis, the researcher can examine and identify the texts in smaller parts. This analysis makes it easier for the researcher to answer the researcher questions and draw conclusions about victims' expectations, needs, and concerns at the ICC. Thread is found in Victims' submissions and observations, which is demonstrated in the textual information and transcripts. It should be noted that the use of transcripts data entails certain limitations, which will be discussed further below.

The research focuses on the *Lubanga* and *Katanga case*. The researcher chose the *Lubanga* case because it is the first completed case decided by the ICC. Therefore, both cases provide an essential glimpse into the treatment of victims in the ICC's early trials. These may be used to compare how the ICC treatment may evolve as the court gains experience. In both cases, there were a significant number of victims who suffered harm as a result of war crimes and crimes against humanity committed by the defendants. Naturally, however, as the *Lubanga* and *Katanga* cases are merely two of several cases involving victim participants before the ICC, the analysis of this thesis concerning these two cases is merely indicative, and the thesis is not able to make broader generalisations about the treatment of victims in other cases.

1.6 Research Limitations

Due to practical constraints and resource limitations, like severe financial and ethical constraints of contacting individual victims to participate in empirical research, this study does not directly engage victims(human participants). Moreover, it would have been very difficult to establish contact with a viable number of victim participants because of anonymity issues and because they are generally spread across the globe. The investigation method adopted in this thesis is, focusing on case transcripts as primary sources, is therefore economical and viable compared to fieldwork research, in view of the time and resources available to complete this research.

This study has used a desk-based approach and is primarily library-based. Flowing from this, transcripts, documents, and historical records of the ICC have been analysed. These sources, and particularly transcripts, were selected because they provide a rich source of information while generally being under-used in research in this area. It should also be noted that another significant advantage of using transcript data is that there is no risk of secondary victimisation and negative impact on the victims since there is no contact between the researcher and the victims.

However, the use of this source does imply significant limitations. Notably, It is not possible to detect non-verbal communication, like facial expression and body language, and other symbols used for transmission based on the transcripts. Moreover, in some cases, the submissions of victims were redacted in the transcripts. In reading and analysing the transcripts data, the researcher had to read and interpret the words and interactions between the victims, their representatives, and other court stakeholders.

This research's analysis and findings are based on the researcher's understandings and interpretations of these transcripts. It should be noted that this limitation is significant because, while analysing the transcripts, some sentences/statements might have been ambiguous and open to differing interpretations. However, as I did not have direct contact with the victims or other players involved, I could not probe further, through empirical methods, to ascertain such subjective meanings.

Therefore, throughout the research process, the researcher was conscious that some extent of personal bias could come into play in the transcripts' interpretations, particularly given the researcher's support of victims' rights. However, to reduce the possibility of bias, the researcher has carefully read and re-read the victims' and other parties' submissions and compared findings with the court's official judgments before offering interpretations.

One shortcoming of transcript analysis is the issue of redaction and confidentiality of records. It is almost certain that these restrictions might affect the data's accuracy to create a gap in the data because the redacted documents are inaccessible. In a similar vein, there is a probability that meanings may get lost in language translations. As such, the intended interpretation may not be worded in the translation.

Another potential problem with using the transcripts is that the researcher could not probe deeper in case of any unanswered questions I may have had as a researcher. This is contrasted with other empirical methods, such as interviews. Furthermore, as noted above, The findings that emerge from this thesis on victims' rights and interests are

limited by the number of transcripts of the two decided cases I examined. These cases happened within a similar context, the Democratic Republic of Congo, with related jurisprudence.

Finally, given the focus of this thesis on Lubanga and Katanga's cases, any observations and findings that the research makes are not generalisable to other cases.

1.7.Literature Review

This section examines prior studies and an overview of the literature that relates to the research questions. This section explores the literature related to prosecutorial discretion, trial, and sentencing, focusing on the extent of applicability of victims' rights and interests at the ICC. These themes provide a convenient and broadly sequential progression of victims' rights and interests at different ICC phases.

Before reviewing literature in this aspect, the following section shall examine victims and victimhood's notion to broaden our understanding of victims within the ICC. It is also necessary to evaluate the meaning of victims since the research is focused on victims.

1.7.1 Victims and victimhood

It is necessary to examine the victim's notion first since each thematic chapter is related to victims' rights and interests. The following shall examine the legal framework of victims as well as the theory of victimhood.

Rule 85a defines as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."⁶⁶ It should be noted that for this thesis. Victims are restricted to natural persons, organisations and institutions are included in the (b) part. The definition stipulates the conditions to be fulfilled to obtain the procedural status of victims.

In line with the connotation of rule 85, an ICC Trial Chamber found that victims' participation should be interpreted in conjunction with the test of '*personal interests*' as enunciated in article 68(3).⁶⁷ This interpretation connotes that rule 85 and article 68(3) are mutually interdependent. Victims' compliance with Rule 85 does not automatically entitle them to participate, except if the condition of personal interest is satisfied. The personal interest test will be evaluated based (i) on the presence of an evidential link between the victim and the evidence the court before the court or (ii) victims' interests are affected by the issues raised during the trial. The standard of proof that is applicable is *prima facie* credible grounds that the applicant has suffered harm due to a crime under the court's jurisdiction.⁶⁸

In this context, the selection of charges directly determines the spectrum of victims to be granted procedural status.⁶⁹ The charges determine the scope of the acts and the

⁶⁶ ICC Rules of Evidence and Procedure, Rule 85

⁶⁷ Situation in Democratic Republic of Congo, Pre-Trial Chamber 1 Decision , 17 August 2007, ICC-01/04-374

⁶⁸ Ibid.

⁶⁹ Ibid ;Sarah Pritchett, 'Entrenched hegemony, efficient procedure , or selective justice ? A Inquiry into charges for gender-based violence at the International Criminal Court(2008) 17(1) *Transnational Law and Contemporary Problems* ,265-305. Luc Cote, Reflections on the exercise of prosecutorial discretion in international law(2005) 3(10)*International Criminal Justice*,162-186

events over which the court has jurisdiction. The dichotomy made by this pyramid of victimhood entrenches a selected few to access justice while the unrecognised victims, stay in the bottom of the pyramid as victims of harm who are not worthy of recognition to seek redress at the court.⁷⁰ Sadly, this could foster secondary victimisation for this set of victims. An implication of this categorisation is the dilemma which arises between the concept of victimhood and victim status at the ICC.

Zappala notes that declaring an individual as a 'victim' in legal proceedings, where the accused's guilt has not been proven robs the accused a presumption of innocence. This idea prejudices the situation surrounding the identity and culpability of the perpetrator.⁷¹ Nonetheless, this may not be an issue where the commission of the crime is not in dispute.⁷² Where there is a dispute regarding the perpetrator's culpability, this prejudgment may sabotage the default rule of presumption of innocence.

Regarding the concept of victimhood, Christie explores the '*ideal victim*' theory. The 'ideal victim' is a concept coined in criminology. The ideal victim refers to 'a person or category of individuals, who, when hit by crime, most readily are given the complete and legitimate status of being a victim.'⁷³ It is said that the ideal victim generates '*the*

⁷⁰ Ibid .

⁷¹ Salvatore Zappala, 'The Rights of Victims v. the rights of the accused' (2010) 8(137) *Journal of International Criminal Justice*, 137-164.

⁷² Ibid

⁷³ Nils Christie, "The Ideal Victim" in Ezzah Fattah ed. *Crime Policy to Victim policy*, (Macmillan, 1986)18.

most sympathy' from society.⁷⁴ Victims that fall within this category are perceived as being '*weak*', '*vulnerable*,' '*physically disadvantaged*' or '*emotionally distressed*'.

On the other hand, the offender is perceived to be powerful and intimidating. Therefore, this is society's standard for whom the ideal victim is. It is believed that once these features are present in the individual, such an individual is a perfect victim. Christie proposes that the concept of the 'ideal victim' could be a subjective phenomenon, mostly depending on the personal conviction of the person involved and the circumstances he/she finds himself.⁷⁵

In his terms, the ideal victim enjoys a kind of public status likened to the type and level of abstraction seen in 'hero' or a traitor'.⁷⁶ While Christie's ideal victim theory helps understand how persons acquire the status of victim in society, in the framework of the Rome Statute, the victim's concept has a more specific, statutory definition. Victims are not automatically permitted to assume their status. On the contrary, victim-applicants need to go through procedures to be granted procedural status by the court.⁷⁷ However, in line with Christie's analysis, victims at the ICC must fulfil the conditions to qualify as victims, such as reporting the crime to the police, making their case known and cooperating fully with the system by attending trials and presenting testimony when requested. It is the fulfilment of these prerequisites, coupled with the court's

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid.

⁷⁷ Rome Statute 1998, Article 85

authorisation that confers the applicants with victims' procedural status. Arguably, an ideal victim might not qualify as a victim at the ICC if he/she does not meet the conditions set out in Article 85.

Hall is critical of Christie's submission. Hall describes Christie's paradigm of the ideal victim as '*arguably incomplete*' because it excludes collective victims and the position of corporate bodies into consideration.⁷⁸ Perhaps Christie intended to explore the individuality of victim and its attendant consequences on such individual.

Furthermore, Elias and Rock contend that society's narrow perception of victims and victimisation flows from selective definitions of crime, which was aggravated by political purposes.⁷⁹ As such, the notion of victims and victimisation are consequences of both offender and victim's social construction.⁸⁰

In some situations, many victims do not fit into the concept of '*ideal victim*.' Some victims may not be considered entirely innocent (e.g. child soldiers). In practice, one may not encounter an 'ideal victim' as a result of fluidity of status. The Dominic Ongwen case illustrates the difficulties and blurring of the boundaries in defining victims. Dominic Ongwen was conscripted under the age of 15 years and used to participate actively in hostilities.⁸¹ He rose through the army ranks and became a

⁷⁸ Matthew Hall, *Victims and Policy-Making :A Comparative Perspective* (1ST Edition ,Routledge 2010)

⁷⁹ Robert Elias, *The Politics of Victimisation: Victims, Victimology and Human Rights* (Oxford University Press 1986)21; Paul Rock, *Helping Victims of Crime* (Clarendon Press 1990)262-265

⁸⁰ Ibid 79.

⁸¹ The Prosecutor v .Dominic Ongwen, 'Alleged crimes(non-exhaustive list)' accessible at < <https://www.icc-cpi.int/uganda/ongwen/pages/alleged-crimes.aspx> > last accessed 03 December 2019;

commander of the Lord Resistant Army(LRV). One of the issues before the ICC is how to classify him. Ongwen's position is a pendulum that swings between victim/perpetrator/witness. Ongwen's case questions the ideal victim theory and explores the relationship between victim and perpetrator.

This fluidity of status demonstrates the need to be explicit about what exactly is meant by the victim within the ICC ambience. Rule 85 defines victims as a natural or legal person who has suffered harm as a result of any crime committed within the jurisdiction of the court.⁸² There must be a connection between the crime and the harm suffered. As simple as this definition appears, the conditions listed must be elucidated conjunctively. Hence, an applicant must fulfil all requirements to be granted official status. Where the applicant does not qualify for one of the condition, his request may be rejected.

A victim's definition as laid down in Rule 85 does not include the position of the offender/perpetrator-whether, the offender is '*apprehended*', '*prosecuted*', '*identified*' or '*convicted*'.⁸³ The definition of victims as enunciated in the 1985 Declaration recognises victims regardless of the offender's position. The presence of a link between the harm suffered and the crime committed, which must be under the court's jurisdiction, suffices

Open Society Justice Initiative, The Trial of Dominic Ongwen at the International Criminal Court, accessible at [The Trial of Dominic Ongwen at the International Criminal Court - Open Society Justice Initiative](#)> Last accessed 03 December 2019, p.2

⁸² ICC Rules of Evidence and Procedure , Rule 85(a) and (b).

⁸³ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 ,29 Novemebr 1985.

for victim-applicant to qualify as a victim. This definition may raise questions over the presumption of the innocence of the alleged offender.

Human rights standard presume that an accused is innocent until the contrary is proved.⁸⁴ This provision protects the accused during pre-trial and trial proceedings until the determination of guilt or innocence. The presumption of innocence is a fair trial right that sets the accused's treatment threshold in criminal trials. This right is inalienable for the accused/defendant.⁸⁵ It is essential protection with roots in human rights. However, by granting individuals the status of victims of a crime already at the early stages of the criminal process may appear to presuppose the guilt of the suspect/accused person before trial.

The provisions of Rule 85 on victims enunciates the concept of victimhood as a legal category.⁸⁶ This definition is also known as "*juridified*" victimhood.⁸⁷ This concept gives such victims recognised status. This recognition filters which victims are given the procedural status to participate and those that are not authorised. Without recognition by law, victims' voices may likely not be heard; neither would the platform be accessible to them. It could be construed that the recognition of victims by law predetermines the selection of a few. This is an idea propounded by Kendall and

⁸⁴ International Covenant on Civil and Political Rights 1966; Article 14; United Nations Declaration of Human Rights 1948 Articles 10 and 11; Rome Statute 1998, Article 66.

⁸⁵ Peter Malanczuk, Akehurst's Modern Introduction to International Law (7th Edition, Routledge 1997) 209

⁸⁶ Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court The Gap Between Juridified and Abstract Victimhood' (2013) 76 *Law and Contemporary Problems*,

⁸⁷ Ibid 86

Nouwen-‘*pyramid of victimhood*’.⁸⁸ The label polarises victims into two categories; the victims of harm and the recognised victims under the law.⁸⁹ It should be noted that victims of harm do not automatically qualify for recognition by the court. They are filtered in the process of victim applications and the Prosecutor's choice of charges. The filter goes through application for victims' status, fulfilling the criteria in Rule 85 and Article 68(3).⁹⁰ As such, to qualify for participation, Rule 85 and Article 68(3) must be read conjunctively.

1.8 Literature on the themes of this thesis

Having discussed victimhood and victims, the following section shall review the literature on this thesis's three themes. The first will address the available literature on prosecutorial discretion's impact on victims' rights and interests. The second part will discuss the literature on victims' rights and interests during the criminal trial. The third and last question is the impact of victims' rights and interest on sentencing.

While on the first sub-question, abundant literature exists on prosecutorial discretion, most of this literature concentrates on the independence of the OTP and academic debate on how the OTP exercises discretion on the interests of justice.⁹¹ Not much

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Situation in the Democratic Republic of Congo, Prosecutor v. Lubanga. Decision on the applications for participation in the proceedings submitted by VPRS 1 to VPRS 6, Case No ICC-01/04-01/06,, Pre-Trial Chamber I, 29th June 2006.

⁹¹ Phillipa Webb, ‘The ICC Prosecutor’s Discretion not to Proceed in the ‘interest of Justice’ 92005) *Criminal Law Quarterly*, p305; Christian De Vos, ‘Investigating from A far: The ICC’s Evidence Problem, (2013) *Leiden Journal of International Law* ; Kai Ambos, ‘The Status, Role and Accountability of the Prosecutor of the International Criminal Court : A Comparative Overview on the Basis of 33 National Reports ‘, (2000) 8 *European Journal of Crime , Criminal Law and Criminal Justice* , 115. ‘

literature studies have examined the implications of broad prosecutorial discretion on victims' rights and interests.⁹² With respect to the second sub-question, regarding victims' rights and interests in their participation in criminal trials, quite a lot has been written on this. Nevertheless, it appears more attention has been drawn to procedural fairness for the accused when compared to the victims, rather than on the management of the rights and interests of victims at trial, as a function of access to justice. Concerning the third sub-question, relating to victims' rights and interests in sentencing, a review of the literature suggests literature is scarce on the implications of victims' rights and interests in sentencing. The following section shall examine the literature regarding these issues.

1.8.1 Prosecutorial discretion

As mentioned earlier, while several studies have investigated the ICC prosecutor's broad powers, most of the debates are pitched on the controversies surrounding the Prosecutor's independence, particularly concerning selecting situations, *Proprio motu*

⁹² Cecile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap' (2012) 10(5)*Journal of International Criminal Justice*, 1357-1375.

investigations,⁹³ interests of justice and politics.⁹⁴ However, a few works of scholarships examines how prosecutorial discretion affects victims. Aptel shows that the broad prosecutorial discretion of the Prosecutor precludes victims' right to remedy.⁹⁵ She argues that from the Prosecution's selection of crimes to the complementarity paradigm, many victims of severe violations of human rights and humanitarian law are denied access to a judicial remedy.⁹⁶ She suggested that the ICC ought to be opened to a broader range of charges.

A similar conclusion was reached by Schabas, who examines prosecutorial discretion in the selection of situations and cases via the criteria of '*interests of justice*' and '*gravity*'.⁹⁷ From his article, it appears that some victims inadvertently fall into the impunity gap because the Prosecutor decides the selection of situations. Some of these

⁹³ Phillipa Webb, 'The ICC Prosecutor's Discretion not to Proceed in the 'interest of Justice' 92005) *Criminal Law Quarterly*, p305; Christian De Vos, 'Investigating from A far: The ICC's Evidence Problem, (2013) *Leiden Journal of International Law* ; Kai Ambos, 'The Status, Role and Accountability of the Prosecutor of the International Criminal Court : A Comparative Overview on the Basis of 33 National Reports ', (2000) 8 *European Journal of Crime ,Criminal Law and Criminal Justice* , 115.; Kenneth Rodman, 'Is peace in the interests of justice? The case for broad prosecutorial discretion at the International Criminal Court, (2009) 22(1) *Leiden Journal of International law* , p.101; Aeyal Gross, ICC Prosecutor: Low-Ranking Israeli Soldiers , as well as Palestinianas , could be Prosecuted for War Crimes , Haaretz (1st Mat, 2015) accessible at <http://www.haaretz.com/news/diplomacy-defense/.premium-1.654516> last accessed at 19 November 2019.

⁹⁴ Alexander Greenawalt, 'Justice without Politics? Prosecutorial discretion and the International Criminal Court (2007) 39 *New York University Journal of International Law and Politics*, 583-673; Cale Davis, 'Political Considerations in Prosecutorial Discretion at the International Criminal Court (2015) *International Criminal Law Review*, 170-189.

⁹⁵ Cecile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap (2012) 10(5) *Journal of International Criminal Justice* ,1357-1375.

⁹⁶ Ibid.

⁹⁷ Williams Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6(4) *Journal of International Criminal Justice* ,731-761

decisions he thinks lack objectivity.⁹⁸ It is also noted that controversy exists as to the definition of '*interests of justice*'. Given that it is within the ICC Prosecutor's ambit to determine the 'interests of justice', most times, the Prosecutor's conception of interest of justice may not be consistent.

For instance, Guzman calls our attention to the former ICC prosecutor's reluctance to prosecute sexual violence. Guzman argues that gender bias assumptions are not unconnected to the recognition of substantive crimes.⁹⁹ They are deeply rooted in informal institutions that they permeate legal procedures, investigations and conduct of trials.¹⁰⁰ The failure to prosecute SGBV at the ICC could be due to the traditional belief that sexual violence is a lesser crime or the perception that sexual violence is 'weapon of war'. While some authors concluded that due to the nature of SGBV, it requires a higher evidentiary burden,¹⁰¹ one could argue that this statement is embedded in gender

⁹⁸ Ibid .

⁹⁹ Margaret de Guzman, 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes' in Bergsmo and Morten, *Thematic Prosecution of International Sex Crime*, available at <https://www.fichl.org/fileadmin/fichl/documents/FICHL_13_Web.pdf> 11-44. last accessed 19 February 2019.

¹⁰⁰ Ibid.

¹⁰¹ Susan SaCouto and Katherine Clearly, 'The Importance of Effective Investigation of Sexual Violence and Gender-based Crimes at the International Criminal Court', (2009) 17(20) *American University Journal of Gender, Social Policy & the Law*, 337-362; Sizan Pritchett, 'Entrenched Hegemony, Efficient Procedure, or Selective Justice? An Inquiry into Charges for Gender-Based Violence at the International Criminal Court' (2008) 17 *Transnational Law & Contemporary Problems*, 265-305; K'Shaani Smith, 'Prosecutor v. Lubanga: How the International Criminal Court Failed the Women and Girls of the Congo', (2011) 54 *Howard Law Journal*, 467-500.

bias assumptions. Civil society and activists called the Prosecutor's attention to his deliberate exclusion of sexual violence from the charges.¹⁰²

SaCuoto and Cleary criticised the prosecutor's insensitivity to the girls and women who suffered sexual violence and several challenges this category of victims faced¹⁰³. The girls were targeted as sex slaves of soldiers and forced to be soldiers or 'wives' because of vulnerabilities, which was exploited.¹⁰⁴

It is also necessary to mention that there are instances in which the Prosecutor has developed an intertwined relationship with victims as a competing/ contradicting relationship. While the Prosecutor represents general or community interests, the victims represent their interests. Interestingly these interests may overlap. However, this is not always the case. In either of these contexts, victims are independent parties.¹⁰⁵ Kofi Anan noted that '[t]he overriding interests must be that of the victims', and the international community as a whole¹⁰⁶ It is believed that since victims are not a

¹⁰² Women Initiatives for Gender justice, Letter to the Prosecutor, Moreno Ocampo; Situation in the Democratic Republic of Congo, Prosecutor v Thomas Lubanga Dyilo.

¹⁰³ Susana Sacouto & Katherine Cleary, 'Investigation of sexual violence and gender-based crimes at the International Criminal Court', (2009) 17(2) *American University Journal of Gender, Social Policy and the Law*, p.341

¹⁰⁴ Solange Mouthaan, 'The Prosecution of Gender-based Crimes at the ICC: Challenges and Opportunities' (2011) *International Criminal Law Review*, 775-802.

¹⁰⁵ Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press 2010) 58.

¹⁰⁶ Kofi Anan, Secretary-General, Press Release, UN Diplomatic Conference to Establish International Criminal Court Begins Five-Week Session in Rome, L/2870 15 June 1998.

homogenous group, this leaves room for a differing(possibly competing) opinions, views and interests.¹⁰⁷

This thesis intends to explore the impact of the Prosecutor's decisions on victims' rights and interests at the ICC. Which will enable us to understand how the role and functions of the OTP contribute towards victims' access to justice at the ICC.

1.8.2 Trial Process

In dispute resolution, research indicates that participants prioritise the process more than the outcome. This positively impacts their experience and perception of the court.¹⁰⁸ Voice is a form of participation in the procedure which gives victims a sense of belonging. One of the concerns of parties in conflict resolution is the desire to be heard.¹⁰⁹ It follows that they would want to voice out and get the opportunities to convey their needs and give an account of their stories. Before the case is determined, possibly, it may impact victims' experience on the system, regardless of the decision.

Procedural justice ensures that due process is granted to victims during their interaction with the court.¹¹⁰ It has been reported that victims' derive satisfaction if the procedures

¹⁰⁷ Victims' Rights Working Group, Promoting the rights and interests of Victims before the International Criminal Court, <<http://www.vrwg.org/victims-rights/interest-of-victims>>

¹⁰⁸ Tom Tyler, What is Procedural Justice?: Criteria used by Citizens to Assess the Fairness of Legal Procedures (1988) 22(1) Law and Society Review pp.103-136, p.; Tom Tyler, 'Procedural Justice and the Courts (1988) 44 *Court Review*, p.24

¹⁰⁹ Ibid.

¹¹⁰ John Thibaut and Lauren Walker, *Procedural Justice :a Pyschological Analysis* (Hillsdale 1975) Tom Tyler, Procedural Justice, Legitimacy and effective Rule of Law, *Crime and Justice* (2003) 283-357; Allan Lind, Ruth Kanfer and Christopher Early, 'Voice, Control and Procedural Justice: Instrumental and non instrumental Concerns in Fairness Judgements' (1990) 59(5) *Journal of Personality and Social Psychology*, 952-959.

are fair. Procedural fairness influences the reactions as well as responses of people at the receiving end of decision-making processes. Arguably, the fairness of the procedure does have a strong impression on the recipient of the decision-making.¹¹¹

When victims' voices are considered, it gives them a sense of belonging. However, one question that arises is the extent of the influence of their voice. Does it come in the form of information gathering, consultation or expression? Some participation types may amplify the victims' voice, but this does not mean that their views would influence the decision. Therefore, having a say in proceedings may serve other, non-justiciable purposes, such as therapeutic purposes.

In this respect, Haslam and Dembour found that victim-witnesses were 'effectively silenced' during the Krstic proceedings at the ICTY.¹¹² An implication of the demands of the legal process on participation as witnesses.¹¹³ As such, the ICTY failed to meet these victim-witnesses' needs because they had to act primarily as witnesses, without giving them the platform to tell their stories.

In international criminal justice, the Legal Representatives of Victims (LRVs) often serve as conduits or voices of the victims. These LRVs make opening and closing statements, as well as observations. They do these on behalf of the victims because they are not permitted to participate directly, only in exceptional cases. Nevertheless, the

¹¹¹ Ibid.

¹¹² Emily Haslam and Marie-Benedicte Dembour, Silencing Hearings? Victim-Witnesses at war Crimes Trials (2004) 15(1) *European Journal of International Law*, P.151-177.

¹¹³ Ibid.

majority of victims reported that they had a voice in the ICC during the pre-trial stage.¹¹⁴ Some victims opined that the submission of individual applications was an indication that the court acknowledged their views. However, we should bear in mind that the submissions of applications are not an automatic qualification for being considered a victim within the ICC framework. It is best described as recognition of their suffering, but this is subject to conditions set out in Rule 85.

SaCouto and Cleary in their study submit that instead of granting participation rights (mostly theoretical) at the investigation stage, the court should place more attention on making information available to victims and prompting them to communicate with the court. Information also includes notifying potential victims about the range of specific rights available to them and clarifying to victims how participation might affect them.¹¹⁵ Providing victims with information at the investigation phase cannot replace their involvement because they crave for recognition at this Stage.

Some victimological studies have suggested that victims have preferences when encountering the criminal justice system.¹¹⁶ These preferences include respect, voice and fair treatment.

¹¹⁴ Human Rights Center, UC Berkeley School of Law The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court 1-86, 32.

¹¹⁵ Susana SaCouto and Katherine Cleary, 'Victims' Participation in the investigation of the International Criminal Court (2008) 17 *Transnational Law & Contemporary Problems*, 73-105

¹¹⁶ Judith Herman, "Justice from the Victims' Perspective" (2005) 11(5) *Violence against Women*, 571-602; Joanne Wemmers, Van Deen Leenden and Steensman "What is Procedural Justice? Criteria Used by Dutch Victims to Assess the Fairness of Criminal Justice Procedure" (1995) 8(4) *Social Justice Research*, 325-500.

Recognition and respect for victims may enhance their sense of belonging. Meredith contends that it is pertinent to differentiate between victims who have suffered harm and those who can access redress for their harm.¹¹⁷ He reports that the official recognition of a victim's right may restore their dignity and enable them to seek redress.¹¹⁸ The principles of fairness and respect create an equal platform and give them a sense of belonging. Therefore, this aims to strike a balance in the criminal proceedings. Previous studies by Thibaut and Walker and Tyler have highlighted the significance of these principles-fairness and respect. They opine that the people judge an adequate and fair trial based on the process and procedures employed rather than the outcome in criminal justice. Also, they believe the effectiveness of criminal proceedings based on their contact with the legal authorities.¹¹⁹

The recognition by the court to a large extent determines which voices are heard and which are not.¹²⁰ This recognition is likened to a double-edged sword because at this stage, and some victims do not qualify by the discretion of the court. This could be on the basis that their situation is not considered as an 'international crime'.¹²¹ This may filter and subsequently polarise the victims, Kendall and Nouwen observe that the

¹¹⁷ Valerie Meredith, 'Victim Identity and Respect for Human Dignity: A Terminological Analysis' (2009) 91(874) *International Review of the Red Cross* 259-277, 260.

¹¹⁸ Ibid.

¹¹⁹ Tom Tyler, 'What is Procedural Justice? Criteria used by Citizens to assess the fairness of Legal Procedures' (1988) 22(1) *Journal of Law and Society Association*, 103-136, 103, 104; Thibaut and Laurens Walker, 'Theory of Procedure'

¹²⁰ Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2013) 96(325) *Law and Contemporary Problems*, 242.

¹²¹ Ibid .

Prosecutor's selection distinguishes between "juridified" and victims in the bottom of the pyramid.¹²² The ICC recognises the "juridified" victims while the latter victims are victims with no legal recognition. This recognition does not preclude the unrecognised victims from being victims. It is a polarisation that reduced their chances of obtaining justice. Thus, victims that fall in this category. In addition, Nouwen and Kendall also highlight the danger of legal representation of victims. They posit that the ICC's representational practices preclude each victim's individual specifics; rather, the victims are represented on a general level, which 'suggests a symbolic unity' and authority'.¹²³ From their perspectives, this generalisation seems right because it is founded on the notion that victims' experiences emanate from the 'uncontested' facts that they have suffered harm/loss. On the other side, this generalisation of victims through representation (LRVs) subverts their ability to hold accountable those who represent.¹²⁴ Thus, victims here have no legal personality nor power to hold accountable, their legal representatives. This is referred to as 'abstract victimhood'.¹²⁵

Similarly, Killean and Moffett contend that the use of common legal representation restricts individual victims' voice. They submit that victims' voices through common representation have been 'collectivised'.¹²⁶ In Donat-Catin's words, "there is no effective access to justice without skilful and responsible representation".¹²⁷ This

¹²² Ibid .

¹²³ Ibid, p.259

¹²⁴ Ibid

¹²⁵ Ibid..

¹²⁶ Rachel Killean and Luke Moffett, 'Victim Legal Representation before the ICC and ECCC' (2017) 15(4) *Journal of International Criminal Justice*, 217-740.

¹²⁷ David Donat-Catin, 'Article 68', in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (2008) 1275, 1291

underscores the importance of victims' access to justice. Mejjian and Varughese point out that the right to legal representation is the most 'procedurally challenging' aspect in the ICC.¹²⁸ As noted earlier, victims are not allowed to choose their LRV directly. Selection of LRVs is always made by the Chambers(registry). Perhaps the most severe disadvantage of the ICC's method is that it could undermine the crime victim agency. Crime victim agency is defined as the autonomy of crime victims to make a fundamental decision about their lives.¹²⁹ The crime victim includes their right and power to make crucial decisions that could affect their situations. Since it is not within their powers to choose LRVs, this reduces the degree of control they may exercise. The right to legal representation and the quality of the interaction between the LRVs and victims should be respected. Chapter three shall explore this fully.

1.8.3 Sentencing

A large and growing body of literature has investigated victim participation at the ICC. Hence, an increasing body of published studies describes victims' role during victim participation and its evolution. However, literature is scarce on the management of victims' rights and interests during sentencing, and the impact of victims' involvement on sentence decision is? Clearly, victims have interests in reparations, justice truth, protection from potential harm and sentence (disposition).

¹²⁸ Gerard Mekjian and Matthew Varughese, Hearing the Victims' s Voice: Analysis of Victims' Advocate Participation in the Trial Proceedings of the International Criminal Court,(2005) 17 *Pace International Law Review* 1, 20.

¹²⁹ Margeret Gavin and David Beloof, Crime Victims Agency,(2015) 13(1) *Ohio State Journal of Criminal Law*, 68.

It is noted that not much has been written about victims' rights and interests in sentencing. This thesis intends to examine the rights and interests of victims in the sentencing decision. Baumgartner was one of the first to draw our attention to how victim participation may influence sentencing and punishment.¹³⁰ However, when she conducted her research, none of the cases before the ICC had reached the sentencing stage.

Ashworth contested victims' legitimate interest in the disposition of the offender. From Ashworth's perspective, "it would be wrong to suggest that the victim has no legitimate interest in the disposition of the offender in his or her case, but the victim's interest is surely no greater than yours or mine."¹³¹ Here he compared the victims' interest to 'one of many citizens' who is part of the community. Ashworth's assertion is flawed because he failed to sufficiently differentiate that victims' interest emerges from the personal harm they have suffered because of the offender's crime inflicted on them. The community interest is classified into the category of 'general public interest'. Which means that the ordinary citizens are remotely affected as opposed to victims. Therefore, the reference of Ashworth to the social contract reasoning does not dig deeper. One other reasonable explanation for his thinking could be because his argument was limited within the ambience of restorative justice. Victims look forward to the determination of the punishment.

¹³⁰ Elisabeth Baumgartner, 'Aspects of victim participation in the proceedings of the International Criminal Court' (2009)90(870) *International Review of the Red Cross*, 409-440.

¹³¹ Andrew Ashworth, "Responsibilities, Rights and Restorative justice"(2002) 42 *British Journal of Criminology* p.585.

Henham suggests that international tribunals and courts should attempt to articulate substantive justifications for sentencing.¹³² He also argues that these courts do not clearly distinguish between the general grounds for punishment and the specific aims of punishment in concrete cases. In his opinion, there exists fluidity between objectives, purposes, principles, function or policy.

In the same vein, Van Zyl Smith points our attention to the limitations of sentencing provisions in the ICC Statute. He posits that challenges that flow from establishing reliable processes through international agreement reflect the confined nature of the punitive rationale for international sentencing,¹³³ given that the maximum penalty that the court could award is 30 years or life imprisonment.

Goldstone cautions against always equating justice with the number of convictions. In his words, "the fairness of any criminal justice system must be judged by acquittals and not by convictions.....acquittal does not necessarily follow from any inadequacies in the office of the prosecutor."¹³⁴ Therefore. Justice could be the discharge of the accused where there are doubts as to his guilt.

¹³² Ralph Henham, 'Philosophical Issues in International Sentencing' in Mark Findlay & Ralph Henham (eds) *Punishment and Process in International Criminal Trials, International and Comparative Criminal Justice* (Ashgate 2005) 129; Prosecutor v Kunarac (Case No.IT-96-23-/1-t), Judgment, 22 February 2001, para.836; Herbert Hart *Punishment and Responsibility* :Essays in Philosophy of Law (Oxford University Press 1968)

¹³³ Van Zyl Smith, 'Punishment and Human Rights in International Criminal Justice' . Inaugural lecture as Professor of Comparative and Penal Law, University of Nottingham , 30 January 2002.

¹³⁴ Richard Goldstone, 'Acquittals by the International Criminal Court' (2019) *European Journal of International Law* accessible at < <https://www.ejiltalk.org/acquittals-by-the-international-criminal-court/>> last accessed 21 November 2019.

This statement brings to light the fact that the Prosecutor is not under an obligation to always secure convictions, especially where the rights of the accused to a fair trial is at stake. The presumption of innocence precludes unwarranted conviction where the Prosecutor is unable to prove beyond a reasonable doubt.

In some domestic jurisdictions, Victim Impact Statement(VIS) in sentencing is used to inform sentencing.¹³⁵ In some common law jurisdictions, the Court permits victims to participate during sentencing. Some victims are allowed to give narratives on how the convicted person's harm or wrongdoing affects them. Through the use of VIS, victims are permitted to inform the court how their victimisation impacted them.¹³⁶ The VIS is presented to the Court after determining the guilt of the accused but before sentencing. This statement is taken into consideration in the decision of sentencing. Reasonably, VIS lightens the burden of the victim and gives them a sense of belonging. VIS proponents contend that it is a medium for victims to emote and express themselves about how the crime affected them.

In contrast, VIS critics have cautioned that the stage of intervention-sentencing is rather too late to address victims' suffering.¹³⁷ Particularly in common law jurisdictions, where victims are not directly engaged in the trial process. Critics of VIS proposes that

¹³⁵ Joanna Shapland and Matthew Hall, "What do we know about the effects of crime on victims" (2007) 14 *International Review of Victimology*, 175-217,176.

¹³⁶ Jo-Anne Wemmers, "Where do they belong? Giving victims a Place in the Criminal Justice Process (2009) *Criminal Law Forum*,396-416, 399.

¹³⁷ Andrew Sanders, "Victim Impact Statements: Don't Work, Can't Work (2001) *Criminal Law Review*, 447-458.

victims should have been involved at an earlier stage.¹³⁸ Moreover, another argument has been that VIS tilt the balance of justice because it is a subjective expression of victims, influencing the sentencing process.¹³⁹

VIS could increase victim satisfaction through procedural fairness at the sentencing stage.¹⁴⁰ This assertion recognises victims' voices in the sentencing hearing without necessarily considering their interests.¹⁴¹ However, one set back for the application of VIS at the ICC would be the negative impact on the court proceedings' efficiency, given a large number of victims, it will be impracticable.

VIS narrates the experience of the victim about the offence and its attendant consequences on the victim. A classic example is *The Stanford case*.¹⁴² In this case, Turner, a former Stanford University swimmer, was convicted of sexually assaulting a woman. The victim submitted a written statement, where she outlined the impact the attack had on her.¹⁴³ This victim read her statement in court directly to the defendant

¹³⁸ Jo-Anne Shapland, Jon Wilmore and Peter Duff, *Victims in the Criminal Justice System* (Aldershot Gower 1985)

¹³⁹ Edna Erez and Julian Roberts, Victim Participation in the Criminal Justice System, in Robert Davis, Arthur Lurigio and Susan Herman (eds) *Victims of Crime* (3rd Edition Sage Publishers 2007); Kim Lens, Anthony Pemberton, Karen Brans, Johan Braeken, Stefan Bogaerts and Esmah Lahlah, 'Delivering a Victim Impact Statement: Emotionally effective or counter-productive?' (2015) 12(1) *European Journal of Criminology*, 17-34.)

¹⁴⁰ Luke Moffett, 'Victims Personal Statements in Managing Victims' Voices in Sentencing in Northern Ireland: Taking a more Procedural Justice Approach' (2017) *Northern Ireland Legal Quarterly*, Queen's University Belfast Law Research Paper No.2019-091-27

¹⁴¹ Ibid

¹⁴² *People of the State of California v Brock Allen Turner*, No HO43709 Santa Clara County Super .Court No.b15771622016

¹⁴³ Independent, Stanford rape case: Read the impact statement of Brock Turner's victim, accessible at <https://www.independent.co.uk/news/people/stanford-rape-case-read-the-impact-statement-of-brock-turners-victim-a7222371.html> > Last accessed 24 November 2019.

during the sentencing process. However, the court sentenced the convict to six months of imprisonment. Contesting the sentencing is beyond this literature review. However, the VIS read out by the victim highlights the importance of victim participation during sentencing. From this case, it seems the VIS did not influence the declared sentence.

In Henham's words, sentencing represents "the point in the trial where the aims of punishment are given concrete and public expression in a specific case".¹⁴⁴ Hence, the sentencing decision could be considered as the legitimacy of the punishment. This legitimacy goes to the root of effective governance of criminal justice.¹⁴⁵

Strang and Sherman, Doak and Moffett highlight the need for the criminal justice system to be victim-oriented.¹⁴⁶ According to these commentators, this can be achieved if there is a move towards more procedural rights, especially the right to information, participation, protection and compensation.¹⁴⁷ Thus, it can be suggested that procedural justice plays a vital role in shaping the perception of how victims feel the legal authorities have treated them.

However, Strang and Sherman found, for instance, that the amount of information that would be released to the victims was limited, but depended on the value of their testimonies to the prosecution or defence. They also found that victims' satisfaction started to decline most times at the investigation stage due to the lack of information

¹⁴⁴ Ralph Henham, *Sentencing and the Legitimacy of Trial Justice* (First Edition, Routledge 2012)351

¹⁴⁵ Ibid

¹⁴⁶ Heather Strang and Lawrence Sherman, 'Repairing the Harm: Victims and Restorative justice', *15 Utah Law Review* (2003)1; Luke Moffett, 'Elaborating justice for victims at the International Criminal Court' (2015)13(2) *Journal of International Criminal Law*; Ibid.

¹⁴⁷ Ibid.

about their case's progress.¹⁴⁸ Thus, one may assert that the availability of information about the development of their case, updates and requirements is essential to giving victims a sense of belonging. Principle 6(a) lends credence to this finding. According to this provision, the need to inform victims of their role, scope, timing and progress of the proceedings may facilitate how the judicial and administrative authorities respond to their needs.¹⁴⁹ Consequently, victims are under the impression that the courts and criminal justice professionals do not have sufficient information to handle their case in such a way that would reflect in any outcome produced. This outcome has to take into account what happened to the victims.

In 2014, Zehr, 'the father of restorative justice' classifies information as a type of victims' need.¹⁵⁰ His studies reveal victims' need for real information about why the offence happened as well as updates after the commission of the crime. Interestingly, he points out that this information should go beyond '*speculation*' and '*legally constrained*' details, *emanating* from trial proceedings or plea bargaining.¹⁵¹ Instead, this information should update the victims and clear out speculations. It is noteworthy that this commentator's analysis restricts victims' informational needs to why the offence was committed and, what has happened after the crime; he termed this as '*real*

¹⁴⁸ Heather Strang and Lawrence Sherman, 'Repairing the harm: Victims and Restorative justice, 15 *Utah Law Review* (2003) 15,20

¹⁴⁹ Principle 6(a), The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985

¹⁵⁰ Howard Zehr, *The Little Book of Restorative Justice: Revised and Updated* (1st Edition, Good Books 2014)5.

¹⁵¹ Howard Zehr, *The Little Book of Restorative Justice: Revised and Updated* (1st Edition, Good Books 2014)5.

information. 'From his findings, little is known about the informational needs of victims during the trial process. He believes these victims' needs were not being adequately met in the international criminal justice system.¹⁵² Moffett also recommends enhancing victims' needs in the criminal justice system; more consideration should be given to procedural and substantive justice, rather than focusing on restorative justice.¹⁵³ This submission highlights the importance of victims' contribution to criminal proceedings, sentencing and decision-making.

Victims need to get information about the kinds of services available to them before, during and after the criminal investigation and during criminal proceedings.¹⁵⁴ They need to know if provisions will be made for victim protection programs, what it entails and medical services. Similarly, victims also need to understand how the police and criminal justice processes operate. The information will enable them to know at what point they can get involved in the investigation or trial. Victims will also want to know if the state will provide any medical care or compensation.¹⁵⁵ Inadequate information may frustrate victims or lead to secondary victimisation. It follows that if victims receive this information, it will assist them pursue other rights and entitlements.

¹⁵² Howard Zehr, *The Little Book of Restorative Justice :Revised and Updated*(Sky Publishing 2014)13.

¹⁵³ Luke Moffett, 'Meaningful and effective?Considering victims interests at th International Criminal Court'(2015) 26*Criminal Law Forum* 255-289.

¹⁵⁴ Waller Irvin, *Rebalancing Justice: Rights for Victims of Crime*(Rowan &Littlefield Publishers 2011)38.

¹⁵⁵ Ibid .

Doak, Henham and Mitchell suggest that the conferment of procedural rights on victims may undermine the accused's process rights.¹⁵⁶ By implication, if rights are granted to victims to even out the imbalance between the victims and the defence, this may increase victims' access to justice. Still, caution must be taken so that such rights do not impede the accused's right to a fair trial.

Moffett believes that victimology and human rights play a central part in the development of victims' rights.¹⁵⁷ However, this development is still in process because most victims' rights struggle to find stability in the criminal justice system. Some of these rights are still very much contentious.¹⁵⁸ One reasonable explanation is that victims' procedural rights have to be balanced against the accused's rights.

The debate over the rights of victims has now become central to the discussions of international criminal justice. Commentators like Spiga Hoyle and Ullrich observe that victims' rights in international criminal justice have become a focal point.¹⁵⁹ Moreover, as mentioned earlier, this is partly due to the argument that victims' involvement in international criminal justice is essential to international criminal proceedings'

¹⁵⁶ Jonathan Doak, Ralph Henham and Barry Mitchell, "Victims and the sentencing process: developing participatory rights? (2009) 29(4) *Legal Studies*, p.651-677.

¹⁵⁷ Luke Moffett, *Justice for Victims before the International Criminal Court* (First Edition, Routledge 2014) 17.

¹⁵⁸ Ibid.

¹⁵⁹ Valentina Spiga, 'No Redress Without Justice : Victims and International Criminal Law' (2012) 10(5) *Journal of International Criminal Justice*, 1377-1394; Carolyn Hoyle and Leila Ullrich, 'New Court, New Justice? The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court,' (2014) 12(4) *Journal of International Criminal Justice*, 681-703; Claire Garbett, 'From Passive Objects to Active Agents: A Comparative Study of Conceptions of Victim identities at the Victim Identities at the ICTY and ICC,' (2015) 15(1) *Journal of Human Rights*, 40-59.

legitimacy and effectiveness.¹⁶⁰ Therefore, it has been theorised that victims' perceptions of the proceedings confirm the legitimacy of the criminal justice system.¹⁶¹ As such, one may conclude that victims are gradually becoming more significant in the criminal justice system. The quality of criminal trials and victims' willingness to accept and abide by their cases' outcome/decision can be enhanced by the victims' involvement in criminal investigations, judicial processes, and legal decision-making.¹⁶²

The more the contact, the higher the satisfaction.¹⁶³ However, Maquire reiterates that the process is more important than the actual outcome of the case. Hence, victims were quite happy if police had been interested or had kept them informed. They rate the procedure more than the outcome.¹⁶⁴

Principle VII of the Basic Principles and guidelines on the right to remedies and reparations allow victims to access relevant information concerning violations and reparation mechanisms.¹⁶⁵ Principle VIII also provides that states should publicise

¹⁶⁰ Peter Dixon and Chris Tenove. 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims,' (2013) 7(3)*International Journal of Transitional Justice*, p 408; Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford: Hart Publishing 2008).325

¹⁶¹ Ibid 27.

¹⁶² Tom Tyler, 'Procedural Justice and the Courts' 44*Court Review* ,27; Jonathan Doak, Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford: Hart Publishing 2008).

¹⁶³ Joanna Shapland, 'Victims, the criminal justice system and compensation' (1984) 24(2)*British Journal of Criminology* 131-149.

¹⁶⁴ Mike Maguire, *Burglary in a dwelling : the offence ,the offender and the victim* (London Heinemann 1982).

¹⁶⁵ Declaration of Basic principles of justice for victims of crime and abuse, 1985, Principle VII.

information about available remedies on gross violations, through private and public mechanisms.¹⁶⁶

Tyler's study attests that the authority put their views into consideration before pronouncing the judgment.¹⁶⁷ It is important to note that Tyler contends that although '*customer satisfaction*' is not an objective of the court, however, courts need to consider the needs of people, since they are responsible for conflict resolution. Hence, whether people feel that justice has been done is central to their trust and confidence in the judicial system.¹⁶⁸ One may infer that this trust and confidence serve as the legitimate basis for the criminal justice system.

Set against this background, this thesis will explore the impact of victims voice on sentencing at the International Criminal Court.

1.9 Conclusion

This chapter has identified the research background, the research questions, significance of the study and the research limitations. The literature review highlights the available scholarship on victim participation in criminal justice, generally and, in particular, at the ICC. It also identifies a gap in the knowledge, particularly the management of victims' rights and interests concerning prosecutorial discretion, trial process and sentencing. This Chapter has set the scene for this thesis. The second chapter examines the degree to which prosecutorial discretion affects victims' rights

¹⁶⁶ Ibid, Principle VIII.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid(n 14).

and interests. The third chapter deals with the extent to which the court respects victims' rights and interests at the trial. The fourth chapter assesses the degree to which the court respect victims' rights and interests during sentencing decision. Finally, the conclusion gives a summary and recommendation.

The next chapter shall explore prosecutorial discretion, mainly how it affects victims rights and interests.

2.0 Chapter 2- Prosecutorial discretion

“[t]he ICC can never be in a position to try all perpetrators of all crimes in situations where international crimes have occurred. Unfortunately, the ICC often acts more as a substitute for non-existent domestic prosecutions than as a complement. It can, therefore, do justice partially, because as indicated above, it can only focus on a relative number of situations, entities, individuals, factual allegations, legal qualifications or crimes, and calling some of the victims as witnesses.”¹

2.1 Introduction

Studies of Megret, Schiff, Robertson, and Chazal propound that politics and reciprocity influence the development and establishment of the ICC as well as its functions within the international community.² Hence, this has led to tension in the pursuit of justice. Arguably, this tension transcends situations and case selection to the prosecution of crimes.

The Office of the Prosecutor(OTP) is at the heart of our understanding of the ICC’s function in combating impunity. Article 42 set out the powers of the OTP as an independent body of the Court. The OTP plays an essential role in the investigation and

¹ Cecile Aptel, “Prosecutorial discretion at the ICC and victims’ right to remedy :Narrowing the Impunity Gap” (2012) 10(5)*Journal of International Criminal Justice* 1357-1375, 1358.

² Frederic Megret, ‘The Politics of International Criminal Justice’ (2002) *European Journal of International Criminal Justice*,1261-1284; Benjamin Schiff, *Building the International Criminal Court*(Cambridge University Press 2008)3,4;Geoffery Robertson, *Crimes Against Humanity:The Struggle for Global Justice* (New York :The New Press, 1999) 454;Nerida Chazal, *The International Criminal Court and Global Soccial Control: International Criminal Justice in Late Modernity*(First published 2016 1st Edition ,Routledge 2016)38.

prosecution of crimes at the ICC. The prosecutor has been referred to as ‘*the Gatekeeper of the ICC*’.³ A large and growing body of literature has described the role of prosecutorial strategies⁴ and its broad discretionary powers.⁵

Recently, questions have been raised about the role of prosecutorial discretion on victims’ rights and interests. This issue has grown in importance in light of the disparity in the international criminal justice system and national jurisdictions. This chapter seeks to examine the impact of prosecutorial discretion on victims’ rights and interests.

This chapter begins by giving a brief overview of the role of actors in the Rome negotiation. The Rome negotiations address the controversial issue on whether it would be appropriate to grant the OTP broad discretionary powers. The Rome Negotiations gives a background into the origin of Prosecutorial discretion at the ICC. The second section ascertains the statutory powers of the Prosecutor to explore the extent of these powers. The following section carefully examines the distinction between victims’ interests and prosecutor’s interests. It is necessary to clarify the differences between

³ Lovisa Badagard and Mark Klamberg, “The Gatekeeper of the ICC:Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court’(2017) 48*Georgetown Journal of International Law* 639- accessible at <<https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2018/05/48-3-The-Gatekeeper-of-the-ICC.pdf>> Last accessed 07 January 2020.

⁴ Ibid 3

⁵ Jingbo Dong, *Prosecutorial Discretion at the International Criminal Court :A Comparative Study* (2009) (2) *Journal of Politics and Law* ;Allison Danner , ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court(2003) 97(3) *American Journal of International Law* pp.510-552; Luc Cote, “Reflections on the Exercise of the Prosecutorial Discretion in International Criminal Law(2005) 3(1) *Journal of International Criminal Justice* pp.162-189;Maria Varaki, “Introducing a Fairness-Based Theory of Prosecutorial Legitimacy before the International Criminal Court(2016)27(3)*European Journal of International Law* ,p769-788.

them because of the seemingly overlap between both interests. This distinction will enable us to understand how the prosecutor's role could potentially affect victims' rights and interests. The fourth section clarifies the position of the prosecution in the framing of charges. The following section investigates the charging document in the *Prosecutor v Thomas Lubanga*. It is necessary to assess the impact of Prosecutorial discretion on victims.

Similarly, the sixth section evaluates the charging document in *Prosecutor v Germain Katanga and Ngudjolo Chui*. Having established these parts, the following areas assess Regulation 55 and its relationship with the prosecutor's powers. This explores the prosecutor's role in the application of Regulation 55 and how the exercise of power in this regard influences victims' rights and interests in the *Lubanga* and *Katanga* cases. Building on this idea, the following section discusses the findings. The final part concludes this chapter.

2.2 The role of actors in the Rome Negotiations

The absence of a settled normative and institutional hierarchy has led to multiplicity norms.⁶ Consequently, fragmentation in international law and the international community implies the emergence of different tribunals and institutions. There is a need to provide unification within these complexities; however, the provision of consolidation could inadvertently foster the parties' selfish interests.⁷ Hence, groups

⁶ Martti Koskeniemi and Paivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15(3) *Leiden Journal of International Law*, pp553-579

⁷ Nerida Chazal, *The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity* (First published 2016, 1st Edition, Routledge 2016).37

tend to identify and interact provided they have common ideas.⁸ Their ‘personal’ interests mostly dictate this. This strategy may unify different groups, promote their common interests and give them power.

The establishment of Yugoslavia and Rwanda Tribunals contributed to the clamour for the demand for the ICC.⁹ The United Nations Security Council created the Yugoslavia, and Rwanda tribunals as ad-hoc tribunals in response to serious crimes committed within their respective jurisdictions.¹⁰ Some commentators suggested that a permanent International Criminal Court would preclude the reoccurrence of problems and challenges that afflicted the tribunals.¹¹ Hence, it is guaranteed that the establishment of a permanent court would expedite investigations and prosecutions.¹² Nonetheless, the question posed by creating a permanent criminal court remained a political one that might threaten national sovereignty.¹³

In 1995, the United Nations General Assembly decided to establish an Ad Hoc committee to discuss and elaborate on the “major substantive and administrative issues”

⁸ Ibid 7.

⁹ Cherif Bassiouni and Christopher Blakesley, “The Need for an International Criminal Court in the New International World Order”(1992) 25(20) *Vanderbilt Journal of Transnational Law*, p151-182.

¹⁰ Lilian Barria and Steven Roper, ‘How effective are international criminal tribunals? An Analysis of the ICTY and the ICTR’(2005) 9(3) *The International Journal of Human Rights*, 349-368; Alexandra Adams, ‘The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and their Contribution to the Crime of Rape’(2018) 29 *European Journal of International Law*, p749-769.

¹¹ Michael Scharf, ‘The Politics of Establishing an International Criminal Court’ (1997) 6(167) *Duke Journal of Comparative and International Law*, p166-173.

¹² Leila Wexler, “The Proposed Permanent International Criminal Court: An Appraisal” (1996) 29 *Cornell International Law Journal*, 665; Micheal Scharf, “Results of the Rome Conference for an International Criminal Court”(1998) 3(10) *American Society of International Law* accessible at <https://www.asil.org/insights/volume/3/issue/10/results-rome-conference-international-criminal-court>> last accessed 05 August 2020.

¹³ Cherif Bassiouni, ‘The Time has come for an International Criminal Court’ (1991) 1 *International Law and Comparative Law Review*, p1-13.

which emerged from the International Law Commission's 1994 draft statute.¹⁴ The Ad Hoc committee had two sessions that led to emergent issues in creating ICC. Subsequently, the Ad Hoc Committee's work led to the establishment of the Preparatory Committee.¹⁵ The Preparatory Committee was to continue the Ad Hoc Committee's work on the establishment of the International Criminal Court. In its address, the General Assembly mandated the Preparatory Committee to "to draft text, to prepare a widely acceptable consolidated text of a convention for an international criminal court as the next step towards consideration by a conference of plenipotentiaries."¹⁶

The negotiations' delegates consisted of individual actors, collective participants, government delegations, Non-Governmental Organisations, United Nations Diplomats, senior servants, public and private experts, Bureau members, and politicians.¹⁷

The Rome Conference revealed the polarised interests between the United States quest for "a Security Council-controlled Court" and the demand of some other countries for a permanent court with universal jurisdiction on war crimes, crimes against humanity

¹⁴ General Assembly Resolution 49/53, United Nations General Assembly Official Records, 49th Session, item 137, United Nations Document A/RES/49/53 1994.

¹⁵ General Assembly Resolution 50/46, United Nations General Official Records, 50th Session, Supplementary No. 49, Volume 1 at 307, United Nations Document A/50/46, 1995; James Crawford, The International Law Commission Adopts a Statute for the International Criminal Court (1995) 89(2) *American Journal of International Law*, p404-416.

¹⁶ Ibid, General Assembly Resolution 50/46, United Nations General Assembly Official Records, 50th Session, Supplementary No. 49 at 307, United Nations Document, A/RES/50/46(1995).

¹⁷ Fanny Benedetti and John Washburn, "Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterward on the Rome Diplomatic Conference", 5 *Global Governance* 16, January-march 1999.

and genocide.¹⁸One reasonable explanation for the USA's objection was the implications of an independent ICC Prosecutor; potentially, an independent Prosecutor could exercise its power to restrict the U.S.A's military personnel and officials.¹⁹Thus, the USA intended for a Court with relatively restricted powers.

The final stage addressed the prosecutor's roles, amongst other issues(triggering mechanisms, complementarity, Court's jurisdiction).²⁰Chazal notes that during the Rome Statute Conference, the key strategy was the groups' constitution around shared interests and ideas.²¹ He also observes that the processes of negotiation and interactions during the conference denote the responsive ability of actors to impact change as well as how powerful these actors become when they create groups based on shared ideas and interests.²² However, Schiff, Megret and Chazal have shown that actors use *ideal Politik* and *realpolitik* to develop their interactions with ICC.²³ Such is seen by the Human Rights Watch's interactions, The Coalition for the International Criminal Court

¹⁸ Micheal Scharf, "Results of the Rome Conference for an International Criminal Court"(1998)3(10)*American Society of International Law* accessible at <https://www.asil.org/insights/volume/3/issue/10/results-rome-conference-international-criminal-court>> last accessed 05 August 2020.

¹⁹ Ibid; American Service members'Protection Act(ASPA), Pub .1 No.107-206,116 Stat.899;Williams Schabas , *An Introduction to the International Criminal Court*(2nd Edition 2004)21;

²⁰ Cherif Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court" (1999) 32(3) *Cornell International Law Journal* p.443-449,457.

²¹ Ibid.

²² Ibid.

²³ Ibid; Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement* (1st Edition Routledge 2006)12.

and Amnesty International with the ICC. It is above the scope of this thesis to discuss the interactions between these groups.

Moreover, during the Rome Statute negotiations, there were three main groups. The United Nations Security Council members- China, United Kingdom, United States, Russia and France. Their idea was that the Security Council should closely monitor ICC. The second group consisted of Mexico, Egypt and India. This group was against the involvement of the Security Council with the Court. In addition, they proposed the inclusion of nuclear weapons in the Rome Statute. The third and most influential was the Like-Minded Group(LMG).²⁴This diverse group materialised from the Ad Hoc Committee's initial meetings, and the Preparatory Committee consisted of approximately sixty states, including Canada, Australia, Austria, Argentina European countries, Latin American States, and the African States. This group proposition was based on jurisdiction over international crimes -crimes against humanity, war crimes, genocide and aggression with a focus an independent and impartial court jurisdiction over international crimes. They also clamoured for an independent prosecutor who has the authority to initiate proceedings while maintaining a working relationship with the Security Council. Driven by these ideas, the LMG supported the states with less power and agenda to achieve their aims. It also aligned with NGOs; as such, it received support from these NGOs.²⁵ For instance, Amnesty International described the Court as ‘a judicial body’ which required an independent Prosecutor to ensure whether to

²⁴ Ibid;Phillppe Kirsch and John Holmes, “The Rome Conference on an International Criminal Court:The Negotiating Process”,(1999)93(1)*The American Journal of International Law*,p2-12

²⁵ Ibid.

investigate or prosecute.²⁶ The interaction highlights the cooperation between actors and groups to use their ideas to construct the ICC to achieve their interests and identities socially.

The discretionary powers of the Prosecutor was a controversial topic during the negotiations of the Rome Statute. Some delegations submitted that the role of the Prosecutor under article 25 was limited.²⁷ Therefore, this restriction, for ‘political reasons’ would curtail States and Security Council to complain. Drawing from the prosecutor’s role in the Statute of the ICTY and ICTR, they proposed for broader prosecutor power to initiate investigations. The ILC’s first draft of the Statute, which was submitted in 1994 granted the prosecutor a restricted prosecutorial power, with the Security Council or State party, the ability to make referrals.²⁸ They canvassed for a Prosecutor empowered with an *proprio motu* to initiate investigations.²⁹ Some delegates criticised granting the prosecutor with the power to commence proceedings *proprio motu* power based on the argument that this would negatively impact the international

²⁶ Amnesty International, *The International Criminal Court: Making the Right Choices* -Part 1 108-109, January 1997,

²⁷ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol.1, 1996, Paras 149-151, Paras-149

²⁸ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol.1, 1996, Paras149-151, Paras-149 Silvia Fernandez de Gurmendi, ‘The Role of the Prosecutor ‘ in Roy Lee(ed), *The International Criminal Court: The Making of the Rome Statute-Issues, Negotiations and Results* (Kluwer Law International ,199).175; Draft Statute for the International Criminal Court, articles 21,23,1994, https://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/7_4_1994.pdf.

²⁹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol.1, 1996, Paras149-151, Paras,149

legal system(it was in its early stage of development).³⁰They argued that an independent Prosecutor would stretch “the limited resources of the prosecutor with frivolous complaints.”³¹ The United States of America(USA)vehemently opposed the independence of the Prosecutor. It argued for a Court whose powers would be mostly dependent on the Security Council referrals.³²Although the USA did not contest the likelihood of Prosecutor becoming political, it posited that a Prosecutor with a self-initiating power is likely to overwhelm the Court with complaints, ‘political decision-making’, ‘risk diversion of resources’ and ‘confusion’.³³Likewise, some delegates agreed that the prosecutor's vast discretionary powers are likely to have adverse effects. They submitted that this would indirectly politicise the court, with accusations of a politically motivated prosecutor.³⁴ Hence, they suggested judicial review by the PTC would check the prosecutor's powers' excesses or abuse. The Delegate stressed that judicial review would serve as an adequate balance without affecting the prosecutor's independence.³⁵

³⁰ Report of the International Law Commission on the work of its forty-six session, 2 May -22 July 1994;Official Records of the General Assembly , Forty-ninth session, supplement No.10, Draft Statute of the International Criminal Court,p.46.

³¹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol.1, 1996, Paras149-151, Para,151

³² David Scheffer, Ambassador, at Large for War Crimes Issues, Address at American University Washington, D.C ,September ,2009, http://www.state.gov/ww/policy_remarks/2000/000914_scheffer_au.html.

³³ David Scheffer, Ambassador at Large for War Crimes Issues and Head of the U.S Delegation to the U.N Diplomatic Conference on the Establishment of a Permanent International Criminal court Before the Committee on Foreign Relations of the U.S Senate , July 23, 1998.

³⁴ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol.1, 1996, Paras149-151, Para 151.

³⁵Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol.1, 1996, Para. 150.

On the other hand, An organised group of over sixty states called ‘*Like-minded*’ states proposed for a more independent prosecutor.³⁶ The Lawyers Committee for Human Rights asserted that if the Court actively worked towards the proscription and punishment of most serious crimes of concern to the international community, the Prosecutor must be given a degree of independence.³⁷ These delegates advanced for the prosecutor’s autonomy as a basis for efficient prosecution at the ICC. Their recommendation included the prosecutor’s power to trigger investigative or prosecution proceedings on her initiative.³⁸ For instance, Amnesty International proposed that given that the Court is “a judicial body....its Prosecutor must have the independence to decide whether to investigate or prosecute.”³⁹ The preparatory committee also supported the *proprio motu* power of the prosecutor during their meeting. Subsequently, a division arose between States on whether to grant the Prosecutor with a *proprio motu* power or not. The proponents posited that a broad prosecutorial power would ensure the prosecutor fulfil his duties from their perspective, an independent prosecutor would likely promote the administration of justice.⁴⁰ Therefore, this will necessitate the independence of the prosecutor to investigate and prosecute.⁴¹

³⁶ Williams Pace and Mark Thieroff, “Participation of Non-Governmental Organisations” Roy Lee(ed) , The International Criminal Court: *The Making of the Rome Statute :The Issues , Negotiations, Results* (1999)392-393.

³⁷ Lawyers Committee for Human Rights , The accountability of an Ex-Officio Prosecutor 6(1998)

³⁸ Ibid .

³⁹ Amnesty International , The International Criminal Court :Making the Right Choices –Part 1 108-109, January 1997, [http://web.amnesty.org/library/pdf/IOR400011997ENGLISH/\\$File/Ior4000197.pdf](http://web.amnesty.org/library/pdf/IOR400011997ENGLISH/$File/Ior4000197.pdf).

⁴⁰ Ibid .

⁴¹ Amnesty International, The International Criminal Court: Making the Right Choices, Part 1, June , 1997.

This dichotomy between the States reflected the idea that prosecutorial independence was at the heart of a competent criminal court. Prosecutorial independence could underscore the legitimacy and competency of the ICC. The supporters of an independent prosecutor submitted that a criminal court subject to the Security Council's mandatory powers would undermine the “credibility and moral authority of the court.”⁴² By implication, the Court's legitimacy could be subverted by political influence while making the court a pawn in external powers' hands.⁴³ The opponents cautioned that an independent prosecutor with broad discretionary powers would leave the prosecutor with unchecked powers which, in turn, would ‘embroil the court in controversy, political decision-making, and confusion’.⁴⁴ It appears both sides of the delegates were for and against endorsing politically motivated prosecutor.

Consequently, a consensus emerged amidst the division between the delegates. They unanimously consented to provide the prosecutor with an independent power to initiate investigation and prosecution.⁴⁵ However, the Prosecutor's power would be subject to checks by the Pre-Trial Chamber at an early investigation stage.⁴⁶ Accordingly, the delegates reached a compromise to grant the ICC prosecutor broad discretionary powers

⁴² United Nations General Assembly Official Records, Report of the Adhoc Committee on the Establishment of an International Criminal Court, par.121, United Nations Document Doc A/50/22, Fiftieth Session, September 6, 1995

⁴³ Ibid.

⁴⁴ Statement of David, Scheffer, Ambassador at Large for War Crimes Issues and Head of the U.S Delegation at the U.N Diplomatic Conference on the Establishment of a Permanent International Criminal Court, The Committee on Foreign Relations of the U.S Senate , July 23, 1998

⁴⁵ Zoe Pearson, ‘Non—Governmental Organisations and the International Criminal Court: Changing Landscapes of International Law, (2006) 39(2) *Cornel International Law Journal* p243-284.

⁴⁶ Zoe Pearson, ‘Non—Governmental Organisations and the International Criminal Court: Changing Landscapes of International Law, (2006) 39(2) *Cornel International Law Journal* p243-284

regarding whether to prosecute or not. The power is subject to a check and balance by the PTC. The compromise reached is embodied in Article 15, particularly article 15(3) of the Rome Statute.

The preamble of the Statute and the Policy papers provide that the OTP's investigative efforts and resources should be directed on the perpetrators that bear the most significant responsibility for the commission of the most serious crimes of international concern.⁴⁷

So far, this section has demonstrated the origin of the powers of the prosecutor. What follows is an outline of the Prosecutor's statutory powers to familiarise the readers with laws and rules on prosecutorial powers.

2.3 The Statutory powers of the Prosecutor.

The prosecutor's powers to initiate prosecution is spelt out in articles 53(2) (a) (b)(c), 54, and 58. Moreover, Article 53(1) (a)(b)(c) stipulates the conditions to fulfil for the prosecutor to initiate an investigation.

Article 15 grants the Prosecutor the power to commence an investigation independently after receiving information from any source without any State or Security Council

⁴⁷ ICC, Office of the Prosecutor , Paper on some Policy issues before the Office of the Prosecutor, September 2003.

referral. Also, the OTP has the power to independently decide how to conduct investigations and method of presentation during the whole trial.⁴⁸

The Prosecutor shall commence an investigation after he must have evaluated the information made available to him.⁴⁹ Where the prosecutor starts an investigation, he is duty-bound “to establish the truth” and to “investigate incriminating and exculpatory circumstances equally.”⁵⁰ Also, for the guarantee of effective investigation and prosecution, the prosecutor is obliged to ‘respect the interests and personal circumstances of victims ...’⁵¹ The fulfilment of these requirements establishes an objective condition as an obligation on the Prosecutor as opposed to politicising investigations and prosecutions. Besides, the Prosecutor shall not proceed with the initiation of the investigation if he or she determines that there are no reasonable grounds to continue under the Statute. The Prosecutor shall consider three grounds to decide whether he should initiate an investigation. The grounds are :

(a) “The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed ;

(b)The case is or would be admissible under article 17; and

⁴⁸Rome Statute 1998, article 54;article 13(c); article 15(3); ICC Rules, Rule 48;Rule 63(5) ;International Criminal Court, Office of the Prosecutor, accessible at <<https://www.icc-cpi.int/about/otp>> last accessed on 11 January 2020.

⁴⁹ Rome Statute 1998, Article 53(1)

⁵⁰ Rome Statute 1998, Article 54(1)(a).

⁵¹ Rome Statute 1998, Article 54(b).

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”⁵²

However, suppose the Prosecutor determines that there is no reasonable basis to proceed, which is determined based on subparagraph (c). In that case, the Prosecutor is under an obligation to inform the Pre-Trial Chamber.⁵³ This provision seems to control the Prosecutor’s powers in this respect. One could argue that this section’s composition sets standards for judicial scrutiny or review of the prosecutor’s powers. Article 53(3)(b) grants the PTC the authority to review on its initiative the OTP’s decision where an “an investigation would not serve the interests of justice.”⁵⁴

Article 15(3) of the Statute grants victims the right to be heard by a Pre-Trial Chamber when “the Prosecutor concludes that there is a reasonable basis to proceed with an investigation.”

