The ICC and Victim Participation for Victims of Gender-based Crimes - A Conflict of Interest?

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Victim Participation at the ICC for Victims of Gender-based Crimes -
A Conflict of Interest?

Abstract:
The ICC has adopted a system of victim participation, which, although innovative, is also complex and inconsistent. As a consequence the meaningfulness of victim participation is questioned, because of its adverse effects on judicial proceedings, in particular on the task to be performed by the judges. It further creates false expectations for victims. The Lubanga and Bemba trials highlight that victims of gender-based crimes in particular bear the brunt of this approach. The ICC thus faces a challenge to develop a consistent approach to victims in line with its mandate to victims of vulnerable groups. A way forward is to determine more precisely what purpose should be achieved by victim participation in line with the objectives to be achieved by the ICC. The system as it is detracts from attaining more realistic goals, such as reaching a long-awaited first verdict, and therefore contributing to the expressing of global norms.

Keywords: Victim participation; ICC; Victims; Gender-based Crimes

Introduction:
The ICC Statute is amongst the first tribunals, alongside the Special Tribunal for Lebanon (STL) and the Extraordinary Chambers of the Courts of Cambodia (ECCC) to recognise the interests and importance of victims of international crimes in the
justice process. It has established the Victims and Witnesses Unit (VWU) to provide protective measures, legal and socio-psychological support and other supportive measures for victims and witnesses.\(^1\) The Statute offers the possibility for the Court to award reparations to victims.\(^2\) Most importantly, the Statute also grants victims the right to participate in the justice process.\(^3\) It may well be that had the ICC not considered the victims’ interests, its legitimacy would have been questioned.\(^4\)

Victim participation refers to the situation in which significant rights are conferred on victims to participate in their own right at various stages of the proceedings.\(^5\) Victim participation is different to the role attributed to a witness. Participation is voluntary and allows a victim to communicate his or her own views and concerns to the Court at various stages of the proceedings, whereas a witness serves the interest of the Court and is called by either the Defence or the Prosecution to testify at a specific time about specific facts or events. Victim participation is an innovative and essential feature of the Rome Statute system, but the ICC Statute gives little guidance to the essence of victim participation leaving it instead to the judges to decide how it should function. So far, judges have determined that victim participation applies to the trial stages of the proceedings and have carved out a role for the victims in the proceedings which is not passive and at the hands of the parties, in particular the prosecutor, but

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1 ICC Statute, article 43(6), A/CONF.183/9.
2 ICC Statute, article 75.
3 ICC Statute, article 68(3): “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.”
rather a more active role. Despite the wording of Article 68(3), participating victims
do not merely express their views and concerns, but may be granted the possibility to
attend hearings, provide and challenge evidence, call and question witnesses and
experts, and question the accused. 

6 Although the system devised for victim participation is inventive, it is also complex and inconsistent. Since the start of the first trial in the Lubanga case, successful applications for victim participation have risen dramatically, putting in jeopardy the meaningfulness of the system. 

7 As a consequence, the system of victim participation is extremely onerous for the ICC and its judges, does not live up to the expectations of the victims generally, provides insufficient support for victims of vulnerable groups, such as victims of gender-based crimes and detracts from the ICC’s principal mandate to prosecute and punish perpetrators.

The ICC thus faces a challenge to adopt a consistent approach to victims within the system of victim participation and in line with its mandate to protect victims of vulnerable groups. 

8 This article, whilst acknowledging the advantages and benefits of including the right for victim participation in the proceedings of the ICC, highlights the conflict of interest in the ICC between the good administration of justice and victim participation. It will do so in four parts. Part 1 will provide a contextual understanding of the current system of victim participation, demonstrating that whilst it is innovative it is also complex and inconsistent and that, even in the eyes of victims, their role in the proceedings may be unnecessarily intrusive and thus fall short of victims’ expectations. Part 2 will argue that victim participation does not give

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6 For Article 68(3), see supra note 3.
7 From 103 in the Lubanga trial to over one thousand in the Bemba trial.
due regard to specific categories of ‘vulnerable’ victims such as victims of gender-based crimes. Part 3 will highlight the conflict between victim participation and the judges’ task to determine the truth. The system as it currently is detracts from achieving more realistic goals, such as reaching a long awaited first verdict, and therefore, contributing to the expressing of global norms.9

1. Towards a more Victim-oriented Court

The question of how to accommodate victim participation is not unique to the ICC. It has been widely discussed and addressed to varying degrees by national and international criminal courts. However, to accommodate victim participation introduces an additional mandate competing with the more traditional mandates of the ICC

1.1. Variety of Approaches

The ICC is the first international criminal tribunal to establish the right to victim participation.10 The fact that the ICC has conceded participatory rights to victims echoes the trend in human rights law to grant a voice to victims and to promote the

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rights and entitlements of victims.  

Prior to the ICC Statute, international criminal law ignored victims, whereas human rights law has entitled victims to participate in international human rights law mechanisms since the late 1940s. In the 1980s, the UN in its Declaration of Basic Principles of Justice further improved the position of victims for Victims and Crime and Abuse of Power which called on States to recognize and adopt basic rights for victims of crime. Many jurisdictions of civil law traditions already allowed for some form of victim participation. This was not the case for the jurisdictions of common law traditions. As a consequence, the response to this declaration has been wide-ranging at the national level. Many major jurisdictions currently provide for victim participation to varying degrees ranging from offering victims the possibility to make victim personal statements to presenting civil claims in criminal proceedings (partie civile) in the French criminal system.

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13 See UN Declaration of Basic Principles of Justice for Victims and Crime and Abuse of Power, supra note 11.

