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## Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court

Gerard J. Mekjian

Mathew C. Varughese

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ARTICLE

HEARING THE VICTIM'S VOICE:  
ANALYSIS OF VICTIMS' ADVOCATE  
PARTICIPATION IN THE TRIAL  
PROCEEDING OF THE INTERNATIONAL  
CRIMINAL COURT

*Gerard J. Mekjian*<sup>†</sup> & *Mathew C. Varughese*<sup>†</sup>

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<sup>†</sup> J.D., Pace University School of Law, *cum laude*, honors in international law (USA); humble thanks to my family for all their support.

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## I. INTRODUCTION

The recognition of individual victims' rights in international law is in part a result of the atrocities that occurred in the wake of World War I (WWI), World War II (WWII) and the pursuit by the international community of individual criminal

responsibility.<sup>1</sup> Prior to WWI and WWII, international crimes pervaded the scope of society with little or no accountability placed on the wrongdoer. However, a number of events in recent times have resulted in the replacement of a culture of impunity with a culture of accountability.<sup>2</sup>

The international prosecutions at Nuremberg and Tokyo after WWII made individuals subject to discipline for purposes of international criminal responsibility, and “developed the premise from which the individual became the subject of international legal rights.”<sup>3</sup> Until WWII, individual rights and obligations *vis-à-vis* the state were the exclusive prerogative of municipal law, and a state was more or less free to treat its own citizens as it pleased.<sup>4</sup> The international community’s enunciation of internationally protected individual rights was accompa-

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<sup>1</sup> CHERIF M. BASSIOUNI, INTRODUCTION TO INTERNATIONAL LAW 91 (2003) [hereinafter BASSIOUNI I]; see generally LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 1 (2002); Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out In Nuremberg, as Mirrored in the ICC Statutes*, 2 J. INT’L CRIM. JUST. 38 (2004); WILLIAM DRISCOLL ET AL., THE INTERNATIONAL CRIMINAL COURT: GLOBAL POLITICS AND THE QUEST FOR JUSTICE (2004).

<sup>2</sup> See generally DRISCOLL, *supra* note 1, at 7-22. “The wave of accountability is gathering strength. At no point in the last fifty years has so much attention been focused on human wrongs: by global media, by nongovernmental organizations, and by the organs of national and international law. One means of holding individuals accountable for these wrongs—criminal prosecution—has become particularly popular of late. Though prosecution for human rights offenses had been a historical rarity, in the year 2000 alone, former officials from at least fourteen different countries were under indictment for violations of international humanitarian law.” See also *The Promises of International Prosecution*, 114 HARV. L. REV. 1957, 1957 (2001) (citing David Stoelting, *Enforcement of International Criminal Law*, 34 INT’L LAW. 669, 669-72 (2000)(Chile, Ethiopia, Haiti)); Roger Boyes & Nigel Glass, *Judge Rules That Nazi Doctor Is Unfit To Stand Trial*, TIMES (London), Mar. 22, 2000, at 15 (Austria); Rajiv Chandrasekaran, *U.N. Names 11 in E. Timor Violence*, WASH. POST, Dec. 12, 2000, at A40 (Indonesia); Douglas Farah, *Chad’s Torture Victims Pursue Habre in Court: Pinochet Case Leaves Ex-Dictator Vulnerable*, WASH. POST, Nov. 27, 2000, at A12 (Chad); Philip Gourevitch, *For-saken*, NEW YORKER, Sept. 25, 2000, at 53, 59 (Democratic Republic of Congo); Tom Long, *Obituary, Aleksandras Lileikis, 93; Indicted in WWII Genocide*, BOSTON GLOBE, Sept. 28, 2000, at B11 (Lithuania); *Pole Charged in Aiding Nazis at a Holocaust Death Camp*, N.Y. TIMES, Nov. 5, 2000, at 18 (Poland); Brian Whitmore, *Latvian Courts Try To Sort Tragic History*, BOSTON GLOBE, Apr. 25, 2000, at A1 (Latvia).

<sup>3</sup> BASSIOUNI I, *supra* note 1, at 91; see generally Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT’L L. 57 (1995).

<sup>4</sup> BASSIOUNI I, *supra* note 1, at 91.

nied by parallel efforts to ensure the protection of these rights through a variety of international enforcement mechanisms and several regional conventions.<sup>5</sup>

Events of the past decade have demonstrated unprecedented international movement toward punishing acts of genocide, crimes against humanity and war crimes, past present and future.<sup>6</sup> One such event is the establishment of the International Criminal Court. It provides the permanency that elicits a deterrent effect against future war crimes, decreases the reaction time of the international community when serious crimes are being committed, and avoids the start-up costs, expenses and dependence of the United Nations Security Council, which is necessarily associated with the establishment of ad hoc tribunals.<sup>7</sup> A unique element to the International Criminal Court

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<sup>5</sup> See BASSIOUNI I, *supra* note 1, at 93. However, few of these conventions and enforcement mechanisms provide for an individual's right to redress or to receive compensation except for the European and the American conventions, which "provide for individual compensation for damages arising out of a state's violation of protected rights," and the 1998 Rome Statute of the International Criminal Court, which provides for a "victim's right to compensation." *Id.*

<sup>6</sup> THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE xlv (Roy S. Lee ed., Transnational Publishers 2001) [hereinafter Lee]. See also Jonathan I. Charney, *Progress in International Law?*, 93 AM. J. INT'L L. 452 (1999). "Each of these events appears to reflect growing support by the international community for effective enforcement of international criminal law. Indeed, some international criminal law has been included within general international law at least since the Nuremberg trials. Subsequently, this area of international law was little used; only recently has this changed. New developments suggest that there has been major movement toward the active and effective application of this law. Many believe that this progress heralds a breakthrough in the achievement of rights protected by international criminal law." *Id.* at 452-53.

<sup>7</sup> *Id.* See Giulio M. Gallarotti & Arik Y. Preis, *Politics, International Justice, and the United States: Toward a Permanent International Criminal Court*, 4 UCLA J. INT'L L. & FOREIGN AFF. 1, 1-2 (1999).

The sentiment for an ICC emanates from dissatisfaction with the prevailing practice of international criminal law. Supporters of the ICC argue that individuals are not being held sufficiently accountable for the most serious crimes against the international community (genocide, war crimes, and crimes against humanity). The use of international tribunals in the 20th century has been ad hoc and temporary, while the present practice of extradite-or-prosecute does not function effectively when states experience bottlenecks in the prosecution of suspected criminals (i.e., because the suspect is a former head of state, because of civil war, because of refusal to extradite suspects, or because the requisite judicial institutions are missing). Under such conditions, an effective deterrent against criminal acts in the global community is lacking because individuals are not held systematically accountable for their transgressions. An ICC, according to supporters, would pro-

(ICC) is the explicit provisions set forth by the Rome Statute<sup>8</sup> and the relevant Rules of Procedure and Evidence<sup>9</sup> reflecting the practical experiences gained by the international community through the Yugoslavia and Rwanda Tribunals.<sup>10</sup> Specifically, the Drafters of the ICC Statute framed prosecutions of mass atrocities as a victim's right and have given victims more ample rights within international criminal proceedings.<sup>11</sup> Under the Rome Statute and the corresponding Rules, victims within the ICC have a right to be represented and are allowed to make presentations independent and separate from the prosecutor at various stages of the proceedings where their interests are implicated.<sup>12</sup>

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vide an ongoing deterrent and thus consolidate a global order based on a respect for international law. To the extent that an ICC became the central player in the prosecution and adjudication of international crime, there would indeed be a major qualitative change in the practice of international criminal law, which has heretofore been principally administered through sovereign states.

*Id.* citing Winston P. Nagan, *Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 127, 134 (1995). See also Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe In International Criminal Courts*, 48 VILL. L. REV. 763, 788 (2003).

<sup>8</sup> See Rome Statute of the International Criminal Court, U.N. Doc. A/ CONF. 183/9 (1998), 37 I.L.M. 999 (1998), available at <http://www.un.org/law/icc/statute/rome.htm> [hereinafter Rome Statute].

<sup>9</sup> See Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000) available at [http://www.un.org/law/icc/asp/1stsession/report/english/part\\_ii\\_a\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf) [hereinafter ICC Rules].

<sup>10</sup> See generally Susan W. Tiefenbrun, *The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the former Yugoslavia and Rwanda, The World Court, and the International Criminal Court*, 25 N.C. J. INT'L L. & COM. REG. 551 (2000); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001).

<sup>11</sup> See Lee, *supra* note 6, at xlv. See also Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625 (2001). "[T]he [ICC] institute[s] new standards and a respect for victims that were absent from prior international criminal law instruments." *Id.* at 643.

<sup>12</sup> Raquel Aldana-Pindell et al., *In Vindication of Justiciable Victims' Rights to Truth and Justice for State Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1429 (2002). Generally, the Rome Statute and the Rules of Procedure and Evidence do not grant victims complete autonomy either "to make decisions regarding the initiation of a criminal investigation or during the proceedings. They do, however, include language providing that victims' views must be taken into account by the appropriate officials responsible for the decisions and that victims must be kept informed of the proceedings. The Rome Statute and the ICC Rules of Procedure and Evidence also permit victims to have their own representatives and to

However, notwithstanding the expansion in the role of the victim and the revolutionary steps taken by the Rome Statute that substantially improve upon the criminal prosecution of international atrocities, there still exists the issue as to what the actual scope of the victims' advocate should be within a proceeding before the International Criminal Court.<sup>13</sup>

This article tackles the issue of the role of the victims' advocate – particularly what is the scope and procedure of the advocate's participation at trial.<sup>14</sup> The first section, Part II, paints a picture of the historical steps involved with the development of an international criminal system, culminating in the creation of the ICC. It highlights briefly the background information for the topic, delineates the historical context upon which the ICC is based, starting with Nuremberg, moving then to the International Criminal Tribunal of Yugoslavia (ICTY) and the International Criminal Tribunal of Rwanda (ICTR). It emphasizes the movement towards increased recognition of victims' rights.

Part III presents an analysis of the Rome Statute and the Rules of Evidence and Procedure, taking a particularly close look at the role of the Victims' Advocate. Part IV emphasizes the restorative aspect of the ICC – codified in the Rome Statute and the Rules – and proposes that the Chambers of the ICC must utilize a holistic balancing test when deciding the participation level of the victim. The paper introduces a triumvirate approach the Chamber should take that emphasizes the interests of all three parties. The paper then highlights how the Rome Statute and the Rules of Evidence are silent as to the specific procedure at trial – specifically at what point the victims' advocate should participate during trial. The article posits that child protective proceedings provide a model to base the procedure for the presentation of a case<sup>15</sup> in an ICC trial.

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make presentations independent from the prosecutor at various stages of the proceedings where their interests are implicated." *Id.*

<sup>13</sup> See SADAT, *supra* note 1, at 85.

<sup>14</sup> The article does not include other steps in the proceedings such as pre-trial investigations, hearings, and reparations.

<sup>15</sup> For example, opening statements, putting witnesses on the stand, and closing statements.

## II. EVOLUTION OF THE VICTIM'S ROLE IN THE HISTORY OF INTERNATIONAL CRIMINAL PROSECUTION

### a. *Historical Antecedents*

The atrocities of the Armenian genocide perpetrated by the Turkish government during WWI, and the explicit doctrine of state sponsored extermination and enslavement of Jews, homosexuals, gypsies and other religious and ethnic minorities within Hitler's Germany, drove most nations at the end of WWII to reconsider state sovereignty claims over the individual rights of its citizens.<sup>16</sup>

Out of moral necessity and in an effort to correct the error of giving amnesty to Turkish officials responsible for the Armenian genocide,<sup>17</sup> the Allied nations of WWII established the Nu-

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<sup>16</sup> Aldana-Pindell, *supra* note 12, at 1402. Thomas Buergenthal argues that the Westphalian principle of non-interference was a valid principle of international law prior to the Second World War but has been abandoned as evidenced by the adoption of universal human rights conventions. THOMAS BUERGENTHAL, CODIFICATION AND IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS, IN HUMAN DIGNITY: THE INTERNATIONALIZATION OF HUMAN RIGHTS 1 (2000). "The international human rights movement, born during the Second World War, has represented a significant erosion of state sovereignty. And it took Hitler and the Holocaust to achieve that. Since 1945, how a state treats its own citizens, how it behaves even in its own territory, has no longer been its own business; it has become a matter of international concern, of international politics, and of international law." Louis Henkin, Lecture: The Robert L. Levine Distinguished Lecture Series *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 4 (1999), citing Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), reprinted in 23 I.L.M. 1027 (1984); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1980), reprinted in 19 I.L.M. 33 (1980); International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195; International Convention on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; International Convention on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948). See also Chan Leng Sun, *Humanitarian Assistance By International Organizations: A Question of Compulsory Access to Victims*, 1991 SING. J. LEGAL STUD. 320, 322 (1991); Patricia A. McKeon, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 ST. JOHN'S J. LEGAL COMMENT. 535 (1997).

