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Thesis title: Victims' Rights in national and particularly in international
criminal procedure, origins and issues: the special status of victims before
the International Criminal Court

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“I certify that the attached is all my own work. I understand that I may be penalised if I use the words of others without acknowledgement.”

.....
(Bárbara Pinto Teixeira Direito)

Abstract

This work will consider the trend towards the introduction of victims' rights in national as well as in international criminal procedural law. In the nineteen eighties, the movement for the empowerment of victims that had already prompted remarkable reforms in many countries finally earned the attention of international and regional organisations. International standards were thus introduced, which suggested that the rights of victims became part of the human rights discourse. The main the goal of this work is to determine the extent to which the victim-related human rights standards had an impact in the procedural rules applicable in international criminal courts, from Nuremberg to the recently created International Criminal Court. On the basis of specific examples, it will be argued that the range of rights granted to victims in domestic orders essentially depends on legal traditions and principles, and that normally adversarial jurisdictions are more reluctant to allow victims to have decision-making powers, whereas inquisitorial jurisdictions are frequently more victim-friendly. Bearing in mind the striking influence of adversarial characteristics in international criminal procedure, the analysis of the innovative status of victims before the ICC gains considerable interest. Now that the ICC has started its work, it will be particularly interesting to assess the concrete procedural rights victims will be able to make use of in the near future.

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Part I - Introduction

In the late nineteen forties, the concern with the position of the victims in domestic criminal justice systems started gathering the attention of a number of scholars who, whilst criticising the reduced importance of victims, advanced the crucial role they should play in judicial proceedings. This new approach gradually gained national and international support as the so-called 'victim movement' emerged in the seventies, influencing reforms in many countries. In fact, the victims' rights cause achieved international recognition when in the mid-eighties two important instruments forged standards on the position of the victim in the criminal justice system. The human rights approach to criminal procedure, which, traditionally, at the individual level, only included the defendants' rights, increasingly affirms victims' rights.

The purpose of the participation of the victim in criminal proceedings is generally to obtain reparation, when the law specifies that possibility, or to influence the outcome of the judicial process similarly to the parties to the proceedings. Victims have also benefited from specific services intended to ameliorate and facilitate their interaction with the justice system. The international standards have sought to raise the range and effectiveness of both victims' rights and services.

The emergence of an international criminal justice system dates back to the second half of the twentieth century, a time when the atrocities committed during World War II precipitated the creation of two International Military Tribunals by the Allied Powers, whose purpose was to try war criminals. States began to acknowledge that international rather than domestic courts would be effective in condemning crimes of international concern. During the subsequent decades, the level of victimisation derived from international as well as internal conflicts reached such proportions that new Tribunals needed to be created in the mid-nineties, this time under the auspices of the United Nations. Although the plight of victims of international crimes gained recognition

through the development of international criminal law, victims were and still are typically not allowed to participate in the proceedings before these courts. They are normally regarded as mere witnesses and deprived of standing in the proceedings, similarly to what can traditionally be observed in adversarial systems. However, the new status of crime victims before the International Criminal Court introduces new challenges to the issue of victims' procedural rights.

In the light of what has been said, it is natural that several questions arise. Firstly, one could wonder which rights and services were provided to victims, before the adoption of the international standards. Furthermore, it would be interesting to determine the extent to which international standards have influenced national and international criminal justice systems. Has the traditional trend for the lack of recognition of victims' procedural rights changed since the adoption of the Rome Statute and the Rules of Procedure and Evidence of the International Criminal Court?

In order to provide answers to these questions, this work aims to examine the remarkable evolution of the position of victims in criminal proceedings, in national as well as in international courts, with a particularly focus on the latter. It will begin by considering the process of dissemination of the concerns about victims' rights in domestic criminal justice systems, taking into account the impact of the international standards on victims in those systems. This will emphasise the striking differences between the two main western criminal procedure models, the adversarial and the inquisitorial models, and the different approaches each of them has had on this topic (Part II). This work will then engage in an analysis of the victim-related rules applicable in different international criminal courts, which will scrutinise and appraise the standing of victims in international criminal procedure before the creation of the International Criminal Court and also question the compatibility of those rules with the above mentioned standards (Part III). Thirdly, it will assess the merit of the victim-related rules applicable in the International Criminal Court in order to point out the achievements as well as the shortcomings of this innovative framework (Part IV). Finally, it will dwell on the concluding observations about all the aspects of victims' rights developed throughout this work (Part V).

Part II - International standards and national experiences

1 - Introduction

Before dwelling on the international instruments that are the central focus of this part, one must first of all understand the role victims have played in the criminal justice system in the past. The starting point of this analysis is Schafer's renowned study of the history of the victim covering the numerous phases of its evolution. Special attention will then be paid to the emergence of the victim movement or the struggle to make the case for victims' rights both at the international as well as the national level. Finally, a few examples of mechanisms created to tackle the deficit of national provisions dealing with victims will be scrutinised in the light of the Recommendation R (85) R of the Council of Europe. Since procedural rights are the main concern of this work, special emphasis will be given to them. It will then be possible to draw conclusions on the level of the international standards and the extent to which they have been implemented.

2 - The history of the victim in the criminal justice system

2.1 - The golden age of victims and their decline

According to Schafer, in traditional justice systems conflicts were solved amidst the family or the tribe in a privately ordered fashion. The fact that there was no central authority entrusted with the function of settling disputes made it possible for the victim to assume a central role: "he made the law, and he was the victim, the prosecutor, and the

judge.”¹ This was the so-called “Golden Age of the Victim”. In this system of private justice the satisfaction for the victim came mostly from the physical punishment inflicted on the offender, after which the dispute was settled. Schafer argues that “[p]unishment for some crimes was achieved by a form of compensation or restitution, but most punishment was through aggressive retaliation.”² Cardenas notes that in the English legal tradition the victim monopolised the prosecutorial power because it was argued that “the surest method of bringing a criminal to justice is to leave the prosecution in the hands of the victim and his family.”³

“As tribes settled down”, Schafer notes, “and reaction to injury or loss became less severe”⁴, compensation appeared as the solution for disputes. Still, the offence was regarded as an attack on the victims’ rights that justified a privately determined punishment or a claim for compensation.

However, the organisation of the justice system suffered substantial changes relegating the victim to a secondary position. The state took over the privately ordered form of justice to turn it into a centralised system where, in most cases, the victim was not a party to the proceedings. This is due to factors such as that the high rate of criminality and the general feeling of dissatisfaction of the authorities as to the chaotic state of the criminal justice system. Moreover, on the issue of compensation, Schafer contends that “composition as the obligation to pay damages, became separated from criminal law and became a special field in civil law.”⁵ This represents the separation of criminal actions and civil actions for reparation, one of the main features of the common law justice systems.