By acknowledging victims the ICC alleviates criticisms that the Court is too far removed from the victims themselves and addresses the lack of emphasis on restorative justice which was perceived to be the case in the *ad hoc* international criminal tribunals.\(^{15}\) Indeed, as argued by victims’ rights groups, it seems unfair that although victims are most affected by the criminal act, they have little power to participate in proceedings.\(^{16}\) Nonetheless, the role of victims in the *ad hoc* international tribunals is minimal, limited to protection and restitution of property.\(^{17}\) A number of reasons have been put forward to justify the minimal role afforded to victims in both *ad hoc* tribunals and these are equally relevant to the ICC. Firstly, the fact that the international crimes under its jurisdiction involve a large number of victims means that they could not all be heard. Indeed this is an issue that the ICC also grapples with. Not only is it impossible to hear all the victims who have suffered during the specific conflict under investigation, because only those who were directly affected by the specific events to be examined by the judges may be given a voice either as a witness or a participating victim, but also amongst that smaller pool of victims, only a selection of victims will be heard. As a consequence, different levels of victims are created, and this leads to discrimination. Secondly, it was feared that the potentially high numbers of victims seeking to participate in the proceedings would have a negative impact on judicial proceedings.\(^{18}\) The judges at the ICC have had to resort to arbitrary mechanisms to organise participating victims into groups. Judges of the ICTR stated that to incorporate victims’ participation into international


\(^{18}\) Zappalà, *ibid.*
criminal proceedings “would not be efficacious, would severely hamper the day to
day work of the Tribunal and would be highly destructive to the principal mandate of
the Tribunal”.\(^\text{19}\) According to Morris and Scharf, amongst other reasons, the drafters
of the ICTY and ICTR Statutes considered that the protection of the interests of the
victims was part of the interests of the community for which the prosecutor was
responsible. Furthermore, they argued that to allow counsel for victims to participate
could interfere “with the case presented by the prosecutor or divert the attention of the
court from the relevant issue in the criminal proceedings thereby prolonging the
trial”.\(^\text{20}\) For both ad hoc tribunals, the principal mandate is the prosecution and
punishment of the perpetrators and not the victims’ interests. The ICC on the other
hand recognises the role of the victim and to some extent their interests. In giving
form to victim participation, the difficulty for the ICC has been to manage the
criticisms voiced against victim participation and to carve out a system that makes
room for victims in the judicial proceedings whilst not detracting from the aims and
purposes of the ICC.

1.2. A Complex System and Inconsistent Approach

Thus from a historical perspective, international criminal tribunals have afforded
victims a limited role and from a comparative perspective, the role of victims in
criminal tribunals is varied. The ICC in deciding to provide space for victims
specifically within the system of victim participation has very little consistent practice

\(^{19}\) Letter from the President of the ICTR to the Secretary General, 9 November 2000.
A view that was also expressed by Judge Claude Jorda, speaking in Sarajevo on 12
\(^{20}\) Virginia Morris and Michael P. Scharf, An Insiders Guide to the International
Criminal Tribunal for the Former Yugoslavia, Vol. 1, Irvington-on-Hudson,
to fall back on for support, or as Jackson so eloquently put it ‘a ready made garden to work from’.  

21 The ICC Statute gives very little guidance as to what such a system should look like leaving it up to the judges to devise a workable and meaningful system.  

22 This is not easily achievable since all those involved in the creation and design of the ICC will be influenced by their domestic system and “judges and other protagonists steeped in their own domestic culture still tend to view processes through adversarial and non-adversarial lenses”.  

23 It is therefore not surprising that the system of victim participation is not always efficient or consistent.  

The ICC defines victim participation in very broad terms, leaving it to the judges to create a system of victim participation that can be as restrictive or non-restrictive as decided by them. As a consequence, the judges have generally adopted a non-restrictive victim-oriented approach.  

According to Article 68(3) of the ICC Statute, victims may present their views and concerns in proceedings when their personal interests are affected, as long as participation does not unduly prejudice the right of the defendant. Rule 89(1) of the RPE further clarifies that victims wishing to participate must file an application to the Registrar, who transmits it to the relevant Trial Chamber, the Prosecution and the Defence. Victims whose interests are affected may apply for participation during the

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22 See in particular, the Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Pre-Trial Chamber, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008 & Trial Chamber II, ICC-01/04-01/07-1788-tENG, 22 January 2010, paras. 68, 71, 74-75, 99-100 & 121-122.  

23 Jackson, supra note 21, at 238.
trial stages. The judges determine whether or not to accept the application, and if the application is accepted, they determine and organise the extent of each victim’s participation. In consequence judges are given a substantial amount of leeway to do so.

In the first instance, participating victims will be kept informed of decisions that affect their interest in the case, in particular they have the right to be informed when the confirmation of charges against the accused is to take place. However, more importantly, participating victims are given a voice, because they or their legal representatives are granted the rights to ‘express views and concerns’, which is akin to the role that witnesses fulfill, albeit not at the behest of the parties. Judges have interpreted this right to mean that the victim does not simply express their views and concerns in writing, but is present in court and their participation may include making opening and closing statements. Additionally, participating victims have been allowed to provide and challenge evidence; question witnesses provided it does not prejudice the accused and that victim intervention assists in better understanding the cultural and social context of the case; question witnesses, experts and the accused provided it is limited to clarifying points at issue or completing the evidence; call new witnesses; present documentary evidence and participate in the witness familiarization process. They may also produce incriminating and exonerating evidence in order to help the establishment of the truth, as long as it does not prejudice the defence.

24 Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04/556, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of the Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of the Pre-Trial Chamber I of 24 December 2007 & Darfur situation, ICC-02/02/107.
25 Rules on Procedure and Evidence (RPE), Rule 89(1).
26 RPE, Rule 92(3).
27 RPE, Rule 91(2).
28 RPE, Rule 89(1).
written motions and may gain access to confidential documents and evidence in the case. With this complex and extensive range of modalities for victim participation, the judges at the ICC have developed and continue to develop an innovative system for victim participation at the trial stages of the proceedings, where the victims are more than mere witnesses called by the Prosecutor. If they so choose, they can form an integral part of the criminal Prosecution process by taking on active role alongside the Prosecutor and the Defence. Victims do not achieve the complete status of party to the proceedings, because victim participation is not automatic and their participatory rights will be limited compared to those of the Prosecution or the Defence. Such an extensive range of possible participation is not without consequences for the judicial proceedings. Judges not only have to manage the Prosecution and the Defence, but have to make room for the victims in so far as their participation contributes to the proceedings.

However, the judges, in determining the degree of participation for each victim, have not resorted to a set of guidelines to help them to adopt a consistent approach across the situations and cases under investigation. McGonigle Leyh contrasting the Katanga/Ngudjola case and the Lubanga case points to the different approaches. In the first case, the single judge adopted a systematic approach whereby all victims who met the criteria of Rule 85 had a right to participate and then granted each victim the same set of participatory rights. In the second case, the Trial Chamber adopted a piecemeal approach whereby victims had to demonstrate how their specific personal

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30 Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, supra note 22
31 Prosecutor v. Thomas Lubanga Dyilo, supra note 24.
32 RPE, Rule 85(1): Victims means natural persons who have suffered harms as a result of the commission of a crime under the jurisdiction of the Court.
interests were affected by the case. The ICC judges thus have different understandings of what victim participation entails, and this together with their discretion in determining the modalities of victim participation has led to a varied system in need of harmonization. For the sake of fairness, victims in each case must be treated similarly. In the determination of such a consistent approach, victim participation must be seen first and foremost as a contribution to the justice process of the Court in establishing the truth.