<sup>17</sup> See CHERIF M. BASSIOUNI, POST-CONFLICT JUSTICE 91 (2002) [hereinafter BASSIOUNI II] "[T]he amnesty given to Turkish officials after WWI encouraged Adolf Hitler some twenty years later to conclude that Germany could pursue his



remberg Tribunals to prosecute individuals who committed abhorrent acts against humanity within Hitler's Germany with the hope that similar acts would not be repeated.<sup>18</sup>

i. *The Nuremberg Precedent: A General Overview*<sup>19</sup>

The Nuremberg Principles, which established the tribunals that prosecuted WWII war crimes, imposed individual criminal liability for grave international crimes and were later construed to require states to prosecute these crimes.<sup>20</sup> The precedent of Nuremberg made the general principle that states owe a duty to prosecute certain grave crimes, an international human rights

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genocidal policies with impunity. In 1939, in relation to the acts of genocide and aggression committed by German forces, Hitler remarked, "Who after all is today speaking about the destruction of the Armenians?" *Id.*; see also Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221, 226 (1989); John Shamsey, *80 Years Too Late: The International Criminal Court and the 20th Century's First Genocide*, 11 J. TRANSNAT'L L. & POL'Y 327 (2002); Vahakn N. Dadrian, *The Historical and Legal Connections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice*, 23 YALE J. INT'L L. 503 (1998).

<sup>18</sup> Aldana-Pindell, *supra* note 12, at 1403-04.

<sup>19</sup> See *id.* Prosecution focused on punitive damages (i.e. imprisonment or death penalty of accused) as only means of retribution for war crimes.

<sup>20</sup> Aldana-Pindell, *supra* note 12, at 1403-04. "Nuremberg is the seminal event in post-World War II international criminal justice. It is the precedent upon which all ensuing developments are based. In large measure, this is due to the widely shared perception that Nuremberg worked. The Nazis convicted at Nuremberg clearly deserved condemnation and the didactic record the Allies produced has withstood the test of time. This has led more recent prosecutors and legislators to see Nuremberg as an appropriate model for emulation . . ." Stephan Landsman, *Those Who Remember the Past Cannot Be Condemned to Repeat It*, 100 MICH. L. REV. 1564, 1571 (2002). See generally Robert F. Drinan, *Is a Permanent Nuremberg on the Horizon?*, 18-FALL FLETCHER F. WORLD AFF. 103 (1994). Cf. Richard Falk, *Telford Taylor and the Legacy of Nuremberg*, 37 COLUM. J. TRANSNAT'L L. 693 (1999).

"In effect, the significance of Nuremberg as a precedent is circumscribed by the legal texts that gave rise to the process, but especially by the formal holdings of the Nuremberg Tribunal (and the associated proceedings in the Far East, and those of lesser defendants in supplementary trials). These holdings were then given an authoritative rendering by the International Law Commission in the form of the Nuremberg Principles."

*Id.* at 699.

norm. With the passage of time, this became settled international law.<sup>21</sup> Evidence of this prevailing norm is witnessed in several subsequent human rights treaties, which "impose a state duty to prosecute [grave crimes], whether or not the crime was committed in the state's territory."<sup>22</sup> Similarly, international case law and scholars interpreting human rights treaties have read a similar duty to prosecute crimes against an individual's right to life and personal integrity, whether the crime was committed by a state agent or a private actor.<sup>23</sup>

## ii. *Nuremberg & Its Aftermath*

In practice, however, state response to state-sponsored mass atrocities post-World War II has not been faithful to the "duty to prosecute norm"<sup>24</sup> established by the Nuremberg principles and subsequent human rights treaties.<sup>25</sup> In the alternative, history has proven through the atrocities perpetrated during "Southern Europe's transition from dictatorships in the 1970's, Eastern Europe's transition from communism in the

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<sup>21</sup> See Landsman, *supra* note 20, at 1571. According to Justice Robert H. Jackson, American Prosecutor at Nuremberg: "By the Agreement and this trial we have put International Law squarely on the side of peace as against aggressive warfare, and on the side of humanity as against persecution. In the present depressing world outlook it is possible that the Nuremberg trial may constitute the most important moral advance to grow out of this war." Report to the President by Mr. Justice Jackson, Oct. 7, 1946, *reprinted in* R. JACKSON, INTERNATIONAL CONFERENCE OF MILITARY TRIALS, 432, 439 (U.S. DEPT. OF STATE PUB. NO. 3080) (1949).

<sup>22</sup> Aldana-Pindell, *supra* note 12, at 1403-04.

<sup>23</sup> *Id.* A person's right to justice is a universally accepted norm that is embodied in several internationally binding provisions. An example of such a provision is found within Article 2 para. 3 of the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., Part I, at 71, U.N. Doc A/810 (1948) [hereinafter UDHR], which re-affirms the legal principal stating, "where a wrong exists there must be a corresponding judicial remedy." This principle is enshrined in the UDHR under Article 8, which states in relevant part: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law." Even though Article 8 of the UDHR "refers specifically to the right to a remedy in a *domestic jurisdiction*, it constitutes *mutatis mutandis* a basic principle of International Human Rights Law applicable before international jurisdictions." David Donat-Cattin, *Article 68*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 873 (Otto Triffterer ed., 1999) [hereinafter Donat-Cattin].

<sup>24</sup> Aldana-Pindell, *supra* note 12, at 1403. See also Steve Fogelson, *The Nuremberg Legacy: The Unfulfilled Legacy*, 63 S. CAL. L. REV. 833 (1990). The positive results so promised and galvanized by the Nuremberg trials have only been imperfectly realized.

<sup>25</sup> See Aldana-Pindell, *supra* note 12, at 1403; Fogelson, *supra* note 24, at 858.

1980's and 1990's, the severe human rights violations in Asia, the violent civil wars in emerging democracies in Africa, and the violent democratization process in Latin America [that]. . . prosecutions are rare and that inaction, amnesties, and pardons are the norm."<sup>26</sup>

The numerous failures "to prosecute in countries where state sponsored mass atrocities have occurred" have led many, including surviving human rights victims, to reconsider the "viability of the duty to prosecute norm in these contexts," and have further left some to even "challenge its validity."<sup>27</sup> As a result, states have responded "collectively or individually to states' domestic failure to prosecute by solidifying their commitment"<sup>28</sup> to a states' duty to prosecute mass atrocities by developing international human rights laws that grant surviving human rights victims a justiciable right to prosecutions.<sup>29</sup> Such rights to victim-focused prosecution,<sup>30</sup> developed within nascent international law reforms, have sought to "alleviate victims' exclusion from the criminal process,"<sup>31</sup> whose absence many believed worsened victims' treatment in the criminal justice system.<sup>32</sup>

## b. *The ad hoc Tribunals*

### i. *ICTY & ICTR: A General Overview*<sup>33</sup>

The internationalization of criminal justice principles, once considered to be limited by national boundaries has extended

<sup>26</sup> Aldana-Pindell, *supra* note 12, at 1403-04. See Fogelson, *supra* note 24, at 858-59, 867-75.

<sup>27</sup> Aldana-Pindell, *supra* note 12, at 1403.

<sup>28</sup> *Id.* at 1405.

<sup>29</sup> *Id.* at 1406.

<sup>30</sup> *Id.* at 1399.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* "Generally, these norms establish that states must guarantee victims an effective prosecution as a remedy whenever violent crimes are committed against them. Second, these norms grant victims certain participatory rights in criminal proceedings that, while not intended to convert prosecutions into a private process, nevertheless limit states' prosecutorial discretion by establishing mechanisms by which victims may have input into the criminal process." *Id.*

<sup>33</sup> The ICTR statute is nearly identical to that of the ICTY. The statutes differ most notably in their subject matter jurisdiction. The ICTY has jurisdiction over four substantive crimes: a) genocide; b) crimes against humanity; c) grave breaches of the Geneva Conventions of 1949; and d) violations of the laws or customs of war. "The ICTR also has jurisdiction over genocide and crimes against humanity, but

within recent developments of international criminal law to restorative justice principles aimed at providing redress for victims.<sup>34</sup> The International Criminal Tribunals for the former Yugoslavia and Rwanda have made valuable contributions along these lines.<sup>35</sup>

ii. *Limited Provisions for the Victim*<sup>36</sup>

Both ad hoc tribunals continue to play an important role in the enforcement of international criminal humanitarian law. However, they fail to adequately address issues of victim reparation and participation, due to the fact that the statutes and the judge-made rules of procedure and evidence provide only limited guidance on these issues.<sup>37</sup> Victims within the ICTY and ICTR were neither allowed to participate in their personal capacity within the criminal proceeding nor entitled to receive reparations or compensation for damages suffered from the atrocities perpetrated against them.<sup>38</sup> Within both ad hoc Tribunals, the Statute and Rules provided safeguards for those

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its jurisdiction over war crimes is distinct, consisting of violations of Article 3 common to the Geneva Conventions and of Additional Protocol II." Both share both an appeals chamber and a prosecutor. *Fair Trials and the Role of International Criminal Defense*, 114 HARV. L. REV. 1982, n.15 (2001).

<sup>34</sup> BASSIOUNI II, *supra* note 17, at 53. See also Jeffrie G. Murphy, *Cruel and Unusual Punishments*, in RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW 227 (1979). Murphy writes, "The retributive theory of punishment, speaking very generally, is a theory that seeks to justify punishment . . . in terms of this cluster of moral concepts: rights, desert, merit, moral responsibility, justice and respect for moral autonomy." *Id.* See Herbert Morris, *Persons and Punishment*, in *On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology* 34 (1976).

<sup>35</sup> BASSIOUNI II, *supra* note 17, at 58; "As important as they are in their own right, the ICTY and the ICTR are perhaps most intriguing for what they herald. Their efforts to establish individual accountability revived widespread interest in a permanent international criminal court." *Developments in the Law*, 114 HARV. L. REV. 1943, 1954 (2001).

<sup>36</sup> See *id.* Limited right to be informed of the proceedings; right to compensation only through domestic courts; varied measures taken to protect witnesses/victims.

<sup>37</sup> BASSIOUNI I, *supra* note 1, at 101.

<sup>38</sup> "Pursuant to the relevant national legislation, a victim or persons claiming through him may bring action in a national court or other competent body to obtain compensation." ICTY Rules of Evidence and Procedure: Rule 106(B) available at [http://www.oup.co.uk/pdf/bt/cassese/intcrimlaw/ch22/1993\\_icty\\_rules.pdf](http://www.oup.co.uk/pdf/bt/cassese/intcrimlaw/ch22/1993_icty_rules.pdf) [hereinafter ICTY Rules]. See also Timothy K. Kuhner, *The Status of Victims In The Enforcement of International Criminal Law*, 6 OR. REV. INT'L L. 95 (2004).

amongst the victims who were instrumental to the criminal prosecution as *witnesses*.<sup>39</sup> As a result, the Statute and Rules of both the ICTY and ICTR simply afford protective measures to the victims until their testimony is given and the element of proof is collected.<sup>40</sup>

The lack of provisions within the ICTY and the ICTR allowing for victim participation within the proceedings, and reparation or compensation, is based in large part on the intent of the governing bodies of both ad hoc Tribunals to limit redress for serious violations of international human rights law to punitive damages.<sup>41</sup> Such an interpretation is founded upon wording of Resolution 827, from which the ICTR was established in like fashion stating, "the establishment of an international tribunal is for the sole purpose of prosecuting persons responsible for serious violations of international law."<sup>42</sup>

As such, participation of the victim within an ICTY hearing is limited to that of witness and is dependent upon the explicit request of one of the parties to appear as such.<sup>43</sup> Although a

<sup>39</sup> Donat-Cattin, *supra* note 23, at 870 (emphasis added).

<sup>40</sup> *Id.* For the two tribunals, it was evident that witness security was crucial. In this capacity the victims were recognized in both tribunals. Generally, they were arranged, via the Victim and Witness Units of the Tribunals: "transportation of witnesses from home to the tribunal, and accompany witnesses where necessary"; "exit and entry permits, travel documents, safe conduct agreements, and visas"; "protection, safe accommodation, and transportation for witnesses" during and after trials, because insufficient protection of victims jeopardizes fair trials. Nina Bang-Jenson, *War Crimes Tribunals: The Record and the Prospects: The Challenges, the Record, and the Prospects*, 13 AM. U. INT'L L. REV. 1541, 1566 (1998).