Thus, to a period of domination followed one of decline of the victim. The state controlled criminal procedure and while offences were regarded as violating the interests of the state, and not of the specific victims, their role was reduced to being parties in a civil court in order to obtain reparation. According to Schafer, even if some attention was paid to this issue at the end of the nineteenth century, “[a]t the turn of the century, the

¹ S. Schafer, *The Victim and his Criminal—A study in functional responsibility*, New York, Random House, 1968, p. 10.

² *Ibidem*.

³ J. Cardenas, *The Crime Victim in the Prosecutorial Process*, in «Harvard Journal of Law and Public Policy», no. 9, 1986, p. 359.

⁴ S. Schafer, *The Victim...*, cit., p. 15.

victim's case continued to be advanced but without success.”⁶ Cardenas illustrates Schafer's analysis with two examples. First of all, Cardenas points out that “[t]he right of any crime victim to initiate and conduct criminal proceedings was the paradigm of prosecution in England all the way up to the middle of the Nineteenth Century.”⁷ This reinforces Schafer's conception of the Golden Age of the Victim, or at least of a phase where the victim still played a central role in the system. However, Cardenas notes that the creation of new police forces with extensive prerogatives, especially in the field of prosecution, gradually made the victim's participation in the early proceedings unnecessary.⁸ Secondly, the author points out that the role of the victim in the American criminal justice system underwent the same evolution. Indeed, “during the Seventeenth Century, the crime victim was largely on his own if he desired to arrest and prosecute.”⁹ This changed however, with the institutionalisation of public prosecution, whereby “[c]rime victims were no longer allowed to manage and control the prosecution of their crimes; rather, the victim was to serve as a piece of evidence to be used by the state to obtain a conviction. Crime was to be addressed entirely in terms of an offense against the state.”^{10 11}

According to Schafer, this scenario remained the same throughout the twentieth century but the author anticipated the emergence of a new phase in the late nineteen sixties that would witness the “revival” of the victim. Indeed, on the basis of the events that took place in the last decades of the twentieth century it appears as though Schafer's predictions were correct, as the next section of this work will demonstrate. Nevertheless, Schafer's version of history of the victim appears to be rather romanticised, as the author appears to have overestimated the role of the victim. But it also clearly underscores the important idea that the victim was not always the forgotten part of the justice system, and

⁵ *Ibidem*, p. 19.

⁶ *Ibidem*, p. 25.

⁷ J. Cardenas, *The Crime Victim...*, cit., p. 360.

⁸ *Ibidem*, p. 363.

⁹ *Ibidem*, p. 366.

¹⁰ *Ibidem*, p. 370.

¹¹ For more on the evolution of the role of the victim in the American criminal justice system, see P. M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years after the President's Task Force on Victims of Crime*, in «New England Journal on Criminal and Civil Confinement», Winter 1999, pp. 23-25.

that the victim had generally been neglected by the modern criminal justice systems, at least until the nineteen sixties. This status quo helps to explain the events that will be described below.

2.2 - The victim movement

The studies on the impact of crime on victims and their relationship with the criminal justice system developed by von Henting and Mendelsohn in the late 1940s laid the basis of what later became known as the victim movement. They were the founding fathers of what van Dijk described as the “victimagogic ideologies”¹² and were mainly concerned with two ideas. Firstly that victims do play an important role in the crime, and that for the crime to be fully understood the victim’s contribution must be taken into consideration. Secondly, the idea that the sentence should aim to restore the relationship between the victim and the offender that was disturbed by the crime. Thus, in order to fulfil these objectives, the victim should be allowed to take part in the criminal proceedings. These ideologies also encompassed an acknowledgement that the victims’ suffering often arose twice, firstly due to the direct effects of the offence on them, and secondly when they severed the consequences of the lack of a victim-oriented policy in the criminal justice system.¹³ Most of the time, victims were unable to defend their interests before the courts because the system did not allow them to participate actively, or because they were ill informed of their rights, which lead to a phenomenon of ‘secondary victimisation’.

Van Dijk then describes the several waves of evolution of the victim movement. Following the example of New Zealand in 1963, the first state compensation schemes were introduced in several countries to reward victims of crimes, between 1965 and

¹² J. van Dijk, *Ideological trends within the victims movement: an international perspective*, in M. Maguire, J. Pointing, (Eds.), *Victims of crime: a new deal?*, Milton Keynes, Open University Press, 1988, p. 116.

¹³ According to Wright, not only during the pre-trial stages as in the relationship with the prosecuting authorities and the police, but also “[o]nce a case reaches the courtroom, those victims who are required as witnesses often find that the traditional procedures are not ‘victim-friendly’”. See M. Wright, *Justice for Victims and Offenders: A Restorative Approach to Crime*, Winchester, Waterside Press, 2nd ed., 1996, pp. 25-26.

1975. “A decisive argument for the schemes”, van Dijk explains, “seems to have been the need to respond to the growing criticism of the general public against the treatment model in penal law.”¹⁴ The following step was the creation of victim support schemes that were to give victims the attention and assistance that states were not yet willing to give them. During the 1980s a third wave was launched with the institutionalisation of the victim support schemes created in the previous years. Van Dijk explains that several of these became ‘affiliated’ with hospitals or were granted funds by the states, which no doubt allowed them to expand their activities and provide even better services to the victims.

Moreover, the author refers that still during this third wave, “new consumer demands upon the criminal justice system”¹⁵ pointed out the pressing need to transform the wrongs of the criminal justice system that were the cause of secondary victimisation. This was recognition of the fact that states should still go further and provide victims with rights and not only services in order to achieve higher standards.

Not surprisingly, despite the positive results, the victim movement would not continue to push the case for reforms in this area at the same fast pace. In fact, even if in some parts of the world one could argue that satisfactory results are yet to be achieved, Shapland and Maguire contend that “the initial enthusiasm and political will to create changes in provisions for victims has subsided.”¹⁶ If it can be said that in most countries, regardless of their legal tradition, the victim movement contributed to the creation of a net of support and assistance to victims, the same cannot be said of effective provisions in the criminal procedure area. It seems as though certain obstacles will continue to prevail over more far-reaching mechanisms for victims. Moreover, the movement has reached different proportions and results in different countries. For instance in the United States it appears that “many provictim groups (...) have adopted an aggressive, overtly political and campaigning approach, with an emphasis on the *rights* of victims—if necessary at the expense of offenders’ rights”.¹⁷ In Europe, however, and particularly in England and Wales, victim groups and governmental institutions seem to call for “desirable

¹⁴ J. van Dijk, *Ideological trends...*, cit., pp. 119-120.

¹⁵ *Ibidem*, p. 121.

¹⁶ M. Maguire, and J. Shapland, *Provisions for Victims in an International Context*, in R. Davis, A Lurigio, W. Skogan, (Eds.), *Victims of Crime*, Thousand Oaks, Sage Publications, 2nd ed., 1997, p. 213.

improvements in *services* for victims than to victims' rights or radical legislation on their behalf."¹⁸

The concrete results of the victim movement will be discussed later in this Part but it is important to keep in mind the striking disparity of solutions found in each country.