It is questionable that, in the long run, this complex and at times inconsistent system of victim participation remains a meaningful and workable system when tested against the increase in participating numbers and limited resources available. Interventions during proceedings of victims and/or their legal representatives will need to be limited to preserve the effectiveness of the trial. Victims may perceive this as a backward step, but it is a necessary one in the interest of justice. Any reassessment should take into account the actual needs of the victims.

1.3. What do Victims Expect?

Extensive and active participation throughout a trial is not necessarily the preferred form of participation for victims and the proceedings. Ultimately, it comes down to the fact that, having left the task to judges to determine a system for victim participation, the ICC as an institution has not reflected on what the purpose of victim participation should be and how best to achieve this.

Wemmers, in her study about how victim participation is viewed within the different organs of the court, suggests that there are five possible participatory roles for

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victims: participation with full decision-making power, participation with a consultative role (consultation), participation with information-sharing akin to that of a witness, the optional participatory role of expression of emotions and information before the Court (expression), and finally a more passive participatory role of notification by the Court. The decisions on victim participation in the ICC so far suggest that the role of victims in the trial proceedings covers at least three of the roles suggested by Wemmers: notification, expression and consultation.

Participating victims will receive notification and are granted, at the least, an optional role of expression. The ICC requires the Court to keep the victims informed of progress in the relevant case. Indeed, victims have the right to be informed of decisions that concern them. The Court has recognised that “victims must first be aware of their right to participate so that they can take informed decisions about whether and how to exercise it, and must be assisted to apply to participate throughout if they wish to do so”. The ICC also provides for the optional participatory role of expression of emotions and information. Indeed article 68(3) of the ICC Statute grants victims a right to present their ‘views and concerns’, which Judge Pikis has defined as their preoccupations and their opinion. Victims can give an independent and personal account of the story. This may help judges to understand the case more fully and may encourage rehabilitation and restoration of the victims’ dignity.

According to the modalities determined by the judges, as discussed above, victim

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35 RPE, Rule 50(1); Rule 92(3); Rule 96; Rules 16(1)(a) and 92.
37 Prosecutor v. Thomas Lubanga Dyilo, Separate Opinion of Judge Georghios M. Pikis, No.: ICC-01/04-01/06 OA 11 i'il. ICC-01/04-01/06-1290-Anx, 13 May 2008.
participation also involves consultation. The ICC allows victims to be an integral part of the proceedings albeit not to the extent that they become a third party to the proceedings. Victims have the option to attend hearings, provide and challenge evidence, call and question witnesses and experts, and question the accused. In doing so, victims are afforded a more consultative role.

The ICC has not gone as far as granting participating victims any decision-making power nor have the judges extended victim participation further in compelling victims to disclose evidence.\(^{38}\) The Trial Chamber II reasoned that, as victims have no right to present evidence unless granted this right, they should not be obliged to disclose information within their possession.\(^{39}\) It found that contesting the admissibility and relevance of evidence constituted a means for the victims to express their ‘views and concerns’, and would further assist the Chamber in assessing the evidence.\(^{40}\) This suggests that victim participation does not go as far as fulfilling an information-sharing exercise.

The current modalities of victim participation in the ICC imply an active role on behalf of the victim throughout the proceedings. I argue that this does not necessarily fulfill the needs of victims or correspond to the intention of the drafters of the ICC Statute. In allowing the victims to present or challenge evidence, victims share the burden of proof with the Prosecutor. The ICC Statute does not support this. The wording of Article 69(3) of the ICC Statute suggests that the submission of such evidence is by the parties only and not the victims. Article 68(3) of the ICC Statute refers to the possibility for victims to share their views and concerns, which implies


\(^{40}\) \textit{ibid}, at para. 104.
an optional expression of emotions and information. As Chung argues, the negotiators at Rome, fearful that the rights of the defence and the efficiency of the Court’s Prosecutions would be affected if the right for victims was not properly defined, never intended this right to be an “ever-expanding participation”.41 Wemmers’ study suggests that victim participation was viewed by the four different organs of the ICC as a possibility for victims to express their views and concerns and a guarantee that victims are kept informed and duly notified of the development of their case by the Court and their legal representatives.42 Many of the studies that have involved victims’ expectations of participation seem to confirm that receiving clear information about their role in criminal proceedings, being kept informed about their case and being given the opportunity to express their views and concerns is important, whilst leaving the decision powers on sentencing to the judges.43 Massidda, Principal Counsel of the OPCV, argues that the expectation of the majority of victims is for their story to be told by someone other than the Prosecutor who will represent their interests in the proceedings.44

42 See Wemmers, supra note 14.
Whilst there is little doubt that victims can contribute to the justice process and have an important role to play in the establishment of the truth, the extent to which victims may participate is questionable and may not capture the expectations of victims.

Victim participation in the ICC enables a larger, but not unlimited number of victims to tell their story either through their legal representatives or by appearing in Court in their own capacity. It seems right that victims of the most heinous international crimes should have a role in the proceedings of the Court other than that of witness at the beck and call of the prosecutor. The interests of the victims are distinct from the interests of the Prosecution. In the role of a witness, victims are confined to answering the questions asked by the Prosecutors and the Defence. In the role of a participating victim, they are able to speak more freely about the events they suffered. As demonstrated in the Bemba trial, participating victims can corroborate events and add to them by presenting a different side to the story. Thus victim participation also has merits, not least because it can assist the judges to establish the truth, as long as victim participation is meaningful for the victims and the trial. The ongoing trial of the former vice-president of Congo Jean-Pierre Bemba heard the stories of five victims participating. Bemba headed the Mouvement de Libération du Congo (MLC) which carried out military operations in the Central African Republic (CAR). He has been charged with failing to stop or punishing his fighters who allegedly raped, pillaged and murdered civilians. Initially the legal representatives of the victims had requested that 16 victims be allowed to testify. However, the judges decided that hearing the evidence of the 16 victims would require at least 15 and half weeks. They stated that while it was important for the participation of victims in trial proceedings to be meaningful, such participation must not be prejudicial to or inconsistent with the

45 Prosecutor v. Jean Pierre Bemba Gombo, ICC-01/05-01/08
rights of the accused and a fair and impartial trial. Undue delays resulting from the presentation of cumulative evidence would affect the accused’s right to be tried without undue delay. The judges therefore asked the legal representatives to select 8 victims whose testimonies would best represent the personal interests of the greatest number of participating victims and complement the evidence already presented in the case. Judges in deciding the modalities of victim participation must determine whether the victim’s intervention is useful to the proceedings and balance the interests of the proceedings against those of the victims. Victims may perceive this as a limitation of their participation.

