



ISSUES IN INTERNATIONAL CRIMINAL JUSTICE

2012

SPECIAL VOLUME: THE LUBANGA TRIAL: LESSONS LEARNED

Published by the International Criminal Court Student Network (ICCSN)



U.S. Ambassador for Global Criminal Justice, Stephen J. Rapp pictured with participants of the ICCSN Conference, 'The Lubanga Trial: Lessons Learned', March 8-9, 2012, The Hague

ISSUES IN INTERNATIONAL CRIMINAL JUSTICE
VOLUME II NUMBER I 2012
THE *LUBANGA* TRIAL: LESSONS LEARNED

Issues in International Criminal Justice

Hope Elizabeth May, Editor

Hope Elizabeth May is Professor of Philosophy at Central Michigan University, where she directs the Center for Professional and Personal Ethics. After receiving a PhD in philosophy, she earned her law degree from Michigan State University, graduating magna cum laude and winning awards for her work in First Amendment jurisprudence, international law, legal interpretation and law and literature. Since 2011, she has been teaching a novel course (based in The Hague) that focuses solely on the International Criminal Court. In 2011, she was a Visiting Professional in the Office of the Prosecutor at the International Criminal Court. Her most recent book is 'Aristotle's Ethics: Moral Development and Human Nature' (Continuum 2010).

Victoria Phan, Editor

Victoria Phan graduated from the University of Cambridge with an M.Phil in Politics and Harvard University with an A.B. in Government. She is continuing her studies at Cambridge for a PhD in Politics and International Studies, researching international criminal tribunals and reconciliation. Victoria has received numerous grants and scholarships for her research in European Union law, international criminal law, and comparative politics. Prior to pursuing her PhD, she managed an approximately \$1 million Model UN conference for 2500 undergraduate and postgraduate students in The Hague and interned at the U.S. Congress and Department of State. She currently serves as the President of the ICCSN Cambridge Chapter and on the board of the Cambridge Review of International Affairs.

Caroline Wojtylak, Editor

Caroline Wojtylak founded the ICCSN in 2007 whilst studying at the London School of Economics. She currently works as a lawyer at Skadden, Arps, Slate, Meagher & Flom (UK) LLP in London. She holds a first class honours degree in law from the London School of Economics and an LLM in International Law from the University of Cambridge. Prior to training as a solicitor in London, she worked at the Trust Fund for Victims of the International Criminal Court.

Visit the video archives of the ICCSN's historic March 2012 conference, 'The *Lubanga* Trial: Lessons Learned' at: <http://www.iccsn.com/lubanga>

© 2012 – International Criminal Court Student Network. All rights reserved.

'Issues in International Criminal Justice' and the International Criminal Court Student Network do not endorse nor bear responsibility for the content of the articles contained within this publication. The views expressed in the articles and essays included are the opinions of the authors alone. Footnotes appear at the bottom of each page when necessary. No part of this publication may be reproduced in any form without permission from the ICCSN. Please contact the ICCSN for any additional information.

For more information and submission guidelines, please visit:
www.iccsn.com

Special thanks to The Center for Professional and Personal Ethics at Central Michigan University for providing funding for the publication of this edition.

Contents

Editors' Notes1

Hope Elizabeth May1

Victoria Phan4

Caroline Wojtylak7

Invited Articles10

The Legacy of a Legal Visionary10

Benjamin B. Ferencz

Keynote Addresses18

Matthew Cannock.....18

Legal Officer, Coalition of the International Criminal Court

Elizabeth Evenson.....29

Senior Legal Counsel, Human Rights Watch

Stephen J. Rapp.....31

U.S. Ambassador for Global Criminal Justice

Nicole Samson.....39

Senior Trial Attorney, International Criminal Court

Articles46

Equal Liability for all Members of a Joint Criminal Enterprise?
Lubanga Continues the Deficiencies of the *ad hoc* Tribunals
.....46
Hassan Ahmad

Child Soldiers: An Exception in International Law?.....62
Elena Batchelder

The Participation of Victims at ICC Proceedings:
Brief Reflections on the Question of the Right 'to' Trial.....73
Francesca Maria Benvenuto