3 - The international standards on the position of the victim in the criminal justice system

3.1 - General

As the victim movement grew stronger in many countries, its core ideas reached higher instances such as the United Nations and the Council of Europe, a trend which reflects how compelling the case for a victim oriented criminal justice system has become.

The two relevant instruments under analysis here are the UN Declaration on victims and the Recommendation of the Council of Europe R (85) 11 on the same issue. The concerns with crime victim have also reached the European Union. Indeed, in March 2001 the Council of the European Union adopted the Framework Decision on the standing of victims in criminal procedure¹⁹ aimed at the homogenisation of the position of the victim. It is interesting to point out that Article 17 of the Decision encompassed an obligation for Member-States to implement the necessary legislation within specific deadlines.²⁰ Because this document is still very recent and because as of yet there are no

¹⁷ *Ibidem*, p. 212.

¹⁸ *Ibidem*, p. 212.

¹⁹ See Framework Decision, available at :
<http://www.euforumj.org/readingroom/council%20framework%20decision.htm>

²⁰ Article 17 reads as follows: *Implementation*
"Each Member State shall bring into force the laws, regulations and administrative provisions necessary to comply with this Framework Decision:
- regarding Article 10, 22 March 2006,
- regarding Articles 5 and 6, 22 March 2004,
- regarding the other provisions, 22 March 2002."

reports available on the actual results we will not focus on it.²¹ But it may be an interesting topic to explore in the near future.

3.2 - The Victim Declaration

The United Nations Declaration of Basic Principles of Justice for Victims^{22 23} was adopted by the General Assembly at its 96th Plenary meeting in November 1985. This document is the natural consequence of the strong victim movement described above, as it sets standards and instructs countries on how to improve the position of the victim in their domestic orders, while preventing the causes of secondary victimisation. One curious element to note is that this Victim Declaration was developed within the framework of the United Nations Office based in Vienna, which has been dedicated to issues such as transnational crime, international co-operation in the field of criminal law among others. Roger S. Clark mentions that this document “was one of a select group that ultimately emerged in the form of an actual resolution of the Assembly”²⁴, a fact that reflects how compelling the case for international standards in this field was.

The VD is divided into two parts: the first one deals with victims of crime, and that is the one under analysis here, while the second one deals with victims of abuse of power. The first important element is the definition of victim therein contained.²⁵ The scope of this provision is wide ranging in that it considers collective not only individual as well as direct and indirect victims.

²¹ For comments on the earlier version of this document, the Draft Framework Decision, see B. Emmerson, A. Ashworth, *Human Rights and Criminal Justice*, London, Sweet and Maxwell, 2001, pp. 556-557. For comments on the Framework Decision see J. Doak, *The victim and the criminal process: an analysis of recent trends in regional and international tribunals*, in «Legal Studies», vol. 23, no. 1, March 2003, p. 10.

²² Adopted by the General Assembly Resolution 40/34 of 29 November 1985.

²³ Hereinafter referred to as Victim Declaration or VD.

²⁴ R. S. Clark, *The 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, in G. Alfredsson, P. Macallister-Smith, (Eds.), *The Living Law of Nations: essays on refugees, minorities, indigenous peoples and the human rights of other vulnerable groups, in memory of Atle Mahl-Gradsen*, Kehl, Strasbourg, N.P. Engel, 1996, p. 356.

²⁵ “Victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights” (...) “[t]he term victim also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist him in distress or to prevent victimisation” (Victim Declaration, paragraphs 1 and 2).

Drawing upon the guidelines laid down by the VD, the UN Handbook on Justice for Victims²⁶ is a useful tool to understand its content and purpose. It also recommends programmes to develop victim-sensitive policies at the national level but recognises that it is meant to “serve as a set of examples for jurisdictions to examine and test.”²⁷

The VD deals with four important issues: ‘Access to justice and fair treatment’, ‘Restitution’, ‘Compensation’ and ‘Assistance’. In the first section, it is suggested that “[t]he responsiveness of judicial and administrative processes to the needs of the victims should be facilitated by” informing them of their rights, providing them with assistance throughout legal proceedings, protecting them when necessary and also by “[a]llowing the views and concerns of victims to be presented and considered at appropriate stages where their personal interests are affected, without prejudice to the accused and consistent with the national criminal justice system.”²⁸ This is a clear indication that mechanisms providing for participatory rights to victims are more than welcome, but one must bear in mind the reference to the domestic system contained in that provision. This safeguard allows for a diversity of responses and solutions according to each country’s legal tradition.

The UN Handbook further develops this provision without taking a position as to which mechanism is more adequate. After enumerating some of the arguments brought forward in favour and against active victim participation, the Handbook draws a conclusion. It is argued that “passive involvement in decision-making”, which consists of mere information or notification, is a sufficient recognition of the victim’s importance, whilst it does not, unlike forms of “direct involvement”, “introduce yet another injustice to the criminal justice system”²⁹. At first this comment may cause some perplexity, as it seems to indicate some reluctance to admit participatory rights. However, later on, when

²⁶ Available on <http://www.uncjin.org/Standards/9857854.pdf>

²⁷ *UN Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, United Nations Office for Drug Control and Crime Prevention, Centre for International Crime Prevention, New York, 1999, p. v.

²⁸ Paragraph 5.

²⁹ *UN Handbook on Justice for Victims*, p. 36.

discussing victim impact statements, it is said that in certain cases, “the information provided to the court can assist in achieving a more just solution”³⁰.

In sum, it seems as though the Victim Declaration, as well as the UN Handbook, created in response to the former, suggest that different models may be used in different contexts for a variety of results. What remains essential is that regardless of the model adopted, whether it follows the suggestions laid down in the Handbook or not, every country must improve the position of the victim.

This appears to be a rather vague, disappointing conclusion for advocates of procedural rights for victims, but nonetheless one that is predictable in the context of the United Nations.

3.3 - The Recommendation R (85) 11

Of the two instruments laying down standards on the treatment of victims, perhaps the most interesting one is the Recommendation R (85) 11 of the Council of Europe, adopted by the Committee of Ministers in 1985.³¹ In spite of the similarity between some of the provisions of the two documents, the fact that R (85) 11 was originally targeted at only 22 countries explains why they are different from those of the Victim Declaration. It uses stronger words, demonstrating more than a vague approach to the topic, yet allowing for some degree of flexibility.

It is important to note that unlike the Victim Declaration, R (85) 11 does not contain a specific definition of victims. However, Brienen and Hoegen suggest that it is based on a certain concept that recognises them as alleged victims during the entire criminal proceedings until a guilty plea has been pronounced.³² This however does not help to determine if the concept of victim also includes relatives or collective victims, as the Victim Declaration does. That particular aspect remains under the scrutiny of the countries of the Council of Europe, through their domestic legislation.