Following this, the prosecutor’s power to interpret and apply ‘the interests of justice’ is subject to review and judicial determination by the Pre-trial Chamber. The assessment grants victims the avenue to provide the PTC with relevant information concerning crimes committed in the situation. The judicial scrutiny by the PTC takes place regardless of if the OTP decides to initiate prosecution or not. It follows that with the relevant information, the Chamber can effectively evaluate the Prosecutor’s decision not to proceed with an investigation. It appears that this judicial review is not an appeal

⁵² Rome Statute, Article 53 (1) (c)

⁵³ Rome Statute, Article 53(3) (a).

⁵⁴ Rome Statute, Article 53(3) (b).

against the decision of the Prosecutor, but a scrutiny of the decision-making process and factors involved.

Notably, the Powers of the PTC to review the prosecutor's decision not to initiate prosecution or discontinue prosecution is well-founded in some domestic jurisdictions like the United Kingdom.⁵⁵ Many a time, the review may be necessitated if doubts arise as to the objectivity and interpretation of the Prosecutor's decisions.⁵⁶ Such review borders on the legality of the decisions which finds support in excerpts from Lord Diplock's statement:

“By “illegality” as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges by whom the judicial power of the states is exercisable”.⁵⁷

For this reason, one may infer that the power of the Pre-Trial Chamber to control the decision-making power of the Prosecutor seems to reconcile the powers of the prosecutor with the principle of legality. An idea which is not strange to some national jurisdictions. Mireille Delmas-Marty holds the view that Article 53 is ‘a compromise between strict legality and prosecutorial discretion’.⁵⁸ Arguably, where the prosecutor's

⁵⁵ R(Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening) [2002] 1AC 800 ; Matalulu v Director of Public Prosecution [2003] 4 LRC 712,736 .

⁵⁶ GCHQ case, Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL, Statement of Lord Diplock, in the House of Lords.

⁵⁷ Ibid

⁵⁸ Delmas-Marty , ‘Interaction between National and International Criminal Law in the Preliminary Phase of Trial at the ICC’ (2006) 4 *Journal of International Criminal Justice*, p10.

decision not to proceed with an investigation is based on the presence of substantial reasons to believe that investigation would not serve the interests of justice, regardless of the gravity of crime and interest of victims enunciated in Article 53. The PTC power comes into play with the caveat that Prosecutorial powers are not absolute.

In addressing which category of victims should take part at this stage, the PTC made a distinction between victims of a case and victims of a situation.⁵⁹ It found that at the situation phase, the victims are not required to fulfil the causal link between the crime and the harm; neither do they need to know the identity of the perpetrator.⁶⁰ At this stage, the threshold is not high because most times, the suspect's identity or alleged perpetrator remains sketchy.

A scholar exhibits another line of thought, in 2011, Schabas, in his book likens the position of the Prosecutor to that of an investigating magistrate or *juge d'instruction* in civil law countries.⁶¹ He posits that this role is distinct from what is applicable in a predominantly adversarial setting with a common law's prosecuting attorney.⁶² Schabas cautions that the prosecutor's role at this stage should be neutral and impartial, without any political considerations.⁶³ He acknowledged that politics is involved in the selection of situations and cases. Schabas believes that Prosecutorial discretion is unfettered,

⁵⁹ Situation in the DRC, Decision on the Applications for the Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6, 17 January 2006, ICC-01/04-101. Para.77-87.

⁶⁰ Ibid, para.65

⁶¹ Williams Schabas, *An Introduction to international Criminal Court*. (4th Edition, Cambridge University Press 2011)

⁶² Ibid .

⁶³ Ibid .

given that the PTC reviews the Prosecutor 's decision. In that case, the most it can do is 'request the Prosecutor to reconsider that decision' the PTC's review does not go beyond requesting the prosecutor to reconsider such a decision. Arguably, the PTC's checks and balance is not sufficient. By implication, it can be inferred that the ICC Prosecutor is not fully accountable to the PTC. He could apply the reasonable basis test to discontinue an investigation. He is empowered with the discretion to select cases from situations based on his judgment. Consequently, from the Prosecutor's selection emerges the classification of victims that could potentially be qualified to access justice with the opportunity to make their interests known to the court.

As discussed earlier, the Prosecutor is selective when considering which serious crime to investigate and prosecute. Most times, he makes decisions based on the extent of gravity of the crime, a large number of victims, and the most responsible perpetrator. A possible implication of this is that in choosing the gravest crimes, the Prosecutor may dismiss some gross violations of human rights or rules of international humanitarian law. It is believed that when selecting which serious crimes to investigate or prosecute, the Prosecutor would have to make comparisons between/amongst these serious allegations. This comparison is not entirely devoid of personal convictions. A decision mostly based on the Prosecutor's perception of morals or justice-which could entirely be devoid of objectivity.

The prosecutor is obligated to consider ‘interests of victims’ amongst other criteria for an investigation's commencement.⁶⁴ The addition of victims' interests to the provision signals the Rome Statute's intention to advocate victims' visibility and voice at the pre-charge and investigation phase. The inclusion may stress a fair and responsive approach to exercising prosecutorial discretion. Interestingly, Article 15(3) sanctions victims' participation because some are identifiable as stakeholders at this juncture. Hence, it is fair to consult them for effective investigations amidst another component like the crime's gravity. Nonetheless, the scope of their participation will be subject to judicial discretion.

From this section, it is clear that the Prosecutor has a considerable role in victims' access to justice at the ICC. From the situation stage to the selection of cases arise a new set of potential victims, we should also bear in mind that some potential victims would be unrecognised based on the Prosecutor's decision not to investigate a situation selection of cases from such situations. It is not the intention of this thesis to delve into this category of victims. The following section will distinguish between victims' interests and the prosecutor's interests to understand the roles performed by both and if there are any overlapping interests. Besides, it will identify the implications of the prosecutor's role on victims' rights and interests.

⁶⁴Rome Statute 1998, Article 53(1)(c).

2.4 Victims' interests versus the Prosecutor's interests

“Mr President,thank you for giving us leave to address the court.....Today for the first time in the history of the international criminal justice victims can address their viewpoints and concerns through their counsel.[...]Today, they can express themselves.”⁶⁵

The above is an excerpt from one out of the four legal representatives of victims' opening statements. The LRVs narrated the background of the case and expatiated on the role the accused, Lubanga played in recruiting children under the age of 15 years to participate actively in hostilities. Also, he brought the Court's attention to the implications of the alleged crime on his clients. The repercussions included post-trauma experiences and the inability of the former child soldiers to continue their education. Also included are the effects of the crimes on the victims' family and relatives.⁶⁶ In addressing the need for recognition of victims, An LRV posits that ‘[T]he primary concern of the victim is his recognition as a human being who is entitled to the dignity and respect that we are all entitled to...’⁶⁷

He reiterated the importance of victims' recognition in the sight of the world and the presence of the culprit/perpetrator. The recognition of victims is seen as acknowledging

⁶⁵ The Prosecutor v. Lubanga, ICC-01/04-01/06-T-30, Pre-Trial Chamber 1, 9 November 2006, P.75-76, statement of Mr Luc Walley.

⁶⁶ Ibid , p.76,77 and 81.

⁶⁷ Ibid , Prosecutor v Lubanga , ICC-01/04-01/06-T-30-EN, statement of Mr Gebbie,p.96-98.

the harm they have suffered, which complements addressing the wrong committed by the perpetrators. The LRV focused on the damage which has been the victims suffered rather than the wrong.

Similarly, an LRV said:

“[O]ne of our child clients was wounded and remains disabled, but the physical wounds that the militias left are not the worst....These children ...were deprived of all contact with their families. They saw their friends die. They were forced to kill...One of my clients who is now barely 15 years, told us, the psychologist, I am not all right, I don't know what to do. My body's not all right. My head hurts.....”⁶⁸

These excerpts illustrate victims' views and concerns through their LRVs to the Court, including the judges(decision-makers), which is considered a response to the court's consultation. Through these excerpts, the LRVs were able to express the victims' interests. The reaction of the presiding judge supports this: “We are listening to you carefully, because what you have to say is perhaps what is most important, especially given the Statute of the ICC.”⁶⁹ The Judge's remarks show an acknowledgement of victims' voice, which relates to victims consultation while the judges listen. It depends on the if the judge decides to take these views and concerns into consideration while balancing it against the defence rights and fair trial.

⁶⁸ Prosecutor v. Lubanga, Transcripts ,ICC-01/04-01/06-T.30, Transcripts of 9 November 2006, excerpts of Mr Mulenda, LRV of victim a/0001/06,a/002/06 and a/0003/06.

⁶⁹ The Prosecutor v.Lubanga, Transcripts , 28 November 2006, p.45.

Furthermore, the Prosecutor addresses the wrong because it is considered a disruption in the social order. To remedy the disorder in the social order, the Prosecutor represents the international community's interests, which includes seeking truth and justice.⁷⁰ Victims, as independent parties also have interests in obtaining truth and justice. However, victims' concerns mainly lie in the harm they have suffered from the perpetrators' actions and inactions. Therefore, the interests of both Prosecutor and victims emerge from the disruption in the social order. However, there are different perspectives and consequences for both participants. Sometimes, their interests may align or overlap. The Chamber addressed the overlap in roles below:

“The two Legal Representatives consider that, while it is agreed that the victims cannot assume the role of the Prosecutor, with whom the burden of proof solely lies, and that their intervention must in no way have the effect of their replacing the latter, they nevertheless have – as does the Court – an interest in the determination of the truth. Furthermore, they emphasise that the proliferation of victims in the instant case will have no implications for the Defence’s workload since not all the victims will want or be able to systematically present evidence.”⁷¹

“With respect to the possibility of the Legal Representatives conducting investigations, they recall that their sole objective is to gather evidence seeking to prove the harm suffered by the victims and not to investigate the guilt of the accused.”⁷²

⁷⁰ Preambular paragraph 4; preambular paragraph 5.

⁷¹ The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Modalities of victim participation at Trial, ICC-01/04-01/07-1788-tENG, 22 January 2010, p.16, para.36

⁷² Ibid 41, para.37.

The above statements demonstrate the blurry intersection between the prosecutor's roles and interests and the victims in criminal trials at the ICC. Evidently, there have been instances of overlapping functions and interests between the Prosecutor and the victims. As a third party with no full party rights, the victims explain this indistinct intersection—an unforeseen implication of the compromise reached in Rome negotiations.

In this instance, the chamber distinguished the prosecutor's role and defence from the victims' by drawing clear boundaries on victims' ability to present evidence and conduct investigations, thus striking a balance between the participants' functions. To some extent; it is noteworthy that the PTC was not meant to determine truth pertaining to the suspect's innocence or guilt, as this is the function of the trial chamber. At this phase, what is required is to provide sufficient evidence to establish substantial grounds to believe that the suspect committed the crimes.⁷³

Some scholars have acknowledged the difference between the interests of the Prosecutor and the interests of victims.⁷⁴ As mentioned earlier, the prosecutor represents the interests of society. There are situations in which victims' interests may overlap with the prosecutor's interests. Similarly, the victims' role may also coincide with the

⁷³ Situation in Prosecutor v LThomas Lubanag, Decision on the Final System of Disclosure and the Establishment of A Timetable, Pre-Trial Chamber 1, ICC-01/04-01/06-102,16 May 2006.

⁷⁴ David Donat-Catin, 'Article 68:Protection of Victims and Witnesses and their Participation in the Proceedings ' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999) 869;Williams Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2004) 172-173; Jorda and Hemptinne , *The Rome Statute of the International Criminal Court :A Commentary* (Oxford University Press 2002) 1388,1394

prosecutor's role. For instance, the role they perform in ascertaining the truth reflects their interests in determining the truth. The interests of victims could be interests general to all the victims or claims distinct to each victim. Ascertaining the latter requires a case-by-case basis. The Chambers have interpreted victims' general interests to include reparations, safety and security measures, presenting their views and concerns, verifying specific facts, and ascertaining the truth, protecting their dignity at trial.⁷⁵ In the same vein, general interests also include identification and prosecution of the alleged perpetrators.⁷⁶

The role of victims in criminal proceedings is not unconnected to their personal interests. For instance, the ICC incorporated two different approaches to determining the role of victims in proceedings. The first is a systematic approach, while the other is a casuistic approach.⁷⁷ The systematic approach illustrates that once victims' procedural status has been verified at the initial stage (investigation stage of a situation or a preliminary stage), where a new situation or case arises, such victims do not require new verification.⁷⁸ Conversely, the casuistic approach precludes the application of a one-way verification for the procedural status of victims. It is suggested that the

⁷⁵ Prosecutor v Lubanga, Decision on Victims' Applications, Trial Chamber Decision, 18 January 2008, para 97.

⁷⁶ Situation in the Democratic Republic of Congo, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC01/0401010tEN, Pre-Trial Chamber 1 17 January 2006, para.31-44

⁷⁷ Hector Olasolo, 'Systematic and Casuistic Approaches to the Role of Victims in Criminal Proceedings Before the International Criminal Court' (2009) 12 *New Criminal Law Review* p 513, 520

⁷⁸ Ibid.

systematic approach fosters efficient trial and promotes time management for criminal trial at the ICC.

In some parts of continental Europe, victims are referred to as '*parties civile*',⁷⁹ Auxillary prosecutor.⁸⁰ As *parties civile*, the victims are encouraged to participate in proceedings to facilitate civil compensation. This is limited to establishing a civil compensation claim.⁸¹ Within the inquisitorial criminal procedure, victims are seen as separate parties in the criminal proceedings.⁸² They are independent of the prosecutor as they pursue their interests without being subject to the prosecutor's control. In this instance, victims submit evidence, respond to submissions made by the prosecution and the defence.⁸³ Also, they express their opinions on decisions made by the court. They are independent and have the right to legal representation, with an independent voice. The inquisitorial system of procedure, which is predominant in civil law jurisdictions, reveals victims' independence in criminal procedure, a deviation from the norm in traditional common law jurisdictions. Funk refers to victims as "*formally independent, co-equal participants*" in the proceedings.⁸⁴ One reasonable implication of the civil law jurisdiction is the distinction between victims' interests and prosecutor's interests. By

⁷⁹ France, Germany and Belgium.

⁸⁰ Germany, Sweden, Norway.

⁸¹ Marion Brien and Ernstine Howgen, 'Victims of Crime' (2001 European Criminal Justice System, (Wolf Legal Publishers,) 27; Brien M, Hoegen H (2000) Victims of crime in 22 European criminal justice systems: the implementation of recommendation (85) 11 of the council of Europe on the position of the victim in the framework of criminal law and procedure. Wolf Legal Productions, Niemegen.

⁸² Jonathan Doak, Victims' Rights in the Criminal Justice System, in Gebern Bruinsma David Weisburg(ed.) Encyclopedia of Criminology and Criminal Justice (Springer 2014).

⁸³ Ibid 44.

⁸⁴ Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press, 2010) 58.

analogy to the ICC, it is believed that victims pursue their interests while the Prosecutor represents general or community interests.

Many times, the adversarial procedure applies during the trial.⁸⁵ Nevertheless, It seems the PTC is more inquisitorial than the TC, especially in relation to the confirmation of charges. Article 60 provides for the charging process of a person-initial appearance before the PTC. The process continues until confirmation of charges before trial.⁸⁶ It is observed that the Pre-Trial Chamber plays an active role in the initial proceedings. It is actively involved in truth-seeking-a feature of the inquisitorial system of procedure. The PTC is responsible for the confirmation of charges hearing.⁸⁷ It also supervises the Prosecutor's submission of charging document and evidence disclosure which is required at the hearing.⁸⁸ It appears the process for evidence disclosure aligns with the inquisitorial system. A perfect illustration is seen in the Lubanga case, which empowers the PTC to analyse the evidence⁸⁹-an investigative power. Scheffer notes that the disclosure system has transformed the judge into an active one with investigative

⁸⁵ Guido Aquaviva, Nancy Combs, Mikael Heikkila, Suzannah Linton, Sergey Vailiev "Trial Process" in Goran Sluiter et al., *International Criminal Procedure: Rules and Principles*, (Oxford University Press 2013)638-645.

⁸⁶ Rome Statute 1998, Article 61.

⁸⁷ Rome Statute, Article 61(3).

⁸⁸ Rome Statute, Article 61; ICC RPE Rule 121(1)(2)(3); Article 60(3)

⁸⁹ Situation in the Democratic Republic of Congo, Prosecutor v Thomas Lubang Dyilo, Decision on the final system of disclosure and the establishment of a timetable, Pre-Trial Chamber 1, ICC-01/04-01/06-102.

powers control over the parties and evidence as opposed to a passive judge and active parties.⁹⁰

To some extent; it is noteworthy that the PTC was not meant to determine truth pertaining to the suspect's innocence or guilt, as this is the function of the trial chamber. At this phase, what is required is to provide sufficient evidence to establish substantial grounds to believe that the suspect committed the crimes.⁹¹ The adversarial criminal procedure is cautious about granting victims extensive role and rights in the proceedings.⁹² In sharp contrast, the inquisitorial criminal procedure, with its roots civil law traditions, grants extensive rights and victims roles. However, within the ICC context, victims' rights are restricted because the trial process is primarily adversarial. The parties have the full rights to participation as well as control over the presentation of evidence.⁹³ Although one may infer that the ICC's criminal procedure is mixed, arguably, the ICC is largely adversarial than inquisitorial because of the limitations on the exercise of victims' rights. As was mentioned in the introduction, the victims are third parties in the proceedings.

⁹⁰David Scheffer, "A review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence" (2009) 21*Leiden Journal of International Law* ; Maximo Langer, "The Rise of Managerial Judging in International Criminal Law"(2005) 53 *American Journal of Comparative Law* ,p835

⁹¹ Situation in Prosecutor v LThomas Lubanag, Decision on the Final System of Disclosure and the Establishment of A Timetable, Pre-Trial Chamber 1, ICC-01/04-01/06-102,16 May 2006

⁹² John Spencer, 'Adversarial v.inquisitorial systems: is there still such a difference(2016) 20(5) *International Journal of Human Rights*,p601-616.

⁹³ Carsten Stahn, "International Criminal Justice Procedure" in Carsten Stahn (ed) *A Critical Introduction to International Criminal Law*"(Cambridge University Press 2018)269-380.

As stated previously, Article 68(3) provides the most general provision for victim participation. It expressly indicates the significance of '*personal interests*' as a yardstick for victims' involvement in the proceedings. Victims interests may also include reparations, truth, justice and protection. It is worth mentioning that the roles victims play during the trials depend on their personal interests. It follows that if their personal interests are not affected, they may be precluded from participation. It would be beneficial for victims if they were included from the early stages like the preliminary examination, investigation or situation. Arguably, inclusion at initial phase might increase their sense of belonging.

Nevertheless, it may also heighten their expectation. While it is feasible if considered, one implication of victims inclusion at the initial phase is that there might be a risk of victims' identity being compromised. Similarly, the perpetrators or allies of the perpetrators may threaten the life or safety of the victims. One approach to fostering the effectiveness of victims' inclusion at the phase is assessing the risk and providing protective measures.

Donat-Catin and Spees criticised the criminal tribunals' function because they failed to focus on victims' interests. They argued that the tribunals' inadequacies to consider victims' interests led to a separation between the work of the tribunal and the victims

of the Rwanda genocide.⁹⁴ An illustration of the previous tribunals' failure to recognise victims' interests led to a gap in their functions. An emphasis on this gap reveals the importance of victims' interests during criminal trials.

It is settled that the ICC's mandate is to prosecute the perpetrators of international crimes⁹⁵-a means to achieve justice. This mandate is known to be the primary function of the Prosecutor. This raises the question of the place of victims interests during the initiation of prosecution. Article 53(2) highlights victims' interests as one of the factors the prosecutor is required to consider if he decides not to prosecute in the interests of justice. Article 53(2) grants the prosecutor the power to conclude that there:

“is not a sufficient basis for a prosecution” if, among other things a “prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, **the interests of victims** and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.”⁹⁶

The “interests of victims” is deemed a factor to be considered amongst other elements for the prosecution to make the decision “in the interests of justice.” At the same time, the meaning of this concept might seem ambiguous because it is not stated in Article

⁹⁴ David Donat-Catin, Article 68(3) :Protection of Victims and Witnesses and their Participation in the Proceedings, in Otto Triffrer (ed) *Commentary on the Rome Statute of the International Criminal Court (1999)* 871; Emily Haslam, “Victim Participation at the International Criminal Court:A Triumph of Hope Over Experience?”, in Dominic McGoldrick, Peter Rowe, Eric Donnelly (eds) *The Permanent International Criminal Court:Legal and Policy Issues* (Hart Publishing 2004)315 p390;Pam Spees, Women’s Caucus for Gender Justice, Report of Panel Discussions on Appropriate Measures for Victim Participation and Protection in the ICC(1999)

⁹⁵ The Preamble of the Rome Statute 1998.

⁹⁶ The Rome Statute 1998, Article 53(2);emphasis is mine.

53. Nevertheless, its meaning could be inferred from the context, object and purpose of the Rome Statute.⁹⁷ From the provision of Article 53(2), victims' interests are a factor to be considered in determining the interests of justice. Impliedly, it is inferred that at this stage, victims interests should be taken into account. Arguably, since victims' interests cannot be considered in their absence or without their participation, presumably, victims interests are deciphered through their roles before and during the investigation. Victim participation ensures their interests are relayed before investigation-a viable factor to be considered by the Prosecutor. However, we should bear in mind that victims interests are distinct from the prosecutor's interests. Victim participation becomes meaningful where they are permitted to exercise their right to justice in connection with knowing the truth and obtaining reparations. Victims contribution to truth-finding displaces symbolic participation.⁹⁸ Meaningful participation is an integral function of criminal proceedings in contrast to the widely held view that victims' involvement offsets the balance of arms; a necessity for the determination of the truth, justice and reparations.

Besides, the LRV argued that Article 69(1) and Article 68(3) are not legally incompatible given that the victim would have to swear an oath as to the truthfulness

⁹⁷ Human Rights Watch Policy Paper, "The Meaning of the "Interests of Justice" in Article 53 of the Rome Statute" accessible at <https://www.hrw.org/new/2005/06/01/meaning-interests-justice-article-53-rome-statute>> last accessed 25 August 2020,

⁹⁸ David Donat-Catin, "Article 68" , In Otto Triffterer(ed), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* , (Second Edition ,C.H BECK, Hart 2008)1279,1290 and 1291.

of their testimony.⁹⁹ This assertion displaces the contention that a person cannot have the status of both victim and witnesses. Arguably, the trial's purpose is to determine legal truth, and the Chamber has the power to weight testimony and evidence.¹⁰⁰ The LRV buttressed her point for the legal compatibility between the victim's status and that of the witness. She explained:

Moreover, it follows from paragraphs 97 and 99 of the Judgement on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on victims' participation that if victims can tender evidence at trial and discuss *evidence adduced by the parties, then, a fortiori, they have the right to appear as witnesses, the interest being the determination of truth.* Testimony constitutes evidence just as much as other materials and evidence

We respectfully submit that the main eyewitnesses in series of crimes presented to the Chamber are most often the victims and the perpetrators.¹⁰¹

In this situation, the Statute and the RPE do not grant victims the unfettered right to lead evidence or question witnesses. Nevertheless, they could tender evidence or

⁹⁹ Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Germain Katanga and Mathieu Ngudjolo, Written Submissions from the Legal Representative of Victims a/0009/08,a/0110/08,a/0011/08,a/0012/08,a/0013/08,a/0015/08,a/0016/08 on the Issues Raised at the Confirmation Hearing, Pre-Trial Chamber 1, ICC-01/04/01/07-690-tENG, 22 July 2008, paras, 22-25, p. 11

¹⁰⁰ Ibid (n 11) para. 25; The Rome Statute 1998, Article 69(4) .

¹⁰¹ Ibid ,p.12, paras 26-28

challenge evidence provided they have shown that the trial proceedings affect their interests. Where a victim testifies as a witness, their role as a victim is suspended under oath. Presumably, their position as a victim is reactivated after the testimony.

As stated previously, Article 68(3) provides the most general provision for victim participation. It expressly indicates the significance of ‘*personal interests*’ as a yardstick for victims’ involvement in the proceedings. Victims interests may also include reparations, truth, justice and protection. It is worth mentioning that the roles victims play during the trials depend on their personal interests. It follows that if their interests are not affected, they may be precluded from participation. It would be beneficial for victims if they were included from the early stages like the preliminary examination, investigation or situation. Arguably, inclusion at initial phase might increase their sense of belonging. Yet, it may also heighten their expectation. While it is feasible if considered, one implication of victims inclusion at the initial phase is that there might be a risk of victims’ identity being compromised. Similarly, the perpetrators or allies of the perpetrators may threaten the life or safety of the victims. One approach to fostering the effectiveness of victims' inclusion at the phase is assessing the risk and providing protective measures.

Be that as it may, McDermott classified the participants in criminal trials into two.¹⁰²

From her perspective, the accused is the only actor with ‘*enforceable rights*’ because

¹⁰²Yvonne McDermott, ‘Rights in Reverse; A crucial Analysis of fair trials rights under international criminal law’ in Williams Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law :Critical Perspectives* (First Edition Routledge, 2013), 165, 166.

of his '*status at the trial*.' The 'other actors' such as the prosecutor, witnesses, victims, and the international community are seen as 'interest-holders', and holders of personal rights as human rights. An analysis of this literature views victims as stakeholders/interests. The victims are considered as '*others*' with no enforceable rights. This argument connotes that their rights do not emerge from their status in criminal proceedings. Rather, the set of rights they are entitled is called procedural rights by their status. With this analysis, it shows criminal trial is offender centred. The accused rights are prioritised over the prosecutor and victims. McDermott's comment seems to corroborate the opinion of Judge Wyngaert in the Katanga case.¹⁰³ This displaces the idea that victims' rights are needed to balance against the rights of the accused.

Interestingly, the majority decision in Katanga shows the prioritisation of the Prosecutor's interests over the accused right to a fair trial. One could also argue that victims benefited from the conviction largely because the impunity gap was moderately closed. Although, some authors have argued that victims have no interests in conviction/sentencing.¹⁰⁴ This argument is not totally correct because victims crave for justice for the harm suffered. Since conviction and sentencing are the outcomes of criminal prosecution, it is only reasonable for victims to have interests in conviction/sentencing.

¹⁰³ Dissenting Opinion of Judge Wyngaert in Prosecutor v Katanga, Judgment Pursuant to Article 74.

¹⁰⁴ Andrew Ashworth, *Sentencing and Criminal Justice* (5th Edition, Cambridge University Press 2010)

Notwithstanding, it is argued that it is not the prosecutor's duty to ensure/secure conviction where evidence shows that the accused is innocent. While the prosecutor's role spans from investigation to evidence gathering, the collection of evidence is not predicated on securing a conviction. Still, such evidence should be collected to establish the truth. The prosecutor's role in establishing the truth continues throughout the investigation of the situation to trial.¹⁰⁵ It is expected that the prosecutor would carry out his duties objectively.

The prosecutor is in charge of exculpatory evidence/material, which could acquit the accused; it is incumbent on him to submit the exculpatory evidence. In Goldstone's words, "the fairness of any criminal justice system must be judge by acquittals"¹⁰⁶ It is worthy to note that acquittals most times does not indicate justice; instead, it is a result of insufficient proof. The Prosecutor did not prove any of the charges filed against Katanga. The court convicted Katanga based on charges that were singlehandedly re-characterised by the judges.¹⁰⁷ From the above, both the prosecutor and the accused have interests in conviction.

One of the rulings of the AC illustrates this distinction. The Appeal Chambers has refused the victims' plight to participate under Article 68(3) concerning the admissibility of an appeal by the defendants because the victims failed to show that

¹⁰⁵ Prosecutor v. Lubanga, Appeal Chambers, ICC-01/04-01/06-568, 13 October 2006, para.52

¹⁰⁶ Richard Goldstone, "Acquittals by the International Criminal Court" (2019) accessible at <https://www.ejiltalk.org/acquittals-by-the-international-criminal-court/> last accessed 09/01/2020

¹⁰⁷ Dissenting Opinion of Judge Wyngaert, Prosecutor v. Germain Katanga, Judgment pursuant to Article 74.

their interests are affected.¹⁰⁸ In considering '*personal interests*', the AC found that the requirement is on a case-by-case assessment. It also held that victims could not claim personal interests in matters that fall within the Prosecutor's role. This ruling shows that victims are not assistant prosecutors, nor do they fit into the prosecutor's allies.

Nevertheless, it seems that this decision fails to consider that there is an overlap between the personal interests of the prosecutors' victims and interests. One may argue that securing the conviction of the perpetrator falls within this category. Victims are interested in obtaining punishment or sentence of the perpetrator, which may be considered justice for the harm they have caused them. Most times, the roles of Prosecutor and victims are usually in line with their interests. These interests may intersect, as opposed to the contrasting interests between the Prosecutor and the defendant.

For instance, the PTC ruled inter-alia that article 68(3) allows victims to participate in proceedings(situation) based on their personal interests.¹⁰⁹ The Pre-Trial Chamber II found that 'privacy and protection of victims themselves and possibly the preservation of evidence',¹¹⁰ qualify as personal interests. This ruling sheds more light on protective measures, as a personal interest of victims, enabling them to present their views and concerns. The victims were permitted to submit their opinions and concerns based on

¹⁰⁸ Lubanga, Decision of the Appeal 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, ICC-01/04-01/06-925 13-06-2007 CB PT OA8, para.45.

¹⁰⁹ Situation in Uganda, Decision on Victims' Application for Participation, Pre-trial Chamber II..

¹¹⁰ Ibid, para.97.

the Court's protective measures before the Chamber considers the merits of the application.¹¹¹

From the previous discussion, one can see that some of the Prosecutor and victims' interests overlap while some are watertight. The following section will explore the victims' needs.

The next section will examine the charging documents for both Katanga and Lubanga cases. It is necessary to explore the content of the charges to assess the role of the Prosecutor in drafting the charges and to what extent prosecutorial discretion affects victims' rights and interests in the proceedings

2.5 The Charging Document: Double-edged sword

Of equal importance is the role of the prosecutor in framing the charging document. This section seeks to critically examine the charging document and its attendant implications for victims.

After the prosecutor decides on whether to investigate or not, the next phase is the charging documents. The prosecutor must determine what charges to include, which also raises the question of victims' interests in charges and charges reduction. The Chamber addressed the question. In the AC's findings, for trial proceedings: "the harm alleged by victims and the concept of personal interests under article 68(3) of the Statute

¹¹¹ Ibid, para.97.

must be linked with the charges confirmed against the accused”.¹¹² This ruling established a connection between the personal interests of victims, the damage and the charges. The charges set a foundation for the victims and their interests.

Given that the Prosecutor is responsible for drafting the charging document, where the Prosecutor by intention or omission fails to include one or two alleged crimes in the charging document, it may potentially create an impunity gap. The AC ruled that a person is considered a victim if they can prove they suffered harm due to the crime included in the charges relevant to the case.¹¹³ The definition of victim finds its roots in the charging document. A person is not qualified to be a victim if the harm he suffered from is excluded from the charges. Hence, this highlights the significance of charges and their connection to victims.

Prosecutor has a general interest in determining truth;¹¹⁴ This transgresses through the investigation stage to the pre-trial, the main trial and sentencing. The determination of this truth starts from investigations to the drafting of the charges. It is within the Prosecutor’s powers to draft the charges. Plausibly, the selectivity of offences is reflected in the charges. In this process, the charging document may reveal the partial truth. If this is left unchallenged, presumably, the whole truth may become lost in the process.

¹¹² ICC-01/04-01/06-1432, 11 July 2008, p.4,para.2.

¹¹³ Prosecutor v Lubanga, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, Trial Chamber , ICC-01/04-01/06-1432. 11 July 2008.

¹¹⁴ Rome Statute 1998, Article 69.

Due to the ICC's mostly adversarial system, it appears that the determination of truth suffers from a considerable drawback. Previous studies have demonstrated that the adversarial system does not promote truth-finding because of the two parties' polarisation. The prosecutor and the defence are pitched against each other to persuade the judge in their favour.¹¹⁵ It has been reported that the inquisitorial system of procedure promotes truth-finding than the adversarial system where the judge is passive.

The Prosecutor's broad discretionary powers are not regulated provided he acts within his mandates. Particularly concerning temporal, jurisdictional material and personal competence.¹¹⁶ He decides whether to press charges or to initiate prosecution. Cecile asserts that in selecting situations and cases, the Prosecutor does not consider credible evidence; instead, he considers the gravity and interests of justice.¹¹⁷ Recourse to 'gravity' and 'interests of justice' further enhances the prosecutor's powers because these concepts are not well defined in the Statute.¹¹⁸

¹¹⁵ Andrew Ashworth and Michael Redmayne, *The Criminal Process* (3rd Edition, Oxford University Press).

¹¹⁶ Lovisa Badgard and Mark Klamberg, 'The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court' (2016) 48 *Georgetown Journal of International Law*, Faculty of Law, Stockholm University Research paper No.8, 639-733; Kai Ambos, 'Prosecuting international crimes at the International Criminal Court: Is there a coherent and comprehensive prosecution strategy?' (2013) 59(4) *Crime Law and Social Change* p415-437 Cecile Aptel, "Prosecutorial Discretion at the ICC and Victims' Right to Remedy (2012) 10(5) *Journal of International Criminal Justice*, p.3437

¹¹⁷ Cecile Aptel, "Prosecutorial Discretion at the ICC and Victims' Right to Remedy (2012) 10(5) *Journal of International Criminal Justice*, p.3.

¹¹⁸ Rome Statute 1998, Article 14 and 15; Office of the Prosecutor, *Prosecutorial Strategy*, 2009-2012, 1 February 2010.22.

According to Aptel, there are five determinative factors which restrict the scope of international criminal prosecutions.¹¹⁹ The first factor is the determination of specific entities which falls within the applicable jurisdictional scope.¹²⁰ This component tends to restrict the scope of investigation by focusing on a specific entity. The entity could be a State or geographic area.

The second component is the individual targets to be investigated and prosecuted.¹²¹ It is believed that in hostilities/armed conflict, a lot of perpetrators are involved in the commission of crimes, but the mandate of the ICC is to try the most responsible. It follows that the ICC is under an obligation to filter through a large number of perpetrators to capture the masterminds or most responsible perpetrators. Consequently, this reduces the amount of suspects/culpable persons for trial. A possible implication of the selection is the limitation of the number of potentially affected victims. The exclusion of lower-ranked officers may marginalise some victims unless they are prosecuted in the national jurisdiction. For instance, the ICC Prosecutor felt Lubanga was the most responsible for crimes committed in the Democratic Republic of Congo. Hence, the main reason for his arrest and arraignment is that there were other masterminds. Kambale concluded that some other high ranking instigators escaped indictment.¹²² These high-rank instigators were identified but not indicted.¹²³ He also

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Pascal Kambale, 'The ICC and Lubanga :Missed Opportunities ' SSRIC Forums:African Futures, 16 March 2012, available at <http://forums.ssrc.org/african-futures/2012/03/16/african-futures-icc-missed-opportunities/> last accessed 16 March 2019.

¹²³ Ibid.

contended that the most severe crimes in Ituri were committed by the RCD-ML(*Rassemblement Congolais pour la Démocratie—Mouvement de Libération*), of which Lubanga was just a minister.

Furthermore, the third component is the selection of specific factual allegations to be listed in the charges.¹²⁴ Limitation of factual allegations is usually done to limit the number of situations or cases to be tried to a few ‘illustrative events’. An illustration is seen in the Prosecutor v. Katanga, where the Prosecutor limited the charges to crimes committed on 24 February 2003 during the attack on the village of Bogoro(DRC).¹²⁵ Multiple attacks occurred in other districts within that period. Similarly, in the Lubanga case, at the commencement of the investigation, the Prosecutor’s declared he would ‘investigate grave crimes allegedly committed on the territory of the DRC since 1 July 2002’.¹²⁶ He mentioned reports from States, international organisations and non-governmental organisations on ‘thousands of death by mass murder and summary execution in the DRC since 2002’. The Prosecutor observed ‘a pattern of rape, torture, forced displacement and illegal use of soldiers’ from the information.¹²⁷ Unfortunately, the Prosecutor failed to investigate these allegations. The charges were very narrow that it overlooked the massive scale of armed conflict and some of its consequences. The limitations of these illustrative events are often not unconnected to the challenges

¹²⁴ Ibid.

¹²⁵ Situation in the Democratic Republic of Congo, The Prosecutor v Germain Katanga and Ngudjolo Chui.

¹²⁶ The Office of the Prosecutor of the International Criminal Court opens its first investigation’: Press release issued by the Court on 23 June 2004, ICC-OTP-200-40624-59.

¹²⁷ ‘The Office of the Prosecutor of the International Criminal Court opens its first investigation’: Press release issued by the Court on 23 June 2004, ICC-OTP-200-40624-59.

inherent in evidence gathering. Combs and Del Ponte points our attention to the problems encountered in collecting evidence for a large scale crime.¹²⁸ Challenges of this nature may constrain the powers of the Prosecutor to expand the content or events in the charges

In addition, the fourth component is the decision to restrict the legal characterisation of the offence. A constrained legal characterisation may inadvertently result in narrow charges. Such may restrict the charges to a one-count or two-count charges, thereby disregarding the other alleged crimes. For example, in the Lubanga case, the Prosecutor framed a two-count charge of recruitment of children under the age of 15 years and using children under the ages of 15 to participate actively in hostilities.¹²⁹ By implication, this two-count charge in the Lubanga case marginalised other crimes like SGBV and cruel and inhumane treatment. Kambale observed that after two years of investigation, it was disappointing that the OTP could only come up with one count of charge-conscription and enlistment of child soldiers- amongst other serious crimes committed in Ituri.¹³⁰

Besides, some human right organisations, NGOs and victims' association across the country questioned the Prosecutor's motives for not taking into account other serious

¹²⁸ Armoury Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Convictions* (Cambridge University Press, 2010) ; Carla Del Ponte, *Investigation and Prosecution of Large –Scale Crimes at the International Level* (2006) 4 *Journal of International Criminal justice*, 552

¹²⁹ *Prosecutor v. Lubanga, Confirmation of Charges*.

¹³⁰ Pascal Kambale, 'The ICC and Lubanga :Missed Opportunities ' *SSRC Forums:African Futures*, 16 March 2012, available at <http://forums.ssrc.org/african-futures/2012/03/16/african-futures-icc-missed-opportunities/> last accessed 16 March 2019.

crimes committed in Ituri, which falls within the jurisdiction of the Court. They opined that the Prosecutor's failure in this aspect might affect the ICC's credibility.¹³¹ It may be inferred that the public trust in the ICC's prosecution of crimes increases its legitimacy. It has commonly been assumed that the ICC's legitimacy springs from its mandate; to prosecute persons responsible for the gross violations of human rights. A derogation from the mandate may question the court's legitimacy.

Aptel describes the fifth component as selections made by the Prosecutor, which affects the scope of accountability as a result of their 'discretionary choice of witnesses and victims-witnesses.'¹³² As such, Aptel submits that the Prosecutor makes decisions which decides the victims to appear before the Court and tell their stories, while other victims are deprived of telling their stories or participating. The Lubanga case confirms Aptel's submissions. The selection of witnesses and victim-witnesses who appeared before the court to testify, but the court dismissed them and, declared their testimonies unreliable and non-credible. Aptel also notes that the prosecutor's discretionary powers to select situations and cases have "fundamental ethical, political and historical consequences."¹³³ An honest mistake in the prosecutor's selection might emanate from personal conviction or other indispensable irregularities.

These taken together suggest restrictive access to justice for victims due to the Prosecutor's sweeping discretionary powers. Unfortunately, the ICC cannot try all the

¹³¹ "Obtaining further charges in the opening case against Thomas Lubanga", *Statement by women's rights and human rights NGOs of the DRC on the prosecutions by the ICC*, Beni, September 16, 2006 (on file with the author)

¹³² Ibid.

¹³³ Ibid.

perpetrators because it will slow down the Court's efficiency. However, it is inferred that these determinant components provide access to justice for the selected few(victims).

To further our understanding of the impact of Prosecutorial discretion on victims' rights and interests, the next section explores the charging document in Lubanga and Katanga cases.

2.5.1 Charging Document: Lubanga case

Before discussing the prosecutor's charges against Lubanga, it is necessary to analyse the background to the charges. This section will also explore significant issues which came up before the initiation of prosecution of the suspect.

2.5.2 Background to the Charges

Thomas Lubanga was a suspect awaiting trial in a national court in Congo on charges of genocide, war crimes and crimes against humanity based on the DRC's military criminal code.¹³⁴ According to his *proprio motu* powers to obtain a State referral in the situation of the Democratic Republic of Congo,¹³⁵ the DRC referred the situation to the Court after Prosecutor specified that he would use his *proprio motu* powers to commence investigations in the DRC.¹³⁶ The President of the DRC referred to the

¹³⁴ International center for Transitional Justice, Situation Brief: The Trial of Thomas Lubanga, accessible at <https://www.ictj.org/sites/default/files/ICTJ-DRC-Lubanga-Trial-2009-English.pdf> last accessed January 12 2020.

¹³⁵ ICC-Prosecutor receives referral of the situation in the Democratic Republic of Congo, Situation: Democratic Republic of Congo. Press Release, ICC-OTP-20040419-50, 19 April 2004.

¹³⁶ Ibid .

situation of crimes within the jurisdiction of the Court. The President wrote, addressed and signed to the Prosecutor. Subsequently, the DRC requested the Prosecutor to conduct investigations to ascertain if they could prosecute one or two individuals. The main request was to investigate and prosecute crimes that happened within its jurisdiction since July 2002. Therefore, to foster the investigations, the National authorities committed to working together with the ICC.

Following several communications and correspondences from individuals and non-governmental organisations to the Prosecutor, On July 2003, the Prosecutor announced that he would examine and follow the situation in the DRC. He specified that the situation would be a matter of the most significant concern for the office.¹³⁷ Subsequently, the OTP continued its working in making enquiries into the situation in the region of Ituri, in DRC. In September 2003, the Prosecutor notified the Assembly of States Parties that he was prepared to receive permission from the PTC to commence an investigation on his motion., nevertheless, referral and support from the DRC will expedite the functions of the OTP. Pursuant to the Decision on the Prosecutor's application for an international warrant of arrest of Lubanga, as a warlord.¹³⁸ The suspect, Lubanga, was arrested and transferred to The Hague.

In a press statement addressing Lubanga's arrest warrant, the Prosecutor said "[f]orcing children to be killers jeopardises the future of mankind"¹³⁹ This sentence highlights the

¹³⁷ Ibid.

¹³⁸ International Federation for Human Rights , "Democratic Republic of Congo :breaking the Cycle of Impunity" (2008) accessible at <<http://www.fidh.org/img/pdf/DRCsexualcrimeseng2008.pdf>>

¹³⁹ ICC, Statement by Luis Moreno-Ocampo:Press Conference in relation with the surrender to the Court of Mr Thomas Lubanga Dyilo,The Hague , 18 March 2006,p.2.

severity of the crime allegedly committed by Lubanga. However, one should note that Lubanga was awaiting prosecution for the alleged commission of war crimes, crimes against humanity and genocide in one of Congo's military tribunal before the intervention of the Prosecutor. It is somewhat surprising that the Prosecution charged Lubanga on a single count of child soldiers' recruitment and, using them to participate actively in hostilities. At first, one may think that he was charged for using child soldiers to preclude the rule against double jeopardy since there were other charges against him at Congo military tribunal. Nonetheless, the crimes Lubanga was awaiting trial in DRC were umbrella crimes with no elements of crimes. It is inconceivable why the Prosecutor decided to focus on a one-count charge.

Schabas criticised the Prosecutor for this single charge. In his words: "*the justice system of the DRC was doing a better job than the Court itself because it was addressing crimes of greater gravity*".¹⁴⁰ From Schabas's assertions, it seems that the single charge made by the Prosecutor did not meet the expectation of the community, given that national jurisdiction had charged him with three crimes. Thus, it is thought that the Prosecutor dropped the threshold drastically. Arguably, if the victims within the domestic jurisdictions had hoped for severe punishment given the gravity of these three crimes against Lubanga, a probable implication of the Prosecution's actions would be a reduction in the number of victims of crimes, and sabotage of their right to remedy. Possibly, the one-count charge might not have met their expectations.

¹⁴⁰ Williams Schabas, "Prosecutorial discretion v. judicial activism at the International Criminal Court(2008) 6*Journal of International Criminal Justice* ,731-761,p.743.

Schabas points to the possibility of the hierarchy of crimes; genocide and crimes against humanity are considered higher crimes than war crimes.¹⁴¹ It is believed that based on this argument, the Prosecutor decided to investigate and prosecute the use of child soldiers. However, where genocide and crimes against humanity are considered of more gravity than war crimes, it is only reasonable that the Prosecutor initiates the prosecution of higher crimes than war crimes. As previously stated, it could be that the Prosecutor wanted to commence investigations on the crime which the suspect was not being charged at that time to prevent disrupting the local investigations or trial.

Furthermore, a reassurance of the Prosecutor's promise to further investigations is shown in the same statement:

“[T]he investigation is ongoing, we will continue to **investigate more crimes committed by Thomas Lubanga Dyilo** and us.....[.]”¹⁴²

The above extract(without mincing words) seems to pass across the message that the prosecutor will continue to investigate more crimes committed by Thomas Lubanga. It is believed that this statement implied further investigations into other alleged crimes committed by the suspect, Lubanga. It is not certain if the prosecutor conducted more investigations, given the absence of new or additional charges against the

¹⁴¹ Ibid, p.743

¹⁴² ICC, Statement by Luis Moreno-Ocampo, Press Conference in relation with the surrender of the Court of Mr Thomas Lubanga Dyilo, The Hague, 18 March 2008, p.2 -3

suspect/accused. The Prosecutor did not subsequently investigate allegations of sexual and gender-based violence and cruelty.

The trial of Lubanga commenced on 26 January 2008, according to ICC's jurisdiction on gross violations of human rights.¹⁴³ The Prosecutor charged Lubanga for the alleged enlistment and conscription of children under 15 years and using them to participate actively in hostilities.¹⁴⁴ It appears there was a discrepancy between charges contained in the arrest warrant obtained by the Prosecutor and the charges against the Lubanga at the national court (Congo).¹⁴⁵ While Lubanga was awaiting prosecution for genocide and crimes against humanity at a national court in DRC, the Prosecutor brought a one-count charge of the enlistment and conscription of the use of child soldiers to participate actively in hostilities.¹⁴⁶ According to his arrest warrant, the suspect, the Prosecutor arraigned Lubanga at the ICC.

Schabas notes the inconsistencies surrounding the commencement of the prosecution of Lubanga.¹⁴⁷ In the Prosecutor's statements, one could infer that he had to choose to initiate Lubanga's prosecution or address civilians' wilful killing by British troops in Iraq. In addressing these issues, the Prosecutor submitted that this wilful killing was

¹⁴³ Rome Statute 1998, article 5(1)

¹⁴⁴ ICC, Statement by Luis Moreno-Ocampo, Press Conference in relation with the surrender of the Court of Mr Thomas Lubango Dyilo, The Hague, 18 March 2008p.2; Decision on the Prosecutor's Application for a Warrant of Arrest, Prosecutor v Lubanga (ICC-01/04-01/06-8), Pre-Trial Chamber 1, 10 February 2006;

¹⁴⁵ Ibid.

¹⁴⁶ Prosecutor v Lubanga, ICC-01/04-01/06, Decision on Confirmation of Charge, 9 January 2007, <http://www.icc-cpi.int/iccdocs/dos/doc266175.pdf>

¹⁴⁷ Williams Schabas, Prosecutorial Discretion v. Judicial Activism 92008) 6*Journal of International Criminal Justice*, 731-761,p742.

insufficient to require further investigation.¹⁴⁸ The arrest of Lubanga was effected within days; the Prosecutor made this statement.¹⁴⁹ The Prosecutor made a distinction between his initial statements and ‘thousands’ of deaths in the DRC. Subsequently, the Prosecutor initiated the arrest of Lubanga on the allegations of enlistment and conscription of child soldiers. The claims of the recruitment of child soldiers are devoid of accusations of homicide. In Schabas’ words, ‘*the Prosecutor was comparing apples to oranges*’.¹⁵⁰ He saw no reason why the Prosecutor had to choose between initiating investigations in Iraq or commencing investigations on Lubanga(Congo). Schabas criticised the Prosecutor’s exercise to prioritise the enlistment and conscription of children in DRC over the wilful killing of civilians in Iraq.¹⁵¹ From his perspective, the PTC determined the gravity of the one-count charge against Lubanga on zero thresholds, which explain the fault in the prosecutor’s exercise of discretion in selecting situations and subsequent framing of charges.

The Prosecutor identified gravity of crime under the Court's jurisdiction; he proceeded to investigate the court's authorisation. This point underscores the prosecutorial discretion in the selection of cases.¹⁵² As mentioned earlier, The Prosecutor chose the DRC situation over the ‘*thousands of death in Iraq*’. However, there was no information on gravity in his statement. He said the Ituri situation is ‘the most urgent situation to be

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid

¹⁵¹ Ibid

¹⁵² Matthew Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’, (2004) 71; *Journal of International Criminal Justice*; Schabas Ibid

followed' in his communications.¹⁵³ In this communication, the Prosecutor did not specify if the situation was of 'sufficient gravity'.¹⁵⁴ In line with the OTP's policy paper, the specification for determination of 'gravity of a case' is the act that constituted the crime, and the degree of participation in its commission.¹⁵⁵ The criteria clarify the fact that gravity of a case is not exclusively attached to the act that constituted the crime. The degree of participation in its commission connotes the perpetrators who "bear the greatest responsibility" In 2005, the Prosecutor, in his statement, came up with two factors to be taken into account in determining the gravity of the crimes. The total number of deceased people, victims and the impact of the crimes.¹⁵⁶ The prosecutor's conception of justice might influence his choices.

It has commonly been assumed that an independent Prosecutor without limitations or accountability to anybody/institution could be a threat to protecting international peace, security and the Court itself. The Prosecutor determines which situation warrants investigations and prosecution. At this phase, it is believed that the prosecutor's actions and inactions have consequences for the victims. Danner opines that if the public discerns that the Court is politically biased, it is likely that the Court would lose its moral authority.¹⁵⁷ This argument is notable because it might affect its effectiveness

¹⁵³ Communications Received by the Office of the Prosecutor of the ICC, 16 July 2003.

¹⁵⁴ Ibid, Schabas.

¹⁵⁵ OTP Policy Paper, Paper on some policy issues before the Office of the Prosecutor, September 2003,p.7.

¹⁵⁶ The ICC, Office of the Prosecutor , Statement by the Luis Moreno-Ocampo, Prosecutor of the International Criminal Court:Informal Meeting of Legal Advisors of Ministries of Foreign Affairs (24th October 2005), P.6.

¹⁵⁷ Allison Danner, ' Navigating law and politics : the prosecutor of the International Criminal Court and the Independent Counsel' (2003) 55 Stanford Law Review ,p.1655.

and legitimacy if the Court is perceived to be politically biased. Buchanan believes that the ICC suffers from “legitimacy deficit” on the grounds of prolonged inconsistency between its performance and its justifying functions.¹⁵⁸ The supposed deficit could be a consequence of institutional barriers or boundaries beyond the powers of the ICC. The jurisdiction of the ICC is subject to the state party consent.¹⁵⁹ The ICC may not have the authority to initiate State investigations that have not ratified the Rome Statute.¹⁶⁰ It is found that the ICC’s legitimacy deficits boil down to selective prosecution and “arbitrarily circumscribed jurisdiction”.¹⁶¹ This chapter is concerned with the former. Where the Prosecutor fails to initiate investigations and prosecute a case, ascribing such failure of role to the ICC as the umbrella institution is acceptable because it underscores the significance and sensitivity of the OTP’s office, one cannot separate the function of the OTP from the ICC. The gap in the role of the OTP may inadvertently call into question the legitimacy of the ICC. While it is observed that there is an academic debate on the legality of the ICC, the controversy on legitimacy should not be a criterion to withdraw support for the ICC's role within the international community.¹⁶² Nevertheless, debate on the ICC's validity should not override the ICC mandate; it may serve as checks and balances from the public.

¹⁵⁸ Allen Buchanan, “The Complex Epistemology of Institutional Legitimacy Assessments, as Illustrated by the Case of the International Criminal Court” (2019)33(2) *Temple International and Comparative Law Journal*, 323-339,p335.

¹⁵⁹ Ibid.

¹⁶⁰ Vienna Convention on the Law of Treaties 1969.

¹⁶¹ Ibid.

¹⁶² Margaret de Guzman & Timothy Kelly, “The International Criminal Court is Legitimate Enough to Deserve Support”(2019)33(2) *Temple International & Comparative Law Journal* 397-404,p404.

Therefore, gaps in selecting situations and conduct in investigations could have a snowball effect on both victims and the trial process.

After this, the next section will explore the charging document's content and the relationship with the prosecutor's role.

2.5.3 The charging document

On 28 August 2006, the Prosecutor filed the first charging document before the PTC. The document is structured into two sections. The charging document's main content was the crimes of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities. It was divided into two sub-headings.¹⁶³ The first was a series of general allegations called “Pattern of the FLPC in enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities.”¹⁶⁴ The second subheading described a series of more specific allegations concerning six identified former child soldiers entitled “*individual cases*.”¹⁶⁵ It is noteworthy that the first section had equivocal formulation with no specific reference to dates, location or identities of victims.

On the other hand, the second section gave comprehensive details of the six alleged former child soldiers' individual stories. This section set out the accurate mention of the locations of their alleged conscription or enlistment, approximate dates, as well as their alleged participation in hostilities and the training/activities during their time in the

¹⁶³ Confirmation of charges for Lubanga.

¹⁶⁴ Document containing Charges, para 30-40.

¹⁶⁵ Document containing the charges, paras 41-84

UPC/FLPC.¹⁶⁶ Lubanga objected to the charging document, particularly the first section which was very vague. He argued that the factual allegations were ambiguous and violated the defendant's right to be informed of the charges' nature and details. In his written submission, the Prosecutor argued that the 'pattern' portion was different from the 'individual cases'; as such, it was not specific like the latter. He pointed out that the '*individual cases section*' contained precise details on victims' identities, dates, and locations of the crimes.

Judge Usacka described the content of the charging document as 'vague', especially the first part which was referred to as 'pattern.' Such part represented a '*contextual or background information*'¹⁶⁷ Judge Usacka opined that the two counts- '*pattern*' and '*individual cases*' were independent of each other. Hence, the 'individual cases' specificity cannot be imported into the content of the first section, the 'pattern' since it does not contain the minimum level of detail required by the court's legal framework.¹⁶⁸ One implication of this is that the allegations in 'the individual cases' is not an extension of 'the pattern' neither does it give it an 'independent value'.¹⁶⁹ On account of this, the prosecutor restricted the allegations against Lubanga to the two-count charge.

¹⁶⁶ Ibid.

¹⁶⁷ Dissenting Opinion of Judge Anita Usacka, The Prosecutor v Thomas Dyilo Lubanga, Trial, Conviction, ICC-01/04-01/06 A5, p7, para12.

¹⁶⁸ Ibid., (n 8) para 15.

¹⁶⁹ Ibid.

These previous sections have explored the prosecutor's role to the charges of Lubanga case and the charges of Lubanga. This section shall examine the charging document of Katanga in to understand the charges.

2.6 Charging Document: Katanga

2.6.1 Background to the case

On April 19, 2004, by referral, the DRC government requested the ICC to determine if it could investigate the DRC situation and ascertain one or more culpable persons, accused of crimes that fall within the court's jurisdiction.¹⁷⁰ On June 23, 2004, the ICC Prosecutor commenced an official investigation into the Ituri district's alleged crimes.

The investigations revealed sufficient evidence to establish the joint military operations carried out by the FRPI and FNI members during an attack on the village of Bogoro in February 2003.¹⁷¹ The members of these militias specifically targeted civilians of the Hema ethnicity. The combatants committed pillaging, the murder of civilians, sexual slavery, rape, and children under fifteen years to participate actively in the

¹⁷⁰ Coalition for the International Criminal Court, Katanga and Ngudjolo Chui cases, accessible at <http://iccnow.org/?mod=drctimelinekatanga&idudctp=109&order=titledesc> last accessed 02 February 2020 ; International Justice Monitor, Germain Katanga and Mathieu Ngudjolo Chui, accessible at <https://www.ijmonitor.org/germain-katanga-and-mathieu-ngudjolo-chui-background/> > last accessed 02 February 2020.

¹⁷¹ Ibid.

hostilities.¹⁷²The classification of these criminal acts fell under war crimes and crimes against humanity.

On June 25, 2007, the Prosecution requested arrest warrants for both Katanga and Ngudjolo.¹⁷³In response to the request, the Chamber issued unsealed arrest warrant against Katanga and Ngudjolo on October 18, 2007, and February 7, 2008, respectively. On March 10, 2008, The PTC 1 joined the two cases because the suspects, Katanga and Ngudjolo allegedly shared responsibility for crimes committed during the joint attack on the Bogoro and, the available evidence linked these suspects together.¹⁷⁴It is also noted that joinder of the case would not be prejudicial to the victims' interests, and witnesses would it adversely affect the defendants.¹⁷⁵

The ICC arraigned Germain Katanga and Ngudjolo Chui as the former leaders of the Forces de Resistance Patriotique Ituri(FRPI) and Front des Nationalists et Integrationnistes(FNI) respectively. They were charged for the alleged commission of war crimes and crimes against humanity during an attack in the village of Bogoro, in

¹⁷² Ibid 158.

¹⁷³ ICC-01/04-348-US-Exp and ICC-01/04-350-US-EXP; The Prosecutor v. Germain Katanga, Case Informations Sheet, ICC-01/04-01/07, accessible at <https://www.icc-cpi.int/iccdocs/pids/publications/KatangaEng.pdf> > last accessed at 02 February 2020.

¹⁷⁴ ICC-01/04-01/07-257; International Justice Monitor, Germain Katanga and Mathieu Ngudjolo Chui, accessible at <https://www.ijmonitor.org/germain-katanga-and-mathieu-ngudjolo-chui-background/> > last accessed 02 February 2020.

¹⁷⁵ International Justice Monitor, Germain Katanga and Mathieu Ngudjolo Chui, accessible at <https://www.ijmonitor.org/germain-katanga-and-mathieu-ngudjolo-chui-background/> > last accessed 02 February 2020.

Ituri district of eastern DRC on 24 February 2003.¹⁷⁶ The crimes spanned from January to March 2003. However, the charging document limited the main crime under investigation to 24 February 2003.

On 26 September 2008, PTC 1 issued the Decision on the confirmation of charges. It found unanimously that “there was sufficient evidence to establish substantial grounds to believe that, during the attack on Bogoro of 24 February 2003, Katanga and Ngudjolo, as principal indirect co-perpetrators, jointly committed through other persons, within the meaning of Article 25(3)(a) of the Statute, the following crimes with intent:

1. war crime of wilful killing under article 8(2)(a)(i);
2. the crime against humanity of murder under Article 7(1)(a);
3. The war crime of directing an attack against a civilian population as such or against individual civilians not taking direct part in hostilities under article 8(2)(b)(i); and
4. the war crime of destruction of property under 8(2)(b)(xii);
5. the war crime of pillaging under article 8(2)(b)(xvi);

¹⁷⁶ Decision on the Confirmation of Charges in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui.

6.the war crime of using children under the age of fifteen years to participate actively in hostilities as set out in article 8(2)(b)(xxvi)'.¹⁷⁷

7.the war crime of sexual slavery under article 8(2)(xxii);

8.the crime against humanity of sexual slavery under article 7(1)(g);

9. The war crime of rape under article 8(2)(b)(xxii);

10.the crime against humanity of rape under article 7(1)(g).¹⁷⁸

It is observed that the charges reveal different crimes committed within one single event on a day. The charges are considered to be comprehensive as opposed to the narrow charges in Lubanga. However, these charges were limited to a single day and event rather than a more extended period. The ICC prosecutor reduced the scope of his investigation to the Ituri region because of the gravity of crimes which occurred in Ituri conflict.¹⁷⁹

The LRV also adduced evidence to prove that the Lendu and the Ngiti attackers massacred civilian population in the events that emerged at Bogoro on 24 February

¹⁷⁷ Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v.Mathieu Ngudjolo, Judgment Pursuant to article 74 of the Statute,ICC-01/04-02/12-3-tENG 12-04-2013 1/198 FB T, 18 December 2012,p.7 para 7-9;Decision on the Confirmation of Charges, para 574-579

¹⁷⁸ Decision on the Confirmation of Charges in Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v.Mathieu Ngudjolo, Judgment Pursuant to article 74 of the Statute,ICC-01/04-02/12-3-tENG 12-04-2013 1/198 FB T, 18 December 2012,p.7 para 7-9;Decision on the Confirmation of Charges, para 574-579

n the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, para.576 and 580.

¹⁷⁹ International Justice Monitor, Background to the Germain Katanga and Mathieu Ngudjolo Chui Trials, accessible at <https://www.ijmonitor.org/germain-katanga-and-mathieu-ngudjolo-chui-background/> Last accessed 02/February 2020.

2004, without making a distinction between the UPC combatants and civilians.¹⁸⁰Corroborated evidence reported that the combatants killed roughly 200 people on the 24 February 2004. The evidence indicated that the intention behind the attack was the elimination of civilians and not military objectives. The LRV reminded the Chambers that it heard specific corroborating testimonies which emphasized several cases of women being raped and taken into sexual slavery¹⁸¹

However, Judge Anita Usacka, in her dissenting opinion held that there was insufficient evidence to establish that the accused persons jointly committed through other people, within the meaning of Article 25(3)(a) of the Statute, the charges of rape and sexual slavery, both as war crimes and crimes against humanity within the meaning of articles 8(2)(b)(xxii) and 7(1)(g) of the Statute, based on Article 61(7)(c)(i).¹⁸²She requested the Prosecutor to provide further evidence in respect of these charges.¹⁸³For this reason, it is shown that SGBV requires a higher evidentiary burden.

The ICTJ notes that the ICC prosecutor could have charged the accused persons of fewer crimes committed during several events over a long period.¹⁸⁴The charges

¹⁸⁰ Ibid 206, paras 213-154.

¹⁸¹ Closing Brief of the common legal representatives of the main group of victims , paras 195-209 and 259; Oral Closing Statement of the common legal representatives of the main group pf victims , T.337, PP.89-91.

¹⁸² Judge Anita Usacka, Dissenting Opinion.

¹⁸³ Ibid.

¹⁸⁴ Michele Laborde-Barnagere, Guy Mushiate and Meritxell Regue, ICTJ briefing, Case against Germain Katanga and Mathieu Ngudjolo <https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Katanga-2014.PDF>.

contained multiple attacks which occurred in one day, 24 February 2004. To this end, the charging document factored out hostilities which took place in the same period.

On November 21, 2012, Trial Chamber severed the cases and, announced its intention to the participants that Katanga's mode of liability as an indirect co-perpetrator and principal under Article 25(3)(a) may be subject to legal re-characterisation in accordance to Regulation 55, to assess his responsibility as an accessory (Article 25(3)(d). Subsequently, Trial Chamber II acquitted Ngudjolo of all charges, because the Prosecutor could not provide sufficient evidence to prove his case beyond a reasonable doubt. The Chamber commented on the prosecutor's inadequacies in evidence gathering and the flawed testimonies of the prosecutor's three principal witnesses.¹⁸⁵ Accordingly, the TC changed Katanga's mode of liability from indirect(principal) co-perpetrator to an accomplice(accessory)

Although, the counts of these charges, to some extent, are comprehensive. However, the content is limited to a single day event, thereby neglecting the other multiple attacks during that period.

Jon Heller and Jacobs criticised the deficiencies of the prosecutor's investigations.¹⁸⁶ They argue that the Prosecutor failed to prove any of the allegations

¹⁸⁵ Ibid.

¹⁸⁶Kevin Jon Heller, "Another Terrible Day for the OTP" *Opinio Juris*, <http://opiniojuris.org/2014/03/08/another-terrible-day-otp/>; Dov Jacobs, The ICC Katanga Judgment: A Commentary: Investigation, Interpretation and the Crimes 10 March 2014, <https://dovjacobs.com/2014/03/10/the-icc-katanga-judgment-a-commentary-part-1-investigation-interpretation-and-the-crimes/> last accessed 10 May 2020.

in the charges. As previously discussed, Judge Usacka, in her dissenting opinion, requested the Prosecutor to conduct further investigations into the allegations of rape and sexual violence.¹⁸⁷ It is not sure if the Prosecutor conducted more investigation into SGBV because the TC acquitted Katanga of SGBV. The acquittal shows the consequences of insufficient investigations at the OTP.

Having discussed the background to the case, the next part shall critically analyse Regulation 55 vis-à-vis the prosecutor's powers and its implications on victims' rights and interests.

2.7 Regulation 55

The Court's Regulations may be described as an official document made by the Judges of the Court to adopt rules for the Court's functions.¹⁸⁸ It is also referred to as judge-made laws. '*A routine function*' necessary for the operations of the court.¹⁸⁹ This Regulation is adopted according to Article 52 of the Rome Statute. One of the most crucial section of this Regulation is Regulation 55.

A poorly drafted or ambiguous charging document could sabotage victims access to justice or remedy. From this, charging documents are significant for victims. Regulation 55 permits the Chamber to change the legal characterisation of facts

¹⁸⁷ Ibid.

¹⁸⁸ Kevin Jon Keller, "A Stick to Hit the Accused With": The Legal Characterisation of Facts under Regulation 55' in Reason' In Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press 2015)982

¹⁸⁹ Ibid ;Rome Statute of the International Criminal Court, U.N.Doc. A/CONF.183/9 1998, Art.52(1)

provided the recharacterisation does not exceed the facts and circumstances described in the charges.¹⁹⁰

This section explores the extent of influence prosecutorial discretion has on victims through the interpretation of Regulation 55 by the court.

Regulation 55 provides:

1. “In its decision under Article 74, the Trial Chamber may change the legal characterisation of facts to accord with the crimes under articles 6,7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.”¹⁹¹
2. [i]t appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions..”¹⁹²

From observation, the provision vests the Chamber with the power to modify the charges. It makes it incumbent on the Chamber to notify the participants of such possibility and time to prepare their evidence. One key issue which this provision

¹⁹⁰ International Criminal Court ,Regulations of the Court, Reg.55,ICC-BD/01-01-04, adopted 26 May 2004.

¹⁹¹ Regulations of the Court, Reg. 55; Regulations of the Court, Official documents of the International Criminal Court, accessible at < <https://www.icc-cpi.int/NR/rdonlyres/DF5E9E76-F99C-410A-85F4-01C4A2CE300C/0/ICCBD010207ENG.pdf>>last accessed 13 January 2020.

¹⁹² Ibid.

introduces is the amendment of charges. As explained earlier, the Prosecutor is responsible for drafting the charges. However, an omission of allegations in the charging document raises the question of who amends the charges. The above provision infers that the Chamber ‘may’ change the legal characterization of facts to correspond with the crimes or the accused's form of participation. There is a condition; such amendment must not exceed “*the facts and circumstances described in the charges and any amendments to the charges.*”¹⁹³ The last part of the provision imposes a cap on the recharacterisation of facts, which limits radical alteration of the content of charges.

Regulation 55 empowers the court to modify the legal characterisation of facts in the charges. A commentator contends that this provision transgresses some Rome Statute provisions because it enables the judges to amend the charges under Article 61(9),¹⁹⁴ an encroachment on the prosecutor's exclusive role. By comparison, it is possible that Regulation 55 could be activated to enable the judge in the interpretation of the law where, otherwise if an action is not taken, it could potentially lead to injustice or prejudice the fair trial rights of the accused.

At this point, it is necessary to analyse the application and consequences of Regulation 55 for victims at the ICC. By focusing on the legal re-characterisation of facts in both

¹⁹³ Ibid.

¹⁹⁴ Dov Jacobs, Opinion Juris, ‘Lubanga Decision Roundtable :Lubanga, Sexual Violence and the Legal Re-Characterisation of facts. Accessible at <http://opiniojuris.org/2012/03/18/lubanga-decision-roundtable-lubanga-sexual-violence-and-the-legal-re-characterization-of-facts/> > last accessed 13 January 2020.

Lubanga and Katanga cases, the following section intends to analyse how the activation of Regulation 55 affects victims' rights and interests.

2.7.1 Legal re-characterisation of facts: Lubanga case visited

Arguably, the narrow scope of the charges against Lubanga restricted the number of victims affected and the alleged crimes. The omission raised questions about the gaps or inadequacies of the OTP's strategy.¹⁹⁵ Kambale observed that after two years of investigation, it was disappointing that the OTP could only come up with one count of charge-conscription and enlistment of child soldiers- amongst other serious crimes committed in Ituri.¹⁹⁶

In response to the narrow charges, some human right organisations, NGOs and civil society across the country questioned the Prosecutor's motives for not taking into account other serious crimes committed in Ituri, which falls within the jurisdiction of the Court. They opined that the Prosecutor's failure in this aspect might affect the ICC's

¹⁹⁵The Women Initiatives for Gender Justice, Reflection:Gender Issues and Child Soldiers,The Case of Prosecutor v Thomas Dyilo Lubanga,25 August 2011P.2-3; The Women Initiatives for Gender Justice<http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf>. ; ICC-01/04-01/06-403. See also Legal Filings submitted by the Women's Initiatives for Gender Justice to the International Criminal Court, available at <<http://www.iccwomen.org/publications/articles/docs/LegalFilings-web-2-10.pdf>>. last accessed 20 May 2020.