Justice Limited by Law? Exploring the Place of Socio-Economic
Rights in International Criminal Justice through the *Lubanga*
Trial.....85
Sarah-Jane Koulen

Investigating Rape at the International Criminal Court:
The Impact of Trauma.....99
Ellie Smith

Regulation of Mistake of Law and the Mental Element in the
Rome Statute and the *Lubanga* Case.....113
Sabina Zgaga

The Participation of Victims at ICC Proceedings: Brief Reflections on the Question of the Right ‘to’ Trial

Francesca Maria Benvenuto

1. INTRODUCTION

It is widely known that the practice of the International Criminal Court (ICC) significantly diverges from that of previous international criminal courts. The extremely innovative nature of the emerging criminal court is not merely a question limited to jurisdictional issues such as complementarity¹ and permanence.² The ICC also has some purely procedural peculiarities.³ Among these is the increasing attention afforded to victims. In the ICC system, victims are allowed a form of participation in the legal process totally unknown in the *ad hoc* tribunals, where they can only play the marginal role of witnesses. The ICC has shown greater consideration for victims, guaranteeing them certain rights to participate in its proceedings and at trial.⁴

1 The rule of complementarity is in opposition to that of ‘*primacy*’, which characterises *ad hoc* Tribunals. The Court may therefore act only when the State, which has jurisdiction over the case, refuses or is unable, to initiate proceedings: these are the ‘preconditions’ of Article 17 of the Rome Statute.

2 The Court judges all international crimes committed since the Rome Statute came into force, in opposition to the jurisdiction of the criminal courts for Rwanda and for the former Yugoslavia which, in contrast, have temporally limited (albeit extendable) jurisdiction.

3 It is widely known that the breaks with the past also regard the principle of legality. In fact, the experience of the Court has gradually led to an evolution of the principle of retroactivity, the latter extending from substantial law (*ex* Article 24 of the Rome Statute), to jurisdiction and competence (*ex* Article 11 of the Rome Statute) envisaging a ‘double’ non-retroactivity. See S. Manacorda, *Imputazione collettiva e responsabilità personale – Uno studio dei paradigmi ascrivibili nel diritto penale internazionale* (Turin 2008) 121 and seq.

4 In the Preamble to the Rome Statute, the victim already seems to have a prominent role. It is in fact the subject of the first ‘reminder’ that the Rome Statute addresses to States, ‘States [...], conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time, Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity’.

This innovative feature of the ICC arises from a gradually changing conception of modern international criminal law and, consequently, of public international law. International law is undergoing a shift away from the past internationalist system, where the state was the main protagonist, towards an anthropocentric approach: a reversal of the international system, which enriches the legal sphere of the individual with new rights (and new duties) and, above all, new forms of protection. The International Criminal Court is moving, therefore, towards a new equilibrium, going beyond the Westphalian model, accepting the individual (and thus also the victim) as one of the focal points of its own system.⁵

Despite the many issues relating to this subject, I intend to focus on just one hermeneutical question: we shall enquire whether the explicit recognition of victim's rights 'at' trial (i.e. a general right to participate) has automatically implied a recognition of a victim's right 'to' the trial within the ICC system. In attempting to answer this question, it will be necessary, first of all, to identify in the Rome Statute (Statute), the legal basis for victims' participation and briefly describe the conditions governing the application, its time limits and its essential content.

Second, we have to consider the nature of the victims' interest in participation. It will, in fact, be necessary to understand whether they are spurred to participate purely to obtain reparations, or if there is some further interest: namely, an interest in the holding and conduct of the criminal trial itself, regardless of any request for compensation relating to the harm suffered.

Finally, we shall try to understand whether, in light of what has been said above, the (potential) recognition of the interest of victims in holding the trial constitutes a real right (we can call it a right 'to' trial). If so, the trial would no longer be understood purely as a 'means' to exercise the right to reparation, but as the autonomous subject of a right in itself.