³⁰ *Ibidem*, p. 39.

³¹ Recommendation no. R (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure, adopted by the Committee of Ministers on 28 June 1985 at the 38th meeting of the Ministers' Deputies.

After a short preamble stating the main goals of the document, one of which is the reduction of secondary victimisation, the Recommendation contains a list of sixteen guidelines divided in seven parts. The first group of guidelines aimed at the police encompasses the duty to keep the victims informed while underlining the importance of training the authorities that normally have direct contact with the victims. The second group (Part B) related to prosecution is the most important one for this work. The first guideline determines that the prosecuting authorities should take the issue of compensation of the victims into consideration when taking a decision whether to prosecute. This is a clear message for the prosecuting authorities, particularly in those countries where the criminal process is ruled by the principle of expediency, meaning that there is not an obligation to prosecute every *prima facie* case. In these circumstances, if the prosecutors were to take the victims' views into consideration, it would help to strike the balance between victims' interests and those of the parties, in systems that originally are not concerned with victims in their decision making.

The second guideline deals with the need to keep the victim informed of a decision to prosecute or not to prosecute. In some countries, the prosecuting authorities are the police while in others there is a specific body entrusted with that task. In either case it is of vital importance for the victim, if he or she so wishes, to be kept informed about the outcome of the initial proceedings, as well as all other decisions that may affect his or her interests. This may help prevent one of the main causes for secondary victimisation. In fact if victims understand the reasons why a certain case is not to be pursued by the criminal justice system there are more chances that they will trust the system and its outcomes, even if eventually it is at odds with the victims' interests.

Finally, guideline B7³³, the third on this section, goes even further: not only should victims be informed of a decision to prosecute or not to prosecute, but they should also have the possibility to challenge that decision. The guideline suggests two mechanisms, the right to ask for a review of such a decision before a competent authority or the right to institute private proceedings. Since the Victim Declaration did not contain

³² M. Brienen, E. Hoegen, *Victims of crime in 22 European criminal justice systems: the implementation of Recommendation (85) 11 of the Council of Europe on the position of the victim in the framework of criminal law and procedure*, Nijmegen, Wolf Legal Productions, 2000, p. 30.

a provision of this sort, it could be argued that this is a landmark provision for procedural rights of victims, but one that faces more resistance at the implementation level. One can imagine that introducing the right to private prosecution in a country where there is no legal tradition of the kind may prove more difficult than funding the training of the police and instructing all authorities to inform victims about the development of the procedures. The practical examples given below will help to illustrate this idea. However, one could argue that each of these guidelines relates to a right that should be granted in national systems, that these rights are complementary, rather than alternative. It seems that in order to offer the victim a comprehensive status in the system all these rights should be guaranteed simultaneously.

The remaining guidelines dwell on the issues of questioning, information of the court proceedings, compensation and special protection to be afforded to the victim in special circumstances. Once again, it must be noted that the wording of these guidelines is more specific than that of the Victim Declaration. For instance, guideline 10 on the possibility of a criminal court ordering compensation to the victims specifies that *“existing limitations, restrictions or technical impediments which prevent such a possibility from being generally realised should be abolished.”* This is a matter where no safeguard clause is mentioned, no reference to the internal order allows for a degree of flexibility at the enforcement stage.

However, in spite of the strong wording contained in these provisions, there is still of course, room for different approaches at the implementation stage. The Recommendation does not have a binding character that would imply an obligation to introduce new mechanisms for the empowerment of the victim in the criminal justice system. Nevertheless, it is an important document for the 22 countries, as well as for the more recent members, because it reflects a common position of the ministers of the Council of Europe. Does this degree of flexibility undermine the purposes and effects of the Recommendation? No, in fact the purpose of R (85) 11 is to set the standards that all these countries should aim to achieve progressively. In this sense, it can be argued that it

³³ *“The victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings.”* Guideline B7.

fulfils this goal in a more comprehensive and effective fashion than the Victim Declaration.

4 - National Experiences

In the light of the international standards analysed above attention must now be paid to the mechanisms deployed by countries to carry out the guidelines and principles enshrined therein. The focus will mainly be on the experiences of countries targeted by the Recommendation of the Council of Europe but the case of the USA will also be mentioned.

4.1 - General remarks on the implementation of R (85) 11

Now that almost twenty years have passed since the adoption of the guidelines by the Council of Europe, it is high time to evaluate the extent to which the 22 countries have implemented them. This is what Brienen and Hoegen attempted to do in a work that analyses the specific measures created in each country to implement each and every one of the sixteen guidelines since 1985. In light of these conclusions and of an evaluation of each criminal justice system, the authors attempt to determine which country presents the best overall result in accordance with the Recommendation.

The immediate remark to be made is that each country had a different starting point. Some countries are bound by the principle of expediency, whereby the prosecuting authorities are not compelled to prosecute every case and often do not need to justify their decisions. The decision to prosecute depends exclusively on the interests of the state, completely disregarding the interests of the victims. This is one of the main characteristics of adversarial systems, where traditionally the prosecuting authorities have a monopoly of the decision-making and where victims are not considered to be a party to the proceedings but are merely regarded as an important witness.

4.2 - England and Wales

Brienen and Hoegen note that this is precisely the starting point in England and Wales. On the one hand, the victim lacks a “formal status”³⁴ in the criminal justice system and there is little participation of the victim in the procedures.³⁵ On the other hand, England and Wales have developed a number of effective victim support mechanisms and it was the first country in Europe to create a state compensation scheme. It seems that a ‘services’ approach has been adopted, because it was thought to be more compatible with the underlying criminal tradition, rather than a ‘rights’ one. Still, there is an important mechanism that at first sight might seem very beneficial for victims: the possibility to be a private prosecutor in relation to certain offences. According to the authors, since there is no public help for the victims, and since the public prosecutor can at any time take over the case and discontinue it, little benefit can come for the victims as private prosecutors. “It is striking”, Brienen and Hoegen explain, “that despite the failure in almost all respects of the institution of private prosecution - with the exception perhaps of a certain symbolic value - it continues to enjoy the staunch support of the authorities.”³⁶ Therefore, the authors suggest that a right to review a decision to prosecute should be introduced if England and Wales are to implement the guideline B7 in a satisfactory way.

Apart from this particular issue, the question of whether or not victims should be granted more participation in the criminal justice system has been widely discussed among scholars.³⁷ It appears that there has been a general acceptance of the services-model, whereby the state supports institutions that provide assistance to victims, accompanied by a resistance to procedural rights for the victims or a rights-model. According to Fenwick, the introduction of Victim Impact Statements (VIS) at the sentencing stage allowing victims to convey the extent to which they have been damaged by the offence has been under discussion throughout the nineties in the United Kingdom. In 1996, the Victim’s Charter mentioned the possibility for the victims to explain how the crime has affected them to the police but not yet before the court, so it appears as though

³⁴ M. Brienen, E. Hoegen, *Victims of crime...*, cit., p. 244.

