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VICTIMS' PARTICIPATION RIGHTS WITHIN THE INTERNATIONAL CRIMINAL COURT: A CRITICAL OVERVIEW

MIRIAM COHEN*

I. INTRODUCTION

The formation of the International Criminal Court marked an important change in international criminal justice. The *Rome Statute of the International Criminal Court* (hereinafter "Rome Statute")¹ not only established the International Criminal Court (hereinafter the "ICC" or the "Court") as a permanent institution with jurisdiction "over persons for the most serious crimes of international concern,"² but also brought about changes to the international criminal scene,³ namely a completely new system for victims' participation in criminal proceedings⁴ during the trial phase as well as the pre-trial phase.⁵ One of the Court's main function is the establishment of the truth and in this sense participation of victims may contribute to the accomplishment of this goal.⁶

The recognition of victims' participatory rights in criminal proceedings is a novelty in international criminal law.⁷ Victims' right to participate in the

*LLB (Université de Montréal); LL.M. (Cantab). The research of the Court's jurisprudence is up-to-date until September 2008. This article builds upon a research project pursued at the University of Cambridge in 2007. I want to thank Dr. Roger O'Keefe and Jane Bestor for reading an earlier version of this article and providing insightful comments. All errors of fact and interpretation are my own.

1. Rome Statute of the International Criminal Court, adopted July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (entered into force July 1, 2002) [hereinafter *Rome Statute*].

2. *Id.* art. 1.

3. In comparison to the ad hoc international criminal tribunals preceding the *International Criminal Court* [hereinafter *ICC* or the *Court*] the differences are numerous. This study will focus on the provisions relating to participatory rights.

4. See Rome Statute, *supra* note 1, art. 68. See also Carsten Stahn et al., *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. INT'L CRIM. JUST. 219 (2006) [hereinafter *Stahn et al.*]; Gerard J. Mekjian & Mathew C. Varughese, *Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court*, 17 PACE INT'L L. R. 1 (2005) [hereinafter *Mekjian & Varughese*]; Timothy Kuhner, *The Status of Victims in the Enforcement of International Criminal Law*, 6 OR. REV. INT'L L. 95 (2004). See generally Gilbert Bitti & Hakan Friman, *Participation of Victims in the Proceedings*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 456 (Roy S. Lee ed., 2001).

5. In this study, the author will not differentiate between the trial and the pre-trial phase pertaining to victims' participation in proceedings, but rather study the subject in a general approach.

6. David Donat-Cattin, *Article 68 Protection of Victims and Witness and their Participation in the Proceedings*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES ARTICLE BY ARTICLE 1275, 1300 (Otto Triffterer ed., 2d ed. 2008).

7. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 328 (3d ed. 2007) [hereinafter *SCHABAS*]. See also Emily Haslam, *Victim Participation at the International*

proceedings is one of the main innovative features of the Court, granting victims further rights than testifying as witnesses.⁸ Before the ICC, other international criminal tribunals did not provide victims with significant rights of participation and were mainly concerned with bringing criminals to justice.⁹ In this sense, this participatory scheme is a distinguishing feature between the ICC and other ad hoc international criminal tribunals, such as the *International Criminal Tribunal for the Former Yugoslavia* (hereinafter "ICTY") and the *International Criminal Tribunal for Rwanda* (hereinafter "ICTR") which bear no provisions on victims' participation in proceedings.¹⁰ As far as national criminal law systems are concerned, victims may have participatory rights to a certain degree depending on the jurisdiction in question.¹¹

The adoption of provisions recognizing participatory rights has caused much dissension amongst jurists. The arguments in favor and against victims' participation in proceedings are numerous.¹² Many argue that the recognition of participatory rights represents a great victory in international criminal justice.¹³ Others fear that victim participation in proceedings may conflict with the accused's right to a fair trial¹⁴ and "affect the expeditiousness of proceedings."¹⁵

Criminal Court: A Triumph of Hope Over Experience?, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL POLICY AND ISSUES 315 (Dominic McGoldrick et al. eds., 2004) [hereinafter *Haslam*]. See also Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 167 (1999).

8. See Haslam, *supra* note 7, at 315. See also Silvia A. Fernández de Gurmendi, *Elaboration of the Rules of Procedure and Evidence*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE 235, 255 (Roy S. Lee ed., 2001).

9. Mekjian & Varughese, *supra* note 4, at 15 (suggesting that in the ICTR victims were granted some minimal participatory rights which consisted of the prosecutor asking the victims as well as witnesses whether some individuals should be investigated for further crimes against humanity).

10. See generally Michael Bachrach, *The Protection of Rights and Victims under International Criminal Law*, 34 INT'L LAW. 7 (2000) (providing a more detailed study on victims' rights under international criminal law) [hereinafter *Bachrach*]. See also David Donat-Cattin, *The Role of Victims in ICC Proceedings*, in COLLECTION OF ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 251, 268 (Flavia Lattanzi & William A. Schabas eds., 1999).

11. See Stahn et al., *supra* note 4, at 220 (discussing the fact that victims' participation rights differ depending on national law system. The authors contend that the participatory scheme within the ICC is aligned with some civil law systems that allow in general for victims' active participation in criminal proceedings). This article does not analyze victims' participatory rights in national systems. See generally MARION ELEONORA INGEBORG BRIENEN & ERNESTINE HENRIETTE HOEGEN, VICTIMS OF CRIME IN 22 EUROPEAN CRIMINAL JUSTICE SYSTEMS (2000) (discussing participatory rights in domestic European systems).

12. This article will examine some of these arguments.

13. See Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUMAN RTS L. R. 625, 643 (2001). See also Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1387, 1388 (Antonio Cassese et al. eds., 2002) [hereinafter *Jorda & de Hemptinne*].

14. See Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. LOUIS U. PUB. L. REV. 249, 278 (2007).

15. See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA8, 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, ¶ 12 (June 13, 2007)

It has been asserted that “punishing the criminals is not enough” as there will be no justice without ensuring justice for victims.¹⁶ Moreover, it has been argued that allowing victims to participate in proceedings may preclude them from “taking justice in their own hands” and stop the cycle of violence.¹⁷ Taking part in proceedings only as witnesses before the ICC does not address victims' concerns; as witnesses they are an object in the criminal process.¹⁸ Victims have witnessed the crimes but also live with the consequences of those crimes; therefore their position and rights as victims go beyond that of a witness.

The adoption of provisions that allow victims to participate in proceedings regarding hideous crimes can also represent an achievement in bringing criminals to justice. Victims can provide the Court with knowledge that only those who experienced these crimes can give and “their attendance in person at the trial may help in establishing the truth.”¹⁹ As Claude Jorda and Jérôme de Hemptinne have observed, the ICC “appears to mark a new step forward . . . victims are accorded the double status denied to them by the provisions setting up the *ad hoc* Tribunals.”²⁰ Their participation will ensure that their concerns are taken into account when passing a final judgement on criminals. Nevertheless, victims' participation rights are provided for throughout the proceedings and not only during the trial stage.²¹ After all, crimes were committed not just against the international community but also against people, namely the victims.

As the right to take part in proceedings has been recognized in the Rome Statute, it remains for the different Chambers of the Court to interpret the scope of participatory rights. The jurisprudence concerning the scope and interpretation of participatory rights are currently under development. In order to provide for effective participation, the Rome Statute and the Rules of Procedure and Evidence²² combined establish victims' participation rights. These provisions, although providing for the same objective of giving victims a voice in proceedings, differ in application. On the one hand, articles 15(3) and 19 of the Rome Statute²³ for example recognize very specific rights of participation that apply only in the context prescribed in the text of these provisions. On the other hand, victims are granted a very broad right of participation because article 68(3) recognizes

[hereinafter *The Appeals Chamber Decision on the Joint Applications of Victims*].

16. Fiona McKay, The Victims Rights Working Group, The Conference for the Establishment of an International Criminal Court, Speech on Behalf of the Victims Rights Working Group (June 16, 1998) *available at* <http://www.vrwg.org/Publications/01/1998%20Rome%20Statement%2016%20June1.pdf>.

17. Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 INT'L CRIM. L. R. 345, 349-50 (2003).

18. See SCHABAS, *supra* note 7, at 328. In the ICTY and ICTR the roles of victims were merely to provide testimonies as witnesses to the parties. Jorda & de Hemptinne, *supra* note 13, at 1391.

19. Jorda & de Hemptinne, *supra* note 13, at 1388.

20. *Id.*

21. Stahn et al., *supra* note 4, at 237.

22. U.N. Preparatory Comm'n for the Int'l Criminal Court [PCNICC], *Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add. 1 (Nov. 2, 2000) [hereinafter *RPE ICC*].

23. Rome Statute, *supra* note 1, art. 15, paras. 3, 19.

participatory rights in the “proceedings,” making it possible for victims to participate in different phases of the proceedings.²⁴

The extent to which victims can take part in proceedings, as well as the conditions of participation regarding this general right of participation affirmed in article 68(3) will have an impact in the exercise of other specific participatory rights in the proceedings. Accordingly, what is the difference between a situation and a case and what is the status of victims relating to each?²⁵ Is the investigation phase included in the term “proceedings” of article 68(3)? Finally, what are the criteria for eligibility as victims and more specifically what is the conception of “personal interests”, which determines the status of victim to a situation or a case. These questions will be addressed in this article that analyses the compatibility of participatory rights with the rights of the accused.