<sup>41</sup> See generally JOHN R.W.D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* (1998) [hereinafter JONES]. "Although the ad hoc tribunals for Rwanda and the Former Yugoslavia have created important precedents by holding individuals accountable for violations of international law, they have failed to demonstrate great progress where reparations are concerned." Chanté Lasco, *Repairing the Irreparable: Current and Future Approaches to Reparations*, 10 HUM. RTS. BR. 18, 19 (2003).

<sup>42</sup> Security Council Resolution 827, U.N. Doc. S/Res/827 (1993) (establishing the ICTY). The ICTR was established in like fashion through Security Council Resolution 955 of 8 November 1994: "Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law . . ."; U.N. Doc. S/Res/955 (1994). See generally JONES, *supra* note 41, at 3-4.

<sup>43</sup> See ICTY Rules, *supra* note 38, at Rule 90. See generally JOHN E. ACKERMAN & EUGENE O'SULLIVAN, *PRACTICE AND PROCEDURE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 436-43 (2000) [hereinafter ACKERMAN & O'SULLIVAN].

primary reason for a victim's exclusion from trial proceedings is based upon the punitive nature of the Tribunals, a second reason is premised upon the fact that the rules of procedure of both ad hoc Tribunals have been based mainly on the adversarial system; whereby the victim's role is merely to appear as a witness for one of the parties to the proceedings, thus limiting his/her right to seek reparation for any harm suffered.<sup>44</sup> Further restraints on victim participation is attributed to the requirement that the victim take the oath and leave open the possibility of being brought into contempt should he fail to tell the truth during the proceedings.<sup>45</sup> The victim may speak only in the context of the examination and cross-examination conducted by the parties and he may neither demand the presence of a lawyer when giving evidence nor does he have any right of access to the evidence presented during the trial.<sup>46</sup> Finally, a victim cannot

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<sup>44</sup> See generally Susanne Malmström, *Restitution of Property and Compensation of Victims in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE 379 (Richard May et al. eds., 2001) [hereinafter *ICTY Essays*]. See, e.g. PRESS RELEASE, ICTY, *Remarks of Judge Richard May, Judge of the International Criminal Tribunal for the Former Yugoslavia, to the Fourth Session of the Preparatory Commission for the International Criminal Court* (Mar. 20, 2000), available at <http://www.un.org/icty/pressreal/p479-e.htm> (last visited on January 16, 2005) (stating the ICTY's rules do not contain provisions relating to victims' participation in the proceedings such as claiming reparations).

<sup>45</sup> See ICTY Rules, *supra* note 43, at Rule 90(A): "Every witness shall, before giving evidence, make the following solemn declaration . . . 'I solemnly declare that I will speak the truth, the whole truth and nothing but the truth.'"; and Rule 77(A)(i): "The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and willfully interfere with its administration of justice, including any person who, as a witness 'before a Chamber, contumaciously refuses or failures to answer a question."

<sup>46</sup> Issue of communication between the parties and witnesses, once the witness has taken his or her solemn declaration under Rule 90(B), was raised by Defence Counsel who discovered that Counsel for the Prosecution had been engaging in out-of-court discussions with Prosecution witnesses during breaks in the proceedings. The Trial Chamber ordered that the Prosecution and Defence must not, henceforth, communicate with a witness, once he or she has made the solemn declaration provided for in Rule 90(B) and commenced testifying, on the subject of the content of the witness's testimony save with the leave of the Chamber. See ACKERMAN & O'SULLIVAN, *supra* note 43, at 439. It is commonly accepted that war crimes trials should provide a space for victims to tell their stories. A close reading of the transcripts of victim-witnesses' testimonies in show however, that war crimes trials effectively silence, rather than hear, victims. Victim-witnesses predictably govern neither the agenda nor the pace of the hearings. There are great demands that the legal process imposes on victim-witnesses and there exists tensions that arise out of their participation in it. See Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT'L L.

demand to be kept informed of the progress of the proceedings, even where they are of personal concern to him.<sup>47</sup>

Drafters of both the ICTY and ICTR Statutes prioritized the importance of safe-guarding the rights of the accused to be fairly and expeditiously tried. This priority was due in large part to the nature and scope of the crimes over which the ad hoc Tribunals possessed jurisdiction.<sup>48</sup> The governing bodies of both Tribunals also found it to be a burdensome prospect to allow the inclusion and presence of a great number of victims within the proceedings with their differing claims and emotions.<sup>49</sup> The governing bodies specifically believed a great number of victims present in the trial proceedings would unduly delay the process, thus undermining the rights of the accused.<sup>50</sup> As a consequence and in an effort to prevent the victim from

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151 (2004). "The ICTY provides victims and witnesses with a certain set of rights. These rights, however, need to be balanced against a defendant's right to examine witnesses. The general rule is that all witnesses have to testify in person before the ICTY [under Rule 90] and need to be available for examination and cross-examination. [Rule 85(b)]." Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255 (2001).

<sup>47</sup> See ICTY Rules, *supra* note 43, at Rule 90. The Chamber decided to utilize the services of the Victims and Witnesses Unit, ordering that if a witness wishes to contact the party which called him or her, he or she shall inform the competent staff of the Victims and Witnesses Unit who will then report the matter to the relevant party. ACKERMAN & O'SULLIVAN, *supra* note 43, at 439. The Chamber also indicated that it was aware of the potential practical problem of numerous victims and numerous requests. *Id.*

<sup>48</sup> The fear is impropriety and impartiality. See Andrew J. Walker, *When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to Be Insulated from International Politics and to Protect Basic Due Process Guarantees*, 106 W. VA. L. REV. 245, 259 (2004). The heinous and cataclysmic nature of crimes such as war crimes and genocide elicit a lynch-like mob phenomena. It creates pressure nationally and internationally. For example, in Yugoslavia the ICTY now bears the burdens of the Security Council and the entire "international community" it purportedly represents. It shows the pressures the judges are under and how the rights of the accused to a fair trial are in doubt. Without these rights being secured, doubt is cast on the faith in the judicial system since the fundamental premise of impartiality is lost. See Scott T. Johnson, *On The Road To Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 INT'L LEGAL PERSP. 111 (1998). Scott investigates the capability of the ICTY to ensure the fair protection of the rights of the accused. He identifies problems at three levels: institutional, organizational and procedural. *Id.*

<sup>49</sup> See JONES, *supra* note 41, at 4-20.

<sup>50</sup> See *id.*; Cf. Thomas Verfuss, *Trying Poor Countries' Crimes in a Rich City*, 2 J. INT'L CRIM. JUST. 509 (2004)(suggesting that the very nature of the ICTY impeded on victim's rights, i.e. location of the tribunal); Timothy K. Kuhner, *The Sta-*

intervening in the case, the Prosecution within the ICTY is given the task of representing the victim at all stages of the criminal proceedings, thereby leaving it upon national courts to decide upon any compensation awards.<sup>51</sup> Although in contrast, the ICTR afforded victims greater inclusion through different levels of quasi-participation, their involvement did not allay many concerns nor address grievances of victims of Rwanda's genocide.<sup>52</sup>

### c. ICC

#### i. A General Overview

Moving away from the lack of provisions allowing participation within the ICTY and insufficient inclusion of victims' in the ICTR, a victim's right to participate in ICC proceedings, codified by the Rome Statute and Rules of Evidence and Procedure, is an important innovation in international justice. For the first time, with the establishment of the ICC as a permanent international criminal court, victims are given the most comprehensive and specific list of participatory rights in criminal proceedings.<sup>53</sup> An increased focus upon victims' rights through-

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*tus of Victims in the Enforcement of International Criminal Law*, 6 OR. REV. INT'L L. 95 (2004).

<sup>51</sup> See generally ICTY ESSAYS, *supra* note 44. "The ICTY's focus on accountability for individual acts does not relieve the state from its obligation to provide compensation. Under Rule 106 of the Rules of Procedure and Evidence, the ICTY transmits to the competent authorities of a state its findings that the accused caused injury to the victim. The victim (or his/her representative) may bring an action in the national court or other competent body to obtain compensation. This approach provides a way for victims to obtain compensation by relying on the ICTY's standing authority under the UN Security Council." Mark S. Ellis & Elizabeth Hutton, *Policy Implications of World War II Reparations and Restitution As Applied to the Former Yugoslavia*, 20 BERKELEY J. INT'L L. 342 (2002).

<sup>52</sup> Victims within the ICTR were not allowed to participate within tribunals held for high ranking officials, however they were given limited rights to participate in town hall settings where they were asked to be judge and jury against low level perpetrators. Specifically, an ICTR prosecutor asked victims and witness to determine whether certain individuals held in custody should be further investigated for crimes against humanity.

<sup>53</sup> Aldana-Pindell, *supra* note 12, at 1429. "Like the ICTR, ICTY. . . the ICC rules of evidence and procedure and its Rome Statute contain provisions on the protection of victims and reparation to victims." Kuhner, *supra* note 38, at 144-147 *citing* arts. 75(1, 2, 5) (providing for reparations for "restitution, compensation, and rehabilitation") and 68 (providing for the protection of victims); *id.*, *citing* Rules 86-7. "These provisions are slightly more elaborate in the ICC than in the ad hoc and mixed tribunals, but this is merely a question of degree. More signifi-



out the Rome Conference and the General Assembly's Preparatory Committee for the Draft Statute of the ICC was a direct response to the limited participation of victims within the Statutes and Rules of Procedure and Evidence of both the ICTY and ICTR.<sup>54</sup>

The rights afforded to victims in criminal proceedings under the Rules are derived in part from Civilist legal systems, which allow a victim to act as *partie civile*.<sup>55</sup> Under the doctrine

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cantly, the ICC contains a change in the kind of rights afforded to victims by providing them with a participatory role in the adjudicative process. This expanded role contains provisions which allow victims to make opening and closing statements," *id.*, citing Rule 89, "question a witness," *id.*, citing Rule 91(3), "and have their views taken into account in a host of matters." *Id.*, citing Rule 93 (stating that the views of victims or their representatives may be taken into account in deciding issues referred to in Rules 107, 125, 128, 136, and 139, inter alia). "These matters include the initiation of an investigation," *id.*, citing Rule 107, "decision to hold a hearing on confirmation of charges in the absence of the defendant," *id.*, citing Rule 125, "whether to amend the charges," *id.*, citing Rule 128, "whether to conduct joint or separate trials," *id.*, citing Rule 136, "and how to evaluate an admission of guilt." *Id.*, citing Rule 139. "Further, the ICC makes allowances for financial assistance for victims who cannot otherwise obtain legal representation and provides for notification of trial dates and other facts to victims and their representatives." *Id.*, citing Rule 95 and 92. "This evolution, culminating in the ICC, shows three things: first, ad hoc, mixed, and international tribunals have been at least somewhat responsive to victims; second, that responsiveness has increased significantly; and third, that responsiveness has not been a Faustian deal in which some justice is provided, but broad questions of social order and authority are wrested from the populace in other areas. The ICC is remarkable in that it makes allowance for victim participation in non-trivial ways. In the language of Minow's various rhetoric, victims can seek truth by questioning witnesses, receive therapeutic value from speaking in open court, and offer forgiveness if they want - all in the context of achieving justice, which includes punishment, compensation, and deterrence." *Id.*, citing MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 147 (1998).

<sup>54</sup> Peter G. Fischer, *Comment: The Victims' Trust Fund of the International Criminal Court - Formation of a Functional Reparations Scheme*, 17 EMORY INT'L L. REV. 187, 196-97 (Spring 2003). The scope of the International Criminal Court's divergence from the precedent of limited victims' rights followed by the ICTY and ICTR is evidenced by the very fact that a definition of a victim is more expansive under the ICC Rules of Procedure and Evidence. Under the ICC Rules, victims are defined as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court," which may include "organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes." ICC Rules, Rule 85. *Cf.* ICTY Rule 2.

<sup>55</sup> See *International Protection of Victims*, NOUVELLES ETUDES PENALES 7 (M. Cherif Bassiouni ed., 1988). See, e.g., Belgian Code de Procedure Penale arts. 82, 63, 108; French Code de Procedure Penal, arts. 85-89; CRIMINAL PROCEDURE SYS-

of *partie civile*, a victim is afforded the capacity to directly through their counsels, or indirectly, through the prosecution, present evidence in a criminal proceeding which the victim deems necessary for the subsequent pursuit of damages in civil proceedings.<sup>56</sup> The premise of the doctrine of *partie civile* provided the drafters of the Rome Statute a basis from which to create rules of evidence and procedure that allow more inclusive victim participation.