¹⁹⁶ Pascal Kambale, 'The ICC and Lubanga :Missed Opportunities ' SSRIC Forums:African Futures, 16 March 2012, available at <http://forums.ssrc.org/african-futures/2012/03/16/african-futures-icc-missed-opportunities/> last accessed 16 March 2019.

credibility.¹⁹⁷ Right from the PTC's issuance of Lubanga's arrest warrant, the charges omitted rape and sexual violence allegations.¹⁹⁸ The PTC confirmed the charges of war crimes of enlistment, conscription and use of child soldiers.¹⁹⁹

An NGO, Women Initiatives for Gender Justice(WIGJ) brought the Prosecutor's attention via a letter, to narrow charges against Lubanga. They referred to the Prosecutor's statement where he reported that he would investigate the reports by states which included: 'alleged pattern of rape, torture, forced displacement and the illegal use of child soldiers.'²⁰⁰ They reminded the Prosecutor that he had made statements over 12 months which confirmed that the DRC situation included summary executions, mass murder, torture, rape and other forms of sexual violence, and forced displacement.²⁰¹ They lamented about the restrictive nature of the charges to the recruitment and use of child soldiers. Although, they acknowledged the ICC's selectivity and limited resources in conducting investigations.

¹⁹⁷ Women's Rights and Human Rights NGOs, "Obtaining further charges in the opening case against Thomas Lubanga", *Statement by women's rights and human rights NGOs of the DRC on the prosecutions by the ICC*, Beni, September 16, 2006 (on file with the author)

¹⁹⁸ Congolese Women's Campaign against Sexual Violence in the Democratic Republic of Congo

¹⁹⁹ Prosecutor V Lubanga, Decision on the Confirmation of the Charges, Case No. ICC-01/04-01/06, 29 January 2007.

²⁰⁰ Press Release, ICC-otp-20040623-59-En, 23 June 2004 http://www.icc-cpi.int/pressrelease_details&=en.html.

²⁰¹ Women Initiatives for Gender Justice, http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf; Address Prosecutor Luiz Moreno Ocampo, Third Session of the Assembly of State Parties to the Rome Statute of the International Criminal Court, The Hague, August 2006, 6 September 2004 http://www.icc-cpi.int/library/asp/LMO_20040906_eN.PDF (stating that "available information suggest that rape and other crimes of sexual violence, torture, child conscription, and forced displacement continue to take place" in the DRC).

Nevertheless, they opined that if the ICC proceedings were to be fair and just, it was ‘*necessary that prosecutorial discretion is exercised in a transparent and principled way*’.²⁰² Also, they noted that the willingness of victims/survivors and witnesses of SGBV to come forward. In expressing their concerns, they complained about the prosecutor's reluctance to investigate sexual violence crimes effectively, given its challenges. In conclusion, they persuaded the Prosecutor to include the crimes of SGBV in the charges. Apparently, this raised the question of whether sexual violence was an intrinsic part of child soldiers' recruitment and use. Despite the persuasion of the WIGJ, the Prosecutor was indifferent to their objection.

Subsequently, under a joint request made by the legal representatives of victims, in May 2006, the LRV filed a motion requesting the Trial Chamber to modify the facts of the charges to include charges of inhumane treatment and sexual slavery as war crimes. The TC notified the parties of its intention to characterise the facts under Regulation 55. The LRV requested the Trial Chamber to apply Regulation 55 for an ‘additional legal characterisation to the facts and circumstances contained in the charging document; the charging document had a one-count charge of conscripting, enlisting and using children to participate actively in hostilities(as war crimes). In the LRV’s argument, the TC had the authority to change the facts' legal characterisation because the additional charges were part of the facts and circumstances of the charges confirmed

²⁰² Women Initiatives for Gender Justice, available at http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf>.p.2.last accessed 11 January 2020.

against the accused by the PTC.²⁰³ These additional charges were not new to the content of the charging document.

In addressing the victims' request, Majority of Trial Chamber included the LRVs additional charges, with Judge Fulford dissenting, he ruled that "*that legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court*"²⁰⁴ The majority noted that it was willing to hear arguments from the parties and consider whether these facts could be re-characterised to include inhumane/cruel treatment and sexual slavery under articles 7(1)(g) and Article 8(2). According to the majority, sub-paragraphs (2) and (3) are distinct provisions from 55(1).²⁰⁵ As such, they can be interpreted separately. At the same time, Regulation 55(1) permits legal re-characterisation of facts unless the factual basis for such re-characterisation exceeds the facts stated in the charges. Subparagraphs (2) does not restrict legal characterisation to the fact and circumstances stated in the Charges. This provision envisages that any re-characterisation can exceed the factual scope of the charges.²⁰⁶ The Majority held that Regulation 55 is applicable to re-characterise the facts to include allegations of inhumane treatment and sexual slavery. The majority also

²⁰³ Ibid, para 41.

²⁰⁴ Prosecutor v. Thomas Lubanga Dyilo, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2049, 14 July 2009; Prosecutor v. Thomas Lubanga Dyilo, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure Under Regulation 55 of the Regulations of the Court, Trial Chamber I, 22 May 2009, ICC-01/04-01/06-1891-tENG, 5.

²⁰⁵ Ibid 162, par. 27.

²⁰⁶ Ibid 192, para. 28-3.1.

noted that it ‘was not bound’ by the facts and circumstances contained in confirmed charges by the PTC.²⁰⁷

In his dissenting opinion, Judge Fulford found that Article 61(9) of the Rome Statute and Regulation 52 confers the PTC with the exclusive authority to frame and amend charges. Additionally, Article 74(2) stipulates that the TC’s final decision is restricted to the facts and circumstances stated in the charging document.²⁰⁸ He criticised the majority’s interpretation of Reg.55 in view that understanding the said regulation cannot be divided into two distinct stages. Instead, the sub regulations should be interpreted together.²⁰⁹

Article 61(9):

“After the charges are confirmed, and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges

²⁰⁷ Ibid,para-27-32.

²⁰⁸ Minority Opinion of Judge Adrian Fulford, Prosecutor v.Lubanga, Notice to the Parties and Participants that the Legal Characterisation of Facts may be subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06,Paras.7,10,12,15,16.

²⁰⁹ Prosecutor v.Thomas Lubanga Dyilo,Decision issuing a second corrigendum to the “Minority opinion on the ‘Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’ Trial Chamber 17 July 2009” ICC-01/04-01/06-2069-Anx-1,31 July 2009.

must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.”²¹⁰

In the dissenting opinion of Judge Fulford, he notes:

“inevitably, it follows that a modification to the legal characterisation of the facts under Regulation 55 must not constitute an amendment to the charges, an additional charge, a substitute charge or a withdrawal charge, because these are each governed by Article 61(9)”.²¹¹

It appears Judge Fulford's reasoning followed strict adherence to the black letter law, without making an assumption. He also criticised the Majority's attempt at dividing the interpretation of the subparagraph of Regulation 55. He stated that the subparagraphs should be read conjunctively instead of separately because the latter application would likely infringe the defendant's right to a fair trial.²¹²

On appeal, the Defense accentuated the incompatibility between Regulation 55, the Rome Statute and the accused fair trial rights.²¹³ In a similar vein, the Defense contended the TC's decision on the subparagraphs' disjunctive interpretation. It stated

²¹⁰ Dissenting Opinion of Judge Fulford.

²¹¹ Prosecutor v Lubanga, Dissenting opinion of Judge Fulford 'Decision Giving Notice to the parties that the Legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court', ICC-01/04-01/06-2054, trial Chamber 1, ICC, 14 July 2009.

²¹² Ibid.

²¹³ The Prosecutor v. Thomas Lubanga Dyilo, Defence Appeal against the Decision of 14 July 2009, "Decision giving notice to the parties and participants that the Legal Characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2112, 10 September 2009.

that these subparagraphs are interdependent rather than distinctive.²¹⁴The Prosecutor opposed the TC's decision on the division of the subparagraphs of Reg.55 into two stages.²¹⁵ The AC reversed the TC's decision; it rejected the defence's argument that Reg.55 is "inherently incompatible" with the Rome Statute or rights of the accused to a fair trial. While stressing that Regulation 55 was 'necessary for the Court's routine functioning'.²¹⁶It also stressed the consolidated interpretation of subparagraphs because they are interrelated provisions.²¹⁷

Besides, the AC highlighted that the Prosecutor has the exclusive power to select charges and the underlying factual elements. Hence, the decision of the TC on Regulation 55 was contrary to the Statute. The AC decision confirms the exclusive power of the Prosecutor to draft and amend charges. The AC emphasised that 'new facts and circumstances which are not contained in the charging document may only be added under the procedure of Article 61(9) of the Statute'.²¹⁸ This incorporation would change the scope of the trial. It is only within the Prosecutor's powers under Article 54(1) to effect this change.²¹⁹The AC observes:

²¹⁴ Ibid para.35.

²¹⁵ Prosecutor v. Thomas Lubanga, Prosecution's Document in support of Appeal against the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulations of the Court", 14 Septemebr 2009.

²¹⁶ Prosecutor v. Thomas Lubanga., Judgment on the appeals of Mr Lubanga Dyilo and Prosecutor against the Decision of Trial Chamber I, ICC-01/04-01/06-2205,ICC Appeals Chamber ,8 December 2009.

²¹⁷ Prosecutor v. Thomas Lubanga., Judgment on the appeals of Mr Lubanga Dyilo and Prosecutor against the Decision of Trial Chamber I, ICC-01/04-01/06-2205,ICC Appeals Chamber ,8 December 2009.

²¹⁸ Ibid.

²¹⁹ Ibid.

“[i]t is the prosecutor who, pursuant to Article 54(1) of the Statute,...is tasked with the investigation of crime under the jurisdiction of the Court and who, pursuant to Article 61(1) and (3) of the Statute,...proffers charges against suspects. To give the Trial Chamber the power to extend proprio motu the scope of a trial to facts and circumstances not alleged by the Prosecutor would be contrary to the distribution of powers under the Statute.”²²⁰

The ruling heightened the prosecutor’s function in amplifying the scope of the trial. It also revealed that it is ultra vires the TC's power to extend the scope of the trial to facts and circumstances that exceeds the content of the charging document. It seems the TC has the powers to modify the charges, given that it does not introduce new facts and circumstances into the subject matter of the trial. This ruling begs whether sexual slavery and cruel and inhumane treatments are new facts and circumstances in this situation. If cruel and inhumane treatment is categorised as a constitutive part of child soldiers' recruitment, then it is not considered ‘new facts and circumstances’. Thus it would mean it is within the Chamber's power to concede to the request of the LRV and modify the charges.

By contrast, where these alleged crimes are considered a separate crime from the crimes contained in the charges, it is within the prosecutor's exclusive power to amend

²²⁰ Prosecutor v Lubanga, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009, “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(20) of the Regulations of the Court”, para.94.

the charges. Conceivably, these distinct crimes may be construed as ‘new facts’ and ‘circumstances’.

A cursory look at the impugned decision reflects that the judge is either pro-victims’ rights or a judge from the civil law system, an active judge in proceedings with extensive control over the proceedings. Jon Heller describes the impugned decision :

“The Judges, whether at the pre-trial phase or at trial, have no power whatsoever in relation to the content of the charges.....The judges, in their never-ending quest to maintain control over the proceedings, included in the Regulations of the Court....”²²¹

The judges of the Trial Chamber's impugned decision and the attempt to modify the charges indicated a more receptive stance towards the victims’ plight. One could argue that it demonstrates a civil law tradition with active judges. In addition, it seems the reasoning behind the impugned decision encapsulates the alleged crimes of sexual violence and cruel and inhuman treatment as inevitable consequences or an intrinsic part of the recruitment of child soldiers. The AC reversed this decision because it infringed on the prosecutor’s power, reasoning that the proposed charges were separate and independent crimes that would introduce new facts.

Arguably, the AC’s decision points out the legal technicality in the interpretation of Regulation 55 as well as the role of the prosecutor in the framing of charges. The

²²¹ Kevin Jon Heller, *Opinio Juris, Lubanga Decision Roundtable: Lubanga, Sexual Violence and the Legal Re-Characterisation of Facts* 18 March 2012 <http://opiniojuris.org/2012/03/18/lubanga-decision-roundtable-lubanga-sexual-violence-and-the-legal-recharacterisation-of-facts/> last accessed 16 May 2020.

technicality that arose, in this case, was left unaddressed by the AC decision, regardless of the impact it had on victims of SGBV and cruel treatment. The AC applied the Law as it is-positive law-not as it ought to be. The decision confirms that it was beyond the TC's power to amend the charges regardless of the victims' situation.

The AC decision also underscores the fact that the TC or the victims cannot challenge the prosecutor's discretion to draft and amend charges. It is only within his exclusive power to amend the charges, notwithstanding that his actions could potentially lead to injustice for the victims involved.

Specifically, one could argue that TC attempted to initiate Regulation 55 to fill the impunity gap and, obtain justice for victims. One commentator thinks that if a gap in the legal characterisation(at the pre-trial stage) would acquit the accused of allegations against him, such decision prejudices the statute's aim to end impunity.²²² However, the AC reversed TC's decision. AC's decision highlights the principle that decisions must conform to positive laws instead of morality. Jon Heller argues that judicial activism often breaches the principle of legality and the rights of the defence.²²³

Nonetheless, we should bear in mind that where technicalities arise during the interpretation of the law, it may be acceptable if the judges make recourse to morality instead of submitting to the term, 'my hands are tied'(Stare Decisis and legal

²²² Ibid.

²²³ Ibid.

formalism).²²⁴ Unless if this could lead to abuse of judicial power. The judge has to interpret the law and fill gaps in positive law.²²⁵ Judicial activism is defined as rulings influenced by the judge's personal decisions where a judge decides to reach a verdict based on their preference instead of strictly applying the law.²²⁶ The judge may be politically motivated while performing the judicial role; a derogation from the norm. Judicial Role is described as "normative expectations shared by judges and related actors regarding how a given judicial office should be performed."²²⁷ According to Gibson, role orientations is described as what judges "think they ought to do."²²⁸ Therefore, judicial decisions are believed to be a product of judicial role orientations (doctrinal and jurisprudential principles) rather than the political factors.²²⁹ It is thought that judicial activism encourages political interference instead of adhering to the law. In contrast, the judge could interpret the law to enhance desirable outcomes,

²²⁴ Lewis Powell, "Stare Decisis and Judicial Restraint" (1990) 47(2) *Washington and Lee Law Review* 281; Aileen Kavanagh, "Judicial Restraint in the Pursuit of Justice" (2010) 60(1) *The University of Toronto Law Journal*, 23-40.

²²⁵ Maimon Schwarzschild, 'Judicial Activism Judicial Independence and Judicial Hubris: The Case of International Courts'. Luis Pereira Coutinho, Massimo La Torre, Steven Smith (eds), *Judicial Activism :An Interdisciplinary Approach to American and European Experiences*, (Springer 2015) 44

²²⁶ Fuad Zarbiyev, 'Judicial Activism in International Law: A Conceptual Framework for Analysis' (2012) 3(20) *Journal of International Dispute Settlement*, 247-278; Lord Walker, How far should judges develop the common law (2014) 3(1) *Cambridge Journal of International and comparative law*, 124-135 Ibid; *Roe v Wade*, 410 U.S 113, 93 Supreme Court 705; *Brown v Board of Education*, 347 U.S 483.

²²⁷ J. Woodford Howard, "Role Perceptions and Behaviour in Three U.S. Courts of Appeals" (1977) 39(4) *Journal of Politics* p.916

²²⁸ James Gibson, "The Role Concept in Judicial Research" (1981) 3(3) *Law and Policy*, 291-311.

²²⁹ John Scheb, Thomas Unger and Allison Hayes, *Judicial Role Orientations, Attitudes and Decision Making: A Research Note* (1989) 42(3) *Western Political Quarterly*, 427-435, p427.

especially where adherence to the law would lead to injustice. Notwithstanding, the rationale for such decision deviates from the stated law.

From the above, it is clear that the prosecutor's role in framing charges inevitably influences the possibility of victims accessing justice. The charging document's content may reflect the whole truth or the partial truth about the atrocities, and partial truth might negatively impact victims' interests and their ability to access justice. Therefore, the Prosecutor must be cautious to ensure that his powers' exercise does not sabotage victims' rights and interests.

While some of the PTC judges have been liberal to accommodate victims' interests amending the charges, further interpretation by the appellate judges entrenched the prosecutor's powers to determine the scope of the charges. Thus, tension still exists in acclimatising victims rights and interests within criminal trials.

So far, this section has analysed the impact of prosecutorial discretion on victims' rights and interests; the next section shall explore Regulation 55 and the Katanga case.

2.7.2 Legal re-characterisation of facts-Katanga visited

To further understand the role of the Prosecutorial discretion on victims' rights and interests, this section explores the implementation of Regulation 55 in *The Prosecutor v. Katanga*

The majority of the Chamber gave notice that the mode of liability for Katanga may be subject to legal re-characterisation in conformity with Article 25(3)(d) of the Rome

Statute.²³⁰ Subsequently, the majority activated Regulation 55 to change Katanga's liability mode from indirect co-perpetrator to an accessory.²³¹ It is noteworthy that the chamber entirely changed from the first mode of liability to a new mode of liability. They submitted that the application of Regulation 55 did not violate the accused right to a fair trial.²³² For this reason, the evidence presented by the Prosecutor during the confirmation of charges had no link with the new legal characterisation of facts.

Jacobs noted that the "*Prosecutor essentially did not prove any of his allegations*"²³³, while Jon Heller posited that the OTP '*failed to prove any of its legal claims*'.²³⁴ In Wigley's opinion: "the majority redefined the case to favour the prosecution and conviction, at the expense of the rights of the accused".²³⁵ To ascertain the prioritisation of the accused rights over other parties, she stated that "considerations about procedural fairness for the Prosecutor and the victims and their Legal Representatives, while certainly relevant, cannot trump the rights of the accused."²³⁶

While the pendulum of this radical change in the charges seems to swing to the side of the accused's right to a fair trial, mainly what is considered as an unfair trial, it also

²³⁰ Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Decision on the Implementation of Regulation 55 of the Regulations of the Court and severing the Charges Against the Accused Persons.

²³¹ Ibid.

²³² Ibid

²³³ Kevin Jon Heller, "Another Terrible Day for the OTP" accessible at <<http://opiniojuris.org/2014/03/08/another-terrible-day-otp/>> last accessed 12 December 2019

²³⁴ Dov Jacobs, "The ICC Katanga Judgment :A commentary (part 1) Investigation, Interpretation and the Crimes "

²³⁵ Sophie Rigney, "The Words Don't Fit You: Re-characterisation of the Charges, Trial Fairness, and Katanga " [2014] 15(2) *Melbourne Journal of International Law* ,p 515

²³⁶ Ibid

reveals the indifference towards victims' rights and interests. Presumably, the accused was released based on insufficient evidence to hold him responsible for the crime. The acquittal does not preclude the accused's blameworthiness. It means the accused's innocence was a product of insufficient investigations and evidence.

Surprisingly, the interpretation of Regulation 55 became an issue in the Katanga case. The judges introduced new characterisation, which led to new liability.²³⁷ Consequently, the Chamber acquitted him of allegations of recruitment of child soldiers as well as SGBV.

It identifies an interesting viewpoint on the implications of acquittal on victims' rights and interests. Using Combs' analogy, '*international victims often view acquittals through an ideology lens*'²³⁸ The acquittal of Katanga based on insufficient evidence to link the accused with the crime illustrates a perceived injustice for the victims within this category. We should also bear in mind that the radical change of the charges, especially the mode of criminal responsibility could be described as a result of procedural issues which affected the original charges. By inference, procedural defects may affect victims' possibility of achieving justice.

²³⁷ Dov Jacobs, The ICC Katanga Judgement: A Commentary Investigation, Interpretation and the Crimes 10 March 2014, <https://dovjacobs.com/2014/03/10/the-icc-katanga-judgment-a-commentary-part-1-investigation-interpretation-and-the-crimes/> last accessed 27 September 2020.

²³⁸ Nancy Combs, *Fact-finding without facts* (Cambridge University Press 2010)351; Simon De Smet, 'Standard of Proof at the ICC-Beyond Reasonable Doubt or Beyond Reason' In Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press 2015)885.

The acquittal could mean justice for Katanga and injustice for the victims. It is worthy of mention that the acquittal of Katanga for these crimes still left an impunity gap which is unconnected to the lack of insufficient evidence (an illustration of the prosecutor's investigative failure)

Interestingly, Judge Wyngaert in her dissenting opinion held that the majority overstretched the provision of the regulation and 'changed the narrative of the charges so fundamentally that it exceeded the facts and circumstances described in the charges'.²³⁹ She observed that the majority's re-characterisation of facts '*fundamentally encroached upon the accused's right to a fair trial*'.²⁴⁰ In Judge Wyngaert's opinion, the Trial Chamber system of procedure is mostly adversarial; thus, the adversarial procedure should have precluded the judges from applying the Regulation.²⁴¹ It is believed that judges in the adversarial procedure are passive instead of active judges in pursuit of truth-finding in an inquisitorial system. Arguably, the judges should not have taken control of the proceedings to the extent of re-characterising the fact beyond the initial charges. It could be that the judges that constituted the Trial Chamber wanted to close the impunity gap. Nevertheless, this does not disregard the fact that these judges usurped the prosecutor's role because the Prosecutor is solely responsible for drafting and amending the charges.

²³⁹ Dissenting Opinion of Judge Wyngaert.

²⁴⁰ Ibid.

²⁴¹ Ibid .

On appeal, the AC addressed the change in legal characterisation.²⁴² The chamber submitted that it was not initially apparent that the intended change in the legal characterisation of the facts “would exceed the facts and circumstances described in the charges”²⁴³ The AC acknowledged TC’s recognition of the accused rights. It decided that the TC did not encroach on the accused(Katanga)’s fair trial rights.²⁴⁴ The AC noted that “a principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Rome Statute.”²⁴⁵ The strength of such an approach lies in addressing impunity and bringing the accused to justice.

Jon Heller avers that the TC’s application of Regulation 55 was ‘*ultra vires*’ because the Regulation was not in conformity with Rome Statute’s procedures for amending charges.²⁴⁶ It appears that amendment of the charges is within the exclusive discretion of the Prosecutor. Heller also argued that the activation of Regulation 55 by the Trial Chamber violated the Prosecutorial independence and the accused’s rights to a fair trial. While this could be true, one may argue that the Court succeeded in filling the impunity gap; however, it did this in detriment to the accused’s right to a fair trial because it changed the legal characterisation of facts and the mode of liability made by the Prosecutor initially. One reason for this may be connected to the fact that the Prosecutor

²⁴² Katanga’s Appeals Judgment.

²⁴³ Ibid ,paras 25-58.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Kevin Jon Heller, ‘‘A Stick to Hit the Accused With’: The Legal Recharacterisation of Facts under Regulation 55’ In Carsten Stahn et al(eds) *The Law and Practice of the International Criminal Court :A Critical Account of Challenges and Achievements* (Oxford University Press 2014).982-984

could not conduct an effective investigation and, provided insufficient evidence to establish the accused's guilt.

In addressing how the court's interpretation of Regulation 55 affected victims' rights and interests, the researcher shall refer to the AC's decision on the activation of Regulation 55 in Lubanga's case. The decision in the Lubanga case established the exclusive power of the prosecutor to amend charges. It is somewhat surprising that in the Katanga case, the judges independently changed the charging document's content, the accused's mode of liability. The original charges differ from the subsequent charges framed by the judges. While this recent decision of Katanga reveals inconsistencies in some of the Chamber's rulings, it is also worthy of mention that the content of a charging document plays a vital role in ascertaining who gets what and the scope of the trial. However, with the changes made to the TC's charging document, prosecutorial discretion's role or influence became unclear. We have a charging document framed by the judges, which questions the prosecutor's exclusive power in drafting the charges and the implications of the new charges on victims' interests and the accused.

In her article, Rigney concluded that the Court secured a conviction for the prosecution by relegating the rights of the accused²⁴⁷:

²⁴⁷Sophie Rigney, “ ‘The Words Don't Fit You’: Re-characterisation of the Charges, Trial, Fairness, and Katanga” (2014) 15 Melbourne Journal International Law, p515

“ [i]n Katanga, the rights of the accused were not considered to be integral, and the interests of ‘correcting’ the prosecution’s case to ensure conviction was given precedence.”²⁴⁸

The prosecutor’s original charges could not sustain the conviction of Katanga. Ordinarily, Katanga should have been acquitted by the principle of *in dubio pro re*. The Principle of *in dubio pro re* stipulates that the defendant may not be convicted by the court when there are doubts about his guilt.²⁴⁹ Thus, to clear all doubts, the case should be resolved in favour of the defendant. The presumption of innocence guides criminal prosecution at the ICC. The principle of *in dubio pro re* is entrenched in the human right to the presumption of innocence.²⁵⁰ It is possibly easier for the prosecution to establish beyond a reasonable doubt the commission of war crimes and crimes against humanity.

Nevertheless, the prosecutor might find it challenging to provide sufficient evidence to prove the defendant's culpability; hence, there was no substantial evidence that established the commission of war crimes and crimes against humanity. There might be insufficient evidence to prove the individual responsibility of the defendant. The evidence must be convincing and sufficient, beyond a reasonable doubt. Anything short

²⁴⁸ Ibid .

²⁴⁹ Rome Statute 1998, Article 22 Article 66; Universal Declaration of Human Rights 1945, Article 10; Prosecutor v Katanga , Judgment in Pursuant to Article 74 of the Statute, ICC-01/04-01/07, 7 March 2014, para.52-53

²⁵⁰ United Nations Interregional Crime and Justice Research Institute, Manual on International Criminal Defence: ADC-ICTY Developed Practices within the framework of the War Crimes Justice Project, available at https://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/ADC_ICTY_developed_practices_en.pdf last accessed 10 August 2020, p15, para.30

of adequate evidence to establish the defendant's guilt could question the court's integrity and legitimacy. Since the accused's freedom is at stake during criminal trials, the odds should be resolved in his favour; acquittal of the accused does not indicate justice's circumvention. Arguably, it appears the court was not willing to repeat what happened in Ngudjolo's case-inadequate evidence. Therefore, the Court introduced new charges and liability to fill the impunity gap and ensure victims' justice.

The conviction of Katanga highlights the pressure on the Court to uphold the rights of the accused persons, the prosecutor's role in drafting charges, and victims' ability to obtain justice. It could be argued that victims' interests and claim for justice are not always the focal point during these proceedings.

Moreover, the Katanga case brings to our attention the battle of supremacy between the accused's rights and securing a conviction. The fairness of procedure for the accused is questionable, but the victims' interests were not in dispute here. It remains uncertain if Katanga's conviction indicates justice for victims. If we go by Goldstone's words, "the fairness of any criminal justice system must be judged by acquittals and not by convictions [...] Acquittals do not necessarily follow from any inadequacies in the office of the prosecutor."²⁵¹ From the first lap of Goldstone's words, arguably, based on insufficient evidence to prove the original charges against Katanga, the Chamber could have acquitted him.

²⁵¹ Richard Goldstone, "Acquittals by the International Criminal Court"(2019) accessible at <<https://www.ejiltalk.org/acquittals-by-the-international-criminal-court/>> last accessed at 10 January 2019.

On the other hand, the submission in the last lap is flawed. It is the responsibility of the Prosecutor to gather evidence. Presumably, where there is no sufficient evidence, he could have been released on the presumption of innocence. However, it is not reasonable for an accused to be released based on inadequacy in the prosecutor's Office. What is the fate of victims?

While one could argue that this legal characterisation of the facts impacted Katanga's rights to a fair trial, Whiting's opinion is contrary. Whiting contends that the legal description of facts and the change of Katanga's mode of Liability had no impact on Katanga's conviction. According to Vos, if Katanga had been tried under the original charges drafted by the Prosecutor and the initial mode of liability, the charged mode of liability could not warrant a conviction for the crimes committed by Katanga. The TC had to change the liability to fit the charges while giving the Defence notice and opportunity to be heard.²⁵² Whiting avers that the Defence was aware that it was within the TC's prerogative to use this approach.²⁵³ Whiting's argument seemed flawed because the Prosecutor had the exclusive power to draft and amend charges; the change effected by TC is equal to hijacking the Prosecutor's power. The AC's decision in the

²⁵² Dov Jacobs, The ICC Katanga Judgment: A Commentary: Investigation , Interpretation and the Crimes 10 March 2014, available at <https://dovjacobs.com/2014/03/10/the-icc-katanga-judgment-a-commentary-part-1-investigation-interpretation-and-the-crimes/> last accessed 11 June 2020.

²⁵³ Alex Whiting, 'The ICC's Ends Days? Not so Fast, 20 March 2014 accessible at [Guest Post: The ICC's End Days? Not So Fast | Spreading the Jam \(dovjacobs.com\)](#) > last accessed at 24 August 2019.

legal re-characterisation of facts in the Lubanga case stressed that the Prosecutor has the sole responsibility to draft and amend charges.

2.7.3 The victims status before the initiation of the investigation

The Prosecutor is responsible to the victim,²⁵⁴ the international community²⁵⁵ and the accused.²⁵⁶ Therefore, on the prosecutor's request to initiate an investigation, Article 15(3) invites victims to make representations to the PTC. The PTC may consider these representations before making decisions on the Prosecutor's request to commence an investigation.²⁵⁷ The interpretation of this provision provides a platform for victim participation via the provision of information. Victims' role at this stage is to provide information to assist the Prosecution in an investigation. This form of participation includes "submitting observations" and "making representations" to the Pre-Trial Chamber.²⁵⁸ It appears victims' empowerment under Article 15(3) is restricted compared to the umbrella provision of Article 68(3) of the Rome Statute, which seems to grant an extensive role for victim participation. Understandably, article 15 intends to limit victims' roles before the PTC authorises the investigation's initiation. Regulation 50(1) grants victims a time limit of 30 days to make representations after the prosecutor's notice.²⁵⁹ Victims engagement at this level is low, but it secures their sense of belonging. There is no evidence to suggest that victims were allowed to participate

²⁵⁴ Rome Statute 1998, Article 15(3) and (6), Article 19(3), Article 53, Article 53(1) c

²⁵⁵ Rome Statute 1998, Preamble.

²⁵⁶ Rome Statute, Article 61(4), Article 67, Article 69(4).

²⁵⁷ Rome Statute, Article 15; ICC Rules of Evidence and Procedure, Rule 50

²⁵⁸ Rome Statute, Article 15(3).

²⁵⁹ Reg. 50(1) of the ICC Regulations.

before the authorisation of an investigation in the Lubanga and Katanga case. One reasonable explanation for this is that Article 15(3) does not apply to investigations initiated on Referral by the Security Council or State. Article 15(3) applies to investigations which are commenced by the Prosecutor proprio motu- which explains the absence of victim participation before the authorisation of an investigation.

2.7.4 Victim and participation during the investigation

The following section shall assess the prosecution's role and victims' rights and interests during the investigation stage. Article 58 grants the PTC the power to consider whether to issue an arrest warrant to the Prosecutor. Article 58(2)(b) stipulates that the Prosecutor should specify the particular crimes which justify the application for an arrest warrant. The PTC may endorse the arrest warrant provided there are reasonable grounds to believe the suspect committed that crimes.²⁶⁰ At this phase, presumably, the role of the PTC seems to be supervisory.

At the commencement of investigations by the Prosecution, the PTC may request the victims to present their views and concerns.²⁶¹ The role of victims at the investigation stage is not specific. This uncertainty questions the place of the victims' rights and interests at the investigation stage. This stage encompasses the pre-trial phase /situation phase as the investigation stage intends to unravel the perpetrator's identity. There is no

²⁶⁰ Rome Statute 1998, Article 58(1).

²⁶¹ Situation in the Democratic Republic of Congo, "Decision to on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101,17 January 2006,para 17.

express statutory provision for victim participation during the investigation stage. Hence, the identity of victims, as well as their role during the investigation, may be limited. The recognition of victims at this stage is unsettled. Since victims' identity is sketchy at this stage, it is expedient to give victims rights and explore their interests in the investigation.

At the heart of criminal investigations is the Prosecution with exclusive power to conduct investigations and determine which crimes should be prosecuted. It is observed in most domestic jurisdictions, that victims are involved in criminal investigations.²⁶² Many a time, when the victim reports a crime to the police, the state commences an investigation. From this point, the victim becomes engaged and receive information on the progress of such an investigation. Victims cooperation during investigation and prosecution enhances their engagement and empowerment. One implication of victims' involvement in domestic jurisdiction is that they have a more recognised role as information providers-their primary role includes identifying offenders. It is worthy of mention that the Rome Statute does not grant victims the power to report or make referrals to investigate the situation at the ICC. We should also bear in mind that there are substantial differences in criminal investigations at the local jurisdictions and international level. Perhaps, the absence of enforcement authority at the international level and the massive scale of crimes at the international level may restrict victim

²⁶² Mary Finn, "Effects of Victims' Experiences with Prosecutors on Victim Empowerment and Re-Occurrence of Intimate Partner Violence, Final Report, Final Report , August 2003, accessible at <https://www.ncjrs.gov/pdffiles1/nij/grants/202983.pdf> last accessed 14 August 2020; People v Eubanks , 927 F.2d 310, California 1996

participation in investigations. Victims' cooperation in criminal investigations may foster accurate and effective investigations.

Therefore, given that Victims' cooperation with the prosecutor, especially concerning investigations and testimony.²⁶³The Prosecutor represents the international community's interests and owes the offender a right to a fair trial. An effective and objective investigation should be at the forefront. This analysis explains the independence of the victims from the prosecutor. Victims' participation may question the objectivity of the investigations. The identity of victims at the investigation is not yet settled.

It seems the PTC is more inquisitorial than the TC, especially concerning the confirmation of charges-the PTC is involved in truth-finding with active judges in this phase.²⁶⁴ With its roots in civil law traditions, the inquisitorial criminal procedure grants extensive rights and victims roles. Although one may infer that the ICC's criminal procedure is mixed, arguably, it appears that the ICC is mainly adversarial than inquisitorial. Because of the limitations on the exercise of victims' rights. As was mentioned in the introduction, the victims are third parties in the proceedings.

²⁶³ *People v Eubanks*, 927 P.2d 310, California 1997.

²⁶⁴ John Spencer, 'Adversarial v inquisitorial systems: is there still such a difference'(2016) 20(5) *International Journal of Human Rights*, 601-616

One could argue that the provision and availability of rights for victims are instruments required to enhance their voice and access to justice. However, one drawback is that the exercise of these rights is not absolute. They need to be exercised in consideration of the fair trial rights of the accused. This underscores the restriction placed on victims rights at the ICC. These rights are seen as empowerment for victims but do they empower victims in the criminal justice system, or is it just a means to an end?

The Statute, Rules and Regulations are silent about the standard of proof to be applied in evaluating victims' applications. The TC ruled that prima facie credible grounds are sufficient in assessing victims' application for an applicant who has suffered harm due to a crime committed within the Court's jurisdiction at the Pre-trial stage, the facts and issues are sketchy and less detailed. As such, it would be far-reaching to use a 'substantive assessment' in evaluating the credibility/reliability of victims' application at this stage.²⁶⁵ On the other hand, a substantive assessment would be needed in evaluating the credibility/reliability of victims' application at the trial stage. The reason being that there are inadequate detailed facts and issues on grounds for consideration.

The victim application came up in the DRC Situation. The PTC had to determine whether a victim has a right to participate during the investigation of a situation.²⁶⁶ Mr Sidiki Kaba submitted applications for victims' participation labelled VPRS 1.VPRS 2,

²⁶⁵ Ibid .

²⁶⁶ Democratic Republic of Congo, ICC-01.04-101-cORR, Pre-Trial Chamber 1, Decision on the Application for Participation in the Proceedings of VPRS 1,VPRS2,VPRS 3,VPRS4,VPRS 5and VPRS 6 January 17,2006,p67

VPRS 3, VPRS 4, VPRS 5, VPRS 6.²⁶⁷The President appointed Emmanuel Daoud as their legal representatives. In their response, the OTP filed a motion opposing the victim applications. He argued that it was too early for victims to get involved in the proceedings; investigation.

Furthermore, he posited that the Statute did not intend victims to take part in the proceedings at such an early stage. The Prosecutor noted that only victim participation under proceedings in Article 15(3), was permitted at the investigation stage. As such, any other form of involvement except the one set out in Article 15(3) would undermine the objectivity of the proceedings and the OTP's office's integrity.²⁶⁸The ad hoc defence counsel(no suspect or identifiable perpetrator) filed its observations. ²⁶⁹

By using the terminological and contextual approach, the PTC analysed the position of victims. With each approach, the judges considered if victims could participate before the identification of a suspect. The Court found that the Statute and rules allow victims to participate in the early stages of participation. Additionally, the Court held that the term 'proceedings' encompass the investigation, pre-trial and trial stage. Hence proceedings are not restricted to court proceedings. This rejected the Prosecutor's

²⁶⁷ DRC Situation, ICC-01/04-24-Conf-EXP, Letter from Mr.Sidiki Kaba, President of the International Federation for Human Rights (FIDH), June 14,2005

²⁶⁸Situation in Democratic Republic Of Congo, ICC-01/04-84-Conf, Prosecution's Reply on the Applications for Participation , 01/04-1/dp to 01/04-6/dp ,Aug 15,2005.

²⁶⁹ Situation in the Democratic Republic of Congo, Defense Response to the Application for Participations of Victims in the Proceedings ,Aug, 11, 2005. ICC—01/04-81-Conf,Pre-Trial Chamber.

argument- the Court acknowledged that although article 68(3) is classified under the statute's trial section, this does not limit its application to trial proceedings only.

Besides, the TC has noted that appearing as a victim before the court is voluntary. Victim participants are independent of the Prosecutor as well as the defence.²⁷⁰ They pursue their interests independent of the parties. Although, they may work with the Prosecutor during investigation or trial. Their cooperation with the Prosecution does not mean their role is subsumed under the Prosecutor. They are not an ally of the prosecutor or assistant prosecutors²⁷¹. Rather, the Statute and Rules grant them an independent voice and role in the proceedings.

Therefore, the victims' role in the trial include :

1. making opening and closing statements;
2. consulting the record of proceedings;
3. receiving notification of all public filings and those confidential filings that affect their personal interests;
4. tendering and examining evidence if the Chamber feels it will assist in determining the truth, otherwise known as seeking leave for the submission of evidence and;

²⁷⁰ Ibid.

²⁷¹ Ibid.

5. legal representatives can attend and participate in the proceedings, question witnesses experts and the accused.²⁷²

The confirmation of charges is an integral part of the Pre-Trial stage. There are restrictions on victims' rights at this phase because they cannot tender new evidence, nor can they access Prosecution's case.²⁷³ The scope of the confirmation of charges is limited to the determination of the availability of sufficient evidence to establish substantial grounds to believe that the suspects are criminally responsible for the crimes contained in the charging document.²⁷⁴ Victims interests lie in the confirmation of charges because it is necessary to commence the suspect's trial. The victims must prove that their interests are affected by the crimes stated in the Prosecution's charging document. On confirmation of charges, the PTC found that victims would be able to participate during the hearing for the accused/suspect-Thomas Lubanga. This participation includes making opening and closing statements.

Nonetheless, the Chamber restricted victims participation on the grounds of anonymity. As a result of security and protective measures, victims a/001/06, a/0002/06 and a/003/06 participated anonymously. Given their anonymous participation, the Chamber ruled that they would not question witnesses and add any points or facts of evidence.

²⁷²Prosecution v Lubanga, Decision on the Arrangement for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, Pre-Trial Chamber 1, Case No. ICC-01/04-01/06, 22 September 2006.

²⁷³ Prosecutor v Katanga and Ngudjolo, Decision on the Set of Procedural Rights attached to Procedural Status at the Pre-Trial Stage of the Case, Pre-Trial Chamber 1, 13 May 2008, ICC-01/04-01/07-474.

²⁷⁴ The Situation in the DRC, Prosecutor V Germain Katanga and Ngudjolo Chui, Confirmation of Charges.

To protect the rights of the accused, the Chamber moderated the degree of participation given the parties' inability to verify their identities.²⁷⁵ A check towards the plausible prevention against the falsification of evidence from sources that cannot be verified. This restriction filters potential discrepancies, which might arise due to unidentified victims in the trial process.

The TC held that 'victims' are individuals who have suffered harm from any crime that falls within the Court's jurisdiction. With this definition, 'any crime' grants a non-restrictive approach regardless of the charging document count.²⁷⁶ This ruling includes victims of crimes which were not committed by the suspect or accused on trial. Besides, the Majority ruled that victim participants could lead evidence. Surprisingly, Judge Blattman in her minority(dissenting) opinion opined that victims' broad definition relays an 'imprecise definition of victims.' Therefore, it is believed to endanger the rights of the accused.²⁷⁷ This interpretation ensures that the accused is held responsible for crimes he allegedly committed in contrast to 'any crime within the Court's jurisdiction.' The 'any crime' tag may be very vague, rather than being specific. A possible explanation is that a vague description of the crimes could potentially result in challenges that may arise from the inability to find nexus between the victims, crimes committed and the accused. 'Any crime within the Court's' jurisdiction' will be broad,

²⁷⁵ Ibid.

²⁷⁶ Prosecutor v Lubanga, Trial Chamber I's Decision on Victims' Participation of 18 January 2008

²⁷⁷ Ibid, Dissenting Opinion of Judge Rene Blattman.

especially where the accused on trial is not responsible for the alleged crime committed.

This will create a gap, and it may also threaten the fair trial rights of the accused.

On appeal brought by the Defence against the decision, the Appeal Chamber overruled the TC's conclusion and found that for victim participation, 'victims' are persons who have suffered harm either directly or indirectly from the counts in the charging document.²⁷⁸ It affirmed that victims could lead evidence. According to Article 69(3), the AC found that victims have the right to adduce evidence on the Chamber's request, whenever it considers it necessary for the determination of the truth.²⁷⁹ The AC's decision restricts qualified victims to individuals who have suffered harm as a result of crimes listed in the charges.

With Judge Pikis and Judge Kirsch dissenting, Judge Kirsch opined that victims could not lead evidence before the Court because they are not obligated to make a disclosure.²⁸⁰ This is based on the fact that they are not full parties to the trial. Judge Pikis observed that the Statute exclusively permits the parties the Prosecutor and

²⁷⁸ Prosecutor v Lubanga, Judgment on the Appeals of the Prosecutor and Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January, Appeal Chamber, Case No. ICC-01/04-01/06 11 July 2008, Appeal Chamber Decision

²⁷⁹ Ibid.

²⁸⁰ Prosecutor v Lubanga, Judgment on the Appeals of the Prosecutor and Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Partly Dissenting Opinion of Judge Phillipe Kirsche, Appeal Chamber Case No. ICC-01/04-01/06, 23 July 2008, 14-16.

Defence to challenge the charges. As such, the victim-participants were not allowed to contend the charges.²⁸¹

Turning now to the context within which modalities of participation is permissible, the PTC determined that by rule 85, it is expedient to grant victims procedural status to applicants who qualify under the RPE, a status outside judicial proceedings.²⁸² The single judge referred to the earlier decision of the PTC on 17 January 2006.²⁸³ This decision stated the need to accord victim procedural status at the investigative stage because victims' personal interests are affected in general during this phase. It is noted that victims' participation at this stage may lead to clarification of facts to punish the perpetrators of crimes and seek reparations.²⁸⁴ Also, the PTC pointed out the fact that victims 'presentation of views and concerns to the 'ongoing investigation' is required because it is "at this stage that the persons allegedly responsible for the crimes from which they suffered must be identified as the first step towards their indictment[...]"²⁸⁵ The PTC ruled that victim participants would be permitted to participate in proceedings by presenting their views and concerns and, to file documents

²⁸¹ ²⁸¹ Prosecutor v Lubanga, Judgment on the Appeals of the Prosecutor and Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, Appeals Decision, ICC-01/0401/06, Dissenting Opinion of Judge Pikis.

²⁸² Situation in the Democratic Republic of Congo, "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" of 7 December 2007, Pre-trial Chamber, ICC-01/04-417.

²⁸³ Democratic Republic of Congo, "Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" 17 January 2006, ICC-01/04-101-Ten-Corr

²⁸⁴ Ibid.

²⁸⁵ Ibid.

concerning the ongoing investigation of the situation, provided their personal interests are affected.²⁸⁶ According to the PTC, the stage of investigation into a situation is deemed appropriate for the proceedings.

On appeal, the Appeals Chamber reversed the PTC's decision and held that "participation can only occur within the context of judicial proceedings".²⁸⁷ As such investigation was not considered judicial proceedings as it is a phase where the prosecutor examines the commission of crimes.²⁸⁸ Furthermore, the AC determined that the PTC exceeded its power because it cannot grant victims the procedural status, which entailed a general right to participate in the investigation.²⁸⁹ The AC states:

[...]authority for the conduct of investigations vests in the Prosecutor. Acknowledgement by the Pre-Trial Chamber of a right to victims to participate in the investigation would necessarily contravene the Statute by reading into it a power outside its ambit and remit." ²⁹⁰

²⁸⁶ Ibid.

²⁸⁷ Situation in the Democratic Republic of Congo, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of the Pre-Trial Chamber 1 of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of the Pre-Trial Chamber 1 of 24 December 2007, Appeals Chamber, 19 December 2008, ICC-01/04-556, p.6, para.7.

²⁸⁸ Ibid.

²⁸⁹ Ibid, p.25, paras 57,58 and 59.

²⁹⁰ Ibid,p.22, para.52.

Proceedings have been defined in Situation in the Democratic Republic of the Congo.²⁹¹ Before the Chamber, the main issue was to decide if ‘situation’ qualifies as ‘proceedings.’ Six persons applied to participate in the investigation of ‘situation’ in the DRC. The main issue for determination was whether an investigation of a situation falls under ‘proceedings’ as stated in article 68(3). The Prosecutor argued that investigation of a situation does not fall under ‘proceedings, because article 127(Part 13-final clauses) distinguishes the terms ‘investigation’ and proceedings’.²⁹² The PTC rejected the Prosecutor’s argument. The PTC reasoned that many human rights court decisions have recognised and interpreted their conventions to grant victims participatory rights during the investigation stage of alleged human rights abuses.²⁹³ The Chamber further stated that according to the teleological point of view, victims participation during the investigation is ‘consistent with the object and purpose of the victims’ participation regime established by the drafters of the Statute’.²⁹⁴ As such, article 68(3) encompasses investigation proceedings, which means that the said victims can exercise their procedural rights pursuant to Article 68(3) of the Statute by :

- presenting their views and concerns;
- File documents
- Requesting the Pre-Trial Chamber to order specific measures.²⁹⁵

²⁹¹ Situation in the Democratic Republic of Congo, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber 1, 17 January 2006.

²⁹² Ibid, p.8, para.29.

²⁹³ Ibid, para.52-53.

²⁹⁴ Ibid,

²⁹⁵ ICC-01/04-101-tEN-Corr, Pre-Trial Chamber 1,

This ruling's significance reflects an inclusive platform for victims to get involved in both investigations and trials. Therefore, as enunciated in article 68(3), proceedings encompass both the investigation and criminal trial stages. Also, as mentioned previously, applicants must pass the personal interests test. For instance, the TC's decision on 18 January reveals a seemingly ambiguous interpretation of victim participation regime.²⁹⁶ The TC held that the assessment of victim participation in proceedings should be regulated by personal interests test, provided in article 68(3). Rule 85 and Article 68(3) are interdependent. Hence, they should be interpreted conjunctively. This decision gives a broad interpretation of victims' participation as it does not make restrictions based on the connection between the harm suffered by the victims and the crime contained in the charges. In his opinion, Judge Blattman dissented from the Majority decision, 'the over-inclusive and imprecise definition of victims' would threaten or endanger the accused's rights.'²⁹⁷

Surprisingly this decision was set aside in the appeal brought by the defence.²⁹⁸ The AC found that application of victim participation should be limited to victims of the situation or a case. Rather than victims of any crime within the jurisdiction of the Court. The AC confirmed TC's decision to allow victim participants to submit evidence and

²⁹⁶ The Prosecutor v. Thomas Lubanga Dyilo, The Oral Decision of Trial Chamber 1 on 18 January 2008 Trial 1, ICC-01/04-01/06.18 January 2008.

²⁹⁷ Separate and Dissenting opinion of Judge Rene Blattman, ICC-01/04-01/06-119, 18 January 2008.

²⁹⁸ Prosecutor v 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, 11 July 2009,

question witnesses.²⁹⁹ Judge Pikis, concurring with Judge Kirsch, stated that the Prosecutor and the accused as full parties to the case are the only parties with the rights to dispute the charges' content.³⁰⁰ In his words:

“[i]n an adversarial hearing the two sides are cast in the position of adversaries, in connection with the determination of the only issue raised before the Chamber, the guilt or innocence of the accused. The adversary of the accused is the Prosecutor and none other. The defendant cannot have more than one accuser. It is not for the accused to prove his innocence. He is presumed to be innocent. The ultimate question is whether the Prosecution proved its case beyond reasonable doubt.”³⁰¹

Judge Pikis' opinion draws our attention to the nature of adversarial proceedings and its requirements. The emphasis on disrupting the equality of arms if victims were permitted to tender evidence in the determination of truth explains that an extended role for victims could prejudice the accused's rights as he is supposedly against two accusers.

Stahn and Olasolo opine that victims role commences before the case phase.³⁰² Nevertheless, some interpretation of the provisions could compound the role of victims

²⁹⁹ Ibid.

³⁰⁰ Dissenting Opinion of Judge Pikis, Appeals Chamber Decision, 11 July 2008.

³⁰¹ Ibid, para.14.

³⁰² Carsten Stahn and Hector Olasolo, 'Participation of Victims in Pre-Trial Proceedings' (2006) 4 *Journal of Criminal Justice*, 219-238.

during the pre-trial phase.³⁰³ These ambiguities make the determination of the scope of victim participation challenging for this phase.³⁰⁴ The inconsistencies in the chambers' rules reiterate the unsettled position of victims' role before and during the investigations. It is recommended that victims should be granted participatory rights during investigations and pre-trial because this phase affects victims' interests.

In the initial years, the victim participation regime has been described as 'unworkable' for the victims because judicial decisions were made based on concession rather than rights enshrined in the Rome Statute.³⁰⁵ Chung argued that this approach ignores the compromises made at the Rome negotiations-an approach, which defeat the mandate of prosecuting the perpetrators of grave crimes.³⁰⁶ In the interpretation of victims participation, we should always keep in mind the ICC mandate.

Perhaps the judges struggle with ascertaining the limits of the regime. Consequently, some judges may exceed the judicial role in a bid to exude the intention of the Statute and Regulations. Differing interpretations might connote judicial orientations or judicial activism. Thus, inconsistent rulings and decisions from the chambers mirror varying comprehension of the victim participation regime.

³⁰³ Ibid

³⁰⁴ Ibid

³⁰⁵ Christine Chung, Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise? 2008 6(3) *Northwestern Journal of International Human Rights*, 459-454, p461

³⁰⁶ Ibid.

That said, victims' procedural status emerges a set of procedural rights that ensure victims can participate and put forward their interests. These procedural rights encompass the pathway which enables them to fight for substantive claims. The participation comes in different forms, which is also called modalities of participation. It falls within the volition of the Chamber to determine. The subsequent section will discuss the findings.

2.8 Discussing findings

This chapter set out to assess the impact of prosecutorial discretion on victims' rights and interests. As mentioned in the literature review, broad prosecutorial discretion may preclude victims' right to remedy.³⁰⁷ The exercise of broad prosecutorial discretion starts from the preliminary and investigation phase to prosecution. Therefore, the effects of prosecutorial discretion transcend these phases to the trial. The prosecutor has the discretion to select a situation for investigations and also select potential cases from situations. The impact of prosecutorial discretion is shown in alleged crimes the prosecutor chose to investigate and the charges contained in the charging document. For the Lubanga case, the Prosecutor restricted the charges to the conscription and enlistment of children under 15 years and used them to participate actively in hostilities.

³⁰⁷ Cecile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap (2012) 10(5) *Journal of International Criminal Justice*, 1357-1375.

While it is found that the PTC can check the decision of the prosecutor not to prosecute, the check is mainly in terms of judicial review. The Prosecutor is empowered to frame charges which will be subject to confirmation by the PTC. It is within the exclusive power of the prosecutor to draft charges. Nevertheless, contention arises as to the power of the Prosecutor concerning the modification and amendment of charges. Surprisingly, the Katanga and Lubanga cases delivered divergent rulings on the prosecutor's powers regarding the revision or amendment of charges. The different outcomes in the legal characterisation of facts for both cases reveal some judges' activism in granting victims a more expansive role by challenging the status quo. The court decisions contribute towards the development of jurisprudence at the ICC.

Article 15 demonstrates the victims' power to 'make representations' in response to the Prosecutions' decision to suspend investigations or not to prosecute. Arguably, it is reasoned that Article 15(3) entrenches a form of a participation-a restrictive approach to participation. It could be that an indiscreet approach to participation could jeopardise the investigations at this phase. Nevertheless, victim involvement is required based on their interests, in the investigation and initiation of prosecution. Such participation is streamlined restrictively by the Rome Statute. In a similar vein, the Prosecutor's exercise of power may restrict victims' inclusion and active involvement in the early stage. Perhaps, a more encompassing approach to participation could be made by the judges via interpretation or decision-making.

Some of the activities by the Prosecutor undeniably filters victims and separates them into qualified and not qualified. This finding supports the previous study of Aptel,

which links the exercise of prosecutorial discretion with victims' access to remedy.³⁰⁸ Notably, the Lubanga case found that victims harm must be charge-based.³⁰⁹ This decision creates a connection between victims and the charges.

It is somewhat surprising that some of the prosecutor's interests overlap with some victims' interests. However, while there are observed differences between the prosecutor's interests and victims' interests, these differences reiterate the independence of victims' role from the prosecutor's role.³¹⁰ Nevertheless, these overlapping roles include presenting evidence to determine the truth—the Determination of the accused's guilt or innocence and questioning witnesses.³¹¹ Regarding victims, their roles in the criminal proceedings are determined by their personal interests.³¹² Prosecutorial functions also reflect their interests.

The investigation and pre-trial phase demonstrate that victims are concerned with obtaining recognition to exert influence because the identity of the perpetrator(s) remains unknown, and their interests lie in investigations. The situation contrasts with

³⁰⁸ Cecile Aptel, "Prosecutorial Discretion at the ICC and Victims' Right to Remedy(2012) 10(5) *Journal of International Criminal Justice*,1357-1375

³⁰⁹ Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Trial Chamber 1, ICC-01/04-01/-6-1432, 11 July 2008, pars.53-65

³¹⁰ The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Modalities of victim participation at Trial, ICC-01/04-01/07-1788-tENG, 22January 2010,p.16,paras 36 and 37; Prosecutor v.Lubanga, Appeal Chambers, ICC-01/04-01/06-568, 13 October, 2006, para.52

³¹¹ Ibid.

³¹² Rome Statute 1998, article 68(3); Lubanga, Decision of the Appeal 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,ICC-01/04-01/06-925 13-06-2007 CB PT OA8,para.45.

³¹² Ibid ,para 28.

what is applicable in some domestic jurisdictions where the victim triggers the investigation.

2.9.Conclusion.

The first question in this thesis was to identify prosecutorial discretion's impact on victims' rights and interests. In addressing the first research question, the transcripts were analysed for findings.

The charges, which is a Prosecutor's product, can shape the truth, whether partial or whole truth. The content of the charging document can potentially restrict victims' interests or access to justice. This may inadvertently influence the categories of victims or the number of victims linked to the charges.

The inconsistent ruling on the extent of participation demonstrates some of the judges attempt to accede to victims' request. The different outcomes in the legal characterisation of facts for both cases reveal some judges' activism in granting victims a more expansive role by challenging the status quo. The court decisions contribute towards the development of jurisprudence at the ICC.

The broad prosecutorial discretion is probably a consequence of the delegates' compromise at the Rome negotiations.³¹³ However, the PTC has the power to check

³¹³ Silvia Fernanadez de Gurmendi, 'The Role of the Prosecutor ' In Roy Lee(ed), *The International Criminal Court:The Making of the Rome Statute-Issues, Negotiations and Results* (Kluwer Law International,1994).175; Draft Statute for the International Criminal Court, arts 21,23. <https://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/7_4_1994.pdf. ; > Williams Pace and Mark Thieroff, "Participation of Non-Governmental Organisations" Roy Lee(ed), *The International Criminal Court:The Making of the Rome Statute :The Issues , Negotiations, Results* (Kluwer Law 1999)392-393.

prosecutorial discretion not to prosecute. This chapter has shown that the PTC, to some extent, can scrutinise the decision of the Prosecutor not to initiate investigations. Still, it appears the Prosecutor has the upper hand although, the outcome of the Rome negotiations granted the Prosecutor wide-ranging powers, regardless, this discretionary powers is subject to checks and balances by the PTC. It seems the PTC's use of the checks and balances cannot entirely curtail the prosecutor's power in this regard.

It has been shown that victims are interested in recognition at this early phase because their status is not settled nor acknowledged given investigation. When the Prosecutor determines the scope of the trial via filtering of cases from situations and framing of charges, the exercise of these roles may intentionally or inadvertently affect victims' access to justice. While some victims may obtain justice through criminal prosecution, some victims may fall into the investigation phase's impunity gap. Consequently, the exercise of the prosecutor's discretion may preclude them from progressing at this phase.

As the court's 'gatekeeper', the Prosecutor represents the international community's interests while their personal interests propel the victims.³¹⁴ While they both perform distinct roles, there are times in which their functions overlap. This overlap is not unconnected to the position of victims during the proceedings. Victims' interest intersects with the prosecutor's interests, especially in the determination of truth and justice. At this phase, the court must strike a balance between these interests

³¹⁴ Ibid

It has been established that the Prosecutor has sweeping discretionary powers which are not well regulated provided he acts within his mandate. These unlimited powers encompass about temporal, jurisdictional, material and personal competence.³¹⁵ Aptel asserts that in selecting situations and cases, the Prosecutor does not consider credible evidence; instead, he evaluates the gravity and interests of justice.³¹⁶ This further enhances the powers of the Prosecutor because these concepts are not well defined in the Statute.³¹⁷ Most times, the challenges of obtaining sufficient evidence is the basis for acquittal. The OTP must enhance his strategy on investigation and evidence gathering.

These taken together suggest that the charging document significantly influences victims' rights and interests due to the prosecutor's vast discretionary powers. Some times, the charging document may contain partial truth. While the decision is within the judges' power, as illustrated in the Lubanga case, they cannot exceed the charges' content.³¹⁸ Unfortunately, the ICC is also restricted in criminal prosecution as it cannot try all the perpetrators because it will slow down the Court's efficiency.

³¹⁵Cecile Aptel, "Prosecutorial Discretion at the ICC and Victims' Right to Remedy(2012) 10(5) *Journal of International Criminal Justice*,p.1358

³¹⁶ Ibid

³¹⁷ Rome Statute 1998, Article 14 and 15;Office of the Prosecutor, *Prosecutorial Strategy*, 2009-2012, 1 February 2010.22

³¹⁸ The Rome Statute 1998, Article 74.

So far, this chapter has discussed the influence of prosecutorial discretion on victims' rights and interests. The next chapter will critically analyse the victims' rights and interests during the trial process.

3.0 Chapter 3-Trial Process

“[I]f a judgment is grossly unjust, it is because the victim has not been afforded fair treatment.”¹

“Fairness of international criminal trial legitimises the Court as opposed to the authority that creates them”²

3.1 Introduction.

The trial process is a fundamental phase of criminal prosecution. It is a platform where the prosecutor, defence and victims persuade the judges for the primary purpose of obtaining a favourable outcome. This phase is mainly structured with rules and procedures. This chapter shall discuss procedural fairness to create a better understanding of this topic. There has been an increased recognition that more attention needs to be focused on procedural fairness in criminal trials. Stahn states that: *‘fairness are too precious to be traded off against vengeance and effective sanction’*.³ One cannot relegate the significance of criminal procedures at the ICC because recent research findings suggest that participants in the criminal justice process rate the

¹ Jan Paulsson, *Denial of Justice in International Law*(Cambridge University Press 2005)

² David Luban, ‘Fairness to Rightness:Jurisdiction, Legality, and the legitimacy of international criminal law’ in Samantha Besson & John Taioulas (eds.), *The Philosophy of International Law* (Oxford University Press 2010)

³ Carsten Stahn, ‘Between faith and facts:By what standards should we assess International Criminal Justice?’ (2012) 25 *Leiden Journal of International Law*, 251,267.

procedure more than the outcome.⁴ Several researchers have reported on the necessity of procedural fairness.

Traditionally, when procedural fairness comes up, it is not unconnected to the position of the accused during the criminal process. For instance, there are a plethora of provisions on the fair trial rights of the accused.⁵ Given that the ICC is a criminal court, and by virtue article 66(1) and (2), the accused's rights take priority over other issues at the proceedings. One question that comes to mind is the impact of procedural fairness on victims during criminal trials. Participation as an essential aspect of procedural fairness cannot be sidelined. For this purpose, it has become necessary to address the fairness of procedure for victims. It is worthy of mentioning that the ICC statute grants victims some procedural rights. These rights might ensure a balance between the rights of the victims against the rights of the accused. One reasonable implication of this is that, in practice, it could become a challenge to implement this balance, as it may sabotage the existing rights of the accused. Suppose rights are given to victims to amend the power disparity between the accused and the victims. In that case, the 'balance approach' may defy rational reasoning, even though the argument appears self-evident, it does not provide a satisfying perspective on the approach.⁶ Ashworth describes it as: "balance is a rhetorical device of which one must be wary"⁷ Ashworth suggests that more attention should be given to victims' values and interests.⁸ Therefore, one could

⁴Laura Klamming and Ivo Giesen, Access to Justice :Quality of the Procedure , Working Paper No.002/2008,2008.

⁵ Universal Declaration of Human Rights 1948, Article 10;International Covenant on Civil and Political Rights 1966, Article 14;Rome Statute 1998, Article 66, 67.

⁶Andrew Ashworth,*The Criminal Process:An Evaluative Study* (2nd edn, Oxford University Press,1998)20

⁷ Ibid.

⁸ Ibid..

infer that to maximise victims' satisfaction, their values and interests should be prioritised over the clamour for balancing victims' rights against the accused. It is worthy of mention that Ashworth's assertion does not downplay victims' role in the criminal trial; Rather, it proposes a more substantive address to victims' satisfaction. It appears that the rationale behind advancing for victims' rights is to create a competition between the victims and accused. Edwards describes it as "as simplifying the issues and allowing complex controversies to be situated within a zero-sum game"⁹ The Balance approach gives a narrow narrative of the victim involvement.

Doak's arguments confirm Ashworth's findings. Doak thinks that victims' rights should be seen as entitlements rather than an avenue to compete with the accused rights.¹⁰ Therefore, if the focus is on victims' interests, victims' rights are seen as instruments to promote their interests.

In a way, it seems the pendulum of procedural fairness favours the accused more than the victims.¹¹ Where the procedure is fair, it may increase satisfaction for every party. However, given the accused's primacy right to a fair trial, sometimes, there may be a

⁹ Ian Edwards, "An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making" (2004) 44(6) *The British Journal of Criminology*, 967-982

¹⁰ Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing 2008) 26, 27 and 28.

¹¹ Christine Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?' (2008) 6(3) *Northwestern Journal of International Human Rights* p459, 506.

clash between competing interests of Prosecutor and Defendant, defendant and victims or victims and Prosecutor.

The chapter seeks to review Katanga and Lubanga's transcripts to assess the application of victims' rights and the extent to which victims' interests are taken into consideration during trial proceedings. Interestingly, it appears that the Court envisages fairness for victims. The PTC in its decision elucidates on fairness:

“[I]n the view of the Chamber, the fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes (in systems which provided for in criminal proceedings)”¹²

However, this is not within a different context. The relationship exists between the Prosecutor, defendant and the victims. In chapter three, the thesis intends to analyse the extent to which victims' rights and interests are taken into consideration during trial proceedings. It shall assess this by using Edwards' theory of participation-the dispositive and non-dispositive category.

Therefore, Chapter three begins with a brief overview of the context of procedural fairness. The second section explores the significance of victims' voice and respect. The third part reviews Ian Edwards' theory of participation. At the same time, the next

¹² Situation in the Democratic Republic of Congo, Decision on the Prosecutor's Application for Leave to Appeal the Chamber ' Decision of 17 January 2006 on the Application in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-135-Teng, 31 March 2006, para.38.

section assesses the modalities for participation. The following section evaluates victims' procedural rights. Afterwards, the next section addresses the modalities of participation through Edwards' non-dispositive category. In this part, the non-dispositive theory subdivisions shall be used to examine the applicability of victims' rights and interests. The remaining part of the section presents this chapter's findings, while the last section concludes the chapter.

So far, this section has focused on the introduction and the structured parts of the chapter. It is now necessary to briefly explain the criminal procedure of the ICC.

3.2 The criminal system of procedure and the ICC

In order to examine the extent of applicability of victims' rights, it is imperative to consider the criminal system of procedure in place at the ICC. It is this context which dictates the position of victims in criminal proceedings. Over the years, the place of the procedural system within the international justice system has been unsettled.¹³ Instead, more attention has been given to "jurisdiction" and "substantive law."¹⁴ Plausibly, the procedural system connects the court's function, the parties, victims and outcome of the criminal proceedings; with its connecting lines. The procedure dictates the role of victims, the parties and the judges. Victims' involvement is restricted in the adversarial

¹³ Gregory Gordon, "Toward an International Criminal Procedure" (2007) 45 *Columbia Journal of Transnational Law*, p635,637

¹⁴ Carsten Stahn, "International Criminal Justice Procedures" in Carsten Stahn (ed), *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 269-380

system of procedure, while victims play active roles in the inquisitorial system. Some countries with civil law traditions allow victims to prosecute perpetrators independently.¹⁵ Similar instances are exemplified in some common law jurisdictions where the victims' legal representative may participate in sexual history evidence issues.¹⁶ Although, the role of the LRV is a restrictive one in this instance. Additionally, in some circumstances, victims may participate in the criminal proceedings as 'private prosecutor.'¹⁷ In England and Wales, private prosecutions have been referred to as "historical right" that was "rarely exercised".¹⁸ However, factors like the financial implications of hiring a private investigator, Legal Representative, and obtaining consent from the Director of Public Prosecutor restricts victims access to act as a private prosecutor.¹⁹ Victims cannot initiate private prosecution without the Director of Public Prosecutions' consent. He commenced such criminal prosecution, the progression of the case's progression will be declared null and set aside.

Similarly, in the context of the United States jurisprudence, it is found that some State courts permit victims to act as prosecutor.²⁰ The right of victims to employ private

¹⁵ John Spencer, 'Adversarial v inquisitorial systems: is there still such a difference(2016) 20(5) *International Journal of Human Rights*,601-616

¹⁶ Sex Offenders Act 2001, s.34;The Criminal Law (Rape)Act 1981

¹⁷ Prosecution of Offences Act 1985, Section 6(1);Gouriet v Union of Post Office Workers [1978] ,UKHL 5,[1977] 3 ALL ER 70

¹⁸ Lord Wilberforce , Gouriet v Union of Post Office Workers, [1978] AC 435,UKHL 5,[1977] 3 ALL ER 70

¹⁹ Ibid.

²⁰ Salvador Guerro Palomarres, "Common and Civil Law Traditions on Victim Participation at the ICC", (2014)4(2)*International Journal of Procedural Law*,217-235,231;Brianne McGonigle Leyh, *Procedural Justice ?Victim Participation in International Criminal Proceedings* (Antwerp 2011).66

prosecutor to assist the public prosecutor depends on the judge's discretion.²¹ Victims are permitted to prosecute minor offences-simple assault and battery.²² These cases demonstrate the progression of victim participation in common law jurisdictions. It should be noted that the projection of victim participation is higher in civil law jurisdictions than common law jurisdictions. It seems victims interests thrive largely within the context of civil law traditions, while the recognition of victims interests is a gradual process in common law tradition.

In common law jurisdictions, the criminal procedure pitches prosecution and defence against each other in the presentations of their cases to the judge.²³ As such, they are referred to as '*adversaries*'²⁴ Both parties compete to convince the judge that their version of facts is the most convincing. The judge acts as an impartial umpire. The judge or decision-maker is very passive. The role of victims in this system is restricted to giving testimonies as witnesses.²⁵ They do not have a party or quasi-party status.²⁶ Their roles are passive because the adversarial system of procedure focuses on the defence and prosecution; victims' involvement is limited.

²¹ Ibid; State of West Virginia v. Calvin Atkins, 261 S.E.2d 55 (1979), Supreme Court of Appeals of West Virginia.