Victims’ participation may not amount to a second prosecutor²⁶ since it would be against the rights of the accused and contrary to a fair trial (which are in turn conditions to participation pursuant to article 68(3)).²⁷ The Rome Statute grants diverse participatory rights but is not clear as to how these rights may be applied in practice and how conflicting interests might be reconciled. Much is left for judicial interpretation and clarification. The jurisprudence of the Court in this regard is still being developed thus it is not yet entirely clear what role victims might play in the different stages of criminal proceedings and how far their rights can go.²⁸ From the few decisions of the different Chambers of the Court, it can be argued that a common interpretation of participatory rights is being sought.²⁹

The goal of this paper is to give a critical overview of the participatory scheme devised within the ICC. It analyzes the scope of victims’ participation at different stages in the proceedings and the interpretation of participatory rights thus far. It also focuses on examining some specific provisions and the application of article 68(3) at different stages of the proceedings. Although article 68(3) is contained in Part 6 of the Rome Statute concerning “the trial”, as this paper will

24. *Id.* art. 68, para. 3.

25. *See, e.g.*, Stahn et al., *supra* note 4, at 221-23 (concerning the difference between victims of a situation and victims of a case).

26. *See* The Appeals Chamber Decision on the Joint Applications of Victims, *supra* note 15, ¶ 28. *See also id.* ¶ 19 (Pikis, J., concurring) (stating that the “[e]quality 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.”) [hereinafter *Separate Opinion of Judge Pikis*].

27. Rome Statute, *supra* note 1, art. 68, para. 3.

28. *See* Jorda & de Hemptinne, *supra* note 13, at 1388-89. *See also* Julian Fernandez, *Variation sur la victime et la justice pénale internationale*, REVUE DE CIVILISATION CONTEMPORAINE DE L’UNIVERSITÉ DE BRETAGNE OCCIDENTALE 1, 9 (2006) (Fr.) (stating that “Le régime de la CPI dépend encore de sa digestion future par les décisions de la Cour”) available at www.univ-brest.fr/amnis/documents/Fernandez2006.pdf.

29. *See, e.g.*, Situation in Uganda, Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-103 (Aug. 20, 2007) [hereinafter *Prosecution's Application for Leave to Appeal the Single Judge Decision*].

examine, it has been used in relation to participation at other stages of the proceedings. This paper will also analyze whether equilibrium can be reached in practice between opposing interests of the Prosecution, the accused, and victims.

The analysis in this paper of the different participatory provisions follows the structure of the Rome Statute. It will first focus on certain provisions concerning specific participatory rights -- that allow participation only within the scope of the specific provision and the application of the criteria in article 68(3) to these provisions. Then, it will examine the conditions for the exercise of the broad right of participation pursuant to article 68(3) of the Rome Statute. Finally, the paper will conclude by contending that a balance between contrasting interests can be reached in practice.

II. THE ROAD TO THE ADOPTION OF PARTICIPATORY RIGHTS: AN OVERVIEW OF THE ROLE OF VICTIMS IN THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS

This section will focus briefly on victims' rights within the framework of *ad hoc* international criminal tribunals in order to illustrate the position of victims in international criminal proceedings prior to the ICC. This section does not intend to give a thorough analysis of the practice and jurisprudence of these tribunals. The aim of this section is to point out the gap that existed prior to the establishment of the ICC in matters relating to participatory rights in order to set the context to examine the groundbreaking system of victims' participation created in the ICC.

Although victims are an inevitable part of an armed conflict, their rights have not been recognized in a satisfactory way in criminal proceedings prior to the establishment of the ICC. Neither in the World War II trials nor in the *ad hoc* tribunals which followed, were victims allowed to participate.³⁰ The Nuremberg and Tokyo trials represented a step forward in international criminal justice by creating a new era for the recognition of war crimes, crimes against humanity, and genocide regarding individuals' accountability for their actions in the international arena.³¹ This beginning of the fight against impunity was crucial for the development of international criminal law as it is today. Just like any new system, however, it needed improvements. One of the changes that needed to be made was in relation to the rights of victims.

After the Second World War tribunals, other conflicts started that generated new international criminal tribunals. This was the case for the ICTR and the ICTY. In spite of the great achievements of the ICTY and ICTR in bringing war criminals to justice and promoting peace in their respective regions, they failed to address victims' concerns.³² As stated above,³³ the ICTY Statute did not include

30. See generally Mekjian & Varughese, *supra* note 4, at 7-15.

31. *Id.* See generally Luc Walleyn, *Victimes et témoins de crimes internationaux: du droit à une protection au droit à la parole*, 84 *Revue internationale de la Croix-Rouge* 51 (2002). In this article, the author analyzes, *inter alia*, the rights granted to victims prior to the ICC in international humanitarian law.

32. See generally Jorda and de Hemptinne, *supra* note 13. In relation to the ICTY, see generally Marie-Bénédicte Dembour and Emily Haslam, *Victim-witnesses at War Crimes Trials: Silencing Hearings?* 15 *EUR. J. INT'L L.* 151 (2004). For a study of victims' rights before the United Nations *ad hoc* criminal tribunals, see Haslam, *supra* note 7, at 317-19.

provisions that recognized participatory rights.³⁴ The ICTR Statute also did not provide for such rights, but, according to Gerard Mekjian and Mathew Varughese, the ICTR did establish some minor participatory rights in very specific circumstances.³⁵ In these tribunals, generally the role that victims play is solely that of a witness. This position is consistent with the view that criminal proceedings are between the Prosecution and the defence. One possible reason for the absence of participatory rights is that, contrary to the ICC, the *ad hoc* tribunals were created by the adoption of Security Council resolutions. Only fifteen member States of the United Nations are members of the Security Council (of which, only five are permanent members).³⁶ Therefore, the creation of these tribunals and the adoption of their regulating statutes did not amount to a representative system where all member states could negotiate the provisions, as was the case for the ICC. This may be one of the underlying reasons that victims' participatory rights were not a concern in the creation of these tribunals and the adoption of their statutes.³⁷

Acting as a witness can be one of the roles of victims, but not its main attribution. Before serving as witnesses of crimes, they suffered the atrocities that took place during conflicts and have to live with the consequences of crimes. As Élisabeth Guigou has affirmed

Victims are not simply witnesses whose participation in proceedings should be limited to gathering the information which they are able to provide. They have a separate role to play, and this must be recognised by the International Criminal Court, as is expressly provided for, moreover, by the Rome Statute.³⁸

Even before the establishment of the ICTY there was pressure from the international community for the creation of a permanent international criminal institution with jurisdiction to judge international crimes such as war crimes, genocide, and crimes against humanity.³⁹ Negotiations amongst States were taking

33. *Supra* note 3.

34. See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993). This is the Security Council resolution that established the ICTY.

35. See Mekjian & Varughese, *supra* note 4, at 11-15.

36. The U.N. Security Council is composed of five permanent members: China, France, Russian Federation, the United Kingdom and the United States and ten non-permanent members (with year of term's end): Austria (2010), Japan (2010), Uganda (2010), Burkina Faso (2009), Libyan Arab Jamahiriya (2009), Viet Nam (2009), Costa Rica (2009), Mexico (2010), Croatia (2009), Turkey (2010). The General Assembly elected Austria, Japan, Mexico, Turkey, and Uganda to serve as non-permanent members of the Security Council for two-year terms starting on January 1, 2009. The newly elected countries will replace Belgium, Indonesia, Italy, Panama, and South Africa. Current membership information available at <http://www.un.org/sc/members.asp> (last visited Feb. 7, 2009).

37. Other reasons have been suggested for explaining the lack of provisions concerning victims' rights. See Jorda and de Hemptinne, *supra* note 13, at 1391.

38. Élisabeth Guigou, *Address of the Ministry of Justice at the International Colloquium on "L'Accès des victimes à la Cour Pénale Internationale"*, (Apr. 27, 1999), cited in Jorda & de Hemptinne, *supra* note 13, at 1397.

39. See generally WILLIAM SCHABAS, THE UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE (2006).

place and soon after the establishment of the ICTY, the International Law Commission (hereinafter "ILC") concluded a draft of the ICC Statute.⁴⁰

The establishment of the ICC changed the situation of victims and their role in international criminal proceedings in various ways. To sum up, it completely modified the position of victims from witnesses of crimes to that of being the subject of rights by granting them specific participatory rights at many stages of the proceedings and a broad right of participation pursuant to article 68(3). In spite of other important rights for victims, this paper will only focus on the participatory rights scheme.