## ii. *The Victim's Right To Participate*

As stated by Roy S. Lee:

. . . [T]his new Court has been transformed from an instrument initially designed for punishing individual perpetrators of atrocious crimes to an international court administering restorative justice. Under this system reparations will be made to victims, and *victims will also be able to take part in proceedings*, with rights to privacy, representation, and to security of person. The newly finalized Rules protect and promote these rights and interests, and establish a procedural framework to give meaning and effect to these important provisions, without in any way infringing upon the rights of the accused. A mechanism is also provided in the Rules to set up institutional support to victims through the Victims and Witnesses Unit.<sup>57</sup>

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TEMS IN THE EUROPEAN COMMUNITY 17, 18, 170-171 (Christine Van Den Wyngaert ed., 1993).

<sup>56</sup> BASSIOUNI I, *supra* note 1, at 651. The *partie civile* is essentially the victim of the crime who has the right to have his civil action associated with the criminal prosecution. In civil law jurisdictions, this victim's right has existed for ages. Most importantly, it provides the victim with cost-free means to have his or her tort case established. Problems of common law jurisdictions are not seen in that damages are not a problem in civil law jurisdictions, because the range is statutorily set. In addition, the burden of proof problem is not presented, because the standard is the same in Europe for both criminal and civil actions; the judge (or jury) must come to a conviction. Christopher L. Blaksley, *Jurisdiction, Definition of Crimes, and Triggering Mechanisms*, 25 DENV. J. INT'L L. & POL'Y 233 (1997).

<sup>57</sup> Lee, *supra* note 6, at lxiv (emphasis added) citing Rules 85-93 of the Rules of Evidence. See also Valerie Oosterveld, Mike Perry, & John McManus, *The Cooperation of States with the International Criminal Court*, 25 FORDHAM INT'L L.J. 767 (2002). The ICC represents a progressive innovation in the role and status of victims and witnesses before international tribunals. It allows victims to participate actively and extensively throughout ICC proceedings. *Id.* "Both ad hoc tribunals had serious failings in supporting victims. In the ICC, there is a victims and witnesses unit, a trust fund for victims, and a support requirement for the legal representatives of victims required by the Rome Statute." John L. Washburn,

The Rome Statute and the Rules affirm that victims have: (i) an absolute right to attend within trial proceedings under Rule 91(2)<sup>58</sup> and discretionary right to participate under Rule 91(3)(a),<sup>59</sup> (ii) the faculty to make representations before the Court even in the Pre-Trial procedure, as stipulated within Article 15.3,<sup>60</sup> (iii) the right to be heard before decisions on reparation under Article 75.3,<sup>61</sup> and (iv) the right to intervene on appeals concerning reparation orders under Article 82.4.<sup>62</sup> All these provisions are to be interpreted as particular specifications of the general right of participation envisioned under Article 68.3<sup>63</sup> of the Rome Statute.<sup>64</sup>

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*What Lessons Can Be Learned From the Ad Hoc Criminal Tribunals?*, 9 U.C. DAVIS J. INT'L L. & POL'Y 23, 29 (2002).

<sup>58</sup> "A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representatives intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims." ICC Rules, Rule 91(2).

<sup>59</sup> "When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber." ICC Rules, Rule 91(3)(a).

<sup>60</sup> "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." Rome Statute, Art. 15 para. 3

<sup>61</sup> "Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States." Rome Statute, Art 75 para. 3.

<sup>62</sup> "A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence." Rome Statute, art. 82 para. 4.

<sup>63</sup> "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence." Rome Statute, art. 68 para. 3.

Notwithstanding the victims' comprehensive right to participation and reparation within the Rome Statute and the Rules, a victim does not have complete autonomy to make decisions regarding the initiation of criminal investigation or how the investigation should proceed before trial.<sup>65</sup> However, both the Rome Statute and the Rules contain language providing "that victims' views may be taken into account by 'the appropriate officials responsible for the decisions and that victims may be kept informed of the proceedings.'"<sup>66</sup>

The general right of victim participation granted under Article 68 paragraph 3, created an unnerving prospect for some delegates to the Rome Statute, who feared of the crippling effect a large number of victims would have in any given ICC trial.<sup>67</sup> The essential fear for many of the delegates was the strain such a large number of victims would have on the due process rights of the accused. Delegates who harbored these concerns primarily had an adversarial model in mind.

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<sup>64</sup> Donat-Cattin, *supra* note 23, at 880. To be sure, the Rome Statute affords victims of crimes explicit rights to make representations, Rome Statute, article 15, paragraph 3, to submit observations, Rome Statute, article 19, paragraph 3, and to have their views and concerns presented and considered "where the personal interests of the victims are affected." Rome Statute, article 68 para. 3.

<sup>65</sup> Aldana-Pindell, *supra* note 12, at 1429-30. That autonomy lies with the Prosecutor referred to as *Proprio motu*, which is initiating a proceeding on the Prosecutor's own motion and without seeking the approval of the Security Council or State Party referrals. See Rome Statute, art. 53.

The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

Rome Statute, art. 53.

<sup>66</sup> Aldana-Pindell, *supra* note 12, at 1429-30.

<sup>67</sup> Similar concerns were expressed by the delegates involved with the drafting of the Rules of Procedure and Evidence for both the ICTY and ICTR.

In order to overcome this concern and ensure the protection of the rights of the accused, Article 68, paragraph 3 states that victims' participation shall take place "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."<sup>68</sup> Such language allowed for the creation of a new dynamic wherein punitive justice, found within adversarial court systems, was to be balanced with restorative justice principles born out of a *victim's movement* under the doctrine of *partie civile*.<sup>69</sup>

Although the modalities for victim participation in a given case is left to the Trial Chamber, the drafters of the Rome Statute sought to create clear mandates allowing for victim's participation through expansive Rules of Evidence and Procedure. Such a commitment is what truly laid the parameters with which a movement toward victims' rights was translated into international law.

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<sup>68</sup> Lee, *supra* note 6, at li. "In other words, victims do not have the right to become a genuine party to the proceedings, but they do have the right to be represented before the ICC." Michele Caianiello & Giulio Illuminati, *From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court*, 26 N.C. J. INT'L L. & COM. REG. 407, 453 (2001). The model for victims' participation does not go as far as some national systems but further than others. This is seen as a crucial achievement because the Court's role should not purely be punitive but also restorative. Distinguished from the ICTY and ICTR which were both limited to solely punitive damages. See generally JONES, *supra* note 41, at 4-20. According to Caianiello and Illuminati, the victim is allowed only marginal participation in the proceedings. "The Rome Statute does not, . . . provide for a *partie civile* giving victims the power to sue the defendant for damages as a party to the criminal process, as is done in the French and Italian systems among others. The participation of the victim is viewed with disfavor because it would make the task of determining guilt and innocence even more difficult and might prejudice the rights of the accused. 26 N.C. J. INT'L L. & COM. REG. at 453; see also Robert Christensen, *Getting To Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court*, 6 UCLA J. INT'L L. & FOREIGN AFF. 391 (2002).

<sup>69</sup> Lee, *supra* note 6, at li. The model for victims' participation does not go as far as some national systems but further than others. This is seen as a crucial achievement because the Court's role should not purely be punitive but also restorative. Distinguished from the ICTY and ICTR which were both limited to solely punitive damages. See generally JONES, *supra* note 41, at 4.

### III. ANALYSIS OF THE ROME STATUTE AND THE RULES OF PROCEDURE AND EVIDENCE:

#### a. *A General Overview of the Provisions for Victims: Victims and Witnesses Unit*

After World War II, one of the Nuremberg Tribunals held that, "prosecutors and judges involved in a trial lacking the fundamental guarantees of fairness could be held responsible for crimes against humanity."<sup>70</sup> The ICC holds true to this Nurem-

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<sup>70</sup> William A. Schabas, *Article 67*, at 846 in TRIFFTERER-ROME COMMENTARY; see also Aldana-Pindell, *supra* note 12, at 1403-04, *citing* U.N. GAOR, 5th Sess., Supp. No. 12, at 11, U.N. Doc. A/1316 (1950) (reporting on the Nuremberg Principles)(state obligation/duty to prosecute). As a matter of general principle, the international human rights norm that states have a duty to prosecute certain grave crimes has progressively become settled law. Notwithstanding whether or not the crime was committed in the state's territory, the majority of specialized human rights treaties impose a state duty to prosecute such acts. Furthermore, international case law interpreting international human rights treaties have interpreted a similar duty to prosecute crimes, whether the crime was committed by a state agent or a private actor. *Id.* at 1402. There are several international human rights laws that establish that states have a duty to the public to prosecute crimes against the individual's rights to life and personal integrity, and to impose penalties. Aldana-Pindell, *supra* note 12, at 1403-04. International human rights tribunals have interpreted certain provisions in comprehensive human rights treaties as establishing a duty to prosecute right to life and humane treatment violations. See, e.g., *Velasquez Rodriguez v. Honduras*, Case No. 4, Inter-Am. C.H.R., OEA/Ser. C, PP 159-88 (1988) (Article 1.1: obligation to respect rights of the American Convention), *available at* <http://www.corteidh.or.cr>; *Gulec v. Turkey*, 28 Eur. H.R. Rep. 121, PP 74-83 (1998) (Article 2 of the European Convention); *Commission Nationale des Droits de L'Homme et des Libertes vs. Chad (merits)*, African Comm. Hum. & Peoples' Rights, Communication No. 74/92, PP 17-22 (1995) (Article 1 of the African Charter), *available at* <http://www1.umn.edu/humanrts/africa/comcases/comcases.html>. Some specialized human rights treaties expressly include provisions requiring signatory states to investigate, prosecute, and punish those responsible for gross human rights violations, including slavery, genocide, torture, forced disappearance, and other acts of violence. See *Convention to Suppress the Sale Trade and Slavery*, Sept. 25, 1926, art. 6, 60 L.N.T.S. 253, 46 Stat. 2183; *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, art. 1, 78 U.N.T.S. 277; *Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment*, Dec. 10, 1984, art. 4, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51; *Inter-American Convention to Prevent and Punish Torture*, Dec. 9, 1985, art. 6, O.A.S. Treaty Ser. No. 67, OAS/Ser.L/V/I.4 rev. 7, *reprinted in* 25 I.L.M. 519 (1985); *Declaration on the Protection of All Persons From Enforced Disappearances*, art. 4, U.N. GAOR, 47th Sess., Supp. No.49, at 207, U.N. Doc A/47/133 (1992); *Inter-American Convention on the Forced Disappearance of Persons*, art. 1, OAS Treaty Ser. No. 47, OAS/Ser.L/V/I.4 rev.7, *available at* <http://oas.org/cim/english>; *Declaration on the Elimination of Violence Against Women*, art. 4, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993); *Inter-American Convention on the Preven-*

berg precedent by not only respecting the rights of the accused to a fair trial, but by also recognizing that the participation of victims in the proceedings “is a necessary mechanism to implement their right to justice before the court,”<sup>71</sup> and a contributing element to finding the truth.<sup>72</sup>

The ICC’s commitment to providing victims a means of restorative justice is achieved through several aspects of the Rome Statute and the Rules. However, the crux of the *victims’ movement* is exemplified in Rule 90(1),<sup>73</sup> which in very simple terms gives victims the right to be legally represented in ICC proceedings.<sup>74</sup> It is the very right of legal representation that proves to be the most important and most procedurally challenging aspect to apply within the ICC.<sup>75</sup>

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tion, Punishment and Eradication of Violence against Women, June 9, 1994, art. 7(c), 27 U.S.T. 3301, *reprinted in* 33 I.L.M. 1534; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 5, U.N. Doc. A/3/383 (2000). *See also* Orentlicher, (discussing the duty to prosecute norm under international human rights law).

<sup>71</sup> Donat-Cattin, *supra* note 23, at 873.

<sup>72</sup> *See id.* The right of justice for victims and their effective “participation in the justice process” as an essential element to fully realizing the “truth and to obtain reparations” is achieved through “legal representation.” *Id.*; *see generally* Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT’L L. REV. 301 (2003)(emphasizing victim’s needing a process to achieve reconciliation and highlighting the victims as revelations of the truth), *citing* THE JUSTICE AND SOCIETY PROGRAM OF THE ASPEN INSTITUTE, STATE CRIMES: PUNISHMENT OR PARDON? 93 (1989) (highlighting Professor Thomas Nagel’s observance that acknowledgement results when knowledge is made accessible to the public); Aryeh Neier, *What Should be Done About the Guilty?* THE N.Y. REVIEW OF BOOKS 34 (Feb. 1, 1990)(pointing out that governments are accountable to the people and that accountability is more than a “political tactic” as it encompasses recognizing moral responsibilities such as listening to and acknowledging the pleas of the victims); Priscilla Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 607-09 (1994) (stressing the importance of acknowledging the truth, rather than just finding it, since acknowledgement indicates that the state admitted its crimes); PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE ATROCITY AND TERROR 24-27 (Routledge 2001) (arguing that the basic goal of a truth commission is “sanctioned fact finding” and that official recognition opens a topic for discussion and public review).