³⁵ J. Cardenas, *The crime victim...*, cit., p. 363.

³⁶ M. Brienen, E. Hoegen, *Victims of crime...*, cit., p. 286.

VIS are not a popular mechanism in this part of the world. Fenwick then contends that despite the fact that victims do not as of yet have a right to be heard in the proceedings, “it [the UK criminal justice system] is showing signs of moving gradually towards a victim-centred or private model of the system”, but concludes that “[i]f provision of procedural rights means moving down a path towards a private model of the system in which certain decision-making powers are handed to the victims, then they should be resisted.”³⁸ On the same matter, Ashworth contends that “the victim’s legitimate interest is in compensation and /or reparation from the offender, and not in the form or the quantum of the offender’s punishment”, and then suggests that “[t]he principle of proportionality goes against victim involvement in sentencing decisions because the views of victims may vary.”³⁹

These two views represent the widespread scepticism regarding participation of the victim, particularly when it comes to VIS. One could argue that this perspective is perhaps somewhat simplistic, because it does not pay attention to other mechanisms of victim participation in different stages of the procedure. It is easy to foresee ways through which victims’ rights could be improved otherwise in a less controversial fashion. Many other European countries of the civil law tradition have achieved satisfactory results while attempting to empower victims during the pre-trial and trial stage rather than at sentencing one. Other authors have on the basis of empirical research on the impact of VIS in England, reached similar conclusions as Fenwick and Ashworth. The difficulties in reconciling the interests of the victim in participating in the proceedings with the characteristics of the adversarial model are a recurrent justification for the above mentioned scepticism against VIS. However, it has been argued that “[t]here is therefore no reason to think that this, or any other reformed statement scheme can solve the problem of the ‘marginalised’ victim”⁴⁰ because “[o]nly a genuinely participative system can treat victims with the respect they deserve without giving them the power to

³⁷ See for instance, D. Miers, *The Responsibilities and the Rights of Victims of Crime*, in «Modern Law Review», vol. 55, July 1992, pp. 499-504.

³⁸ H. Fenwick, *Procedural ‘Rights’ of Victims of Crime: Public or Private Ordering of the Criminal Justice Process*, in «Modern Law Review», vol. 60, no. 3, May 1997, p. 333.

³⁹ A. Ashworth, *Responsibilities, Rights and Restorative Justice*, in «British Journal of Criminology», vol. 42, 2002, pp. 584-586.

⁴⁰ A. Sanders, C. Hoyle, R. Morgan, E. Cape, *Victim Impact Statements: Don’t Work, Can’t Work*, in «Criminal Law Review», 2001, p. 458.

influence decisions that are not appropriately theirs.”⁴¹ Indeed the authors acknowledge the inadequacy of VIS to fulfil the goals of victim participation satisfactorily whilst recognising that more could be done in the country within the rights-model framework. But the authors also demonstrate scepticism in relation to decision making powers for victims. In sum, it seems that at the theoretical as well as practical level, victim participatory rights in the proceedings have reached a stalemate.

4.3 - Germany

The German criminal justice system is a good example of a civil law country where the victim is regarded as more than a mere witness. In theory, there are strong provisions of rights and not just services to the victims. In relation to certain offences, victims may act as auxiliary prosecutors, thus joining the public prosecutor and participating in the proceedings in a number of ways. Furthermore, there is a right to private prosecution concerning a limited number of offences, in which case the victim has “the same rights to appeal that the public prosecutor normally has.”⁴² Finally, the victim has the right to ask for a review of a decision not to prosecute to a competent authority, which could be the highest-ranking prosecutor or, in second appeal, the Higher State Court. It appears that Germany reaches a high score in the compliance with guideline B7, but Brienen and Hoegen’s analysis reveals that whereas the law in the books reaches high standards, the law in action, the actual practice, is “disappointing”.⁴³ The task of keeping victims informed of their rights appears to be entrusted to the public prosecutor and the courts rather than to the police. This has led to a situation where only the victims that are actually interested in participating, therefore having at least a basic knowledge of how the system works, are informed by the authorities. This only comes to show how important it is to implement all guidelines otherwise, no matter how progressive the system is it will

⁴¹ *Ibidem*.

⁴² M. Brienen, E. Hoegen, *Victims of crime...*, cit., p. 364.

⁴³ *Idem*, p. 382.

not benefit victims. Without reliable and useful information about their rights, victims will not be able to make any use of them.⁴⁴

4.4 - Conclusion on the Recommendation R (85) 11

Brienen and Hoegen draw a conclusion to their work whereby in general, states could go further in the implementation of the Recommendation. In fact, despite the encouraging legislation adopted by some countries, the law in the books is often at odds with the law in action. Moreover, according to the authors, the Netherlands⁴⁵ and England and Wales have reached best performances in implementing R (85) 11. This not only means that these countries have enacted useful legislation, but also, and perhaps more importantly, that they have produced considerable efforts to guarantee that victims are aware of them and can actually use them without constraints. However, the authors also note that England and Wales' results would most likely be otherwise if victim participation in the proceedings had been considered in their final comments.⁴⁶

4.5 - Victims' rights in the USA

The United States' experience with victims' rights is perhaps one of the most interesting ones for this work and therefore deserves special attention. Despite being a common law system, whereby traditionally the victim has no standing in the proceedings apart from that of a witness, the influence of the victim movement has been surprisingly profound.⁴⁷ Several states have enacted legislation granting participation rights to victims

⁴⁴ For more on the German case see the special edition of the Buffalo Law Review, vol. 3, at <http://wings.buffalo.edu/law/bclc/bclr.htm#issues> on victims in the criminal process in Germany and America and W. T. Pizzi, W. Perron, *Crime Victims in German Courts: A Comparative Perspective on American Problems*, in «Stanford Journal of International Law», vol. 32, 1996.

⁴⁵ On more about the position of the victim in the Netherlands as well as in other countries, and for a general research database on victimology, see www.victimology.nl

⁴⁶ For more on the impact of the victim movement in European criminal justice systems see T. Peters, I. Aersten, *Towards 'Restorative Justice': Victimisation, Victim Support and trends in Criminal Justice*, in Council of Europe report on Crime and criminal justice in Europe, Strasbourg, 2000 and M. Chiavario, *Private parties: the rights of the defendant and the victim*, in M. Delmas-Marty, J. R. Spencer, (Eds.), *European Criminal Procedures*, Cambridge, Cambridge University Press, 2002.