²² Ibid; State of New Jersey v William Kinder, 701 F.Supp.486 (D.N.J.) December 15, 1988

²³ Mike McConville and Geoffrey Wilson, *The Handbook of the Criminal Justice Process* (Oxford University Press 2002); Jacqueline Hodgson, 'The Police, the Prosecutor and the judge d'instruction: Judicial Supervision in France ,Theory and Practice' (2001) 41(2) *British Journal of Criminology* 342-361

²⁴ Andrew Ashworth and Mike Redmayne *The Criminal Process* (Oxford University Press 2005)

²⁵ Jonathan Doak, 'Victims' Rights in Criminal Trials :Prospects for Participation' (2005) 32(2) *Journal of Law and Society* ,1-26.

²⁶ Ibid.

In most civil law jurisdictions, an investigating judge actively controls the trial and directs witnesses.²⁷ The victim plays a central role; he may initiate proceedings or seek compensation. This system refers to them as a “partie civile”(civil petitioner). The victim has the right to join civil claims with criminal prosecutions. Also, he can exercise his rights to challenge evidence.

Similarly, some jurisdictions allow victims to act as auxiliary prosecutors.²⁸ This comparison explains the position of victims within these jurisdictions. The Rome Statute, being a product of compromise between civil and common law jurisdictions, gives the role of the victim as a third party to the proceedings. The victim is not a full party, as opposed to the defence and the prosecutor with competing interests.

Ambos identifies the shift from a purely adversarial procedure to a truly mixed procedure in the international criminal procedure.²⁹ This came into existence by merging common and civil law procedures into one international procedure. He contends that it is less significant if a rule is ‘adversarial’ or ‘inquisitorial’, but opines that what matters is if the rule facilitates the tribunals in accomplishing their tasks.³⁰

²⁷ Jacqueline Hodgson, ‘The Police , the Prosecutor and the juge d’instruction:Judicial Supervision in France ,Theory and Practice’ (2001) 41(2)*British Journal of Criminology*,342-361

²⁸Brianne McGonigle Leyh, Victim Oriented Measures at International Criminal Institutions :Participation and its Pitfalls (2012) 12 *International Criminal Law Review*,375-435

²⁹ Kai Ambos, ‘International Criminal Procedure: adversarial, inquisitorial or mixed?’(3(1) *International Criminal Law*(2003)

³⁰ Ibid

Moreover, more attention should be placed on if these rules conform to fundamental fair standards. In contrast, Wemmers submit that to understand how courts treat victims; we need to look at the criminal procedure in place-‘adversarial’ or ‘inquisitorial’.³¹ While Ambos’ proposition tends to relegate the place of criminal procedure in international criminal justice, his proposition is flawed. In practice, settings of the ICC criminal proceedings reflect otherwise. Victims do not have full procedural rights because they are not parties in the proceedings. Their procedural rights are restricted; these restrictions reflect the elements of the adversarial system of procedure.

Many a time, the adversarial procedure applies during the trial.³² Nevertheless, It seems the PTC is more inquisitorial than the TC, especially concerning the confirmation of charges. It is observed that the Pre-Trial Chamber plays an active role in the initial proceedings. It is actively involved in truth-seeking-a feature of the inquisitorial system of procedure.³³ The PTC is responsible for the confirmation of charges hearing.³⁴ It also supervises the Prosecutor’s submission of charging document and evidence disclosure required at the hearing.³⁵ It appears the process for evidence disclosure aligns with the inquisitorial system. A perfect illustration is seen in the Lubanga case, which

³¹ Jo-Anne Wemmers, Ibid ; John Spencer, ‘Adversarial v.inquisitorial systems: is there still such a difference(2016) 20(5) *International Journal of Human Rights*,601-616.

³² Guido Aquaviva, Nancy Combs, Mikaela Heikkila, Suzannah Linton, Sergey Vailiev “Trial Process” in Goran Sluiter et al.,*International Criminal Procedure:Rules and Principles*” (Oxford University Press 2013)638-645

³³ Rome Statute 1998, Article 61.

³⁴ Rome Statute, Article 61(3).

³⁵ Rome Statute , Article 61;ICC RPE Rule 121(1)(2)(3);Article 60(3).

empowers the PTC to analyse the evidence³⁶-an investigative power. Scheffer notes that the disclosure system has transformed the judge into an active one with investigative powers control over the parties and evidence as opposed to a passive judge and involved parties.³⁷

At this phase, what is required is to provide sufficient evidence to establish substantial grounds to believe that the suspect committed the crimes.³⁸ The adversarial criminal procedure is cautious about granting victims extensive role and rights in the proceedings.³⁹ In sharp contrast, the inquisitorial criminal procedure, with its roots civil law traditions, grants extensive rights and victims roles. However, within the ICC context, victims' rights are restricted because the trial process is primarily adversarial. The parties have the full rights to participation as well as control over the presentation of evidence.⁴⁰ Although, one may infer that the ICC's criminal procedure is mixed, arguably, It appears that the ICC is mainly adversarial than inquisitorial because of the

³⁶ Situation in the Democratic Republic of Congo, Prosecutor v Thomas Lubang Dyilo, Decision on the final system of disclosure and the establishment of a timetable, Pre-Trial Chamber 1, ICC-01/04-01/06-102.

³⁷ David Scheffer, "A review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence" (2009) 21 *Leiden Journal of International Law* ; Maximo Langer, "The Rise of Managerial Judging in International Criminal Law" (2005) 53 *American Journal of Comparative Law* , 835.

³⁸ Situation in Prosecutor v Thomas Lubanga, Decision on the Final System of Disclosure and the Establishment of A Timetable, Pre-Trial Chamber 1, ICC-01/04-01/06-102, 16 May 2006

³⁹ John Spencer, 'Adversarial v. inquisitorial systems: is there still such a difference' (2016) 20(5) *International Journal of Human Rights*, 601-616.

⁴⁰ Carsten Stahn, "International Criminal Justice Procedure" in Carsten Stahn (ed) *A Critical Introduction to International Criminal Law* (Cambridge University Press 2018) 269-380.

limitations on the exercise of victims' rights. As was mentioned in the introduction, the victims are third parties in the proceedings.

In addition, article 21 of the Rome Statute provides a human rights approach to applying and interpreting the Rome Statute. Article 21 sets international human right as a threshold. According to this provision, the applicable law should be consistent with the standard of internationally recognised human rights. By implication, Article 21 supports the applicability of victims rights at the ICC. However, there is a limit to which Rule 21 is applicable given that the ICC is not a human rights court; instead, it is a criminal court with the mandate to prosecute the perpetrators of gross violation of human rights.

Interestingly, in the course of implementing this mandate, it contributes to protecting the human rights-a relationship between international human rights and the ICC. Victims' rights are a subset of human rights. Notably, the application of human rights within the context of the ICC procedures must be balanced against the court's mandate. Thus, it should not sabotage the court's mandate. For instance, in the Lubanga case, Lubanga appealed the Pre-Trial Chamber's decision⁴¹ to stay or stop the proceedings because he was grossly mistreated, which violated his human rights. He concluded that

⁴¹ Prosecutor v Lubanga, The decision of Pre-Trial Chamber 1 entitled "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute"

the pre-trial process was abused.⁴² Therefore, the Appeals Chamber had to consider the doctrine of abuse of process, its ambit and applicability in proceedings before the ICC.⁴³ Besides, the Appeal Chamber determined if Article 21(3) of the Rome Statute is relevant to the Court's assumption of jurisdiction in any given case.⁴⁴ In response to these issues, the Appeals Chamber affirmed that the doctrine of abuse of process ‘had *ab initio* a human rights dimension.’⁴⁵ It reasoned that abuse of process breached the rights of the litigant. The statute safeguards the accused rights, which are entrenched in articles 55 and 67. In the words of the Appeals Chamber:

“Human rights underpin the Statute; every aspect of it, including the exercise
Of the jurisdiction of the Court. Its provisions must be interpreted and
more importantly, applied in accordance with internationally recognised
human rights...”⁴⁶

The Appeals decision excerpts acknowledge the interpretation of article 21(3) in ICC procedural issues. It should also be noted that the judges referred to English law cases in ascertaining the implications of abuse of process in criminal proceedings. Both are considered applicable-international human rights and regional human rights.

⁴² Situation in the Democratic Republic of Congo, In the Case of The Prosecutor v Thomas Lubanga Dyilo, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, Appeals Chamber, ICC-01/04-01/06, 14 December 2006, para. 19.

⁴³ Ibid, para. 19(b).

⁴⁴ Ibid, para. 19.

⁴⁵ Ibid, para. 36.

⁴⁶ Ibid, para. 36; Articles 64(2), 67(1), 68(1) and (5) of the Rome Statute.

Furthermore, in deciding on victim participation, particularly on the definition of ‘victim’ and ‘harm,’ the Trial Chamber considered 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.⁴⁷ The chamber interpreted Principles 8, and 9 as the applicable law for determining a victim's status under Article 21(3) of the Rome Statute. In a similar vein, the Trial Chamber also alluded to the Convention on the Rights of the Child.⁴⁸ While the Basic Principles is soft law, the Convention of Rights of the Child 1989 is a binding treaty. Judge Blattman, dissenting opined that the Basic Principles was not appropriate as internationally recognised human rights because it is not legally binding; rather, its authority was only persuasive.⁴⁹ Judge Blattman conceded that the decisions of the Chamber must be compatible with internationally recognised human rights. However, the learned Judge argued that the Basic Principles were not fit for the consideration because the Rome Statute drafters rejected it during the Rome conference's preparatory stages.

On Appeal, the Appeal Chambers ruled that the ICC Chambers may rely on international documents which are not legally binding.⁵⁰ As such, the ICC may refer to

⁴⁷ Situation in the Democratic Republic of the Congo. The Prosecutor v Thomas Lubanga Dyilo Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008, Para 35.

⁴⁸ Ibid para.36.

⁴⁹ The Prosecutor v Lubanga, Separate and Dissenting Opinion of Judge Rene Blattman, ICC-01/04-01/06-1119, Trial Chamber I, para 4-5.

⁵⁰ The Prosecutor v Lubanga, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I' Decision on Victims Participation of 18 January 2008, Appeals Chamber, 11 July 2008, para.33.

these instruments. Therefore, the chamber could interpret through the use of international human rights treaties and national laws.

McGonigle posits that the ICC is unclear as to the extent to which it should apply a human rights approach in addressing the interpretation of human rights within the context of article 21(3).⁵¹In her words: The application of human rights “is largely driven by pragmatism rather than principle.”⁵²McGonigle cautions that the court's implementation of a human rights approach can subvert the founding principles of a fair and legitimate criminal proceeding.⁵³

It could mean the judges' effort to complement the application of article 21(3) overstretch its interpretation, thereby shifting the trial's focus from criminal prosecution to a more victim-centred approach. The human rights approach should encompass the rights of both accused and victims. It follows that the court ought to strike a balance between the application of a human rights approach between the accused and victims. If not done, the human rights approach's implementation might overshadow the mandate of the criminal court.

⁵¹ Brianne McGonigle Leyh, “ Pragmatism over Principles:The International Criminal Court and a Human Rights-Based Approach to Judicial Interpretation” (2018)41(3)*Fordham International Law Journal* , 696--736

⁵² Ibid.

⁵³ Ibid.

With the criminological theory's proliferation, victims' extensive role provides another approach to victims' position at the ICC; passive role to a more active role. Doak thinks that if victims are given procedural rights, these rights will entrench a sense of belonging within the criminal justice system.⁵⁴ Procedural rights will enhance their interests and access to justice; at the same time, procedural fairness could impact their experience at the ICC. The availability of these human rights to victims at the ICC makes the ICC a victim-oriented court.⁵⁵ These rights may be procedural-a means to an end-therefore, they are to some extent, restricted. They do not grant victims the right to determine the outcome of the proceedings.⁵⁶ However, they may influence such decisions.

In brief, it may be inferred that the ICC aligns itself with the recognition and enforcement of victims' rights. So far, this section has focused on the implications of the ICC criminal procedure on victims. It will be necessary to examine procedural fairness.

3.3The context of procedural fairness

In the field of law, the various definition of justice is found. The concept of 'justice' is a commonly-used notion in law, yet it is a concept difficult to define precisely.

⁵⁴ Jonathan Doak, 'Victims' Rights in Criminal Trials :Prospects for Participation'(2005) 32(2) *Journal of Law and Society* ,1-26.

⁵⁵ Luke Moffett, 'Elaborating Justice for victims of at the International Criminal Court:Beyond Rhetoric and the Hague (2015) 13(20 *Journal of International Criminal Justice* , 281-311.

⁵⁶ Luke Moffett, 'Elaborating Justice for victims at the International Criminal Court(2015) 13(2) *Journal of international Criminal Justice*,281-311.

Therefore, the definition of justice will depend upon the nature of the dispute or issues at hand. Additionally, justice is considered a very relative term for people.

Rawls considers '*justice as fairness*'. A terminology which posits that trustworthy principles of justice are reached in an initial situation that is fair.⁵⁷ For trustworthy principles of justice to emerge, there must be a fair enabling situation or status quo, i.e. principles of justice are situated within a fair institution. The initial state of things must be honest enough for these principles to thrive and emerge.⁵⁸ Applying this theory to the ICC implies the fairness of such an institution. ICC could be likened to the '*initial situation*' (status quo) in Rawls' analysis. The perception is that the institution must be founded on fairness, which underscores the significance of justice in an institution. An institution bereft of fairness cannot deliver what it does not have. In a way, this analysis emphasises an upright, just or trustworthy institution with integrity and legitimacy.

Having said that, Tyler, in his study, found that citizens base their judgement and experience on the fairness of the procedure during the proceedings.⁵⁹ How people and their problems are managed during dispute resolution by the courts has more influence on them than the outcome of such disputes.⁶⁰ It is believed that fairness of procedure

⁵⁷ John Rawls, "A Theory of Justice" (Cambridge, Massachusetts, Harvard University 1971)

⁵⁸ Ibid ; John Thibaut, Laurens Walker, Stephen LaTour, Pauline Houlden, Procedural Justice as Fairness (1974) 26 *Stanford Law Review*, 1271-1272. p. 1271.

⁵⁹ Tom Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law', (2003) 30(1) *Crime and Justice*, p283-357.

⁶⁰ John Thibaut and Lauren Walker, 'A Theory of Procedure :Psychological Analysis' (Hillsdale 1975)

entrenches legitimacy for the legal authorities.⁶¹ Their experience during the proceedings is a determinant if they would accept the outcome of such proceedings.⁶² Most times, victims prioritise the process than substantive justice. It is stated that victims' positive experience at the court, may shape their perceptions of the court. The four criteria for procedural fairness are respect, voice, neutrality and trust.⁶³ It follows that procedural justice influences whether people recognise, acknowledge and obey the courts' decisions. Therefore, the fairness of procedure becomes a yardstick in determining how people are treated in judicial proceedings. Procedural justice is needed to assess the interests of victims as well as their rights.

The next section shall discuss the significance of victims' voice and respect as essential aspects of procedural justice during the trial process.

3.3.1 The significance of victims' voice

Building on from the theory of procedural justice, this section addresses 'voice' as an important content of fairness of the procedure. When people are permitted to give an

⁶¹ Tom Tyler, 'Procedural Justice and Policing: A Rush to Judgment'(2017) 13(1)*Annual Review of Law and Social Science*, p.29-53; Tom Tyler, *Why Do People obey the Law* (Yale University Press 1990)

⁶² Ibid

⁶³ Tom Tyler, 'Procedural Justice and the Courts' (2007) 44*Court Review*,p.30

account of their stories.⁶⁴ The disclosure of their views and concerns recognises their position within the trial

Voice is a form of participation in the procedure which gives a sense of belonging to the victims. Depending on the degree to which their voice is heard, it may influence the decision or sentencing. For instance, research suggests that in common law jurisdictions, victim impact statement is considered by judges when making decisions about the sentencing of the accused.⁶⁵ One of the desires of parties in conflict resolution is the desire to be heard. Their voice could amplify their opinions, concerns and needs to the court. The role of the victim impact statements as the voice for victims shall be discussed in chapter four.

Haslam and Dembour posit that victim-witnesses were ‘*effectively silenced*’ during the Krstic proceedings at the ICTY.⁶⁶ A consequent of the demands of the legal process on

⁶⁴ Ibid

⁶⁵ Tracy Booth, “Victim Impact Statements, Sentencing and Contemporary Standards of Fairness in the Courtroom,” In Dean Wilson and Stuart Ross (eds) *Crime, Victims and Policy*, Palmgrave Studies in Victims and Victimology (Palgrave Macmillan, 2015) 161-183; Joint Agency Guide to the Victim Personal Statement: A guide for all criminal justice practitioners, accessible at https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/joint-agency-guide-victim-personal-statement_0.pdf last accessed 04 September 2020; Ray Paternoster and Jerome Deise “A Heavy Thumb on the Scale :The Effect of Victim Impact Evidence on Capital Decision Making(2011) 49(1) Criminology 129; Kerstin Braun, “Giving Victims a Voice : On the Problems of Introducing Victim Impact Statements in German Criminal Procedure(2013) 14(9) *German Law Journal* ,1889-1908; Luke Moffett, Victim Personal Statements in Managing Victims’ Voices in Sentencing in Northern Ireland: Taking a more Procedural Justice Approach (2017) 68(4) *Northern Ireland Legal Quarterly*, available at https://pureadmin.qub.ac.uk/ws/portalfiles/portal/137289940/Moffett_NILQ_Final_Special_Edition.pdf >last accessed 04 September 2020.

⁶⁶ Emily Haslam and Marie-Bénédicte Dembour, Silencing Hearings? Victim-Witnesses at war Crimes Trials (2004) 15(1) *European Journal of International Law*, 151-177.

the victim-witnesses.⁶⁷ As such, the ICTY could not meet these victim-witnesses' needs because they had to act primarily as witnesses, without giving them the platform to tell their stories. The victims' voices could not be heard during the trial process. The victims appeared as witnesses, not in their capacity as victims.

In the ICC, the LRVs are the voice of the victims. These LRVs make opening and closing statements, as well as observations. Due to practical constraints, LRVs make submissions and move motions on behalf of victims. In a study conducted by UC Berkeley, a majority of victims reported that they had a voice in the ICC during the pre-trial stage. These victims' answers were supported by the previous encounter they had with Court staff. It demonstrates that they knew the court, especially the awareness that the Court renders assistance for victims who have suffered harm.⁶⁸ Some victims opined that the submission of individual applications was an indication that their views were known at the court.⁶⁹ While this is commendable, it is noteworthy that applications' submission is not an automatic qualification for hearing their voices. It is at best described as recognition of their suffering, but, this is subject to conditions set out in Rule 85. It is important to enlighten the victims about this in order to prevent giving them unreasonable expectations. Additionally, the follow-up communications and feedback will keep them updated about the court's activities.

⁶⁷ Ibid

⁶⁸ Human Rights Center, UC Berkeley School of Law, 'The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court' (2015) available at [VP_report_2015_final_full2.pdf \(berkeley.edu\)](#) 1-86, 32.

⁶⁹ Ibid.

The section below describes ‘respect’ for victims as an important aspect of fairness. A discussion on respect for victims will further our understanding of the treatment of victims.

3.3.2 The significance of Respect

“participation” had been defined as “having a say, being listened to, or being treated with dignity and respect.”.⁷⁰

Respect is another important criteria for assessing how victims are being treated. The rationale behind respect emphasises that victims are essential and valuable in the system. It may also reinforce their inclusion within the rights and protection offered by the law.⁷¹ Respect for the victims is vital at all stages, from the police officers to the parties and the judges.⁷² It involves treating victims with politeness. For example, providing victims with updates and feedback about the court activities and their protection denotes that they are carried along. It is believed that respect may also encompass the dignity a human person; The dignity of a human person is the underlying factor of most human rights documents.⁷³ Therefore, as stated in the preamble, victims

⁷⁰ Ian Edwards, “An Ambiguous Participant: The Crime and Criminal Justice Decision – Making (2004) 44 *British Journal of Criminology*, 967,973; Jonathan Doak, “Victims’ Rights in Criminal Trials :Prospects for Participation (2005) 32 *Journal of Law and Society*,294,295.

⁷¹ Tom Tyler, ‘Procedural Justice and the Courts (1988) 44 *Court Review* 24.

⁷² Ibid.

⁷³ The United Nations Charter 1945; Universal Declaration of Human Rights 1948;preamble of the Convention on the Elimination of all Forms of Discrimination against Women(CEDAW);Preamble of the Convention on the Rights of the Child 1989; United Nations Declaration of Basic Principles for Victims of Crime and Abuse, 1985, Preamble

should be treated with compassion and respect for their dignity.⁷⁴ This may be the rationale behind the argument for victims' rights as entitlements, based on the fact that it entitles them to access justice. A generally accepted definition of Dignity lacks in academia and international instruments. The term 'dignity' embodies many concepts that include the 'quality of being worthy of honour or respect.'⁷⁵ Para.2 of the Preamble of the United Nations Charter stipulates: "reaffirm faith in fundamental human rights, the dignity and worth of the human person" The excerpt reiterates the threshold for treatment of human. A connection between fundamental human rights and the dignity of the human person.

Respect here is classified under dignity as a '*minimum core*'; this emphasises that each individual possesses intrinsic worth.⁷⁶ The 'use of dignity' as a tool of judicial interpretation highlights the intrinsic value to humans.⁷⁷ It has commonly been assumed that this transcends dignity as a substantive right. The argument finds support from human rights' foundational aspirations, amongst others are equality, justice, and peace. If victims' rights are seen as entitlements, then the foundations from which human rights emerged from must be incorporated in the application for victims. Dignity is a

⁷⁴ United Nations Declaration of Basic Principles for Victims of Crime and Abuse, 1985, Preamble.

⁷⁵ Yaroslav Belousov v. Russia, Merits, Judgment [2016] ECHR 805; Jalloh v Germany, Judgment, Merits [2006] ECHR 721 The European Convention on Human Rights 1950, Article 3,

⁷⁶ Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights (2008) 19 *European Journal of International Law* 655-724, 657; David Feldman, 'Human Dignity as a Legal Value-Part II (2001) 61 *Public Law*, p.75; John Humphrey, 'Human Rights and the United Nations: A Great Adventure'(1984) 40(3) *International Journal* 44; C-36/02, March 18, 2004, [2004] ECR I-09609, para.84; *Airedale N.H.S v. Bland*, 1 AC.789, 826 (1993); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833 (1992); *Pretty v. United Kingdom*, 35 EHRR(2002) 1.

⁷⁷ Ibid.

fundamental aspect of respect for the victim because it is considered to protect their identity and individuality. Therefore, respect should be seen as the source of victims' rights rather than a substantive right on its own. It is seen as a foundation for rights as entitlements-value.

Moreover, some victims opine that more communication and support from the authorities make them feel truly respected.⁷⁸ Acknowledgement of their suffering and face-to-face meetings are also indicators of respect. Assistance and '*continuous programs*' with multiple visits are considered as treating them with respect.'⁷⁹ Infrequent visits' could mean they are not treated with respect.

From the above, it is clear that dignity and respect are intertwined. Having discussed respect as a criterion of procedural justice, the next section shall analyse the ICC's criminal system procedure to lay a foundation for the context of the trial process.

Furthermore, it is worth noting that recent developments within criminological theory have also challenged the classical criminal justice system and influenced victims' role in criminal proceedings.⁸⁰ This development in criminological theory proposes a

⁷⁸ Human Rights UC Berkeley School of Law, The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court,(2015) 1-86, 35;Ibid

⁷⁹ Ibid ,page 35

⁸⁰Brianne McGonigle. 'Bridging the Divides In International Criminal Proceedings :An Examination into the Victim Participation Endeavor of the International Criminal Proceedings'. (2009) 21(63)*Florida Journal of International Law*,93-152.

holistic approach to addressing wrong in criminal justice.⁸¹The holistic approach examines the relationship between the victim, the offender, the society and the criminal justice system. This is in contrary to the initial offender centred approach.

In brief, it may be inferred that the ICC aligns itself with the recognition and enforcement of victims' rights. Nonetheless, this does not mean that it is victim-focused or gives victims' rights primacy over the accused's rights. There is a possibility that this situation may be improved if the restorative justice values are reconciled with the ICC's traditional criminal justice system.

What follows is a description of the rationale behind participation by using the Edwards theory of involvement. I will present a detailed account of the argument for this theory.

3.3.3 Edwards' form of participation

While some writers have suggested the 'balance approach' as a rationale behind victims' participation, the researcher shall review victims' involvement in the ICC criminal trial by using the Edwards framework of dispositive and non-dispositive participation. The researcher prefers to use Edwards' theory because it analyses the

⁸¹ Jo-Anne Wemmers, *Victimology :A Canadian Perspective*(University of Toronto Press 2017) ; Matthew Hall , *Victims of Crime :Construction, Governance and Policy*(Palmgrave McMillian 2017); Ezzat Ezzah, 'Victims and Victimology: The Facts and the Rhetoric (1989) *International Review of Victimology*,43-66.;Rob Mawby and Sandra Walkate, *Critical Victimology:International Perspectives*(Sage 1994) 48-51

relationship between victims and the decision-makers as well as how victims' participation influences the decision and interests of victims. Victims' interests could be considered through procedural and substantive justice for victims.⁸² The procedural aspects involve the trial process and the rights afforded to victims.

One of the rationales behind victim participation is empowerment. Victims are empowered as primary stakeholders with '*decision-making clout*' over processes that affect them and their communities.⁸³ This empowerment is referred to as full empowerment for victims as decision-makers. The scope of participation for victims at the ICC is deeply rooted in their interests during the proceedings. Victims' interests are used as metrics for their degree of involvement-a provision enshrined in Article 68(3). Procedural rights enhance their role during criminal trials.⁸⁴ During criminal proceedings, victim participation is besieged with challenges of determination of guilt, the quest for truth-finding, protection of public interests, and respect for the accused's fair trial rights.⁸⁵ These pre-existing competing ends become complicated for the position of victims before sentencing.⁸⁶

⁸² Luke Moffett, 'Meaningful and Effective? Considering Victims' Interests through Participation at the International Criminal Court' (2015) 26 *Criminal Law Forum*, 255-28, 257.; Luke Moffett, *Justice for Victims at the International Criminal Court* (First published 2014, Routledge 2014) 31-35

⁸³ Sherry Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) *Journal of the American Planning Association* 216-224.

⁸⁴ Jonathan Doak, 'Victims' Rights in Criminal Trials :Prospects for Participation' (2005) 32(2) *Journal of Law and Society*, 1-26.

⁸⁵ Ibid (n 296).

⁸⁶ Ibid (n 296).

Doak divides the impact of victim participation in the criminal trial into two-structural barriers and normative barrier.⁸⁷ Given that the ICC is primarily adversarial, the incorporation of victim involvement destabilises the equality of arms; an offset of the “structured setting between the Prosecutor and the defendant.”⁸⁸ Consequently, this may lead to a prolonged criminal trial and a clog in the wheel of victim participation.⁸⁹ Concerning the normative barrier, Ashworth argued that the criminal justice system's mandate is retributive justice for the protection of public interests as opposed to individual interests.⁹⁰ Punitive measures are set in place for social control and wrongdoing; an approach for preserving the common good. Therefore, it is distracting to incorporate individual interests. The court should prioritise public good over private interests.⁹¹ According to Ashworth, to maintain objectivity in criminal justice, victims interests will inadvertently be relegated.⁹² Since Ashworth propounds the preservation of objectivity and legitimacy of the criminal justice system over victims interests in sentencing, his assertion questions the status and implications of victim involvement in criminal trials. Interestingly, Doak submits that considering

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid;Claudia Jorda and Jerome De Hemptine, “The status and role of the victim” in Antonio Cassesse, Paola Gaeta, John Jones(eds)*The Rome Statute of the International Criminal Court:A Commentary* (Oxford University Press 2002)

⁹⁰ Andrew Ashworth, “Punishment and Compensation:victims, offenders and the state” (1986) 6(1) *Oxford Journal of Legal Studies*,86-122 ;Andrew Ashworth, *Sentencing and Criminal Justice*(Fifth Edition 2010)71-103.

⁹¹;Andrew Ashworth ,*The Criminal Process:An Evaluative Study*(Oxford University Press 5th Edition) 1-55;Michael Cavadino, James Dignan, “Reparation, Retribution and Rights” In, Andrew von Hirsh and Andrew Ashworth (eds)*Principled Sentencing :Readings on Theory and Policy*(Oxford Hart Publishing 2002) 348-358.

⁹² Suprea 81

victims' interests in the criminal justice system ensures transparency and checks in the system, legitimising the system.⁹³ Victim involvement during trials may contribute to the court's legitimacy. Simultaneously, the court should properly manage their participation to minimise procedural challenges that might arise due to their participation in a predominantly adversarial setting.

Victims are likened to stakeholders in the proceedings; this entails their interests as well as influence in the proceedings. Victims interests as a stakeholder should be considered to enhance the value of the ICC. The needs of each stakeholder are valuable. It examines the role and influence of victims in criminal trials. Participation may either be real empowerment for victims to influence the outcome of decision-making or passive involvement.⁹⁴ Either way, it could be a real power, which affects the decision or just a means to an end.⁹⁵ A means to an end connotes victims as a tool in the process, but their position is relatively better than the initial instrumentalization in a criminal trial.

⁹³ Jonathan Doak, 'Victims' Rights in Criminal Trials :Prospects for Participation'(2005) 32(2) *Journal of Law and Society* ,1-26.;Neil Walker and Mark Telford, *Designing Criminal Justice :The System in Comparative Perspective* ,Report 14, Review of the Criminal Justice System in Northern Ireland(2000) 10.

⁹⁴ David Taylor, Impunity Watch, Victim participation in Transitional Justice Mechanism: Real Power or Empty Ritual, (2014)

<[DiscussionPaper_Victim_Participation_in_Transitional_Justice_2014_eng.pdf](#)
(impunitywatch.nl)>

⁹⁵ Ibid

Edwards opines that assessing the effectiveness of participation is best obtained by analysing the concept of victim involvement in decision-making rather than creating 'balance' between the rights of the accused and victims' rights.⁹⁶ From this, flows meaningful participation for victims. From his perspective, the '*balance approach*' may not provide the desired results. This section will critically evaluate the forms of participation and the extent to which it influences victims' rights and interests. Edwards proposed four different participatory roles for victims. With this model, each participatory form is used to assess its influence on the decision- making process.

A generally accepted definition of participation is lacking. It can be loosely described as the act of taking part in an activity. As a result of its unsettled concept, participation encompasses A)being in control B)having a say, C)Being treated with dignity and respect. These definitions have been applied to situations within the ambience of victim emancipation.⁹⁷

Edwards points out from his theory that participation should be direct and active.⁹⁸ These forms of participation make a distinction between the relationship of the victim and the decision-maker. He referred to this as four typologies, with further division into a dispositive and non-dispositive category. Under the non-dispositive

⁹⁶ Ian Edwards, An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making (2004) 44 *British Journal Of Criminology* , 967-982.

⁹⁷ Ian Edwards, An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making (2004) 44 *British Journal Of Criminology* , 967-982.

⁹⁸ Ibid

category, the three forms of participation are consultation, information-provision and expression. For this category, the victim is not the decision-maker, but they may influence the decision.⁹⁹ On the other hand, the dispositive category comprises one form of participation, known as control. With control, the victim is akin to the decision-maker. They are in total control of the decision-making process.

Concerning control, Edwards assesses this through the relationship of victims with influence and control. Some commenters also corroborate this theory. Thibaut and Walker identified two types of authority that parties might have over the procedure used in dispute resolution.¹⁰⁰ These are process control and decision control. They made a distinction between these two aspects of control. The significant difference between the two is that while the process control involves ‘the control over the opportunity to present evidence’, the decision control focuses on the victims' ability to exercise control over the final decision.¹⁰¹ Data from the transcripts reveal that victims have, to some extent, a degree of control over the process. Participatory rights,¹⁰² through LRVs,¹⁰³ questioning of witnesses, admissibility and relevancy of evidence,¹⁰⁴ sentencing, and decisions of the Court.¹⁰⁵ Also, victims are allowed, through their LRVs to submit

⁹⁹ Ibid.

¹⁰⁰ Tom Tyler, What is Procedural Justice?: Criteria used by Citizens to Assess the Fairness of Legal Procedures (1988) 22(1) Law and Society Review, pp.103-136, p.

¹⁰¹ Ibid.

¹⁰² Rome Statute 1998, Article 68(3); ICC Rule 90; Rule 89.

¹⁰³ Rule 89.

¹⁰⁴ Rule 72.

¹⁰⁵ ICC Rule 143, Rule 145.

observations(oral and written), representations,¹⁰⁶ participating in hearings,¹⁰⁷ attending trials,¹⁰⁸The adversarial system, in particular limits the extent of control victims can have in the presentation of evidence and decision-making.

The decision-maker is obligated to identify and use the victims 'preference' in decision-making while the victim must submit his preference to the decision-maker.¹⁰⁹Hence the victim has control over the process of decision-maker. However, each form of participation is either based on a symbolic voice or an influencing voice or control. With the ICC, the control of decision –making is entirely left to the Court's discretion.

Regarding the non-dispositive category, consultation centres on identifying and considering the views and opinions about guidelines and strategies to be used in the formulation of policies or decisions.¹¹⁰Cambridge dictionary defines 'consultation' as 'the process of discussing something with someone to get their advice or opinion about'¹¹¹ The consultation connotes the process of seeking the opinions and views of victims during the criminal proceedings. It also means that the criminal justice system or decision-maker is obliged to seek victims views and concerns. However, it is not under an obligation to include these views and opinions in the final decision.¹¹² These views and concerns need to be balanced with other essential factors. It should be noted

¹⁰⁶ Rome Statute 1998, Article 15(3).

¹⁰⁷ ICC Rules 91(3)(a).

¹⁰⁸ ICC Rules 91(2)

¹⁰⁹ Ian Edwards, 'An Ambiguous Participant:The Crime Victim and Criminal Justice Decision-Making, (2004) 44 *British Journal Of Criminology* , 967-982.974.

¹¹⁰ Ibid,p.975

¹¹¹ Cambridge Dictionary , <www.dictionary.cambridge.org>

¹¹² Ibid.

that these views and concerns may influence the decisions, but there are other competing factors. Hence, consultation may not have an impact on the outcome concerning the victims' intentions and expectations. It is considered being a means to an end or due diligence. One criticism of this form of participation is that it might create false expectations for the victims who feel their contribution will have a considerable impact on the decision.

The provision of Article 68(3)¹¹³ depicts the implications of consultation. The discretion given to the court in determining the appropriate stage of participation reinforces the use of consultation as a form of participation; judicial discretion to determine the proper stage of involvement, and considering the victims' views and concerns. In the same vein, Article 61 appears to demonstrate that victims have an interest in participation.¹¹⁴ It includes, amongst other things, the avenue to influence the content of the charges; consultation, because the victims may make an application for amendment of the charges. For instance, the LRV requested the Prosecutor to include of inhumane treatment and SGBV to the charges.¹¹⁵

¹¹³ Rome Statute , Article 68(3).

¹¹⁴ Rome Statute 1998, Article 61

¹¹⁵ Women Initiatives for Gender Justice, Letter addressed to the Prosecutor, Luis Ocampo Moreno accessible at http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf;Women last accessed 12 February 2019; Situation in the Democratic Republic of Congo, The Prosecutor v Thomas Lubanga Dyilo, Women Initiatives for Gender Justice, Request for leave to participate as amicus curiae in Article 61 Confirmation of Charges proceedings.

This form of non-dispositive participation may create a two-way obligation on the authorities and victims regarding information provision. The authority may have to seek information from the victims, and the victim has to provide information to the authority. The form of participation is less restrictive because victims provide information to the decision-maker based on specifications of the decision-maker. This is reflected in Article 64(6)(b) (c) ((d). It includes the request for evidence from witnesses or victim-witnesses, which expresses victims' place as witnesses in most common law jurisdictions. Hence, the instrumentalisation of victims in criminal proceedings. The practical examples were found in the ICTY and ICTR. Information provision does not recognise the interests of victims. Christie and some victim-centric approach have criticised this approach because it reduces victims' visibility in criminal proceedings.¹¹⁶ The controversies surrounding this came into play during the trial stage in the Lubanga case. How appropriate is the participation of victims at this stage? This will be discussed in the later section.

Furthermore, the 1985 UN Declaration of principles provides for victims' right to receive and give information.¹¹⁷ This right falls under access to justice and fair treatment.¹¹⁸ This principle states that informing victims of their roles, scope, and timing of the case, particularly where they request this information, facilitates the

¹¹⁶ Nils Christie, 'Conflicts as Property' (1977) 17(1) *British Journal of Criminology*, 1-15; James Dignan, *Understanding Victims and Restorative Justice* (First published 2005, Open University Press, 2005).

¹¹⁷ United Nations Declaration of Basic Principles Principles of Justice for Victims of Crime and Abuse of Power 1985.

¹¹⁸ United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, Annex, Principle 6b.

responsiveness of judicial and administrative processes to the victims' needs.¹¹⁹ Receiving and giving information may be argued to constitute part of the procedure. However, it appears this may be challenging in practice

The final form of non-dispositive participation is expression. As far as expression is concerned, it is a very loose form of involvement.¹²⁰ While the authorities are obliged to provide an opportunity for expression, victims are not under any obligation to respond. With expression, victims are allowed to tell their story and emote. Most times, the expression does not influence decision-making. It is seen as an acknowledgement of victims' presence. The form of participation is similar to Victim-Impact Statements(VIS).¹²¹ It is prevalent in common law traditions which are usually done before sentencing. The decision-maker could use this in the determination of sentencing for the accused.

This section has focused on the forms of participation as laid down by Edwards. Each of the sub-categories defined the level of influence which victims possess. The following section shall evaluate the modalities of involvement to set a foundation for victims' procedural rights.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

3.3.3.1 Modalities for participation

This section shall examine the method of participation. It grants victims procedural rights. It might equally be said that modalities of participation determine the means of participation.

The statutory provision that victims may present their views and concerns on matters which affect their personal interests has been given a different interpretation. A decision reached concluded that victims are permitted to question witnesses and introduce evidence.¹²² The Trial Chamber opined that the right to submit evidence during trials before the Court is not exclusive to the parties. It stated that the Court has the general right to request the presentation of all evidence necessary to determine truth.¹²³ It is within the courts' purview to shape the extent of involvement of victims in the proceedings. Although victims are third parties to the proceedings, the Court could extend their rights (presentation of evidence) to facilitate the determination of truth. Therefore, the Rome Statute limits the victims' right to participate in evidence relevant to the determination of truth.¹²⁴

Unsatisfied with the ruling, the ICC Prosecutor sought leave to appeal the decision.¹²⁵ The Prosecutor contended that the TC provided extensive participation

¹²² Prosecution v. Lubanga, Decision on Victims' Participation, Trial Chamber 1, ICC-01/04-01/06-1119, 18 January 2008.

¹²³ Ibid.

¹²⁴ Rome Statute 1998, article 69(3).

¹²⁵ Situation in the Democratic Republic of Congo, Prosecutor v. Lubanga, ICC-01/04-01/06-1136, Application for Leave to Appeal, Trial Chamber 1, January 18, 2008.

modalities that exceeded the ‘expression of views and concerns’.¹²⁶In the Prosecutor’s words, ‘modalities of participation may not infringe upon the parties rights or overlap with the exclusive function of the Prosecution’.¹²⁷The Prosecutor urged the court to give a restrictive interpretation to prevent the victims from usurping the parties’ exclusive rights (to tender evidence).

In its Judgement, the AC stated that the right to lead evidence and challenge evidence’s admissibility is within the Prosecutor and Defence autonomy.¹²⁸ However, none of the provisions of the Rome Statute ‘prevents victims from participating in these ways. The AC notes:

“if victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused from challenging the admissibility or relevance of evidence (victims) right to participate in the trial would potentially become ineffectual.”¹²⁹

From the above, it can be seen that there are different pathways for victim involvement; nonetheless, these modalities for participation are less generalisable. It depends on a case by case basis. The Rome Statute leaves the modalities of participation to the discretion of the Chamber. This means that there is no value for determining

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Judgment on Prosecutor ‘Appeals of the Prosecutor and the Defence against Trial Chamber 1’ Decision on Victims’ Participation of 18 January 2008, Appeals Chamber, 11 July 2008, ICC-01/04-01/06.

¹²⁹ Ibid.

participation. Rather, the Chamber decided that participation based on the presentation of evidence at a particular point during the case. In response to an application for victims' participation, the chamber evaluates a connection between victims' interests and the Prosecution's presentation of evidence. Suppose the victims' application passes the personal interests test at the particular stage of the proceedings. In that case, despite the absence of victims' locus standi, the Chamber is empowered to decide whether the mode of participation is appropriate and consistent with the defence's fair rights trial.

Having discussed the modalities and pre-requisites for participation, the following section describes victims' procedural rights and its applicability to further victims' interests.

3.4.1 Procedural rights of victims.

Turning now to victims' procedural rights, this section will focus on victims' procedural status via the procedural rights applicable to them. The procedural status of victim confers victims participatory rights which entitles them to express their views and concerns.¹³⁰ It seems that the concept of the procedural status of victims is not settled.

The following passage espouses the reasoning behind such a statement:

¹³⁰ Situation in the Democratic Republic of Congo, Prosecutor v Lubanga, Submission of the Prosecutor, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber 1 of 7 December 2007 and the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber 1 of 24 December 2007, Appeals Chamber ICC-01/04-556, 19 December 2008, p.5, para.4.

“Procedural status of victim” is unknown to law. Such status is fraught with confusion and opens the door to victims intruding into the investigation process, the exclusive province of the prosecutor.”¹³¹

Although the prosecutor(appellant) remarked this to support his opposition to victims' participation in the investigative process, the Appeals Chamber's determination supports the prosecutor's arguments. It states as follows:

“The notion of the procedural status of victims is nowhere defined, and it is difficult to attach a specific meaning to it. “Are there other forms of victims status?... Moreover, is there a substantive victim status in contrast to a procedural one?”¹³²

In addition, the AC noted that the word ‘procedural’ means something related to the procedure. A code which regulates the judicial power known as ‘adjectival law’.It is distinguished from substantive law which was described as “definitive of the rights, duties and obligations of a person. The word "status" signifies a person's legal condition, whether personal or proprietary, Procedure is not of itself determinative of the status of any person.”¹³³

¹³¹ Ibid,p.11, para.22(b) and (c).

¹³² Ibid,p.19, para.43.Merits.

¹³³ Ibid.p.19-20, para.44

Procedural status is a precondition for a victim to participate. From the procedural status emerges the procedural rights available to victims, contributing to their access to justice. It is worthy of mention that the realisation of these rights is not automatic. They have left to judicial discretion, i.e. the extent of their application depends on the court's decision/rulings. These rights may ensure the realisation of victims' interests. The UN Declaration set out some rights to empower victims of crime and abuse of power.

Interestingly, this instrument's preamble accedes to the fact that the rights of victims have not been fully recognised.¹³⁴ The basic founding themes of victims' rights, according to this declaration is respect and recognition.¹³⁵ The recognition of a person is a right embedded in UDHR.¹³⁶ The right of a person to recognition before the law may be construed as a precondition for the realisation of procedural rights for victims; hence, the emergence of procedural status. The primary rights listed in this declaration are :

- Right to receive information;
- Right to receive notification about the progress of the case;
- Right to express their views and concerns at the appropriate stages in the criminal justice system
- Right to protection of their physical safety and privacy;

¹³⁴ Ibid 153, Preamble.

¹³⁵ UN Declaration, Article 1; Jack Donnelly, *Universal Declaration of Human Rights in Theory and Practice* (Cornell University Press 2014)

¹³⁶ Universal Declaration of Human Rights 1948, Article 6,

- Right to reparation from offender and compensation from State.¹³⁷

Furthermore, the Rome Statute provides additional rights like right to confidentiality,¹³⁸ access to court documents and information¹³⁹ right to legal representation,¹⁴⁰ and the right to appeal reparation orders.¹⁴¹ While these rights enlisted in the 1985 Declaration could enhance victims' status in the criminal justice system, one major drawback of applying these rights is the non-binding nature of the declaration. The signatories to this declaration are not under any legal obligation to enforce these rights. It is rather persuasive. However, the Rome statute has incorporated some of these rights. This highlights the development in the area of victims' rights. For instance, article 68(3) is a replica of principle 6(b) of the UN Declaration which grants victims the right to 'express their views and concerns'. This provision strikes a balance between an adversarial and inquisitorial criminal procedure system,¹⁴² intending to be subject to judicial scrutiny. One may infer that the proliferation of these rights seems to be a genuine response of human rights to the poor treatment of victims of crime in the criminal justice system. Nevertheless, restrictions apply to the extent of these rights' effectiveness for victims access to justice, given that the ICC is not a human rights court. The applicability of these procedural rights depends on the background or framework within which the trial process is situated.

¹³⁷ Ibid.

¹³⁸ Rome Statute, article 54; ICC Rules, Rule 16(2)(b).

¹³⁹ ICC Rules, Rule 121(10) and Rule.131.

¹⁴⁰ ICC Rule 90.

¹⁴¹ Rome Statute 1998, article .82(4).

¹⁴² Mugambi Jouet, Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court (2007) 26 St Louis University Law Review , 253-254, p249

In her article, Aldana-Pindell suggests that victims must have access to the criminal process to guarantee the effectiveness of criminal prosecutions and hold States accountable to victims.¹⁴³ According to the Rome Statute, victims can participate at different stages of the proceedings, but this is made subject to the Chambers. Victims' procedural rights are not absolute but must be exercised considering the accused's rights and fair trial.¹⁴⁴ The exercise of these rights are determined on a case-by-case basis. The extent of applicability of procedural rights is not settled.

Findlay and Henham observe that procedural frameworks regulate trial in such a way that it predetermines the context of such trial. It is vital in setting 'boundaries' that impels the avenue of '*influence*' in decision making.¹⁴⁵ From this, the role of victims and their procedural rights are dictated by the procedural framework.

The traditional forms of criminal justice may sabotage the involvement and extent of applicability of victims' rights in the criminal justice system.¹⁴⁶ Ashworth cautions that introducing victims into 'an *already balanced system*', -the defence and Prosecutor- will result in remarkable consequences.¹⁴⁷ Little wonder the applicability of victims'

¹⁴³ Racquel Aldana-Pindell, In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes, (2002) *Vanderbilt Journal of Transnational Law* ,1399, 1413

¹⁴⁴ Rome Statute, Article 68(3) .

¹⁴⁵ Mark Findlay and Ralph Henham, Transforming International Criminal Justice: Retributive and Restorative justice (First Published 2005, Wilan Publishing 2005)86.

¹⁴⁶ Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' *Integrating A Victim Perspective Within Criminal Justice* in Adam Crawford and Jo Goody ed (First published 2000, Routledge 2016)

¹⁴⁷ Ibid .

rights is limited. Procedural rights can improve the status of victims at the court.¹⁴⁸ These rights should be seen as the property of the victims rather than elements that place them in the same level as the accused (defendant) the goal is not to compete with the accused or seek for balance. Instead, these rights are pathways to accessing justice, as well as redressing the harm suffered by the victims.¹⁴⁹ If extensive procedural rights are granted to victims, it may empower them.

However, a severe weakness with this argument is that procedural rights are a means to an end, rather than a substantive right. While it may contribute to victims' access to justice, it might not guarantee justice for victims. Some additional factors like accused right, provisions of the Rome Statute, and the ICC RPE, have to be factored in, during the criminal proceedings. Hence, victims' procedural rights may influence the decision, but, most times, it does not have a considerable impact on the decisions or outcome.

Interestingly, an issue came up in both Lubanga and Katanga cases that question the set of procedural rights that could be attached to anonymous victims' procedural status. The Chamber ruled in the Lubanga case that :

“The fundamental principle prohibiting anonymous accusations would be violated,

¹⁴⁸ Mikaela 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* (Institute for Human Rights, Abo Akademi University, 2004).

¹⁴⁹ Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing 2008).

if victims a/0001/06 to a/0003/06 were permitted to add any point of fact or any evidence at all to the Prosecution's case-file presented against Thomas Lubanga Dyilo is the notification of charges document and the list of evidence.”¹⁵⁰

The single judge asserted that an anonymous victim could participate effectively in the proceedings. However, in order to prohibit anonymous accusations, the set of procedural rights available to anonymous victims will be restricted. In the Chamber's ruling, victims granted anonymity are precluded from adding any point of fact or any evidence, nor question the witness (in accordance with the procedure set out in rule 91(3) of the Rules). Notwithstanding, the Chamber held that some procedural rights would be compatible with the anonymity of those granted the victim's procedural status at the pre-trial stage. These rights are:

- ‘notification of the public documents contained in the record of the relevant case;
- attendance at status conferences, or the parts of those status conferences, which are to be held in public;
- making opening and closing statements at the confirmation hearing, in which they can, inter alia, address points of law, including the legal characterisation of the modes of liability included in the Prosecution Charging Document; and
- requesting during the said status conferences and during the public;

¹⁵⁰ Prosecutor v. Lubanga, ICC-01/04-01/06-462-tEN, p. 7.

- sessions of the confirmation hearing, leave to intervene, in which case the Chamber would rule on a case by case basis.”¹⁵¹

It is worth noting that the Chamber in Lubanga case held that these procedural rights are not exhaustible given that they could be extended “in light of exceptional circumstances.”¹⁵²

A similar question arose in the Katanga case¹⁵³; victim a/0333/07 prayed the Chamber for anonymity during the proceedings leading to and at the confirmation hearing. The LRV supported this request with the vulnerability of victim a/03333/07(minor at the time of application); the unsettled situation in victim a/0333/07’s location(Ituri District); and the fear of the disclosure of the victim’s identity to the defences(Katanga and Ngudjolo). The Prosecution did not oppose the request for anonymity of victim a/0333/07. He submitted that the same set of procedural rights granted to the anonymous victims at the pre-trial stage of Lubangai should be granted to victim a/0333/07. In contrast, the Defence for Mathieu Ngudjolo Chui argued that anonymous victims' participation is not consistent with the rights of the Defence and the principle of equality of arms.¹⁵⁴He also submitted that anonymous participation should be

¹⁵¹ ICC-01/04-01/06-462-IEN, p 8 See also Decision on the Schedule and Conduct of the Confirmation Hearing, ICC-01/0401/06-678, p 7.

¹⁵² ICC-01/04-01/07-433.

¹⁵³ ICC-01/04-01/07-433.

¹⁵⁴ ICC-01/04-01/07-433, paras 22-23.

restricted to the protective measures linked to the anonymous victim.¹⁵⁵The Defence for Katanga concurred with the observations of the Prosecution. He submitted that he was not in opposition to the anonymity request made by Victim a/0333/07.¹⁵⁶

The Chamber granted the anonymity request of victim a/0333/079 (non-disclosure to Defence, any other participant, the public and media).¹⁵⁷In addition, the Chamber held that Victim a/0333/07 should have the set of procedural rights granted to victims in VII(They are the same rights granted in the Lubanga case, as shown above).¹⁵⁸

Be that as it may, the single Judge observed that some set of specific procedural rights like:

“right to access confidential filing, decisions and transcripts contained in the Record of the case, as well as the right to attend and participate in closed hearings, can be limited..... if it is shown that the relevant limitation is necessary to safeguard another competing interest protected by the Statute and the Rules - such as national security, the physical or psychological well-being of victims and witnesses, or the Prosecution's investigations”¹⁵⁹.

¹⁵⁵ ICC-01/04-01/07-433, para.22.

¹⁵⁶ ICC-01/04-01/07-400.

¹⁵⁷ ICC-01/04-01/07, 13 May 2008, p61,

¹⁵⁸ Situation in the Democratic Republic Of Congo, The Prosecutor V. Germain Katanga and Mathieu Ngudjolo, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case Pre-trial Chamber 1, p.61.

¹⁵⁹ Situation in the Democratic Republic of the Congo, 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, 13 May 2008 p.50, Para.147.

With participatory victim rights, victims can present their views and concerns on issues related to disclosure, questioning of witnesses interim release, jurisdiction, investigations, amendments, admissibility of evidence, sentencing and questioning of witnesses. It should be noted that they can not automatically exercise their rights in these aspects. They must be able to prove that their personal interests are affected. Moreover, victims may also be allowed to submit observations, make representations, make submissions, attend, participate in hearings and consult the Court's record.

The victims' participatory rights emerge from the Rome Statute; it is being regulated by the Rome Statute and the ICC RPE. Below is Judge Blattman's excerpts on the victims' rights to participate:

“[t]he important notion that victims' participation is not a concession of the Bench, but rather a right accorded to victims by the Statute.”¹⁶⁰

“The Chamber should remain mindful that the right to participate when victims' interests are affected is the consequence of a legally protected interest of the victim.”¹⁶¹

The Judge's statements reinforce the origin/rationale of participation at the ICC. These rights are provided to protect the interests of the victims. It is noteworthy that while

¹⁶⁰ Separate and Dissenting Opinion of Judge Rene Blattman, Decision on Victim Participation, 18 January 2008, p.54, para13.

¹⁶¹ Ibid, para.14.

these rights are stipulated in the Statutes and Rules of the ICC, their application is not automatic. The extent of the application of these rights is subject to judicial discretion, bearing in mind the accused's fair trial rights. As suggested by Doak, these rights should be seen as entitlements rather than instruments to compete against the offenders,¹⁶² then, victims rights from the concept of human rights framework would preclude the opposing dichotomy between victims' rights and offender's rights. This dichotomy does pitch the victims against the offender with the idea that their interests and position are irreconcilable.¹⁶³ With Edwards' theory, the balance approach is relegated with the view of assessing the relationship between the victim and the decision-maker and the channel through which they influence the decision. It also places more values on victims' contact with the criminal justice system to advance their interests and influence the outcome of the proceedings.

The following section shall explore victims' right to legal representation because victims' LRVs are considered as the link between victims and the court. Victims mainly act through them as they cannot participate directly in the court due to the proceedings' efficiency and smooth running.

3.5. Effectiveness of Victims' right to legal representation

¹⁶² Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice :Reconceiving the Role of Third Parties* (Hart Publishing 2008).

¹⁶³ Ibid.

“The on-going insecurity in Ituri means that victims cannot always communicate easily with their legal representative or each other. Forcing victims to communicate in order to liaise with other people whom they do not know could pose a security risk.”¹⁶⁴

“In the view of the Legal Representatives, several groups of victims would not necessarily need to be put together to ensure the efficiency of proceedings, even if the number of groups was much higher than at present. It would depend on the circumstances.”¹⁶⁵

Legal representation is an important aspect of victims' procedural rights, although victims are permitted to participate directly in their own right. However, to expedite the trial process, the use of LRVs is indispensable. It follows that a few victims will be allowed to participate directly. Thus, most take part in trials through legal representatives. The LRV is very relevant for victims' access to justice, as he is their voices.¹⁶⁶ For victims to participate under Article 68(3), it is not mandatory to participate through legal representatives; “[s]uch views and concerns may be represented by the legal representatives of victims where the court considers it appropriate. “The use of ‘may’ illustrates an open option for victims to participate in

¹⁶⁴ Situation in the Democratic Republic Of Congo, The Prosecutor v Thomas Lubanga Dyilo, Submissions of Victims a/0001/06 to a/0003/06 for the hearing of October 2007, ICC-01/04-01/06-992-tENG, Trial Chamber, 19 October 2007, p.20.

¹⁶⁵ Situation in the Democratic Republic Of Congo, The Prosecutor v Thomas Lubanga Dyilo, Submissions of Victims a/0001/06 to a/0003/06 for the hearing of October 2007, ICC-01/04-01/06-992-tENG, Trial Chamber, 19 October 2007, p.21.

¹⁶⁶ Dmytro Suprun, ‘Legal Representatives of Victims before the ICC: Developments, Challenges and Perspectives. (2016) 16 *International Criminal Law Review* 972-994.

trial proceedings directly. In a similar vein, Rule 89 stipulates that victims may participate, at the Chamber's discretion, to make opening and closing statements.¹⁶⁷ It can be inferred that regardless of if victims have legal representatives, they may make opening and closing statements if the Chamber finds it appropriate. However, Rule 91 stipulates that victims who decide to participate through legal representatives will have more opportunities than victims who choose to participate directly (without legal representatives).¹⁶⁸ This form of participation is referred to as a direct form of participation.

Furthermore, Rule 90 set out the regime for choosing legal representatives. Victims are free to choose a legal representative.¹⁶⁹ This provision gives the victim the free will to choose their legal representative. Rule 90(1) grants victims the right to be legally represented in the criminal proceedings.¹⁷⁰ It is one of the rights of victims, which may be said to be applicable in principle. Rule 90(2) empowers the Chamber to request the victim, with the registry's assistance to appoint a common legal representative(s) for victims or a group of victims to ensure trial effectiveness.¹⁷¹ The Rules affirm that victims have discretionary right to participate under Rule 91(3)(a). On the Chamber's ruling, the LRV shall represent the victims in criminal trials. The main distinction

¹⁶⁷ Situation in Uganda, Prosecutor V. Kony, Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-Limit for Submission of Observations on Application for Participation, a/0010/06, a/0064/06 to a/00070/06, a/0081/06 to a/0104/06 and a/01111/06 to a/0127/06.; ICC Rules of Procedure and Evidence, Rule 89.

¹⁶⁸ ICC Rules of Evidence and Procedure, Rule 91.

¹⁶⁹ Ibid Rule 90.

¹⁷⁰ ICC Rules of Evidence and Procedure, Rule 90(1)

¹⁷¹ Ibid, Rule 90(2).

between Rule 90 and Rule 91 is that, while Rule 90 spells out the need to choose legal representatives for victim participation, Rule 91 sets out the modalities in which a legal representative may participate in the proceedings. According to Rule 91(2), the LRV can attend and participate in the hearing, provided the court has not confined the LRVs participation to written observations or submissions. The LRV may also request leave from the Chamber to question a witness, expert, or the accused.¹⁷² In response to the request, the Chamber may order the LRV to submit written notice of the intended question and then determine the “manner and order of the questions” permitted during the proceedings.¹⁷³

In Donat-Catin’s words, “there is no effective access to justice without skilful and responsible representation”.¹⁷⁴ This statement underscores the importance of LRVs for victims’ access to justice. Mekjian and Varughese point out that the right to legal representation is the most ‘*procedurally challenging*’ aspect in the ICC.¹⁷⁵ Thus, Effective representation goes a long way in enhancing victims’ interests and realising full participatory rights. Nonetheless, flawed legal representation may jeopardise the realisation of victims’ rights and interests.

¹⁷² Rule 91(3)(a.)

¹⁷³ Rule 91(3).

¹⁷⁴ David Donat-Catin, Article 68, in Otto Triffterer(ed) Commentary on the Rome Statute of the International Criminal Court (2008) 1275,1291.

¹⁷⁵ Gerard Mekjian and Matthew Varughese, Hearing the Victims’ s Voice:Analysis of Victims’ Advocate Participation in the Trial Proceedings of the International Criminal Court,(2005) 17 *Pace International Law Review* 1, 20.

In practice, it is noticed that victims have less power to choose their legal representatives, coupled with the fact that a large group of victims are represented by a common legal representative(s). One implication of a common LRV is that there is a presumption that these victims have mutual or common interests. At the same time, this thesis does not intend to explore if the LRVs neglect victims' voice because this cannot be inferred from the transcripts.

The relationship between victims and their LRVs could be likened to the "crime victim agency." The Chamber chooses many a time, the LRVs as the representatives of the victims for the victims. One serious disadvantage of the ICC's method is that it could undermine the crime victim agency. Crime victim agency is defined as the autonomy of crime victims to make a fundamental decision about their lives.¹⁷⁶ This autonomy includes their right and power to make important decisions that could have consequences on their situations. The concept is divided into two, self-definition and self-direction. Self-definition is described as the determination of how one envisions himself as an individual or as a member of the community. Self-direction is '*charting of one's life*'¹⁷⁷ It is within this context that crime victim agency is situated. Research suggests that crime victim agency can lead to an enhanced quality life and ensure victims' security and protection.¹⁷⁸ On the other hand, if the crime victims agency is

¹⁷⁶ Margeret Gavin and David Beloof, Crime Victims Agency,(2015) 13(1) *Ohio State Journal of Criminal Law*, p.68

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

done recklessly, it could lead to re-victimisation for victims, loss of trust/confidence in the criminal justice system, as well as disengagement with the system¹⁷⁹

Most times, victims do not ‘meaningfully choose ‘*whether*’, ‘*when*’ and ‘*where*’ and to ‘*what extent*’ to get involved in the process and exercise their rights.¹⁸⁰ This is due because of the parameters laid down by the Court's existing Statutes, Rules and Regulations. These are interpreted and regulated by the judges. Arguably, the LRVs are responsible for speaking on behalf of the victims. Given that, most times, victims do not choose their LRVs, it remains important that the LRVs enlighten victims about the criminal process and possible outcomes of the criminal proceedings. It is also necessary that the LRVs inquire about the victims' needs and interests and how these will be accomplished. It is believed that some victims might have unreasonable expectations of the ICC from information received during the initial campaign and outreach. They may come with this pre-conceived idea that the criminal prosecution will solve all their problems. In this regard, the LRVs must sensitize the victims about the possible outcomes and the court's workings. A viable means to minimise disappointments on the part of the victims.

¹⁷⁹ Ibid.

¹⁸⁰ Lauren Bennet, ‘Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective’ (1999) 14*Journal of Interpersonal Violence* ,761.

“if some hearings were held in the DRC, this would increase the visibility of justice among victims and allow victims who have been authorised to take part in proceedings to follow hearings.”¹⁸¹

In view of the Legal Representatives, insecurity in Ituri is currently too great for a trial to be held in Bunia in normal conditions, but hearings could be held in Lubumbashi.”¹⁸²

Clark notes that cultural issues and distance may disengage victims from the court and their legal representatives.¹⁸³ He argued that the ICC becomes distance from the victims in an attempt to remain impartial or neutral. This situation played out in the use of intermediaries and its implications on testimonies during the trial proceedings.¹⁸⁴ Arguably, the ICC may lack connection with victims because of cultural differences between its staff and the victims. However, the language barrier is addressed by the use of interpreters. Cultural differences pose a challenge between the ICC's applicable substantive and procedural law and the national jurisdiction's operating law. For example, the inconsistency between the rules, principles and regulations on rape and

¹⁸¹ Situation in the Democratic Republic Of Congo , The Prosecutor v Thomas Lubanga Dyilo, Submissions of Victims a/0001/06 to a/0003/06 for the hearing of October 2007, ICC-01/04-01/06-992-tENG, Trial Chamber, 19 October 2007, p.7, para. 27.

¹⁸² Situation in the Democratic Republic Of Congo, The Prosecutor v Thomas Lubanga Dyilo, Submissions of Victims a/0001/06 to a/0003/06 for the hearing of October 2007, ICC-01/04-01/06-992-tENG, Trial Chamber, 19 October 2007, p.7, para.28

¹⁸³ Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics*, (Cambridge University Press 2018)45,46

¹⁸⁴ Situation in the Democratic Republic of Congo, The Prosecutor v Thomas Lubanga Dyilo, Judgement pursuant to Article 74 of the Statute, Trial Chamber, 14 March 2012, ICC-01/04-01/06-2842, p.82, para.167-205.

other forms of sexual violence applicable in national jurisdiction and other international instruments (human rights law, Convention on the Rights of the Child, Convention on all Forms of Discrimination Against Women, International Humanitarian Law) and the Rome Statute, including the RPE reveals the difficulties encountered in the investigation and prosecution of these crimes.¹⁸⁵ These are possibly the issues that failed the Prosecutor to investigate SGBV (difficulties in proving sexual violence and rape). These challenges reflect the disparity between the victims' expectation and the reality of the ICC. One possible solution is for the ICC to recruit staff from the same country or situation to represent victims. Understandably, the ICC may be cautious about being biased. Presumably, the ICC might have distanced itself from politics; inadvertently; the remoteness resulted in a disengagement between the victims and the court.

The LRV's role in victim participation is shown in *Prosecutor v Katanga*; the Chamber held that victims' right to choose legal representative is not absolute; it is a right made subject to paragraph 2 and 3 of Rule 90.¹⁸⁶ This brings to light the indispensable role of LRVs in trials. Regardless, this does not avail the denial of victims right to choose LRVs of their choice. As a result of the situation, some victims may not be intellectually and psychologically sound to choose a competent lawyer to represent them. It will for the Chamber to choose LRVs for victims in such a situation. According to a study by

¹⁸⁵ Situation in the Democratic Republic of Congo, Judgment pursuant to Article 74; Lubanga sentencing; *The Prosecutor v Lubanga*; *The Prosecutor v Katanga*.

¹⁸⁶ *Prosecutor v Katanga and Ngudjolo Chui*, Order on the Organisation of Common legal representatives, 22 July, 2009, ICC-01/04-01/07, para.11.

the Human Rights Watch, the Court has factored in cost and efficiency implications, to have primacy over victims' views on their legal representation in determining LRVs.¹⁸⁷ The study implies that victims' views on legal representation are not relevant in their appointment. It is a prerogative of the Court. The Court's authority to appoint lawyers for the victims is justified because of managing unreasonable trial delays.

Nonetheless, it is not an important factor in the selection of LRVs. It goes to say that using victims' views as the main criteria may slow down the legal process and its efficiency. Although the wording of Rule 90 enables victims to choose legal representatives of their choice without the Court's interference, it seems the Court does eventually choose legal representatives for victims to prevent the delay in the normal course of proceedings.¹⁸⁸ Subsequently, the Court might have to select a common legal representative for a large number of victims. With this, the Court overlooks the fact that victims' personal interests may be subsumed under common interests of numerous victims, which may not fulfil victims' needs on an individual basis. On the other hand, due to a large number of victims, it is uncertain if the common legal representatives can reach out to the victims individually. The implication of these results would be the under-representation or partial representation of victims.

¹⁸⁷ Human Rights Watch, 'Who will Stand for Us? Victims' Legal Representation at the ICC in the Ongwen Case and Beyond, August 29, 2017 < <https://www.hrw.org/report/2017/08/29/who-will-stand-us/victims-legal-representation-icc-ongwen-case-and-beyond> > last accessed 22 May 2019.

; Regulation 80, Regulations of the Court.

¹⁸⁸ Situation in the Democratic Republic of Congo, The Prosecutor v Thomas Lubanga Dyilo, Submissions of Victims a/0001/06 to a/0003/06 for the hearing of October 2007, ICC-01/04-01/06-992-tENG, Trial Chamber, 19 October 2007 p.6, para.19.

In 2017, Killean and Moffett suggested that victims' inclusion in decisions over-representation may foster victims' voice and agency.¹⁸⁹ They recommended seeking victims' opinion on legal representation gives them a degree of control over their representatives.¹⁹⁰ According to the authors, the use of common legal representatives has “collectivised” victims' voices.¹⁹¹ While victims might have suffered harm from the same crime, this does not preclude them from having distinct interests and concerns. It is noted that victims have two general interests-reparations and justice.¹⁹² A ‘collectivised’ voice cannot herald the victims' personal interests. The divergent interests and concerns of victims can make it challenging for a common legal representative to represent “victims' interests” thoroughly.¹⁹³ Also, Killean and Moffett argue that common legal representatives do not strip victims of the political or legal agency. From their perspectives, the engagement of legal assistant(local lawyers and civil party lawyers) with victims to a large extent reduces victims' marginalisation at the ICC.¹⁹⁴ They caution that “there remains a real risk that within the courtroom, victim participation is a token effort, rather than a genuine representation of voice and agency.”¹⁹⁵ Representation of victims as an indispensable aspect of victim participation

¹⁸⁹ Rachel Killean and Luke Moffett, “Victim Legal Representation before the ICC and ECCC (2017) 15(4) *Journal of International Criminal Justice* , 713-740,p.732.

¹⁹⁰ Ibid

¹⁹¹ Ibid

¹⁹² Separate Opinion of Judge Song, paragraph 10 ICC-01/04-01/06-925

¹⁹³ Redress, Representing Victims before the ICC: Recommendation on the Legal Representation System accessible <<https:redress.org/wp-content/uploads/2017/12/1504representingvictims.pdf>> last accessed 14 September 2020.

¹⁹⁴ Ibid .

¹⁹⁵ Ibid.

reinforces the value of voice because victims cannot participate directly in the criminal proceedings. Unfortunately, it remains unsettled if the use of legal representation heralds victims' voice. At most, it could be likened to the carrot and stick metaphor. No doubt using LRVs as intermediaries between the Court and the victims eases victim participation; however, it may filter victims' voices. In light of this, more attention should be given to victims from pre-trial to the trial stage to mitigate any processes that could sabotage the underrepresentation of their voices.