<sup>73</sup> *See infra* note 84.

<sup>74</sup> All parties within a trial, whether the victim, the accused or society as a whole (represented by the Prosecutor) has the same expectation from the criminal process: to punish the guilty, and acquit the innocent. *See* Donat-Cattin, *supra* note 23, at 877.

<sup>75</sup> *See id.* Lee, *supra* note 6, at 462; Aldana-Pindell, *supra* note 12, at 1403-04. During negotiations, “some cross-cutting issues were encountered by all groups,

The Rules of Procedure and Evidence were negotiated under the chairmanship of Ms. Silvia Fernandez de Gurmendi of Argentina, who had also coordinated negotiations of procedural issues in Rome.<sup>76</sup> It was during the Paris Seminar, which was later issued as a Preparatory Committee document where it was recognized that victims might have to be grouped together in order to make victim participation possible in practice. The subsequent legal representation of such a large class of victims was to be done by a victims' advocate.

The designation of a victims' advocate raised several questions among the drafters of the Rules centering on the ability of the victim to choose and afford a legal representative and the conflict of interests that would undoubtedly ensue among them.<sup>77</sup> In order to address these concerns, it was agreed that the Registrar,<sup>78</sup> under the auspices of the Trial Chamber, when required, would have to facilitate the process of obtaining and sustaining legal representation by appointing a victims' advocate for large number of victims out of a pool of qualified attorneys.<sup>79</sup>

Specifically, Article 43, paragraph 6 provides that the appointment of a victims' advocate is to be done through the Vic-

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notably the extent to which victims are involved in the court process." Lee, *supra* note 6, at li.

<sup>76</sup> Lee, *supra* note 6, at li.

<sup>77</sup> Lee, *supra* note 6, at 463, 262-284; see generally Christopher Keith Hall, *The First Five Sessions of the UN Preparatory Commission for the International Criminal Court*, 94 AM. J. INT'L L. 773, 783 (2000). An example of a conflict among victims is where two victims have adjoining properties and there are discrepancies in the damages each victim claims.

<sup>78</sup> There are two main functions of the Registrar as set forth by Rule 13. The text originated from an Australian proposal. Lee, *supra* note 6, at 260, citing PCNICC/1999/DP.1 (26 January 1999). First that it serves as the channel of communication of the Court. Rule 13(1). "Functions of the Registrar. . . Without prejudice to the authority of the Office of the Prosecutor under the Statute to receive, obtain and provide information and to establish channels of communication for this purpose, the Registrar shall serve as the channel of communication of the Court." *Id.* Second that it is responsible for internal security of the Court. Rule 13(2). "The Registrar shall also be responsible for the internal security of the Court in consultation with the Presidency and the Prosecutor, as well as the host State." *Id.*

<sup>79</sup> ICC Rules, Rule 90(2). See Lee, *supra* note 6, at 463, 262-284. There is arguably a similarity to the International Class Action Suit. See William J. Aceves, *Actio Popularis? The Class Action in International Law*, 2003 U. CHI. LEGAL F. 353 (2003)



tims and Witnesses Unit, a unit established within the Registrar.<sup>80</sup> Article 43, paragraph 6<sup>81</sup> lists three categories of persons under the responsibility of the Unit: a) witnesses; b) victims who appear before the Court; and c) other persons who are at risk on account of witness testimony.<sup>82</sup> Different levels of detail were offered by different countries in guiding the Registrar on the establishment of the Unit.<sup>83</sup>

### b. *Victims' Advocate*

With the necessary provisions in place for appointment of a victims' advocate, the delegates within the Preparatory Committee began deliberating upon the procedural questions raised regarding the scope of the victims' advocate participation in trial. Deliberations subsequently led to the enactment of Rules

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<sup>80</sup> There was much discussion at the Rome Conference as to the best location for the unit. One alternative was the Office of the Prosecutor. Lee, *supra* note 6, at 269; see Michael Bachrach, *The Protection and Rights of Victims Under International Criminal Law*, 34 INT'L LAW. 7 (2000). "The Unit is charged with providing protective measures, security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. As explicitly stated, the Unit 'shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.' The ICC Statute obliges the Prosecutor to take appropriate measures for the protection of victims and witnesses, having regard to factors such as age, gender and the nature of the crime 'in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.'" *Id.* at 80, quoting Rome Statute, art. 43 para. 6. .

<sup>81</sup> It is the key provision concerning the Victims and Witnesses Unit. Lee, *supra* note 6, at 268. "The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence." Rome Statute, art. 43 para. 6.

<sup>82</sup> See *id.*

<sup>83</sup> For example, Australia offered a skeleton rule, Lee, *supra* note 6, at 268, citing PCNICC/1999/DP.1 (26 January 1999), while France provided much more detailed provisions. The Paris Seminar in April 1999 confirmed this need and had a large impact on the subsequent debates. PCNICC/1999/DP.1 (26 January). The Registrar is given other tasks pertaining to the Prosecutor. ". . . [T]here will be instances where the Prosecutor will need the cooperation of the Registrar in order to carry out his or her functions more effectively and efficiently. In such cases, the rule provides for consultation with the office of the Registrar, especially on those matters which also fall under the mandate of the Registrar. . . This is particularly true in respect of the Victims and Witnesses Unit under article 43, as well as organization of the Registry under Rule 14." Lee, *supra* note 6, at 260 n.5, 262-284.

90 and 91. Rule 90 addresses the assignment of legal representatives of victims in the context of victims' participation,<sup>84</sup> and Rule 91 addresses the manner in which a legal representative may participate in the proceedings.<sup>85</sup>

Delineation of how a legal representative is to represent the victim in a proceeding before the Chamber of the ICC warrants a brief discussion of Rule 91. Rule 91 contains the provisions regarding the proceedings and the manner in which a legal representative may participate. It is based on the underlying premise that it is up to the Court to determine these issues. However, the rule provides a presumption of a rather extensive participation.<sup>86</sup> A legal representative's right to participate and attend is granted under the entitlement clause of Rule 91(2).<sup>87</sup> This Rule grants the victims' advocate the right to participate

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<sup>84</sup> ICC Rules, Rule 90: Legal representative of victims:

1. A victim shall be free to choose a legal representative.
2. Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, *inter alia*, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.
3. If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.
4. The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.
5. A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.
6. A legal representative of a victim or victims shall have the qualifications set forth in rule 22, sub-rule 1.

<sup>85</sup> See ICC Rules, Rule 91.

<sup>86</sup> Although the language of the Rule gives the Chamber discretion to limit the method of intervention, it does not limit or deny the victims' advocate right to participate. See Rule 91.

<sup>87</sup> See *supra* note 58.

in hearings, unless the court has ruled that the intervention should be limited to written observations.<sup>88</sup>

The legal representative of a victim may intervene by questioning a witness, an expert, or the accused. However, this intervention is tempered by Rule 91(3)(b),<sup>89</sup> which mandates the Chamber to balance and “take into account the stage of the proceedings, the rights of the accused, the interests of the witnesses, and the need for a fair, impartial and expeditious trial as stated under Article 68(3).”<sup>90</sup>

Sub-Rules 2 and 3 of Rule 91 have their origin in the Paris Seminar, and were amended by the Preparatory Commission, while Sub-Rules 1 and 4 were added in later negotiations.<sup>91</sup> Sub-Rule 1 clarifies that a ruling under Rule 89, which provides that the Trial Chamber shall specify the manner in which a victim is to participate in trial,<sup>92</sup> may be modified. The rationale for including the provision within Rule 89 is to allow for the issuance of modified rulings in order to provide greater participation for victims who had been limited by a previous ruling.<sup>93</sup> Although not explicit, a modification of a Rule 89 ruling would require an additional application.<sup>94</sup>

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<sup>88</sup> *See id.*

<sup>89</sup> “The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victims legal representative.” ICC Rules, Rule 91(3)(b).

<sup>90</sup> See attached diagram annexed heretofore as “Diagram 1: The Trial”. The aim of a “fair trial” is a commonly shared conception of criminal justice, which appears “behind the compromise language expressed especially in Part 5, 6, and 8 of the Rome Statute. *See* Donat-Cattin, *supra* note 23, at 877.

<sup>91</sup> Lee, *supra* note 6, at 466; *see generally* 94 AM. J. INT'L L. at 783.

<sup>92</sup> “In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, *the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.*” ICC Rules, Rule 89(1)(emphasis added)

<sup>93</sup> Lee, *supra* note 6, at 466.

<sup>94</sup> *Id.*

Sub-Rule 2 makes clear that participation of the victims' legal representative is subject to the Court's ruling under Rule 89. However, there is a presumption that a legal representative normally should be entitled to participate in hearings, unless the Chamber decides otherwise.<sup>95</sup> Thus, participation of the legal representative in hearings becomes the principle norm, with restriction to written observations or submissions found under Sub-Rule 2 being the exception. As a result, any departure from the principle must be based on the "circumstances of the case."<sup>96</sup>

Further reading of Sub-Rule 2 indicates that the delegates envisioned differing levels of participation for the legal representative of the victim. Specifically, the phrasing of the sub-rule indicates that the delegates may have imparted upon the term "participate" a meaning something other than "attend." Many delegates claimed that the former term brings about a more active role at the hearing, such as addressing the Court orally.<sup>97</sup> It is apparent from several interpretations of the ICC Rule Commentaries, that delegates, arguing for a more active role for the victims' representative, made it a point to interpret Sub-Rule 2 as including oral intervention. Alternatively, some argued that participation, as set forth in Sub-Rule 2, "should be confined to written observations or submissions."<sup>98</sup> In making their case, delegates for a more active role successfully stressed that Sub-Rule 2 is not to be interpreted as a limitation on participation, but instead a provision simply guaranteeing a legal representative's right to make observations or submissions in conjunction with oral intervention.<sup>99</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Oral intervention by the victims' advocate during a trial proceeding is presumed under Rule 91(2) based upon the language of the Rule which states in relevant part: "[a] legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof. . . This shall include participation in hearings unless, in the circumstances of the case, *the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. . .*" ICC Rules, Rule 91(2) (emphasis added).

<sup>99</sup> Lee, *supra* note 6, at 466. This is limited to where participation has been granted by the Chamber's ruling

The words utilized in Rule 91 are a reflection of several compromises. The insertion of “submission” in addition to “observations” is an example of a compromise aiming at providing a general and comprehensive scheme for victims’ participation at trial. The purpose of the amendment was to give the legal representative a more active role, thus allowing for comments, responses and initiation of questions. It is important to note, however, that although the Prosecutor and Defense shall have the right to respond to any observations, their ability to respond to submissions is limited by the fact that they may be dealt with *ex parte*.<sup>100</sup>

Sub-Rule 3 of Rule 91 introduces a very contentious form of participation – namely the questioning of a witness, expert, or the accused by the legal representative of the victim.<sup>101</sup> The contentious nature of Sub-Rule 3 is based upon the strong feelings of some delegates who expressed a fear that such questioning would be harmful to the strategies of both the prosecutor and/or the defense.<sup>102</sup> Other delegates who were less concerned by this form of participation still insisted that strict procedures be provided. The inclusion of the right to participate through questioning within the Sub-Rule was finally agreed upon after delegates expressed the opinion that evidence presented during the criminal proceeding would be relevant in determining subsequent reparations.<sup>103</sup> The basis of such an opinion was due in large part to two levels of compromise included within the wording of Rule 91. The first is an attempt to limit superfluous litigation by having a victims’ advocate obtain “prior permission” before questioning.<sup>104</sup> The second is the inclusion of a “balancing test” within the language of Sub-Rule 3, which warrants the Trial Chamber to take into account concerns of all parties when allowing questioning by the victims’ representative.<sup>105</sup>

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<sup>100</sup> See, e.g. ICC Rules, Rule 88 or Rome Statute, art. 57.

<sup>101</sup> Lee, *supra* note 6, at 467.

<sup>102</sup> *Id.* at 467.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See ICC Rules, Rule 91(3)(b), *supra* note 9.