⁴⁷ For more on the position of the victim in the American criminal justice system, see M. D. Dubber, *The Victim in American Penal Law: A Systematic Overview*, in «Buffalo Criminal Law Review», vol. 3, 1999

when originally little or none role was given to them. In a perhaps overly enthusiastic view, it has been suggested that “a complete new paradigm of justice will emerge, with victims as a third party”⁴⁸ but the following analysis will show why this is not yet the case.

Kelly and Erez explain that the 1982 President’s Task Force on victims of crime⁴⁹ suggested that all victims should be guaranteed “a right to be present and a right to be heard at all critical stages of the judicial proceedings”⁵⁰. While many states have adopted measures inspired by this Task Force others have enacted Bills of Rights of Victims and VIS “are now permitted virtually in every state”⁵¹. Some of the authors’ conclusions on the impact of these sweeping reforms are for instance, that “victim participation does not bog down the criminal justice system” and that “victim participation does not necessarily result in more harsh punishment of offenders”⁵².

Recent studies have shown the surprising results of the Task Force, not only at the federal, but also at the state level as wide-ranging reforms have sought to revive the position of the victim in an originally ‘hostile’ criminal justice system. Tobolowski notes that “in the fifteen years since the issuance of the Task Force Final Report, there has been a literal explosion of federal and state action to increase crime victim access to and participation in the criminal justice process. It has largely centered on establishing and interpreting crime victims’ rights to notice of and presence and hearing at critical stages of the criminal justice proceedings.”⁵³ In practice, the author points out that the range of victims’ participatory rights recognised so far has been essentially centred in allowing for some input at the sentencing level rather than at other stages of the proceedings. Indeed,

and also L. Sebba, *The Victim’s Role in the Penal Process: A Theoretical Orientation*, in «American Journal of Comparative Law», vol. 30, 1982.

⁴⁸ M. Young, *Victim Rights and Services, A Modern Saga*, in R. Davis, A. Lurigio, W. Skogan, (Eds.), *Victims of Crime*, cit., p. 209.

⁴⁹ According to Tobolowski, “the Task Force issued a Final Report which included over sixty action recommendations addressed to the federal and state legislative and executive branches, criminal justice system agencies (i.e., the police, prosecutors, judiciary, and parole authorities), and other professionals involved in crime victim service delivery (i.e., health care personnel, clergy, lawyers, educators, mental health care providers, and relevant private sector personnel). Several of these action recommendations encouraged greater victim access to and participation in the criminal justice process.” See P. M. Tobolowski, *Victim Participation...*, cit., pp. 29-30.

⁵⁰ D. Kelly and E. Erez, *Victim Participation in the Criminal Justice System*, in R. Davis, A. Lurigio and W. Skogan, (Eds.), *Victims of crime*, cit., p. 233.

⁵¹ *Ibidem*, p. 235.

⁵² *Ibidem*, p. 237.

Tobolowski contends that “the existing participatory rights provisions have clearly been drafted to provide crime victims the means to have access to and provide input into the criminal justice process—not to control it. In our well-established public prosecution system, this appears to be the most likely role for victim participation.”⁵⁴

Moreover, the case is being made for a victim’ amendment to the Constitution that would formally recognise victims’ interests, which of course has been an extremely controversial project. Pizzi argues that indeed victims’ interests should be taken into consideration, and that including them in the Constitution would be extremely beneficial and symbolic for crime victims.⁵⁵ In response to the critiques that fear a complete transformation of the criminal justice system, Pizzi remarks that “the Victims’ Rights Amendment is very modest in what it provides victims with regard to the trial. It gives victims no right of participation at trial, nor even a right to sit in the front of the courtroom. In fact, the Amendment does not even give victims ‘a right to be present’ at the trial.”⁵⁶

The analysis of the American experience with victims’ rights shows that even a traditionally common law system—where the victim is normally a “peripheral actor”⁵⁷—can try to achieve international standards on victims, whether through reforms at the state level, whether through amendments to the Constitution.⁵⁸ In spite of the actual practical results, which some have argued are not always positive⁵⁹, it is clearly an extremely noteworthy example. But yet again, like in the case of England and Wales,

⁵³ See P. M. Tobolowski, *Victim Participation...*, cit., p. 22.

⁵⁴ *Ibidem*, p. 69.

⁵⁵ According to Pizzi, “[t]here is nothing inconsistent in having a strong and reliable trial system that, at the same time, acknowledges that victims have an interest in the prosecution of a criminal case, including the trial.” W. T. Pizzi, *Victims’ Rights: Rethinking our “Adversary System”*, in «Utah Law Review», 1999, p. 366.

⁵⁶ *Ibidem*, pp. 355-356.

⁵⁷ See J. Cardenas, *The crime victim...*, cit., p. 372.

⁵⁸ See also <http://www.ojp.usdoj.gov/ovc/new/directions/pdf/txt/direct.pdf> for a report on victims’ rights by the Office for Crime Victims of the US Department of Justice.

⁵⁹ Tobolowski’s study on the measures implemented throughout the USA amounts to a rather disappointing conclusion. In fact, the author contends that “existing empirical research has been generally inconclusive, confirming only a modest impact as a result of victims’ exercise of participatory rights, if any at all, on most measures of dispositional outcomes and victim satisfaction.” P. M. Tobolowski, *Victim Participation...*, cit., p. 104.

these reforms have mainly focused on participation at the sentencing stage, rather than at other phases of the proceedings.⁶⁰

5 - Conclusion

In sum, this Part has showed that the victim movement has been quite successful in spreading the concern about victims' rights and services at the national as well at the international level. There has been widespread recognition of the need to improve the situation of the victim, through debates and reforms, through standard setting by the United Nations and the Council of Europe. Still, issues like information, assistance and compensation are given priority in most common law countries, whilst civil law ones have been more effective in recognising procedural rights to victims. The degree of flexibility that the international standards on victims encompass has originated an uneven framework, whereby discrepancies between the aims and the results of their implementation at the national level proliferate. There seems to be a general preponderance of services rather than procedural rights for victims, and when it is not the case, other obstacles seem to undermine the victims' access to the criminal justice system.

⁶⁰ For a comprehensive view on this issue, see L. N. Henderson, *The Wrongs of Victim's Rights*, in «Stanford Law Review», vol. 37, April 1985 and by the same author, *Revisiting Victims' Rights*, in «Utah Law Review», 1999.

Part III - International criminal law and victims' rights

1 - Introduction

Now that the international standards on victims' rights have been presented, and that due attention was paid to the national experiences of implementation of these standards, it is time to move one step further in this work. One must determine how procedural norms of international criminal tribunals have sought to incorporate these standards. Thus, Nuremberg and Tokyo's Charters and rules of procedure will be revisited in the light of this issue, and the same method will be used for the Statutes and Rules of Procedure and Evidence⁶¹ of the more recent international tribunals for the former Yugoslavia and for Rwanda⁶². This is the logical step to take before dwelling on the Rome Statute and the RPEs of the International Criminal Court.⁶³

2 - The International Military Tribunals

2.1 - Nuremberg

In the aftermath of World War II France, the United States, the Soviet Union and the United Kingdom, known as the Allied Powers, created two military tribunals in Nuremberg and in Tokyo.⁶⁴ Representatives of these four countries met in London in 1945 to agree upon the 30 articles of the Charter of the International Military Tribunal of Nuremberg whose purpose was to try 22 German war criminals. In the light of the focus

⁶¹ Rules of Procedure and Evidence of the *ad hoc* Tribunals for the former Yugoslavia and Rwanda or of the ICC, hereinafter RPEs.