The selection of one or two legal representatives to represent many victims inadvertently classifies them with common interests. Many a time, this is not the reality. Each victim might have concerns which are distinct from the others. This is not within the thesis's scope because it is impossible to ascertain the transcript analysis findings. We should bear in mind that not every right of victim extends to their LRVs. While victims can participate anonymously for protective measures, LRVs are not permitted to join under the shield of anonymity. Due to the functions the LRVs perform, anonymity or redaction of their identities is not allowed. It came to test in Katanga case.¹⁹⁶ Based on his safety and security, the LRVs requested the Court to keep his identity confidential. The Chamber asserted that a grant of a confidential request to the LRVs would mean that all processes and filings made by such LRVs become redacted and confidential. This request will affect the expeditiousness of the proceedings, "but also create a conflict of interest in which the Legal Representative must choose, for

¹⁹⁶ Prosecutor v. Katanga, ICC-01/04-374 , 17 August 2007 p.20, para.45-48

example, between effectively representing the victims in a public hearing and keeping his identity confidential.”¹⁹⁷

The Chamber concluded that “that a legal representative is entitled to participate in the proceedings according to the terms set by the Chamber and considers that anonymity is incompatible with the functions to be performed by a legal representative.”¹⁹⁸ In its ruling, the Chamber decided that the LRVs shall disclose his identity within ten days if she wishes to remain the Applicants' legal representatives. The Chamber further stated that if the LRVs decides to remain anonymous after the ten days, the OPCV will act as a legal representative of all the applicants until another legal representative is chosen.¹⁹⁹ It reiterates that privileges that could be granted to victims do not extend to their LRVs- a distinction between victims and their lawyers.

In the Lubanga case, victims were permitted to choose their LRVs.²⁰⁰ The considerable low number of participating victims made the process easier.²⁰¹ The total number of

¹⁹⁷ Situation in the Democratic Republic of Congo, Decision on the Requests of the Legal Representatives of Applicants on Application process for victims' participation and legal representation , ICC-01/04-374, 17 August,p.21,para.47

¹⁹⁸ Ibid, p.24

¹⁹⁹ Ibid , p.24

²⁰⁰ Susana SaCouto and Katherine Cleary Thompson, “Regulation 55 and the Rights of the Accused at the International Criminal Court” (2014) 21(1)*Human Rights Brief* p1-8,p.8.Accessible at <http://digitalcommons.wcl.american.edu/hrbrief/vol21/iss1/4> last accessed 03 January 2020.

²⁰¹ Prosecutor v Thomas Lubanga Dyilo, Redacted version of the Corrigendum of the Decision on the applications by 15 victims to the participate in the proceedings,Trial Chamber I, ICC-01/04-01/06-2659-Corr-Red , 08 February 2011,p.15,para.41

participating victims was approximating around 129(34 female and 95 male victims).²⁰² The legal teams were divided into two. The first team was appointed for the child soldiers while the second team was appointed for the other victims. It follows that most victims in the Lubanga case had lawyers of their choice because of the considerable low number of participating victims.²⁰³ The outcome is in contrast to the Katanga and Ngudjolo with large victims totalling around 366 participating victims. The Court divided 366 victims into two groups and charged ten different common legal representatives for victims.²⁰⁴

Regarding if victims needed continuous legal representation, the OPCV on behalf of the victims called the AC's attention to non-represented victims. The LRV of these victims, which he termed-‘concerned victims’ withdrew during the proceedings.²⁰⁵ He raised an appeal on this ground. The OPCV averred that the TC made a ‘procedural error by not appointing a new lawyer for victims immediately after authorising the former LRV to terminate his mandate regarding the concerned victims’.²⁰⁶ The OPCV asserted that the victims must be represented throughout the proceedings until

²⁰² The Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute, Trial Chamber I Decision, ICC-01/04-01/06-2842, 14 March 2012,p.19 para.15;Situation in the Democratic Republic of Congo, The Prosecutor v Thomas Lubanga Dyilo, Summary of the “Judgment pursuant to Article 74 of the Statute,Trial Chamber 1, ICC-01/04-01/06-2843, 14 March 2012p.6,para.11

²⁰³ Ibid.

²⁰⁴ Prosecutor v Katanga & Ngudjolo , ICC-01/04-01/07-1328, Order on the Organisation of Common Legal Representation of Victims, 22 July 2009;International Criminal Court , Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings in Proceedings , ICC-ASP/11/22, 5 November 2012, p5,6 ; Ibid 205.

²⁰⁵ Appeal Hearing of Prosecutor v Germain Katanga, ICC-01/04-01/07-t-349-ENG ET WT 08-03-2018 13/15 NB A3 A4 A5

²⁰⁶ Ibid lines 3-9 3-9,p12

completing the reparations phase. The OPCV requested that the concerned victims should be granted reparations, after having been allowed to present or supplement their application for reparations. The AC rejected OPCV's argument that the representation of victims must be continuous. One of the question for determination was if the TC abused its discretion by not appointing counsel immediately after the former LRV was granted leave to withdraw as counsel while the proceedings were ongoing. The AC found that the TC did not abuse its discretion due to failure to appoint counsel to assist the concerned victims in completing their applications.²⁰⁷

Besides, the AC noted that, generally, it is not only in the interests of victims but also in the interests of the efficient conduct of the proceedings, that victims are legally represented during the reparations phase. The AC stated that neither the Rome Statute nor the RPE expressly provides that victims be 'represented by counsel at all times before a trial chamber'.²⁰⁸

Suppose victims do not need to choose and be represented by LRV, however, once LRV represents them. In that case, it is only reasonable for such representation to continue as the LRV is their voice. An absence of legal representation during the proceedings leaves a gap for the victims, potentially leading to procedural injustice. In this context, victims may become invisible due to the absence of their representative. Besides, information may get lost in transit. The right to receive information like every other

²⁰⁷ Ibid. p.13, lines 1 -3.

²⁰⁸ Ibid.

procedural right aims at improving victims' experience in the criminal justice system.²⁰⁹ It also encompasses the right to receive information on the progress of the case. The dissemination of relevant information to victims is considered a pre-requisite for making an informed decision on whether to participate or not. The transfer of pertinent information should span throughout the criminal trial and afterwards.

Apart from the impact of LRVs representation on victims' interests, it is noted that some victim participants who are not able to access the court due to logistic reasons also depend on some external factors.²¹⁰ These external factors included VPRS, staff, OPCV, intermediaries.²¹¹ The activities of these factors shape how victims experience participation at the ICC.

From the above, one could infer that the LRVs are essential in determining the quality of victims' contact and experiences at the ICC. They are the victims' voice; therefore, their representation must be adequate and sufficient for victims to obtain maximum satisfaction from the proceedings. Besides, the role of NGOs, like Women Initiatives for Gender Justice and Human Rights Watch, cannot be overemphasised in promoting victims' interests at the ICC. The Women Initiatives via *amicus curiae* brought the Prosecutor and the Court's attention to the exclusion of the crimes of sexual and gender-

²⁰⁹ Helen Fenwick, 'Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?' (1997) 60(3)*The Modern Law Review*, 317-333, 321.

²¹⁰ Human Rights Center, UC Berkeley School of Law, The Victims Court? A Study of 622 Victim Participants at the International Criminal Court (2015) accessible at <https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Victims-Court-November-2015.pdf> last accessed 14 September 2020.

²¹¹ Ibid.

based violence from the charges.²¹² The Women Initiatives also requested the Prosecutor to conduct further investigations into the crimes in the case of Lubanga. These activities enhance the ICC's function in ensuring judicial accountability of perpetrators of human rights-A watchdog for amplifying victims' interests.

Having discussed the effectiveness of legal representation for victims, the next section shall examine the dispositive category of participation in order to evaluate the extent of degree of control victims have in criminal proceedings. The following section will discuss these subdivisions in non-dispositive participation in light of victims' involvement during the proceedings. The concept of participation exposes victims to the criminal procedure of the court.

3.5.1 Dispositive category

The dispositive category is described as the most direct form of participation. It is also known as '*full empowerment*'.²¹³ It ensures that victims are enabled with real decision-making power. This power is presumed to transcend the commencement of the decision-making process to the implementation.²¹⁴ Here, victims have total control over

²¹² Women Initiatives for Gender Justice, Letter to the Prosecutor, accessible at http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf last accessible 14 September 2020.

²¹³ Ian Edwards, "An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making" (2004) 44 British Journal of Criminology 967-982; David Taylor, 'Victim Participation in Transitional Justice Mechanism: Real Power or Empty Ritual?' (2014) Discussion Paper, Impunity Watch available at <[DiscussionPaper_Victim_Participation_in_Transitional_Justice_2014_eng.pdf](http://www.impunitywatch.nl/Documenten/2014/01/DiscussionPaper_Victim_Participation_in_Transitional_Justice_2014_eng.pdf) ([impunitywatch.nl](http://www.impunitywatch.nl))> last accessed 27 January, 2020.

²¹⁴ Ibid.

a particular decision because they participate as decision-makers. This form of participation creates a two-way obligation on the victims and decision-makers. In Edwards words, this form of decision-making power is called ‘control.’²¹⁵ The victims are active participants in the decision-making process rather than passive recipients of decisions. According to Lundy and McGovern, this is ‘*transfer of power*’²¹⁶ with ‘the right to participate in decisions which affect one’s life’.²¹⁷ This category is considered the most realistic form of achieving victims’ rights.²¹⁸

Control is the only type of classification under this category. Control as a type of participation creates an obligation on the decision-maker to seek and apply victims’ preference.²¹⁹ The victim's corresponding obligation is to provide their preference as the victim to the decision-maker. The decision-maker is under a duty to implement the decisions. The keyword here is ‘control’- it connotes that the victim wields absolute power over the decision-making process, given his interests in such decision. Within the context of the ICC, article 68(3) leaves the determination of victims participation, significantly considering their views and concerns to the judges' discretion (decision-maker). The threshold for such participation is the victims’ interests.

²¹⁵ Ibid.

²¹⁶ Patricia Lundy and Mark McGovern, ‘Whose Justice? Rethinking Transitional Justice from the Bottom Up’ (2008) 35(2) *Journal of Law and Society*, 279-283.

²¹⁷ Karen Kenny, ‘The Right to Participate in International Human Rights Fieldwork’, (2000) International Human Rights Network.

²¹⁸ Impunity Watch, Discussion Paper, “Victims’ Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual (2014)24 available at [DiscussionPaper_Victim_Participation_in_Transitional_Justice_2014_eng.pdf \(impunitywatch.nl\)](https://www.impunitywatch.nl/discussionpaper-victim-participation-in-transitional-justice-2014-eng.pdf)> last accessed 12 March 2020.

²¹⁹ Ibid

Consequently, there are limits to how far this concept of control can go in a criminal justice system like the ICC. Besides, given that the ICC is a primarily adversarial system-this concept of control is incompatible with the ICC jurisprudence. Furthermore, as it is, one could argue that victims' involvement seems to disrupt the equality of arms. Giving victims' control would displace the status quo. The parties-prosecutor and defence's polarisation would have to accommodate the position of the victims as third parties with no full parties rights and privileges.

To corroborate this, one commentator posits that a criminal trial might not be entirely workable to strengthen victims rights.²²⁰ This argument is evidenced in the mandate of the Rome Statute-the focus is criminal prosecution rather than victim-centredness. Article 68(3) illustrates the Rome Statute's intention to give ultimate control of the trial proceedings to the judges, particularly the judicial discretion. Hence, it is clear that victims do not fully control the ICC's decision-making from the provision. Instead, they may exercise their procedural rights to influence the decision-making process. Their participation is a right granted to victims by the Rome Statute-a means to an end. According to Chung:

“Thus, participating victims are not parties to the proceedings; under article

²²⁰ Christine Chung, ‘Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise? (2008) 6 *Northwestern Journal of Human Rights*, 459 available at <<https://scholarlycommons.law.northwestern.edu/njihr/vol6/iss3/4>> Last accessed 09 December 2019, 540, 541

68(3) of the Statute they may only present their ‘views and concerns’,
and this only if their personal interests are affected²²¹

From the above, it is evidenced that victims, to some extent, influence the proceedings through the presentation of evidence.

On the other hand, evidence from the decision-making like sentencing shows that victims do not have control over the decision. Although their observations and submissions are taken into consideration via consultation, it does not substantially impact the outcome because this is within the judges' exclusive discretion. They might influence the decision. However, they do not have absolute control over it because the statute and rules have restricted their ability to impact the decisions. The adversarial system, in particular, limits the extent of control victims can have in the presentation of evidence and decision-making.

This section has analysed the position of control as well as its applicability within the context of the ICC. The next section shall assess the non-dispositive theory subcategories within criminal trials at the ICC vis-à-vis the Lubanga and Katanga cases.

²²¹ Ibid

3.5.2 Non- dispositive category

The non-dispositive classification divides the type of participation into consultation, information-provision and expression.²²² The first two sub-categories of consultation and information-provision intend to seek and consider victim preference and victim information, respectively. The victim's corresponding obligation is an optional supply of preference and non-optional supply of information, respectively.²²³ The last subcategory of non-dispositive categorisation is expression. The decision-maker should authorise victim expression while its corresponding obligation on the victim is an optional supply of information and expression of emotion. From the non-dispositive category, the victim is not the decision-maker. One reasonable consequence of this is the victims' power to influence the decision-making process concerning his interests is restrictive. The role play applicable is influence, not control.

The subdivisions shall explore the concept of participation, and its relationships with these parties, to broaden our understanding of the application of victims' rights and interests. The following section shall address instances of consultation, information provision and expression under the non-dispositive category. From the data, it is worth

²²² Ian Edwards, , "An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making" (2004) 44 *British Journal of Criminology* 967-982; David Taylor, 'Victim Participation in Transitional Justice Mechanism: Real Power or Empty Ritual ? (2014) Discussion Paper, Impunity Watch, available at <[DiscussionPaper_Victim_Participation_in_Transitional_Justice_2014_eng.pdf](#) ([impunitywatch.nl](#)) >24-27.

²²³ Ibid

mentioning that there is no evidence to suggest that victims have control over the decision-making.

Concerning victim involvement at the ICC trials, a plethora of rulings and decisions have reiterated that personal interests are a precondition for expressing their views and concerns.²²⁴ Some scholars (discussed above) have advanced for the rationale behind the concept of participation. Surprisingly, an analysis of the transcripts shows that asides from the traditional competing interests between the defendant and the Prosecution, there are competing interests between the defendant, Prosecutor on the one hand, and the victims on the other hand.²²⁵ Arguably, it often occurs that these two parties (defendant and prosecutor) tend to oppose the broad application of victims' rights- conflict of interests. The non-dispositive category empowers victims with a reasonable degree of control which could influence the decision-maker.²²⁶

For instance, the TC's decision on 18 January reveals a seemingly ambiguous interpretation of victim participation regime.²²⁷ The TC held that the assessment of victim participation in proceedings should be regulated by personal interests test, provided in article 68(3). Rule 85 and Article 68(3) are interdependent. Hence, they

²²⁴ Rome Statute 1998, Article 68(3); Lubanga case, Katanga Case.

²²⁵ Prosecutor v. Lubanga, 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 Appeals Chamber, June 2007, ICC-01/04-01/06-925.

²²⁶ Ian Edwards, 'An Ambiguous Participant :The Crime Victim and Criminal Justice Decision-Making' (2004) 44(6) *British Journal of Criminology*, 967,973.

²²⁷ The Prosecutor v Thomas Lubanga Dyilo, The Oral Decision of Trial Chamber 1 on 18 January 2008 Trial 1, ICC-01/04-01/06.18 January 2008.

should be interpreted conjunctively. This decision gives a broad interpretation of victims' participation as it does not make restrictions based on the connection between the harm suffered by the victims and the crime contained in the charges. In his opinion, Judge Blattman dissented from the Majority decision, 'the over-inclusive and imprecise definition of victims' would threaten or endanger the accused's rights.²²⁸ This decision intended to broaden the provision of rule 85, 'any crime within the jurisdiction of the court',²²⁹ rather than a restrictive provision that restricts crimes in the charges.²³⁰ The TC also noted that it was imperative to draw a correlation between the victims' interests and presentation of evidence in the proceedings.²³¹

Surprisingly this decision was set aside pursuant to the appeal brought by the defence.²³² The AC found that the qualification for victim participation should be limited to victims of the situation or a case. The AC confirmed TC's decision to allow victim participants to submit evidence and question witnesses.²³³ Judge Pikis, concurring with Judge Kirsch, stated that the Prosecutor and the accused as full parties to the case are the only parties with the rights to dispute the charges' content.²³⁴ In his words:

²²⁸ Separate and Dissenting opinion of Judge Rene Blattman, ICC-01/04-01/06-119, 18 January 2008.

²²⁹ Prosecutor v. Thomas Lubanga Dyilo, Decision on Victims' Participation, 18 January, 2008, Trial Chamber I, ICC-01/04-01/06-1119, para.93-95.

²³⁰ Ibid, paras.93.

²³¹ Ibid, Paras 102.

²³² Prosecutor v 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, 11 July, 2009

²³³ Ibid.

²³⁴ Dissenting Opinion of Judge Pikis, Appeals Chamber Decision, 11 July 2008.

“[i]n an adversarial hearing the two sides are cast in the position of adversaries, in connection with the determination of the only issue raised before the Chamber, the guilt or innocence of the accused. The adversary of the accused is the Prosecutor and none other. The defendant cannot have more than one accuser. It is not for the accused to prove his innocence. He is presumed to be innocent. The ultimate question is whether the Prosecution proved its case beyond reasonable doubt.”²³⁵

Judge Pikis’ opinion draws our attention to the nature of adversarial proceedings and its requirements. The emphasis on disrupting the equality of arms if victims were permitted to tender evidence in determining truth explains that an extended role for victims could prejudice the accused's rights as he is supposedly against two accusers.

The ruling showed progress from a broad definition of victims to a restrictive definition of victims and ascertaining whether victims can lead evidence. While the presentation of evidence is primarily the role of the parties, in the determination of the truth, the Chamber held that victims role might be extended to the provision of information-. It shall be explored under the heading of information-provision in the following section and consultation and expression.

²³⁵ Ibid , para.14.

3.5.2.1 Consultation

“[O]ne of our child clients was wounded and remains disabled, but the physical wounds that the militias left are not the worse.....These children...were deprived of all contact with their families. They saw their friends die. They were forced to kill...One of my clients who is now barely 15 years, told us, the psychologist, I am not all right.

I don't know what to do. My body s not all right. My head hurts...”²³⁶

These excerpts illustrate victims' views and concerns through their LRVs to the Court, including the judges. This submission is considered a response to the court's consultation. The response of the presiding judge supports this. “We are listening to you carefully, because what you have to say is perhaps what is most important, especially given the Statute of the ICC.”²³⁷ The judge's remarks show an acknowledgement of victims' voice, which relates to victims being consulted while the judges listen. It depends on whether the judge decides to take these views and concerns while balancing it against the defence rights and fair trial.

The consultation offers victims powers to influence the process and outcome of the decision-making.²³⁸ However, this is subject to judicial discretion. It is a process that seeks to ascertain and consider opinions before or during the decision-making process; which encourages the active participation of victims. While victims are not obligated

²³⁶ Prosecutor v. Lubanga Transcripts , ICC-01/04-01/06-T-30, Transcripts of 9 November 2006, excerpts of Mr Mulenda ,LRV of victim a/0001/06,a/0002/06 and a/0003/06

²³⁷ The Prosecutor v. Lubanga , Transcripts ,28 November, 2006, p.45

²³⁸ Ibid, Edwards, 226

to participate, the decision-makers are under a duty to consult the victims. However, the Court(decision-makers) may decide to consider the victim preference. They are not obliged to take into account the opinion or wishes of the victims, but the Court would seek their opinions. This implies that the outcome may contradict the wishes of the victims.²³⁹ The ICC seeks victims' opinion as an independent third party with a stake in the criminal proceedings. The influence of victims here is considered low as well as their power to influence the proceedings. However, their contribution may shape the outcome of the decision-making process. The ICC statute and RPE regulate victims participation. For instance, Rule 89(1) provides that victims can make opening and closing statements at hearings. Rule 93 instructs the Chamber to seek victims' views “on any issue” at all stages of the proceedings.²⁴⁰ Furthermore, victims are provided with procedural rights to enhance their participation.

This consultation is a means to give victims a ‘say’ in the proceedings. One implication of this is that it ensures transparency and accessibility to the court.²⁴¹ Victims are not fully enabled with decision-making power, but they are granted the power to influence the process and outcome.²⁴² This consultation does not necessarily determine the outcome, nor will it reflect the wishes of the victims. One main criticism of this non-dispositive classification category is that it is not best suited for realising victims’

²³⁹ Ibid

²⁴⁰ ICC Rules, Rule 89(1) and R.93.

²⁴¹ Jerome Hemptine, ‘Challenges Raised by Victims’ Participation in the Proceedings of the Special Tribunal for Lebanon (2010) *Journal of International Criminal Justice* 8, 165-179

²⁴² Supra, Edwards, 226.

rights.²⁴³ It could be an ideal approach to victims' rights—a contrast to control as a dispositive classification which gives victims full empowerment to dominate decision-making.²⁴⁴

Therefore, consultation as a form of participation applies where the Chamber seeks victims' views and concerns because it affects their personal interests. In such a situation, the Court deems it fit to seek information from victims because they are stakeholders in the proceedings. Whether the Court takes the views and concerns of the victims into account is dependent on judicial discretion. There is no consensus on the definition of victims' views and concerns, but different chambers have defined victims' views and concerns with a proposition on 'personal interests'. According to the Chamber;

“In order to be granted leave to express their “views and concerns” at the trial, the Statute requires that victims be able to demonstrate that their personal interests are affected. Accordingly, where it is clear that an intervention by a legal representative is not related to the personal interests of any of the victims represented by that counsel, the Chamber cannot allow it.”²⁴⁵

²⁴³ Ibid ; David Taylor, “Victim participation in transitional justice mechanisms: real power or empty ritual” (2014) Discussion paper of Impunity watch, p.1-42.

²⁴⁴ Wendy Lambourne, ‘Transitional Justice and Peacebuilding after Mass Violence, (2009) 3(1) *International Journal of Transitional Justice*, 28-48.

²⁴⁵ The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, 22 January 2010, Trial Chamber II, ICC-01/04-01/07-1788-tENG P.23,ara.58.

While ruling on a DRC situation has described views and concerns to indicate ‘opinions or ‘preoccupations’.²⁴⁶ The court is under an obligation to examine these views and concerns. It is worth mentioning that victim-witnesses cannot give their views and concerns in their capacity as witnesses. According to their dual status, they are only permitted to give evidence and answer questions.²⁴⁷ Besides, the Chamber stated that questioning of witnesses under rule 91(3) is a means by which LRVs may use to present their ‘views and concerns’ within the context of article 68 of the Statute.²⁴⁸

At times, the presentation of views and concerns could flow into the role of the parties. Some judges have expressed their concerns about potentially abdicating the role of the parties to the victims. Victims’ voice may blur the distinction between their roles and those of the parties. Judge Pikis calls our attention to this in his dissenting opinion:

“The participation of victims in the proceedings is confined to the expression of their views and concerns...participation of victims is confined to the expression of their

"views and concerns," whereafter I added, "It is a highly qualified participation limited to the voicing of their views and concerns. Victims are not made

²⁴⁶ Situation in the Democratic Republic of the Congo, Prosecutor v. Lubanga, Concurring Opinion of Judge Pikis, Decision of the Appeals Chamber on Joint Application of Victims a/0001/06 to a/0009/06 and a/01015/05, Directions and Decision of the Appeal Chamber, February 2, 2007. ICC-01/04-01/06 OA8.

²⁴⁷ The Prosecutor v Katanga and Ngudjolo, ICC-01/04-01/07-1788-tENG, 22 January 2010, para. 110; Prosecutor v Lubanga, No. ICC-01/04-01/06-1119, 18 January 2008, para. 133-134.

²⁴⁸ The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Trial Chamber II, ICC-01/04-01/07-17-1788-tENG, 22 January 2010, p 27, para. 74.

parties to the proceedings nor can they proffer or advance anything other than their 'views and concerns expression of their "views and concerns,"”²⁴⁹ In relation to what

can victims express their views and concerns was the next subject I addressed
”Not in relation to the proof of the case or the advancement of the defence. The
 burden of proof of the guilt of the accused lies squarely with the Prosecutor; article
 66(2) of the Statute.”²⁵⁰

This dissenting opinion shows the judges dissensus on victims’ expression of views and concerns as well as the place of the adversarial system of procedure. For the determination of truth, the Court has the right to invite victims to present evidence. However, this presentation of evidence and questioning of witnesses seems to violate the prosecutor's exclusive right because it bestows on the victims the opportunity to prove or disprove the allegations against the accused and how it affects their personal interests. The implication centres on a supposed encroachment of the parties’ rights, as the Court bestows the same right on the victim.

Regarding the personal appearance of victims at trial, while the court acknowledged that victims could be invited to give their views and concerns in person, but noted this might slow down the trial. The court reiterated that it would be preferable for legal

²⁴⁹ Prosecutor v 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" 13 June 2007 (ICC-01/04-01/06-925), Separate Opinion of Judge Georgios M. Pikis.

²⁵⁰ Judge Pikis, Dissenting Opinion, p.42, para.15.

representatives to appear during trial rather than individual victims to achieve a fair and expeditious trial. It stressed that for victims to appear in person, “there would have to be cogent, indeed powerful, reasons”²⁵¹ The Chamber notes:

“people without legal training coming to talk about very difficult things that have happened to them could have a real capacity for destabilising these court proceedings....At the end of the day, **this is not a truth and reconciliation commission or a body of that kind**[...] we’re not saying no, but we’ are saying exceptional and for a good reason.”²⁵²

From this excerpt, one could make inferences on the restricted platform the Court is willing to give to victims who are interested in presenting their views and concerns in person. It simply states that the court's procedural activity is not built like other mechanisms(TRC) to entertain victims’ appearances. In exceptional circumstances, the court observed that the court permits victims to make appearances based on ‘cogent and powerful reasons’.²⁵³ Interestingly, the Chamber authorised the request of an LRV for three victims to testify at trial.²⁵⁴ Their testimonies included presenting their views and concerns in person after they had tendered their personal witnesses’ account as

²⁵¹ Situation in the Democratic Republic of Congo, Status Conference (Open Session), ICC-01/04-01/06-t-101-ENG , 12 January 2009, P43, lines 15-25.

²⁵² Status Conference (Open Session), ICC-01/04-01/06-t-101-ENG , 12 January 2009,

²⁵³ Ibid.

²⁵⁴ 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, ICC-01/04-01/06-2032-Anx., para.26

evidence.²⁵⁵ The Chamber posited that in this situation, it should ensure that the victims' views and concerns are not a repetition of their witness's account(evidence).²⁵⁶

Interestingly, In another ruling, Judge Blattman reiterated the statutory nature of victim participatory right: "victims' participation is not a concession of the Bench, but rather a right accorded to victims by the Statute."²⁵⁷ Furthermore, "The Chamber should be mindful that the right to participate when victims' interests are affected is the consequence of a legal protected interest of the victim."²⁵⁸ Hence, participatory rights legalised, there are boundaries to the extent of its applicability to uphold the court's mandate.

In summary, the use of consultation may enhance victims visibility during the proceedings as it explores their influence on the outcome of the decision. Therefore, the court is obligated to consult victims in court proceedings that affect them, but this consultation may contribute to the process or outcome. Expressing of views and concerns of victims is the main form of consultation.

3.5.2.2 Information provision

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Prosecutor v. Thomas Lubanga Dyilo , Separate and Dissenting Opinion of Judge Rene Blattman to Decision on victim participation, Trial Chamber I, ICC-01/04-01/06-1119 18 January 2008, para 13.

²⁵⁸ Ibid ,para.14

The information provision is another sub-division of non-dispositive category from Edwards theory, which ensures a two-way obligation between the decision-maker and the victim. The decision-maker seeks or requests information from the victims, while the victim must provide information to the decision-maker.²⁵⁹ Here, the victims offer information according to rules set by the decision-maker, the Statute and RPE. It is noteworthy that the victim has a non-optional supply of information.²⁶⁰ The role of the victim as a witness is a typical example of this type of participation. One drawback of this sub-category is that it utilises victims as instruments for information. In such a situation, a victim may be compelled by the decision-maker to provide information. It is featured in Truth commissions with subpoena powers.²⁶¹ Victims are seen as witnesses rather than stakeholders who may exercise powers or influence during the proceedings.

In addition, the role of victims as information providers, increases the risk of 'tokenism'.²⁶² Understandably, victims who give testimonies as witnesses are underrepresented groups from a large pool of victims. Consequently, the process robs the victim of choosing to provide information in their capacities as victims, as they are

²⁵⁹ Ian Edwards; 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making,' (2004) 44(6) *British Journal of Criminology*, 967-982; Impunity Watch, Discussion Paper, 'Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual,' (2014) Oak Foundation, 1-42, 25

²⁶⁰ Ibid

²⁶¹ Impunity Watch, Discussion Paper, 'Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual,' (2014) Oak Foundation, p. 1-42., 25

²⁶² Impunity Watch, Discussion Paper, 'Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual,' (2014) Impunity Watch, p. 1-42.

under oath. The role of victims as a stakeholder whose interests require attention is swept under the carpet. At the same time, he acts as an information provider in response to the decision maker's needs. The victim is perceived as a source of information; they are put on oath to testify as witnesses during the trial. This brings to light the dual status of the victims. These phase of testimonies is besieged with examinations in chief and cross-examination.

Victims as witnesses do not provide a convenient platform for victims to tell their stories or emote. Their primary function is to provide accurate information to the parties.²⁶³ At this stage, the privileges of victim status are suspended. An excellent example of this can be found in the arguments of the prosecutor: “such status is fraught with confusion and opens the door to victims intruding into the investigation process, the exclusive province of the Prosecutor.”²⁶⁴ The Prosecutor’s arguments present a perspective which does not grant a warm welcome for victims inclusivity in criminal proceedings. His views emphasise victims' initial state as witnesses (information provider), in contrast to their emergent status as stakeholders.

²⁶³ Vladimir Tochilovsky, “Victims’ Procedural Rights at Trial: Approach of Continental Europe and the International Tribunal for the Former Yugoslavia” In Van Dijk (ed) *Caring for Crime Victims: Selected Proceedings of the 9th International Symposium on Victimology* (Criminal Justice Press 1999) 287-291

²⁶⁴ Situation in the Democratic Republic of Congo, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, Arguments of the appellant (Prosecutor) in OA6, 19 December 2008, ICC-01/04-556, P.11, Para.22(C)

The victims' right to present evidence at the trial was examined in the Lubanga case. The prosecutor and the Defence sought leave to appeal the Trial Chamber decision(referred to as an impugned decision).²⁶⁵ On merits, the AC had to decide whether it was possible for victims participating at trial to lead evidence pertaining to the accused's guilt or innocence and challenge evidence's admissibility.²⁶⁶ The impugned decision found that the right to introduce evidence is not exclusive to the parties. The Court has a general right(not dependent on the parties' consent) *to request the presentation of all evidence necessary for the determination of the truth, pursuant to Article 69(3)*.²⁶⁷ The Prosecutor argued that TC committed a 'legal error' for deciding that victims may introduce evidence on the guilt or innocence of the accused and the extent to which it authorised victims can challenge the evidence's admissibility or relevance.²⁶⁸ The Statute exclusively vests this power in the prosecutor.²⁶⁹ The Prosecutor also contended that the presentation of views and concerns under Article 68(3) of the Statute connotes the right of victims to present '*their personal perspective or opinion on an issue*' rather than the submission of evidence.²⁷⁰

Moreover, the Prosecutor averred that the TC's powers under Articles 64(6) (d) and 69(3) do not provide a basis for victims to present evidence about the guilt or innocence

²⁶⁵ ICC-01/04-01/06-1135;ICC-01/04-01/06-1136;Decision Granting Leave to Appeal.

²⁶⁶ Ibid.

²⁶⁷ ICC-01/04-01/06,18 January 2008.

²⁶⁸ ICC-01/04-01/06-1219, paragraph 2.

²⁶⁹ Rome Statute, Article 66(2).

²⁷⁰ Ibid

of the accused.²⁷¹ He stated that these provisions regulate the functions and powers of the Chambers. As such, the interpretation of Articles 64 and 69 is inconsistent with victims' right to present evidence. In his words; "*the erroneous conflation of the interests of the victims and the role of the Prosecution*". The Defence argued that the right to present evidence relating to the guilt or innocence should be within the parties' exclusive. He submitted that the TC erred in allowing victims to lead evidence and to challenge the admissibility of evidence.²⁷² The Prosecutor supported the Defence arguments. In his arguments, the LRVs argued that the accused's guilt or innocence affects the victims. Also, the LRV contended that victims' personal interests might be affected by the evidence presented or proposed. Given that presentation of evidence by the parties may prejudice their right to reparations.²⁷³

The AC stressed that the parties predominantly own the right to lead evidence on the accused's guilt or innocence and the right to challenge the admissibility of evidence. It noted that the sentence of article 68(3) and Article 64(6) (d) specifically mentioned 'parties' not parties and victims or victims. The Prosecutor's burden of proof supports the parties' exclusive right to present evidence and the parties' disclosure obligations. The AC, however, this provision does not preclude the victims from tendering and presenting evidence. The Chamber confirms the TC's finding on victims' ability to lead evidence and challenge the evidence's admissibility.²⁷⁴

²⁷¹ Ibid.

²⁷² Ibid ,p.27, para.78.

²⁷³ Ibid, paras 80-82.

²⁷⁴ Ibid, 36, para.109.

“The Appellant opposes the participation of the Victims in the admissibility proceedings as well as at the hearing of the appeal itself if the decision is found to be appealable. The Victims have no conceivable interest, as he maintains, in the determination of the admissibility of the appeal and none as regards the appeal itself. In his contention, they can have no interest in the confirmation of the charges either or any appeal arising therefrom. Their interest is confined to trial proceedings that lay the ground for the pursuit of reparations....”²⁷⁵

“Equality of arms is another element of a fair trial, which in the context of the Statute, putting the burden of proof on the Prosecutor, means that the defendant cannot be required to confront more than one accuser. Holding the scales even between the parties with the burden of proof cast upon the Prosecutor rules out a second accuser. The Prosecutor, the accuser, is required to forewarn and inform the person about the case he/she has to face at the confirmation hearing or at the trial. The defendant, too is required to forewarn and inform the other side, respecting the advancement of specified defences. A right to inspect the material in possession of either side is also envisaged.”²⁷⁶

“Thus, the Victims assert that their interests lie, first of all, in the possibility of seeking reparations. Secondly, the Victims assert their

²⁷⁵ Prosecutor v Lubanga Dyilo "Réponse à la demande des victimes a/0001/06, a/0002/06, a/0003/06 et a/0105/06 d'autorisation de participation à la procédure en appel de la décision de confirmation des charges" 11 May 2007 (ICC-01/04-01/06-901) and the annex thereto ICC-01/04-01/06-925 13-06-2007 ,P.14,par 7

²⁷⁶ Ibid.

interest in seeing the Appellant being prosecuted; in other words, the
Victims want that justice is done.”²⁷⁷

The ruling reiterates the ICC's truth-seeking power as part of a criminal justice system—one of the rationale behind the establishment of the Court. Truth serves a dual function in this instance; truth as an objective of the ICC²⁷⁸ and truth as a fundamental right of the victims.²⁷⁹ Obtaining an accurate historical record propels the arraignment and prosecution of the accused.²⁸⁰ It is worth mentioning that the ICC's truth-seeking power may overshadow the criminal proceedings' adversarial nature in light of the judges' role as passive umpire. If article 69(3) empowers the judges to invite victims for evidence presentation, then it may be that the Rome Statute enables the judges to perform a truth-finding function. A cursory look at article 54(1)a also illustrates that the prosecutor is interested in establishing the truth. However, the operation of this article 69(3) stretches the third-party status of victims—granting them one of the rights of full party status. Interestingly, Judge Wyngaert doubts the contribution of victims to the ICC's truth-finding process. She opines that considering victims' views “may or may not, be

²⁷⁷ Ibid.

²⁷⁸ Antonio Cassese, *International Criminal Law* (Oxford University Press 2003) 269.

²⁷⁹ Williams Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2010) 326, 327

²⁸⁰ Ibid.

conducive to the truth-finding process.”²⁸¹ False or inaccurate narrative and testimonies from victims will affect the outcome of truth-finding.

Be that as it may, victims also have a right to know the truth.²⁸² They have an interest in the determination of the facts and the identification of the perpetrators of crimes.²⁸³ It is believed that victims' right to know the truth about what happened may give them closure. It is observed that none of the provisions of the Rome Statute expressly provides for victims right to truth. However, a criminal prosecution could be a means to obtain the truth.

The approach of the judges reflects the literal interpretation of Article 69(3). It is observed that this ruling offsets the parties' exclusive rights to present evidence; an expansion of the rights of victims as third parties. This ruling demonstrates that the judges were willing to adjust the presupposed rights of the victims for truth-finding. The judges did exceed the scope of the Rome statute. The determination of the truth is an essential element of criminal prosecution. Both parties are interested in the truth. Victims are also interested in the truth. Therefore, their participation in this aspect facilitates in uncovering the truth.

²⁸¹ Christine Van den Wyngaert, “Victims before International Criminal Court: Some Views and Concerns of an ICC Trial Judge” (2012) 44 *Case Western Reserve Journal of International Law*, 475-496, p.485

²⁸² Williams Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2010) 326, 327.

²⁸³ *Prosecutor v Katanga and Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, para.32.

Furthermore, one other issue which arises is the conflict of interests between the LRV and the Prosecutor. This has been seen in the case of *Prosecutor v Germain Katanga*; the AC had to determine if the TC erred in law by allowing victims to present incriminating evidence without corresponding disclosure obligations. In addressing this issue, the LRV stated:

“The two Legal Representatives consider that, while it is agreed that the victims cannot assume the role of the Prosecutor, with whom the burden of proof solely lies, and that their intervention must in no way have the effect of their replacing the latter, they nevertheless have – as does the Court – an interest in the determination of the truth. Furthermore, they emphasise that the proliferation of victims in the instant case will have no implications for the Defence’s workload since not all the victims will want or be able to systematically present evidence.”²⁸⁴

“With respect to the possibility of the Legal Representatives conducting investigations, they recall that their sole objective is to gather evidence seeking to prove the harm suffered by the victims and not to investigate the guilt of the accused.”²⁸⁵

Besides, the defence objected to the reliability of the testimonies of victim-witnesses. The probative value of such testimonies is questionable given the underlying interest of such witnesses as victims. In response, the Chamber noted that it is within its

²⁸⁴ *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the modalities of victim participation at Trial , ICC-01/04-01/07-1788 16/46 22 January 2010p.16, para36

²⁸⁵ *Ibid* ,para.37

prerogative to decide whether it is appropriate to allow a victim to testify in person in order to ensure that the dual status of the victim does not sabotage the probative value of the testimonies.”²⁸⁶

Furthermore, the TC brought our attention to the general position of victims with dual status, victim-witnesses. And the implications of their testimonies as a source of information.²⁸⁷ On January 2008, the TC held that victims appearing before the Court do not automatically qualify as witnesses.²⁸⁸ It depends on whether they are called as victims or witnesses. It is necessary to ensure that the participation of victims with dual-status does not affect the rights of the defence.²⁸⁹

“ The Chamber indicated that their security should not be compromised, it also established that individuals with dual-status do not accrue rights above and beyond those of someone who is solely a victim or a witness.”²⁹⁰

In a similar vein, the role of victim-witnesses in information provision also came into play in *Prosecutor v Germain Katanga*; the LRV aver that the joint reading of articles 68(3) and 69(1) of the Statute ascertain that the status of victims and witnesses are not

²⁸⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, ICC-01/04-01/07-1788-tENG, 22 January 2010 p.32, para.90.

²⁸⁷ Transcript of hearing on 30 October 2007, ICC-01/04-01/06-T58-ENG, page 17, lines 17-24

²⁸⁸ *Prosecutor v Lubanga*, Decision on victims’ participation, 18 January 2009, ICC-01/04-01/06-119

²⁸⁹ Decision on certain practicalities regarding individuals who have the dual status of witness and victim, ICC-01/04-01/06-1379, 5 June 2008, Trial Chamber, p.4 Para.6(b).

²⁹⁰ *Prosecutor v Lubanga*, Decision on certain practicalities regarding individuals who have the dual status of witness and victim, 5 June 2009, ICC-01/04-01/06-1379, para.52.

legally incompatible.²⁹¹ He further argued that if a victim is granted a dual status of victim-witnesses, this does not undermine the Chamber's power to weigh testimony and evidence under article 69(4) of the Statute. Rather, it would assist in the determination of truth, which is the purpose of the trial. To support his argument, he made reference to the AC's decision of 11 July 2008. This decision granted the victim the right to tender evidence at the trial and discuss evidence adduced by the parties.

The Chamber stressed that the recent jurisprudence of the Court recognises and permits the dual status of victim-witnesses. Regarding the case law dated 18 January 2008,²⁹² Besides, according to the context of the situation, it was challenging to find '*spectators*' that are not victims of the Bogoro attack. The Chamber granted witness 166, the procedural status of victims at the PTC stage.

The role and influence of evidence in criminal proceedings cannot be overemphasised. The preponderance of evidence determines the innocence or guilt of the accused. It is the primary responsibility of both parties-defence and prosecution- to present evidence and convince the judge or jury to decide in their favour. This begs the question of the place of victims in the presentation of evidence. If victims are allowed to present evidence, this will disrupt the equality of arms and threaten the accused's fair

²⁹¹The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Application for Participation of Witness 166, ICC-01/04-01/07-632, Pre-trial Chamber 23 June 2008.

²⁹² The Prosecutor v Thomas Lubanga, ICC-01/04-01/07-1119, 18 January 2008 paras 132-134.

trial.²⁹³ This connotes that the accused will be up against two accusers; the prosecution and victim. This is not consistent with the adversarial system of procedure. However, since the ICC system of procedure is a hybrid of the inquisitorial and adversarial system of procedure, victims may tender and examine the evidence with some exceptions. It is debatable if victims have the right to present evidence during criminal proceedings.

Be that as it may, victims' personal interests are not required for them to give evidence under oath. The TC pointed this out. In its ruling, the Chamber has 'a general right to request the presentation of all evidence necessary for the determination of the truth...' ²⁹⁴ The Chamber also acknowledged that Rule 91(3) of the Rules permits participating victims to examine(question) witnesses with the leave of the Court. Therefore, this rule enables participating victims to tender and examine evidence if it will assist in the determination of the truth in the Chamber's view. The test for this is the "personal interests" test.²⁹⁵ The Chamber reasoned that the victims applying to participate should be provided with access to the redacted version of the prosecution's 'summary of presentation of evidence' ²⁹⁶ This shows that Court allows victims to lead evidence provided it is in the determination of the truth and such evidence affects the victims' personal interests:

²⁹³ Masha Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (1st Edition, Intersentia 2012) 109, 110.

²⁹⁴ ICC-01/04-01/06, 18 January 2008 P.37 Para 108; Article 69(3) Rome Statute.

²⁹⁵ Ibid.

²⁹⁶ Ibid, Para 110.

“ [T]he Chamber is satisfied that the victims of crimes are often able to give direct evidence about the alleged offences and as a result a general ban on their participation in the proceedings if they may be called as witnesses would be contrary to the aim and purpose of Article 68(3) of the Statute and the Chamber's obligation to establish the truth.”²⁹⁷

The ruling explains the stance of the Court on the dual status of victims. The position of a victim does not preclude him from being eligible as a witness. In this situation, a victim performs two distinctive roles, participating victims and a witness. Nevertheless, this does not affect the role of the victim as a third party to the proceedings. The Prosecutor and the Defendant are full parties with obligations and rights in the proceedings. One of such obligations is full disclosure obligations.²⁹⁸ Both parties are under total disclosure obligations if they want to lead evidence, which creates equal opportunities for them on equality of arms. None of the provision under Section II (Rule 76-84) expressly provides for disclosure obligations on victims—same applies to the Rome Statute.

The victims lead evidence in their capacity as victims; it is believed that this could offset arms' equality and entrench them as assistant prosecutors. This would pitch the defendant against two accusers.-the Prosecutor and the victims. The court has noted

²⁹⁷ Ibid ,paras,113.

²⁹⁸ ICC Rules of Procedure and Evidence, Section II, Rule 76-84.

that victims do not have a corresponding obligation to disclose evidence to the other parties before trial because they are not parties to the proceedings.

The scenario is not strange in the jurisdiction of some continental Europe. In Germany, Italy and Ukraine, victims have the right to present evidence.²⁹⁹ In Ukraine, the victims' role included 'scrutinising the evidence at trial'. In addition, one of their rights also consists of the right to file a complaint against the prosecutor's actions.³⁰⁰ This ruling shows that the proceedings shifted way from a largely adversarial nature towards a continental criminal procedure. According to Damaska, continental criminal procedure is not founded on 'bipolar contest', which marginalises victims' voice. Victims' active participation in the continental criminal system is not a clog in the proceedings' progress.³⁰¹

Similarly, the Chamber made a distinction between "giving evidence" and "expressing their views and concerns."³⁰² The former are testimonies given under oath; the latter includes victims story-telling, narratives and grievances. The victims are treated as

²⁹⁹ Vladimir Tochilovsky, 'Victims' Procedural Rights at Trial :Approach of Continental Europe and the International Tribunal for Former Yugoslavia. In Jan Van Djik, Ron Kaam and Jo-Anne Wemmers, (eds) *Caring for Crime Victims: Selected Proceeding of the Ninth International Symposium on Victimology* (Criminal Justice Press 1999)1.

³⁰⁰ Ibid.

³⁰¹ Mirjan Damaska, *The Faces of Justice and State Authority :A Comparative Approach to the Legal Process* (Yale University Press 1986).

³⁰² *Prosecutor v Lubanga* , ICC-01/04-01//06-2032, 9 July 2009, paras. 104.150; Ibid ,paras 38;*Prosecutor v. Thomas Lubanga Dyilo* Transcripts of Trial hearings of 12,13,14,15 and 21 January 2010.

witnesses. The LRVs, Prosecution and the Defense would ask them questions. It was more of questioning than narratives.

Besides, victims can also tender evidence as independent witnesses rather than witnesses called by any of the parties. It has been demonstrated in three victims' testimonies (two former child soldiers and a school teacher) in the Lubanga case.³⁰³

This section has reviewed the participation of victims during the trial process as information providers. It is noted that most times, the chambers permitted victims to present evidence, which is an exclusive right of the parties, where the provision of such evidence required for the determination of the truth. It follows that the Court has a general right per Article 69 to request victims to lead or give evidence. Victims may also testify on their own right provided it would contribute to the ascertainment of truth.³⁰⁴

3.5.2.3. Expression

As was pointed out above; expression is an optional supply of information or emotion; the permission to emote or tell stories. It is voluntary because it requires the victim to

³⁰³ Prosecutor v. Thomas Lubanga Dyilo Transcripts of Trial hearings of (a/0229/06, VO2-0003, a/0225/06, VO2-0002 and a/0270/06, VO2-0001, 21 January 2010.

³⁰⁴ The Prosecutor v. Germain Katanga and Ngudjolo, 09 July 2010; The Prosecutor v. Katanga and Ngudjolo, Decision authorizing the appearance of victims a/0381, a/0018/09, a/0191/08 and a/0363/09 acting on behalf of a/0363, ICC-01/04-01/07-2517, 9 November 2010, Trial Chamber II, 9 November 2010.

provide information or communicate feelings to the decision-maker.³⁰⁵ The obligation on the decision-maker may be to allow victims to emote. Victims don't need to undertake this function as it is voluntary. The victims may or may not accept the invitation. The impact of expression on the trial is shallow. It has been described as '*the weakest of all participatory forms*'.³⁰⁶ This subcategory is very symbolic, as it encourages tokenism.³⁰⁷ Their level of influence is considered to be at the lowest when compared to other subcategories of non-dispositive participation. According to Edwards, Victim Impact Statement(VIS) is similar to expression.

The expression could also come in the form of story-telling at a particular stage of the proceedings. Story-telling is not a common process at the ICC, but the narratives may contribute towards truth-finding. An instance can be seen in the Lubanga case, The Chamber, in response to the request of the LRVs, authorised three victims to give evidence.³⁰⁸ It noted that the story of each witness(chid soldier) is peculiar because "none of their personal histories is the same."³⁰⁹ Also, the Chamber stressed the account of the witnesses should complement the Prosecutor.³¹⁰ It further distinguished between "giving of evidence" and "expressing their views and concerns." The victims are treated

³⁰⁵ Ibid.

³⁰⁶ Impunity Watch, Discussion Paper, "Victims Participation in Transitional Justice Mechanisms:Real Power or Empty Ritual (2014)p.24

³⁰⁷ Ibid.

³⁰⁸ 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, 26 June 2009,ICC-01/04-01/06-2002-Conf. 26 June 2009.

³⁰⁹ Ibid.

³¹⁰ Ibid, paras 150

as witnesses. The LRVs, Prosecution and the Defence would ask them questions. It was more of questioning than narratives. The witnesses consisted of two former child soldiers and a schoolteacher. The victim(a/0270/06, V02-0001), a schoolteacher narrated instances of murder, sexual violence and sexual slavery.³¹¹ He stated that he witnessed the UPC soldiers enlisting four pupils on 5 February 2003.³¹² His testimony also revealed he was the guardian of a.0229/06(V02-0003) and a/0225/06(V02-0002).³¹³ Lubanga was the President of the UPC. He gave an account of the horrible experience the child soldiers in his presence and how he struggled to protect the children, but he failed to and ended up suffering harm.

The two former child soldiers narrated their ordeal and encounter with the militia. The harm they suffered, the state of the camp, the torture and the sexual violence encountered by underaged girl soldiers(13-14 years old)³¹⁴ The second victim, a former child soldier(a/0229/06, VO2-0003) averred that the accused was the president of the militia group(UPC). Besides, he attested to his abduction³¹⁵ as well as occurrences of SGBV of girls between ages 13 and 14.³¹⁶ He asserted that the commander tortured him, the poor condition of living in the militia camp, and his active participation in hostilities.³¹⁷

³¹¹ Ibid.

³¹² T-225-Red2-ENG,page 22,lines 23-25.

³¹³ T-226-Red2-ENG,page 48,line 11 to page 50,line 20.

³¹⁴ Prosecutor v Lubanga , ICC-01/04-01//06-2032, 9July 2009, Annex,para.1.

³¹⁵ T-230-Red2-ENG,page 34, lines 17-19.

³¹⁶ The Prosecutor v Lubanga, 14 January 2010,p61

³¹⁷ T-231-Red2-ENG,page 28,lines 10-11.

Although, the victims gave testimonies as independent witnesses. Nonetheless, their testimonies reveal narratives of their experiences during the hostilities. While they narrated their ordeal, it demonstrated expression. The Chamber rejected some of these testimonies on the grounds of falsification of identities and testimonies. The defence's cross-examination of the former child soldiers revealed that the former-child soldiers had falsified their identities and one of the child soldiers had tendered false information.³¹⁸

It appears the court is very restrictive with expression via story-telling. Story-telling may invoke emotions. The structure of the court is not conditioned to manage emotions which comes due to narratives. Narratives are essential for the ascertainment of truth and record keeping. Perhaps, a better-suited forum for this is truth commission.³¹⁹ Truth Commission promotes truth, healing, forgiveness and therapeutic benefits.³²⁰ With TCs, there a possibility of reflective engagement and reparative elements between narratives and trauma.³²¹ Public testimony in the presence of the perpetrators and the community

³¹⁸ The Prosecutor v Lubanga, 22 January 2010,p31;The Prosecutor v Lubanga, 25 May 2010.

³¹⁹ Cristian Correa, "Julie Guillerot and Lisa Magarell, Reparations and Victim Participation :A Look at the Truth Commission Experience" accessible at <https://ictj.org/sites/default/files/ICTJ-Global-Reparations-Participation-2009-English.pdf> last accessed 04 March 2020; Carla Ferstman, Mariana Goetz and Alan Stephens, (Eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity*, Brill Academic Publishers (2009) available at < <http://www.brill.nl/default.aspx?partid=210&pid=28759> > last accessed 04 March 2020

³²⁰ Ibid;South African Truth and Reconciliation Commission in 1990s.

³²¹ Dominick LaCapra, *Writing history, writing trauma*(The John Hopkins University Press)

is restorative.³²² Cohen believes the TC encourages “the symbolic recognition of what is already known but was officially denied.”³²³ On the other hand, in criminal prosecutions, perpetrators are usually reluctant to acknowledge their crimes and admit guilt,³²⁴ which precludes healing and reconciliation. Thus, the ICC's normative content is not well equipped in accommodating these needs because it is built on punishment rather than reconciliation.

Victims should express themselves within this context as right holders rather than informants or witnesses. In turn, their stories should contribute to the historical context (record keeping) of what happened. As a form of expression, storytelling promotes victims’ “healing and rehabilitation” to provide them with closure.³²⁵ In the same vein, victims’ story-telling is likely to contribute to fact-finding and truth-telling in the trial process. The truth-finding may promote healing after trauma.³²⁶ However, there is a limitation to healing or rehabilitation because of the structure of criminal trials.

³²² Rose McGarry and Sandra Walklate, *Victims :Trauma, testimony and justice*”(Routledge 2015) 79-100

³²³ Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering*(Blackwell Publishers 2001); Cathy Caruth, *Trauma: Explorations in memory*(Jon Hopkins University Press 1995).

³²⁴ Lubanga Sentencing.

³²⁵ Fiona McKay, REDRESS, Universal Jurisdiction in Europe :Criminal Prosecutions in Europe Since 1990 FOR War Crimes , Crimes against Humanity ,Torture & Genocide (1999) 15, accessible at <<http://www.redress.org/documents/inparct.html>> last accessed 04 March 2020.;

³²⁶ Victims’ Rights Working Group, *Victims’ Rights in the International Criminal Court* (2000), available at <http://www.vrwg.org/Publications/01VRWG%20flyer2000.pdf>

As mentioned earlier, VIS exemplifies a medium of expression for victims. It is applicable in some domestic criminal justice system. Victims are allowed to emote in writing or orally. However, arguably, VIS is mainly symbolic, but it could give victims a degree of satisfaction. VIS allows victims an opportunity to inform the Court how their victimisation impacted them.³²⁷ The VIS is presented to the Court after determining the guilt of the accused but before sentencing. The researcher shall examine VIS in chapter 4.

Thus far, this section has explained expression as a function of non-dispositive category of participation. The section that follows moves on to consider the findings and discussion.

3.6 Discussing findings

This chapter set out to assess whether the ICC provided sufficient scope to consider victims' rights and interests during the trial process. It is argued that procedural fairness fosters victims' rights and interests in criminal trials. Rawls holds the view that the system must be fair to reinforce fairness during proceedings. He likens the system as an initial situation.³²⁸ In a similar vein, prior studies of Tyler, Thibaut and Walker

³²⁷ Jo-Anne Wemmers, "Where do they belong? Giving victims a Place in the Criminal Justice Process (2009) 20(4)*Criminal Law Forum*,396-416 p.399

³²⁸ John Rawls, 'A Theory of Justice' (Cambridge, Massachussets, Harvard University 1971)36,37.

believe procedural fairness enhances victims' experiences during trial proceedings.³²⁹ These studies have noted the importance of procedural fairness during trial proceedings. It follows that victims tend to prefer how they are treated during the proceedings to the outcome of such proceedings. Procedural fairness cannot be entirely separated from victim participation in the proceedings.

Similarly, the fairness of the trial process is essential for both victims and accused. But this chapter is focused on victims' rights and interests during the trial process. It is noted that respect and voice are essential criteria for victims' experiences during the trial.³³⁰ Both requirements may give victims a sense of belonging.

Victims' procedural rights increase their visibility during the proceedings. Victims' visibility is not a determinant of their influence in the proceedings, but rather their participation ensures that their interests might be considered provided they are not prejudicial to the victims' rights.³³¹ Victims' voice could be heard through their LRVs(opening statements, closing statements, observations and submissions). Victims could also voice out through VIS or storytelling. However, from the transcripts, there

³²⁹ Tom Tyler, 'Procedural Justice and the Courts' (2007) 44*Court Review* p.30; John Thibaut, Laurens Walker, Stephen LaTour, Pauline Houlden, *Procedural Justice as Fairness* (1974) 26 *Stanford Law Review* 1271, P.1271-1272.

³³⁰ John Thibaut, Laurens Walker, Stephen LaTour, Pauline Houlden, *Procedural Justice as Fairness* (1974) 26 *Stanford Law Review* 1271, P.1271-1272; Tom Tyler, 'Procedural Justice and Policing: A Rush to Judgment' (2017) 13(1) *Annual Review of Law and Social Science*, p.29-53; Tom Tyler, 'Procedural Justice and the Courts' (1988) 44 *Court Review*, p.24.

³³¹ Rome Statute 1998, Article 68(3).

is some evidence to suggest that LRVs are the primary voice of victims. The OPCV intervenes at times.³³² The LRVs are the direct representatives of victims. Victim representation may determine the realisation of rights and interests.

A good example is found in the words of the prosecution; “affection of personal interests is the “cornerstone” upon which victim participation may be premised.”.³³³ Therefore, procedural Status of a victim is not the only factor of involvement; victims' personal interests are also essential for victim participation in the trial process. While some victims have general personal interests, some victims have individual personal interests. This distinction distinguishes between general interests applicable to all victims within a collective context and personal interests specific to some victims.

Ambos suggests that the ICC system of procedure is a mixture of an adversarial and inquisitorial procedure system.³³⁴ While he posits that the bifurcation of rules into common and civil law procedure is less significant, he argues that what matters is if these rules facilitate the courts' effectiveness.³³⁵ Do these rules conform to fundamental

³³² Situation in the Democratic Republic of Congo, Decision on the Requests of the Legal Representatives of Applicants on Application process for victims' participation and legal representation , ICC-01/04-374, 17 August,P.21,para.47.

³³³ Situation in the Democratic Republic of Congo, Judgement on victim participation in the investigative stage of the proceedings in the appeal of the OPCD against the decision of PTC 1 OF 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the decision of PTC 1 of December 2007, ICC-01/04-556,19 December 2008, Appeals Chamber, p.8, para.13.

³³⁴ Kai Ambos, 'International Criminal Procedure: “adversarial”, “inquisitorial” or mixed?(2003) 3(1) International Criminal Law, 1-37.

³³⁵ Ibid; Kai Ambos, 'International Criminal Procedure: “adversarial”, “inquisitorial” or mixed?(2003) 3(1) International Criminal Law, 1-37.

fair trial standards? As mentioned in the literature review, the criminal procedure in place is a significant determinant of how victims are treated during the proceedings.³³⁶ The system of procedure dictates the role of victims and the extent of their participation in trials. With this in mind, it is thought that the system of procedure in place inevitably affects the realisation of victims' rights and interests. From the trial proceedings, arguably, the trial process is mainly adversarial than inquisitorial. Therefore, there are limitations to the extent of application of victims' rights and interests. Suppose the procedural system is mostly adversarial, while victims may be given a range of extensive rights. The prosecutor has utilised this argument to oppose victims' participation, vis-à-vis the presentation of evidence for the determination of truth. He argued that the presentation of evidence is an exclusive function of the parties; as such, it is ultra vires the victims' role in presenting evidence during trials. This argument finds a basis in common law jurisdictions or adversarial settings.

Nonetheless, the Chambers' decision to allow victims to present evidence and testify for the determination of truth demonstrates the Chamber's role in fact-finding and truth-finding, a feature of the inquisitorial system of procedure. The court is willing to extend the role or rights of victims in order to facilitate the functioning of the court. It is argued

³³⁶ John Spencer, 'Adversarial v. inquisitorial systems: is there still such a difference' (2016) 20(5) *International Journal of Human Rights*, 601-616; Mike McConville and Geoffrey Wilson, *The Handbook of the Criminal Justice Process* (Oxford University Press 2002); Jacqueline Hodgson, 'The Police, the Prosecutor and the judge d'instruction: Judicial Supervision in France, Theory and Practice' (2001) 41(2) *British Journal of Criminology*, 342-361.

that this is beneficial for victims because victims are also interested in truth as they also have the right to truth. Nevertheless, tension still exists, especially concerning the recognition and application of victim participatory rights and interests and other participants. This tension is seen in the parties' reactions to the chamber's ruling on victims' right to present evidence in determining the truth. Clearly, the ICC has improved the respect for rights of victims compared to the previous courts. There still exists tension as to the rights of victims and others.

Some of the victims are anonymous; their roles during the trial are restricted to protect the accused. It is observed that restrictions are placed on the application of procedural rights for victims.³³⁷ The Chambers have been cautious in granting extensive procedural rights to victims and have noted that procedural rights are not automatic for victims. Victims must show that the proceedings affect their personal interests.³³⁸ The Chamber granted some victims extensive procedural rights. It is noted that anonymous victims were granted limited procedural rights to protect the accused right to a fair trial³³⁹ because anonymous accusations could prejudice the defendant's right. However, where

³³⁷ The Prosecutor v Germain Katanga and Mathieu Ngudjolo, Decision on the modalities of victim participation at Trial , ICC-01/04-01/07-1788 16/46 22 January 2010,p.16, para36.

³³⁸ Situation in the Democratic Republic of Congo , The Prosecutor v.Thomas Lubanga Dyilo, *Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing*.Pre-Trial Chamber 1, 22 September 2006, ICC-01/04-01/06-462-tEN; *Prosecutor v Thomas Lubanga , Decision on victims' participation*, ICC-01/04-01/06-1119 ,18 January, p.44,Para 131

³³⁹ Situation in the Democratic Republic of Congo , The Prosecutrov.Thomas Lubanga Dyilo, *Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing*.Pre-Trial Chamber 1, 22 September 2006, ICC-01/04-01/06-462-tEN; *Prosecutor v Thomas Lubanga , Decision on victims' participation*, ICC-01/04-01/06-1119 ,18 January 2008, p.44,Para 131

the victim's identity is known, the court is willing to grant more procedural rights. Which connotes that anonymous victims and non-anonymous victims are not entitled to the same role or rights. This measure is to guide against anonymous accusations.³⁴⁰ Victims' interests in a protective measure are guaranteed by compromising the accused right to a fair trial. Therefore, victims' anonymity if factored in may restrict the availability of procedural rights to victims. Consequently, this affects their roles and, could potentially affect their interests.

Victims' access to some rights exclusive to the parties indicates the fluidity of victims' procedural rights. An analysis of both Lubanga and Katanga cases in the trial process reveals that the ambience tilts towards a largely adversarial procedure which connotes a bifurcation of roles between parties with each party persuading the judges through the presentation of evidence and use of witnesses. A reasonable implication of this is breaking the monopoly of power concerning the parties' presentation of evidence. It is worthy of mentioning that victims are not obligated to make disclosure obligations like the parties in exercising these rights.³⁴¹ Victims can testify as of right without being witnesses of the Prosecutor. The AC confirmed the TC's decision on victims' rights to lead evidence. Although it acknowledged that the right to lead evidence pertaining to the accused's guilt or innocence lies primarily with the parties, these provisions do not

³⁴⁰ Ibid.

³⁴¹ The Prosecutor v Germain Katanga and Mathieu Ngudjolo, Appeal of Mr Katanga against the Decision of Trial Chamber II ; Appeal Hearing of Prosecutor v Germain Katanga, ICC-01/04-01/07-t-349-ENG ET WT 08-03-2018 13/15 NB A3 A4 A5.

preclude the victims from leading evidence.³⁴² However, the AC noted that victims are required to submit a ‘discrete application’ in order to be eligible to lead evidence.³⁴³

It appears victims are seldom permitted to make personal appearances at the ICC. The personal appearance of victims at trial is not guaranteed because of the ICC's normative content and mandate. The Court pointed out the implications of victims making personal appearances at trial.³⁴⁴ Expression within this context is best-suited truth commission. Their LRVs mostly represent victims. Therefore, this medium does not give them the platform to express themselves directly. They could only be allowed personal appearances on rare occasions.

The chapter also reveals that victims' rights and interests change according to the stage of the proceedings. While it appears victims were interested in recognition during the investigation stage, during the trial process, victims interests revolve around truth, accountability, reparations and justice.

Having discussed the findings, the next section gives a summary of this chapter.

³⁴² Prosecutor v Lubanga, Appeals Chamber Judgement on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victim Participation of 18 January 2008, ICC-01/04-01/06-1432, 7 July 2008.

³⁴³ Prosecutor v Lubanga, Appeals Chamber Judgement on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victim's Participation of 18 January 2008, ICC-01/04-01/06-1432, 7 July 2008. Paras 61 and 104. ;Prosecutor v Lubanga , Decision on Victims' Participation on 18 January 2008, ICC-01/04-01/06-1119.

³⁴⁴ Status Conference (Open Session), ICC-01/04-01/06-t-101-ENG , 12 January 2009,

3.7. Conclusion

The investigation into the ICC proceedings' victim participation and trial process shows the extent of applicability of victims' procedural rights. Procedural rights enhance victims' ability to pursue their interests. The exercise of these rights is not absolute.³⁴⁵ It assists in making their experience during the proceedings fair and favourable. It is not sure if these rights foster a favourable outcome/decision. Nevertheless, the failure of the court to consider these rights may incur procedural injustice for victims.

Due to logistics and administrative reasons, it is noted that victims cannot participate directly at the ICC. Hence, the need for LRVs. The role of LRVs includes acting as a channel of information to victims,³⁴⁶ the dissemination of information to the victims, which increases the quality of interaction between victims and LRVs. Speculations still abound as to if LRVs genuinely represent victims' voice, which questions the effectiveness of LRVs for channelling victims' interests.

The most apparent finding depicts the application of victims' rights tends to lead to competing roles against the Prosecutor or at times, the Defence. A notable example is the Chamber's power to request evidence in the determination of truth. In a mainly adversarial setting, it is a known fact that it is within the parties' exclusive purview to present evidence and question witnesses. While the ICC criminal procedural is

³⁴⁵ Situation in the Democratic Republic Of Congo, The Prosecutor V. Germain Katanga and Mathieu Ngudjolo, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-trial Stage of the Case Pre-trial Chamber 1, p.61

³⁴⁶ Rachel Killeen and Luke Moffett, "Representation, Agency and Voice: Victim Legal Representation before the ICC and ECCC" (2017) 15(4) *Journal of International Criminal Justice*, 1-37.

mixed/hybrid,³⁴⁷ Victims as a third party does not have the right to adduce evidence.³⁴⁸ Despite that, this function offsets the equality of arms. It also changes the role of victims at the criminal proceedings. Therefore, giving victims an edge over being a third party. The Chambers' power to call victims to adduce evidence or question witnesses confirms Ambos' proposition, which states it is less significant if a rule is 'adversarial' or 'inquisitorial', but opines that what matters is if the rule facilitates the tribunals in accomplishing their tasks.³⁴⁹ The Chamber's ruling that victims can present evidence and question witnesses for the determination of truth demonstrate the fluidity and characterisation of victims' role and the trajectory of victims' right to truth and the ICC's objective in truth-finding.

Some of the judges are cautious not to allow victims rights and interests override the court's mandate. They drew boundaries on the court's underlying functions and the role of TRCs in story-telling as a therapeutic function.

It is recommended that the staff's composition, specifically the LRVs, should reflect the interested victims' background and countries. Generally, there seems to be a gap between the court and victims due to cultural, physical and institutional differences.³⁵⁰

³⁴⁷ Kai Ambos, 'International Criminal Procedure: adversarial, inquisitorial or mixed? (2003) 3(1) *International Criminal Law Journal*, 1-13.

³⁴⁸ Prosecutor v Germain Katanga and Mathieu Ngudjolo, Appeal of Mr Katanga against the Decision of Trial Chamber II.

³⁴⁹ Ibid.

³⁵⁰ Phil Clark, *Distance Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press 2018) 230.

Nevertheless, this disparity is upon the court's neutrality and impartiality. Unfortunately, the distance has led to a disconnect between victims and the LRVs. - familiarisation between victims and their LRVs could also increase victims satisfaction. An enhanced victim engagement by the ICC would ensure enforcement of victims' rights and interests.

In the chapter that follows, the researcher present victim participation in sentencing.

Chapter 4

4.0 Introduction

In Roy Lee's words,

“This new Court has been transformed ...to an international court administering restorative justice.[...]and victims will also be able to take part in proceedings with rights to privacy, representation and security.....”¹

Central to the traditional criminal justice system is retributive justice. With the ICC establishment, some commentators suggest a shift from a purely retributive justice approach to incorporating restorative elements and victim-oriented agenda for the ICC.² This restorative element is reflected during criminal proceedings, primarily via victim-participation and victim trust fund programme.³ The impact of victims on the sentencing outcome and the extent to which their interests is considered at the sentencing stage remains unclear. However, this chapter does not intend to go into an extensive discussion of restorative justice theory. Rather, the debate on restorative

¹Roy Lee, “The Rome Conference and its Contribution to International Law” In Roy Lee (ed)*International Criminal Court:The Making of the Rome Statute –Issues , Negotiations, and Results* (1st Edition Springer 1999).

² Emily Haslam, “Victim Participation at the International Criminal Court :A Triumph of Hope Over Experience ?, in Dominic McGoldrick et al (eds) , *The Permanent International Criminal Court:Legal and Policy Issues* (Oxford Hart Publishing 2004).

³ Elisabeth Baumgartner, ‘Aspects of victim participation in the proceedings of the International Criminal Court (2008) 90(870) *International Review of the Red Cross* , 409-440,413.;Emily Haslam, ‘Victim participation at the International Criminal Court:a triumph of hope over experience ? in Dominic McGoldrick et al. (eds), *The Permanent International Criminal Court :Legal and Policy issues*(Hart Publishing 2004) 315,324.

justice would be limited to how it can be used to assess the role victims' interests play in sentencing.