The first victim recounted being raped by a group of soldiers from the MLC, the rebel group headed by Bemba. The second victim provided evidence of murder, rape and pillaging by Congolese troops and the visit by Mr. Bemba to the town of Sibut. Such statements seem indispensable to the establishment of events surrounding the crimes that Mr. Bemba is alleged to have committed and their value must be recognised. To give evidence about the visit of Mr. Bemba to his troops in their localities complements the case for the Prosecution. The witnesses’ testimonies for the Prosecution focused on events in Bangui whereas these victims will provide testimonies of events having occurred in a wider variety of localities where the MLC denies having perpetrated crimes. Jorda when he was still a judge at the ICTY had stated that the role of victims should be specifically limited to those who were useful to establish the truth, thus limiting their involvement in answering questions from the Prosecutor or the Defence.46 However victim participation, viewed in the light of the Bemba trial, can be meaningful and may be able to shed additional light on the case,

such as the patterns of the crimes and the consequences of the attacks on the civilian population, thus contributing to and complementing the establishment of events, rather than simply reinforcing the case for the Prosecution. As this is the first time that victims were allowed to participate by giving evidence in person, it is not yet clear what value the judges will attribute to these victims’ accounts. Judges may not rely on their evidence for purposes of the judgment, but it could at least be used to corroborate other testimonies of witnesses and experts. This is a useful aim to fulfill for victim participation.

The difficulty is how to grant this right to the growing number of victims in a meaningful manner without jeopardizing the proceedings and within financial constraints. This is not the case with the role carved out for victims by the ICC judges so far in granting participating victims extensive procedural rights in the trial. This is not surprising, as the judges originating from different legal systems, have been given insufficient guidelines, but significant leeway to determine the modalities of victim participation. In fact, increased victim participation does not coincide with victims’ expectations.

The current system could come under threat due to the growing number of victims seeking participation in recent and upcoming trials. To give victims an extensive consultative role as envisaged by the judges may hamper efficient proceedings and risks falling short of victims’ expectations. Instead, victim participation should respect the right of the victims to be kept informed about the proceedings and provide the possibility for victims to express their point of view at certain stages during the trial.
2. Victims of Gender-Based Crimes

The system of victim participation does not live up to the expectations of victims of vulnerable groups, such as victims of gender-based crimes. In view of the thousands of victims of international crimes, victim participation operates selections thus creating inequalities amongst victims.

2.1. Who are the victims?

The first question to ask is who are the victims. The system of victim participation has the potential to allow a high number of victims to apply and be granted the status. The ICC Strategy document concerning victims notes that:

By providing victims with an opportunity to articulate their views and concerns, enabling them to be part of the justice process and by ensuring that consideration is given to their suffering, it is hoped that they will have confidence in the justice process and view it as relevant to their day to day existence rather than as remote, technical and irrelevant. It is also hoped that their participation will contribute to the justice process of the Court.  

This is a worthwhile aim, but not all victims of the conflict will be granted the status of victims for the purpose of victim participation thus creating inequalities amongst victims.

The nature of international crimes, such as genocide or crimes against humanity will inevitably involve tens of thousands of victims, compared to crimes in national settings where the number of victims is generally small. Victims in international criminal law have a double role. They are both individual victims and victims that are part of their community or ethnic, religious or national group. Furthermore, the notion

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47 Report of the Court on the strategy in relation to victims, supra note 36, at para. 3.
of crimes against humanity suggests that these are crimes committed against the
international community as a whole, and as a consequence each individual could be
considered a victim.

The legal definition of victims for the purpose of victim participation can be found in
Rule 85 RPE specifying, albeit in a vague manner, the criteria for natural or legal
persons to qualify as a victim. Rule 85(1) RPE states that a victim is a natural person
who has suffered harm from a crime within the jurisdiction of the Court and
committed in the territory. There must be a causal link between the crime and the
harm. So far, the judges, on the basis of Rule 85(1) RPE, have interpreted the notion
of victim broadly in the sense that provided the applicant fulfills the requirements of
Rule 85(1) RPE and the conditions of article 68(3), namely the additional criterion
that their personal interests are affected victims, should receive permission to take
part appropriately during the proceedings.\(^48\) The threshold to fulfill in order to enable
the judges to determine whether the applicant meets the requirements is thus
relatively low. It must be established that there are grounds to believe that the
requirements are met.\(^49\)

This issue was addressed during the *Lubanga* trial. Thomas Lubanga was the
President of the Union of Congolese Patriots, a rebel group that operated in the Ituri
region (north east DRC). This rebel group was implicated in many serious
international crimes, such as ethnic massacres, torture and rape. Thomas Lubanga was
prosecuted for the war crimes of enlisting and conscripting children under the age of
15 as soldiers and using them to participate actively in hostilities between 2002-2003
(child soldiers). It was the first trial of the ICC (2009), which rendered its first verdict

\(^48\) *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, ICC-01/04-101-tEN-
Corr, Decision on the Applications for Participations in the Proceedings of VPRS 1,

\(^49\) *Prosecutor v. Thomas Lubanga Dyilo*, *ibid*, at para. 98.
on 14th March 2012. According to the Trial Chamber, victims are persons who have suffered direct or indirect harm as a result of the commission of a crime within the jurisdiction of the court.\textsuperscript{50} As a consequence children under fifteen years old who were allegedly conscripted, enlisted or used to participate actively in hostilities by the militia under the control of the accused within the time period confirmed by the trial chamber must be granted the status of victims.\textsuperscript{51} Also included are the families and relatives of child soldiers along with individuals who intervened to help the victims or to prevent the commission of these crimes. Families and relatives must demonstrate a close relationship between them and a direct victim, for instance that the indirect victim was the parent of a child soldier.