2. BRIEF NOTES ON PARTICIPATION: THE CONDITIONS

The provision that explicitly recognises the victim's right to take part in

⁵ For further clarification, see Julian Fernandez, 'Variations sur la victime et la justice pénale internationale' (2006) 6 *Amnis* < <http://amnis.revues.org/890> > accessed 1 March 2012.

a trial of the International Criminal Court is Article 68(3) of the Statute, which states that if a victim's 'personal interests' are involved, he/she may directly submit an application to the Registrar of the Court, expressing his/her 'views' and 'concerns.' Even if the Statute does not include victims in the rigid pairing of parties (prosecution and defence), it acknowledges that victims have the right to interact actively in a trial which affects their interests, directly involving them in the development and the conduct of the proceedings.

The notion of 'victim' contained in the Rules of Procedure and Evidence (Rules) is not different from what is nowadays established in public international law.⁶ Victims include individuals and entities that have suffered harm as the result of the commission of any crime within the jurisdiction of the Court. Organisations are therefore entitled to apply to participate, as are legal persons who have suffered direct harm from the crime.⁷ The conditions securing participation will therefore be: the existence of harm (the notion is not merely limited to institutional damage, but extends also to physical and psychological harm);⁸ the commission of a crime that falls within the jurisdiction of the Court (therefore within its *ratione materiae*, *loci personae* and *temporis competence*); and a causal link between the harm suffered and the crime.

Victims may participate 'at stages of the proceedings determined to be

6 Principle 8 of the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* defines victims as 'persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization'.

7 Rule 85, Rules of Procedure and Evidence: '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.'

8 For further clarification on the concept of 'harm', see Trial Chamber, *The Prosecutor v Thomas Lubanga Dyilo*, 18 January 2008, ICC-01/04-01/06-1119, Decision on Victims' participation.

appropriate by the Court,⁹ even in the investigation stage, as explained by the Pre-Trial Chamber during the *Lubanga* trial.¹⁰ In fact, on 14 June 2005, in the wake of the situation of the Democratic Republic of the Congo, six victims - through the *Fédération Internationale des ligues des droits de l'homme* - made an application under Article 68(3) of the Statute. In deciding on the admissibility of the application, the Pre-Trial Chamber, in the decision of 17 January 2006, allowed the victims to be involved in the investigation, despite the firm opposition of the Prosecutor. The Chamber also stated that recognising such a large time-frame for the application was teleologically compliant with the new view and new consideration that international criminal law has of the individual, and, therefore, of the victims themselves.¹¹

There is a further precondition to exercising the right to participate, which is mainly a matter of content. Although from reading Article 68(3) of the Statute the content of the application may seem wide, because the Statute says nothing on the substantive core of the 'views and concerns,' the Court will actually have to consider whether the intervention may be in conflict with the rights of the accused and the principle of fair trial.¹²

Finally, the victim will be considered entitled to participate only if his/her 'personal interests' are directly involved. And actually the most common hermeneutical disputes on victim participation at the ICC arise from the reasons that lead a victim to participate in an international criminal trial. So, in order to look further into the issue, it is necessary to identify the real goals the victim pursues in participating in the ICC proceedings.

9 Rome Statute, Article 68(3).

10 Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS, 6 ICC-01/04-101-Corr, 17 January 2006.

11 *Ibid.* para 50 and seq.

12 For an example see V.A., 'Article 68' in O. Triffterer (eds), *The Commentary on the Rome Statute of the International Criminal Court - Observers' notes, article by article* (Baden 2008) 1289: '[...] the judges could not allow a certain intervention of the victims' representative when its content consists in arguments already integrally presented by the Prosecutor: fairness and expeditiousness of the proceedings would be at risk of prejudice.'

3. THE INTERESTS OF VICTIMS: 'PERSONAL' AND 'REPRESSIVE'

Victims may, of course, take part in the trial in order to obtain reparations if, at the end of the proceedings, the guilt of the accused is established. However, in the Court's system, application under Article 68(3) and application for reparations (under Article 75 of the Statute) are wholly independent, both from the formal and substantive points of view. Victims may in fact decide to submit an application under Article 68 of the Statute without making any reference to damages, thus expressing only their 'views and concerns,' or they may present only an application for reparation to the Court under Article 75 of the Statute.¹³ Limiting the purpose of victims' participation only to obtaining damages would be extremely restrictive. In fact, we may note that other provisions of the Statute, as well as some of the norms of the Rules, recognise that victims may have an interest beyond reparations: an interest in the conduct of the trial itself.