It is noteworthy that the Rome Statute does not give comprehensive specifications on what principles are applicable at the sentencing stage. Judgment, particularly sentencing, is an essential aspect of the criminal justice process, and it is the outcome of the criminal proceedings.

Researchers have not treated the victims' role in sentencing at the ICC in much detail in previous studies. Therefore, this chapter seeks to examine the role that victims play during sentencing by analysing the case transcripts of the *Prosecutor v. Lubanga* and the *Prosecutor v. Katanga*. Also, this chapter will critically discuss if victims influenced sentencing decisions. It is found, victims are permitted to participate during the sentencing hearing, but this is very restrictive and regulated by the court.

Arguably, victims' influence on the sentencing outcome can be enhanced by using some restorative justice and procedural rights elements. The underlying issues include whether the rationale for sentencing mirrors victims' interests.

This chapter discusses retributive justice's theoretical dimensions and its justifications: deterrence, retribution, and rehabilitation. It will then go on to defining restorative justice, as well as the academic debate on it. It is imperative to analyse the theories of restorative and retributive justice because it is needed in distilling the elements that need to be taken into consideration during sentencing. The following section gives a brief overview of the relationship that exists between retributive justice and restorative

justice. It is also necessary to discuss the retributive and restorative justice to understand the two broad theories underlying sentencing at the ICC.

The remaining part of the chapter is structured into an analysis of the sentencing hearing and sentence decision in *Lubanga* and *Katanga* cases. Afterwards, this chapter will examine the role and influence of victims in the sentence decision/review and discuss the findings. The final part concludes the chapter by summarising the sections and findings.

4.1. Retributive Justice

The international criminal justice system may be described as a social control system whose philosophy is based on retributive justice approach. According to a definition provided by Smith and Darley, “Retributive justice is a system by which offenders are punished in proportion to the moral magnitude of their intentionally committed harms.”⁴ From this definition, it is apparent that retributive justice places punishment of the offender at the forefront. The punishment is awarded according to the principle of proportionality, i.e. the offender is punished by the proportion of the harm⁵. It is no gainsaying that retributive justice addresses the wrong, rather than the harm. Thus, the offender is the central focus of retributive justice.

⁴ Kelvin Smith and John Darley, ‘Psychological Aspect of Retributive Justice’, (2008) 40(1)*Advances in Experimental Social Psychology*, p.193-236.

⁵ Andrew Hirsch, “Proportionality in the Philosophy of Punishment” (1992) 16 *Crime and Justice*, p.55,56

The concept of retributive justice has been used in a variety of ways, but it is best understood as that form of justice committed to the following three principles:

“(1)that those who commit certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a proportionate punishment; (2) that it is intrinsically morally good—good without reference to any other goods that might arise—if some legitimate punisher gives them the punishment they deserve; and (3) that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers.”⁶

The idea of retributive justice has played a dominant role in theorising about punishment over the past few decades. Still, many features of it—‘especially the notions of desert and proportionality, the normative status of suffering, and the ultimate justification for retribution—remain contested and problematic.’⁷ The three justifications of retributive justice are deterrence, retribution and rehabilitation.

⁶ Kelvin Smith and John Darley, ‘Psychological Aspect of Retributive Justice’, (2008) 40*Advances in Experimental Social Psychology* 193-236.

⁷Retributive Justice, Stanford Encyclopedia of Philosophy, (2014) <http://plato.stanford.edu/entries/justice-retributive/>> last accessed 28 April 2016.

Some proponents of retributive justice argue that it serves as a deterrent (individual or general) while also reducing society's crime rates.⁸ In the same vein, Schafer supports his argument with Pope Clement VI's words "any punishment that makes the offender not commit a crime again is worth administering: and a punishment that does not correct should not be given".⁹ From the above arguments, it can be inferred that deterrence is one reason behind the prosecution of crimes in the international criminal justice system. Similarly, most domestic criminal justice systems are rooted in retributive justice approach. Bagaric and Morss submit that general deterrence is the primary rationale behind punishment in international criminal trials.¹⁰ However, little research suggests that punitive measures deter future offenders. From McGonigle's perspective, there is no empirical evidence that retributive justice deters crimes.¹¹ Theoretically, retributive justice is believed to deter future crimes; nevertheless, pragmatically, it may be difficult for retributive justice to deter future crimes based on the fact that the occurrence of crimes seems to be on the increase.

⁸Douglas Husak, 'Why Punish the Deserving?' (1992) 26(4) *Nous*, 447-464 https://www.jstor.org/stable/2216023?seq=1#metadata_info_tab_contents; Stephen Schafer, Restitution to Victims of Crime-An Old Correctional Aim Modernised (1965) 50(243)*Minnesota Law Review* 243-254.

⁹ Stephen Schafer, Restitution to Victims of Crime-An Old Correctional Aim Modernised (1965) 50(243)*Minnesota Law Review* 243-254. Available at <<https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=3348&context=mlr>> last accessed 23 January 2019

¹⁰ Mirko Bagaric and Jon Morss, International Sentencing Law: In Search of a Justification and Coherent Framework: (2006) 6 *International Criminal Law Review*, 253

¹¹ Brianne McGonigle, Leyh, "Two for the Price of One :Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles (2009) 22(1) *Leiden Journal of International Law*, 127-149.

With the punishment theory, one might posit that some people obey the law because of punishment. Presumably, if prevention of punishment is the motivation to obey the law in society, why has the law not been able to eliminate social vices and severe human rights violations? In his study, Tyler concludes that the fear of punishment is the force behind obedience to the law; instead, people obey the law because they think the authority is legitimate.¹² Thus, if the legal system's authority is legitimate and respects the people, there will be an increase in obedience to the law. It could also be argued that people may also be motivated to obey the law because of their selfish interests-to avoid punishment

On victims' and sentencing, Ashworth suggests that the traditional forms of criminal justice may adversely affect the involvement and the extent of applicability of victims' rights in the criminal justice system.¹³ He cautions that remarkable consequences are likely to arise for introducing victim into an already balanced system- accused and the defence.¹⁴ This argument supposes the traditional criminal justice; notably, the criminal trial setting lacks a well-equipped structure to incorporate victims' interests and rights, empowering their involvement. Retribution and deterrence are the driving force of the traditional criminal justice system. Retributive justice focuses on the rights of the accused in order to prevent convicting an innocent person. Hence, retributive justice is offender-centred. In retributive justice systems, punishments given out to the offender

¹² Tom Tyler, *Why people obey the law?* (Princeton University Press 2006)

¹³ Andrew Ashworth, 'Victims' Rights , Defendants' Rights and Criminal Procedure' *Integrating A Victim Perspective Within Criminal Justice : International debates* in Adam Crawford and Jo Goody (eds), (Routledge 2000) 158.

¹⁴ Ibid

are grounded on evaluating the seriousness of the offender's crime and mental state. Which, relegates the needs and expectations of victims in the determination of guilt or punishment of the offender.¹⁵ The offender's sentence responds to the wrong instead of how it affects the victims' position. An indication that retributive justice does not align with the interests of the victims. In the light of the above argument, how do we reconcile retributive justice with victims' rights within the ICC's context? Barnett opines that retributive justice reacts to the wrong inflicted on a victim rather than the harm suffered by the victim. As such, some have submitted that it is less victim-friendly.

In contrast, it is believed that retributive justice is victim-friendly because the manner of punishment depicts society's cohesion with the victim.¹⁶ The critical problem with this argument is that it trivialises the victim's interest on an individual basis. The punishment only shows the intention to address the wrong done to society, rather than the victim's personal harm. Thus, the victim's satisfaction is sacrificed for society's. The traditional criminal justice system would have been more useful for addressing victims' needs if retributive justice provides a central role for victims and response to the harm suffered by the victim.

Gohan cautions about over-stretching retributive justice, especially within the context of victims interests, because it is likely to result in victimisation of the accused(convict) or sabotage its effectiveness.¹⁷ Perhaps, the notion of retributive justice within the

¹⁵ Randy Barnett, *Restitution :A New Paradigm of Criminal Justice*,(1977) 87 *Ethics* 279,284

¹⁶ Ibid.

¹⁷ Helena Cobban, *Amnesty After Atrocity? Healing Nations after Genocide and War Crimes*, (Paradigm 2007)p.209.

domestic context slightly differs from the idea of retributive justice within the international sentencing context. In the international jurisdiction, the ICC deals with large scale violations of human rights, which is considered ‘*serious*’, and with many victims that must have suffered harm. Henham opines that victims tend to play significant roles within international sentencing as opposed to domestic sentencing.¹⁸ The large scale of crime and collective violence may require victim involvement. The similarity within both contexts espouses justice as the accountability of the offender to the state or community. With victims’ participation in criminal justice, justice should move beyond accountability.

Besides, the ICC has witnessed a progression from purely retributive norms to incorporating restorative justice elements¹⁹; despite this, there are still challenges in fully accommodating victims' rights and interests in sentencing. Empowering victims to participate during criminal proceedings may prejudice the rights of the accused.²⁰ It could also shift the trial's focus from the ‘*wrong*’ to the ‘*harm*’ suffered by the victim. This idea restructures the traditional criminal justice system.

Article 22 and 23 of the Rome Statute contains the Latin expression *nullum crimen sine lege, nulla poena sine lege*. The principle indicates a mandatory connection between punishment(crime) and a fixed, predetermined law-the basis for criminal responsibility, a principle of legality which is considered one of the foundations of international

¹⁸ Ralph Henham, “International Sentencing in the Context of Collective Violence” (2007) 7(10) *International Criminal Law Review*, p.449, 454

¹⁹ Rome Statute 1998, Article 68(3); Article 79

²⁰ Rome Statute 1998, Article 68(3).

criminal law.²¹ It is also espoused in customary international law and some international treaties such as International Covenant on Civil and Political Rights 1966 and Universal Declaration of Human Rights 1948. It is noteworthy that Article 22 generated a consensus amongst the delegations during the Rome Conference.²² Hence, the origin of the court's power is to investigate and prosecute an individual most responsible for violations of the most severe crimes. The Rome Statute does not prohibit the offence; such a person cannot be considered an accused or criminal.²³ Article 21 mirrors the legitimacy and jurisdiction of the ICC. The elements of crime underscore the objectives of Article 22, especially about the jurisdiction of the Court.²⁴

Article 77 of the Rome Statute empowers the Court to impose penalties on individuals convicted by the Court of crimes within its jurisdiction. The penalties include imprisonment, not more than 30 years, life imprisonment fines or forfeiture. It appears the Rome Statute is cautious about the imposition of some severe forms of penalties.²⁵ This may be the rationale behind the exclusion of the death penalty from the Statute. The delisting of the death penalty, corporal punishment, and other forms of

²¹ Susan Lamb, “*Nullum Crimen , Nulla Poena Sine Lege* in International Criminal Law”, in Antonio Cassese et al.(eds), *The Rome Statute of the International Criminal Court:A Commentary* (Oxford University Press, 2002)734-735 ;Per Saland, “International Criminal Law Principles”, in Roy Lee (ed.), *The International Criminal Court :The Making of the Rome Statute:Issues , Negotiations, Results*(Kluwer Law International Law 1999)194-195

²² Ibid

²³ Bruce Broomhall, Article 22: *Nullum crimen sine lege* in Otto Triffterer and Kai Ambos (eds),*The Rome Statute of the International Criminal Court::A Commentary*(Beck Hart Publishing 2008)716

²⁴ Mark Klamburg, “General Principles of Criminal Law” in Mark Klamburg (ed) *Commentary on the Law of the International Criminal Court*(Torkel Opsahl Academic E Publisher 2017)254.

²⁵ Kai Ambos, “Article 77:Applicable Penalties” in Otto Triffterer and Kai Ambos (eds),*Rome Statute of the International Criminal Court:A Commentary*(BECK Hart 3rd Edition, 2016) 1878.

penalties implies an intention to adhere to the limitations provided by international treaties like the UNCPR and the UN minimum rules for prisoners' treatment.²⁶ Article 80 notes that these provisions do not prejudice the applicable laws in the national jurisdictions. Although, the ICC does not acknowledge harsher punishment like the death penalty and other forms of penalties which could lead to torture or another form of degrading treatment.

Nevertheless, the stipulated provision's implementation does not preclude its enforcement in the State party domestic jurisdictions. Additionally, of equal importance is the restrictive application of life imprisonment as a form of penalty. The Chambers are required to ensure that the imposition of life imprisonment is subject to the fulfilment of strict conditions.²⁷ Life imprisonment is justified by the extreme gravity of the crime and one or more aggravating circumstances.²⁸ This interpretation sums up a liberal approach of the ICC to individual rights and rehabilitation of offenders. While at the same time, respecting the existing criminal law applicable in national jurisdictions of the affected parties.

That being said, according to Heikkila, procedural rights can improve the status of victims at the court.²⁹ Procedural rights may be essential for assessing victims' situation

²⁶ Kai Ambos, "Article 77: Applicable Penalties" in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (BECK Hart 3rd Edition, 2016) 1879.

²⁷ ICC Rules of Evidence and Procedure, Rule 145(3)

²⁸ Ibid

²⁹ Miakela Heikkila, *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims Before International Criminal Tribunals and Factors Affecting this Status* (Institute of Human Rights, Abo Akademi 2004)

during criminal proceedings; which has been examined in chapter three. What follows is a review of the justifications for retributive justice. It is necessary to assess the rationale for retributive justice in order to explore its relevance to the role of victims in sentencing. Besides, an assessment may reveal if it resonates with victims' needs and expectations in criminal justice.

A considerable amount of literature reveals that, in most national jurisdictions, retributive justice is at the heart of their criminal justice systems. International criminal law being a distinct area in public international law incorporates some of the theories and principles of national jurisdictions with some modification.³⁰ It is largely founded on retributive justice.

Having discussed that, the next section shall examine the classic theories of justifications of punishments which are deterrence, retribution and rehabilitation.

4.1.1 Deterrence

Bentham describes morality as that which promotes 'the greatest happiness of the greatest number.'³¹ From Bentham's perspective, the state is under the duty '*to promote the happiness of the society, by punishing and rewarding.*'³² One reasonable explanation for this is that punishment is used as a social or crime control, especially for offenders'

³⁰ Antonio Cassese, 'International Criminal Law' in Malcolm Evans (ed), *International Law* (2nd Edition OUP 2006) 719.722.

³¹ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (New York Macmillan 1948)

³² Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (New York Macmillan 1948)

action. It could be said that while it controls the actions of offenders, at the same time, it increases the happiness of the society and reduces the pain of the community. The aim of punishing the offender is to deter people from violating the law in the future.³³

The literature on deterrence asserts that the primary justification for the punishment in an international criminal trial is deterrence.³⁴ Rothe and Mullins published a paper in which they conclude that the notion behind international criminal prosecution is deterrence.³⁵ From observation, Rothe and Mullin's viewpoint emerges from criminology. In an author's opinion, international criminal tribunals have integrated accountability and '*instilled long-term inhibitions against international crimes in the global community.*'³⁶ The inhibitions are measures towards deterrence and accountability. Nevertheless, it is questionable if international criminal law, courts and tribunals have been able to pass on a deterrent effect in the international community. There are still instances of severe violations of human rights around the world. At best, it could be said that the rate of severe abuses of human rights has reduced slightly. Arguably, a harsher sentence/punishment may restrict future offenders. The perpetrator is sanctioned to serve as examples for future offenders. Thus, deterrence is perceived

³³ Ibid.

³⁴ Mirko Bagaric and Jon Morss, International Sentencing Law: In Search of a Justification and Coherent Framework: (2006) 6 International Criminal Law Review ,253

³⁵ Dawn Rothe and Christopher Mullins, 'Beyond the Juristic of International Criminal Justice System: The Relevance of Criminological Insights to International Criminal Law and its Control' (2010) 10(1) International Criminal Law Review, 97-110.

³⁶ Payam Akhavan, 'Beyond Impunity : Can International Criminal Justice Prevent Future Atrocities?' (2001) 7 American Journal of International Law 27.

as a legal threat to crime control.³⁷ This sanction could be in the form of the death penalty, imprisonment or fine.

The absence of a general provision for sentencing objectives in the Rome Statute leaves a gap for the rationale behind the punishment. Notwithstanding, a cursory look at the Preamble shows a deterrent function: “Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”³⁸ And “Determined to these ends and for the sake of present and future generations.”³⁹ Preamble 5 and 9 support the deterrent function of the Rome Statute.

This section has briefly explained deterrence as a justification for retributive justice. The next part of this section will discuss retribution as another justification for retributive justice.

4.1.2 Retribution

Retribution is at the heart of criminal law theory.⁴⁰ It underscores punishment as a reaction to the commission of a crime. The foundation of retribution is deeply rooted in respect for the autonomy of the offender. It is a notion that justifies the imposition of punishment because it is deserved.⁴¹ In Moore’s words, “*Punishment is justified if it is*

³⁷ Franklin Zimring, Gordon Hawkins and Jams Vorenberg, “Deterrence :The Legal threat in Crime Control” accessible at < <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=10857> > last accessed at 16 July 2019

³⁸ Rome Statute 1998, Preamble 5.

³⁹ Rome Statute 1998, Preamble 9.

⁴⁰ Michael Moore, *Placing Blame : A General Theory of the Criminal law*(Oxford University Press 2010)

⁴¹Ibid.

given to those who deserve it."⁴² 'Desert ... is a sufficient condition of just punishment, not only a necessary condition'⁴³ It is not yet certain if the offender's punishment can be equated to the harm and suffering inflicted on the victims. Therefore, the fact that the offender is deserving of punishment does not mean that such punishment is quantifiable to the victim's plight, given that they occur within two different contexts. As such, punishment is motivated by '*just deserts*' and *proportionality*. Punishment is mainly imposed because the offender has committed a crime. This offender is sanctioned by punishment or reward because he deserves it; this is the philosophy behind just desert. The sanction is a reaction to the breaking of rules by the offender. Theoretically, the offender's punishment is proportionate to the offence committed. How to measure the proportionality of the punishment remains unsettled. Different courts adopt different approaches. Proportionality principle is significant in the determination of retribution. Nevertheless, it is difficult to ascertain if the sentencing matches the crime committed.⁴⁴

The principle of proportionality determines the sentencing that is appropriate for the gravity of the crime. The gravity of the crime must be commensurate with the severity of the crime. The principle of proportionality is a commonly –used notion in sentencing, and yet it is a concept difficult to define precisely. Goh asserts that proportionality competes with other sentencing goals, which subsequently gives rise to conflicting

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ralph Henham, *International Sentencing in the Context of Collective Violence*, (2007) 7(1) *International Criminal Law Review*, 458, 449-468.

objectives of criminal punishment proscribed by sentencing guidelines.⁴⁵ There is an inconsistency with this argument; proportionality is a determining factor for sentencing; it is similar to the deciding factor. Hence, it is not an objective of criminal punishment. Goh's argument fails to consider that proportionality is not an objective of criminal punishment but rather, a determinant. Therefore, there is no competition between proportionality and other goals of punishment. Punishment is a reaction to crime. It is argued that proportionality is a principle in determining the punishment, while retribution is an objective of criminal punishment. The principle of proportionality is a determinant of sentencing, and it is a means to an end, which is sentencing. It measures the gravity of the crime in determining the severity of the punishment. It is believed that sentence which matches the gravity of offences are deemed fairer than punishment that does not.⁴⁶ It is worthy of mention that proportionality as a concept is nebulous. We should be careful not to confuse the justification for punishment with the determinant for sentencing. While the former focuses on retribution, deterrence and rehabilitation, the latter aims to determine the reasoning or logic why a particular quantity(measurement/amount) of a sentence is given in response to the gravity of the crime.

To broaden our understanding of proportionality, the following paragraph shall briefly explore the different types of proportionality. The five types of proportionality are

⁴⁵ Joel Goh, "Proportionality-An Unattainable Ideal in the Criminal Justice system (2013) 2(41)Manchester Student Law Review 41- available at <https://pdfs.semanticscholar.org/25ad/43cab27eb1c3434d817c5cb9f1fae55b3650.pdf?_ga=2.107538955.826057802.1583880709-1350360667.1583880709> last accessed 05 December 2019.

⁴⁶ Andrew Hirsch, "Proportionality in the Philosophy of Punishment" (1992) 16 Crime and Justice, 55,56

retributive proportionality, constitutional proportionality, ordinal proportionality, cardinal proportionality, and utilitarian proportionality.

Retributive proportionality is backwards looking. It addresses the past of the offender by depriving him of his rights. It is considered that the offender deserves this deprivation of rights. It ensures the extent of punishment of the offender by using the concept of blameworthiness.⁴⁷

Ristroph draws our attention to constitutional proportionality. He argues that within the criminal context, constitutional proportionality sets a limit on the state penal powers.⁴⁸ This means that there is a maximum sentence which caps the totality of sentence an offender may serve. This type of proportionality is prevalent in most national jurisdictions. These jurisdictions have a maximum number of imprisonment which the offender can serve. For instance, the ICC's states that imprisonment should not exceed 30 years or a sentence of life imprisonment in conformity with article 77.⁴⁹ The Rome Statute set a maximum, which ensures that sentencing is not only the purpose of punishment. However, there are other purposes for punishment which could be rehabilitation. However, it is debatable if the different purposes of sentencing are combined while using constitutional proportionality. Arguably, if constitutional proportionality is applied, it could co-exist with other purposes of punishment.

⁴⁷ Immanuel Kant, *Metaphysics of Morals* in Mary Gregor (ed) *Practical Philosophy* (Cambridge University Press 1996)

⁴⁸ Alice Ristroph, "Proportionality as a principle of Limited Government" (2005) 55(2)*Duke Law Journal*, 263-331.

⁴⁹ Article 77(1) of the Rome Statute and Rule 145(3) of the Rules of Evidence and Procedure.

Constitutional proportionality is not the purpose of punishment. It puts a cap to the quantum of punishment; it regulates and prevents abuse of the process.

Furthermore, ordinal proportionality proposes that more serious crimes require severe punishment. Thus, the gravity of the crime determines the severity of the sentence—crimes of a lesser degree attracts less severe punishment.

According to cardinal proportionality, absolute measures are set for punishment that is proportional to a given crime.⁵⁰ This proportionality lay emphasis on commensuration between the sentence and the crime. There are doubts regarding the applicability and attainment of cardinal proportionality as the crime and harm suffered by the victim happen within an entirely different context. At the same time, the punishment occurs in another context with various factors to be taken into consideration in determining the quantum.⁵¹

Retribution as a concept with particular reference to proportionality and just deserts depends on moral relativism and public opinion.⁵² The moral values of society dictate if a crime should get a harsher punishment.⁵³ The crime and punishment are paired together on two scales to determine equality.

⁵⁰ Andrew Hirsch, 'Proportionality in the Theory of Punishment' (1992) 16 *Crime and Justice* 55-98, 55

⁵¹ Ibid.

⁵² Goran Duus-Otterström, 'Retributivism and Public Opinion': On the Context of Sensitivity of Desert' (2018) 12(1) *Criminal Law and Philosophy*, 125-142

⁵³ Goran Duus-Otterström, 'Retributivism and Public Opinion': On the Context of Sensitivity of Desert' (2018) 12(1) *Criminal Law and Philosophy*, 125-142.

Some of the Rome Conference delegates proposed proportionality between the gravity of the crimes and severe penalties; they suggested death penalty and life imprisonment reflect the magnitude of the offence.⁵⁴ This bid was counteracted by a few delegations who pointed to the compliance of human rights treatise. The opposing delegations suggested humane means of punishment which would gradually reform and rehabilitate the offenders.⁵⁵

According to the Orthodox school, the law is criminal when the individual who contravenes it is punished.⁵⁶ The judicial punishment invokes sanction on the offender as a response to a violation of the law. Husak argues that a sanction does not qualify as a punishment in the absence of '*punitive intention*'.⁵⁷ It is believed that there must be a functional idea behind the imposition of sanction on the offender. What does the sanction intend to achieve by imposing punishment? It could possibly be the correction of the wrong or to address the harm. Most times, the intention behind the punitive measure is to reinforce social control.

Concerning the ICC, after rigorous debate on the issue of mode of punishment, all the delegates at the Diplomatic Conference unanimously agreed to include imprisonment as the main punishment.⁵⁸ While some delegations advocated for a maximum sentence,

⁵⁴ Rolf Einar Fife, "Applicable Penalties" in Otto Triffterer and Kai Ambos(eds) in *The Rome Statute of the International Criminal Court: A Commentary* (Beck and Hart Publishing 2016)1882

⁵⁵ Ibid

⁵⁶ Joshua Dressler, *Understanding Criminal Law* (2nd Edition 1995)

⁵⁷ Douglas Husak "Retribution in Criminal Theory" (2000) 37 *San Diego Law Review* ,959-986,963

⁵⁸ Rolf Einar Fife, "Applicable Penalties" in Otto Triffterer and Kai Ambos(eds) in *The Rome Statute of the International Criminal Court: A Commentary* (Beck and Hart Publishing 2016)1882

the counterpart preferred judicial discretion to determine sentence rather than a specific cap.⁵⁹ It is observed that the delegations reached no consensus on the rationale behind punishment. Although, there were “widely differing” opinions on the objectives of penalties because of the large disparity between the moral values, norms, principles and practices are operating in their different jurisdictions.⁶⁰ Unfortunately, no conclusion was reached on the issue. However, the Rome Statute Preamble gives us guidance on the purpose of penalty: “Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution...”⁶¹

The phrase “must not go unpunished” emphasised on the inclination for retribution as an objective of sentencing.

Having examined what is meant by retribution, it is necessary to explain rehabilitation as an aspect of retributive justice.

4.1.3. Rehabilitation

Concerning rehabilitation, Andrews and Bonita argue that more attention should be given to offenders' rehabilitation rather than increasing punitive measures.⁶² In their opinion, punitive measures have not been able to curtail criminal recidivism; rather,

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Rome Statute 1998, Preamble 4.

⁶² Don Andrews and James Bonta, ‘Rehabilitating Criminal Justice Policy and Practice (2010) 16(1)*Psychology, Public Policy and Law*, 39-55.

there is an increase in the proliferation of correctional facilities-affecting government budgets.⁶³ Possibly, punitive measures do not deter crimes to the expectation of society.

For more clarification, it is imperative to define rehabilitation. According to Hudson, Rehabilitation is :

“taking away the desire to offend, is the aim of reformist or rehabilitation punishment.

The objective of reform or rehabilitation is to reintegrate the offender into society after a period of punishment, and to design the content of the punishment so as to achieve this.”⁶⁴

Unfortunately, Hudson’s definition does not provide a certain perspective on rehabilitation. While the definition aims to be comprehensive, it also gives an unsettled perception of rehabilitation. This definition raises some questions about rehabilitation's objective, the relationship it has with punishment, the act or process of rehabilitation, and the aftermath of rehabilitation. However, from this definition, it is believed that rehabilitation intends to reform the offender after he has served the punishment.

Rehabilitation takes place during and after punishment. Presumably, the courts' contribution to offenders' rehabilitation after the sentence term can result in re-integration into society. One viable approach is for the court to address the consequences of a conviction for the convict/sentenced person.⁶⁵ Court’s involvement

⁶³ Ibid.

⁶⁴ Barbara Hudson, *Understanding Justice* (2nd Edition Open University Press 2003), p.26

⁶⁵ Shadd Maruna, ‘Judicial Rehabilitation and the ‘Clean Bill of Health’ in Criminal Justice’ (2011) 3*European Journal of Probation*, 97-117.

in rehabilitation would demonstrate their interest in deterrence and retribution. However, it would also show their interests in the offender's life post-conviction and reintegration into society. Re-integration is a pillar of restorative justice, an indication that retributive justice is not totally punitive, rehabilitation entails a restorative element.

Triffterer notes that the most effective means to 'fight' criminality is to prevent the commission of crimes.⁶⁶ He recommends an early evaluation of the different ways to challenge impunity.⁶⁷ Prevention, deterrence and repression are sustainable means of fighting impunity.⁶⁸

Rehabilitation has been described as a humane alternative to retribution and deterrence; some times, the punishment is lenient to dissuade recidivism.⁶⁹ Article 110(4) and Rule 223 states the Conditions and factors for Sentence review at the ICC.⁷⁰ These provisions that may ensure the convicts' early release could conflict with the deterrent and retribution function because it focuses on reformation and resocialisation of the offender, which may outweigh or preclude the deterrent's objectives retribution. Possibly, rehabilitation of the offender could be the reason why the maximum term of

⁶⁶ Otto Triffterer, 'The Preventive and Repressive Functions of the ICC', in Mauro Politi and Giuseppe Nesi(eds) *The Rome Statute of the International Criminal Court :A challenge to impunity*(First Edition Ashgate, Dartmouth 2001)143

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Don Andrews and James Bonta, 'Rehabilitating Criminal Justice Policy and Practice (2010) 16(1)Psychology, Public Policy and Law, 39-55; Barbara Hudson, *Understanding Justice* (2nd Edition Open University Press 2003), p.26

⁷⁰ Rome Statute 1998; ICC RPE.

imprisonment is 30 years. How these conditions and factors reflect the rationale of penalty is left to the discretion of the panel.

Arguably, the ICC could use a combination of deterrence, retribution and rehabilitation for sentencing, since they are not mutually exclusive. While it is easy for the ICC to enforce deterrence and retribution, it could become challenging for the ICC to implement and supervise offenders' rehabilitation. While article 110 of the Rome Statute and Rule 223 of the ICC RPE provides for the reduction of sentencing and expressly list reintegration and re-socialisation, respectively, these provisions do not stipulate a medium of compliance with these conditions during the convict's incarceration and after the release. It seems rehabilitation as a purpose of punishment would be more effective in the domestic context.

That being said, this study does not intend to discuss rehabilitation extensively, and criminologists have written a lot on rehabilitation.⁷¹ So far, this section has focused on retributive justice; the following part addresses the theory and principles of restorative justice

4.2 Restorative Justice

Having considered the implications of retributive justice, and its elements, within the ambience of sentencing in criminal courts, this segment will discuss restorative justice

⁷¹ Peter Raynor and Gwen Robinson, *Rehabilitation, Crime and Justice* (Palmgrave Macmillan 2005); Gwen Robinson and Iain Crow, *Offender Rehabilitation :Theory , Research and Practice* (Sage 2009); Philip Priestley and Maurice Vanstone, *Offenders or Citizens? Readings in Rehabilitation* (Willan Publishing 2010); Fergus McNeill, 'Punishment as rehabilitation' in Gerben Bruinsma and David Weisburd (eds) *Encyclopedia of Criminology and Criminal Justice*, (Springer 2014), 4195-4206.

and its impact on sentencing. It is necessary here to clarify what is meant by restorative justice. Zehr is one of the first authors to define restorative justice. He is referred to as the father of restorative justice. According to Zehr:

“Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things right as possible.”⁷²

Similarly, Zehr’s definition shares the same content as Marshall’s. Marshall defines it ‘as a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future’.⁷³ Be that as it may, Doolin is critical of Marshall’s definition. From her perspective, Marshall’s description contains lacunae because it does not include some crucial restorative justice elements.⁷⁴ Some of the questions raised include; who should be involved in collective resolution? how do those involved arrive at the collective resolution? what is meant by dealing with the aftermath of an offence and its implications for the future? Moreover, what are the best ways to resolve such issues in terms of the spirit of restorative justice? This debate opens a range of broad questions with the process of restorative justice. Doolin gives a comprehensive perspective on restorative justice.

⁷² Howard Zehr, *The Little Book of Restorative Justice* (Good Books 2002)37

⁷³Tony Marshall, *Restorative Justice :An Overview* Accessible at http://www.antonioacasella.eu/restorative/Marshall_1999-b.pdfLast accessed 01 November 2019.5

⁷⁴ Katherine Doolin, ‘But what does it mean ?Seeking definitional clarity in restorative justice, *Journal of Criminal Law*(2007) , *The Journal of Criminal Law* accessible at <<https://journals.sagepub.com/doi/pdf/10.1350/jcla.2007.71.5.427>> last accessed 16 January 2020

Moreover, Doolin also proposes that the definition of restorative justice should not be restricted to the ‘*process*’ involved, but, the outcome should also be considered. She pointed out that Marshall’s definition is ambiguous; hence his interpretation did not refer to the result to be achieved.⁷⁵ Doolin’s assertion prioritises the voluntariness and informal settings of the process. For instance, where one of the stakeholders is absent, he/she could be coerced for appearance. One severe weakness with the proposition of Doolin is the use of coercion. Coercion goes against the voluntary and consent needed for the process. A possible implication of this is that the process might lead to a ‘*non-restorative ends*’ thereby compromising the intention of restorative justice.⁷⁶ As such, compulsion may lead to victimisation of the offender or re-victimisation of the victim. Thus, the use of coercion flaws the proposition of Doolin.

Besides, Zehr’s principles of restorative justice comprise of the relationship between parties in conflict resolution. These values include:

- deals with victims’ harms and consequent needs, as well as offenders’ and communities’;
- Addresses obligations that arise from these harms;
- Uses inclusive, collaborative processes;

⁷⁵ Katherine Doolin, ‘But what does it mean ?Seeking definitional clarity in restorative justice, *Journal of Criminal Law*(2007)*The Journal of Criminal Law* accessible at <<https://journals.sagepub.com/doi/pdf/10.1350/jcla.2007.71.5.427>> last accessed 16 January 2020

⁷⁶ Masahiro Suzuki and William Wood, Co-Option, Coercion and Compromis:Challenges of Restorative Justice in Victorial, Australia(2017) 20(2)*Contemporary Justice Review*, 274-292;Ibid

- involves victims, offenders, families, community members and society because they have a legitimate stake in the situation;
- aims to put right the wrong.⁷⁷

One of the aims of restorative justice is to reposition victims as ‘*active agents*’ rather ‘*passive objects*’ of the justice process.⁷⁸ It puts the needs of both parties at the forefront. One benefit of restorative justice is that it proffers inclusive approach for all stakeholders.

Moreover, Ness and Strong divide restorative justice into three categories. The three categories are referred to as three key pillars of restorative justice; ‘*encounter*’, ‘*amends*’ and ‘*reintegration*.’⁷⁹ These commentators argue that victims have a central participatory role in the three pillars of restorative justice processes. Realistically, victims ought to be involved in direct participation in this process. The three key pillars of restorative justice shall be discussed in the following section:

4.2.1 Encounter

According to Van Ness and Heetderks, Encounter is the first pillar of RJ. The encounter between victims and the offender is an essential element of the RJ process. This

⁷⁷ Howard Zehr, *The Little Book of Restorative Justice* (Good Books 2002), 33

⁷⁸ Claire Garbett, ‘From passive objects to active agents: changing conceptions of victim identities at the ICTY and ICC (2016) 15(1) Journal of Human Rights ,40-59.

⁷⁹ Daniel Van Ness and Karen Heetderks Strong, *Restoring Justice: An Introduction to Restorative Justice* (Anderson Publishing 2006).83

encounter may be referred to as a meeting. It is vital that this meeting must involve the voluntary participation of victims. No participant should be coerced to attend or participate in the conference. The conference provides a platform for communication for both the victims and offenders where they can narrate their experiences, the harm caused they suffered, and the impact on their lives.⁸⁰

Interestingly, one unique aspect at the encounter stage is that the victims can tell their stories in their own words, instead of speaking in legal language. Besides, they can also emote and use emotional language. In a way, it becomes easier for understanding the relationship between the parties and the implications of their actions.

In the meeting, all participants bring their unresolved, undiscovered, and unacknowledged issues with their emotional consequences from the wrongdoing to the meeting.⁸¹ Hence, allowing them to express these emotions can promote healing for both parties.⁸²

It is argued that if the victim is allowed to give a narrative of the crime and the events that led to the crime, he will probably make a subjective account rather than the factual, objective account. Subsequently, the storytelling and its consequences lead to a

⁸⁰ Vander Vennen, 'Towards a relational theory of restorative justice' in B.Hopkins (ed.), *Restorative Justice in Practice: Insights into what works and why*(Jessica Kingsley Publishers) 121-137; Van Ness, "The shape of things to come:a framework for thinking about a restorative justice system.In Elmar Weitekemp & Han-Jurgen (eds), *Restorative Justice:Theoretical Foundations*(Willan Publishing 2002)1-20,3

⁸¹Tony Foley, *Developing restorative justice jurisprudence :Rethinking responses to criminal wrongdoing* (Routledge 2014)137

⁸² Van Ness and Heetderks Stong, *Restoring Justice:An Introduction to Restorative Justice* (3rd Edition Anderson Publishing 2006)

discussion between the victims and offenders. McCold and Wachtel maintain that restorative justice's dialogue stage helps in the 'collaborative problem-solving approach', which is the central focus of restorative justice practice.⁸³ It follows that the meeting between the participants aims to highlight the problems/issues. Afterwards, the participants proffer solution to these issues collaboratively. It is also noteworthy that the discussion grants them the freedom to make their choices/decision. The result of the encounter is to reach an 'outcome agreement.'⁸⁴ Encounter emphasises on the practice of restorative justice or best put, the process of restorative justice.

4.2.2 Amends

As mentioned earlier, amend is the second pillar of the restorative justice-A role of the offender.⁸⁵ Given that 'encounter' means the practice of restorative justice, then 'amends' means the outcome'⁸⁶ Thus, the outcome of restorative justice is to heal individuals, communities and nations after harm caused by wrongdoing.⁸⁷ An essential determinant of repair is the input/involvement from those who were mainly affected by the crime. This ability to repair connotes taking on responsibility for the crime he(the

⁸³ Paul McCold and Ted Wachtel, 'Restorative Theory validation. In Elmer Weitekamp and HamburgKerner (eds.), *Restorative Justice: theoretical foundations* (Willan Publishing) 110-142.

⁸⁴ Joana Shapland, Gwen Robinson and Angela Sorsby, *Restorative Justice in Practice: Evaluating what works for victims and offenders* (First published 2011, 1st Edition, Routledge 2011)

⁸⁵ Van Ness, 'The Shape of things to come: a framework for thinking about a restorative justice system. In EGM Weitekamp & Kerner (eds), *Restorative justice theoretical foundations*(Willan Publishing, 2002)

⁸⁶ Ibid.

⁸⁷ Katherine Van Wormer and Lorenn Walker, In Van Warmer and Lorenn Walker (eds) ,*Restorative justice today: Practical applications* (2013) *Journal of Restorative Justice*,255

offender) has committed. Furthermore, finding ways to repair the harm or loss, the victim has suffered.

Moreover, making amends could be in tangible ways.⁸⁸ Also, amends could be made through an acknowledgement of the crime or sincere apologies. It has been submitted that in most conferences of restorative justice, the crux of discussion 'always presents a moment when it is natural for an apology to be offered in recognition of emotional restoration needed by the victim.'⁸⁹

Research suggests that in the criminal justice system, victims are affected by their experiences.⁹⁰ Victimologists have described this as 'secondary victimisation' or re-traumatisation.⁹¹ They may be characterised as anti-therapeutic experiences which victims of crimes go through as a result of their involvement or contact with the actors of the criminal justice system

Presumably, victims may be affected by these actors' indifferent reactions, leading to secondary victimisation. While Courts are not therapeutic centres, they are not expected to carry out therapeutic functions; their primary function is to prosecute criminal and administer justice. Naturally, the settings of the court are not victim-

⁸⁸ Ibid.

⁸⁹ Heather Strang, Lawrence Sherman, Evan Mayo-Wilson Woods and Barak Ariel, 'Restorative Justice Conferencing (RJC) using face-to-face meetings of offenders and victims: effects on offender recidivism and victim satisfaction: A systematic review. (Campbell Systematic Reviews 2013) accessible at <<https://restorativejustice.org.uk/sites/default/files/resources/files/Campbell%20RJ%20review.pdf>>

⁹⁰ Jo-Anne Wemmers, 'Victims' Experiences in the Criminal Justice System and their Recovery from Crime(2013) 19(3) *International Review of Victimology* ,221-233.

⁹¹ Ibid

centred or focused. On the other hand, restorative justice parameters are more relaxed and could foster genuine communication between the offender and the victims.

We should bear in mind that the dialogue for restorative justice does not operate within the context of adversarial settings. It involves victims, offenders and other affected individuals or participants.⁹²The amends here could include individual or collective measures. The individual measures may be in the form of victim-offender mediation, here, the offender tender apologies to the victims. The victims ask the offenders questions and also narrate the real impact of the crime against them.⁹³On the other hand, RJ's collective measures are truth commission and other forms of justice aimed at disclosing the truth regarding the commission of the crime and acknowledging the wrongdoing to the victims.⁹⁴

This part has analysed amends within the context of restorative justice. It is now necessary to explain re-integration as the last pillar of restorative justice.

4.2.3 Re-integration

Christie writes that conflicts are valuable commodities which have been taken away from their rightful owners(victims, offenders and communities) and given to

⁹² Jim Parsons and Tiffany Bergin 'The Impact of Criminal Justice Involvement on Victims' Mental Health(2010) 23(2)*Journal of Traumatic Stress*, 182-188

⁹³ Luc Huyse , 'Justice', in David Bloomfield , Theresa Barnes and Luc Huyse (eds) *Reconciliation After Violent Conflict: A Handbook* (Stockholm ;International Institute for Democracy and Electoral Assistance (2003)97-115

⁹⁴ Chris Cunneen, "Exploring the Relationship between Reparations , the Gross Violations of Human Rights and Restorative Justice", in Dennis Sullivan and LarryTifft (eds) *Handbook of Restorative Justice :A Global Perspective* (Routledge 2008) 355-368.

professional thieves-lawyers, prosecutors and the criminal justice system.⁹⁵ He submits that, 'the bigger loser is us-to the extent that society is us. The loss is first and foremost, a loss in opportunities for norm-clarification.'⁹⁶ If properly managed, conflict, he believes, could give rise to a crucial opportunity for community development. The question that arises is, 'is re-integration also a property.' It is noteworthy that both the victims and offenders need re-integration within the context of the community.

Van Ness and Strong define reintegration as the re-entry into community life as a whole, contributing, productive person.⁹⁷ For offenders, re-integration includes rehabilitation into the community. Stigmatisation is an indispensable occurrence for the aftermath of crime. Consequently, it may cause the ostracisation or exclusion of the offender from the community or family relationship. Through reintegration, restorative justice intends to 'build or rebuild relationships between offenders and their communities.'⁹⁸ This includes but not limited to reinforcing the offender's ties with adults and peers and changing the offenders' view of law-abiding citizens and community.'⁹⁹ Therefore, the channels of socialisation need to be involved in the policies and strategies for re-integration.

Set against this background, it is almost sure that some restorative justice elements could enhance victims' involvement in the sentencing stage. Such could include

⁹⁵ Nils Christie, 'Conflicts as Property' (1977) 17(1)*British Journal of Criminology*, 1-15.

⁹⁶ Ibid (n 8).

⁹⁷ Van Ness and Heetderks Strong, *Restoring Justice* (Anderson Publishing 1997) 116.

⁹⁸ Gordon Bazemore, 'Restorative Justice and earned redemption: communities, victims and offender reintegration.' (1998) 41(6) *American Behavioural Scientist*, 768-813, 789

⁹⁹ Ibid (n 787).

consultation with victims on how the crime has affected them; this may be in the form of VIS. It could also be an encounter between the victim and the offender, remorse, public apology, acknowledging the crime, admission of guilt, and efforts to address the harm done. Since sentencing is also a process, some of the restorative justice elements could be incorporated to enhance the process and outcome for the victims.

Before examining the Lubanga and Katanga cases' sentencing, the following section shall discuss if there is a relationship between retributive justice and restorative justice.

4.3.0 Retributive justice and restorative justice: Two sides of a coin?

The previous sections have focused on the theories of retributive and restorative justice. It is now necessary to explain if there is any relationship between these theories. This part would make a comparison between the two approaches to assess their compatibility within the context of sentencing. In Zehr's observation, retributive justice is not the opposite of restorative justice.¹⁰⁰ They are not irreconcilable. Instead, their approaches address the imbalance caused by the wrongdoing.

Similarly, Zehr also submits that restorative justice is not a replacement for legal system nor an alternative to prison.¹⁰¹ It is believed that restorative justice runs parallel to retributive justice. It seems the elements of these theories are opposites. However, these theories can be applied to complement each other because it recognises the harm suffered by the victims. In contrast, retributive justice recognises the wrong committed.

¹⁰⁰ Howard Zehr and Ali Gohar, *The Little Book of Restorative justice* (Good books)59 available at <https://www.unicef.org/tdad/littlebookrjpakaf.pdf> last accessed 01 December 2019.

¹⁰¹ Howard Zehr, *The Little Book of Restorative Justice: Revised and Updated* (Good books 2001)58-60.

The focus of retributive justice is criminal punishment.¹⁰² Most advocates of restorative justice agree that crime has both a public dimension and private dimension.¹⁰³ Zehr opines that crime has a societal dimension, as well as a more local and personal aspect. He argues that the legal system focuses on the public dimension vis-à-vis society's interests and obligations as represented by the State. Nevertheless, the emphasis on the collective dimension relegates the personal and interpersonal aspects of crime.¹⁰⁴ Sentencing as an integral part of the criminal justice system is situated within the common facet of addressing crime.

Also, it is thought that restorative justice method is more holistic when compared to retributive justice.¹⁰⁵ It is argued that both theories do not have to be alternatives in criminal trials. Findlay and Henham argue that both paradigms of justice share common qualities despite '*distinct differences*.'¹⁰⁶ As such, both paradigms can be used within the context of criminal trials, without relegating the status of restorative justice to an option or using it for symbolic function.¹⁰⁷

Christodoulidis is sceptical about the ability of trials and punishment to obtain restorative functions in conflict resolution.¹⁰⁸ Retributive expectations from trials are

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid .

¹⁰⁵ Ibid.

¹⁰⁶ Mark Findlay and Ralph Henham, *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process*(Willan Publishing 2005)274.

¹⁰⁷ Ibid.

¹⁰⁸ Emiliios Christodoulidis, 'Truth and Reconciliation as Risk's(2000) 9 *Social and legal Studies* 179

mainly just deserts and punitive outcomes.¹⁰⁹ Shapland et al. also argue that it is almost not certain if restorative justice can co-exist with retributive justice in the criminal justice system.¹¹⁰ These authors believe that restorative justice cannot have a predominant role within the criminal justice system. They submit that it may operate '*in the shadow of criminal justice*'¹¹¹ Nevertheless, restorative justice may perform background function.¹¹² From their studies, it appears that restorative justice cannot have a direct impact on criminal justice. However, there is a possibility that some elements of restorative justice would be useful in criminal justice.

This section has evaluated the relationship between the theories of retributive and restorative justice. Let us now consider the role of victims in sentencing. This assessment shall be made based on the decided cases approach; an analysis of *Lubanga* and *Katanga* cases' transcripts. This approach is required to evaluate the impact of victims on sentencing.

¹⁰⁹ Mark Findlay and Ralph Henham, *Transforming International Criminal Justice System: Retributive and Restorative Justice in the Trial Process* (Willan Publishing, 2005) 306.

¹¹⁰ Joana Shapland, Anne Atkinson, Helen Atkinson, Emily Colledge, James Dignan, Marie Howes, Jennifer Johnstone, Gwen Robinson and Angela Sorsby, 'Situating restorative Justice within criminal justice' (2006) 10(4) *Theoretical Criminology*, 505-532.

¹¹¹ Ibid, 523-524.

¹¹² Ibid.

4.4.0 Victims in sentencing-The Prosecutor v. Lubanga

4.4.1.Overview of the Lubanga judgment

This section intends to investigate victims' role during the sentencing hearings to Lubanga's sentencing analysis.

On 14 March 2012, the chamber ruled that Thomas Lubanga was guilty as a co-perpetrator of conscripting and enlisting children under the age of fifteen years into an armed group(UPC/FLPC) and using them to participate actively in hostilities in Ituri region of the DRC.¹¹³ Subsequently, the sentencing hearing commenced.

In the determination of the judgment, the chamber resorted to documentary video evidence and evidence a former UPC soldier who was over 15 years when he joined the UPC, testimonies of P-38 and P-10.¹¹⁴ This chapter aims not to address the judgment of Lubanga; some scholars have discussed the fairness of the decision.¹¹⁵ Nevertheless, one could infer that victims' role in the trial, mainly concerning victim-witnesses was not fully realised because of witness tampering and unsupervised intermediaries' activities.

That being said, it is evident from the ICC transcripts that victims participated through their LRVs during the sentencing hearing via written observations/submissions in

¹¹³ Prosecutor v .Lubanga Dyilo, Judgment Pursuant to Article 76

¹¹⁴ Ibid.(n 480-481)

¹¹⁵ Landmark Verdict, Human Rights Watch; Women Initiatives for Gender Justice , Lubanga Judgment , The Prosecution 's Investigation and Use of Intermediaries , Lubanga Trial.Org (Aug 20, 2012, available at <<http://www.lubangatrial.org/2012/08/20/lubanga-judgment-the-prosecutions-investigation-and-use-of-intermediaries/>> last accessed 12 May 2019.

sentence hearings.¹¹⁶ However, what is not yet clear is if these written observations/submissions have a significant role or influence in the ICC's sentencing decision. With this background, the following section will assess victims' observations in the Lubanga case.

4.4.2.0 The Sentencing Hearing

The Trial Chamber is responsible for the determination of the appropriate sentence on the accused person's conviction.¹¹⁷ A hearing will hold to hear additional evidence or submissions relevant to the sentence.¹¹⁸

4.4.2.1 Victims' Observations

In determining the sentence, the Chamber considered five relevant factors. These factors were :

- (1) The gravity of the crime,
- (2) The large and widespread nature of the crimes committed,
- (3) The degree of participation and intent of Thomas Lubanga Dyilo,
- (4) The aggravating circumstances and,
- (5) The mitigating circumstances.

In determining the gravity of the crime, the Chamber referred to the evidence of Ms Radhika Coomaraswamy the United Nations Special Representative of the Secretary-

¹¹⁶ Lubanga Sentencing and Katanga sentencing.

¹¹⁷ Rome Statute 1998, Article 76(1).

¹¹⁸ Ibid.

General on Children and Armed Conflict and the opinion of expert witness Ms Schauer.¹¹⁹

On the 24 April 2012, the Trial Chamber ordered the victims' legal representatives to submit their views on all evidence discussed during the trial.¹²⁰ In response to the Trial Chamber 1's order, the LRVs provided evidence examined during the proceedings to establish aggravating and mitigating circumstances for the convicted person. In the determination of sentencing, the legal representatives were allowed to make oral and written submissions in the event of sentence hearing. In their written observations, the LRV submitted three aggravating evidence, with no mitigating evidence.

At this stage, it is necessary to examine the meaning of aggravating circumstances.

4.4.2.2 The Prosecutor's request; aggravating circumstances

The Prosecution listed the aggravating circumstances as '*harsh conditions in the camps*' and '*the brutal treatment of children.*'¹²¹ The Prosecution had requested the Chamber to consider sexual violence as an aggravating factor.¹²² However, the Chamber rejected the evidence; it found the evidence insufficient because it was inadequate to establish a conclusion beyond a reasonable doubt that the punishment of children under the age of

¹¹⁹ T-223-ENG, page 12;13-24;EVD-CHM-00001, Page 3; Expert Report of Ms Schauer(CHM-0001), The Psychological Impact of Child Soldiering , ICC-01/04-01/06-1729-Anx 1(EVD-CHM-00001);Gregoria Suarez , Kindersoldaten im Volgersstarfretch (2009), page 124

¹²⁰ Le Procureur v.Thomas Dyilo, Observations du groupe de victims VO2 Sur des elements de prevue etablissant des circonstances aggravantes ou des cironstances attenuantes des faits portes a la chrgde de l'accuse reconnu coupable,ICC-01/04-01/06-2882, 14 May 2012,p.3,para 1;Observations of the Victims' Group VO2 on Evidence establishing Aggravating Circumstances or Mitigating Circumstances of the facts alleged against the accused person

¹²¹ ICC-01/04-01/06-2901, 10-07-2012,p.23, para.57; ICC-01/04-01/06-2901, 10-07-2012,P.23, para.57

¹²² Ibid.

15 years of age occurred in the ordinary course of the crime for which the chamber convicted the accused.¹²³ The prosecutor's arguments were insufficient to hold Lubanga responsible for cruel treatment.

Furthermore, the prosecution requested the imposition of a 30-year sentence on Lubanga.¹²⁴ Thirty years is the maximum term of imprisonment under the Rome Statute. He arrived at this request by drawing on a mathematical formula.¹²⁵ The Prosecutor supported his claim by referring to the Special Court's precedents for Sierra Leone, where sentences for similar offences fell within seven to fifty years.¹²⁶ Initially, the Prosecution requested a 'severe sentence' of 30 years... *'in the name of each child recruited, in the name of Ituri region'*¹²⁷ Subsequently, the Prosecution submitted that it would reduce the sentence from 30 years to 20 years, provided that Lubanga offers 'a genuine apology' to victims of the crimes.¹²⁸ It is believed that this sincere apology is a demonstration of acknowledgement of the offence and remorse from the perpetrator.

4.4.2.3 Victims' Aggravating Circumstances

In their written observations, the LRVs urged the Chamber to consider the aggravating factors such as the abuse of the official functions by Lubanga, the particular

¹²³ ICC-01/04-01/06-2901,P.23, Para 59,lines 2-4.

¹²⁴ T-360-Red2-ENG, page 35, lines 13-16, paras 92,95.

¹²⁵ Lubanga Sentence, para.s. 92, 95.

¹²⁶ Lubanga sentence, paras 12-15.

¹²⁷ Lubanga Sentencing Decision.

¹²⁸ ICC-01/04-01/06-2901,P.23, Para 59,lines 2-4.

vulnerability of the victims and the motive for the discriminatory aspect.¹²⁹ They argued that Lubanga as the president of the UPC and commander –in –chief of the FLPC, abused his role and position to recruit children under the age of 15 and use them to participate actively in hostilities.¹³⁰ They presented evidence of experts opinion which corroborated their proof. Also, their observations revealed how the soldiers threatened and raped women and girls.¹³¹ The LRVs supported the statements with the testimonies and evidence of witnesses and victims.¹³² The observations also contained a list of commanders and soldiers supervising the child soldiers(victims). The victims submitted that the convict has a discriminatory motive that instigated him to commit crimes which led to soldiers' sexually abuse female child soldiers.¹³³

The following shall describe the mitigation circumstances and the court's ruling on it.

4.4.2.4.Mitigating Circumstances

“All these factors can only be considered on the basis of the submissions and evidence presented primarily by the Office of the Prosecutor, but also on the basis of the Registry report specifically on the personal circumstances of the convicted person

¹²⁹ Prosecutor v Thomas Lubanga Dyilo, Observations du groupe de victims VO2 Sur des elements de preuve etablissant des circonstances aggravantes ou des circonstances attenuantes des faits portes a la charge de l'accuse reconnu coupable, ; ‘Observations pf the VO2 Team of Legal Representatives of Victims on Evidence Establishing Aggravating Circumstances or Mitigating Circumstances over facts bearing the account which recognised the accused as guilty’ Trial Chamber 1, 14 May 2012, ICC-01/04-01/06-2882, p.3, para 4.

¹³⁰ Ibid

¹³¹ Ibid ,p.4,para.7(h).

¹³² Ibid,p.4 and 5

¹³³ Ibid ,p.5,para8

*and the victims' submissions, especially with regard to the scope and extent of the harm they and their family members suffered."*¹³⁴

Mitigating circumstances are factors that could reduce the convicted person's term of imprisonment. It is more beneficial to the convict because these are facts or situations that do not relate to the defendant's guilt, but these circumstances support the leniency of the sentence.¹³⁵ For instance, the defendant's cooperation with the ICC is perceived as a mitigating factor because it expedites the ICC's work.¹³⁶ Glickman cautions that the mitigation for surrender may undermine the court's role in fostering general deterrence, but rather, entrench special deterrence. His submission confirms that the court's objective is to deter future offenders from committing similar crimes, instead of special deterrence for a convict.¹³⁷ It appears the ICC is not under any obligation to consider local practices in the determination of sentences.

The convict's expression of remorse, acknowledgement of the offence, and the effect of guilt admission are the crucial factors to be considered.¹³⁸ Arguably, the convict's expression of remorse, recognition of the crime, admission of guilt and apology can promote restorative process, provided the victims acknowledged the apologies and articulation of remorse which may accelerate the healing process of the victims and repair the relationship between the victims and the offender/convict. An apology by the

¹³⁴ The Prosecutor V. Thomas Lubanga Dyilo, Observations of the V02 group of victims on sentencing and reparations, ICC-01/04-01/06, 18 April 2012., para 6, p.3-4

¹³⁵ Ibid

¹³⁶ Steven Glickman "Victims' Justice :Legitimising the Sentencing Regime of the International Criminal Court, (2004) 43 *Columbia Journal of Transnational Law* ,229,264.

¹³⁷ Ibid.

¹³⁸ Ibid.

offender/convict demonstrates the expression of responsibility and acknowledgement of the harm done.

Mitigating factors is very significant because if considered, it may decrease the term of sentence. Perhaps, the most severe disadvantage of the rule on mitigating circumstances is that it requires proof- a balance of probabilities- as opposed to the aggravating factors. Balance of probabilities is also known as preponderance of the evidence. It does not require a piece of overwhelming evidence—a reflection of what is applicable in the jurisprudence of the ICTY.¹³⁹ Hence, the threshold is lower for the balance of probabilities. For instance, in the Lubanga case, the implication of mitigating factors is that it resulted in a lenient sentence of 12 years imprisonment for the convict. As a result of the lower threshold for mitigating circumstances, one may deduce that from the ICC's Statute and RPE, the ICC rules' intention makes it easier for mitigating circumstances to lessen a sentence. In comparison, the aggravating circumstances require a higher threshold to get an increased sentence.

The LRVs submitted that there was no circumstance on the convicted person who could exonerate him from his criminal responsibility.¹⁴⁰ These taken together, the LRVs prayed the Chamber to retain the aggravating circumstances in the convicted person's case.

¹³⁹ Prosecutor v. Kumarac, Csae No IT -96-23-T&IT-96-23/1-T, 22 February 2001,pa.847; Stuart Beresford , “Unshackling the Paper Tiger-the Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda (2001) 1 *International Criminal Law Review*,55

¹⁴⁰ Ibid ,p.5,para.9.

The prosecution and the legal representatives (V01 and V02) noted no mitigating circumstances in the case.¹⁴¹ On the other hand, the defence tendered several extenuating circumstances.¹⁴² The factors included necessity, peaceful motives and demobilisation orders, cooperation with the Court.¹⁴³

In addressing the mitigating circumstances, the defence requested the Chamber to deduct the period of Mr Lubanga's domestic detention from his total sentence because his initial incarceration by the DRC authorities between 2003 and 2006 resulted from the same crimes.¹⁴⁴

4.4.2.5. The Chamber's response to the aggravating circumstances

In determining the gravity of the crime, the Chamber examined the evidence of Ms Radhika Coomaraswamy the United Nations Special Representative of the Secretary-General on Children and Armed Conflict and expert opinion witness Ms Schauer.¹⁴⁵

Furthermore, the Chamber rejected the Prosecution's submissions that sexual violence and rape should be considered an aggravating factor because there was no relevant evidence to link Mr Lubanga to sexual violence in the ordinary recruitment course. The

¹⁴¹ ICC-01/04-01/06-2881, para.7; ICC-01/04-01/06-2880, paras 17-21 and ICC-01/04-01/06-2882, Page 5

¹⁴² ICC-01/04-01/06-2891-Red, paras 86-109.

¹⁴³ Ibid 172.

¹⁴⁴ Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012 ICC-01/04-01/06-2901, P.30 paras.83-89.

¹⁴⁵ T-223-ENG, page 12; 13-24; EVD-CHM-00001, Page 3; Expert Report of Ms Schauer (CHM-0001), The Psychological Impact of Child Soldiering, ICC-01/04-01/06-1729-Anx 1 (EVD-CHM-00001); Gregoria Suarez, Kindersoldaten im Volgersstarfretch (2009), page 124; Ibid.

Prosecution failed to prove beyond a reasonable doubt. Therefore, this factor did not reflect his culpability for the sentence.¹⁴⁶

Besides, the Chamber rejected the Prosecution's request on life sentence; the Chamber opined that life imprisonment would be inappropriate because it is "justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances."¹⁴⁷ The Chamber submitted that it would be '*inappropriate*' to sentence the convicted person-Mr Lubanga- to life imprisonment because it has not found any aggravating factors in this case.¹⁴⁸ In his observations, the Chamber noted that it would consider other evidence necessary to determine an 'appropriate' sentence. This 'appropriate' sentence should be proportionate to the offence. The proportionality is determined by balancing all the relevant factors.¹⁴⁹

The Chamber did not accede to the aggravating factors presented by the Prosecutor and the LRV; it ruled that the evidence was insufficient to establish beyond a reasonable doubt that child soldiers under the age of 15 years were subject to punishments such as 'whippings and canings' in the ordinary course' of the conflict.¹⁵⁰ The Chamber

¹⁴⁶ Ibid, p.28, para 75

¹⁴⁷ Ibid , p.35, 96.

¹⁴⁸ Ibid,p.35.

¹⁴⁹ Lubanga Sentence, paras 25, 29-31 and 34.

¹⁵⁰ Prosecutor v.Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76 of the Statute ,10 July 2012,ICC-01/04-01/06-2901, P.23,Para.55-59

reiterated that the convict had not ‘ordered or encouraged’ the infliction of these punishments.

The Chamber pointed out the prosecutor's failure include sexual violence in the charges, and his inability to introduce new evidence of gender-based violence during the sentencing phase.¹⁵¹ In the same vein, the Chamber rejected the children's vulnerability and discriminatory motives as aggravating factors. While the former was denied based on the facts that it qualifies as a double count, the Chamber rejected the latter because there was no sufficient evidence to prove that Lubanga ‘*deliberately discriminated against women, given that his commanders sexually abused female soldiers.*’¹⁵² Therefore, the Chamber found no aggravating factors.

4.4.2.6.The Chamber’s response to mitigating circumstances

The Chamber considered the convicted person's cooperation with the Court during the proceedings as a mitigating factor. The Chamber factored in Lubanga’s ‘*notable cooperation*’ and commented on the prosecution’s refusal to disclose evidence with its consequent delays.¹⁵³ By inference, the reasoning behind this decision shows an offender-centred approach.

4.4 2.7.The Sentence

In determining the declared sentence, it is revealed that the majority of the Chambers took into account: the widespread use of child soldiers during the time frame of the

¹⁵¹ Lubanga Sentence, paras 60, 75

¹⁵² Ibid,p 30, para 81

¹⁵³ Lubanga Sentence, para 91.

charges, the influential position of Mr Lubanga within the UPC/FLPC and his capacity by virtue of his position of authority to supervise the foot soldiers. Besides, the majority of the Chamber dismissed the aggravating circumstances(as presented by the LRVs). The Chamber's reasoning, the aggravating factors were insufficient to warrant an influence on the sentence, as they submitted that they found no aggravating circumstances in the LRVs submissions.

The chamber outline the declared sentence is as follows:

“In considering these factors, the majority chamber meted a separate sentence for each of the three crimes for which Lubanga had been convicted. The following is the crime and the corresponding sentence:

- (1) Conscription of children under 15 years old-13 years imprisonment;
- (2) Enlistment of children under 15 years old-12 years imprisonment; and
- (3) The use of children under 15 years to participate actively in hostilities-14 years imprisonment.

Furthermore, the Chamber pronounced a joint sentence of a total period of imprisonment as 14 years.¹⁵⁴

However, in her dissenting opinion, Judge Odio suggested that ‘punishment and ‘sexual violence’ should have been considered aggravating factors in the determination of

¹⁵⁴ Decision on Sentence pursuant to Article 76 of the Statute”, ICC-01/04-01/06-2901, para. 107.

sentence because they resulted in severe and often irreparable harm to the victims and their families.¹⁵⁵ The learned judge noted that it would have considered evidence of sexual violence, had it been introduced during the sentencing stage. Therefore, the Chamber found no aggravating factors.¹⁵⁶

On the same point, Judge Odio buttressed the gravity of the suffering of child soldiers with the expert opinion of Ms Schauer and evidence of Ms Radhika Coomaraswamy. They both testified to the negative impact on their(child soldiers) education psychological development and the girl child soldiers subjected to sexual violence.¹⁵⁷ The witness reported that the children narrated an account of systematic sexual violence in the camps—the incidences of pregnancies and abortions, and the subsequent expulsion of the pregnant girls. The learned judge opined that the Majority disregarded the damage caused to the victims and their families. However, she reasoned that ‘punishment and ‘sexual violence’ should have been considered as aggravating factors. Because they resulted in severe and often irreparable harm to the victims and their families; which puts them *at risk of severe physical and emotional harm’ and death.*¹⁵⁸ She stressed the Majority's indifference to victims' loss due to harsh punishments and sexual violence.¹⁵⁹ She argued that the Majority of Chamber considered; a)the large and widespread nature of the crimes committed;b) the degree of participation and intent of

¹⁵⁵ Dissenting Opinion of Judge Elizabeth Odio Benito, para.22, Ibid ,p.50

¹⁵⁶ Ibid.

¹⁵⁷ EVD-CHM-0001,pages 23-24;T-223-ENG,page 28,line 16 to page 29,line 11; Dissenting Opinion of Judge Elizabeth Odio Benito, para.22, Ibid ,p.50

¹⁵⁸ Ibid 143,p.51,para 25,lines7-9.; Dissenting Opinion of Judge Elizabeth Odio Benito, para.22, Ibid 353,p.50.

¹⁵⁹ Dissenting Opinion of Judge Odio Benito, p.41, para.2, lines 1-4.

the convicted person; and c) the convicted person's individual circumstances as the 'fundamental factors.'¹⁶⁰Initially, the Chamber acknowledged 'the harm caused to victims and their families as a factor of gravity pursuant to Rule 145(1) © of the Rules.'¹⁶¹Subsequently, it disregarded this item as a factor of gravity. She emphasised that the Chamber received sufficient evidence to establish the punishments, harsh conditions and sexual violence suffered by the victims due to their recruitment in the camps. Therefore, these items should have been factored in when determining the sentence against the convicted person as is it precipitates '*serious*' and '*irreparable harm*' to the victims and their families.¹⁶²

Regarding the term of imprisonment, judge Odio criticised the majority's decision to impose a lower sentence to the crime of enlistment, 12 years, a higher sentence to the crime of conscription, 13 years and an even severer punishment to the crime of the use of children to participate in the hostilities, 14 years. She asserted that the distinction in term of imprisonment gives a wrong impression about each crime's consequences. Although the crimes are 'distinct and separate crimes', they are the outcome of a common plan implemented by Mr Lubanga.¹⁶³ The learned judge opined that Mr Lubanga should be sentenced to 15 years imprisonment for each of the crime of enlistment, conscription and the use of children under the age of 15 years to participate

¹⁶⁰ Dissenting Opinion of Judge Benito Odio, p.49,Ibid, p.42, para 4.

¹⁶¹ Ibid , p.42, para 5.

¹⁶² Ibid,p.42, para 42.

¹⁶³ Ibid 143.

actively in hostilities.¹⁶⁴ Thus, the joint years of imprisonment should have been 15 years of imprisonment.¹⁶⁵

Arguably, the court could have considered the item for recruiting under 15 children in the armed conflict. The exclusion would suggest that the children's suffering was not severe for the gravity of the crime. Also, the Chamber rejected the effects of sexual violence. One possible explanation for this might be related to inadequate evidence on these alleged crimes. Nonetheless, this does not preclude the fact that the offender might have been responsible for the commission of the alleged crimes. It connotes that the evidence was not sufficient enough to warrant charges and subsequent conviction as well as the sentence. The declared sentence shows that the criminal proceedings' outcome is a product of persuasive or convincing evidence from the parties, rather than the stated sentence being victim-focused. Hence, this corroborates the fact that the outcome relies heavily on the preponderance of the evidence.

Following the sentencing, and the appeal after that, Mr Lubanga, filed an action on the possibility of Review of his sentence. It is necessary to examine the role of victims in Mr Lubanga's sentence review. The next part of this chapter shall outline the reduction/sentence review.

¹⁶⁴ Ibid 143, p.51 p.26, lines 2-8.

¹⁶⁵ Ibid 143, p.52, para 27, lines 1-2.

4.5.0 The first sentence review

Having discussed the involvement of victims in the sentencing decision for Lubanga, this part shall assess victims' participation in the sentence reduction and if they influenced the review of the sentence. This section follows on from the previous part, which examined the sentencing hearing and the declared sentence.

4.5.1 Overview of sentence Reduction and its provisions.

Pursuant to Article 110 of the Statute, the Court is empowered to review a convict's sentence when he has served two-thirds of the sentence or 25 years imprisonment.¹⁶⁶ The presiding judge's scheduling Order invited the participating victims to express in written submissions their views and concerns regarding any reduction in the convicted person's sentence.¹⁶⁷ Furthermore, Article 110(4) lists the conditions that the Court must be satisfied with to reduce the offender's sentence. These conditions include the offender's willingness to cooperate with the ICC at the initial stage and subsequently; the offender must have rendered voluntary assistance to the court to enable ease enforcement of the judgments; a clear and significant change in circumstances that warrant a reduction of sentence.¹⁶⁸

Furthermore, Rule 223 states other factors that will be considered in sentence review.