2.2. Inequality

The system of victim participation thus operates a selection amongst the victims of the conflict. In actual fact, victim participation is further limited by the choices of the Prosecutor of crimes and events to prosecute. The Lubanga case demonstrated that victims of gender-based crimes can be a forgotten category due to the decision of who to prosecute for which crimes committed where.

Firstly, victim participation is dependent on the Prosecutor’s selection of crimes charged. In the Lubanga trial, the Prosecution decided to focus its charges on child soldiers to the detriment of other crimes, in particular gender-based crimes. In doing so, the Prosecution closed the door to the participation of victims of gender-based crimes other than those who fulfilled the victim requirements of being a child under the age of 15 who was conscripted, enlisted or used. The victims of gender-based

\textsuperscript{50} Prosecutor v Thomas Lubanga Dyilo, Trial Chamber, ICC-01/04-01/06-1119, Decision on Victim Participation, Public, 18 January 2008, at para .91.

\textsuperscript{51} Prosecutor v. Thomas Lubanga Dyilo, ibid, at para 47.
crimes committed by the rebel forces, even those who suffered gender-based crimes at the hands of the child soldiers were not able to participate. The judges did hear evidence from witnesses and participating victims that, particularly for girl child soldiers, the suffering of gender-based crimes was an intrinsic part of the use of child soldiers. Nonetheless, the Court decided that the Prosecution did not provide sufficient evidence to this effect.

I argue that, particularly with regards to victims of gender-based crimes, the ICC has a duty, when there is evidence that gender-based crimes were committed, to put in place appropriate measures to address these crimes. In doing so the ICC must take into account their specific needs and this requirement applies also to the system of victim participation. The ICC Statute is a progressive legislative framework that includes reference to gender and gender-based violence. This has manifested itself through the codification of an increased number of gender-based crimes as war crimes and crimes against humanity and the inclusion of a gender mandate within the ICC structures and procedures urging the organs to pay particular attention to gender and gender-based violence. The ICC Statute specifically emphasizes that, in its dealings with victims and witnesses, particular attention must be given, but not limited, to gender and whether the crime involves sexual or gender violence (article 68(2)), thereby acknowledging that gender-based crimes are a common occurrence. Yet they are not prosecuted as vigorously as other international crimes, despite the fact that according to article 54(1)(b) ICC Statute, the OTP has a duty to investigate gender-based crimes. So far, the Prosecutor has sought charges for gender-based crimes in the situations of Uganda, Democratic Republic of Congo (DRC), Central African
Republic (CAR), Darfur and Kenya.\textsuperscript{52} It is also likely that gender-based crimes will be included amongst the charges in the \textit{Gadaffi et al.} case in the Libya situation. However the indictments of only twelve individuals out of the twenty-six individuals charged have gender-based crimes included in their charges. Of the two cases that have reached the confirmation of charges stage, the \textit{Bemba} trial and the \textit{Katanga/Ngudjolo} trial, the Pre-Trial chamber dismissed a third of the gender-based crimes, because of lack of evidence. These facts thereby put into question the effective and consistent investigation and prosecution of gender-based crimes, the extent to which, despite evidence, gender-based crimes are not included in the charges or fail at the confirmation of charges stages, but also the extent to which sufficient measures are in place for victims of gender-based crimes to come forward. For instance Jean-Pierre Bemba Gombo, President and Commander in Chief of the MLC has been charged with murder and rape as crimes against humanity and murder, rape and pillaging as war crimes. Other alleged gender-based crimes, such as rape as torture, the act of torture of forcing victims to watch rape of family members, and rape and enforced nudity and other acts as outrages of personal dignity were not included in the confirmation charges. Similarly, as discussed, Thomas Lubanga was only charged with the crime of recruiting and using child soldiers. Judge Odio-Benito provided a separate opinion found that the invisibility of sexual violence in the legal concept of recruitment and use of child soldiers leads to discrimination against the victims of recruitment.\textsuperscript{53} I do not endorse Judge Odio-Benito’s stance that the


\textsuperscript{53} \textit{Prosecutor v. Thomas Lubanga} Dyilo, Decision on Sentence Pursuant to Article 76 of the Statute, 10 July 2012, Separate and Dissenting Opinion of Judge Odio-Benito, at para.13.
Court should have included sexual violence within the legal concept of ‘use to participate actively in the hostilities’. Gender-based crimes, including crimes of sexual violence are criminalized by the Rome Statute, and should be recognised as such, not subsumed in another crime. However, the Prosecutor, in exercising his/her prosecutorial discretion to decide which crimes to investigate and prosecute does create inequalities. Victim participation is only available for victims of gender-based crimes as identified by the prosecutor and confirmed by the pre-trial chamber, and this reinforces victim inequality.

Secondly, victim participation is also dependent on the prosecutor’s determination of events under investigation. The Prosecution makes decisions and chooses a limited number of incidents. In the Bemba case, for instance, the courts will look at evidence surrounding a limited number of villages and events that took place on specific dates. As a consequence, victims of other villages and/or other dates will not be granted the right to participate. However, although justified for procedural reasons, such a selection also creates further inequalities amongst victims. Indeed, the participating victims are only those who were affected by the situation under investigation and by the crimes charged as presented by the prosecutor and confirmed by the pre-trial chamber. Judge van der Wijngeart argues that this leads to discrimination between victims and also questions whether this fulfills the so-called restorative justice goal of the ICC. Indeed can a criminal court fulfill the role of a human rights court in giving a voice to victims if it cannot be all-inclusive? Thus victim participation despite its very victim-oriented outlook contributes to creating divisions between victims of international crimes.

2.3. Insufficient Recognition
The judges at the ICC, whilst adopting a broad definition for the concept of victims, have failed to afford special attention to vulnerable categories of victims, such as victims of gender-based crimes, women, children or indeed other categories of victims belonging to minorities. The Bemba trial demonstrates that the ICC has yet to determine clear strategies and mechanisms to assist victims of gender-based crimes to participate in the proceedings. The Lubanga trial questions whether participation by victims of gender-based crimes can aid in establishing the truth.