First, this further interest is considered explicitly in Article 65 of the Statute, which, by recognising that the accused may admit guilt, thus bringing the trial to an end, restricts the closure of the proceedings to certain conditions. The Trial Chamber is not only charged with determining whether any admission of guilt is supported by appropriate evidence, but it is also empowered to ascertain whether the proceedings require a more complete reconstruction of the facts 'in the interests of justice and in particular in the interests of the victims' (Article 65(4)).¹⁴

Second, this further interest is also (implicitly) stated in Rule 92 of the Rules. In fact, Rule 92(2) obliges the Court to notify the victims of the Prosecutor's decisions to refrain from either an investigation or, following an investigation, from a prosecution, pursuant to Article 53 of the Statute. These provisions of the Rules enable victims to participate precisely so they

13 On the issue of reparations, for a more detailed examination, see J.B. Jeangène Vilmer, *Réparer l'irréparable. Les réparations aux victimes devant la Cour Pénale Internationale* (Paris 2009).

14 For further discussion see W.A. Schabas 'Article 65' in *The International Criminal Court: a commentary on the Rome Statute* (Oxford 2010) and V.A., 'Article 65' in O. Triffterer (eds), *The Commentary on the Rome Statute of the International Criminal Court - Observers' notes, article by article* (Baden 2008).

can confer regarding any Prosecutor's negative determinations.¹⁵ In this way, participation is sought to allow victims to prevent the trial from being closed at a time they might consider premature. Moreover, Rule 92(3) states another part of the obligation of notification. In fact, the Court is obliged to notify victims regarding its decision to set the hearing for the confirmation of the charges, so as to encourage them to participate in a key stage of the proceedings which determines whether or not to proceed with a trial.

Lastly, Article 15(3) of the Statute¹⁶ provides that in the event of a *proprio motu* investigation by the Prosecutor, the Pre-Trial Chamber must, before authorising the prosecution, inform the victims and hear any representations that could possibly convince the Court to grant such permission. Both the Statute and the Rules suggest that the victims are both potential 'driver' and 'brake' of the ICC proceedings (both during the investigation and the trial itself), demonstrating their actual interest in the conduct and the holding of the international criminal trial itself, regardless of any request for redress. Moreover, many Court decisions, particularly in the *Lubanga* case, help to corroborate the existence of the multi-faceted aims behind victim participation. In *Lubanga*, the Pre-Trial Chamber, recognising the victim status of six persons (in the investigation stage) stated that '[...] *article 68-3 du Statut confère également aux victimes le droit à la lutte contre l'impunité,*' (Article 68 also acknowledges victims the right to participate in the fight against impunity) admitting that they may, therefore, intervene in the proceedings not only to obtain adequate redress, but also to '[...] *obtenir une clarification des faits et la punition des coupables [...]* (obtain a clarification of the facts and to see the perpetrators punished).'¹⁷

15 V. S. Vasiliev, 'Article 68 (3) and personal interests of victims in the emerging practice of the ICC' in Carsten Stahn, Göran Sluiter (eds), *The emerging practice of the International Criminal Court* (BRILL 2009) 641 and seq.

16 See W.A. Schabas 'Article 15' in *The International Criminal Court: a commentary on the Rome Statute* (Oxford 2010); V.A., 'Article 15' in O. Triffterer (eds), *The Commentary on the Rome Statute of the International Criminal Court - Observers' notes, article by article* (Baden 2008).

17 Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS, 6 ICC-01/04-101-Corr, 17 January 2006.