III. SPECIFIC PARTICIPATORY RIGHTS IN PROCEEDINGS WITHIN THE INTERNATIONAL CRIMINAL COURT FRAMEWORK

Before analyzing the provisions that grant victims participatory rights, it is important to address the question of whether the recognition of victims' rights in the Rome Statute is a good initiative in international criminal law. The recognition of a role for victims in proceedings is an achievement that was, amongst other factors, highly influenced by the "advocacy of non-governmental organisations,"⁴¹ which helped ensure that the Rome Statute and Rules of Procedure and Evidence contained strong provisions on victims' rights.⁴² The question that remains is how these rights will be interpreted and applied in practice. In other words, how the rights of victims will affect the rights of the accused and the duties of the Prosecution, trial management and to what extent victims can take part in proceedings. In light of these considerations, this paper will analyze the main provisions that deal with participatory rights.⁴³

As stated above,⁴⁴ victims are granted, throughout the Rome Statute and the Rules of Procedure and Evidence, various opportunities to participate in the ICC proceedings.⁴⁵ The Rome Statute recognizes on many occasions different participatory rights of victims.⁴⁶ It is imperative to analyze them, discuss their differences, and determine in which cases they are applicable in order to understand the ICC victims' participatory scheme. Moreover, it is important to note, from the beginning of this study, that these rights differ greatly from each

40. Report of the International Law Commission on its forty-sixth session, May 2—July 22, 1994, G.A. Res. 10, ¶¶ 42-91, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994).

41. Haslam, *supra* note 7, at 321.

42. *Id.* See also, Amnesty Int'l, *The International Criminal Court: Ensuring an effective role for victims*, AI Index: IOR 40/10/1999, July 1, 1999, available at <http://asiapacific.amnesty.org/library/Index/ENGIOR400101999?open&of=ENG-385>. See also, Jorda & de Hemptinne, *supra* note 13, at 1400. See also, Amnesty Int'l, *The International Criminal Court: Making the Right Choices Part II*, AI Index: IOR 40/011/1997, July 1, 1997, available at <http://www.amnesty.org/en/library/info/IOR40/011/1997>.

43. This paper will focus on selected provisions contained within the Rome Statute only.

44. Stahn et al., *supra* note 4, at 224-37.

45. See generally Bachrach, *supra* note 10.

46. In this article, the author will focus on participation rights and will not analyze other rights granted to victims within the ICC framework. For a complete study of victims' rights in the ICC Statute, see Sam Garkawe, *The Victim-Related Provisions of the Statute of the International Criminal Court: A Victimological Analysis* 8 Int'l R. of Victimology 269 (2001).

other,⁴⁷ mainly in two ways: the stages at which victims can participate and who can actually participate at each stage.⁴⁸ In this section, this paper will examine some participatory rights acknowledged throughout the Rome Statute that provide for participation at different stages of the proceedings,⁴⁹ which the writer refers to as “specific participatory rights” because their application is limited to situations envisaged within the framework of the articles. This section will first examine article 15(3) of the Rome Statute in the context of the decision of the Prosecution to pursue an investigation. Second, this section will focus on article 19 of the Rome Statute. Finally, this section will analyze articles 53 and 61 of the Rome Statute as well as participation pursuant to articles 56 and 57 of the Rome Statute.

A. Participation Under Part 2 of the Rome Statute

The second Part of the Rome Statute concerns jurisdiction, admissibility and applicable law. It contains important provisions on victims’ participation rights in the pre-trial phase of proceedings. In this context, this section will focus on article 15(3) and article 19 of Part 2 specifically.

1. Decision to Initiate Investigations (Article 15)

Article 15 deals with an important part of prosecutorial proceedings, the decision to initiate investigations. It concerns the power attributed to the Prosecutor to initiate investigations *proprio motu* on the basis of information received.⁵⁰ In many cases the information that leads the Prosecutor to start an investigation *proprio motu* is provided by victims.⁵¹ It may be argued that victims’ participation at this stage of proceedings is important in gathering all the relevant information and understanding what in fact occurred during armed conflicts in order to successfully start and pursue the investigation. For this reason, the Rome Statute allows victims “to make representations” once the Prosecutor decides that there are sufficient grounds to proceed with the investigation.⁵² The scope of their participation is limited to “making representations to the Pre-Trial Chamber” and is concerned only with the request to the Pre-Trial Chamber to start an investigation. However restricted this right may be it is a very important one, since it allows victims to participate at a very early stage of the proceedings, even before the beginning of an investigation, the starting point of criminal proceedings. In this sense, it is not premature at this early stage of proceedings to grant victims rights to participate since the information provided may assist the Pre-Trial Chamber in its decision on whether an investigation should start.

47. The author has divided participatory rights in two groups, specific rights and broad participatory rights. In this section, the focus will be on some provisions that establish specific rights of participation.

48. See Stahn et al., *supra* note 4, at 224-37.

49. This analysis of provisions concerning participatory rights is not exhaustive.

50. See Rome Statute, *supra* note 1, art. 15, para. 1.

51. Morten Bergsmo & Jelena Pejic, *Article 15*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES ARTICLE BY ARTICLE 581, 590 (Otto Triffterer ed., 2d ed. 2008).

52. See Rome Statute, *supra* note 1, art. 15, para. 3.

According to the text of article 15 of the Rome Statute, participation is only permitted on the condition that its exercise is “in accordance with the Rules of Procedure and Evidence”.⁵³ Nevertheless, it is not clear from the text of article 15(3) whether their participation is also submitted to the conditions included in the general participation scheme of article 68(3). This provision states that victims can participate only “where their interests are affected” and the application of article 68(3) relates to “stages of the proceedings determined to be appropriate by the Court.”⁵⁴ If one considers the request for authorization of an investigation to be a stage of the proceedings as pursuant to article 68(3), then whether personal interests are affected becomes a condition to the exercise of victims’ participatory rights under article 15(3).

The *Decision on victims’ applications for participation in the Uganda Situation* (hereinafter “the *Single Judge Decision*”) is a landmark decision of the ICC concerning victims’ participatory rights.⁵⁵ It provided a thorough study of previous decisions of the Court and analyzed various applications for participation pursuant to article 68(3). This decision concerned the application of victims to participate in the pre-trial phase of proceedings in the Uganda situation.

In this decision, the Single Judge has adopted a view that victims’ “personal interests” have an impact on the application of participatory rights pursuant to article 15(3). In other words, the Single Judge Decision applied the principle enacted in article 68(3) as a further condition to article 15(3). In fact, the Single Judge Decision concluded that

Article 15, paragraph 3, provides that “victims” may make representations to the Pre-Trial Chamber when the Prosecutor concludes that there is a reasonable basis to proceed with an investigation and, accordingly, submits to the Pre-Trial Chamber a request for authorisation of such an investigation in the absence of referral by a State or the Security Council. In this scenario, the “personal interests” of the alleged victim (or victims) may be affected since victims’ representations to the Pre-Trial Chamber can provide factual and legal elements for the decision to authorise the investigation into the situation within which the same victims claim to have suffered harm as a result of the commission of crimes within the jurisdiction of the Court.⁵⁶

A final remark is crucial. Article 15(3) requires the making of representations to be in accordance with the Rules of Procedure and Evidence. It is Rule 50⁵⁷ that

53. Article 15(3) provides that “If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence”. *Id.*

54. *Id.* art. 68, para. 3. This provision will be studied in detail in Part IV of this paper.

55. Situation in Uganda, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101 (Aug. 20, 2007) [hereinafter the *Single Judge Decision*].

56. *Id.* ¶ 90.

57. On a more practical basis, Rule 50(3) and Rule 50(4) concern the manner in which the

applies to article 15(3). Rule 50(1) states that whenever the Prosecutor decides to start an investigation, he or she must inform victims of this decision or inform the Victims and Witness Unit.⁵⁸ It is important to stress the rather obvious fact that the Prosecutor must inform only the victims of whom he is aware. The notification of victims is an important step since it enables them to make representations as to whether an investigation should take place and provide indications, which might help the conduct of the investigation before it begins.⁵⁹ As it has been stated,⁶⁰ the Prosecution's obligation to inform victims of the intention to start investigations is quite innovative in comparison with the duty of notification in national systems,⁶¹ where the Prosecutor does not always have such an obligation at early stages of the proceedings.⁶²

2. Challenges to the Jurisdiction of the Court or Admissibility of a Case (Article 19)

Article 19(3) in Part 2 of the Rome Statute concerns a crucial issue in ICC proceedings, namely "challenges to the jurisdiction of the Court or the admissibility of a case." Article 19(3) reads as follows:

The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.⁶³

participation occurs. As stated in article 15(3), victims may only participate by "making representations," which is explained in rule 50(3) that these must be "in writing" to the Pre-Trial Chamber. Rome Statute, *supra* note 1, art. 15, para. 3. RPE ICC, *supra* note 22, Rule 50, ¶¶ 3-4. However, in the event that the Pre-Trial Chamber decides that it is appropriate it may "hold a hearing" to gather further information or to ask further questions.

58. RPE ICC, *supra* note 22, Rule 50, ¶ 1.

59. As noted by Stahn et al., *supra* note 4, at 226 n. 32, the notification of victims at such an early stage was a recommendation of the Eur. Comm. of Ministers, *Recommendation No. R (85)11 on the Position of the Victim in the Framework of Criminal Law and Procedure*, 387th Mtg. of the Ministers' Deputies, Doc. No. 2269 (1985).