A high proportion of the crimes reported by victims are gender-based crimes. Although the Office of the Public Counsel for Victims (OPCV) does not represent all the victims that have been granted the right to participate in the three trials underway at the ICC, 90 per cent of the crimes reported by recognised victims that it represents per case are gender-based crimes, including rape, sexual violence and sexual slavery, thus making gender-based crimes the most suffered crime.\(^{54}\) I argue that, in view of the occurrence of gender-based crimes in the situations and cases under scrutiny by the ICC and the gender mandate included in the ICC, it is necessary to recognise the specificity of victims of gender-based crimes in order to take their needs into account. So far, the Bemba trial suggests this is not yet the case. Indeed, a significant number of victims applied to participate in the proceedings of the Bemba trial, of whom 1,619 victims were granted the right to participate. The judges in the Bemba trial decided that participating victims would be divided into two groups according to geographical location of the crimes. One Central African lawyer who would have knowledge of local traditions, culture and language would represent each group. To divide the large number of participating victims into only two groups regardless of the gender-based

\(^{54}\) Women’s Initiatives for Gender Justice, Figures as of 5 August 2010.
crimes suffered, seems to suggest that little thought has been given to this specific category of victims.

It is the lack of recognition for the specificity of victims of gender-based crimes that needs to be addressed. Some victims of gender-based crimes have also expressed regret that, so far, they have not been recognised as a special category of victims who have suffered a specific vulnerability due to war and their gender, and this contributes to the impression that the ICC does not live up to victims’ expectations.55

To recognise victims of gender-based crimes as a specific category would be more sensitive to their specific needs. This would be in line with the mandate the ICC has been given to give due regard to gender and gender-based crimes and assist the OTP in gaining access to sufficient relevant evidence, thus alleviating criticisms of failure to investigate, indict appropriately and charge the full array of gender-based crimes and, in some instances, to provide sufficient evidence to substantiate charges of gender-based crimes. This does pre-suppose a complementary mechanism for victims to communicate with the OTP during the Pre-Trial stages.

The Lubanga trial raises a further issue of whether participating victims of gender-based crimes will actually add to the establishment of the truth. In the Lubanga trial, as discussed previously, the judges did not address the gendered aspects of child soldiers. Training boys to rape, as well as using girls as sex slaves, were gendered aspects of the reality of child soldiers. The majority of judges considered that the issue may be discussed during the sentencing and reparations phase. As it turns out the issue was similarly dismissed at the sentencing stage and left to be addressed at the reparation phase. The decision reached in the Lubanga judgment thereby

questions the value accorded to the participation of victims, who in part wanted to
demonstrate the gendered aspects of the recruitment and use of child soldiers. Judge
Odio-Benito, in her separate opinions to both decisions, agreeing with the
Prosecution that gender-based crimes were deep-rooted in the recruiting of children
and in their use in hostilities. She argues that

The harm suffered by victims is not only reserved for reparations proceedings but
should be a fundamental aspect of the Chamber’s evaluation of the crimes
committed.\(^{56}\)

I am dubious that the evidence presented by witnesses and participating victims was
insufficient to, at least, demonstrate that sexual violence was a consequence,
particularly for girls, of the use of child soldiers. The input of participating victims
corroborated part of other witness testimonies thus providing ample evidence that
sexual violence was an intrinsic part of the use of child soldiers, but the judges found
the evidence to be insufficient and that sexual violence could not be attributed to Mr.
Lubanga. The judges instead made it clear that the blame should lie with the
Prosecutor for not including gender-based crimes in the indictment. The fact that for
participating victims of gender-based crimes their input and stories only become
relevant at the reparation stages creates an unhelpful link between reparation and
victim participation. As previously mentioned, Massidda argues that for participating
victims; it is the telling of their stories and not reparations that is the primary aim. It is
difficult for victims of gender-based crimes to envisage what reparations would
entail.\(^{57}\) Thus victim participation does not yet reflect the specific needs of victims of
gender-based crimes.

\(^{56}\) *Prosecutor v. Thomas Lubanga Dyilo*, Judgment, 14 March 2012, Separate and
Dissenting Opinion of Judge Odio-Benito, para. 8.

\(^{57}\) Massidda, *supra* note 44.
3. A Burdensome System that Detracts from the Purposes of the ICC

A number of issues also arise from victim participation for the ICC. Amongst these is the least the burden that victim participation places upon the institution and its judges. Furthermore, the victim-oriented approach of victim participation detracts from the purposes of the ICC.

3.1. Burden for the Institutions

For the sake of fairness, any of the possible contributions that participating victims may offer should not interfere with the rights of the accused. A factor to be taken into account for determining a consistent approach is that victim participation is meaningful to the process of determining the truth in a fair manner and without unduly delaying the procedure. Some authors, such as SáCouto argue that victim participation is limited, in particular because of the requirement that Court proceedings be conducted in a manner that is fair and expeditious.\(^{58}\) However, fair and expeditious proceedings should be the overriding principle that drives victim participation. Victim rights under the victim participation system can only be upheld in so far as they safeguard the minimum rights of the accused and do not hamper the efficient conduct of the proceedings. The rights of the accused ensure that the criminal process is effective and fair. Therefore, the balancing act performed by the judges between the rights and interests of all participants in the trial should always

ensure that the defendant’s fair trial rights are upheld and also that the proceedings are conducted efficiently. Justice must be seen to be done comprehensively. Indeed as noted by Stahn that “an extensive interpretation of victims’ rights could conflict with two cardinal principles which are vital to the work and functioning of the Court: the function of the Court as a judicial institution and the imperative of impartiality”\(^{59}\).

However, the reality does not easily coincide. There is a clear increase in the number of applications for victim participation. By the end of 2011, the ICC had received more than 9,900 victim participation applications. The Victims Participation and Reparation Section (VPRS) at the ICC alone has received 6,156 applications to participate in the Court’s proceedings since 2005, with a sharp increase since September 2009.\(^ {60}\) How will the ICC’s institutions and judges deal with an increasing number of applications? These applications have to be processed efficiently without creating too much of a backlog, because that would affect adversely the requirement of expeditiousness of proceedings, thus prejudicing the rights of the accused. It would also affect adversely management of victims and their expectations.

One third of applicants have so far been allowed to participate. By the 1\(^{st}\) of September 2011, 3,182 applicants had been granted the right to participate, of whom 1,619 are victims participating in the *Bemba* trial alone compared to the 560 participating victims in the Kenya situation,\(^ {61}\) 123 participating victims for the *Lubanga* trial, 366 participating victims in the *Katanga* trial. Despite improvements to deal with victim participation applications more swiftly, the Court’s resources are

\(^{59}\) Stahn, et al., *supra* note 14, at 223.

\(^{60}\) Women’s Initiative for Gender Justice, report card 2011, p. 273. Between 30\(^{th}\) August 2010 and 1\(^{st}\) September 2011, the ICC received 2, 577 applications to participate.