These factors are:

¹⁶⁶ Rome Statute 1998, Article 110(3).

¹⁶⁷ The Prosecutor v Lubanga, Observations of the V01 group of victims on the possible review of Mr Thomas Lubanga Dyilo' sentence, ICC-01/04-01/06-3149-tENG, 10 July 2015, p3, para3, lines 1-3

¹⁶⁸ Ibid.

- The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime:
- The prospect of the resocialisation and successful resettlement of the sentenced person;
- Whether the early release of the sentenced person would give rise to significant social instability;
- Any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release;
- Individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age.

It has commonly been assumed that a sentence reduction may be a remedy for alleged violations of the human rights of the convict, to serve his sentence without risk of physical harm.¹⁶⁹ Moreover, we should bear in mind that reducing a sentence as a remedy based on alleged violations of human rights is not provided for in article 110(4) of the Statute or rule 223 of the Rules. Nevertheless, evidence suggests that some common law jurisdictions do grant review of sentence reduction, not as a remedy to human rights violations, but as the basis of the convict's cooperation with the legal authorities, or if a particular part of the sentence has been served.¹⁷⁰ Reduction of a

¹⁶⁹ *Hutchinson v. The United Kingdom*, ECHR 021 [2016], Grand Chamber judgments.

¹⁷⁰ Sarah Welch, *Reviewing Leniency :Appealability of 18 USC & 3582©(2) Sentence Modification Motions* (2018) 85(5) *The University of Chicago Law Review*, 1269-1311.

sentence is not an automatic right; it is subject to some conditions. In addition, it seems the reduction of sentence and review is not new to the criminal justice system; it is prevalent in most national jurisdictions.

Hole notes that sentence reduction tries to strike a balance between the interests of offenders, victims, and the community. From his perspective, the sentence review checks ‘an arbitrary’ discretion’ to the Court.¹⁷¹ Sentence reduction will probably address unresolved issues between the sentenced person and victims which have not been corrected by the original sentence. The notion is applicable where a sentence is meant to promote rehabilitation of the offender. It follows that the sentence review embraces a holistic approach towards repairing the relationship between the stakeholders-victims, offenders, and society.

Arguably, the sentence review gives victims a more participatory role. Similarly, one could argue that it permits a deeper interaction between the victims and the sentenced person. The conditions listed in Rule 223 appears to stress an integrative or holistic approach to addressing sentence review. These conditions expressly inform an expectation of the offender’s reformation, particularly concerning building a relationship with the victims. The conditions imply that the offender’s early release is made conditional on ‘significant actions’ to address the harm caused to the victims. In a similar vein, the rules also highlight the implications of the offender’s release on the

¹⁷¹ Adrian Hole, “The Sentencing Provisions of the International Criminal Court” (2005) 1(1) *International Journal of Punishment and Sentencing*, 37-69.

community. Therefore, this explores the interrelationship between the offender, victims and the community-a subtle approach to restorative justice.

21 August 2015 marked the commencement of the hearing on Lubanga' first sentence review. The Court listened to arguments from both parties and, the victims. The Court's primary function was to evaluate the convicted person on the criteria set out by Article 110(4). Inadvertently, the parties presented these criteria in two contrasting arguments; argument favouring early release and arguments against early release. The Chamber invited written representations from the participating victims on their views and concerns regarding a possible reduction of sentence.¹⁷² Also, the Registrar and the DRC filed observations.

In this sentence review, The Prosecutor, the OPCV and the LRVs, V01 and V02 concluded on the absence of the factors in Article 110(4)(a) and (b), Rule 223. The LRVs 01 submitted written observations. In the words of the Court:

“[[t]he Appeals Chamber invited **the participating victims** to express in **written submissions their views and concerns** in relation to any reduction in the sentenced person's sentence, having regard to the criteria set out in article 110(4) of the Statute and rule 223 of the Rules of Procedure and Evidence”.¹⁷³

¹⁷² ICC-01/04-01/06-3346 07-08-2017 1/5 NM RW.

¹⁷³ The Prosecutor V Lubanga Dyilo , Observations of the V01 Group of victims on the possible review Mr Thomas Lubanga Dyilo's Sentence ,ICC-01/04-01/06-3149-Teng, 31 July 2015,P.3,para 3.

In response to the court's order, the victims submitted their observations. The victims concluded that the legal criteria for a reduction of the sentence were not present.¹⁷⁴In the LRVs 01' observations, the victims averred that criteria (a) to (d) of rule 223 affected the victims' interests directly. These criteria are duplicated in article 110(4).

In the victims' assertions, Mr Lubanga Dyilo 'consistently denied his responsibility', that he committed the crimes he was convicted. Additionally, the victims observed that his conduct and behaviour did not reflect that he has '*dissociated*' from those crimes.¹⁷⁵ They recommended that an apology and expression of regret by the sentenced person would suffice as a step towards reparations. They also pointed out that his unrepentant ways were likely to escalate the continuing tension in Ituri while an apology and expression of regret could ease the existing tension in Ituri.¹⁷⁶These victims' observations highlighted their expectations and the thorough follow-up of the offender's activities (Lubanga). In addition, the victims also expressed their concerns about the consequences that might arise if Mr Lubanga was released to return to the Ituri region. They expressed fears that his release "might hamper implementation of the Trust Fund for Victims' reparations programme, as a result of Lubanga's influence on public opinion." They averred that Lubanga's return would negatively influence the collective reparations process and the symbolic reparations.¹⁷⁷

¹⁷⁴ The Prosecutor v Lubanga Dyilo, Observations of the V01 Group of Victims on the Possibility of Review of Mr Thomas Lubanga Dyilo's Sentence With Two Annexes ICC-01/04-01/06-3366 14 September 2017,p.9.

¹⁷⁵ Ibid , p.4,para 7.lines 1-3

¹⁷⁶ ICC-01/04-01/06-3149-Teng 31-07-2015,p.5, para10.

¹⁷⁷ Ibid 176,p.5,para 9.

Regarding reintegration back into society, the victims averred that Mr Lubanga would face challenges, which could hinder or impact negatively on his ability to resettle in the community with peace and reconciliation. They reported the lack of motivation on Mr Lubanga's part reflected his attitude towards victims.

On the risk of social instability, the victims felt the offender's release. Returning to the region could aggravate the communities' tension, provided Lubanga does not change his attitude.¹⁷⁸ They also contended that Lubanga's return might escalate reprisal attacks as well as the beginning of new war crimes.

Turning now to the positive action favouring victims, the victims' arguments show that Mr Lubanga has declined to undertake a proposal of positive actions during his detention term. This criterion required him to engage victims by reassuring them of his support publicly, a public acknowledgement that children under the age of 15 years were indeed enlisted into UPC, as well as an expression of regret in the absence of an apology.¹⁷⁹

Furthermore, the LRVs(victims V01) also claimed that Mr Lubanga has not participated in any conduct that shows that he has taken '*significant action*' to benefit the victims. Mr Lubanga failed to make public apologies, which could have formed part of the reparations; he refused to cooperate throughout the reparations proceedings.¹⁸⁰ He

¹⁷⁸ Ibid , p. 5, para 12

¹⁷⁹ Ibid.

¹⁸⁰ Observations of Legal Representatives V91,para12.

objected to the inclusion of child soldiers in the reparations programmes. He blatantly refused to recognise the fact that he was responsible for the former child soldier's recruitment. The Registry corroborated this assertion. The LRVs of Victims V02 argue that Lubanga was required to prove his good faith and wish to cooperate with the reconciliation process in Ituri.¹⁸¹ The LRV concluded that none of the sentenced person's conduct could be considered '*change*' to qualify for the legal criteria for a sentence reduction. The LRV's submitted that the statutory criteria for sentence reduction were not, at this juncture, present. They deferred for six months, the review for a possible sentence reduction.¹⁸²

In response to this, the Defence contested the LRV's assertion and claimed that Lubanga offered apology letter. They reiterated that Lubanga's apologies were genuine. The Defence argued that the conduct antecedent to sentence review supported Lubanga's application for a sentence reduction.

Nonetheless, the Panel considered the LRV's submissions. It dismissed Lubanga's application to reduce the sentence because he failed to comply with the rules, including his lack of remorse and insincere apology. Given the information received from the LRVs, the Panel concluded that Mr Lubanga had not genuinely dissociated from his crimes.¹⁸³ However, the Panel acknowledged the prospect for the resocialisation and

¹⁸¹ Observations of Legal Representatives of Victims V02, paras 11-12.

¹⁸² Observations of Legal Representatives of Victims V01, para.19; Observations of Legal Representatives of Victims V02, para 18,25. Ibid 176, p.9, ICC-01/04-01/06 14 September 2017.

¹⁸³ Lubanga First Sentence Review Decision, 177,p 4.

successful resettlement of Mr Lubanga in the DRC.¹⁸⁴ Hence, the reduction of his sentence could not be justified in the present circumstances. Based on the above factors' assessment and the absence of evidence to establish Mr Lubanga's dissociation from the crimes, the judges found no elements favouring Lubanga's release.¹⁸⁵ Furthermore, the judges held that Lubanga had not satisfied the court that there was any indication which supported the fact that he has taken '*significant action*' for the benefit of the victims of his crimes.

Interestingly, the first sentence review manifests the significance of remorse, and sincere apology in sentencing, especially in assessing the relationship between victims and offender and victims' perspectives on this. Perhaps victims may find closure from the offender's apologies. On the other hand, remorse and public apology could serve as a mitigating factor for the defendant at sentencing. Since apology may perform a restorative function towards mending the broken relationship between the victims and sentenced person, victims tend to expect this from the perpetrator. In this particular case, from their perspectives, the victim believed the apology was not genuine. Remorse and sincere apology could fit in as a medium to teach offenders lessons, vindicate victims and expedite reintegration into the society.¹⁸⁶

¹⁸⁴ The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Review concerning reduction of sentence of Mr Thomas Lubanga Dyilo, ICC-01/04/01/06,22 September 2015, p.3

¹⁸⁵ Ibid

¹⁸⁶ Stephanos Bibas and Richard A.Bierschbach 'Integrating Remorse and Apology into Criminal Procedure' (2004) 114 *Yale Law Journal* 85.

In summary, the Panel found no factors in favour of Lubanga's release. The panel reached this decision based on the absence of evidence that he had genuinely dissociated himself from the crimes and failure to establish any indication that supported the fact that he had taken 'significant action' to benefit the victims of his crimes.

From the above assessment, It is observed that the Panel considered the victims' submissions in the determination of the sentence review. After a while, the sentenced person, Lubanga, applied for a second review for a sentence reduction. The following part shall explore the second review by commencing with the preliminary issue.

4.5.2 Preliminary issue: request to postpone the second review.

The LRV V01 and V02 requested the Chamber to defer the sentence review for six months.¹⁸⁷ The LRV V01 stated that Mr Lubanga had not met the conditions set for his early release. Therefore, the requirements from his initial review have not changed. However, according to the letter dated 7 September 2017 titled '*merits considerations*', which contained a 'new information' on Mr Lubanga's intentions. This letter expressed Mr Lubanga's desire to participate in the reparation process and become its 'committed partner.'¹⁸⁸

¹⁸⁷ The Prosecutor v. Thomas Lubanga Dyilo, Second Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-3375 03-11-2017, P.6, para.11; Observations of Legal Representatives of victims V01, PARA.19; Observations of Legal Representatives, paras 18, 25

¹⁸⁸ Observations of Legal Representatives of Victims V01, para.16.

Additionally, they observed Mr Lubanga's intentions via his proposal, to organise public apologies, which could be held while still in detention. Lubanga also proposed that he would continue detention if it increased the chances of social harmony and well-being of the communities who suffered from his crimes.¹⁸⁹

In addressing this, the LRV VO1 contended that if these new proposals were sincere, it may expedite public apologies, which in turn could provide some measure of satisfaction to victims and successful reparations.¹⁹⁰ They submitted that the justification for a postponement of six months was to prepare for a meeting between Mr Lubanga and a delegation of victims, intending to reach an agreement on the possible forms of public apologies and implementation of such agreement.¹⁹¹ The LRV V01 posited that if the process's initiation was successful, it could relieve the victims' fears and promote reconciliation between communities and Mr Lubanga's community. This process could also lessen the hindrances to implementing reparations and, ensure his release was carried out in favourable conditions.¹⁹²

The LRV VO2 in their submissions concluded that if the panel agreed to postpone its decision, it would positively impact the implementation of the reparations process and the involvement of all parties and trust fund.¹⁹³

¹⁸⁹ Observations of Legal Representatives of victims, para 16.

¹⁹⁰ Observations of Legal Representatives of V01 , par 17.

¹⁹¹ Observations of Legal Representatives V01, para 19.

¹⁹² Observations of Legal Representatives of Victims V01, par 19.

¹⁹³ Observations of Legal Representatives of Victims V02, para.18.

The Prosecutor's submission was quite different. The Prosecutor persuaded the Panel that it should decide on the information currently available, rather than postponing its decision.¹⁹⁴ He argued that the letter dated 7 September 2017 was a repetition of Mr Lubanga's earlier statements, which had already been considered in the First Sentence Review.¹⁹⁵

On the other hand, the OPCV 's submissions expressed his opposition to Mr Lubanga's early release and the postponement of the panel's decision. The OPCV urged the Panel to make an urgent decision to reassure the victims who will potentially have access to the reparation programme.¹⁹⁶

The sentenced person, Mr Lubanga, recognised the request for the postponement of reviewing his sentence. He emphasised his intention to meet with the victims of his crimes to fulfil his wishes for reconciliation.¹⁹⁷

The Panel noted that the Defence' Second Observations reflected Mr Lubanga's intentions and actions to be taken in the future.¹⁹⁸ This statement from Mr Lubanga was considered more aspirational than pragmatic.

The Panel held that there are 'too much' uncertainties in Lubanga's proposals. The Panel relayed his doubts on the realisations of these proposals, especially, the time

¹⁹⁴ Prosecutor's Second Observations ,para 8.

¹⁹⁵ Ibid.

¹⁹⁶ OPCV Second Observations ,para.9

¹⁹⁷ Defence Second Observations, para 22.

¹⁹⁸ Defence Second Observations, paras 24-27.; Second Decision on the Review concerning reduction of sentence of Mr Thomas Lubanga Dyilo, para 2.

constraints. The Panel ruled that the parties and participants' arguments do not warrant the postponement of its decision.¹⁹⁹ The Panel was mindful that some of the parties and participants raised the same arguments presented in the first sentence review.²⁰⁰

4.5.3 The second review for reduction of sentence.

Rule 224(3) of the Rules provides for the review of sentence reduction every three years. Following the decline of Lubanga's initial sentence review in 2015, Mr Lubanga applied for the second review after two years.²⁰¹ The Panel requested Defence, the Prosecutor, the LRV V01, the LRV V02, the OPCV, the DRC and the Registrar to submit written representations for the sentence review concerning Mr Lubanga Dyilo.²⁰² The review's scope was restricted to questions on any significant change in circumstances since the initial sentence review.²⁰³ This review included a piece of new information available that demonstrated any changes since the first sentence review decision was issued.

As claimed by LRVs V01:

“In view of the Legal Representatives of Victims V01, a traditional ceremony to be attended by the victims could be problematic for those who fear retaliation and would

¹⁹⁹ Second Decision on the Review concerning reduction of sentence of Mr Thomas Lubanga Dyilo P.9 Para.20.

²⁰⁰ Ibid, para.32.

²⁰¹ The Prosecutor v. Thomas Lubanga Dyilo, Situation in the Democratic Republic Of Congo, Scheduling Order for the second review concerning reduction of sentence of Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-3346 07-08-2017,.P3.

²⁰² Ibid, p.4 para 1; regulation 33(1)(d)

²⁰³ Ibid, para 2.

have to make known their participation in the proceedings. In their submission, the Letter of 7 September 2017, which refers extensively to the 2015 Sentence Review Hearing which was already considered by the Panel in its First Sentence Review Decision, does not reflect a genuine change of attitude.”²⁰⁴

The LRV V01 argued the sentenced person, Mr Lubanga refused to cooperate in the reparations proceedings. They also averred that Mr Lubanga failed to accept that he was responsible for recruiting the former child soldiers, as he was reluctant to accept their reparations.²⁰⁵ The LRV V01 asserted that since Mr Lubanga’s first sentence review decision, his conduct had not shown his dissociation from the crimes from which he was sentenced.”²⁰⁶ They referred to the negative implications of Mr Lubanga’s release on implementing the Trust Fund for Victims’ reparation programme and the leaders’ strong ties with the political group headed by Lubanga. The opposition on their part to the reparation programme may deter any participation in them.²⁰⁷

In a similar vein, the LRV V02 submitted that Mr Lubanga was required to establish good faith and wish to cooperate with the reconciliation process in Ituri. Although, the LRV acknowledged Mr Lubanga’s good faith and intention to collaborate with the reconciliation process in Ituri, however, this intention was not sufficient.²⁰⁸ Besides, the

²⁰⁴ Ibid 193; Observations of Legal Representatives of Victims V01, para.15,11.

²⁰⁵ Ibid ,para 39; Observations of Legal Representatives of Victims V01,para.12.

²⁰⁶ Ibid.

²⁰⁷ Ibid,p.20, para 69; Observations of Legal of Victims V01, Para.9.

²⁰⁸ Ibid, para 40; Obseravtions of Legal Representatives of Victims V02, paras 11-12.

LRV V02 pointed out the adverse reaction to Mr Lubanga's release, which included, the risk of social instability, the potential for stigmatisation of victims during the implementation of the reparations."²⁰⁹In their submission, they recommended that Mr Lubanga should "adopt a more cooperative approach towards victims." ²¹⁰

Additionally, the Panel rejected Lubanga's statement concerning serving his full sentence to promote the victims' wellbeing. The Panel ruled that this did not constitute a significant change in circumstances because none of this indicated a significant action taken by Mr Lubanga for the victims' benefit.²¹¹

In reaching the decision, the Panel evaluated the significance of any actions taken by the sentenced person, Mr Lubanga, for the victims' benefit (as stipulated in rule 223(d) of the Rules). The Panel acknowledged Lubanga's proposal of a public ceremony to meet with victims and offer his apologies. Although this constituted a change in circumstance, the Panel did not consider it significantly sufficient to modify Lubanga's sentence. It reasoned that the proposal was more intentional than feasible.

These taken together, the Panel determined that there had been no significant change in circumstances since the first sentence review decision would merit a reduction of Mr

²⁰⁹ Observations of Legal Representatives of Victims V02,para.19.

²¹⁰ Ibid 193, p.22,para.80;Observations of Legal Representatives V02, para.23.

²¹¹ Ibid 193.

Lubanga's sentence.²¹² A summary of the main findings, together with the discussion, is provided in the following section.

4.6.0 Discussing findings.

Henham's study results reveal that international criminal law is founded on a measure of consensus for punishment and morality; however, there is little agreement on what approach to re-enforce this morality/punishment.²¹³ To date, there is no consensus on the path to take. One implication of this is the disparity between different national jurisdictions with varying approaches to sanctions and punishments. While the Rome Statute outlines the applicable penalties, presumably, the victims, in this case, are familiar with the penalties applicable in their local jurisdictions. It seems some victims do not comprehend the ICC's approach to punishment nor the justification for such sentences.

In Beresford words, "the passing of a sentence on an offender is, after all, probably the most public face of the international criminal justice system..."²¹⁴ Beresford's statement draws our attention to the function of this phase of proceedings—sentencing—in international criminal justice. A climax which every stakeholder of the criminal justice system expects. Seemingly, transparency is expected in sentencing. Sentencing within

²¹² Ibid, p.26,para.95; The case of Prosecutor v.Thomas Lubanga Dyilo,ICC-01/04-01/06-3375,03-11-2017, Para 94.

²¹³ Ralph Henham, "Theorising the penalty of Sentencing International Criminal Trials,(2004) 8*Theoretical Criminology* ,329,441

²¹⁴ Stuart Beresford , "Unshackling the Paper Tiger-the Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda (2001) 1 *International Criminal Law Review* ,33,34.

the global context is described as a response to collective violence.²¹⁵ A response to this end indicates a more significant number of victims. Victims and the international community look forward to international sentencing. As opposed to national jurisdictions, sentencing operates within a broader context of gross violations of human rights. Since the ICC is not a 'self-contained' institution, it derives some of its applicable law from internationally recognised human rights, treaties, and the legal system's national law.²¹⁶ This derivation is evidenced in the compromise reached at the Rome Conference. It is settled that the Rome Statute provisions do not prejudice the existing national laws of the State parties.

The application of these rules differs within the ICC jurisprudence. ICC's approach may seem liberal, given that it excludes some harsh penalties like a death sentence and corporal punishment. The delegations of the Rome negotiations agreed to humane punishments.

As mentioned in the introduction, retribution, deterrence, and rehabilitation are the main justifications for sentencing. Nonetheless, it is interesting to note that the judges did not expressly mention the rationale behind sentencing. There are divergent opinions by penal lawyers on the purpose of sentencing. Schabas proposes that human rights principles are more suitable to achieve rehabilitative goals over retributive goals²¹⁷.

²¹⁵ Ralph Henham, *International Sentencing in the Context of Collective Violence* (2007) 7(1) *International Criminal Law Review* ,449,449-468.

²¹⁶ Rome Statute 1998, Article 21.

²¹⁷ Williams Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, (1997) 7 *Duke Journal of Comparative and International Law* , 461,481.

According to Schabas, more attention should be given to rehabilitating offenders rather than promoting punitive purposes. Human rights principles are used as guidelines, explaining the leniency of penalties at the ICC; an attempt at rehabilitation.

In contrast, Danner believes that the driving force of international criminal sentencing is retributive justice.²¹⁸ While rehabilitation is a subset of retributive justice, retribution takes the forefront in sentencing. Perhaps, striking a balance between retribution, deterrence, and rehabilitation would enhance the role of retributive justice. If the court contributes towards rehabilitation and liaises with the national jurisdiction involved, combining these parts would create a more holistic approach to sentencing.

Although it is observed that the Rome Statute and RPE do not expressly stipulate any justification for punishments, nonetheless, a cursory look at the preamble of the Rome Statute implies retribution and deterrence as justifications for punishment.²¹⁹ Regarding deterrence, it is not yet clear if individual deterrence is included. This stresses ICC's primary goal to mete out punishment to the masterminds/perpetrators of serious human rights violations. This punishment could be a reflection of just desert and proportionality. The last emphasis reflects the deterrent effect, to serve as deterrence for future offenders. Therefore, one may infer that the conviction and sentencing of

²¹⁸ Allison Danner, Constructing Hierarchy of Crimes in International Criminal Law Sentencing, 87 Vancouver Law Review, (2001)415,442. Situation in the Democratic Republic of Congo , Prosecutor v..Thomas Lubanga Dyilo, Decision on Sentence Pursuant to Article 76 of the Statute ICC-01/04-01/06-2901 ,P.9, para 16.

²¹⁹ Situation in the Democratic Republic of Congo , Prosecutor v.Thomas Lubanga Dyilo, Decision on Sentence Pursuant to Article 76 of the Statute ICC-01/04-01/06-2901 ,P.9, para 16.;Preamble of the Rome Statute.

Lubanga underscore the objectives of classical criminal law theory-deterrence, retribution and rehabilitation.

That being said, victims expected the vulnerability of children under the age of 15 to aggravate the sentence; they also expected sexual and gender-based violence (against women and girls) and discriminatory motives against female child soldiers to provoke the punishment.²²⁰ Given that crimes of sexual and gender-based violence were excluded from the charges, and subsequently not prosecuted. The victims anticipated these items to exacerbate the sentence. However, the Chamber found no aggravating factors in these observations. It is observed that victims contribution via aggravating circumstances to increase the convicted person's sentence play little role in the outcome of the sentence because the Chambers found no aggravating factors.

Judge Odio's dissenting opinion highlighted the discrepancy between the declared sentence and the seriousness of the crime. However, the learned judge's opinion on the sentence is unsatisfactory because of the observed difference between the declared sentence and the recommended sentence suggested by Judge Odio is negligible; she stated that 15 years of imprisonment would have been preferable to 14 years. In the learned judge's opinion, one could see that the difference between the majority's term in prison and her preferred term of imprisonment was one year. Although the learned judge shed light on the deficiency in proportionality, her suggested sentence is of little

²²⁰ Ibid.

or no help to the proportionality between the seriousness of the crime. Judge Odio's opinion might have been more persuasive if she had suggested a higher sentence.

Nonetheless, her observations on the majority's decision reveal her disappointment in the length of the sentence. On proportionality of the gravity of the crime and the deserving punishment, it is not yet settled if there is a threshold for measuring punishment. There is no universal principle; preferably, the cardinal proportional principle is applied; this principle of proportionality is not universal; it is determined based on moral relativism.²²¹ Thus, it is open to inconsistencies and different interpretations. From the Lubanga case data, it is apparent that the declared term of imprisonment 14 years expresses acts of retributive justice. Nonetheless, one could argue that these stated terms of imprisonment are perceived as an expression of general deterrence.

One implication of this sentence is the possibility that the accused/offender/convicted person still takes the forefront at the sentencing stage. Non-lengthy sentence and sentence review ensure rehabilitation of the perpetrator. The threshold is sufficiently humanitarian that one may infer the promotion of offender reformation as well as the transformative approach of the court towards the punishment of the offender.

Interestingly, the Lubanga sentencing demonstrates that victims were permitted to submit observations and participate through their LRVs during sentencing. This form

²²¹Joel Goh, 'Proportionality-An Unattainable Ideal in the Criminal Justice System(2013) available at <[http://hummedia.manchester.ac.uk/schools/law/main/research/MSLR_Vol2_4\(Goh\).pdf](http://hummedia.manchester.ac.uk/schools/law/main/research/MSLR_Vol2_4(Goh).pdf)>last accessed 19 January 2020.

of participation connotes a regulated and restricted medium of participation. Therefore, it can be assumed that the sentencing phase enhances victim engagement, subject to judicial discretion. Also, one may argue that protecting the sentenced person's rights from a human rights perspective is the basis for this restricted participation. Cretney and Davis opine that based on moral reasons, victims should be given roles to play in the delivery of punishment because it can reassure them that they have '*public recognition and support*.'²²² From these commentators' submission, victims' role in the delivery of punishment should emanate from a moral standpoint.²²³ This submission resonates with Christie's analysis of 'stolen property's within most common law jurisdictions' adversarial system.²²⁴ From a moral perspective, the victims should be allowed to participate. Nevertheless, the effects of their participation on the sentence are regulated by judicial discretion/power. This finding agrees with Henham's ideas, suggesting that the extent of victims' involvement in sentencing is curtailed by judicial discretion.²²⁵

It is also interesting to note that the declared sentence does not conform to the prosecution's request for a severer punishment. It demonstrates that the judges have full discretion to determine the term of imprisonment, provided it conforms with the statute and RPE provisions. The prosecutor's request on a higher sentence seems to demonstrate his viewpoint on retributive justice, especially the doctrine of retribution,

²²² Antonia Cretney and Gwyn Davis, *Punishing Violence* (London: Routledge 1996) 178.

²²³ Ibid.

²²⁴ Nils Christie, 'Conflict as of Property' (1977) 2(1) *British Journal of Criminology* 1-15.

²²⁵ Ralph Henham, *Punishment and Process in International Criminal Trials* in Mark Findlay and Ralph Henham's (Eds) *International and Comparative Criminal Justice* (Ashgate 2005).

just desert and deterrence. As mentioned in the literature review, there is no empirical evidence that criminal trials deter crimes.²²⁶ Prior studies also note that deterrent as an arm of retributive justice serves a more rhetoric function than a pragmatic one.²²⁷ The deterrent function could be an individual function for the sentenced person or general deterrence for future offenders. The Judge dismissed the OTP's request for a threshold sentence of 20-30 years. This sentence seems to reflect that the war crime of using children under the age of 15 years to participate actively in hostilities is not considered severe to warrant the highest sentence of 30 years imprisonment or life imprisonment. This sentence supports Schabas' assertion that genocide and crimes against humanity rank higher in the hierarchy than war crimes.²²⁸ We should bear in mind that the Rome Statute does not expressly provide for the hierarchy of crimes. Perhaps, the Chamber did not consider the war crime of recruiting child soldiers as severe to warrant a higher sentence. Possibly the declared sentence implies a liberal approach to water down vengeance request from the victims.

Another emerging issue is the possibility that active victim participation during sentencing may likely override the process's objectivity. It is crucial to bear in mind the possible bias that might arise if victims are given extensive rights to participate. Unregulated victim engagement during sentencing may lead to an emotional

²²⁶ Brianne Mc Gonigle, "Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles" (2009) 22(1) *Leiden Journal of International Law*, 127-149.

²²⁷ Ralph Henham, *Punishment and Process in International Criminal Trials* (Ashgate Aldershot, 2005)

²²⁸ Williams Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Second Edition, Oxford University Press, 2016).

rollercoaster. It is believed that most of the victims are speaking from a place of hurt, as a result of their sufferings, most times, their submissions may be very subjective and vengeful. On the other hand, the rights of the convicted person need to be considered and protected. Therefore, the convict's circumstances is a major factor in the determination of sentencing. Arguably, this helps us understand that the sentencing stage is dominated by retributive justice principles with lesser principles of restorative justice.

Moreover, the Lubanga case also emphasised the importance of apology(genuine) for victims in sentencing. The Prosecutor attempted to negotiate with the convict by requesting the latter to make a 'genuine apology' to victims because of his culpability.²²⁹ The Prosecutor asserted that he would be willing to reduce the request for a sentence from proposed 30 years to 20 years provided the convicted person made a 'genuine apology' to the victims. The Chamber eventually dismissed this request. However, this request shed light on the significance of sincere apologies for victims. It also shows that apology from the convict may be perceived as an essential aspect of sentencing and review. Surprisingly, from the perspective of the defence, it seems apology are mitigating circumstances. Here it performs a dual function, as a mitigating circumstance for the defence and, also as a restorative function. As mitigating

²²⁹ Lubanga Sentencing decision.

circumstances, they may be used as metrics for punishment or as an approach to teach offenders lessons, vindicate and expedite reintegration into the society.²³⁰

Moving on now to consider sentence review, Hole notes that sentence reduction tries to strike a balance between the interests of the offender, victims and the community. From his perspective, the sentence review checks ‘an arbitrary’ discretion’ to the Court.²³¹ Arguably, the sentence review gives victims a more participatory role- within two polarised parties. Similarly, one could argue that it permits a deeper interaction between the victims and the sentenced person. The conditions listed in Rule 223 appears to stress an integrative or holistic approach to addressing sentence review. These conditions expressly inform an expectation of the offender’s reformation, particularly concerning the victims’ relationship. By implication, the offender’s early release is conditioned on ‘significant actions’ to address the harm caused to the victims. The same rules also emphasise the implications of the offender’s release on the community. Therefore, this explores the interrelationship between the offender, victims and the community.

Furthermore, it can be seen that the victims expressed their dissatisfaction with the review of the sentence by adducing reasons why the convicted person should not be released earlier than envisaged.²³² They argued that the convicted person has

²³⁰ Stephanos Bibas and Richard Bierschbach , Integrating Remorse and Apology into Criminal Procedure (2004) 114 *Yale Law Journal* 85.

²³¹ Adrian Hole , “The Sentencing Provisions of the International Criminal Court” (2005) 1(1) *International Journal of Punishment and Sentencing* , 37-69.

²³² Observations of Legal Representatives of Victims V01, para.19; Observations of Legal Representatives of Victims V02, para 18,25. Ibid 176, p.9, ICC-01/04-01/06 14 September 2017.

consistently denied his responsibility; he had failed to show remorse or expressed regret, and has refused to acknowledge his crimes. From these victims perspectives, one could argue that justice includes the factors they listed(which the convicted person refused to do). The sentence of 14 years might not have meant sufficient justice.²³³ The penalty of 14 years cannot replace sincere apology, acknowledgement, and expression of remorse from the convicted person. In addition, one may deduce that the victims were not in agreement with the sentence review; that is why they submitted observations to object to the sentence review. They asserted that Mr Lubanga failed to acknowledge that he recruited child soldiers, while he made efforts to frustrate the reparations programme.²³⁴ These points reveal that victims need more than the imposition of sentencing. They also expect restorative functions. Fortunately, the Chamber acceded to the victims' observations, and the sentenced person, Mr Lubanga's sentence reduction was declined.

In a similar vein, the current study found that victims prioritised apology and expression of regret from the sentenced. They believed it would suffice as a step towards reparations.²³⁵ One could infer that apology and expression of regret here perform a restorative function for the victims. The fact that Mr Lubanga '*consistently denied*' his responsibility connotes that he did not acknowledge the crimes he committed. Neither did he recognise his contribution to the recruitment of child soldiers. In this regard, he cannot be coerced to perform these roles. It is dependent on him. The victims contested

²³³ Ibid.

²³⁴ Ibid 235.

²³⁵ Ibid.

the sincerity of the defence's apologies. It is observed that the offender's failure, Mr Lubanga, to offer sincere apologies and implement significant actions for the benefit of the victims negatively impacted the offender's access to a reduction of sentence. The same issue came up in the second review. The offender was denied sentence reduction.

A comparison of Mr Lubanga's two-sentence reviews reveals that the Panel did not find any significant change in the circumstances that should be taken into consideration within the meaning of Rule 223(e) the Rules and the factors under Article 110(4) of the Statute for the determination of the reduction of sentencing.²³⁶ Moreover, the panel also observed that Mr Lubanga's sentence expires on 15 March 2020. Hence, there was no reasonable ground to schedule a further review of his sentence.²³⁷ Nonetheless, the Panel acknowledged Mr Lubanga's rights under rule 224(3) of the Rules to apply for a new review of his sentence provided there was a significant change in circumstances.²³⁸

The decision on the review of sentence reduction has shown that victims' observations of LRV's V01 and V02 were considered to determine whether Mr Lubanga qualified for a sentence reduction. All the parties and the LRVs(V01 and VO2), were ordered to submit observation. It is not surprising that the factors considered are pursuant to Rule 223 of the RPE and Article 110(4). Arguably, the sentenced person's denial to accept his responsibility for child soldier's recruitment and his reluctance to include them in

²³⁶ ICC-01/04-01/06-3375, 03 November 2017, p.25 para 93,94.

²³⁷ Para 95.

²³⁸ Ibid, p.26, para.95.

the reparations programmes tacitly demonstrates the limit of sentencing; retribution's objective to ensure he took responsibility for his actions.

It is observed that the sentenced person's stance can impede rehabilitation or the process restorative justice. The convicted person, Lubanga, refusal to acknowledge his crimes; his lack of remorse and sincere apology reveals the implications on victims. A reference to Doolin's proposal supports the idea of using coercion to ensure a stakeholder's(offender) presence in the restorative justice process.²³⁹ This argument is flawed because coercion may sabotage both process and outcome. We should bear in mind that at this point, apology from the convict should be voluntary. Coercion is not an effective strategy to receive an apology from the convict. Nothing could have been done to persuade the offender; Lubanga; even imprisonment could not induce him to apologise to the victims. Voluntariness/willingness on his part was required.

Be that as it may, it is noted that the Rome Statute provisions overlook the consequences that follow the release of the offender as a result of sentence reduction or regular discharge after imprisonment. It is not sure if there is any provision to support the offender regarding reintegration after his release. This gap needs to be filled by the domestic criminal justice system to promote offenders' rehabilitation and reintegration.

In general, therefore, it seems that the ICC restricts victims' ability to influence sentencing, particularly the term of imprisonments for the convicted person. The

²³⁹ Katherine Doolin, "But what Does it mean? Seeking definitional clarity in restorative justice", (2007)71(5)*Journal of Criminal Law* 427-440.

finding observed in this study seem to be consistent with the research of Perez-Leon – Acevado. Perez-Leon points out that the ICC impose limits on the involvement of victims at the sentencing stage.²⁴⁰

Having discussed the Lubanga sentencing findings, the next section of the chapter addresses victims' role in sentencing and presents the results.

4.7.0Victims'role in sentencing: The Prosecutor v.Katanga.

The following is an examination of the role of victims in Prosecutor v Katanga. The section below shall address victims' position during sentence hearings and if victim participation affects the sentencing decision.

4.7.1.Overview.

On 20 March 2014, the majority found Katanga guilty on one count(murder) of war crime and four counts(pillaging, killing, an attack against civilian population and destruction of property) of crimes against humanity.²⁴¹ Sadly, The Chamber acquitted Katanga of rape and sexual slavery as war crimes and crimes against humanity. One implication of this is the effect on substantive justice. Judge Bruno Cotte summarised the implication of Katanga's acquittal on the alleged crimes of sexual violence and the use of child soldiers.

²⁴⁰ Juan Pablo Perez-Leon-Acevedo, "Assessing Victim Participation during Sentencing at the International Criminal Court" (2019) 17 *Journal of Criminal Justice* , 431-451,p.451

²⁴¹ Situation in the Democratic Republic of Congo, Prosecutor v Katanga, Judgment in Pursuant of Article 74,Trial Chamber II, ICC-01/04-01/07-3436, 20 March 2014,

In Judge Bruno Cotte's words:

“If an allegation has not been proven beyond a reasonable doubt, this does not necessarily mean that the alleged act did not occur. Declaring a person not guilty does not mean the Chamber is convinced of the person's innocence; just that they are not convinced of the person's guilt as charged.”²⁴²

Perhaps, one of the challenges, in this case, was the failure of the Prosecutor to obtain and present convincing evidence at the court. Consequently, the victims within this category might not have been able to know the truth concerning the crime or find closure.

The Chamber sentenced Katanga to 12 years imprisonment.²⁴³ However, since the convict has been in ICC detention since 18 September 2007, he will serve six years imprisonment.²⁴⁴ In response to this, the Prosecution made an application for appeal because the sentencing decision was erroneous and not proportionate to the crimes committed. The Prosecution requested for the sentence to be revised to 22 years imprisonment. Furthermore, the Prosecutor pleaded the Court to reverse or amend Trial Chamber II's judgment to organise a new or partial trial before a different trial chamber. Katanga's defence notified the Chamber of discontinuation of appeal and submitted Katanga's apology statement to the victims. An appeal could have given the victims some thread of hope. However, with the discontinuation order by the defence, the

²⁴² Presiding Judge Bruno Cotte's words, The Prosecutor V. Mathieu Ngudjolo Chui, ICC-01/04-02/12

²⁴³ Situation in the Democratic Republic of Congo, Prosecutor v Katanga, Judgment in Pursuant of Article 74, Trial Chamber II, ICC-01/04-01/07-3436, 20 March 2014

²⁴⁴ Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436 (Katanga Judgment).

chamber dismissed the appeal. Some victims relayed their disappointment in the sentencing order of 12 years imprisonment, which they felt was not proportionate to the crime committed. They opined that if the local courts had tried him, he could have incurred a more substantial punishment. Katanga's apology also calls into question the role of apology in retributive and restorative justice for victims. While the LRVs contested Katanga's apology's authenticity, they averred that Katanga's apology was a ploy to avoid the appeal and subsequent increment of a harsher sentence.

The dissenting opinion of Judge Christine Wyngaert questioned the impartiality of the majority in the Katanga case. She acknowledged that while judges may exercise their truth-seeking roles, it is reasonable that they do not overstretch their boundaries by recklessly shaping the case.²⁴⁵ She challenged the modification of Katanga's liability vis-à-vis Regulation 55. In her opinion, the change in Katanga's liability mode was a deliberate effort to ensure his conviction, which violated the fair trial principle. This argument is further exemplified by McGonigle, who notes that the Katanga's judgement illustrates the 'impartiality deficit' of the criminal institution. McGonigle contends that the conviction of Katanga was in a bid to suppress the rights of the accused in order to 'fulfil its mandate of ending impunity and providing justice for victims.'²⁴⁶

²⁴⁵ Judge Christine Wynngcart, Dissenting Opinion.

²⁴⁶ Brianne McGonigle Leyh, 'Procedural Justice? Victim Participation in International Criminal Proceedings 348, (Intersentia 2011).

The majority decision and the dissenting opinion of Judge Wyngaert suggest that there is division amongst the judges in addressing justice for victims and closing the accountability gap. While some judges are pro-victims' rights and, access to justice for victims, some judges are pro-defendants' rights. Bearing this in mind, it is submitted that the ICC as a criminal court founded on criminal law principles and norms, however, recognise victims' rights, it still struggles with incorporating victims' rights as a subset of human rights law within its jurisprudence. Given that Article 21 provides that its interpretation should conform to the human rights standard, the ICC is not a human rights court.

The following sections shall summarise the arguments of the parties in the sentencing hearing under the headings of gravity of the crimes committed, aggravating circumstances and mitigating circumstances.

4.7.2 Gravity of the crimes committed

This section will discuss the interaction of the victims through the LRVs and the other parties. The response of the court shall also be assessed.

The Chamber examined the cruelty of the crimes against the inhabitants of Bogoro, including the defenceless children, the discriminatory intent behind the attack and the accused's abuse of victims in an official capacity.²⁴⁷ The Chamber specified that the sentence's determination depended on factors like the gravity of the crimes committed,

²⁴⁷ Katanga Sentencing Judgment, ICC-01.04-01/07-3484-tENG, 23 May 2014, p.31,para.75

individual circumstances of the convicted person, mitigating circumstances and aggravating circumstances.

The gravity of the acts committed by the convicted person is necessary for the determination of sentencing. The gravity is a determinant of the severity of punishment. As such, the accused person must be aware that the crime he was convicted of is the most severe crime of concern to the international community.²⁴⁸ It is noteworthy that these crimes are not of similar gravity. The particular circumstances and the degree of participation of the convicted person in the crime commission must be taken into account.²⁴⁹

The Chamber noted that not all crimes are equally severe. It differentiated between crimes against people and crimes against property.²⁵⁰ The Chamber observed that the crimes committed during the attack in Bogoro on the 24th February 2003 were of questionable magnitude.²⁵¹ It pointed out that the attack reflected explicit discrimination against a particular tribe and intended to wipe out the Hema population. The Chamber stated that Katanga was convicted of contribution ‘in any other way.’²⁵² The Chamber highlighted the implications of the attack on Bogoro community and the victims.

²⁴⁸ Rome Statute, Preamble, para.7.

²⁴⁹ Mark Jennings, “Article 78-Determination of the sentence” in Otto Triffterer (Ed), *Commentary on the Rome Statute of the International Criminal Court* (Beck Hart 2008)1436.

²⁵⁰ Katanga sentencing.

²⁵¹ Katanga sentencing.

²⁵² Ibid.

Finally, the Chamber submitted that the degree of participation of Katanga must not be underestimated and must be included in the gravity of the crimes committed.

4.7.3 Aggravating circumstances

The Chamber recalled that the OTP submitted four aggravating circumstances. These aggravating circumstances were: (i) the vulnerability of the victims (defenceless victims). Especially the children; (ii) cruelty of the commission of the crimes; (iii) discriminatory intent; and, (iv) the accused's abuse of official power/capacity.²⁵³

The LRV concurred with the contention of the OTP's first three aggravating circumstances.²⁵⁴ The Defence averred that the Prosecution misconstrued the accused's official capacity, he submitted that the accused never abused his power. In the Chamber's opinion, in order to establish the abuse of power as an aggravating circumstance, it must be shown that the convicted person exercised power and abused power.²⁵⁵ The Chamber recognised that the accused exercised his authority to make decisions regarding the distribution of weapons. However, he did not exceed the authority nor abuse it. The Chamber noted that it was not convinced that Katanga abused his power position or used his power to "*promote the commission of crimes*."²⁵⁶ Therefore, the Chamber found no aggravating factor in this.

²⁵³ Second Prosecutions' Observations, paras.39,40,41; Prosecution Closing Statement, T.344,P.66.

²⁵⁴ Second Observations of the Legal Representatives, paras.41-47, Closing Statement of the Legal Representative, T.345,p.7.

²⁵⁵ ICC-01.04-01/07-3484-tENG, 23 May 2014, p.31,para.75

²⁵⁶ Ibid.

4.7.4 Mitigating circumstances

Regarding mitigating circumstances, the Chamber referred to the Prosecution and the LRVs submissions, which advanced that Germain Katanga must not benefit from the application of mitigating factors to his sentence.²⁵⁷ However, the Chamber considered the factors presented by the Defence to determine the mitigating circumstances. The Chamber considered age, family and character (good moral standing as mitigating factors).

The mitigating circumstances are relevant for reducing the sentence and not the gravity of the crime.²⁵⁸ Mitigating factors is very significant because if considered, it may decrease the term of sentence. Perhaps, the most severe disadvantage of the rule on mitigating circumstances is that it requires proof- a balance of probabilities- instead of the aggravating factors. Balance of probabilities is also known as preponderance of the evidence. It does not require a piece of overwhelming evidence—a reflection of what is applicable in the jurisprudence of the ICTY.²⁵⁹ Hence, the threshold is lower for the balance of probabilities. From the Katanga case, one implication of this is that it resulted in a lenient sentence of 12 years imprisonment for the convict.

²⁵⁷ Second Prosecution Observations, paras.3 and 32; Second Observations of the Legal Representative, paras.49-54 and 59.

²⁵⁸ Katanga Sentencing Judgment, ICC-01.04-01/07-3484-tENG, 23 May 2014, p.31, para.77

²⁵⁹ Prosecutor v. Kumarac, Case No IT -96-23-T&IT-96-23/1-T, 22 February 2001, pa.847; Stuart Beresford, “Unshackling the Paper Tiger-the Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda (2001) 1 *International Criminal Law Review* ,55

Moreover, the Chamber also considered peace and reconciliation efforts, and remorse by the accused towards the victims, the accused's conduct during proceedings. However, the Chamber did not find the violation of Mr Katanga's rights as a mitigating factor because there was no violation of his rights while he was in Court's authorised detention.

The following sections shall assess the role of victims in the sentencing hearing, the parties' observations, and the Court's decision.

4.7.5. Katanga case: Victims role in sentencing

The sentencing decision of the Katanga case shares some similarities with the Lubanga case. The Prosecution requested a sentence of 22-25 years, after which the parties and participants presented their final submissions.

In addressing the court, the LRVs reported:

“They had lost everything during the attack. Many people were injured and were the victims of cruel attacks. Some still bear the scars of bullets or matches. Mr Byaruhanga also explained to us that the suffering is continuing for some victims. They still have not been able to obtain adequate care.....”²⁶⁰

“The victims are having a very difficult time going back to their older way of life because, you see, they lost everything.....On 24 February, the attackers wiped Bogoro off the map...we are not talking about minor looting or one or two buildings

²⁶⁰ Sentence Hearing, ICC-01/04-01/07-345-Red-ENG WT 06-05-2014, Lines 13-16

destroyed here and there. In this case, an entire village was struck..It cannot be denied that Germain Katanga played a key role in the commission of the crimes. ”²⁶¹

To emphasise the seriousness of the crimes, the victims persuaded the Court to consider three aggravating circumstances. These are; ‘the particular vulnerability of the victims. It is noted that some vulnerable individuals(especially civilians) like many women, children, older adults and newborns became targets during the attack.²⁶² They were either killed or injured despite their vulnerability. The LRV argued that the second aggravating circumstance is the cruelty of the crimes. In her submissions, the combatants stripped some victims of their clothing. Some corpses were dismembered, and some victims were treated without dignity.²⁶³They begged to be spared. The third aggravating circumstance was the attackers' discriminatory acts against a particular ethnic group, the Hema. It was reported that every person deemed to be Hema was initially detained and killed.²⁶⁴ The LRV found no mitigating circumstances and discountenanced any potential mitigating circumstances.²⁶⁵

Furthermore, the LRV stressed the culpability of Katanga, notably how he contributed to the wiping out of an entire village. She posited that Katanga’s moves during the trial had been a ‘*strategic choice*’ to defend himself and that he(Katanga) never for once expressed any remorse or regret for the victims. He was also elusive about

²⁶¹ Ibid , p.5,lines 2-3,9,11,p.7, lines 2 and 3.

²⁶² Ibid, p.7,lines 6-9.

²⁶³ Ibid ,p.7,10-13.

²⁶⁴ Ibid,p.7,14-16.

²⁶⁵ Second Observations of the Legal Representatives ,paras.48-54.

acknowledging that civilians were targeted and killed. The victims reiterated that there were no extenuating circumstances that could affect the sentencing of the accused. The LRV states:

“We are not here to represent the international community.....we are here to ensure that the victims’ voices are heard...the seriousness of these crimes cannot be reduced to just a number of casualties. We must take into account the long-term effects on the victims. The harm that has been done has hit an entire community. People will be victimised for generations.”²⁶⁶

Furthermore, the LRV expressed the victims’ quest for justice.

“I have met with people who are thirsty, who have a thirst for justice. They only wish for justice, taking into account the key role played by Germain Katanga in the commission of the crimes of the attack on Bogoro on 24 February 2003.”²⁶⁷

In the Defence’s observations, he listed Katanga’s personal history and his low degree of participation, his passive role in the hostilities, which was limited to weapons distribution.²⁶⁸ He also observed that Mr Katanga lacked the intent, but he was aware of the crimes’ commission.²⁶⁹ He reminded the court about the rule against double counting, i.e. no factor taken as an aspect of gravity of the crime might be considered as a separate aggravating circumstance.²⁷⁰

²⁶⁶ Ibid,p.9.

²⁶⁷ Ibid, p.10, lines 19-22.

²⁶⁸ Second Defence Observations,paras.5-13.

²⁶⁹ Second Defence Observations , paras.14-42.

²⁷⁰ Second Defence Observations, paras.53-126.

In the same vein, the Defence listed factors that could be considered as mitigating factors. This factors included the role of Katanga in demobilisation process, the time he had spent in detention in the DRC and the need for the amount of time spent to be taken into consideration, Katanga' moral standing and Katanga's behaviour within his community.²⁷¹

In its closing statement, the Defence stressed the statement made by the accused before the Court and pointed out that Mr Katanga acknowledged the victims' suffering and the killing of civilians.²⁷²The Defence's statement was in contrary to the assertion of the Prosecution. Additionally, the Defence restated its sympathy and compassion for the victims on behalf of the convicted person.²⁷³He emphasised that Katanga had always been remorse throughout the proceedings.²⁷⁴The Chamber did note that a statement of remorse could be considered as a mitigating circumstance. However, for a declaration of remorse to qualify as a mitigating circumstance, it must be genuine/sincere.²⁷⁵ However, the Chamber distinguished between a statement of remorse and the expression of sympathy or genuine compassion for the victims. The Chamber stated that the expression of sympathy and genuine compassion might be considered in determining the sentence; nonetheless, it cannot be compared to a statement of remorse because a statement of guilt carries a higher value than an expression of sympathy

²⁷¹ Second Defence Observations, paras 156-160.

²⁷² Situation in the Democratic Republic of the Congo, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3484-Teng-Corr 23 May 2014, P.47, Para.116.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

compassion for victims. Hence, an expression of sympathy and compassion for victims had lesser weight.²⁷⁶

Moreover, the Chamber recalled the legal representatives' observations for victims and the prosecutor's closing statement that none of Mr Katanga's statements could be interpreted as an expression of deep and genuine remorse. The Chamber acknowledged that Mr Katanga made some statements that could qualify as an expression of deep and genuine remorse. Nonetheless, the Chamber observed that Mr Katanga made some statements "*attesting to his compassion for the victims and his desire for justice.*"²⁷⁷ In the Chamber's observation, it was noted that at the end of the hearing for the determination of the sentence, Mr Katanga's statement per article 67(1)(h) expressed his compassion in general for victims of "*that war.*" The term "*that war*" referred to the ongoing war in Ituri, and victims from his community.²⁷⁸

In their second submission, the defence stated that "mitigation seeks to diminish the sentence, not the crime".²⁷⁹ It is noteworthy that this assertion is flawed. The punishment(just desert) and proportionality are the theories applicable here. It is argued that sentencing is punishment. The sentenced is reduced; it may indirectly send a message that the crime's severity or gravity has been lowered.

²⁷⁶ Ibid,P.48,Para 117.

²⁷⁷ Ibid 140,p.48,para 118,line 5.

²⁷⁸ T.345,pp49-50.

²⁷⁹ Defence Second Submissions.

The defence argued that Katanga expressed his genuine sympathies for the victims, which should not be dismissed. The defence submission was contrary to the LRVs submission that Katanga never made a genuine sympathy to the victims. He also reiterated that Katanga never denied the civilians' suffering, nor failed to acknowledge these civilians' death. He cited Katanga's words:

“Today, my thoughts go out to all victims of the conflicts in Ituri in general and particularly the conflict in Bogoro. My thoughts go out to all those who have lost loved ones, who have lost their prosperity and their wealth, for all those whose pride and dignity have suffered. I extend to them my compassion in regard to all the suffering that they have suffered because of the foolishness and wickedness of human nature.”²⁸⁰

The Chamber opined that Mr Katanga's statements were not an acknowledgement of the crimes he committed.²⁸¹ Instead, the statements were considered as a ‘mere convention.’²⁸² In support, the Registry submitted that it had ‘no reliable information’ on any measure that Mr Katanga must have taken to ensure the victims' compensation.²⁸³ In the Registry's report, the village chief revealed that he was unaware of any action/measure put in place by the convicted person in the victim's interest.²⁸⁴ Based on the above reasons, the Chamber rejected Katanga's statements because it did not qualify as an expression of compassion or genuine remorse for the

²⁸⁰ Ibid , p.14,lines 4-9.

²⁸¹ D02-300,T.325,PP.58-60

²⁸² D02-300,T.340,PP.54-59.

²⁸³ Ibid,p.49 Para 12.

²⁸⁴ Ibid.

victims of Bogoro. It also concluded that it was not sufficient to be considered as a mitigating circumstance.²⁸⁵

The Chamber sentenced the convicted person, Katanga to 12 years imprisonment.²⁸⁶ After a few years, the convicted person, Katanga applied for sentence review. The sentence review shall be discussed below.

4.7.6.Review on sentence reduction-Katanga case

4.6.1 Overview

As mentioned earlier, sentence review is not an automatic right. It is regulated by the Rome Statute and the ICC Rules. It is subject to the condition that a sentence may be reviewed when two-thirds of that sentence has been served.²⁸⁷ According to Article 110(4) of the Statute, a decision on whether to reduce a sentence is discretionary. It is evident in the use of the phrase ‘may reduce.’ The presence of one factor is sufficient to decrease a sentence. We should bear in mind that the presence of one factor does not guarantee a reduction. Furthermore, the presence of a factor against modification of a sentence does not hinder the exercise of this discretion. The factors against modification of a sentence must be weighed against factors in favour of review in order to determine whether a reduction of punishment is justified.²⁸⁸

²⁸⁵ Ibid, p.49 para 121.

²⁸⁶ Katanga sentencing decision.

²⁸⁷ Rome Statute 1998, Article 110(4).

²⁸⁸ Lubanga Sentence Review Decision , para.32.

Mr Germain Katanga withdrew his appeal against the conviction decision and submitted his ‘expression of sincere regret.’²⁸⁹The prosecutor also withdrew her appeal against the conviction decision. Katanga filed a video recording and transcripts of filmed apology, where he publicly apologised to the victims of the crimes for which he was convicted.²⁹⁰The legal representatives noted that victims are ‘entitled’ to express their ‘concerns’ on the basis that Judge Van Den Wyngert has been requested to rule on a reduced sentence of Germain Katanga.²⁹¹It was observed that once a decision of sentence reduction is made, it is final and irreversible.²⁹²

Schabas suggests that early release's primary justification is to decide if the prisoner is suitable for social rehabilitation after the sentence.²⁹³The Defence cited this point. Nonetheless, it should be noted that early release is likely to sabotage the deterrent and retributive function of sentencing. Perhaps, early release or sentence reduction may affect victims’ perspective of justice or how victims perceive the ICC. Where the rationale behind sentencing is classical theories of retributive justice, early release or reduction of sentencing may sabotage the purpose of such punishment.

The excerpts from victims’ submissions are in the quote below:

²⁸⁹ Defence Notice of Discontinuance of Appeal against the judgement rendered in pursuant to article 74 ,Trial Chamber ii on 7 April 2014,25 June 2014, ICC-01/04-01/07-3497-AnxA.

²⁹⁰ ‘Defence Submission of a Video Recording of Mr Germain Katanga’ ICC-01/04-01/07-3606 (RW) with Annex 1, icc-01/04-01/07-3606-Conf-Anx (rw), and Transcript Translation of Video Recording’

²⁹¹ The Prosecutor v. Germain Katanga, Legal Representatives observations on the reduction of sentence of Germain Katanga, ICC-01/04-01/07-3559-tENG, 30 September 2015, p.6,para 15.

²⁹² Ibid 238, p.7, para 19,line 4.

²⁹³ William Schabas, *The International Criminal Court :A Commentary on the Rome Statute* (2nd Edition, Oxford University Press 2013).

“Furthermore, having regard to the gravity of the crimes of which he was found guilty and the extent of the harm suffered by the victims, we deplore the 12-year sentence imposed on Germain Katanga by the International Criminal Court ...[.....]The victims of the February 2003 attack on Bogoro consider that this sentence is not proportionate to the crimes committed and that any reduction would merely exacerbate the feeling of injustice shared by all victims.”²⁹⁴

“ With respect to the victims’ submissions and the observations of the DRC authorities regarding the victims’ continuing negatives feelings regarding the length of Mr Katanga’s original sentence, the panel concurs.....”²⁹⁵

It is necessary to state here that the above excerpts demonstrate the disappointment of victims in the declared sentence and sentence review. It seems the victims expected a higher sentence because of the gravity of the convict's crime. Both the victims and the DRC authorities expressed that they were not satisfied with the Court's declared sentence. The dissatisfaction is not unconnected to the applicable laws and the jurisprudence in DRC. They believed the convict would have received a harsher sentence in Congo.

Similarly, the DRC authorities expressed their reservations regarding the declared sentence for Lubanga. They reported that Katanga’s sentence of 12 years came as a

²⁹⁴ Reduction of Sentence, p.14, para 47, lines 5-10.

²⁹⁵ Ibid.

rude shock to the affected population of Ituri, “who, the DRC authorities submit, expected a higher sentence, given the nature of the crimes committed.”²⁹⁶

The panel considered the presence of five factors listed in Lubanga sentencing. In as much as the panel finds information that supports one of the factors in rule 223, or article 110, it is left to the discretion of the Court to make a sentence reduction. According to the panel, the reduction is mainly dependent on the information taken into account to establish the presence of the factors in rule 223(a)-(e)

On the early release of Mr Katanga, the Panel found that the early release of Mr Katanga would not give rise to “significant” social instability. However, it had found that his early release would give rise to a degree of social unrest.

In addressing this point, Mr Katanga submitted he took actions for the benefits of the victims. These actions include; withdrawal of his appeal, expression of regret, actions towards bringing the two communities together, supporting victims in their applications for individual reparations, expressing public apologies.²⁹⁷

According to the Prosecutor, the sentenced person has not taken any significant action to benefit victims because the victims rejected Mr Katanga’s apology. In addition, the Prosecutor recalled that in the victims’ submissions, they averred that Mr Katanga’s early release to Ituri would trigger their trauma. She also noted that it was too early to decide if any of the potential actions that Mr Katanga promised to take during

²⁹⁶ Observations of the DRC authorities.p.4 ,ICC-01/04-01/07 p.27para 72.

²⁹⁷ ICC-01/04-01/07-3615,13 November 2015, p.31,para 82.

reparations would benefit the victims.²⁹⁸ Mr Katanga argued that his withdrawal of appeal against the conviction decision constituted ‘*a significant action*’ that would benefit the victims.

Turning now to the final three actions identified by Katanga: that he has offered support for the Victims’ individual reparations,²⁹⁹ that he has released an apology video and; that he offered to apologise personally to the victims, the Panel noted that the victims’ opposition was based on the fact that the reparations proceedings were ongoing. Thus, there was a time constraint between completing the criminal proceedings against Mr Katanga and the sentence review proceedings (two years and a half months).³⁰⁰ The victims rejected Mr Katanga’s offer to apologise. They averred that accepting his apology is inconsistent with a fundamental principle in Hema culture, articulating that an offender must make amends before they tender an apology.³⁰¹ The principle of this culture believes that reparations precede an apology. The Panel acknowledged the Prosecutor’s argument that it was too early in the reparations proceedings to deduce if any of Mr Katanga’s actions benefitted the victims.³⁰² The Panel reasoned that it should analyse this factor on a ‘case by case basis.’³⁰³

²⁹⁸ Transcript of Sentence Review Hearing, p.18, lines 21-24.

²⁹⁹ Mr Katanga’s Reparations Response, para 97.

³⁰⁰ Prosecutor v Germain Katanga, 30 June 2014, ICC-01/04-01/07-3501-Anx; Observation of Victims on the Withdrawal of Appeal, 26 June 2014, ICC-01/04-01/07-3499.

³⁰¹ Victims Submissions, para 54-55.

³⁰² Ibid.

³⁰³ Ibid.

The Panel noticed that the filmed apology was not aimed at the ‘*broader community*’. However, it was directed to specific victims of the Bogoro attack, who held Mr Katanga liable, this led Mr Katanga to extend the filmed apology to more victims.³⁰⁴ However, Mr Katanga did not show the video to the victims because it would cause further upset.³⁰⁵ Therefore the benefit of the filmed apology to the victims was ‘indirect’ and ‘minimal.’

Mr Katanga showed the filmed apology to members of the broader community. The Panel also referred to the observations of the HRC/TJI: “[t]hus far. It appears that Mr Katanga’s apology has been found inadequate for victims.”³⁰⁶ Consequently, this triggered ‘negative reaction’ from the actual victims to the video. As such, the Panel found the victims’ rejection of the filmed apology as reasonable. The Panel conceded that the filmed apology was beneficial to the broader community affected in the DRC. Despite that, the benefit to the victim was ‘*indirect*’ and ‘*minimal*’. Within this context, for that reason, it does not qualify as a significant action’ taken by Mr Katanga for the benefit of the Victims.

Concerning Mr Katanga’s offer to meet personally with victims to apologise (last identified action), the Panel reasoned that a more personal form of apologies such as a face to face meeting between the sentenced person and victims might constitute ‘significant action’ that would benefit victims. The Panel observed that in this instance,

³⁰⁴ Mr Katanga ‘s Reparations Response.

³⁰⁵ Mr Katanga’s Submission, pars 82.84.

³⁰⁶ HRC/TJI Observations on Reparations, para 86.

it remained uncertain if the victim wishes to have a face to face encounter with Mr Katanga or whether this action might also cause further upset. The Panel recognised that while Mr Katanga's offer to meet with victims to apologise was an action that could potentially benefit the victims. However, it was not sufficient as a significant action because it was probable whether such action would be beneficial to the victims. Besides, the Panel mentioned that the second clause to the factor, "any impact on the victims and their families as a result of the early release" recognised the trauma it could cause the victims and their families to be relevant on evaluating this factor.

Based on the information received, the Panel concluded that from the actions taken by Mr Katanga, there was a '*limited benefit*' to the victims. Hence, all the actions undertaken by Mr Katanga did not constitute a 'significant action' for victims' benefit within the meaning of rule 223(d) of the Rules of Procedure and Evidence. The Panel also found that the early release of Mr Katanga could negatively affect victims and their families. Flowing from this, the Panel submitted that the factor under Rule 223(d) of the RPE was not present to determine whether it would be appropriate to reduce Mr Katanga's sentence.

The Panel took into account Mr Katanga's cooperation with the court in its investigations; a genuine dissociation from his crimes, the prospect of resocialisation and change in Mr Katanga's circumstances. The Court admitted Katanga's expression of regret. It should be noted that although victims were allowed by the Panel to submit observations about the benefit, they had derived from Katanga's 'significant action.' This factor was considered but, had limited influence on the outcome of the sentence

review. In conclusion, three judges considered it appropriate to reduce Mr Katanga's sentence by three years and eight months.³⁰⁷

This section has reviewed the sentence reduction, the section that follows moves on to discuss findings.

4.7.7 Discussing findings.

This section summarises and discusses the main findings of the Katanga sentencing decision and sentence review. The results represent purely data obtained from transcripts of the decided case. Not in-person observations.

By carefully examining the data, it is found that victims were allowed to participate during the sentencing hearing and sentence review. From the data obtained on sentence review reduction, as well as evidential provisions of article 110(4)(b) of the Statute and Rule 223(d) of the RPE, it is shown that victims participated through written and oral observations/submissions. The judges and panel had to balance between defendants, prosecutor, and LRVs' observations and verbal and written submissions. Perhaps, the rationale behind this is to give victims a platform to influence the sentencing decision and the sentence review. Nonetheless, their participation seems to illustrate a restriction on their ability to influence sentencing. Even though the chamber weighed LRVs'

³⁰⁷International Criminal Court, Germain Katanga's sentence reduced and to be completed on 18 January 2016, available at < <https://www.icc-cpi.int/Pages/item.aspx?name=pr1174> > accessed on 20 January 2020; Prosecutor v. Katanga, Decision on the review concerning reduction of sentence of Mr Germain Katanga, Appeals Chamber, ICC-01/04-01/07-3615, 13 November 2015.

submissions against other parties involved, the sentencing decision and review were not made based on strictly victims' requests. The outcome implies that victims could not determine the term of imprisonment against the convicted person, Katanga. The control resides within the decision-makers, the judges. Therefore, regardless of the extent of victims' participation, primarily through aggravating circumstances and mitigating circumstances, the sentencing decision is mostly dependent on judicial discretion. This finding is consistent with Henham's study, which suggests that judicial discretion suppresses victims' ability to effectively influence the sentencing decision.³⁰⁸ This reasoning underlines the role of judicial discretion in sentencing. One could say that the sentencing decision filters the views and observations of the victims.

This finding seems to be consistent with the research of Perez-Leon-Avecado.³⁰⁹ Perez-Leon Avecado points out that the ICC imposes limits on the involvement of victims at the sentencing stage.³¹⁰ Surprisingly, from this data, their submissions did not play a massive role in the determination of sentencing or sentence review, which reiterates that the Court is vested with the judicial discretionary power to decide sentence and sentence reduction. The impact of victims' participation on the sentencing outcome

³⁰⁸ Ralph Henham, "Sentencing as Social Reality" Ralph Henham and Mark Findlay (eds) in *Punishment and Process in International Criminal Trials* (Ashgate 2005)p.98; Ralph Henham, "Reconceptualising International Penalty" in Ralph Henham and Mark Findlay (eds) in *Punishment and Process in international Criminal Trials* (Ashgate 2005)p.218-219

³⁰⁹ Juan Pablo Perez-Leon-Acevedo, "Assessing Victim Participation during Sentencing at the International Criminal Court" (2019) 17 *Journal of Criminal Justice* , 431-451,p.451

³¹⁰ Ibid.

could be described as symbolic—an impact made by representation through a few victims a means to an end.

The outcome of both the sentencing decision and sentence review suggests that judges were very cautious not to lose their objectivity based on the victims' emotional stories. Some instances show Mr Katanga's inadequacy in addressing the victims' concerns; most of these concerns came from victims' hurtful emotions. The judges exercised caution in making a decision. Victims' submissions are most times subjective. Perhaps, such emotions from victims could affect how the judicial role is performed by triggering judges' sentiments. In making a fair sentencing decision or sentence review, the judges' reasoning should be objective to a large extent rather than the victims' reaction.³¹¹In Gibson's words: judicial role theory is "a means of moving beyond an exclusive focus on individuals to consider the influence of institutional constraints on decision-making. Contexts are always associated with the expectations emanating from others who share the context."³¹²Judicial restraint takes precedent over sentiments, as sentiments could derail the purpose of sentencing.

On the other hand, victims' emotions could perform therapeutic functions for both victims and the offender., which is best achieved in an informal context. Notably,

³¹¹ John Scheb, Thomas Unga and Allison Hayes, "Judicial Role Orientations, Attitudes and Decision Making: A Research Note"(1989)42(3)*The Western Political Quarterly*,427-435.

³¹² James Gibson, "From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behaviour"(1983) 5(1)*Political Behaviour*,7-49 ;James Gibson, "Judges Role Orientations, Attitudes and Decisions: An Interactive Model"(1978)72(1) *American Political Science Review*,911-924.Woodford Howard, "Role Perceptions and Behaviour in Three U.S Courts of Appeal"(1977) 39 *Journal of Politics* ,916-938.

victims' communicated they envisage a more severe punishment for the convicted person. However, contrary to their expectations, this study did not find that victims' observations and submissions influenced sentencing. The impact of victims' participation on the sentencing outcome could be described as partly symbolic. Some commentators have argued that most victims' representations are beclouded with emotions rather than objectivity.³¹³ Thus, it may be difficult for the Chamber to consider their observations in the determination of sentencing.³¹⁴ According to the classical theories of punishment, Sentencing is mostly devoid of emotions,³¹⁵ which could ensure that sentiments and feelings do not compromise the court's integrity. Nevertheless, in the realm of restorative justice, emotions from victims and remorse from the offender could impact the sentence and repair relationships.³¹⁶

It is worthy of mention that international sentencing at the ICC is influenced by the western liberal rules and human rights. The conclusion on penalties during the Rome negotiations highlights a more humane approach to punishments. It also reflects a shift

³¹³ Neal Feigenson 'Emotional Influences on judgments of legal blame. How they happen, whether they should, and what to do about it'. In Brian Bornstein & Richard Weiner (Eds), *Emotion and the law: Psychological perspectives* (New York Springer 2010) 45-96; Neal Feigenson, "Jurors Emotions and Judgments of Legal Responsibility and Blame :What Does the Experimental; Research Tell Us?(2015) 8*Emotional Review* 26-31.