## IV. HOLISTIC BALANCING TEST

Prior permission from the Chamber was an essential procedural step for dissenters to allow victim questioning.<sup>106</sup> In making any decisions as to legal representatives' questioning, the chamber shall take into account a) the stage of the proceedings; b) the rights of the accused; c) the interests of witnesses; and d) the need of a fair, impartial and expeditious trial. The Chamber is not limited to just the allowance of questions but the form and kind of questions to be allowed. It may specifically give directions on the manner and order of the questions and the production of documents.

Among the most important issues before the working group on the Rules included the extent of participation of victims when prior permission was requested.<sup>107</sup> State parties to the Rome Statute made it an important objective "to accommodate interests of victims through their participation in the proceedings before the Court in their own right and for their own interests."<sup>108</sup> It is important to note that such accommodation of victim interests is a prophetic development in light of the fact that victims in previous military or ad hoc tribunals have historically appeared primarily as witnesses without an independent role.<sup>109</sup> In contrast to antecedent tribunals, the drafters of the Rome Statute sought to achieve, through compromise, a balance between punitive and restorative justice in order to bring "the Court and its proceedings closer to persons who have suffered atrocities."<sup>110</sup> It is through the very participation of victims within the criminal proceedings that the drafters believed a linkage to victims' reparations, the most important restorative element in the Statute, could be achieved.<sup>111</sup>

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<sup>106</sup> Lee, *supra* note 6, at 467. See ICC Rules, Rule 89, *supra* note 92.

<sup>107</sup> Christopher K Hall, et. al, *Current Development: The First Five Sessions of the UN Preparatory Commission for the International Criminal Court*, 94 AM. J. INT'L. L. 773, 783-784 (2000).

<sup>108</sup> Lee, *supra* note 6, at 456.

<sup>109</sup> *Id.* Victims of crimes under the Rome Statute are afforded explicit rights to make representations, Rome Statute, article 15, para. 3, to submit observations, Rome Statute, article 19, para. 3, and to have their views and concerns presented and considered "where the personal interests of the victims are affected." Rome Statute, article 68, para. 3.

<sup>110</sup> Lee, *supra* note 6, at 457.

<sup>111</sup> One generally accepted reason for allowing questioning by the legal representative was that certain evidence important also for a later determination of

a. *The Holistic Balancing Test Defined*

Discussions concerning victims' participation, held by the Preparatory Commission during the Paris Seminar on Victims in April 1999, culminated with the amended codification of Rules 89, 90, and 91, which consolidated a comprehensive coverage of victims' participation.<sup>112</sup> In order to facilitate court proceedings, the preparatory commission sought to represent, via Rules 90 and 91, the incompatible interests of victims through legal representation, thus avoiding a potential crippling problem facing the ICC.<sup>113</sup>

However, with the achievement of creating a codified Rules of Evidence and Procedure that embodies the restorative principles found within the Rome Statute, the issue quickly becomes, when, where and how a victim advocate is to participate. In beginning to answer this question, it is imperative that the Trial Chamber first adhere to the "holistic balancing test" forwarded by the language of the Statute and Rules, whereby the interests and rights of all parties to the trial are simultaneously protected.

Each party to a trial before the ICC has several interests and concerns that warrant specific attention by the Chamber

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reparations could be obtained already in the criminal proceedings. This would avoid repeated appearances of witness before the Court. *See Lee, supra* note 6, at 467.

<sup>112</sup> Lee, *supra* note 6, at 459. Negotiations of the rules on victims' participation within the ICC were assisted by the considerable interest of NGOs, whose comments and suggestions played an integral if not helpful role in the work of the Preparatory Commission. *See Lee, supra* note 6, at 459. *See, e.g.,* Amnesty International, *The International Criminal Court: Ensuring an effective role for victims*, IOR 40/10/99 (July 1999) available at <http://web.amnesty.org/library/index/engior400101999!opendocument&of=eng-385> (last visited on January 18, 2005)); Human Rights Watch, *Elements of Crimes and Rules of Procedure and Evidence* (July 1999) available at <http://www.hrw.org> (last visited on January 18, 2005); Redress, *Rules of Procedure and Evidence for the International Criminal Court, Recommendations to the Preparatory Commission Regarding Reparation and Other Issues Relating to Victims* (March 2000) available at <http://www.redress.org> (last visited on January 18, 2005).

<sup>113</sup> Some legal systems (e.g., the civil law systems that apply the *partie civile* system) actually allow victims to trigger criminal proceedings and do not distinguish between national and foreign victims for that purpose. Often, such victims claim refugee status in the State in which they bring their complaint. In certain cases, they acquire the nationality of the State to which they have fled. *See CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY* 1 (C. Van den Wyngaert, ed. 1993) (for a survey of national criminal procedure systems in Europe).

during trial. Throughout this process, the trial Chamber must weigh the interests of the accused, the prosecution, and the victim in a triumvirate approach that incorporates the rights of all parties in each decision. Such an approach is borne out of principles embodied in the Rome Statute and Rules whereby each party is guaranteed certain due process rights and interests of justice that must be balanced by the Chamber.<sup>114</sup> Specifically, the triumvirate approach requires the Court to holistically balance the due process rights of the accused with the restorative and punitive forms of justice sought by both victim and prosecution respectively.<sup>115</sup>

b. *Examples of Due Process Protection*

Participation of the victims' advocate should be limited in cases where his/her participation becomes superfluous or inefficient. It is at this very juncture where the Trial Chamber plays an integral role. In deciding appropriateness, the chamber should look to the content of the victim advocate's participation to see if it is in fact superfluous and time consuming. At the moment the right of the accused to an efficient trial is jeopardized, the advocate's participation within the trial process should be limited. Such limitation is an effort to adhere to one of the tenets of the Rome Statute, which is to provide a holistically

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<sup>114</sup> The modern concept of *interest of justice* corresponds to the common interest of society, victims and non-guilty suspects/accused to know the truth. See Donat-Cattin *supra* note 23, at 877.

<sup>115</sup> See attached diagram annexed heretofore as "Diagram 2: Holistic Balance". The modern concept of *interest of justice* is balanced within the Rome Statute with the traditional concept of *due process* for the defendant entails two different, although partially overlapping, concepts. The first concept is the respect for the rights of the accused, as defined in Articles 67 and 66 of the Statute. The Second is fair trial, which is comprehensive of, but not limited to, the respect for all the rights of the suspect/accused; it means equitable justice for defendants, victims, and international society as such, the foundation of all procedural norms of the Statute. See Donat-Cattin, *supra* note 23, at 877. There are other tensions to keep in mind. "They are, firstly, the tension between the need to focus narrowly upon the person of the accused, while simultaneously establishing a wider historical record of past events; secondly, the tension between adhering to the strictures of the legal process, while attending to the suffering of individual victims; and, finally, the tension between the need to make harrowing past events the focus of the trial, whilst aspiring to contribute to the creation of a more hopeful future." Dembour & Haslam, *supra* note 46.



balanced trial, where the right to participate is balanced among the rights afforded to all relevant parties.<sup>116</sup>

In keeping with the above precept, a second right mandated by the Rome Statute is the need, under due process, to protect the accused from double prosecutions while ensuring a) the victim's right to submit questions and participate under Rule 91(2); b) victim's overall right to ensure prosecutions' due diligence;<sup>117</sup> and c) the prosecutor's duty to try a case toward conviction without jeopardizing his case with unnecessary interference from the victims' advocate.<sup>118</sup>

In contrast to and in conjunction with the rights of the accused, the Chamber must heed attention to the prosecutor's duty. The prosecutor's duty is to present a thorough, fair and impartial case against the accused. As a result, the Chamber must: (a) limit interference with the prosecutor's strategy; (b) prevent jeopardizing a conviction; and (c) ensure that evidence for punitive damages is presented effectively and judiciously.

In limiting interference with the prosecutor's strategy, the Chamber has the discretion to limit, once again, superfluous questions submitted by the victims' advocate to the Chamber.<sup>119</sup> However, any limits placed upon the participation of the

<sup>116</sup> See generally ICC Rules, Rule 91(3)(b), *supra* note 9; Rule 101(1). "In making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims." ICC Rules, Rule 101(1).

<sup>117</sup> See generally Rome Statute, Art. 68 *supra* note 63.

<sup>118</sup> In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

*Id.* Rome Statute, Art. 17(2).

<sup>119</sup> See generally ICC Rules, Rule 89(1), 91(3)(a) *supra* note 9.

victims' advocate must be tempered with the fact that the prosecutor's sole intent is conviction. As a result, the Chamber has the onus to involve the victims' advocate within the trial process so as to balance the prosecutor's right to punitive justice with that of restorative justice afforded the victim. Essentially, the victim's advocate is a necessary party to ensure the drafter's intent of providing restorative justice.

c. *Eliminating Confusion with Examples of an Analogous Paradigm:*

The general precept forwarded by Rule 91 defines the parameters of the Chamber's interpretive scope in relation to a legal representative's right to participate on behalf of the victim. However, even with the establishment of clearly defined rules of evidence and procedure, the fact that there is no precedent case law makes it difficult to synthesize information that will provide some guidance toward the actual role of the victims' advocate at trial. The lack of such precedent also creates the potential of a more diminished victims' advocate role at trial in an effort to stave off confusion associated with their participation, thus undermining the ICC's mandate of providing restorative justice.

In an effort to address the above paradox, this thesis will illustrate that a paradigm, nearly identical in scope and application to the victims' advocate exists in proceedings affecting child welfare, which can be used as a basis for determining the role of the advocate during an ICC trial. The paradigm is that of the law guardian in proceedings related to children in family courts.<sup>120</sup>

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<sup>120</sup> The New York Family Court Act declares that minors who are the subject of Family Court proceedings should be represented by counsel of their own choosing or by law guardians. This declaration is based on the finding that counsel is often indispensable to practical realization of due process of law and may be helpful in making reasoned determinations of facts and proper orders of disposition. A system of law guardians for minors who often require the assistance of counsel to help protect their interests and to help them express to the court is established. See New York Civil Practice: Family Court Proceedings §14.01 – "Rights of the Children".

i. *Participation of Children in trial proceedings*

The participation of children in judicial and administrative proceedings that affect their interests is a right afforded to them under the UN Convention on the Rights of the Child (UNCRC).<sup>121</sup> This convention enables individuals to go before the European Court of Human Rights with claims affecting a child's rights should the member state allegedly fail to comply.<sup>122</sup> Member states to the convention observe the rights secured by the convention by providing mechanisms for children to be heard in proceedings.<sup>123</sup>

The UNCRC significantly influences the policy and development of law concerning children in both civil law and common law countries. German law provides for the appointment of a *Verfahrenspfleger* (guardian *ad litem*) in family or guardianship court proceedings. The English Children Act of 1989 provides for a similar appointment in the context of discharge of care or supervision proceedings.<sup>124</sup> Within the United States, an example of such child protective measures is embodied within the New York Family Court system.

ii. *The Role of the Law Guardian in NY Family Court*

In New York, law guardians are frequently expected to act in such a way that their role is actually a hybrid or combination of several traditional roles.<sup>125</sup> The traditional roles, which par-

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<sup>121</sup> Katja Schweppe, *Child Protection in Europe: Different Systems - Common Challenges*, 3 GERMAN L. J. 10 (2002), citing Art. 12 II of the UN Convention on the Rights of the Child. "[It] provides that every child has the right to be heard in any judicial administrative proceedings affecting him or her either directly or through a representative or an appropriate body."

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* Some courts include age limits, such as Belgium and Netherlands. Those countries place an obligation on the court to hear children from the age of 12 and up. *Id.*, citing Art. 394 Code Civil Belgium; Art. 809 Act on Civil Procedures Netherlands.

<sup>124</sup> *Id.*

<sup>125</sup> Diane Somberg, *Defining the Role of Law Guardian in New York State by Statute, Standards, and Case Law*, 19 TOURO L. REV. 529 (Winter /Spring 2003); see also Jessica Matthews Eames, *Seen But Not Heard: Advocating For the Legal Representation of a Child's Expressed Wish in Protection Proceedings and Recommendations for New Standards in Georgia*, 48 EMORY L.J. 1431, 1443-45 (1999); Guy James Mangano, *Statutory Law Guardians Ensure Competent Services*, NEW YORK LAW JOURNAL, May 1, 1990 at 3; Gary Solomon, *Purpose of and Role of Counsel in Article Ten Proceedings, in Child Abuse, Neglect and the Foster Care System*

allel the role of a victims' advocate within the ICC, are: guardian *ad litem* and the attorney as advocate.<sup>126</sup> Under New York law, a guardian *ad litem* has been defined as a court appointed special guardian of an infant ward or unborn person, who is responsible for determining and representing the best interests of the child in specific litigation.<sup>127</sup> An attorney, acting as an advocate for the child,<sup>128</sup> is required to act in accordance with the child/client's wishes, even if the attorney feels the child/client's choice is not the best decision.<sup>129</sup>

As noted, the law guardian in New York State has a dual hybrid role whereby he is part advocate<sup>130</sup> and part guardian *ad*

591, 615 at PLI LITIG. & ADMIN. PRACTICE COURSE HANDBOOK SERIES NO. C-179 (1998)(hereinafter "Solomon"); see generally Diane Geraghty, *Ethical Issues in the Legal Representation of Children in Illinois: Roles, Rules and Reforms*, 29 LOY. U. CHI. L.J. 289 (1998); JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTION PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS XIV (1997)(hereinafter PETERS).