Moreover, on the occasion of an *incidenter tantum*¹⁸ appeal, Judge Song wrote in his separate opinion annexed to the Chamber's decision, that he acknowledged the dual purpose of the victim's participation: the purpose to obtain compensation, and above all, a 'repressive' purpose regarding the crimes and the potential perpetrators. The victim participates in the trial 'so that justice may be done' by ascertaining the facts of the crime and establishing the criminal responsibility of the offenders, participating, therefore, in the 'fight against impunity': '[...] [t]he victim of a crime has a particular interest that the person allegedly responsible for his or her suffering be brought to justice'.¹⁹ And the same concept is stated in the *Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing*, where the Chamber, in clarifying the purpose of participation (in this case during the hearing of the confirmation of the charges), said that the victims intervene in the proceedings in order to assist the Prosecutor in ascertaining responsibility and, 'where relevant,' to obtain redress.²⁰

The Court, therefore, applied a broad interpretation of 'the personal interest' of the victims. The vagueness of the statutory terms and expressions led the Court to extend the concepts rather than restrict them, opting for an extension of the content of the 'first cause' of victim participation.²¹

It is necessary, lastly, to take another hermeneutical step, which is, however, obligatory according to Article 21(3) of the Statute. This, in fact, states that the Statute must necessarily be interpreted and applied in the light of international standards on human rights. It is therefore necessary at this point to wonder whether the main international human rights protection bodies have stated that victim participation in criminal trials involves a further interest beyond reparation. In effect, not only have both the Inter-American Commission on Human Rights and the European Court of

18 Appeal Chamber, *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06 OA8 13/06/2007, Decision on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the Directions and Decision of the Appeals Chamber.

19 *Ibid.* para 13, Separate opinion of Judge Song.

20 Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, 22 Septmeber 2006, ICC-01/04-06 22/09/06.

21 On this subject see also, R. Cairo 'Les droits des victimes devant la Cour pénale internationale' in *Actualité Juridique (Pénal)* (June 2007) 261 and seq.

Human Rights acknowledged to victims the ‘repressive’ interest that the ICC itself has adopted in its own system, but they have also translated this interest into a real right: the right to an ‘effective prosecution’. States Parties, in fact, according to some judgments of the human rights courts, would be guilty of violating, respectively, Article 25 of the Inter-American Convention (duly read in conjunction with Article 8 and Article 1.1) and Article 13 of the European Convention on Human Rights,²² when there has been a refusal to undertake the investigation or to prosecute and conduct the ensuing trial, when there is a clear lack of impartiality among the judges or the investigative body, or when there are obvious irregularities or delays in conducting investigations or the trial itself.²³

So, both the International Criminal Court and the various international human rights organisations (and courts) have repeatedly demonstrated full awareness of the existence of a dual purpose to victim participation, a two-fold interest which cannot, therefore, be denied. The victim becomes involved in a criminal trial not only to obtain compensation, but also to be heard. He/she breaks away from the formal and constraining role of the witness and takes on an active role in the investigations and reconstruction of the facts in (and by means of) the trial and establishing the guilt of the alleged offender, overcoming the frustration caused by the procedural limitations of previous international criminal tribunals.²⁴

4. THE RIGHT ‘TO’ TRIAL: CRITICAL PROFILES

Given the provisions of the Statute, and in the light of what has been established by the ICC and by regional human rights organisations, the question arises, then, of whether we can distinguish and see in victims’ ‘repressive’ interest an actual right to the international criminal trial. If so, the trial, characterised by a therapeutic-healing goal, would be considered

22 See *Bamaca Vélasquez*, Case n. 70, Inter-Am. C.H.R.; *Barrios Altos*, Case n. 73, Inter-Am. C.H.R.; and also *Kaya vs Turkey*, n. 22729/93, 28 Eur. H.R. Rep. (1998); *Yasa vs Turkey*, n. 22495/93, 28, Eur. H.R. Rep. (1998).

23 For further information see R. Aldana-Pindell, ‘An emerging universality of justiciable victims’ rights in the criminal process to curtail impunity for State-sponsored crimes’ in (2004) 26(3) Human Rights Quarterly 606 – 686.