60. See Stahn et al., *supra* note 4, at 227-28.

61. For an overview of the duty of notification in national systems, see *id.*, at 227-28, where the author states that: "France, Greece, Italy, Scotland, Turkey, Italy and Malta, do not formally obligate the police or other criminal justice authorities to notify victims at this early stage. In Austria, Iceland and Portugal, a partial statutory obligation for informing victims has been created, meaning that only certain victims are notified, or only certain information is provided. In Germany and Sweden, legislation recognizes that the victim should be notified at this stage, but does not place an obligation on any party to carry out the task of notification. And while England, Wales, Ireland and the Netherlands impose a duty on police to notify victims at the stage of the initiation of investigations, the duty in each case is a general, non-statutory duty."

62. See THE REDRESS TRUST, ENSURING THE EFFECTIVE PARTICIPATION OF VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT: COMMENTS AND RECOMMENDATIONS REGARDING LEGAL REPRESENTATION FOR VICTIMS 4 (2005), available at <http://www.vrwg.org/Publications/02/REDRESS%20-%20Legal%20Representation%20for%20Victims%2023%20May%202005.pdf> (concerning the interest of victims to participate at early stages of the proceedings).

63. Rome Statute, *supra* note 1, art. 19, para. 3.

This provision enacts a right of participation parallel to the duty of the Prosecution with regard to the question of admissibility and jurisdiction. Since victims have an interest that crimes of which they suffered the consequences are admissible under the jurisdiction of the Court, it is fair that they may "submit observations." Here, the scope of the participation is different from that recognized in article 15(3), as the right to make observations pursuant to article 19 is not only recognized for victims but also for those who have referred the situation under article 13. Rule 59 applies to the proceedings pursuant to article 19.

Rule 59 provides for a very specific application of the right as it only allows "the victims who have already communicated with the Court in relation to the case, or their legal representatives" to submit observations.⁶⁴ There are two important points in this Rule. First, it concerns a limited category of victims - those who have previously communicated with the Court - which means that there is an additional practical condition for participation. The sense of "having communicated with the Court" has been explained as "victims that, whilst not having (as yet) been allowed to participate in proceedings, have nevertheless been in contact with the Court."⁶⁵ As concluded in the Single Judge Decision, "having communicated with the Court" applies to victims who have presented the relevant form and duly registered it with the Registry.⁶⁶ Second, and more importantly, Rule 59 refers to "a case" as opposed to "a situation."⁶⁷ In general terms, participation in a case is more restricted than participation in a situation.⁶⁸

This differentiation between "a situation" and "a case" becomes particularly interesting if analyzed in the context of Rule 93, which concerns the power of the Pre-Trial Chamber to seek the views of "victims of a situation."⁶⁹ Using a broad interpretation and applying Rule 93 to the context described in article 19, the Pre-Trial Chamber might allow victims to submit their observations in relation to a situation as well as a case. Be that as it may, this article submits that participation should be limited to victims of a case because the participatory right provided for in article 19 concerns very specific circumstances. Moreover, Rule 59 makes it clear that participation is in relation to a case.

B. Participation Pursuant to Part 5 of the Rome Statute: Investigation and Prosecution

A different regime from that established in Part 2 of the Rome Statute is recognized for proceedings in Part 5, which concerns the "Investigation and Prosecution."⁷⁰ These proceedings are also governed by the Rules of Procedure

64. RPE ICC, *supra* note 22, Rule 59, ¶1.

65. Single Judge Decision, *supra* note 55, ¶ 93.

66. *Id.*

67. For a difference between participation in a situation as opposed to a case, *see* Single Judge Decision, *supra* note 55, ¶¶ 11-21, 96-111.

68. *See* Christopher K. Hall, *Article 19*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES ARTICLE BY ARTICLE 637, 640 (Otto Triffterer ed., 2d ed. 2008).

69. *Id.*

70. Rome Statute, *supra* note 1, arts. 53-61.

and Evidence,⁷¹ which set the path for participation referring to the “initiation of investigation” or the decision not to prosecute⁷² and in relation to the confirmation of charges, pursuant to article 61⁷³ of the Rome Statute. Although the text of article 53 does not specifically concern victims’ right of participation,⁷⁴ it is Rule 92(2) that makes the connection providing that the Court has a duty to notify to victims of the Prosecutor’s decision not to initiate investigations or not to prosecute pursuant to article 53.⁷⁵ Rule 92(2) limits the category of victims to those who have already participated and “those who have communicated with the Court in respect of the situation or case in question.”⁷⁶

The same category of victims is granted a right to participate in the proceedings relating to the Court’s decision to hold a hearing to confirm the charges, pursuant to article 61 of the Rome Statute.⁷⁷ It is Rule 92(3) that establishes the duty of the Court to notify victims “who have communicated with the Court in respect of the case in question” of its decision to hold a hearing to confirm the charges.⁷⁸

Another instance where victims’ participatory rights become important is where evidence is concerned.⁷⁹ More specifically, article 56 of the Rome Statute concerns a “unique investigative opportunity” which may be initiated by a request of the Prosecutor or by the Pre-Trial Chamber itself.⁸⁰ Article 57 concerns *inter alia* the preservation of evidence.⁸¹ Victims’ participatory rights are important at this stage because the preservation of evidence is a crucial point in the proceedings and imperative for the Prosecution in the accomplishment of its duties, therefore participation might affect the conduct of proceedings and trial-management. Within these provisions, participatory rights are not specifically provided for in the text of these articles.⁸² Therefore, participatory rights can only be attached to articles 56 and 57 by the application of article 68(3).

These provisions had an importance especially in regards to the *Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation* (hereinafter “*Application for leave to appeal the Single Judge Decision*”).⁸³ The Single Judge Decision makes the connection between the preservation of evidence as provided by articles 56 and 57 and the notion of “personal interests,” pursuant to article 68(3),⁸⁴ making it clear that victims’

71. See Stahn et al., *supra* note 4, at 225.

72. Rome Statute, *supra* note 1, art. 53.

73. *Id.* art. 61.

74. See generally *id.* art. 53.

75. RPE ICC, *supra* note 22, Rule 92, ¶ 2.

76. *Id.*

77. Rome Statute, *supra* note 1, art. 61.

78. RPE ICC, *supra* note 22, Rule 92, ¶ 3.

79. Rome Statute, *supra* note 1, arts. 56-57.

80. *Id.* art. 56.

81. *Id.* art. 57.

82. See generally Rome Statute, *supra* note 1, arts. 56-57.

83. Prosecution’s Application for Leave to Appeal the Single Judge Decision, *supra* note 29.

84. Single Judge Decision, *supra* note 55, ¶ 100.

personal interests must be affected in order for them to be granted participatory rights in proceedings relating to the preservation of evidence. Furthermore, in relation to article 57 of the Rome Statute, the Single Judge Decision refers to the presentation of victims' "views and concerns" as pursuant to article 68(3) of the Rome Statute.⁸⁵ In its Application for leave to appeal the Single Judge Decision, the Prosecutor challenges the Single Judge Decision in relation to victims' rights to participate at the investigation phase of proceedings.⁸⁶ In this regard, the Prosecutor submits

that, on the one hand, the Decision includes extensive participation at the investigative stage, including in activities undertaken pursuant to Articles 56 and 57 of the Statute, and further leaves open the possibility of further (and undefined) participation.⁸⁷

The above-mentioned debate clarifies, pursuant to the Single Judge Decision, that the conditions set out in article 68(3) of the Rome Statute are applicable to other stages of the proceedings such as the investigation stage pursuant to articles 56 and 57 of the Rome Statute,⁸⁸ even where the latter provisions do not expressly establish a right to participate in proceedings. The Prosecution's response to the Single Judge Decision's interpretation of participatory rights submits that the participation of victims in the investigative phase of proceedings may compromise the expeditiousness of the trial.⁸⁹ Furthermore, the Prosecution submits that "such activity can impact the Prosecution's investigations, and thus affects fairness in terms of "respect for the procedural rights of the Prosecutor".⁹⁰ In spite of the Prosecution's arguments for clarification of the scope of victims' participation in the investigation phase,⁹¹ the Single Judge Decision has maintained the position to allow victims to participate, pursuant to articles 56, 57 and 68(3) of the Rome Statute.⁹²

85. *Id.* ¶ 101.

86. Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 7.

87. *Id.*

88. Donat-Cattin, *supra* note 6, at 1286-87.

89. In fact the object of the Prosecution's application for Leave to Appeal is to clarify the extent of victims' rights to participate in the investigative phase pursuant to article 68(3) and in relation to articles 56 and 57. Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 7.

90. *Id.* ¶ 13.

91. The prosecution submits further that in certain areas, such as in Northern Uganda for example, the participation of victims in the investigation phase could have an impact in the outcome of the investigation since external actors' pressure can compromise the fairness of the investigation. Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 14.

92. Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-112 (Dec. 19, 2007) [hereinafter Decision on Prosecution's Application for Leave to Appeal]. In this decision, the Single Judge denies the Prosecution's application for leave to appeal the Single Judge Decision, *supra* note 26. In fact, the Prosecution's application for leave to appeal concerned mainly the "issue of to what extent and in what manner victims may participate in an investigation, under Article 68(3), including in relation to Articles 56 and 57(3)(c), which [he] submits affects the fair and expeditious conduct of the proceedings." Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 7.