<sup>126</sup> Somberg, *supra* note 125 at 529.

<sup>127</sup> *Id.* at 530. The role of the law guardian is to help protect the interests of the children and to also help them express their demands and wishes to the court. N.Y. Fam. Ct. Act § 241 (McKinney 1999).

This act declares that minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented by counsel of their own choosing or by law guardians. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. This part establishes a system of law guardians for minors who often require the assistance of counsel to *help protect their interests and to help them express their wishes to the court*. Nothing in this act is intended to preclude any other interested person from appearing by counsel.

*Id.* (emphasis added).

<sup>128</sup> An attorney acting in this capacity is defined under the New York Family Court Act as a law guardian.

<sup>129</sup> Somberg, *supra* note 125, at 530. "The statute is very clear in that the law guardian shall present the child's wishes to the court. See N.Y. Fam. Ct. Act § 241. New York State law disfavors a law guardian pursuing a position that the guardian believes to be in the child's best interests when that position conflicts with the child's wishes. Eames, *supra* note 125, at 1445-6, citing Committee on Professional and Judicial Ethics of the Bar of the City of N.Y., Formal Op., N.Y. L.J., Aug. 21, 1997, at 7. "The law guardian should follow the Model Code's mandates for client representation unless exceptions arise due to the child's capacity or the threat of imminent danger." *Id.* See also the "Peters model", which advocates the child-in-context approach to representation. See PETERS, *supra* note 125.

<sup>130</sup> In New York, a law guardian must be an attorney who is charged with protecting a child's best interests and helping to express the child's wishes. The FCA section 243 governs appointment of law guardians in New York. There are three sources from which courts can appoint attorneys as law guardians: 1) pursu-

*litem*,<sup>131</sup> “with a statutory mandate to represent both the child’s wishes and the child’s best interests.”<sup>132</sup> Such a statutory mandate is premised upon the precept that a competent law guardian, who must be an attorney, will offset the adversarial character of a family court proceeding by advocating his client’s concerns, thus protecting the child’s best interests.<sup>133</sup>

New York family court proceedings, in which a law guardian is assigned to represent a child, are governed by New York Statutes, case law, standards developed by the New York State Bar Association (NYSBA) and the Code of Professional Responsibility.<sup>134</sup> The entitlement of a child to be represented by counsel in a delinquency proceeding was established through the holding of the United States Supreme Court case, *In re Gault*.<sup>135</sup> The extension of this right was extended for protective proceedings in New York State by the case of *In re Jamie TT*.<sup>136</sup> The appellate court in *Jamie TT* not only reiterated the holding in *Gault*, but also held that a minor had the right to *effective counsel* for a protection proceeding under both state

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ant to an agreement with a legal aid society; 2) from a panel of qualified attorneys appointed by the local jurisdiction; 3) by appointment of the Appellate Division, a private attorney can provide representation in the local family court. See Somberg, *supra* note 125, at 534.

<sup>131</sup> Under New York Civil Practice Law and Rules, article 12, sections 1201 and 1202, a guardian *ad litem* is appointed in order to act as investigator, mediator, problem solver, and can require her to act as a witness and prepare a report for the court. See Somberg, *supra* note 125, at 534. The statutory explanation of the law guardian’s hybrid role has created some confusion about the role of an attorney in this capacity. It is not clear that the proper role of an attorney representing a child in New York is, and “[t]he Legislature’s use of the hybrid term ‘law guardian,’ which suggests a cross between a lawyer and a guardian ad litem, contributes to the uncertainty.” Eames, *supra* note 125, at 1444 quoting Solomon, *supra* note 125. However, there arrived some guidance with the New York State Bar adoption of the Model Code of Professional Responsibility. It requires a lawyer to represent the client “zealously within the bounds of the law”. *Id.*, quoting Model Code of Professional Responsibility Canon 7 (1979).

<sup>132</sup> Somberg, *supra* note 125, at 531.

<sup>133</sup> Joel R. Brandes, *Re-Examining the Role of the Law Guardian*, NEW YORK LAW JOURNAL (October 2000).

<sup>134</sup> Somberg, *supra* note 125, at 561.

<sup>135</sup> *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428 (1967) (declaring that “[n]either the Fourteenth Amendment nor the Bill of Rights is for adults alone”).

<sup>136</sup> 191 A.D.2d 132 (1993). The court stated that the appearance of a lawyer to protect Jamie’s interests seemed clearly necessary to avoid an erroneous outcome unfavorable to Jamie in the proceeding. See *id.*

and federal constitutions.<sup>137</sup> Such a holding was interpreted to mean that if representation of a minor is to be meaningful, then mere “physical presence of a state appointed lawyer in the courtroom is not enough.”<sup>138</sup> This interpretation is based upon the court’s holding in *Jamie TT* that “effective representation must include taking time to prepare a presentation of relevant law and the pertinent facts, as well as the use of basic advocacy skills to protect the child’s [victim’s] interests.”<sup>139</sup> As a result of the important precedent set forth by *Gault* and *Jamie*, it has been subsequently held to be mandatory that law guardians fully participate in trials by offering evidence and questioning witnesses.<sup>140</sup>

### iii. *Drawing Parallels*

#### 1. *Similarities between the Victims’ Advocate and the Law Guardian*

The power of court participation given to New York law guardians through statutes, case law, and legislative acts provides the ICC with a working and tested example of how a triumvirate trial proceeding can successfully be implemented. New York’s example of effectively representing children who are easy victims of the law within family court proceedings should not presuppose the notion that such case law is unique to American courts.<sup>141</sup> Similar versions of law guardians also exist in the Australian, and New Zealand court systems.<sup>142</sup>

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<sup>137</sup> Somberg, *supra* note 125, at 561.

<sup>138</sup> 191 A.D.2d at 136, 599 N.Y.S.2d at 846

<sup>139</sup> *Id.* at 137.

<sup>140</sup> *Borkowski v. Borkowski*, 90 Misc. 2d 57, 396 N.Y.S.2d 962 (1977); *see also* *See Somberg, supra* note 125, at 534; *PETERS, supra* note 125.

<sup>141</sup> Historically, the law has made special provisions for minors because they are not considered to be fully capable of protecting their legal rights. As Justice Douglas noted in a criminal case, “. . .when as here, a mere child – an easy victim of the law – is before us, special care in scrutinizing the record must be used.” *See* New York Civil Practice: Family Court Proceedings §14.01 – Rights of the Children.

<sup>142</sup> Child’s Representatives in Australia and Counsel for the Child in New Zealand are allowed, through statutes, the same powers of participation in the trial process a law guardian would have in the United States. All are allowed to cross-examine, make submissions, file motions, call witnesses, and appeal a decision in effort to advocate the best interests of their client/child. *See* [www.familycourt.gov.au](http://www.familycourt.gov.au) and [www.justice.govt.nz](http://www.justice.govt.nz) for relevant statutes from Australia and New Zealand respectively.

But are the two systems, one found in the family courts of New York and the other in the trial chambers of the ICC at The Hague, really analogous? It is not purported that both systems are identical; however, evidence indicates its similarities lend itself to having New York Law adopted for family court proceedings as being an ideal model. Specifically, child protective proceedings of New York State are analogous, known as Article Ten proceedings, to the triumvirate trial proceedings of the ICC.<sup>143</sup> It is through the organizational structure of these two courts, New York family court and the ICC, that one witnesses the very similar three-party trial framework, where the respondent/prosecution, defense/accused, and child/victim are afforded representation.

Viewing a New York child protective proceeding from a purely legal standpoint illustrates that there are a limited number of parties entitled to participate fully at every stage of the proceeding. The parties are generally: a) the petitioner, who is making the charges of an abuse or neglect; b) the respondent, the person defending against those charges; and c) the child who is the subject of the proceeding represented by the law guardian.<sup>144</sup> A similar limit on the number of parties entitled to participate fully is also found within the ICC, where you have: a) the prosecutor; b) the defendant charged with the international crimes; and c) the victim and his/her advocate.

The petitioner, in an Article Ten proceeding, must be either a protective agency or a person who has been directed by the court to initiate proceedings.<sup>145</sup> The majority of petitions are brought by the child protective agency. Prior to 1973, individuals were able to institute neglect and abuse proceedings. However, the Family Court Act no longer affords individuals this right. The purpose of this change was to encourage the report-

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<sup>143</sup> See Article Ten of the Family Court Act (1969). This is a civil proceeding. The criminal case is separated out - creating concurrent jurisdiction. "[W]hen there are allegations of sexual abuse or serious physical injury, it is not uncommon for a district attorney to commence a criminal Prosecution. . . However. . . the Family Court. . . has jurisdiction over abuse or neglect proceedings even when a criminal case is pending. . ." MERRIL SOBIE, *NEW YORK FAMILY COURT PRACTICE* §2.33 (West 1996)

<sup>144</sup> See SOBIE, *supra* note 143, at §2.1; *New York Civil Practice: Family Court Proceedings* §30.02 (2004)

<sup>145</sup> Family Court Act §1032; SOBIE, *supra* n.144, at §2.7.

ing of incidents to an agency. In turn, this would allow the agency to conduct full investigations, using trained caseworkers to resolve the problems. This procedure was intended to be a filtering system, saving valuable court time and money.<sup>146</sup> Equivalent agencies are found within the ICC, where you have the Registrar and the Office of the Prosecutor.<sup>147</sup> The Registrar, in similar capacity to that of the New York State Protective Agency, receives applications from victims, vets through potential claims, appoints legal representatives, and acts as a liaison between the Trial Chamber and Office of the Prosecutor, in an effort to save valuable time and expense.<sup>148</sup> The Office of the Prosecutor, in turn forwards the claim to the trial chamber.<sup>149</sup>

The respondent in a New York family court proceeding is one who is charged with abusing or neglecting a child.<sup>150</sup> A parallel is easily drawn to that of the accused in an ICC case who is standing trial for his misdeeds perpetrated against a similar class of victims' to that of a defenseless child.<sup>151</sup>

Finally, there is the child/victim in New York family court proceedings who is specifically referenced in Article Ten, which distinguishes "the child" as a class separate from that of the petitioner and defendant.<sup>152</sup> Although, Article Ten does not specifically or outwardly state that the child is a "party" to the proceedings,<sup>153</sup> it does forward the definitive precept that the child is to be represented in the proceeding by a lawyer/law guardian. As a result of such a mandate set forth within Article Ten of the New York Family Court Act, a child, through his law guardian, becomes "very much a party with rights and privileges and not merely the alleged victim of abuse or neglect . . . ." <sup>154</sup> As aforementioned, a victim of a crime within the ICC's

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<sup>146</sup> New York Civil Practice: Family Court Proceedings §30.02[1].

<sup>147</sup> Rule 13, *supra* note 83.

<sup>148</sup> See ICC Rule 89(1), *supra* note 9; Rome Statute, Art. 43

<sup>149</sup> See attached diagram annexed heretofore as "Diagram 3: Application for Participation of Victim Advocate".

<sup>150</sup> Family Court Act §1012(a); see generally SOBIE, *supra* note 144, at §2.8.

<sup>151</sup> See generally Kenneth S. Gallant, *The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, 34 INT'L LAW. 21 (2000)

<sup>152</sup> "Child" is defined in F.C.A. §1012(b) as "any person or persons alleged to have been abused or neglected" that is less than 18 years old. *Id.* at n.43.

<sup>153</sup> See SOBIE, *supra* note 143, at §2.9.

<sup>154</sup> *Id.*



jurisdiction is provided a victims' advocate with all of its rights and privileges. The crux of the parallel between the two proceedings is the designation given to the victim as a "party" in need of legal representation.<sup>155</sup> It is this very designation that creates the analogous interpretation of the legislative intent, found in both the Rome Statute and New York Family Court Act, of providing legal protection, representation, and participation to a class of people too weak to advocate on their own behalf.