⁶² Hereinafter ICTY and ICTR respectively.

⁶³ Hereinafter ICC.

⁶⁴ Hereinafter IMTs.

of this work on the position of victims in international criminal law, it is important to draw attention to a number of relevant characteristics of the Nuremberg Tribunal.

First of all, one must bear in mind the essentially adversarial nature of the proceedings, stemming from the fact that the Charter was drafted with the Anglo-American system in mind.⁶⁵ Fogelson argues that “[t]he parties finally agreed on a compromise plan, which embraced the Anglo-American concept of trial procedure, but was modified to include some characteristics of the continental system.”⁶⁶ This fact alone influenced the content of the provisions as well as the nature of the proceedings adopted in London.

Secondly, the procedural framework that guided the work of the Tribunal was extremely limited. Indeed, the “political urgency”⁶⁷ that characterised the process of creation of the Tribunal was reflected in the few provisions contained in the Charter and rules of procedure.⁶⁸ Article 19 of the Charter read as follows: “*The tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.*” Thus it appears that the Allied Powers’ main concern upon the creation of the IMT was in efficient and speedy trials. Rather than laying down the basis and principles for international criminal procedure, the priority was in building a simple framework, not to be delayed by cumbersome and unnecessary procedures.

It has been noted that during the London Conference of 1945 the main disputes over the rules were related to “the contents of the indictments, the role that the prosecutors and judges would play, the rights of defendants, the admissibility of evidence”⁶⁹, among other issues. Certain safeguards like the rights to be informed of charges, to have a defence counsel, to question witnesses were included in the articles

⁶⁵ On this issue see C. Safferling, *Towards an International Criminal Procedure*, Oxford, Oxford University Press, 2001, p. 33 and D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, in R. S. Clark, M. Sann, (Eds.), *The Prosecution of International Crimes*, New Brunswick and London, Transaction Publishers, 1996, p. 294.

⁶⁶ S. Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, in «Southern California Law Review», vol. 63, no. 3, 1990, p. 845.

⁶⁷ *Ibidem*, p. 849.

⁶⁸ The Charter contained 30 articles and the Rules contained only 11 provisions.

⁶⁹ J. Murphy, *Norms of Criminal Procedure at the International Military Tribunal*, in G. Ginsburgs and V. N. Kudriavtsev, (Eds.), *The Nuremberg Trials and International Law*, Dordrecht, Martinus Nijhoff, 1990, p. 70.

and rules in order to protect the accused.⁷⁰ However, some commentators have argued that the rights of the accused were hardly guaranteed. Landsman, for instance, argues that “[m]any of the safeguards that ensure the integrity of adversary proceedings were abandoned at Nuremberg” as “[t]he defendants were provided with inexperienced and underfunded counsel”⁷¹, whereas the Allied Powers had vast resources to prepare the cases against the accused. In theory, the drafters may have intended to guarantee the fairness of the trials, but in practice it appears that the defendants were unable to prepare their defence adequately. Thus, the third relevant feature of the Nuremberg proceedings is the rather rudimentary nature of the guarantees of the rights of the accused.

A fourth characteristic, and perhaps the most relevant one for this work, is the lack of any provision mentioning victims and their rights. Moreover, no distinction is made between victims and witnesses, and the latter are viewed as mere instruments in the hands of the prosecutor or the defence.

And yet, in spite of the criticisms raised as to the extent to which the trials were conducted with fairness, Nuremberg is still regarded as a step forward in the evolution of international criminal law, and rightfully so: “[t]he Nuremberg Charter and Judgement are among the most significant developments in international law in this century.”⁷²

⁷⁰ See for instance article 16 of the Nuremberg Charter:

“In order to ensure fair trial for the Defendants, the following procedure shall be followed:

(a) *The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment translated into a language which he understands, shall be furnished to the Defendant at reasonable time before the Trial.*

(b) *During any preliminary examination or trial of a Defendant he will have the right to give any explanation relevant to the charges made against him.*

(c) *A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.*

(d) *A Defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.*

(e) *A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.”*

⁷¹ S. Landsman, *Those who remember the past may not be condemned to repeat it*, in «Michigan Law Review», vol. 100, May 2002, p. 1571.

⁷² V. Morris, M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Irvington-on-Hudson, New York, Transnational Publishers, vol. 1, 1995, p. 9. The authors note that “[t]he Nuremberg Tribunal also demonstrated the feasibility of an international criminal jurisdiction and led to efforts within the United Nations to establish a permanent international court.”, *ibidem*, p. 10.

2.2 - Tokyo

Later on in 1946, General Douglas MacArthur, Supreme Commander for the Allied Powers in Japan, created the International Military Tribunal for the Far East through an executive order. The Tribunal's task was to try the Japanese war criminals responsible by the atrocities committed in Japan in the previous years.

As noted by Cassese, the fact that Americans drafted the Charter contributed to the essentially adversarial nature of the proceedings. Cassese then explains that despite a few structural and substantive differences, “[b]y and large, the Tokyo Charter was modelled on the Nuremberg Charter.”⁷³

The same conclusions can be drawn at this point: the procedural provisions were limited to what was thought to be the essential needed to assure that a fair trial was conducted and there were no provisions relating to the protection or rights of victims.

2.3 - Victims, the forgotten party of the International Military Tribunals

In order to explain why victims were a forgotten party in the beginnings of international criminal law, one must take into account the historical period in which Nuremberg and Tokyo were created.

Chinkin notes that the tension between the rights of the accused and victims and witnesses' rights was already recognised before the creation of the ICTY. However, the author explains that “[t]his tension had not previously arisen in any acute form, partly because the World War II had terminated with the unconditional surrender of Germany and Japan and partly because in 1945 international human rights law was still embryonic. Indeed, the international criminal tribunals at Nuremberg and Tokyo operated under only rudimentary rules of procedure.”⁷⁴

⁷³ B. V. A Röling, *The Tokyo Trial and Beyond, Reflections of a Peacemonger*, A. Cassese, (Ed.), Cambridge, Polity Press, 1993, p. 2.

⁷⁴ C. Chinkin, *The Protection of Victims and Witnesses*, in G. Kirk McDonald, O. Swaak-Goldman, (Eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, The Hague, Kluwer Law International, 2000, p. 455.