The Single Judge Decision reiterated in December 2007, in the *Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation*⁹³ that victims have a right to participate in the investigative phase of proceedings, only by presenting their "views and concerns," which he classifies as not an "active" intervention.⁹⁴

It is not clear from the text of article 68(3) that it is applicable in this context and articles 56 and 57, which concern the investigation stage, do not expressly provide for victims' participatory rights. Considering the impact of evidence management in the investigation stage and in the entirety of proceedings, profound attention should be given to this phase as it regards victims' participation. In order to maintain a balance between victim's and accused's rights, in certain stages participation may not be appropriate.

IV. A GENERAL PARTICIPATORY RIGHT: PARTICIPATION IN THE PROCEEDINGS PURSUANT TO ARTICLE 68(3) OF THE ROME STATUTE

Article 68(3) concerns the participation of victims in the proceedings without any attachment to a specific stage of the proceedings. The text of the provision reads as follows:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and fair and impartial trial.⁹⁵

The Court has not made a general conclusion as to the scope of article 68(3), limiting itself to the application of this article on a case-by-case basis and to certain phases of the proceedings.⁹⁶ In other words, this provision is contained in Part 6 of the Rome Statute, which pertains to "the trial", but the text of the provision does not limit it to the trial phase.⁹⁷ In fact, this provision states that when victims' personal interests are affected, "the Court shall permit their views and concerns to be presented and considered *at stages of the proceedings determined to be appropriate by the Court*" (emphasis added).⁹⁸

On the one hand, the text of article 68(3) does not specify that participation is only permitted in the trial phase. On the other hand, the structure of the Rome

93. *Decision on Prosecution's Application for Leave to Appeal*, *supra* note 92.

94. *Id.* ¶ 31.

95. Rome Statute, *supra* note 1, at art. 68, para. 3.

96. See Stahn et al., *supra* note 4, at 236 (arguing that there are two different approaches to the interpretation of this article: "One might argue that the Pre-Trial Chamber is empowered to permit the views and concerns of victims to be presented and considered at any stage of the proceedings, pursuant to Article 68(3) . . . Article 68(3) might be viewed as a general mandate clause, which needs to be implemented through other specific provisions in the Statute and Rules and does therefore not serve as an independent basis of authority for the Court to allow for broader victims' involvement.").

97. Rome Statute, *supra* note 1, at part VI.

98. *Id.* at art. 68, para. 3.

Statute suggests that the provisions contained in Part 6 refer solely to the trial stage thus the location of article 68(3) in this Part could indicate that it is limited to the trial phase. If the first interpretation is adopted, article 68(3) was misplaced and should not have been included in that part of the Rome Statute, which concerns the trial stage specifically. Those in favor of this approach⁹⁹ rely on the fact that the text of the provision mentions at “stages of the proceedings determined by the Court” which is not limited only to the trial stage otherwise it would only indicate “at the trial stage.” However, in accordance with article 31(1) of the *Vienna Convention on the Law of Treaties* (hereinafter “*VLCT*”),¹⁰⁰ which is the instrument for interpreting treaties such as the Rome Statute, the location of the provision in Part 6 is an important element for the interpretation, indicating an element of context. If article 31(1) of the *VLCT*¹⁰¹ is used to interpret article 68(3) of the Rome Statute, it could be concluded that the latter only concerns the trial stage.

This paper favors the first interpretation for two reasons. First, albeit the title of Part 6 concerns the trial phase, the text of the article provides two literal indications that its application is not limited to the trial phase. The first indication is the word “stage” in the plural, implying that it refers to various stages. If it referred solely to the “trial stage” it would have been specified that their views were to “be presented and considered at the trial stage” (or at least the word “stage” would be in the singular, referring only to the “trial stage”). Second, the use of the word “proceedings” is larger than the trial alone and includes not only the trial phase but also the pre-trial phase.

With this caveat, this paper submits that article 68(3) does not create an unlimited right of participation at any or all stages of the proceedings. The conditions stipulated in this provision play a major role in deciding whether victims should participate in a specific phase but in spite of the broad scope of article 68(3) there are stages of proceedings when it is inappropriate for victims to participate, as for example participation pursuant to articles 56 and 57. Furthermore, the Court’s role is crucial in limiting the application of article 68(3) only to stages of proceedings that are appropriate and not using this provision indiscriminately to allow victims to take part at every phase of the proceedings. In light of these considerations, a thorough analysis of the conditions of article 68(3) is imperative. This will be the object of the next section, which first studies the conditions that triggers the existence of a participatory right and second the scope of the participation.

99. See Jérôme de Hemptinne, *The Creation of Investigating Chambers at the International Criminal Court: An Option Worth Pursuing?*, 5 J. INT’L CRIM. JUST. 408, 412 (2007) (concluding that article 68(3) of the Rome Statute provides for a participatory right at “all phases of the proceedings, from the opening of the investigation until the sentencing.”).

100. Vienna Convention on the Law of Treaties art. 31, ¶ 1, May 23, 1969, 1155 U.N.T.S. 311.

101. *Id.*

A. The Conditions for the Exercise of Participatory Rights Contained in Article 68(3)

1. Definition of Victims Within the ICC Framework

The right to participate in proceedings is not automatic.¹⁰² The first condition for participation is very clearly stated in the text of the article: the participant must qualify as a victim.¹⁰³ The Rome Statute does not define the term “victim”, which is given in Rule 85 of the Rules of Procedure and Evidence of the ICC. Therefore, the first consideration when examining participatory rights is the concept of victim. According to Rule 85:

For the purposes of the Statute and the Rules of Procedure and Evidence:

- (a) “victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court;
- (b) victims may include organizations or institutions that have sustained direct harm to any of their property¹⁰⁴

The term “victims” is quite vague and it includes not only natural persons but also organizations and institutions (which in practice translate as a greater category of victims who can take part in the proceedings).¹⁰⁵ The scope of the definition of victims, it has been argued, might interfere with the fairness and expeditiousness of the trial since “the definition is too broad and vague allowing for too many victims to participate.”¹⁰⁶ Thus a precise analysis of victims’ applications for participation is crucial.¹⁰⁷

102. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-925, 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, ¶ 12 (June 13, 2007) (concluding that a right to participate in an appeal is not automatic and a demonstration that the personal interests are affected is always necessary). See also, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-824, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*”, ¶ 43 (Feb. 13 2007) [hereinafter *Judgment on the Appeal of Lubanga Dyilo*] (“In the absence of any express mention of victims within regulations 64 (4) or (5), the Appeals Chamber therefore does not interpret the reference to a “participant” or to the filing of “[t]he response” within those provisions to mean that victims have an automatic right to participate in an interlocutory appeal under article 82 (1) (b) of the Statute”).

103. See Single Judge Decision, *supra* note 55, ¶ 9 (implying that the concept of victim should follow the definition given in Rule 85 RPE ICC).

104. RPE ICC, *supra* note 22, at Rule 85.

105. Compare RPE ICC, *supra* note 22, at Rule 85 with Int’l Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, 2(a), IT/32/Rev. 37 (Apr. 6, 2006) (providing for a more restricted definition of victim, “Victim: A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed”).

106. *Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Decision on Victims’ Participation » rendue le 18 janvier 2008*, ICC-01/04-01/06-1135, ¶ 28-32 (Jan. 28, 2008).

107. See e.g. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1136, Application for Leave to Appeal Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation, Introduction (Jan. 28, 2008).

This issue has been studied in a decision of the Trial Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.¹⁰⁸ The Trial Chamber in this decision has taken a very broad approach in granting victim status to persons having suffered harm, allowing an applicant who “suffered any harm as a result of the commission of a crime within the jurisdiction of the Court” to participate in proceedings.¹⁰⁹ This conclusion is controversial and was the object of an application for leave to appeal by both the Defence and Prosecution, which was indeed granted.¹¹⁰

The Appeals Chamber rendered a decision on July 11, 2008.¹¹¹ The Appeals Chamber reversed the Trial Chamber’s decision¹¹² on the extent to which Rule 85 has the effect of restricting participation of victims to crimes contained in the charges confirmed by the Pre-Trial Chamber. In fact, for the purposes of participating in trial proceedings, the Appeals Chamber has made it clear that the “harm alleged by a victim and the concept of personal interests under article 68 (3) of the Statute must be linked with the charges confirmed against the accused.”¹¹³

In the first decision concerning participatory rights, the Pre-Trial Chamber I relying on Rule 85, established a few conditions for applicants to be granted the status of victims in order to participate in proceedings.¹¹⁴ Namely, victim applicants have to: i) be natural persons; ii) persons who have suffered harm; iii) the harm has to have been caused by alleged crimes covered by the ICC’s jurisdiction; and iv) show a causal link between the alleged crimes and the harm.¹¹⁵ The definition of victim is the basis of any application for participatory rights leading one to conclude that it is a general definition and not one that only applies pursuant to article 68(3) of the Rome Statute.

A comment on the definition of “victims” is worth noting. Judge Pikis in a Separate Opinion concluded that the reference to the term “victim” in articles

108. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1119, Decision on victims’ participation, ¶ 90-92, (Jan. 18, 2008), [hereinafter *Decision on Victims’ Participation in the Case of Thomas Lubanga Dyilo*].

109. *Id.* ¶ 90.

110. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1191, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, ¶ 29-34 (Feb. 26, 2008).

111. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1432, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, Judgment (July 11, 2008.) [hereinafter *Judgment on the Appeals of The Prosecutor and The Defence*].

112. Decision on Victims’ Participation in the Case of Thomas Lubanga Dyilo, *supra* note 108, ¶ 97.

113. Judgment on the Appeals of The Prosecutor and The Defence, *supra* note 111, at Reasons ¶ 2.

114. Situation in the Democratic Republic of Congo, ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ¶ 79 (Jan. 17, 2006) [hereinafter *Situation in the Democratic Republic of Congo*].

115. Jérôme de Hemptinne and Francesco Rindi, *ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings*, 4 J. INT’L CRIM. JUST. 342, 345 (2006). See also, Jouet, *supra* note 14, at 260.

43(6), 68(1), (2), (4) and (5) “leave[s] the impression that they are not confined to those immediately affected by pending proceedings.”¹¹⁶

Furthermore, only individuals can be prosecuted for international crimes within the jurisdiction of the Court,¹¹⁷ but victims may include those who are not natural persons, such as organizations or institutions.¹¹⁸ It is also noteworthy that the Single Judge in the situation in Darfur has concluded that the definition of victim cannot include deceased persons within the scope of natural persons.¹¹⁹

2. The Notion of Personal Interest

Qualifying as a victim is not sufficient to participate in proceedings pursuant to article 68(3).¹²⁰ Given that the definition of victim does not seem to cause much ambiguity, participants to proceedings not only have to be victims within the above-mentioned definition pursuant to Rule 85, but must also have their “personal interests affected.”¹²¹ Therefore, the notion of “personal interests” becomes of crucial relevance because it represents the *conditio sine qua non* for the application of this article. Since the article is unclear as to *what* can affect their personal interests, it can be argued that the proceedings in which they wish to take part should affect their “personal interests” and not, in a broad approach, the entire proceedings.¹²² This view is consistent with the Appeals Chamber position that an application is needed for participation in an appeal and that the Appeals Chamber “cannot automatically be bound by the previous determination of the Pre-Trial Chamber that it was appropriate for the victims to participate before the court of first instance.”¹²³

The notion of personal interests has great impact in practice since, depending on the interpretation the Court gives to this concept, the right to participate may be denied. Furthermore, the right is highly dependent on the proceeding the victim may wish to participate in, since in certain proceedings, for example concerning procedural issues, it is difficult to conceive that a victim’s personal interests could be affected.¹²⁴ The notion of personal interests has been given some attention in

116. Separate Opinion of Judge Pikis, *supra* note 26, ¶ 13.

117. Rome Statute, *supra* note 1, at art. 1.

118. RPE ICC, *supra* note 22, at Rule 85.

119. Situation in Darfur, ICC-02/05-111-Corr, Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, ¶ 36 (Dec. 14, 2007) [hereinafter *Darfur Situation Decision*].

120. Separate Opinion of Judge Pikis, *supra* note 26, ¶ 13.

121. *Id.*

122. This approach is consistent with the Appeals Chamber position that an application for participation should be filed for each stage. See Judgment on the appeal of Lubanga Dyilo, *supra* note 102, ¶¶ 38-41.

123. *Id.* ¶ 43.

124. *E.g.*, Prosecution’s Response to the Joint Application of Victims, *supra* note 15 (“[O]rdinarily when the issue to be addressed is a narrow and procedural one, like the one relating to whether an appeal against a decision on confirmation may be appealed under Article 82 (1) (b), it will be difficult to sustain a position that the victims’ ‘personal interests’ are affected.”). See also Separate Opinion of Judge Pikis, *supra* note 26, ¶ 1 (“[P]articipation of victims before the Pre-Trial Chamber does not per se confer upon them a right to take part in an appeal mounted by a party against a first-instance decision or any aspect of it.”).

the decisions rendered by the Court.¹²⁵ Therefore, it is necessary to analyze whether the notion has been restrictively or broadly interpreted. Since this criterion is, as stated above, a condition to allow participation, it is important that the decisions of the Court are consistent in the interpretation of this concept in order to provide for certainty and clarity for future proceedings.¹²⁶

As far as the ICC's jurisprudence is concerned, it is not yet very clear whether this notion should receive a restrictive or broad interpretation. The first decision that dealt with article 68(3) and the notion of "personal interests" was a decision from the Pre-Trial Chamber I in January 2006 regarding the situation in the Democratic Republic of Congo.¹²⁷ In this decision, the notion of "personal interests" was defined in general terms at the investigation stage.¹²⁸

In relation to the same question - how victims' "personal interests" must be affected - the Single Judge Decision concluded that this will be dependent "not only upon the nature and scope of the proceeding, but also upon the personal circumstances of the victim in question."¹²⁹ The Single Judge Decision studied thoroughly the issue of victims' participation rights pursuant to article 68(3) and in particular analyzed the notion of "personal interests."¹³⁰ In this regard, the decision studied previous jurisprudence on victims' participation rights¹³¹ and, as stated by the Prosecution on its Application for Leave to Appeal the Single Judge Decision,¹³² it took a different approach in regards to the notion of "personal interests" than that of previous decisions. In fact, the Prosecution submitted that "the Decision involves the issue of the extent to which victims may participate under Article 68(3); specifically, regarding the scope of victims' participation, the decision provides for a definition of the personal interests of victims diverting from the other chambers."¹³³

In light of these considerations, it can be argued that the Single Judge Decision is not unambiguous in relation to the scope of victims' participation. It concluded that victims should participate in proceedings under articles 56 and 57, albeit these provisions do not expressly provide for participation. As the Prosecution has stated,¹³⁴ article 68(3) should not provide for "autonomous procedural rights" as it can be argued from the Single Judge Decision.¹³⁵

125. See Judgment on the Appeal of Lubanga Dyilo, *supra* note 102, ¶43; Single Judge Decision, *supra* note 55, at ¶¶ 9-10; Separate Opinion of Judge Pikis, *supra* note 26, ¶ 13.

126. Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, at Introduction.

127. Situation in the Democratic Republic of Congo, *supra* note 114, ¶ 61.

128. *Id.* ¶ 63.

129. Single Judge Decision, *supra* note 55, ¶ 89.

130. *Id.* ¶¶ 8-10.

131. *E.g.* Situation in the Democratic Republic of Congo, *supra* note 114, ¶ 7 (analyzing mainly the Pre-trial Chamber I decision).

132. Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 6.

133. *Id.*

134. *Id.* ¶ 7.

135. Single Judge Decision, *supra* note 55, ¶ 103.

A more recent decision has also touched on the issue of “personal interests” at the investigation stage. Judge Kuenyehia, in the situation in Darfur has noted:

It is the view of the Single Judge that in accordance with article 68(3) of the Statute and the jurisprudence of the Court, the assessment of the personal interests of the victims in specific proceedings taking place during the investigation of a situation and the pre-trial stage of a case is only to be conducted for the determination of the specific set of procedural rights attached to the procedural status of victim.¹³⁶

By the same token, the Trial Chamber in a January 2008 decision on victims' participation in the case of Thomas Lubanga Dyilo has concluded that a “general interest in the outcome of the case or in the issues or evidence the Chamber will be considering at that stage is likely to be insufficient.”¹³⁷ In contrast, a previous decision of the Pre-Trial Chamber I of January 2006, the first decision concerning participatory rights, stated that “personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered.”¹³⁸

As far as the Appeals Chamber is concerned, it has taken a decision of principle and has concluded that decisions on whether victims' personal interests are affected should be made on a case-by-case basis.¹³⁹ It has further urged that extreme caution should be taken in order to avoid confusing victims' personal interests with the role of the Prosecution.¹⁴⁰

In light of the above decisions and taking into account the different interpretations of judges, it is still too soon to conclude on which test should be used in the application of article 68(3) of the Rome Statute in relation to the notion of “personal interests.”¹⁴¹

3. The Appropriateness of Participation

As far as other conditions of article 68(3) are concerned, the appropriateness of participation is an important factor to consider. Once the Court has decided that victims' personal interests are affected by the proceedings in which they wish to participate, their participation is again not automatic. The Court must adjudicate on whether it is appropriate for them to participate at that particular stage of the proceedings.¹⁴²

136. Darfur Situation Decision, *supra* note 119, ¶ 13.

137. Decision on Victims' Participation in the Case of Thomas Lubanga Dyilo, *supra* note 108, ¶ 96.

138. Situation in the Democratic Republic of Congo, *supra* note 114, ¶ 63.

139. The Appeals Chamber Decision on the Joint Applications of Victims, *supra* note 15, ¶ 28 (concluding that the question should be decided on a case-by-case basis, but noting some “clear examples” of situations where the personal interests of victims are affected).

140. *Id.*

141. See Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 9.

142. The Appeals Chamber Decision on the Joint Applications of Victims, *supra* note 15, at Separate Opinion of Judge Song, ¶ 21.