³¹⁴ Jeffrie Murphy, *Remorse, Apology and Mercy in Punishment and the Moral Emotions* (Oxford University Press 2012) 129-180; Samuel Pillsbury, "Emotion and Criminal Punishment :In Principle and in Practice" available at <<https://emotionresearcher.com/emotion-and-criminal-punishment-in-principle-and-in-practice/>> last accessed 13 January 2020; Jonathan Doak and Louise Taylor, "Hearing the voices of victims and offenders: the role of emotions in criminal sentencing" (2013) 64(1) *Northern Ireland Legal Quarterly* 22-46.

³¹⁵ Ibid.

³¹⁶ Samuel Pillsbury, "Emotion and Criminal Punishment :In Principle and in Practice" available at <<https://emotionresearcher.com/emotion-and-criminal-punishment-in-principle-and-in-practice/>> last accessed 13 January 2020.

from a purely vengeful notion of ‘an eye for an eye or a tooth for a tooth’ to a more liberal approach to punishment. It could be inferred that the ICC does not adhere to the principle of ordinal proportionality. A contrast to the application of retributive justice’s principle of ordinal proportionality in some national jurisdictions.³¹⁷

Given this, most victims of international crimes participated in the proceedings with higher expectations of sentencing. Still, they felt disappointed or not satisfied when the Chambers sentenced the convict to 12 years imprisonment- which was considered a lesser punishment- as opposed to what is applicable in their respective national jurisdictions. The DRC authorities and victims’ submissions³¹⁸ demonstrated they expected severe punishment. Hence, they lamented on the supposed disproportionality between Katanga’s declared sentence and the crime's gravity. They reasoned that a term of 12 years, excluding the six years Katanga had spent in the ICC’s custody was not proportionate to the crime's gravity. The Rome Statute and RPE are silent on the determinant of proportionality. These victims felt that their national court would have met a harsher punishment than what the ICC gave Katanga. Moreover, the finding on sentencing outcome reinforces the general belief that cultural differences exist between sentencing in some domestic jurisdictions and the ICC's jurisprudence.

In comparison, this difference flows from the objectives of sentencing within these jurisdictions. Unfortunately, it appears that the objective of sentencing at the ICC is

³¹⁷ Some States in United States of America gives higher sentence for grave crimes. Congo also has a higher sentence or death penalty for serious crimes.

³¹⁸ Victims’ submissions ,para 47; ICC-01/04-01/07-3615,13 November 2015.p.27para71; Observations of the DRC authorities.p.4 ,ICC-01/04-01/07 p.27para 72.

entirely different from what victims expected. For instance, the declared term of imprisonment for the convicted person, 12 years is considered low, compared to if the offender was prosecuted in the national court. Therefore, this finding underscores the differences between punishment approaches at the ICC and the concerned domestic jurisdiction(DRC). The Chamber declared 12 years for the convicted person(Katanga)based on a few mitigating factors. While this 12 years imprisonment serves as a general deterrent function because it was interpreted as a stern warning for future offenders that the Court frowns at impunity. The Chamber stated that Katanga's sentence must reflect both punishment and deterrence.³¹⁹ From the transcripts(quoted under Rule 223(c) the declared sentence does not seem to resonate with the victims' expectations. They expected a higher penalty. Their expectation could be due to the corresponding punishment in Congo's laws. One reasonable explanation for this is not unconnected to the fact that the convict, Katanga was acquitted of some crimes such as the use of child soldiers to participate actively in hostilities and the charges of sexual violence. One of the victims' submissions also expressed their disappointments about the request for Katanga's sentence reduction. From their perspectives, it is inferred that the early release potentially lessens the penalty, which may, in turn, decrease the gravity of the crime. The victims' complaint about reducing the sentence reinforces their conception of sentencing as mainly retributive justice.

Given that in their domestic jurisdiction, the options of sentencing spans from the death penalty, terms of imprisonment to life imprisonment. The DRC maintains the death

³¹⁹ Katanga sentencing.

penalty in its legislation.³²⁰ In DRC, the death penalty is regarded as the highest form of punishment, as well as capital punishment for grave and heinous crimes. The nearest to this capital punishment is life imprisonment. It is possible that the victims expected ‘capital punishment’ of the death penalty or at least life imprisonment. Thus, for this particular case point, it could be argued that the ICC was unable to fulfil or manage the victims' expectations. The Rome Statute's provision on sentencing states a three-step process to determine what law is applicable. These are the provision of the Statute, elements of the crime and the RPE.³²¹ Where this is not applicable, then the court shall refer to relevant treaties and the principles and rules of international law. Where this does not suffice, the court should resort to general principles of law derived from national jurisdictions.³²²

The victims did not accede to have benefited from any significant actions taken by Mr Katanga. They acknowledged the reception of Mr Katanga's filmed apology. Nonetheless, the apology should be taken with caution because the ‘affected victims’ have not seen Mr Katanga's filmed apology. The victims averred that apologies at this stage were incompatible with a “fundamental principle in Hema culture, according to which a person who has done someone wrong must make amends before he or she

³²⁰ Oliver Lungwe Fataki, World Coalition Against Death Penalty, Africa Towards the Abolition of the death Penalty in DRC: Advances to be confirmed, published on 13 December, 2016. Accessible at www.worldcoalition.org/Towards-the-abolition-of-the-death-penaalty-in-DRC-advances-to-be-confirmed.html >Last accessed 12 November 2019.

³²¹ Rome Statute Article 21.

³²² Robert Cryer, ‘Royalism and the King Article 21 of the Rome Statute and the Politics of Sources (2009) 12 *New Criminal Law Review*, 390,391; David Hunt, The International Criminal Court :High Hopes, Creative Ambiguity “ and the Unfortunate Mistrust in international Judges; (2004) 2*Journal of Criminal Justice*, 56.

makes an apology.”³²³ This development highlights the intersection between law and culture. The clash between the Hema cultural precedent and the dictates of the law reminds us of the connection between law and culture. At this stage, the affected jurisdiction context cannot be entirely detached from prosecution, sentencing and review.

Therefore, the ICC’s failure to meet victims’ expectations is attributed to the ICC’s restrictive/liberal approach to sentencing. Basset and Drumbl opine that international sentencing is primarily influenced by objective universalism.³²⁴ From the universalist approach, consistent rules that preclude subjectivism and moral relativism are the appropriate methods for determining the sentence.³²⁵ The observed difference between the imposed sentence and the victims’ projections in this study reveals a transformative ICC approach towards sentencing. One could infer that the ICC was lenient about this sentencing. It strengthens the place of rehabilitation of convicts within a purely retributive goal. While the ICC aims to work towards rehabilitative justifications for sentencing, the victims expected a strictly punitive sentencing approach. This finding accords with Schabas’ argument that international sentencing should be guided by

³²³ Victims Submission, para .54.

³²⁴ Mark Drumbl, *Atrocity Punishment, and International Law* (Cambridge University Press, 2007) p.56-57; Marissa Basset, “Defending International Sentencing :Past Criticism to the Promise of the ICC” (2009) 16(2) *Human Rights Brief* 22,23

³²⁵ Ibid.

human rights principles which enhances rehabilitation objectives rather than purely retribution goals.³²⁶

Suppose the ICC's justification for sentencing is rehabilitation. The approach connotes that it accords priority to the offender's needs over the victims or balances the difference between offender and victims.³²⁷ With this, the support of the communities is usually required. The sentence does not preclude general deterrence and the 'expressive notions of punishment'. Sloane, in his study, posits that international punishment should have the value of expressing punishment.³²⁸ Sloane's argument does not reference proportionality, but there must be a value of expressing a sentence, which could be incapacitation or other objectives.³²⁹ Perhaps, because the international crimes committed within this context is on a large scale, and regarded as a mass atrocity, the victims had expected a 'severe' penalty for Katanga. It is suggested that the court strike a balance between considering the victims' concerns and interests and the integrity of the sentencing process.

Having discussed the findings in Katanga, the next section shall explore how to address sentencing with restorative justice and procedural justice.

³²⁶ Williams Schabas, 'Sentencing by International Tribunals: A Human Rights Approach (1997) 7 *Duke Journal of Comparative and International Law*, 461, 481.

³²⁷ Von Hirsh and Andrew Ashworth, *Principled Sentencing : Readings on Theory and Policy* Oxford (Hart Publishing 1998).

³²⁸ Robert Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law (2007) 43 *Stanford Journal of International Law* , 39, 44.

³²⁹ Ibid.

4.7.8 Procedural and Restorative justice: A viable way to enhance victims' impact on the sentencing outcome?

Sentencing is the pinnacle of the criminal process.³³⁰ It unravels the punishment and its justifications; the most public face of the criminal trial.³³¹ Plausibly, procedural justice and restorative justice are pathways to enhance victims' experiences during the sentencing process. Suppose the court effectively utilises Victim Impact Statement(VIS) vis-à-vis procedural justice and restorative justice elements. In that case, combining these two will positively impact the sentencing outcome and victims' satisfaction with the sentencing decision.

Findings reveal that victims participate through verbal and written submissions; the impact of this medium of participation on the sentencing decision is minimal. One implication of this observation is that the balance of different views on victims' rights and interests results in extra weight and values of submission of victims in sentencing, which is subject to judicial discretion.

VIS³³² is a written or verbal statement by the victims presented to the court at the defendant's sentencing.³³³ Thus, as a medium, VIS expresses victims' emotions and concerns about the implications of the crime on them. It is worthy of mentioning that there are pros and cons to VIS. VIS proponents contend that it is a medium for victims

³³⁰ Ralph Henham, *Sentencing and the Legitimacy of Trial Justice* (Routledge 2012)1

³³¹ Ibid.

³³² Also known as Victim Personal Statement in United Kingdom.

³³³ Andrew Ashworth, 'Victim Impact Statements and Sentencing'. (1993) 7*Criminal Law Review*, 498-509.

to emot and express themselves about how the crime affected them.³³⁴ With VIS, victims are allowed to tell the court the effect of the crime on them. The input of victims is likely to contribute towards the restoration of their dignity.³³⁵ As good as it sounds, we should be careful not to allow victims' emotion to override the sentencing decision.

VIS critics have cautioned that the stage of intervention-sentencing is rather too late to address victims' suffering.³³⁶ They also argue that VIS may tilt the balance of justice because it is a victim's subjective expression.³³⁷ Some have contended that VIS is not suitable for an adversarial system that focuses on the Prosecutor and the defendant. It may disrupt the notion that crime is committed against the state, not an individual.³³⁸ They also argue that it may blur the objectivity of the decision-maker.³³⁹ This argument overlooks the role of victims' harm in aggravating the sentence. While also questioning the proportionality between the gravity of the crime to the seriousness of the punishment. Probably, VIS might be situated within the context of retributive justice, as an aggravating factor. However, we have to be careful not to raise the expectations of victims with VIS inadvertently.

³³⁴ Carolyn Hoyle, "Empowerment through emotion: The use and abuse of victim impact evidence. . In Edna Erez, Michael Kilchlinh and Jo-Anne Wemmers(Eds) ,*Therapeutic jurisprudence and victim participation in justice :International perspectives* (Hart Publishing 2011).294-283.

³³⁵ Deborah Kelly and Edna Erez, "Victim Participation in the Criminal Justice System " in Roberts Davis , Arthur Lurigo and Wesley Skogan (eds) *Victims of Crime* (Sage 1997).

³³⁶ Andrews Sanders, Carolyn Hoyle, Rod Morgan and Ed Cape "Victim Impact Statements: Don't Work, Can't Work (2001) *Criminal Law Review*, 447-458.

³³⁷ Edna Erez and Julian Roberts, Victim Participation in the Criminal Justice System , in Roberts Davis, Arthur Lurigo and Susan.Herman (eds) *Victims of Crime* (4th Edition, Sage Publications 2013)251

³³⁸ Ibid.

³³⁹ Ibid, (n218).

Manikis contends that the use of VIS is not clearly articulated; as such, there are inconsistencies as to its effectiveness during criminal proceedings.³⁴⁰ She categorised VIS into instrumental and expressive.³⁴¹ From her perspective, VIS is instrumental because it is regarded as a procedural right that empowers victims with an active role to influence the decision-making process.³⁴² Thus, it intends to accomplish victim satisfaction, belonging and visibility in the sentencing phase.

Through the expressive function of VIS, the victims' voice may be heard and probably acknowledged during the sentencing process.³⁴³ The reminiscent part is considered empowering for victims. Studies show that VIS could have a therapeutic benefit for victims.³⁴⁴ Such therapeutic function could be healing or closure.³⁴⁵ The VIS performs an expressive function which might influence the outcome of the sentencing. However, there are still controversies as to the primary role of VIS in sentencing.

³⁴⁰ Marie Manikis, "Victim Impact Statement at Sentencing: Towards a Clearer Understanding of their Aims." (2015) 65 *University of Toronto Law Journal* 85—111, 85.

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Tracy Booth, Alice Bosma and Kim Lens, 'Accommodating the Expressive Function of Victim Impact Statements: The Scope for Victims' Voices in Dutch Courtrooms (2018) 58(6) *British Journal of Criminology*, 1480-1498.

³⁴⁴ Carolyn Hoyle, "Empowerment through emotions: The use and abuse of victim impact evidence In Edna Erez Michael Kilching and Jo-Anne Wemmers(Eds.), *Therapeutic Jurisprudence and victim participation in justice :International perspectives*(Hart Publishing 2011)249-283.

³⁴⁵ Antony Pemberton and Sandra Reynaers, "The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statement. In Edna Erez, Michael Kilchlinh and Jo-Anne Wemmers(Eds.), *Therapeutic jurisprudence and victim participation in justice :International perspectives* (Hart Publishing 2011).

The expressive function of VIS also includes ‘emoting’. This role relays a message to the court, the offender or the public about the harm suffered.³⁴⁶ As mentioned earlier, the expressive function of VIS can be therapeutic.³⁴⁷ It is noteworthy that the therapeutic benefits of VIS may not be one size fit all; it may not work for every victim. While VIS may aggravate sentencing, at the same time, and reassure them that the court validates their emotions. Presumably, it becomes empowering for victims because they have a degree of control on the sentencing hearing. There is, therefore, a definite need for VIS because it engages the emotions of victims. VIS explores the reactions and impact of harm on victims. Arguably, VIS is an approach which could effectively combine elements of retributive justice and restorative justice at the sentencing hearing.

As mentioned earlier, the expressive function of VIS aims to grant victims a voice in criminal proceedings with implied therapeutic benefits.³⁴⁸ A channel which establishes an interaction between the judge and victim, victim and offender.³⁴⁹ While it evokes emotions, the interaction between the victim and the offender might reinforce the crime's consequences on both participants. It is interesting to note that the victims and offender have an encounter in the court at this phase. Conceivably, the extent of the

³⁴⁶ Ibid.

³⁴⁷ Antony Pemberton and Sandra Reynaers, “The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statement. In Edna Erez, Michael Kilchlinh and Jo-Anne Wemmers(Eds) ,*Therapeutic jurisprudence and victim participation in justice :International perspectives* (Hart Publishing 2011).

³⁴⁸ Julian Roberts and Edna Erez, ‘Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements’, (2004) 10*International Review of Victimology*223-244.

³⁴⁹ Ibid.

meeting is curtailed because it is best situated within an informal setting.³⁵⁰ The sentencing hearing may not be entirely appropriate in effecting the role of restorative justice via VIS. In a way, the sentencing process as a part of criminal prosecution is considered a mechanism of transitional justice. Criminal prosecution is one of the mechanisms of transitional justice.³⁵¹ It is sketchy if the Rome Statute or Rules provisions refer to VIS because it is not applicable at the ICC. One explanation of this could be that the large number of victims involved will become impracticable for individual victims to read out their VIS during sentence hearing. Nevertheless, VIS offers direct participation for victims during sentencing. Unfortunately, it is not applicable at the ICC.

It is noteworthy that Story-telling does not perform the same function as VIS. Storytelling is distinct and shares some similarities with VIS like establishing the

³⁵⁰ Van Ness, “The shape of things to come: a framework for thinking about a restorative justice system. In Elmar Weitekemp & Han-Jurgen (eds), *Restorative Justice: Theoretical Foundations* (Willan Publishing 2002) 1-20.

³⁵¹ Obiora Okafor and Uchechukwu Ngwaba, “The International Criminal Court as a ‘Transitional Justice’ Mechanism in Africa: Some Critical Reflections” (2015) 9(1) *International Journal of Transitional Justice* 90-108; Makau Mutua, “What is Transitional Justice?” (2015) 9(1) *International Journal of Transitional Justice* 1-9; Ray Nickson, “Participation as restoration: the current limits of restorative justice for victim participants in international criminal trials” in Kerry Clamp (ed) *Restorative Justice in Transitional Settings* (First published 2016, Routledge 2016) 95

truth,³⁵² healing³⁵³ and giving victims a voice.³⁵⁴ At the ICC, an aspect of victim participation permits story-telling during the trial process, not at the sentencing hearing. Victims' narrative contributes to truth-finding and historical records.³⁵⁵ The sentencing hearing precludes story-telling.

We should be careful not to raise victims' expectations as their expression may be symbolic with no substantial effect on the decisions. We should note that it is one thing for victims to voice out, while it is another for their voices to be heard and influence the outcome. Moffett draws our attention to the distinction between giving victims a platform to '*voice their views*' and '*considering their interests*' in sentencing.³⁵⁶ He believes that Victim Personal Statement(VPS) is a channel the criminal justice system may use to acknowledge "victims experience, rather than engendering harsher

³⁵²David Webster, 'History, nation and narrative in East Timor's Truth Commission report, (2007) 80(4) *Pacific Affairs*, 581; Sofia Stolk 'The Victim, the International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truth about Mass Atrocity (2016) 13(5) *Journal of International Criminal Justice*, 973-994.; Mirjam Damaska, "What is the point of International Criminal Justice" (2008) 83 *Chicago Kent Law Review*, 329.; Erin Baines, Beth Stewart, "I cannot accept what I have not done": Storytelling, gender and transitional justice (2011) 3(3) *Journal of Human Rights Practice*, 245-263.

³⁵³ David Androff, "Narrative healing among victims of violence: The Impact of the Greensboro Truth and Reconciliation Commission. *Families in Society*, (2012) 93(1) *The Journal of Contemporary Social Services*, 38-46.

³⁵⁴ Kirk Simpson, "Voices silenced, voices rediscovered: Victims of violence and the reclamation of language in transitional societies (2007) 3(2) *International Journal of Law in Context*, 89-103.; Marie-Benedicte Dembour and Emily Haslam, "Silencing Hearings? Victim-witnesses at War Crimes Trials." (2004) 15(1) *European Journal of International Law*, 151-177.

³⁵⁵ Nancy Combs, *Fact-Finding Without Facts. The Uncertain Evidentiary Foundations of International Criminal Convictions* (First published 2010, Cambridge University Press 2010) 430.

³⁵⁶ Luke Moffett, 'Victim Personal Statements in Managing Victims' Voices in Sentencing in Northern Ireland: Taking a more Procedural Justice Approach' (2017) 68(4) *Northern Ireland Legal Quarterly*, 1-22.

sentence”.³⁵⁷ The VPS may impact the sentence; a means to an end. Nevertheless, procedural justice enhances their potential to go through this process in fairness.

Furthermore, some restorative justice elements are portrayed in the sentencing hearing, and sentence review of both cases. The crucial factors are the process, the parties, the stake, the crime, the agreement, the aftermath and the consequences of the violation. The sentencing hearing is the process; the victims and the offender (convicted person) as “stakeholders” are the ‘directly affected’ participants.³⁵⁸ However, both parties indirectly participate in the sentencing process through their legal representatives; a restriction is absent within informal settings of restorative practices. In this instance, the scenario reinforces the analogy of Christie-property has been stolen from the original owner and taken over by the prosecutor and legal representatives of the directly affected.³⁵⁹ Arguably, besides from the formal settings, presumably, victims' indirect participation through their LRVs may sabotage restorative practices during the sentencing hearing.

Be that as it may, for a successful process and outcome of restorative justice, both parties must exhibit willingness and voluntariness to participate actively in the process.³⁶⁰ One of the parties does not participate voluntarily or hesitates to carry out

³⁵⁷ Ibid .

³⁵⁸ Carolyn Hoyle, “Victims, the criminal process and restorative justice.” In Mike Maguire , Rod Morgan and Robert Reiner(eds), *The Oxford Handbook of Criminology* (Oxford University Press, Fifth Edition, 2012) 398-425.

³⁵⁹ Nils Christie, “Conflicts of Property” (1977)17(1) *British Journal of Criminology*,1-15

³⁶⁰ Katherine Doolin, ‘But what does it mean ?Seeking definitional clarity in restorative justice, *Journal of Criminal Law*(2007) , *The Journal of Criminal Law* accessible at <<https://journals.sagepub.com/doi/pdf/10.1350/jcla.2007.71.5.427>> last accessed 16 January 2020.

any activity necessary for the procedure's progress, which would impact the outcome and victims' satisfaction. Van Camp and Wemmers' study explains that victims satisfaction with restorative justice exceeds the procedural justice model.³⁶¹ While procedural justice is partly responsible for victims' satisfaction with restorative practices, they found that flexibility, care, central dialogue and pro-social motives (helping, sharing and comforting) partly contribute towards victims satisfaction with restorative justice.³⁶² Unfortunately, it appears these factors are absent at the sentencing hearing of the ICC. As mentioned earlier, the ICC setting is strictly conventional. It is challenging for these elements to be factored in-a limitation to the practicability and outcome of applying the restorative justice approach. Therefore, the Rome Statute compromises some indispensable retributive features and legitimate restorative practices, making the process predominantly retributive.

Truth commissions and reparations schemes are mechanisms which advance restorative interests because of the absence of prosecutions. Truth-telling, narratives, and symbolic reparations like public apologies and monuments represent victims' formal acknowledgement of victims' ordeal and offender responsibility.³⁶³ It is noteworthy that criminal prosecution may sabotage the accomplishment of a restorative approach because most times, the defendant/accused denies the charges by entering a non-guilty plea. Subsequently, both parties contest the non-admission of guilt in the proceedings.

³⁶¹ Tinneke Van Camp and Jo-Anne Wemmers, "Victim satisfaction with restorative justice: More than simply procedural justice" (2013) *International Review of Victimology*, 1

³⁶² Ibid.

³⁶³ Nancy Combs, *Guilty Pleas in international criminal law: constructing a restorative justice approach* (Stanford University Press 2007) 8.

Even post-conviction, convicts like Lubanga denied the crimes he committed. These elements of prosecution are impediments to successful incorporation of restorative justice in criminal trials.

The following section shall discuss the three pillars of restorative justice within the ICC context and the cases mentioned above.

4.7.8.1. Encounter

This phase involves a face-to-face meeting between the offender and the victims.³⁶⁴ A critical aspect of the encounter is that the participation of all stakeholders must be voluntary.³⁶⁵ The accused is referred to as an offender. Encounter ensures communication between both participants to narrate their experiences, emotive and express the consequences of the harm they suffered. The dialogue at this phase assists in “collaborative problem-solving approach”.³⁶⁶ Some of these elements of encounter are illustrated in both sentence hearing and review. The use of narratives via victims’ observations and submissions is restricted in the criminal trial but mostly accommodated in TRCs.

³⁶⁴ Daniel Van Ness & Karen Heetderks, *Restoring Justice: An Introduction to Restorative Justice* (Second Edition, Anderson Publishing 2006).

³⁶⁵ Mark Vander Vennen, ‘Towards a relational theory of restorative justice’ in Belinda Hopkins (ed.), *Restorative Justice in Practice: Insights into what works and why* (Jessica Kingsley Publishers) 121-137; Van Ness, “The shape of things to come: a framework for thinking about a restorative justice system.” In Elmar Weitekamp & Han-Jurgen (eds), *Restorative Justice: Theoretical Foundations* (Willan Publishing 2002) 1-20, 3

³⁶⁶ Paul McCold and Ted Wachtel, ‘Restorative Theory validation. In Elmer Weitekamp and Han-Jurgen Kerner (eds.), *Restorative Justice: theoretical foundations* (Willan Publishing 2003) 110-142.

From the victims' statements, it appears they were vindictive rather than problem resolution.³⁶⁷ The use of legal language also increases the tension and robs the hearing of basic restorative elements. One could not have expected a less conservative environment given the context of the ICC. An encounter modelled after the first pillar of restorative justice by Van Ness and Heetderks Strong is unworkable during the ICC sentencing hearing. Perhaps, the use of the VIS as the voice of victims and fulfilment of procedural justice could become practicable during the sentencing hearing. Nonetheless, the encounter procedure requires the absence of a process to determine punishment, which is not feasible in a traditional retributive arena.

The sentence review considers every participant's interests by addressing points raised in the sentence, reviewing any improvement by facilitating interaction between the participants. For instance, in the second review, the convicted person, Mr Lubanga proposed a public ceremony to meet with the victims and offer his apologies.³⁶⁸ Similarly, the sentenced person, Mr Katanga suggested he would meet personally with victims to apologise to fulfil the condition of 'significant action' as stipulated in the Statute and rules. The panel recommended a face-to-face between Mr

³⁶⁷ The Prosecutor V. Thomas Lubanga Dyilo, Observations of the V02 group of victims on sentencing and reparations, ICC-01/04-01/06, 18 April 2012.,para 6, p.3-4; Le Procureur v.Thomas Dyilo, Observations du groupe de victims VO2 Sur des elements de prevue etablissant des circonstances aggravantes ou des cironstances attenuantes des faits portes a la chrg de l'accuse reconnu coupable,ICC-01/04-01/06-2882, 14 May 2012.,p.3,para 1;Observations of the Victims' Group VO2 on Evidence establishing Aggravating Circumstances or Mitigating Circumstances of the facts alleged against the accused person ; Observations of Legal of Victims V01; Prosecutor v Germain Katanga, Reduction of Sentence, p.14, para 47,lines 5-10; Prosecutor v Germain Katanga, Observations of the DRC authorities.p.4 ,ICC-01/04-01/07 p.27para 72.

³⁶⁸ The case of Prosecutor v.Thomas Lubanga Dyilo,ICC-01/04-01/06-3375,03-11-2017, Para 94

Katanga and the victims, provided the latter were willing to be involved.³⁶⁹ The convicted persons' proposed encounter and the panel's sanction simulates an ideal encounter for restorative practices.

The presence of judges, LRVs and evidence examination may also hinder the outcome agreement as it is best achieved within a relaxed social context. The encounter set the stage for amends and re-integration.

In the following part, the researcher briefly discusses amends and draws comparison from the context of ICC sentencing hearing.

4.7.8.2 Amends

Amends is the role of the offender to address and repair the harm suffered by the victim. The outcome is usually to heal the individuals from the consequences of the harm and wrongdoing.³⁷⁰ The offender's acknowledgement of the offence, as well as an apology, is a step towards taking responsibility for the crime he has committed. At this phase, the main issue is the offender's willingness to acknowledge the crimes they committed, feel remorseful and tender sincere apologies.³⁷¹ These questions arose in the Lubanga case; the victims disputed the sincerity of his apology and remorsefulness.³⁷²

³⁶⁹ Transcripts of Sentence Review Hearing; Mr Katanga's Submission, paras 82.84; HRC/TJI Observations on Reparations, para.86.

³⁷⁰ Katherine Van Wormer and Lorenn Walker, In Van Warmer and Lorenn Walker (eds) ,*Restorative justice today: Practical applications* (2013) *Journal of Restorative Justice*, 255

³⁷¹ Ibid.

³⁷² ICC-01/04-01/06-2901,P.23, Para 59,lines 2-4;The Prosecutor v Lubanga Dyilo, Observations of the V01 Group of Victims on the Possibility of Review of Mr Thomas Lubanga Dyilo's Sentence With Two Annexes ICC-01/04-01/06-3366, 14 September 2017,p.9

In Lubanga and Katanga, victims lamented about the lack of remorse and insincere apologies from the sentenced persons, Lubanga and Katanga, respectively.³⁷³ The reluctance of both convicts to show remorse and offer genuine apologies demonstrates the limitations of the court's role in the process of restorative justice. Their unwillingness may impede rehabilitation. The convicted person, Lubanga, refused to acknowledge his crimes; his lack of remorse and sincere apology reveals an unrepentant offender's implications on the restorative justice process. A reference to Doolin's proposal supports the idea of using coercion to ensure a stakeholder's(offender) presence in the restorative justice process.³⁷⁴ Coercion may be unworkable in practice as it may sabotage both process and outcome. We should bear in mind that at this point, apology from the convict should be voluntary. Coercion is not an effective strategy to receive an apology from the convict. Nothing could have been done to persuade the offender; Lubanga; even imprisonment could not induce him to apologise to the victims. Voluntariness/willingness on his part was required.

The convicted person's remorse and sincere apology are factors that the judges assess at sentencing and sentence review. Metrics for character assessment and improvement.

³⁷³ Second Decision on the Review concerning reduction of sentence of Mr Thomas Lubanga Dyilo P.9 Para.20; para 39; Observations of Legal Representatives of Victims V01,para.12; Situation in the Democratic Republic of the Congo, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3484-Teng-Corr 23 May 2014, p.47,Para116; 'Defence Submission of a Video Recording of Mr Germain Katanga' ICC-01/04-01/07-3606 (RW) with Annex 1, icc-01/04-01/07-3606-Conf-Anx (rw), and Transcript Translation of Video Recording'; ³⁷³ Defence Notice of Discontinuance of Appeal against the judgement rendered in pursuant to article 74 ,Trial Chamber II on 7 April 2014,25 June 2014, ICC-01/04-01/07-3497-AnxA.

³⁷⁴ Katherine Doolin, "But what Does it mean? Seeking definitional clarity in restorative justice, (2007)71(5)*Journal of Criminal Law* 427-440.

The convict's remorse and sincere apologies have contributed towards the mitigating and aggravating circumstances as well as sentence reduction. However, assessing contrition and sincere apology has undoubtedly led to controversy between victims and convicts because of differing conforming standards.

Victims' reactions to the convicted person's apathetic attitude indicate they value remorse and sincere apology from the perpetrators. It is hard for an offender who had persistently denied the charges to accept responsibility and tender apology. Lubanga and Katanga were reluctant in accepting the responsibility of the crime committed. It is interesting to note that the Chamber and the panel(sentence reduction) established their obligations in this respect. Of utmost importance are the Chamber's assessment of whether the offenders' apologies were genuine and the victims' remorsefulness.³⁷⁵ This is inferred from the conditions set out in Rule 145.

Victims may obtain closure from apologies because it validates the offender's acknowledgement of the crimes committed. Apology increases solidarity between the stakeholders and reasserts the identities of the parties involved.³⁷⁶ One could classify an apology as making amends-a component of restorative justice. It is commendable that the Chamber considered the absence of admission from the sentenced person and the ingenuity of the convicted person's apology to reduce the sentence. It reveals that the remorse and sincere apology are significant in mending a broken relationship between

³⁷⁵ Rule 145(2) of the RPE

³⁷⁶ Lawrance Sherman, Heather Strang , Caroline Angel, Daniel Woods, Geoffrey Branes, Sarah Bennet and Nova Inkpen, 'Effects of face-to-face restorative justice on victims of crime in four randomised, controlled trial' (2005)*Journal of Experimental Criminology*,367-395,368.

the victims and the sentenced persons(perpetrators). An acknowledgement of the convicted person's crimes indicates accountability by the perpetrator and validates the victims' harm. Acknowledgement which usually comes before an apology contributes largely to making amends. The Perpetrators' reluctance to take responsibility for the crimes is typically connected to the guilty plea. One of the conditions for a successful restorative justice process is that the offender accepts responsibility and makes a guilty plea at any point of the proceedings.³⁷⁷In criminal trials, the accused(now convicted person) mostly contest their guilt. The acceptance of responsibility contributes towards the establishment of truth. Therefore, the absence of a guilty plea could potentially affect a successful restoration. The hesitation of the sentenced persons to tender, sincere apologies to the victims supposes lack of willingness to rectify the damage. Unfortunately, the Court cannot coerce the perpetrators to make amends. All parties must participate voluntarily. However, it can facilitate an encounter between the victims and convicts to facilitate reconciliation. Perhaps, suppose the ICC can arrange a pre or post-sentence restorative justice process for victims.

In that case, it is commendable that the ICC provided victims to participate directly and indirectly during the criminal justice process, which gives an accent of the restorative justice activity. However, this is fettered with use of LRVs and the restraints of criminal justice procedures. The few victims who participate directly may not represent the

³⁷⁷Ministry of Justice, 'Pre-Sentence restorative justice' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/312426/pre-sentence-restorative-justice.pdf>P.7

interests of the larger percentage of victims. One implication of this is the promotion of tokenism for victims participation.

While restorative justice is not a substitute or the opposite of retributive justice,³⁷⁸ the court can simultaneously use both to address the wrong and harm. Inevitably, in a criminal trial, retributive justice may overshadow the interaction between the stakeholders.

4.7.8.3. Re-integration

As the third pillar of restorative justice, the goal is to reinstate the victim and the offender into the community.³⁷⁹ After the commission of the crime, both victims and offenders often face stigmatisation from family, friends and the community.³⁸⁰ Sometimes, victim-shaming and victim-blaming may lead to ostracization of some victims while the offenders may become vilified. In such a situation, victims and offender require a support system to promote their re-entry into community life.³⁸¹

Reintegration also includes rehabilitation of the offender and rebuilding the offender's relationship with their communities.³⁸² It is noteworthy that rehabilitation is the third arm of retributive justice, supposedly, restoration of the offender commences in the

³⁷⁸ Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice* (Good Books 2002) 10,11.

³⁷⁹ Gordon Bazemore, 'Restorative Justice and earned redemption: communities, victims and offender reintegration.' (1998) 41(6) *American Behavioural Scientist*, 768-813, 789.

³⁸⁰ Ibid.

³⁸¹ Daniel Van Ness and Karen Heetderks Strong, "Reintegration" In , *Restoring Justice* (2nd Edition , Anderson Publishing) Chapter 6.

³⁸² Ibid (n 116).

correctional facilities. Rehabilitation can occur during sentence execution and after the offender has been released. After the release, reintegration of the offender begins. The state can continue rehabilitation. Braithwaite notes that besides from offenders and victims, communities also need to be restored.³⁸³ The community is defined as members of ‘micro-community’ and ‘macro-community.’³⁸⁴ The micro-community has been described as a victim’s or offender’s relatives, friends and neighbours. Macro-community indicates ‘ethnic group’ and volunteer community participants representing ‘community interests.’³⁸⁵ Both are necessary for re-integration.

The role of the community in re-integration is indispensable; it is necessary as a third party.³⁸⁶ Rule 233(a)-(c) are requirements of resocialisation and re-integration which are mandatory to support sentence reduction.³⁸⁷ For the practical outcome, the community must have a working knowledge of the criminal justice system as well as the rationale behind sentencing. It follows that the ICC could contribute towards re-integration through the implementation of positive complementarity. The ICC’s collaborating with the community by disseminating information and enlightening the participants on the criminal justice system’s purposes would suffice. In this instance, the ICC might give recourse to the principles, rules, laws, norms and values of the domestic jurisdiction affected rather than its(ICC) laws. It is also worthy of mentioning

³⁸³ John Braithwaite, ‘Restorative Justice :Assessing optimistic and pessimistic accounts’(1999)*Crime and Justice*, 1-127.

³⁸⁴ Paul McCold, “What is the role of community in restorative justice theory and practice” (2004)*Critical Issues in Restorative Justice*.155-172.

³⁸⁵ Ibid.

³⁸⁶ Ibid.

³⁸⁷ The Rome Statute 1998, Article 110(4) and The ICC Rules of Evidence and Procedure Rule 223.

that the ICC rules on the reintegration of the offender and victims are limited. The Rome Conference negotiations show the Rome Statute's intention to implement more humane values and less lengthy sentences in compliance with limitations obtained from human rights standards.³⁸⁸ One could argue that the leniency of punishment does not preclude retribution or deterrent function; rather, the rationale behind this liberal approach is to encourage offenders' rehabilitation.

Doubts remain as to the extent of ICC's role in the rehabilitation and reintegration of convicts. Rehabilitation is preventive-reduces recidivism-at the same time ensures the reintegration of the offender into the society.³⁸⁹ In a similar vein, offender rehabilitation is a form of punishment and a condition for early release. It is an offender-centred treatment mechanism and intervention.³⁹⁰ However, the absence of an individualised programme for the restoration of international prisoners and post-sentence strategy question the effectiveness of conviction and sentencing. It seems the ICC disconnects from evaluating the convicts time in prison.

³⁸⁸ Rold Einar Fife, 'Applicable Penalties' in Otto Triffrere and Kia Ambos (eds) *Rome Statute of the International Criminal Court :A Commentary* (Third Edition Beck and Hart 2016) 1879; UN Statndard minimum rules for the treatment of prisoners , ESC Resolution 663 C XXIV 31 July 1957; United Nations Covenant on Civil and Political Rights 1966, Article 7.

³⁸⁹ Ibid 374,377; Jessica Kelder, Barbora Hola and Joris van Wijk, 'Rehabilitation and early Release of Perpetrators of International Crimes:Case Study of ICTY and ICTR(2014)14(14)*International Criminal Law Review*,1177-1203.

³⁹⁰ Ibid.

Hola, in her research titled, “When justice is done” describes the offender rehabilitation program as “poorly.”³⁹¹ She submitted that the system could not support the restoration and reintegration of convicts. From her interview, she observed that the prison officers are not ‘sufficiently trained’ to promote offender rehabilitation in these facilities.³⁹² Thus, one would conclude that the deficiency in the reformation and reintegration of these perpetrators would mean a loophole in the justice system—a futile effort to transform offenders.

Lubanga served his term in Makala local prison, Kinshasa, DRC. On 15 March 2020, after completing his time, Thomas Lubanga was released amidst jubilation by Kinshasa's residents.³⁹³ He immediately celebrated his release at a Church with different attendees, including the Senate's second vice president.³⁹⁴ This celebration saw the grand entry of the ‘innocent messiah’ in DRC.

³⁹¹ Justice Hub, ‘Expert: Rehabilitation of those convicted by international criminal tribunals is woefully inadequate’ accessible at <https://justicehub.org/article/expert-rehabilitation-of-those-convicted-by-international-criminal-tribunals-is-woefully-inadequate/> last accessed 17 November 2020; Barbra Hola and Jessica Kelder ‘Life after conviction at the international criminal Tribunals: An Empirical Overview’ (2014) 12 *International Criminal Justice*, 109-132; Barbra Hola, Jessica Kelder and Joris van Wijk, ‘Effectiveness of International criminal tribunals: Empirical assessment of rehabilitation as sentencing goal’ in Nobuo Hayashi and Cecilia Bailliet, *The legitimacy of international criminal tribunals* (Cambridge University Press 2017) 351-375.

³⁹² Ibid.

³⁹³ The Africa Report, DRC: Former warlord Thomas Lubanga freed after serving 14-year sentence. Accessible at <https://www.theafricareport.com/24712/drc-former-warlord-thomas-lubanga-freed-after-serving-14-year-sentence/> last accessed 18 November 2020.; Aljazeera, DR Congo warlord Thomas Lubanga released from prison, accessible at <https://www.aljazeera.com/videos/2020/03/16/dr-congo-warlord-thomas-lubanga-released-from-prison/> last accessed 18 November 2020.

³⁹⁴ Ibid.

As explained by him: “you know me better than these three international court judges who tried to present me as a devil, I remain Thomas Lubanga, who suffered with you in 2002 - 2003, during this conflict in Ituri I remain the same to you, my people.”³⁹⁵

From Lubanga’s address, one could infer the absence of remorse and his persistent reluctance to take responsibility for the war crimes; an issue which the victims raised during the sentence review. Most of the residents celebrated, and his statement portrayed him as a victor. It does not appear that the correctional facility made any impact during his incarceration. With this, his reintegration back into the society may be smooth. Nonetheless, one ponders on the reactions of Lubanga’s victims.

The following section shall summarise this chapter.

4.8. Conclusion

This chapter set out to discuss the justification for punishment and found that retribution and deterrence are the main reasons behind sentencing in international sentencing, especially at the ICC. The criminal justice system’s foundation is retributive justice. Empirical study finds that criminal prosecution does not deter crime.³⁹⁶ However, it could foster compliance and ensure the international rule of law. Primarily, retribution is the rationale behind sentencing. Deterrent, rehabilitation, and some restorative justice

³⁹⁵ Aljazeera , DR Congo warlord Thomas Lubanga released from prison, accessible at <https://www.aljazeera.com/videos/2020/03/16/dr-congo-warlord-thomas-lubanga-released-from-prison/> last accessed 18 November 2020.

³⁹⁶ Brianne McGonigle Leyh, ‘Two for the Price of One: Attempt by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles’(2009) 22(1) *Leiden Journal of International Law*, 127-149.

elements might be found in the ICC's sentencing decision. Some aspects of restorative justice within the criminal justice system(ICC) mirror a holistic approach towards victims' position at the ICC.

The thesis has also shown that victims' role in sentencing is very restricted; thus, they have a relatively low impact on the sentencing decision. The extent of the applicability of their participation is subject to judicial discretion. Understandably, the Court must take caution when considering the impact of LRVs observations and submissions in sentencing. At times, the court' sentence requires objectivity because emotions and vengeance may obscure most victims' expectations. The chamber compromises the victims' expectations and the convicted person's right, which results in a liberal approach. The Rome Statute envisages the humane treatment of a convicted person as opposed to strict punitive measures.

Concerning the central question in this chapter, it is also shown that victims can participate, however in a restrictive means through written submissions and observations. Victims' complaint about the lack of proportionality between the gravity of the crime and severity of punishment reveals the disparity between the norms, rules and principles in their jurisdiction and the ICC's approach to the declared sentence. The Katanga case is a perfect illustration of victims' dissatisfaction with the declared sentence. They complained that the punishment was not proportionate to the gravity of the offence. Some of the victims were disappointed at the sentencing outcome.³⁹⁷This

³⁹⁷ Katanga sentencing decision.

result connotes victims' interests in sentencing as opposed to Ashworth's assertion that victims have no interests in sentencing.³⁹⁸ Victims may perceive sentencing outcome and their participation in sentencing as an exercise of their right to justice.

Unfortunately, the ICC sentence may not always meet victims' expectations. For victims, there is a thin line between justice, and vengeance.-The opposition of victims against the declared sentence reveals ICC's challenges in managing victims' expectations. A reasonable approach to tackle this issue is to strike a balance between victims' interests in sentencing and the justification of sentencing by the court. Additionally, the court may also need to enhance victim participation during sentencing by increasing restorative function of dialogue. One explanation for this is the absence of statutory provision and arrangements for the sentenced person's reintegration into society.

In a similar vein, the sentence decisions show the disparity between norms and cultural differences. Presumably, the victims' displeasure with the declared sentence illustrates a discrepancy between the Congo's criminal justice system and the ICC. In most domestic jurisdictions, law overlaps with their culture. Thus, the law cannot be entirely detached from their norms and culture, one of the reasons while the victims rejected Mr Katanga's offer apologise because the norm of Hema culture dictates that an offender must make amends an apology. The culture of the affected national jurisdiction filters into the sentence review.

³⁹⁸ Andrew Ashworth, *Sentencing and Criminal Justice* (6th Edition Cambridge University Press 2015).

The absence of expressive justifications for penalties in the Rome Statute, Rules and Regulations reveals the ambiguity in interpreting the ICC rationale for sentencing. From the declared sentence of the convicted person, it appears that the justification for international sentencing is not mainly centred on retribution, rather, general deterrence, rehabilitation, and some restorative justice elements are all involved. One could also argue that the sentencing of the ICC is lenient and influenced by western ideas. Studies suggest that in some third world countries, the more severe the offence is, the harsher the punishment.³⁹⁹ That is why some third-world countries reward such punishment with harsher punishment like a death sentence and longer term of imprisonment. It is commendable that the court recognised the importance of the convicted person's apology to the victims and the expression of regret and remorse by the offender, which enables the restorative function.

Moreover, since the judges are usually from different jurisdictions; civil and common law jurisdictions, we should bear in mind that while some judges may be pre-defendant rights, some may be pro-victims rights. The implication of this is that such differences may lead to division in reaching consensus. The pro-victims judges may be more interested in the emancipation of victims' rights in trials while the pro-defendant judges may be rigid in considering victims' rights.

³⁹⁹ Criminal justice system of United States of America; Oliver Lungwe Fataki, World Coalition Against Death Penalty, Africa Towards the Abolition of the death Penalty in DRC: Advances to be confirmed, published on 13 December, 2016. Accessible at <www.worldcoalition.org/Towards-the-abolition-of-the-death-penalty-in-DRC-advances-to-be-confirmed.html> last accessed 07 July 2019

Restorative justice process may provide a context for forgiveness and reconciliation, especially in community settings.⁴⁰⁰ Admittedly, there is no pure model for restorative justice activity/process.⁴⁰¹ It is clear from the sentencing process that the Rome Statute and the Rules of Evidence and Procedure infused some elements of restorative justice. Nonetheless, the effectiveness of restorative justice outcome can be subverted in the absence of guilty plea by the offender as well as refusal to participate in such activity.

To conclude this section, it has been shown that their participation in sentence decision is minimal despite victims' empowerment at the sentencing hearing phase. Their participation is not absolute; the influence of such participation is subject to judicial discretion.

The sentence review seems to embrace emoting and resolving the damaged relationship between the offender and victims rather than a more punitive approach. It also incorporates rehabilitation and reintegration of the convicted person; however, there seems to be a gap in the offender's restoration because the ICC does not monitor correctional facilities' role in transforming the victims. The convict might feign adherence to the conditions and factors (Article 110(4) and Rule 223) of good behaviour, prospects, reflections, individual characteristics and acknowledgement of responsibility for early release.

⁴⁰⁰ Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice* (Good Books 2002) 10, 11.

⁴⁰¹ Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice* (Good Books 2002) 10, 11.

The next chapter describes the summary of the thesis and recommends a future solution.

5.0 Chapter 5

5.1.Conclusion

The main goal of the thesis was to examine how the ICC has managed victims' rights and interests through three themes, namely (1) prosecutorial discretion, (2) trial process and (3) sentencing. The researcher critically explored these themes to assess how they impact victims interaction at the ICC.

Victims interests in this context are described as personal, as opposed to the Prosecutor's interests which is general (community interests). Although, one may argue that some Prosecutor's interests overlap with the victims'. In the determination of the personal interests of victims, the Court uses a case-by-case assessment.¹ Nevertheless, this unfettered power could become a double-edged sword metaphor, which might disproportionately affect victims access to justice. As put by Aptel, such victims would fall into the impunity gap.²

With its broad discretionary powers, the independent prosecutor, which is 'subject' to the PTC, is the outcome of one of the compromises reached by the Rome Conference

¹ The Prosecutor v. Thomas Lubanga Dyilo, 13 June 2007, International Criminal Court, Appeals Chamber, Separate Opinion of Judge Georgios Pikis, 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, ICC-01/04-01/06-92513-06-2007 CB PT 0A8, para.11

² Cecile Aptel, "Prosecutorial Discretion and Victims' Right to Remedy: Narrowing the Impunity Gap" (2012) 10(5) Journal of International Criminal Justice, 1357-1375.

negotiators; a decision made on state interests.³It is believed that the prosecutor's exclusive powers are to protect the integrity of the office in combating impunity. Chapter 2 has shown that, under the Rome Statute framework, the prosecutor enjoys considerable discretion even though the Pre-trial Chamber is empowered to exercise checks and balances over the prosecutor's decision to prosecute or discontinue prosecution. The PTC's reviews over the prosecutor's authority to prosecute are limited. The exercise of these broad prosecutorial powers generally affects victims' interests or in some circumstances, access to justice. For instance, the prosecutor's decision to focus on some incidents, rather than others may leave some victims in an impunity gap. It can be seen in victims of SGBV, and cruel and inhumane treatment in both *Lubanga* and *Katanga* cases fell into the impunity gap. The prosecutor's influence starts from the selection of situation to cases and during trials-drafting of charges. Inadequate investigations relegated situations, and narrow charges might inadvertently preclude some victims from participating in the criminal justice and accessing remedy. This constraint could again emerge from gaps in the charging document, thereby jeopardising their interests.

The prosecutor's exclusive powers to draft the charging document and his selection of situations and cases are contributing factors that could impede the victims access to justice. The controversial interpretation of Regulation 55 by the chambers in *Lubanga*

³ Silvia Fernandez de Gurmendi, 'The Role of the Prosecutor' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute-Issues, Negotiations and Results* (Kluwer Law International 1999)

and the radical change made by the judges in Katanga case unravels the impact of prosecutorial discretion on victims.

The prosecutor's obligation to investigate incriminating and exculpatory circumstances,⁴ and establish truth are conditions essential for objectivity in exercising the powers. The victims, as independent parties are also interested in truth and justice. Both interests emerge from the disruption of social order with different consequences for them. With victims, truth and their interests are on a personal level while for the prosecutor, he is duty-bound and exercising his powers. Accordingly, victims' claims should be taken into consideration in the determination of justice.⁵ The prosecutor has obligations to the victim, community, the court, and to the accused.⁶

At the investigation stage, it is observed that victims are more interested in their recognition. In this phase, investigations are intense, and the identities of the perpetrators are sketchy. The acknowledgement of victims would be an adequate step to easing their fears and empowering them with a sense of belonging. The recognition of victims is set out in the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crimes and Abuse. It is a measure of access to justice and fair treatment; a responsive process to victims' needs in the preliminary and investigation stages. Therefore, the investigation phase is as important as the trial phase for victims.

⁴ Rome Statute 1998, Article 54(1)(a).

⁵ Rome Statute, 1998, Article 53(2).

⁶ Rome Statute 1998, Article 15(3), and 15(6), Article 19(3), Article 53; Article 54(1)(a); Rome Statute, Preamble;; Article 61(4), Article 67, Article 69(4).

The trial process reveals that tension still exists between the victims' rights and interests and the defendant's fair trial rights.⁷ This tension is further heightened when competing roles emerge from Article 69(3) of the Rome Statute. The Prosecutor and the defendant opposed the victims' right to present evidence for the determination of truth. Victims cannot present evidence or question witnesses except with the chamber's authorisation, provided such request is exercised under Article 69(3) of the Rome Statute. The Chamber authorised the victims to present evidence, and question witnesses in line with Article 69(3) of the Rome Statute, given that their personal interests are affected.⁸ To this end, there is fluidity in the third-party rights of victims. The personal interests of victims may attract some roles which would necessarily have been exclusive to the parties.

It has been shown that victim participation cannot fulfil all victims' interests, for instance, regarding story-telling. Truth commission can complement the works of the ICC. The environment of TRCs is more suitable for victims' healing and reconciliation. Some times victims rights and interests are secondary to the mandate of the ICC-prosecution of the most responsible individuals for serious violation of human rights

⁷Situation in the Democratic Republic of the Congo, 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, Appeal Chamber, par.2 and 3, paras 67-104.;ICC-01/04-01/06-1432 11-07-2008 1/44 ICC-01/04-01/06-1135;ICC-01/04-01/06-1136;Decision Granting Leave to Appeal.

⁸ Ibid, paras 67-104.

and humanitarian law. Therefore, there is a limit to the function of the ICC in achieving justice for victims.

Edwards' theory, which was discussed in Chapter 3, gives us a useful framework to analyse participation implications. Arguably, this dispositive theory, based on a reflection of victims' significant control over the proceedings, is not applicable at the ICC. This submission is due to the statutory provision in article 68(3), which highlights judicial discretion, whereby the Court is in control, not the victims. With Edwards forms of participation, the analysis reveals that victims have no control over the proceedings and outcome.⁹ The dispositive category shows that the relationship between victims and the decision-maker mirrors the victims' control over the processes.

However, the non-dispositive category gives victims a degree of influence over the proceedings, as it places corresponding obligations on both decision-maker(judges) and the victims.¹⁰ While some of the roles of victims are voluntary, some may be mandatory. Nonetheless, victim participation enables them to exercise influence during the trial process, regulated by the court. It is worthy of mentioning that Edwards' theory gives us an in-depth approach to the implications of participation rather than the competitive approach between victims' rights and defendant rights.

⁹Ian Edwards, 'The Ambiguous Participant:The Crime Victims and Criminal Justice Decision-Making'(2004)44(6)*The British Journal of Criminology*, 967-982.

¹⁰ Ibid.

In addition, it has shown that the application of victims' procedural rights is limited. The restriction is not surprising as most human rights are not absolute.¹¹ These procedural rights are exercised in such a manner that would not prejudice the rights of the accused.¹² The use of procedural rights of victims ensures they access justice and participate efficiently during the trial process. The investigation into procedural rights has shown that while these rights enable victims to pursue their interests, the exercise of these rights is not absolute.¹³ We should note that the court's refusal to recognise and apply these rights during the trial process is likely to result in procedural injustice for victims.

For effective participation rather than sheer tokenism, the ICC needs to enhance its engagement with victims. Clark opined that the physical, institutional and demographic barrier between the court and affected countries has been detrimental to the court's functions.¹⁴ The barrier is seen in the distanced ICC investigations and prosecutorial practices.¹⁵ The perceived distance is not unconnected to the court's attempt at maintaining independence and impartiality.¹⁶ Unfortunately, the 'distance' has negatively impacted the court's operations and its interactions with victims.

¹¹ United Nations Charter 1945; International Covenant on Civil and Political Rights 1966.

¹² Rome Statute 1998, Article 68(3).

¹³ Situation in the Democratic Republic of Congo, the Prosecutor v. Germain Katanga and Mathieu Ngudjolo, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Pre-Trial Chamber 1, p.61.

¹⁴ Phil Clark, *Distance Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press 2018) 25, 304, 379.

¹⁵ Ibid; Christian De Vos, "Investigating from A far: The ICC's Evidence Problem" (2013) 26(4) *Leiden Journal of International Law*, 1009-1024.

¹⁶ Ibid.

One more significant finding to emerge concerning sentencing is that victims are permitted to participate during a sentencing hearing via oral, written submissions and observations. Nonetheless, victim participation in sentence hearing is not a guarantee that their observations and submissions would impact the sentencing outcome. At this juncture, the court should compromise between the legitimate rights and interests of the victims and the rights of the accused. By Edwards' analogy, they do not have control over the sentencing hearing or sentence outcome. There is an interplay of power and influence at this stage, which is shown in their observations and submissions before the court. Given that victims' role in sentencing is restricted, they have a relatively low impact on sentence decision.

The ICC's struggle to increase its focus on victims and strike a balance between retributive and restorative justice unravels during sentencing and sentence reduction.

Factors such as the absence of a guilty plea by the convicted person and the sentenced person's reluctance frustrate the restorative justice approach. While there are elements of restorative justice such as interactions between the convicted person and victims, encounter, amends, and reintegration are best achieved in an informal setting, with cooperation from all stakeholders-victims offenders, and community. This activity could be implemented in the affected domestic jurisdiction with the monitoring and compliance by the ICC.

There is a thin line between justice and vengeance; a clamour for a higher sentence for the convicted persons shows the quest for vengeance. On the other hand, it appears the

ICC is liberal(western ideas) in mapping out a declared sentence for the convicted person. Consequently, the outcome reveals the disconnect between the expectations of some victims and the declared. Unfortunately, from their perspective, the gravity of the crime should be proportionate to the penalty. A lesser term in prison may be interpreted as undermining their suffering. A reference to their national jurisdiction reflects a perceived proportionality between the crimes' gravity and the severity of punishment. In some domestic jurisdiction, their criminal laws stipulate the justifications for the penalty's punishment and determination¹⁷. In the ICC context, neither the Rome Statute nor the ICC RPE set out the sentencing rationale. Scholars like Henham and Guzman pointed out this absence and criticised this gap in the Rome Statute and RPE provisions.¹⁸ With this in mind, the victims might not have grasped the rationale behind the sentencing. No provision lists retribution, deterrence or rehabilitation as the rationale for Rome Statute. As discussed somewhere in this chapter, there are speculations of deterrence and retribution as justifications for sentencing at the ICC. It is deduced from the preamble of the Rome Statute.¹⁹ Flowing from this, one may infer that the rationale/justification for sentencing is dependent on the discretionary power of the courts/judges. The single general provision on the imprisonment for all crimes was

¹⁷ England and Wales Criminal Justice Act 2003, c44pt12 s142; Criminal Code of Sentencing 1985, C c-46 ,s 718,4

¹⁸ Ralph Henham. *'Punishment and Process in International Criminal Trials'*(Ashgate 2005)15-17;Ralph Henham, "The Philosophical Foundations of International Sentencing" (2003) 2 *Journal of International Criminal Justice* ,64,85; Margeret Guzman, 'Proportionate Sentencing at the International Criminal Court '(2014)Temple University Legal Studies Research Series(Research Paper No. 2014-2015.

¹⁹ Prosecutor v Lubanga, Decision on Sentence, Trial Chamber I ,para. 16, Preamble of Rome Statute, paragraphs 4,5 and 9;Prosecutor v Germain Katanga, Decision on Sentence Pursuant to Article 74 of the Statute,Trial Chamber II, paras 37--38

intended to make judges role flexible since the requirements are not incompatible with the principle of legality.²⁰One could not be certain if the declared sentence were primarily based on retribution or just desert theory. Although ‘Just desert’ theory might have been partly considered, the term of imprisonment seems to consider rehabilitation by striking a balance between retributive and restorative functions.

In both cases, victims' objection to the declared sentence espouses the marked differences in the victims' cultural background and the Rome Statute's applicable law. According to article 77 and 78, in considering the appropriate sentence, the judges had to choose between life imprisonment and term of imprisonment, which is not higher than 30years. The Rome Statute did not codify the death penalty. In some national jurisdictions, DRC inclusive, the death penalty is capital punishment. The victims might have anticipated ‘severe or ‘capital punishment’ for the gravity of the crimes committed.

Due to the lack of consensus regarding the law's adoption on penalties, the Diplomatic Conference's working group deleted it from the Draft Statute.²¹However, in consideration of appropriate sentencing, the judges could refer to Article 21(general principles of law derived by Court from national jurisdictions). Additionally, the application of capital punishment and death penalty was vehemently opposed by a large majority of the delegation based on its violation of human rights(dignity of the human

²⁰ Rolf Eina Fife “Article 77:Applicable Penalties”, in Otto Triffterer and Kai Ambos , In *Rome Statute of the International Criminal Court: A Commentary* (Hart Publishing 2016)1881.

²¹ Rolf Eina Fife “Penalties” in Otto Triffterer and Kai Ambos ,*Rome Statute of the International Criminal Court: A Commentary* (Hart Publishing 2016)1501.

person) and the possibility of rehabilitation.²² A reflection of the disparity between the progressive and conservative states.

One could argue that sentencing outcome goes beyond proportionality; instead, it underscores both general and individual deterrence. The declared sentence serve as a just dessert for the convicted person as well as a deterrent function. Prior studies also note that deterrent as an arm of retributive justice serves a more rhetoric function then a pragmatic one.²³Therefore, sentencing at the ICC drifts towards reforming the convict. The Rome Statute provisions and the ICC Rules of Evidence and Procedure mirrors a transformative approach towards retributive justice. A classic example is found in the strict conditions²⁴ set out for the imposition of a life sentence and the exclusion of death sentence—an attempt to foster reintegration and rehabilitation of offenders.

One notable point is the ICC's role and penal servitude in promoting the restoration of the offender. There are speculations about the outcome of rehabilitation for international prisoners, which raises the question of the degree of transformation the

²² Ibid;Rolf Einar Fife “Article 77:Applicable Penalties”, in Otto Triffterer and Kai Ambos ,*Rome Statute of the International Criminal Court: A Commentary* (Hart Publishing 2016)1879

²³ Ralph Henham, *Punishment and Process in International Criminal Trials*(Ashgate Aldershot, 2005)

²⁴ Report of the Preparatory Committee on the Establishment of an International Criminal Court ,228-234;United Nations Document A/AC.249/WP.35;Decisions taken by the Preparatory Committee at its Session held from 1 to 12 December 1997, Annex V, Report of the Working Group on Penalties , UN Doc. A/AC.249/1997/1.9/Rev.1,p.18;Rolf Einar Fife, “Penalties” in Roy Lee(ed.) *The International Criminal Court: The Making of the Rome Statute* (The Hague Kluwer 1999)319-344;Rolf Einar Fife, “Article 77”, in Otto Triffterer(ed.), *Commentary on the Rome Statute for the International Criminal Court: Observers Notes, Article by Article*(Brill Nijhoff 1999)985-998.

sentenced person is exposed to post-conviction. It is crucial to assess the effectiveness of rehabilitation and the impact of the sentencing decision on the convicts. The assessment would enable us to weigh the outcome of sentencing on international criminals. If the Rome Statute aims to encourage convicts' reformation through a rehabilitation program(imprisonment), it is reasonable to examine international sentences' enforcement system.

Since the ICC has not established a specialised prison for convicts, Article 103 of the Rome Statute stipulates that the sentenced person shall serve their term of imprisonment in a State designated by the Court from a list of States which have agreed to accept sentenced persons. Given this situation, it implies that convicts' transformation is left under the host State's supervision. Therefore, one question that comes to mind if these prisons are well equipped for the rehabilitation of international prisoners. The study of Hola et al. advances answers to this question. Hola found that correctional facilities lack provisions for transforming the calibre of international prisoners.²⁵ She noted that the staff were exclusively trained for local prisoners.²⁶ If the host prison is not upgraded to

²⁵ Justice Hub, 'Expert: Rehabilitation of those convicted by international criminal tribunals is woefully inadequate' accessible at <https://justicehub.org/article/expert-rehabilitation-of-those-convicted-by-international-criminal-tribunals-is-woefully-inadequate/> last accessed 17 November 2020; Barbora Hola and Jessica Kelder 'Life after conviction at the international criminal Tribunals: An Empirical Overview' (2014) 12 *International Criminal Justice*, 109-132; Barbora Hola, Jessica Kelder and Joris van Wijk, 'Effectiveness of International criminal tribunals : Empirical assessment of rehabilitation as sentencing goal' in Nobuo Hayashi and Cecilia Bailliet, *The legitimacy of international criminal tribunals* (Cambridge University Press 2017) 351-375.

²⁶ Ibid.

quality of reform, then the international prisoner is subject to the lower/poor standard of rehabilitation, defeating the purpose of sentencing.

The section below moves on to give recommendations.

5.2 Recommendation

The question raised by this study is the extent to which the court respects victims' rights and interests. The researcher divided the problem into three thematic categories; prosecutorial discretion, trial process and sentencing.

The overall assessment of victims in the investigation, trial proceedings, and sentencing reveals that the ICC needs to improve victim engagement. To foster victim participation, the ICC needs to increase victim engagement from the investigation stage to the post-sentence phase. There seems to be a gap between the operation of the court and victims.

More research is needed to understand better why the ICC might need to incorporate VIS during sentencing. There could be a definite need for VIS because it engages the emotions of victims. Nonetheless, it could be unworkable because of the large numbers of victims involved in victims participation during this sentence hearing phase.

Moreover, it is recommended that restorative justice practice may increase victims' positive perception of the ICC, which could be done by striking a balance between victims' interests in sentencing and justification for sentencing. Henham posits that restorative justice "implies an approach to a punishment which is tolerant of the diverse

contexts of criminality and capable of accommodating and realising its implications.”²⁷

With increased restorative justice elements, comes an enhanced victim role. However, the extent of applicability of the restorative justice approach during criminal proceedings is limited because of the structure of the criminal proceedings. The conventional context of the ICC negates an advancement of restorative justice. The ICC structure might not be suitable to incorporate full restorative activities. However, it is commendable that the ICC adopted more restorative elements to complement the punitive approach.

Given that it is impracticable to include the full restorative justice process during the trial or sentence hearing. The ICC could complement its restorative function at the domestic jurisdiction of the affected State. This could be similar to the community-Based Gacaca Courts in Rwanda. A viable recommendation since the ICC is not a ‘self-contained’ institution- fragmented part of the international criminal justice system, based on pluralism.²⁸

It is revealed that neither the Court Statute nor rules make provision for the offender's reintegration after the sentence reduction. Arguably, this complementary practice is necessary to maintain stability and mend the relationship between the victims, offender

²⁷ Ralph Henham, *Punishment and Process in International Criminal Trials*(Ashgate 2005)p.148

²⁸ Elias Van Sliedregt and Sergey Vasiev, “Pluralism :A New Framework” in *Pluralism in International Criminal Law* in, Elias Van Sliedregt & Serhey Vasiliev(eds) (2014)3, 10-11.

and society. With this approach, recourse to the laws and principles guiding the domestic jurisdiction involved may fulfil victims expectations.

Fulfilling victims' expectations contributes towards the outcome of judicial processes. Substantive justice redresses the harm victims have suffered, and the causes of victimisation.²⁹ According to Bassiouni, judicial processes' outcome corresponds with an effective remedy in human rights law, which has developed three rights for victims of gross violation: truth; justice and reparations.³⁰ These substantive rights can be effectively exercised and enforced within procedural fairness entrenched by the ICC.

Another viable means of ensuring victim participation is a collaborative implementation of other mechanisms of transitional justice. The ICC employs criminal prosecution and reparations, at the domestic level. The use of truth commissions could complement storytelling and truth-telling as victims' participation, which brings us to positive complementarity.

Besides, further research should investigate the relationship and impact of culture on the workings of the ICC. There is a connection between law and culture; therefore, there are instances where the domestic jurisdiction's culture and norms might clash with the court's statutory provisions. Research into this area will assist the efficiency of the court.

²⁹ Jo-Anne Wemmers, 'Victims' Need for Justice :Individual versus Collective Justice', In Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer and Antony Pemberton (eds.), *Victimological Approaches to International Crimes: Africa* (Intersentia 2011) 148.

³⁰ Cheriff Bassiouni, 'International Recognition of Victims' Rights' (2006) 6(2), *Human Rights Law Review*, 203-279.

Perhaps, this would give us new insights and perspectives into the ICC's role in promoting transitional justice.

Research might also explore the ICC's role in the reintegration of the victims and offenders in the community. It is suggested that the ICC should establish a unique rehabilitation centre for convicts to serve their term; this will ensure monitoring and compliance with standards. It is also noted that the convicts must be willing to partake in the rehabilitation. A sentenced person who denies responsibility for the charges and allegations may not be interested in his restoration. This information can be used to develop targeted interventions to supervise and upgrade offenders' correctional facilities for better results.

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Appendix

Victims' needs

A key aspect of victims' life in criminal justice is their needs. Questions have been raised about the specificity of these needs. In some commentators opinion, Victims crave for information, participation and respect.³¹ The significance of victims' needs is stated in the 1985 Declaration of principles; specifically, Principle 6(b) stipulates that victims' information upon their request and the consideration of their interests should facilitate the responsiveness of judicial and administrative mechanisms to the needs of victims.³² It describes the requirements for the judicial mechanism or criminal trials to be responsive to victims' needs. The study of Strang suggests the needs of victims in international criminal proceedings include:

“obtaining information on the progress and outcome of the case concerning them; being treated with respect and fairness; participating in the handling of the case that concerns them; making their voice heard, and obtaining economic and emotional redress.”³³

In another study, Zehr, a pioneer of the modern concept of restorative justice, submits the four types of victims' needs. The need is information, truth-telling, empowerment

³¹ Marijke Malsch and Raphaela Carrier, “Victims' wishes for compensation : the immaterial aspect” (1999) 3 *Journal of Criminal Justice*.p239-239;Mina Rauschenbach and Damien Scalia , ‘Victims and International Criminal Justice: a vexed question? (2008) 90(870) *International Review of the Red Cross*,441-459,p.444.

³² Principle (a) and (b) ,United Nations Declaration of Basic Principles for Victims of Crime and Abuse, 1985.

³³ Heather Strang *Repair and Revenge: Victims and Restorative Justice* (Oxford University Press 2002).

and restitution or vindication.³⁴ He observed that in most criminal justice processes, these needs appear to have been neglected. Victims require protection from risks associated with being vulnerable. In criminal prosecutions, when the perpetrator has been detained, this ensures victims' safety.³⁵ Article 68(1) of the Rome Statute confirms the assertion, which makes it a duty of the court to ensure that protection and safety measures are put in place for the victims by the court.³⁶ Inevitably, some of these needs are incorporated into victims' interests. In particular, victims' safety and security are considered protective measures that qualify as interests of victims.

³⁴ Howard Zehr , *The Little Book of Restorative Justice: Revised and Updated*. (The Little Book of Justice and Peace building)13-14

³⁵ Ibid

³⁶ Rome Statute 1998, Article 68(1); Campbell McLaughlin, 'Victim and Witness Measures of the International Criminal Court: A Comparative Analysis " (2007) 6 *The Law and Practice of the International Courts and tribunals*,189; Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wimshurst, *An Introduction to International Criminal Law and Procedure* (First published 2007, Third Edition Cambridge University Press 2014)486