24 D. Donat-Cattin, ‘The role of victims in the ICC proceedings’ in Flavia Lattanzi (eds), *The International Criminal Court, Comments on the Draft Statute*, (Napoli 1998) 256 and seq.

the culmination of the gradual de-victimisation of the injured party.²⁵ The victim would become the agent of a real ‘private prosecution’²⁶ and would have the right to finalise his/her ‘views and concerns’ to ascertaining the criminal liability of the accused, not only with a view to compensation, but also ‘to see that the culprits receive reasonable retribution for their crimes.’²⁷

However, we have to review the terms of our discourse, briefly retracing the salient points of the discussion. While it is indisputable that victim participation is driven not only by the desire for redress, but also by the aim of ‘repression’, it is not so undisputed and undoubted that, in the ICC system, a true ‘right’ to trial can be derived automatically from a simple interest.

First of all, no provision of the Statute (or of the Rules) sets this out explicitly. Even if the Court system seems to be well aware of the ‘further interest’ of the victims, it has consciously opted for a model of participation that rejects the characteristics of the so-called ‘private prosecution.’²⁸ The victim cannot make a referral;²⁹ he/she can, at best, provide the Prosecutor

25 A. Mangiaracina, ‘Le vittime nel procedimento penale internazionale: verso un ampliamento degli spazi partecipativi’ in V. Militello, *Conflitti inter-etnici e tutela delle vittime. Fra Corte penale internazionale e giurisdizione nazionale*, (Milan 2008) 47 and seq; L. Scomparin, ‘Il ruolo della vittima nella giurisdizione penale internazionale: alla ricerca di una possibile mediazione fra modelli processual’, in V.A., *Soggetti deboli e giustizia penale* (Turin, 2003) 365 and seq.

26 M. Jouet, ‘Reconciling the conflicting rights of victims and defendants at the International Criminal Court’ (2007) 26 Saint Louis University Public Law Review 249-307.

27 *Ibid.* at 275 and seq.

28 It should also be noted that national systems which envisage the system of ‘private prosecution’ (such as the French institution of the *citation directe* or the Argentinian equivalent), allow ‘private prosecution’ by the victim only for crimes of lesser importance or less public concern, such as, for example, defamation, slander, and certain offences relating to family relationships between the injured party and the accused.

29 Article 13 of the Statute, in fact, narrows the circle of those entitled to bring a case to the ICC, to States Parties, the UN Security Council and the Prosecutor. For further clarification on the *trigger mechanism* see G. Della Morte, ‘Le potestà giurisdizionali della Corte penale internazionale’, in Vivarium (eds), *La Corte penale internazionale – Problemi e prospettive* (Napoli 2003) 31 and seq.; V.A. ‘Article 13’ in O. Triffterer (eds),

with information, under Article 15 of the Statute, in order to have an investigation opened. However, the Prosecution is not obliged to act and to initiate it. In the ICC system, the decision to proceed, therefore, remains the sole prerogative of the Prosecutor.

If, then, the Statute recognised the victim's right 'to' a trial (even implicitly), it would also have to automatically confer to the victim the powers needed to actually exercise the right itself. Yet these are powers which, at the moment, the Statute does not acknowledge. Although, in fact, the victims enjoy a wider participatory role, the investigation and the decision to proceed remain the exclusive prerogative of the Prosecutor.

Moreover, the victim has no opportunity to object to any 'inaction' by the Prosecution. Under Article 53 of the Statute, the Pre-Trial Chamber assesses, *ex officio* or upon the request of the State which made the referral, or upon the request of the Security Council, the Prosecutor's decision not to prosecute, and there is no reference to the 'interests of victims', who have only the right to information under Rule 92(2) and (3), as mentioned above.

Neither can the disagreement of the victim to closing the proceedings following a guilty plea by the accused (under Article 65 of the Statute) bind the decision of the Court, which always has the last word in any case.³⁰ It should be observed, however, that the victim is not subject, at this stage, to any type of evidence, as there is no provision in this regard in Article 65 of the Statute, and the Court itself, to date, has not yet ruled on whether victims can give evidence against the admission of guilt.³¹

Second, the Court's decisions on this matter offer no insights on how to bridge the gaps in the Statute. It has never affirmed the existence of such a law and, while recognising that victims have ample opportunity to participate, it has never approved any 'private prosecution' nor has

The Commentary on the Rome Statute of the International Criminal Court – Observers' notes, article by article (Baden 2008).