## 2. Article Ten Trial Procedure and ICC proposal

New York Article Ten proceedings provide a viable road map as to the specific procedure to be followed in court where there are three interested parties. In Article Ten proceedings, the petitioner has the burden of proving the allegations by a preponderance of the evidence.<sup>156</sup> Therefore, the petitioner's case is presented first.<sup>157</sup> Although it is common for the respon-

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<sup>155</sup> See Caianiello & Illuminati, *supra* note 68, at 453.

<sup>156</sup> "The term 'burden of proof' denotes the duty of establishing the truth of a given proposition or issue by such quantum of evidence as the law demands in the case." Romualdo P. Eclavea, Christine M. Gimeno, Jeanne Philbin and Charles J. Nagy, Jr., *Burden of Proof: In General*, 57 N.Y. JUR. 2D EVIDENCE AND WITNESSES § 160 (2005), *citing* Farmers' Loan & Trust Co. v. Siefke, 144 N.Y. 354, 39 N.E. 358 (1895) (holding that after all the evidence is in, the question arises as to whether the burden of proof has been sustained by the party obliged to make out his case by the required quantum of evidence); Spaid v. Liverpool Cent. School Dist., 169 Misc. 2d 41, 642 N.Y.S.2d 783, 109 Ed. Law Rep. 907 (Sup. Ct. 1996). "As to the effect of the failure of the party charged with the burden of proof to produce sufficient evidence to sustain the burden, it is the quantum of evidence that must be produced to establish prima facie any particular fact." 57 N.Y. JUR. 2D EVIDENCE AND WITNESSES § 160, *citing* 169 Misc. 2d at 43.

<sup>157</sup> *Id.* at §2.67. ". . . [I]n all actions tried in New York, the burden of proving a prima facie case rests with the plaintiff. 57 N.Y. JUR. 2D EVIDENCE AND WITNESSES § 160, *citing* Monahan v. Sunset Appliance Stores, Inc., 61 Misc. 2d 476, 305 N.Y.S.2d 375 (Sup. Ct. 1969). In a case where the allegations in the complaint stating, "plaintiff's cause of action are denied by the defendant's answer, the plaintiff has the burden—that is, the real and ultimate burden—of proof of the essentials of the cause of action which he or she has alleged." 57 N.Y. JUR. 2D EVIDENCE AND WITNESSES § 163 *citing* Lopp v. Lopp, 191 A.D. 500, 181 N.Y.S. 476 (1st Dep't 1920); Angerami v. Nationwide Ins. Co., 133 Misc. 2d 1086, 509 N.Y.S.2d 298 (City Ct. 1986) (stating that even in small claims court with its less strict technical requirements, the plaintiffs had the burden to bring forth competent evidence to substantiate their claims); Anderson v. Material Co-ordinating Agency, 63 N.Y.S.2d 324 (Sup. Ct. 1946). "The plaintiff has the burden of proving a prima facie case in his or her favor." 57 N.Y. JUR. 2D EVIDENCE AND WITNESSES § 163, *citing* Caruso-Rinella-Battaglia Co. v. New York Cent. R. Co., 222 A.D. 371, 226 N.Y.S. 308 (3d

dent to then move to dismiss the charges for lack of legally sufficient evidence, in an Article Ten proceeding, the respondent's dismissal motion cannot be granted until the law guardian is given an opportunity to present evidence. Evidence that a law guardian would present before the respondent moves to dismiss would include, but is not limited to, a fact-finding order or an order for the presentation of witnesses supporting a finding of legally sufficient evidence to continue with the proceeding.<sup>158</sup>

In *Jamie EE*, a child's foster mother and a department investigator testified as witnesses for the law guardian on behalf of the child. Subsequently, the law guardian attempted to submit into evidence a letter written by the child documenting her stepfather's abuse. The trial court found that the uncorroborated out-of-court statements of the child, and statements of the law guardian's two witnesses were hearsay that could not be corroborated with an in camera interview.

The Appellate Court, however, in *Jamie EE* reversed the judgment of the trial court, by holding that the law guardian was entitled to be heard and to present proof before any motion was decided, which would *impact the welfare of the child*. The court further held that, "[w]ithout deciding where in the course of a fact-finding hearing or trial a law guardian should be given the opportunity to present evidence, it is clear that before any motion is decided which will impact on the welfare of the child, the law guardian *must* be given an opportunity to be heard and where appropriate, as here, to present proof."<sup>159</sup> As suggested by Merrill Sobie, an expert in the field of New York family court practice,<sup>160</sup> "rather than proceed with the respondent's case and

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Dep't 1928); *Syracuse Reduction & Mfg. Co. v. City of Syracuse*, 172 A.D. 224, 159 N.Y.S. 213 (4th Dep't 1916); *Anderson v. Material Co-Coordinating Agency*, 63 N.Y.S.2d 324 (Sup. Ct. 1946); *Union Mills v. Harder*, 191 N.Y. 483, 84 N.E. 387 (1908) (stating that when a party has produced sufficient evidence to establish his contention, and it is not contradicted, he has made out a prima facie case and is entitled to a verdict if the adverse party does not produce further evidence). This is an ultimate burden; it rests upon the plaintiff until the end of the trial. 57 N.Y. JUR. 2D EVIDENCE AND WITNESSES § 163.

<sup>158</sup> SOBIE, *supra* note 143, at §2.67 n.428, *citing* *Matter of Jamie EE*, 670 N.Y.S.2d 931 (1998)(an example of a case where deference is given to the inclusion of a law guardian's participation within an Article Ten proceeding).

<sup>159</sup> 670 N.Y.S.2d at 934, *citing* *Matter of Department of Social Servs. o/b/o Pearl P.*, N.Y.L.J., 2/18/94, p.36, col. 3 (Fam.Ct., Ulster County).

<sup>160</sup> See <http://www.law.pace.edu/facbios/sobie.html>.

then be confronted with additional evidence presented by the law guardian, the respondent's lawyer would be well-advised to request that the court direct the law guardian to proceed first when it appears obvious that the law guardian is supporting the petitioner."<sup>161</sup>

In a court proceeding, the respondent has a due process right to call witnesses, cross-examine other parties' witnesses, and present evidence in his or her case.<sup>162</sup> Under the Family Court Act within an Article Ten proceeding, the law guardian is entitled, to do the same on behalf of the children.<sup>163</sup> "In fact, when 'cross-examining' witnesses presented by the party whose position the law guardian is *supporting*, the law guardian has the luxury of using leading questions in an effort to elicit favorable testimony."<sup>164</sup> Furthermore, because appellate courts desire a full development of the record, there exists judicial authority allowing a law guardian to amend the pleadings to conform to the proof under Family Court Act §1051(b).<sup>165</sup> It would therefore "appear that the law guardian [could] explore subject areas that were neglected by the other lawyers without being limited by traditional principles governing the scope of cross-examination."<sup>166</sup>

The procedural strategies used within New York Article Ten proceedings can be implemented with the same amount of success within the ICC. It is reasonable to suppose that when there is an issue that would *impact the welfare of the victim*<sup>167</sup> within an ICC trial, the victims' advocate should be able to participate. As a result of the precedent set forth within New York courts, it seems clear that the most prudent time for the victims' advocate to participate is after the prosecutor, before the defendant – in all stages of the proceedings. Specifically, after the opening statement of the prosecutor and before the opening statement of the defendant, the victim's advocate should be

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<sup>161</sup> SOBIE, *supra* note 143, at §2.67; Aldana-Pindell, *supra* note 12, at 1429.

<sup>162</sup> See SOBIE, *supra* note 143, at §2.67, citing Matter of Herbert F., 56 A.D.2d 601, 391 N.Y.S.2d 654 (2d Dep't 1977).

<sup>163</sup> See 191 A.D.2d 132.

<sup>164</sup> SOBIE, *supra* note 143, at §2.67 (emphasis added).

<sup>165</sup> See *id.*

<sup>166</sup> SOBIE, *supra* note 143, at §2.67

<sup>167</sup> See 670 N.Y.S.2d at 934. Arguably, there is no issue that would not impact the victim.

given an opportunity to be heard. Similarly, after the prosecutor presents a witness *but* before the defendant's cross-examination, the victims' advocate should be given an opportunity to ask the witness questions. Furthermore, after the close of the prosecutor's case, before any motions to dismiss or the opening of the defendant's case, the victim's advocate should be given the opportunity to present evidence for its case not brought out by the prosecution.<sup>168</sup> Finally, after the prosecution's closing arguments, the victims' advocate should be able to present an abbreviated closing argument.<sup>169</sup>

## V. CONCLUSION

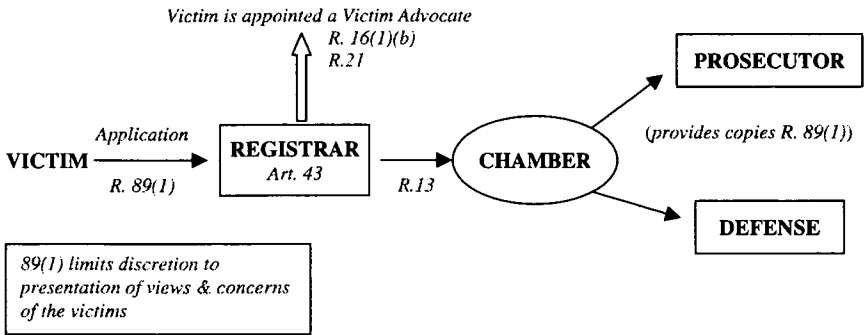
The International Criminal Court has yet to try a case; its fate depends on whether the relevant actor's uphold the intent and purpose of the creators of the ICC. In doing so, all involved with the inner workings must keep in mind the importance of the victims' participation to finding the truth, justifying the loss, and healing the wounds of terrible international crimes. It must always be emphasized that the ICC embodies societal empowerment of those that have yet to be heard; those that need to be heard – the victim.

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<sup>168</sup> Unless it can be bifurcated to solely damages.

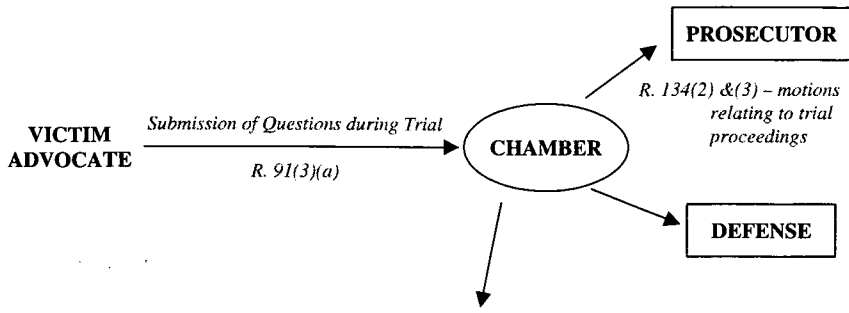
<sup>169</sup> In all cases, the Defense has a right to be the last to examine a witness throughout the trial. *See* ICC Rules, Rule 140(2)(d) which underpins Article 64. As a result, if the victim advocate forwards a question under Rule 91(3)(a) to the Chamber after the Defense has redirected, the court must take into account the time allowed for not only reply by the defense and prosecution, but to also allow the defense the last opportunity to examine any witness under R.140(2)(d).

**PHASE I:  
APPLICATION FOR PARTICIPATION OF  
VICTIM ADVOCATE**

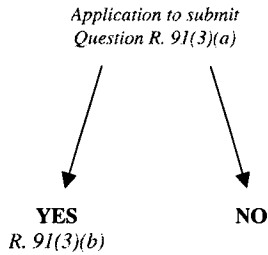
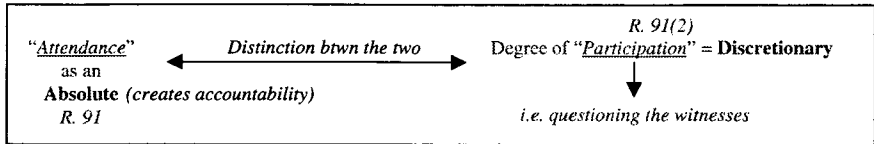


**PHASE II:**

**THE TRIAL**



Chamber must consider these (in regards to Victims' Advocate) when making decision to allow question



Apply Holistic Balancing Test

1. Stage of the proceedings
2. Right of the Accused
3. Interest of the Witnesses
4. Prevent Interference  
w/ Prosecutor's Strategy

**HOLISTIC BALANCE**

★ Chamber must balance the following when Victim submits question during proceeding

R. 140 – Directions of Conduct of Trial Proceedings  
Art. 64 – Functions & Powers of the Trial Chamber