The question of appropriateness of participation, like that of the notion of personal interests, is to be addressed by the victims in an application seeking leave to participate.¹⁴³ The application should also be decided on a case-by-case basis. Victims will not be granted an automatic right of participation just because their personal interests are affected. This is clearly evidenced by Judge Song in his *Separate Opinion* in the June 2007 Appeals Chamber Decision on the Joint Applications of Victims.¹⁴⁴ He concluded that although the personal interests of victims were affected, an application for leave to appeal a decision pursuant to article 82(1)(b) of the Rome Statute is not the appropriate stage for victims to participate in the proceedings. At this stage of the proceedings, the Appeals Chamber is determining a preliminary issue on whether or not the appeal can be heard.¹⁴⁵

The question of appropriateness of participation is closely related to the rights of the accused and the right to a fair and expeditious trial. Participatory rights should not be granted if the consequence is to cause an undue delay in the proceedings and thus prejudice the rights of the accused. It seems that this is an important consideration the Court will take into account when judging whether participation is appropriate at a certain stage of the proceedings.¹⁴⁶ In his *Separate Opinion*, Judge Song concluded that

[I]n the circumstances of the present case, it would not be appropriate for the Victims to participate at this stage and to submit their views and concerns in relation to the admissibility of the appeal. The proceedings in this appeal have been delayed for several weeks due to the withdrawal of counsel for the Appellant shortly after the appeal had been filed . . . On balance, the participation of the Victims at this stage of the proceedings therefore would be inappropriate.¹⁴⁷

When judging on the appropriateness of participation, the Single Judge Decision noted that this notion is highly connected to the effect on “personal interests”:

[T]he statute makes it clear that the Court’s discretion in determining the appropriateness of a victim’s participation has to be exercised against the criterion of the existence of an impact on the personal interests of the applicant. With regard to each of the victims involved, this determination will then depend not only upon the nature and scope

143. Judgment on the Appeal of Lubanga Dyilo, *supra* note 102, ¶ 38.

144. The Appeals Chamber Decision on the Joint Applications of Victims, *supra* note 15 at Separate Opinion of Judge Song, ¶ 21. Judge Song concluded that “In light of this decision of the Appeals Chamber and in the circumstances of the present case, it would not be appropriate for the Victims to participate at this stage and to submit their views and concerns in relation to the admissibility of the appeal.” *Id.* ¶ 23.

145. *Id.* at Decision, ¶ 26.

146. *Id.* at Decision, ¶ 22.

147. *Id.* at Separate Opinion of Judge Song, ¶ 23.

of the proceeding, but also upon the personal circumstances of the victim in question.¹⁴⁸

In light of the above, whenever the rights of the accused, which are defined in article 67 of the Rome Statute,¹⁴⁹ and the right to a fair and expeditious trial, are in jeopardy, participation will consequently be inappropriate. As noted by Judge Pikis in his *Separate Opinion*,¹⁵⁰ the appropriateness of the participation will depend on the manner in which victims' views and concerns are expressed. To decide on the appropriate stage of the proceedings it is important to analyze in what way the participation is to occur. In the words of Judge Pikis, participation at a stage of the proceedings

[M]ust be at an interval of the proceedings that would be appropriate, regard being had to the norms of a fair and impartial trial and the rights of the accused evaluated within the context of the Statute. An opportune stage at which the views and concerns of participating victims may be presented is at the outset of the proceedings, alerting the Court and the parties to the implications of the case on the personal interests of victims and how best they may be safeguarded.¹⁵¹

It goes without saying that the "presentation of views and concerns" should be in accordance with the rights of the accused, as the text of article 68(3) states.¹⁵² However, in practice how should this participation be exercised? It is a concern to the accused as well as to the Prosecution that the victims are not given a very broad right of participation so as to become a second prosecutor.¹⁵³ Reconciling the broad right of participation which article 68(3) creates and the right of the accused to have only one opponent is a difficult task; therefore, it is crucial to limit the scope of the participation to strictly the presentation of "views and concerns" of the victims and to properly define what this mode of participation consists of.

In this sense, the Prosecutor bears some duties in regards to the accused that the victims do not have. For instance, the Prosecution holds the burden of proof.¹⁵⁴ If participatory rights are unlimited, it may well happen that victims perform duties that are solely incumbent upon the Prosecution and thus affect the notion of "equality of arms."¹⁵⁵ For the equilibrium of the process not to be broken, victims should not concur with the Prosecution in the effort to prove the accused's guilt and get a conviction. Their role should be to provide the Court, the Prosecution,

148. Single Judge Decision, *supra* note 55, ¶ 89.

149. Rome Statute, *supra* note 1, at art. 67.

150. Separate Opinion of Judge Pikis, *supra* note 26, ¶ 17.

151. *Id.* ¶ 20.

152. See Stahn et al., *supra* note 4, at 236.

153. See, e.g., Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 13, (citing Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-901-Corr-tEN, Corrigendum to the Response to the Application by Victims a/000 1/06,a/0002/06,a/0003/06 and a/0105/06 for Authorization to Participate in the Appeal Proceedings Relating to the Decision on the Confirmation of Charges, ¶¶ 25, 29-31 (May 16, 2007)).

154. Rome Statute, *supra* note 1, art. 66, para. 2.

155. See, e.g., Separate Opinion of Judge Pikis, *supra* note 26.

and the accused with their concerns. In practice, victims should not be allowed to interfere in any role that by its nature belongs solely to the Prosecution in accordance with its duties pertaining to evidence and conviction. Judge Pikiš in his *Separate Opinion* drew a good illustration of how the equilibrium may be reached in practice. Victims ought not to have the power to make any accusation, nor to present their views and concerns in relation to the evidence, the conduction of the case by the Prosecution or the defence put together by the accused.¹⁵⁶

The purpose of victims' participation is to shed light on the suffering and harm that occurred during or as a consequence of the crime being considered and assist in the discovery of the truth. Furthermore, their views and concerns can bring a voice to the entire community who suffered, if not as direct victims, certainly as indirect victims of the crimes committed. If this is the manner in which participation occurs, it does not conflict with the roles of other parties and may indeed prove beneficial for the conduct of proceedings, since it puts the crimes in perspective by giving an idea of the reality in times of conflict. In this sense, victims' participation can be beneficial to the establishment of the truth since they have "first-hand knowledge of the crimes."¹⁵⁷ Furthermore, their participation as victims and not merely their testimony as witnesses can assist the Court with clarification of the facts of the case. As noted by Claude Jorda and Jérôme de Hemptinne, this role can be a "decisive contribution to the prevention of future crimes."¹⁵⁸

4. The Rights of the Accused and the Notion of a Fair and Impartial Trial

Further conditions imposed by article 68(3), are that participation be done in accordance with the rights of the accused and with a fair and impartial trial. This paper has already discussed these conditions when analyzing the notions of "personal interest" and the "appropriate stage of the proceedings." It is evident from these discussions that it is difficult to untangle them from the other conditions stipulated in article 68(3). Nonetheless, it is still important to give some supplementary attention to these two conditions (the rights of the accused and the notion of fair and impartial trial) which are inseparable.

The rights of the accused are expressly defined in article 67 of the Rome Statute.¹⁵⁹ However, this list is not exhaustive. Other rights can be found throughout various provisions of the Rome Statute. For instance, article 66 enacts the principle of presumption of innocence well-recognized in international criminal law and in many domestic criminal systems.¹⁶⁰ In practical terms, the inclusion of

156. *Id.* ¶ 15-16 (Judge Pikiš draws an analysis of the terms "views and concerns," and in regards to other versions of the Rome Statute he concludes that "[t]he term 'views' in the context of article 68 (3) of the Statute signifies 'opinion', in fact an opinion, stance or position on a subject. In the Russian and Spanish version of article 68 (3) of the Statute the word 'opinion' is used. '[C]oncerns' signify matters of interest to a person; matters that preoccupy him/her. '[P]réoccupations' is precisely the word used in the French text of the Statute.").

157. Jorda & de Hemptinne, *supra* note 13, at 1397.

158. *Id.*

159. Rome Statute, *supra* note 1, at art. 67.

160. *Id.* at art. 66. The author submits that this principle could also be regarded as a component of

the victims in the proceedings cannot in any way interfere with the defendant's presumption of innocence as victims' participation give a different color to the facts which are being presented to the Court. In addition to the rights provided for in the Rome Statute, the Rules of Procedure and Evidence provide for some basic guarantees to the accused.¹⁶¹ Further to the presumption of innocence, there are other guarantees to ensure that the accused receive a just and impartial judgment.¹⁶²

The condition of a fair and impartial trial is a right of the defendant. This notion is particularly linked with an expeditious trial, on which victims' participation can cause a great impact. Participatory rights can be a real threat to the expeditiousness of the trial since in certain cases the number of victims can be very high and thus cause undue delays to the proceedings.¹⁶³ It is thus crucial to define who is eligible to participate and when it is appropriate to participate. It is always important to keep in mind that the positions of victims and that of the accused can be opposed throughout the proceedings.¹⁶⁴ Therefore the views and concerns of victims cannot affect the rights of the accused or the right to a fair and impartial trial.

The right to a "fair and impartial trial," as stated in the Single Judge Decision, includes the notion that the fairness of the proceedings "should be preserved to the benefit of all participants in the proceedings," and that would include victims and Prosecution, as well as the accused *who is the core beneficiary of this right*.¹⁶⁵ It goes without saying that the participation at a certain stage may jeopardize the rights of the accused whereas in other stages it might not.

However broad the participatory rights granted in article 68(3) may be,¹⁶⁶ the accused is also granted many rights and guarantees. The aim is then to balance those rights. From the decisions of the ICC interpreting participatory rights in light of the rights of the accused, this balance is being sought.