30 On this point, see also W.A. Schabas 'Article 65' in *The International Criminal Court: a commentary on the Rome Statute*, (Oxford, 2008); V.A., 'Article 65' in O. Triffterer (eds), *The Commentary on the Rome Statute of the International Criminal Court – Observers' notes, article by article* (Baden, 2008).

31 *Ibid.*

it affirmed that the victim may be officially recognised as one who can provide the Prosecutor with formal assistance.³² The 2006 decision on victims' participation reaffirmed the total independence of the victim's role in the trial from that of the Prosecution. The injured party may not necessarily be regarded as an ally of the Prosecutor, as their roles and aims are quite distinct.³³

However, some clarification is needed on what the Inter-American Commission and the European Court of Human Rights have said, granting, unlike the ICC, the victims a real right to an 'effective prosecution.' While it is true that the provisions of the Statute should be applied and interpreted in accordance with international standards of human rights and, therefore, the case law of its organs, it does not seem to be equally true that, again by virtue of Article 21(3) of the Statute, the rules and the judicial practice of the human rights courts are automatically incorporated.³⁴

Finally, it should be recalled that acknowledging that the trial is the last stage of the 'healing process' for the victim, would create a dangerously symbolic vision of the international criminal trial. Any interpretation to this effect might seem to be an 'emotional reading' of the victim's involvement (an emotion brought about, of course, by the violent impact that international crimes have on the collective consciousness). A hermeneutic error of this kind would lead to confusing an internationally recognised right of access to justice for victims with a (very different) right 'to obtain justice,' transforming an obligation of means (the state obligation, in cases of grave violations of human rights, to conduct

32 The subject of private prosecution is well refuted by the court. In the separate opinion in the decision at appeal in 2007, ruling that it is not the prerogative of the victim 'to reinforce the prosecution or dispute the defense.' And furthermore, in the Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, (Pre-Trial Chamber I, *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-06 22/09/06), though the dual purpose of the victim's participation exist, the 'may' is very clear when it comes to providing assistance in the prosecution's activities, excluding *a priori* a formal and recognised assisting role.

33 Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS, 6 ICC-01/04-101-Corr, 17 January 2006, para 51.

34 V. S. Vasiliev, 'Article 68 (3) and personal interests of victims in the emerging practice of the ICC' in Carsten Stahn and Göran Sluiter (eds), *The emerging practice of the International Criminal Court* (BRILL 2009) 674.

effective investigations and a fair trial) into a resultant obligation, with no international legal basis.

5. CONCLUSIONS

It does not seem possible to say that the ICC truly grants the victim the right 'to' a trial. Of course there is no doubt as to the (unusual) attribution to the victim of a more important and more active role than the *ad hoc* tribunals envisaged, insofar as the Court recognises a right to effective access to justice in accordance with the legal guidelines of the above-mentioned human rights courts. It should be noted, in fact, that although the Statute does not recognise that the victim has the right to an 'effective private prosecution,' he/she is, however, guaranteed a significant position in the work of the Court and, therefore, in the mechanism of the ICC system.

The International Criminal Court can judge a crime falling within its jurisdiction only where the state with jurisdiction is inactive, or, secondly, where the state, although active, shows unwillingness or inability to conduct investigations or genuinely to prosecute.³⁵ In setting out the contents of the concept of 'unwillingness,' the Statute refers to canons wholly similar to those used by the human rights courts to describe when and how a state can violate the right to access to justice for the victims: a) the proceedings have been undertaken or the trial has been conducted for the purpose of shielding the accused from his/her criminal responsibility (this would be the case if states refuse to prosecute by adopting amnesty laws, such as the cases decided by the Inter-American Court of Human Rights); and b) there has been an unreasonable delay in the investigation or in the conduct of the trial itself; or c) the proceedings and the trial have not been conducted independently or impartially.

All this goes to show that the experience of the Court is not to be considered as the end of the road, but as a starting point for effective international justice for victims. This new criminal procedure grants them the right to take an active part in the 'fight against impunity' and give voice to their 'views and concerns,' allowing them to put behind them the depersonalisation that the crime originally inflicted on them.

35 Rome Statute, Article 17