\(^{61}\) Women’s Initiative for Gender Justice, report card 2011, p. 276. The victims participating in the Kenya situation are divided as follows: 326 in the *Prosecutor v. Ruto* et al. and 233 in the *Prosecutor v. Muthaura* et al.
stretched to deal with these numbers, in particular in the Victims Participation and Reparation Section (VPRS). There is still a significant backlog of applicants demonstrating that the system of victim participation creates too much of a strain on the workings of the ICC. As a consequence applicants wait for more than a year to receive a decision, which in turn can result in the Court losing the support of victims. The financial implications are also not to be ignored. After all, the success of the ICC depends on how well it can carry out a balancing act: who to prosecute, for which crimes and within this process how best to prosecute within financial constraints. The system of victim participation is also burdensome for the judges. It is the task of the judges to grant the right to participate for each victim’s application. To do so, judges have discretion to determine the appropriate standard of review, and judges adopt different approaches. Judges have to go through each submission, and each initial application is a seven-page fact-intensive document, to which is added the comments provided by the Prosecution and the Defence. This in itself may not seem overly burdensome, but when viewed in the context of the number of applicants and resulting strain the ICC is under, it turns out to be a lot more extensive. There is also the issue of the consequences of victim participation during the proceedings. To take the example of written submissions by participating victims: the judges in their judgement must address the issues raised by the written submissions of the participating victims. This in part may explain the length of ICC judgments, but nonetheless is time-consuming.

62 Women’s Initiative for Gender Justice, report card 2010, p. 185.
63 McGonigle Leyh, supra note 14, at 256.
64 McGonigle Leyh addresses the overall burden that the assessment of applications puts upon the ICC and particularly raises the issue of the effects on the Defence, supra note 14, at 240.
International tribunals are often criticized for their lengthy procedures. The ICC is not immune to this criticism with the first judgment in the Lubanga trial being 6 years in the making. Victim participation contributes to the length of procedures and distracts judges from their primary role of determining the guilt of the accused and stops them from prosecuting other alleged perpetrators. A more efficient approach to assessing victims’ applications, particularly for the judges, needs to be adopted otherwise the system will grind to a slow halt due to the number of applications and the institution’s ability to deal with the numbers. The time of the ICC judges could be more wisely spend determining and expressing legal norms.

3.2. Weakening of the Purposes of ICC

The ICC Statute provides little guidance as to its purpose and what it should seek to achieve, nor how the victim-oriented system of victim participation should conform to the purpose(s) of the ICC which are after all very perpetrator-oriented. Generally, the underlying purposes of international criminal tribunals are retribution and deterrence. The ICC, in recognising the interests of the victims also seeks to contribute to restorative justice. As a consequence, the ICC sets out to achieve retribution, deterrence, restorative justice, or a combination of all three.\(^{65}\) They have been discussed widely and each can be subjected to criticisms.\(^{66}\) A further purpose of

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\(^{65}\) McGonigle Leyh, *supra* note 14, at 64.

the ICC is that of the expression of global norms. Giving a voice to victims through victim participation adds a further dimension to an already difficult task of fulfilling these purposes.

Through victim participation, victims play a more central role in the proceedings. Some of the extensive modalities of victim participation, for instance to allow the victims to present or challenge evidence, empowers victims, and all but positions them on a par with the Prosecutor and the Defence. Restorative justice seeks to open up a link between the perpetrator and the victim. It focuses on the role of the victim vis-à-vis the offender and aims at attempting to repair the harm suffered by the victims of mass crimes and to restore communities through dialogue and education, after guilt has been established, through collaboration between the victims and perpetrators in order to achieve reconciliation. They, more often than not, take the form of Truth and Reconciliation Commissions (TRC). The question is whether victim participation achieves restorative justice for victims.

Spiga, amongst others, contends that restorative justice is the primary role of the ICC. The ICC’s Strategy in Relation to Victims asserts “a key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but a restorative function. It reflects growing international consensus that participation and reparations play an important role in achieving justice for victims”. Judge Odio-Benito, in her dissenting opinion in the Lubanga judgment seems to agree that the harm suffered by victims is “a fundamental aspect of the Chamber’s evaluation of the crimes committed”.

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67 See De Guzman, supra note 9.
69 Report of the Court on the strategy in relation to victims, supra note 45.
70 Odio-Benito, supra note 54, at para. 8.
It is unclear on what basis Judge Odio-Benito suggests that the ICC also has a purpose to attend to the harm suffered by the victims. The Statute does not provide for a broadly defined restorative role such as proposed by Judge Odio-Benito and her statement creates false expectations amongst the victims that the ICC has a restorative role even before any guilty verdict has taken place.

It is true that the ICC acknowledges the interests and importance of victims of international crimes in the justice process and thus contributes to restorative justice, in particular within the victims’ reparation scheme through which it aims to provide the foundations for rebuilding societies after mass violence.\(^{71}\) As McGonigle Leyh points out, the effectiveness of the restorative justice processes is dependent on the finding of guilt.\(^{72}\) Only when the accused has been found guilty can a link be established between the victim and the perpetrator to start repairing the harm done to the victim. During the proceedings and before the determination of guilt, the contributions to the overall aim of restorative justice \textit{per se} of any of the more victim-oriented procedures such as victim participation are limited. Victim participation enables the Court to listen to victims in order to determine the truth. Trumbull for instance draws attention to the fact that victim participation helps victims by telling their stories in order to help them recover from trauma.\(^{73}\) Although victim participation provides the opportunity to testify for a greater number of victims, the proceedings’ time constraints will not allow for all participating victims who wish to do so to give evidence. This leads to restorative justice for a chosen few victims, which is no restorative justice at all. Victim participation also fails the victims by raising expectations. For instance, the \textit{Lubanga} trial has a limited effect on participating


\(^{72}\) McGonigle Leyh, \textit{supra} note 14, at 63.

\(^{73}\) Trumbull, \textit{supra} note 11.
victims. As discussed, during the proceedings victim participation has had limited effects, because despite victims’ representations during the proceedings that sexual violence should be included in the charges or that sexual violence should be recognised as forming an intrinsic part of the recruitment and use of child soldiers, Lubanga has been found guilty of recruiting and using child soldiers and not of crimes of sexual violence or of the effects on the victims due to sexual violence. As a consequence, victims in the Lubanga case, particularly those participating child soldiers who suffered crimes of sexual violence, will have a diminished faith in international justice and will have found very little restorative solace.