The Court should not be carried away with the undeniable need for participatory rights and all arguments in favor of broad participation, if that is to the detriment of the rights of the accused. To reach the "balance of conflicting interests", victim's rights should be limited at certain stages of the proceedings where their participation could put at risk the accused's rights. These stages where participation may infringe the accused's rights are, for example, stages where the

the right to a fair and impartial trial.

161. See, e.g., RPE ICC, *supra* note 22, at rule 141(2) (allowing the accused to have the last word at the end of the trial). This right is particularly important since victims can have the right to express the effect of the evidence on their personal interests at the end of the trial, as noted by Judge Pikis, Separate Opinion of Judge Pikis, *supra* note 26, ¶ 21.

162. E.g. Rome Statute, *supra* note 1, at art. 63 (stating that trial should be in the presence of the accused).

163. See Jorda & de Hemptinne, *supra* note 13, at 1408.

164. Jouet, *supra* note 14, at 250.

165. Decision on Prosecution's Application for Leave to Appeal, *supra* note 92, ¶ 27.

166. Rome Statute, *supra* note 1, at art. 68, para. 3. Other more specific rights are granted to victims in article 15(3), 19 and others. However, article 68(3) enacts a very broad right of participation in the sense that it refers to participation in proceedings, which has a very broad definition.

question is purely procedural¹⁶⁷ or stages where their participation might interfere with the duties that belong solely to the Prosecution with regard to the case, e.g. in instances of evidence management.¹⁶⁸

B. The Scope of Participatory Rights Pursuant to Section 68(3) of the Rome Statute

This section will briefly analyze the scope of participation in the proceedings. First, it will examine participation in a case as opposed to a situation. Second, it will analyze the mode of participation, such as the presentation of “views and concerns” pursuant to article 68(3) of the Rome Statute and other types of participation. The analysis in this part of the essay will be fairly short as the question of the scope of participation has been touched upon to a certain extent previously in this paper.

On a preliminary note, in terms of the manner in which participation may occur, it is important to first examine the general form of participation established in article 68(3) which applies to participation pursuant to other articles of the Rome Statute, such as articles 56 and 57 of the Rome Statute, as has been discussed.¹⁶⁹ The manner in which participation may occur has an impact in practice depending on whether this participation occurs by presenting their views and concerns¹⁷⁰ or whether it is by “submit[ting] observations to the Court”¹⁷¹ or even by “mak[ing] representations to the Pre-Trial Chamber.”¹⁷²

The text of article 68(3) does not specifically provide an explanation of whether it refers to victims of a situation or victims of a case.¹⁷³ Since this provision concerns participation at stages of the “proceedings,” it serves as a general provision for participation at different phases, as stated above. This was the interpretation adopted by the Pre-Trial Chamber I in the ICC’s first decision concerning victims’ participation.¹⁷⁴ This decision makes it clear that the wording

167. Prosecution's Response to the Joint Application of Victims, *supra* note 15, ¶ 3.

168. Prosecution's Application for Leave to Appeal the Single Judge Decision, *supra* note 29, ¶ 12.

169. See discussion *supra* Part III.

170. See Rome Statute, *supra* note 1, at art. 68, para. 3.

171. See *id.* at art. 19, para. 3.

172. See *id.* at art. 15, para. 3.

173. See Stahn et al., *supra* note 4, at 221-22. The author affirms that “the Statute and Rules fail to specify clearly if and where participatory rights are linked to ‘victims of a situation’ (e.g. all natural persons, organizations and institutions that have suffered harm as a result of the commission of crimes within the jurisdiction of the Court in a specific territory) or confined to ‘victims of a case’ (e.g. natural persons, organizations and institutions that have suffered harm as a result of the conduct of one or several identified accused or suspects).” Furthermore, he suggests two possible interpretations for the notion of victims: “broad approach . . . in relation to the territorial and temporal scope of the ‘situation’.” This position receives some support from the broad definition of victims under Rule 85 and the fact that the protection of the interests of victims is a principle which applies, in general, at all stages of the proceedings . . . Moreover, the concept of ‘victims of the situation’ is expressly embedded in specific provisions of the ICC system.”

174. See Situation in the Democratic Republic of Congo, *supra* note 114, at ¶¶ 72-75 (recognizing victims’ participatory rights at the investigation stage, in the context of a situation, and concluding that participation pursuant to article 68(3) could entitle victims with a right to take part in proceedings relating to articles 56 and 57 of the Rome Statute).

of article 68(3) of the Rome Statute was interpreted broadly enough to allow for (i) participation in the investigation stage of proceedings¹⁷⁵ and (ii) allow for participation in the investigation of a situation.¹⁷⁶ This position has been questioned by the Prosecution;¹⁷⁷ however the Pre-Trial Chamber I denied the Prosecution's application for leave to appeal this decision.¹⁷⁸ Moreover, this interpretation was reaffirmed by the Single Judge Decision.¹⁷⁹ A decision in the situation in the Democratic Republic of Congo has confirmed that participation in the investigation stage is permitted pursuant to article 68(3) and that it is possible to be granted the status of victim to participate in proceedings before the Pre-Trial Chambers.¹⁸⁰

As far as the mode of participation is concerned, Judge Pikiš in his *Separate Opinion* presents an interesting approach.¹⁸¹ He proceeds to an interpretation of the terms "views and concerns." He concludes that this mode of participation is a very strict one and does not provide victims with a right to become a party to the proceedings.¹⁸² Furthermore, he pursues an analysis on the significance of the term "views" and concludes that victims' views are their opinions, their position in relation to a subject and their "concerns" means their preoccupations, something that bothers them.¹⁸³

Finally, it is worth noting that once all the conditions of article 68(3) are met, the Court has to permit victims' views and concerns to be presented, since the text of the article uses the word "shall" and not "may" as it was a matter of discussion and negotiation.¹⁸⁴

175. *Id.* ¶ 72. For an analysis of participation at the investigation stage, see David Lounici & Damien Scaliá, *Première Décision de la Cour Pénale Internationale Relative aux Victimes: Etat des Lieux et Interrogations*, 76 REVUE INTERNATIONALE DE DROIT PÉNALE 375 (2005).

176. See Situation in the Democratic Republic of Congo, *supra* note 114, at ¶¶ 65-66.

177. Situation in Uganda, ICC-02/04-85, Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation, ¶¶ 20-21 (Feb. 28, 2007). The Prosecution is of the view that the text of article 68(3) is not broad enough to include participation in the investigation of a situation.

178. Situation in the Democratic Republic of The Congo, ICC-01/04-135, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (March 31, 2006).

179. Single Judge Decision, *supra* note 55, at ¶¶ 88-90.

180. Situation in the Democratic Republic of the Congo, ICC-01/04-423, Corrigendum to the Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06, Introduction (Jan. 31, 2008).

181. Separate Opinion of Judge Pikiš, *supra* note 26, ¶ 14-17.

182. *Id.* ¶ 15.

183. *Id.*

184. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, Rome,

V. CONCLUSION

Hideous crimes are a major concern for the entire international community. The need to prevent these crimes from happening as well as to punish the criminals is the endeavor of international criminal justice. However, a justice system cannot be complete without taking into account the existence of victims of crimes and what they have to say about the violence they have experienced during conflict situations.

Hearing the victims' voice¹⁸⁵ is the beginning of a process of reconstructing societies destroyed by international crimes and providing for their reintegration. With the establishment of the ICC as a permanent court to try the gravest crimes, victims' rights are now rooted in its legal documents. This represents a historic event. This paper has addressed whether participatory rights pits victims' against the accused by compromising the latter's rights. This paper has argued that victims' participatory rights do not necessarily have to conflict with the rights of the accused and a fair and expeditious trial.

The ICC system can become a system of justice¹⁸⁶ that moves away from times when suffering was regarded as a tool for punishing criminals to a system where pain brings the right to participation and restoration. The threat of turning victims into a second prosecutor against the accused does not have to become real. This article has argued that the equilibrium can be reached in practice if victims are not granted participation rights at stages when their participation is not appropriate (e.g. at the investigation phase) and are granted limited rights at early stages of the proceedings (thus avoiding undue delays in the proceedings).

Much depends on the current development of the jurisprudence of the ICC in the interpretation and application of these provisions. The manner in which judges of the Court will interpret and apply these provisions is under current development. Competing rights need not necessarily be opposed and it is for the Court to provide for harmony amongst opposing interests. It remains to be seen whether the provisions concerning participatory rights will amount to a "charter of victims' rights", that also takes into consideration opposing rights and interests.

Italy, June 15-July 17, 1998, *Proposal Submitted by Canada*, ¶ 3, A/CONF.183/C.1/WGPM/L.58 (July 6, 1998) (showing that both terms were suggested for article 68(3) of the Rome Statute).

185. As suggested by the authors Mekjian & Varughese in the title of their article, "Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court", *supra* note 4.

186. *But see* Donat-Cattin, *supra* note 10 (stating that the right to participate in proceedings is a true "justice for victims"). The author disagrees with the idea of "justice for victims," since justice is a notion that can only be achieved by the considerations of all parties involved, the community as a whole.