Any restorative role of the ICC is thus limited to identifying a perpetrator and the crimes the perpetrator is to be charged with and the reparation of victims if the perpetrator is found guilty.

Although restorative justice is a significant element, the ICC’s approach favors deterrence followed by retribution. According to the ICC Statute, the ICC was established to put an end to impunity, to bring perpetrators to justice and thus to contribute to the prevention of such crimes.\footnote{Preamble, ICC Statute.} This was reiterated at the Kampala Review Conference held in June 2010.\footnote{First Review Conference, Kampala Declaration, RC/Decl.1, 1 June 2010.} In the Lubanga trial, judges have expressed the view that retribution is subordinate to prevention.\footnote{Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-8-Corr, Decision Concerning Pre-Trial Chamber’s I’s Decision on 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Mr. Thomas Lubanga, annex I, 24 February 2006, at 48.} As a consequence, there is a specific focus on the offender rather than the victim. In international criminal law, retribution focuses on the Prosecution and punishment of perpetrators of the most serious crimes, whereas deterrence focuses on the prevention of future international crimes. If retribution is the primary goal, the role of victims in the proceedings is
limited to that of witness. If deterrence is a secondary goal, victims will have to contend with the interests of society or of the offender. Retribution or deterrence does not preclude the possibility for victims to come forward of their own accord to express their views and concerns, but only as an additional method to establish the truth.

The ICC, due to financial constraints, will always have to be selective as to whom it will prosecute and for which crimes. For this reason, retribution will only be reserved for a chosen few perpetrators, deterrence will only be reserved for a few chosen international crimes and a few prospective criminals, and restorative justice will always fall short of victims, because the ICC cannot ensure that the stories of all or even most victims in mass atrocities are told. For instance, in the Lubanga case, the verdict demonstrates that one person, even if they are responsible for a number of most serious crimes, will only be sentenced for a small proportion of most serious crimes. For the victims seeking reparations, it is yet unclear how this will pan out, but the judges deemed that Thomas Lubanga’s financial situation exempted him from making any contributions to the Trust Fund for Victims. In other words, Thomas Lubanga will not bear the financial cost for the harm suffered by the victims seeking reparation. His conviction should be sufficient to satisfy his victims. Instead, any financial compensation will be funded by State contributions to the Trust Fund.

Having received a sentence of fourteen years, will the Lubanga trial have any deterrent effect on the recruitment and use of children in warfare? That is a difficult question to answer. As Schabas said: “while we can readily point to those who are not

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Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, at para. 106.
deterred, it is nearly impossible to identify those who are”.

De Guzman suggests an alternative purpose of the ICC: to express global norms. The ICC, in its choice of crimes to investigate, indict and prosecute conveys a social message that the crime is considered to be amongst the most serious crimes of concern to the international community as a whole. The expression of global norms, just like retribution, deterrence and restorative justice, will necessarily be limited to a number of international crimes. However, the punishment of a few perpetrators is sufficient to express outrage at the commission of such crimes and act as a trigger to alter the way in which the wrongful behavior of the crime is perceived.

The choice of crimes to pursue is particularly important for those crimes that are less established, such as gender-based crimes. If effectively targeted at those international crimes still undervalued and most in need of norm development, it will give the ICC the dynamic role it deserves: that of advancing international criminal law. The difficulty will of course be to garner agreement as to which norms are most in need of development within the financial constraints of the ICC. It may well be that the situation or case under investigation naturally points at a particular crime, as occurred in respect of the recruitment and use of child soldiers in the Lubanga trial, but which should also have addressed gender-based crimes as a priority. In other instances, the wider context of the situation or case will determine the choice of crimes, taking into account the specific nature of the crimes committed, the harms inflicted upon the

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victims, but in this determination, the Court should pay particular attention to crimes that have so far been undervalued, such as crimes of sexual violence.\textsuperscript{80} If the role of the ICC is to be understood as such, victim participation should support the path to expression of those global norms without detrimental effects to the expediency of trials and the ICC’s limited resources. The international community, including victims, has expressed concerns about the lengthy procedures and frustration at the long wait for the first outcome of a trial.\textsuperscript{81} Since 2006 and the first arrest warrant, a small number of trials are underway. In 2012 we finally saw the much-anticipated conviction of Thomas Lubanga for recruiting and using child soldiers in armed conflict. For victims, and arguably possible perpetrators, expression of norms would be the most significant impact of the ICC. Each global norm will convey a clear message that, the ICC by virtue of investigating a crime or set of crime allegedly committed by a high-level political or military leader considers the crime(s) to be amongst the most serious crimes. In this sense, the extensive participation of victims in the proceedings of the ICC hampers efficiency by adding a third participant. Victim participation undermines the expressive capacity of the ICC to punish the perpetrators of the most serious crimes, diminishes the deterrent effect of punishment and stops the ICC from prosecuting other crimes. Instead victim participation should be limited to the “expression of concerns and views” to enhance the quality of information received by the Court in order to assist the ICC in its truth finding mission without detracting from its role in bringing perpetrators to justice and ending impunity. Victim participation should remain an opportunity for a limited number of victims to be heard and to have an efficient voice to add to the establishment of the truth, but never to

\textsuperscript{80} De Guzman, \textit{ibid}.

\textsuperscript{81} Victims’ Rights Working Group, \textit{The Impact of the Rome Statute System on Victims and Affected Communities}, April 2010, at 11.
compete with the rights of the defendant and to ensure an efficient outcome of the trial. Indeed, in view of the nature of international crimes, it is important that the rights of the victims are carefully and sensitively balanced with the Court’s duty to manage proceedings. Otherwise, there is a danger of tokenism by on the one hand determining a broad range of victim participation modalities, but on the other hand minimising the participatory role of the victim, which does not assist justice for victims. Any role attributed to the victim participating in the proceedings should contribute and not detract from the purposes of the ICC.

Concluding comments

There is little doubt that victims should not be ignored in international criminal justice. However, I wonder to what extent this additional burden detracts even further from the ICC’s role as an expresser of norms. The ICC not only has to achieve a combination of retribution and deterrence, but now also a degree of restorative justice. Is victim participation really the manner in which to achieve restorative justice? If it is, then the current system is not meaningful enough, because it is restorative justice for a chosen few victims. The ICC thus faces a challenge to develop a consistent approach to victims in line with its mandate to victims of vulnerable groups, such as victims of gender-based crimes.