The main reason for the lack of concern with victims and witnesses appears to be the early stage of development of human rights law. Indeed, if the protection and guarantees granted to the accused by the Charters were deemed insufficient even though they were viewed as *sine qua non* conditions for a fair trial, one can understand the lack of concern with victims. At this premature stage, the rights of the accused appeared as a priority, whereas those of the victims were not even considered.

In sum, this short description demonstrates that the concerns with victims in international criminal law did not originate in Nuremberg or Tokyo. Due to the specific circumstances in which the IMTs were created, this is understandable. Moreover, it is also important to note that both Charters drew upon the Anglo-American adversarial model, traditionally characterised by the lack of a *locus standi* of the victims in the proceedings as has been analysed in the previous part of his work. The combination of these factors results in the lack of status for victims.

3 - The *ad hoc* International Criminal Tribunals

3.1 - Introduction

The next landmark in international criminal law was the creation of the *ad hoc* International Criminal Tribunal for the former Yugoslavia in 1993.⁷⁵ Later in 1994, the Security Council created a second *ad hoc* Tribunal to deal with the atrocities committed during the same year in Rwanda.⁷⁶ Safferling notes that “[f]rom a procedural point of view this is the birth of international criminal procedure, illustrated by the fact that the statutes and rules of both tribunals do not adhere to one specific national procedural order, but endeavour to combine several systems.”⁷⁷

Given the fact that as has been pointed out above, Nuremberg and Tokyo worked with a set of basic procedural rules, it can be argued that the RPEs of the *ad hoc* Tribunals were in fact extremely innovative. Morris and Scharf contend that “the

⁷⁵ Security Council resolution SC 827, 25 March 1993.

⁷⁶ Security Council resolution 955, 8 November 1994.

⁷⁷ See C. Safferling, *Towards an International...*, cit., p. 34.

unprecedented development of international human rights standards in the intervening years provides a general standard for fair trial and due process in a criminal court before a national or an international court.”⁷⁸

Needless to say, since the *ad hoc* Tribunals were created under the auspices of the United Nations, the need to ensure that human rights safeguards are incorporated both in the Statutes and in the RPEs becomes even more evident. It has been argued that “[t]he main rationale for international criminal law is therefore the protection and promotion of human rights in the global society”⁷⁹, and that one of the priorities should be to guarantee the rights of the offender. However, bearing in mind the international standards on victims’ rights described above, one could wonder how the priority on the offender’s rights could be reconciled with the victims’ interests.

For the first time, attention was brought to the case for victims’ interests when the Secretary-General’s report recommended that the Rules of Procedure and Evidence of the Tribunal for the former Yugoslavia should take this issue into consideration. Indeed, the ICTY and the ICTR were the first international criminal tribunals to provide for rules concerning victims. According to Bachrach, the Tribunals “were created with the Victim Declaration partly in mind.”⁸⁰ The author notes that “[a]lthough there are only limited references to victims throughout the statutes of the ICTR and ICTY, the presence of these references are still significant.”⁸¹

In fact, the ICTY and ICTR provide a framework of protection and assistance for victims and since the relevant provisions are almost identical in both Tribunal’s Statutes and RPEs they will be analysed simultaneously.

The reasons for the incorporation of this framework are linked to the specific events that occurred in the territory of the former Yugoslavia. Violence against women was one of the most striking atrocities committed during the conflict that swept through that area in the early nineties. In order for this *ad hoc* Tribunal to function properly, those

⁷⁸ See V. Morris, M. Scharf, *An Insider’s Guide...*, cit., p. 175.

⁷⁹ See C. Safferling, *Towards an International...*, cit., p. 46.

⁸⁰ M. Bachrach, *The Protection and Rights of Victims under International Criminal Law*, in «The International Lawyer», vol. 34, no. 1, Spring 2000, p. 12.

who have been victimised must feel confident to come forward and help the Prosecutor find the necessary evidence to make a substantial case against the accused. But in such delicate issues a system must be into place, which guarantees that the victims and witnesses are not victimised a second time by the judicial process. Victims and witnesses must therefore feel that they will not be the target of intimidation if they choose to appear before the court, they must feel that adequate protections will ensure their safety, they must have the financial means to come before the court. This is why special measures were created to guarantee that the work of the tribunal would be effective.

Moreover, Chinkin argues that “[i]t also soon became apparent that the approach of the ICTY to issues of protection would have precedential weight, both for the ICTR and more generally. Concerns for the subsequent safety of witnesses in both the post-conflict former Yugoslavia and post-genocidal Rwanda showed that protective measures must be integral to any international criminal process, including that of the permanent International Criminal Court.”⁸² Therefore, it appears as though “[t]he protective measures developed and granted to witnesses at risk are thus not only important for the safety of the witnesses but also for the work of Tribunal in general.”⁸³ Furthermore, one must bear in mind that unlike in Nuremberg, where the Prosecuting team depended almost exclusively in documentary evidence, in the ICTY and ICTR the main evidence will be testimonial⁸⁴, which emphasises the need to protect both witnesses as well as victims.

3.2 - Analysis of the relevant provisions

a) Definition of victims

The first element to be noted at the outset is the definition of victims included in Rule 2(A) of the RPEs, as well as the definition of ‘party’ to the proceedings. A victim is a “*person against whom a crime over which the Tribunal has jurisdiction has allegedly*

⁸¹ *Ibidem.*

⁸² See C. Chinkin, *The Protection of Victims...*, cit., p. 457.

⁸³ A. Rydberg, *The Protection of the Interests of Witnesses – The ICTY in Comparison to the Future ICC*, in «Leiden Journal of International Law», vol. 12, 1999, p. 455.

been committed”, while only “the Prosecutor or the accused” are considered as parties. Therefore, one may immediately assume that in the light of such a limited definition, the role of victims in the proceedings must be equally limited.

b) Protection of victims and witnesses

Articles 20(1) of the ICTY and 19(1)⁸⁵ of the ICTR Statutes stress the importance of respecting the rules concerning the protection of victims and witnesses. This indicates that there is a will to conduct the trials with fairness, through means that guarantee the compatibility between all the diverging interests.

Articles 22 and 21⁸⁶ of the Statutes of the ICTY and ICTR respectively suggest two protective measures while providing that the RPEs shall determine the other measures to protect victims and witnesses. Therefore, the Statutes merely exemplify the type of protective measures, leaving the task of determining which in particular will be accepted to the drafters of the RPEs, i.e., the judges.⁸⁷

Morris and Scharf note that originally there was a proposal to include a Unit to deal with special issues such as rape victims in the office of the prosecutor. One of the reasons brought forward to support this mechanism was “to bring to the attention of the Prosecutor the need for protective measures to ensure the safety of victims and witnesses or to facilitate their ability to testify.”⁸⁸ However, the judges that drafted the RPEs decided otherwise and included the Victim and Witnesses Unit⁸⁹ within the Registrar’s office. Rydberg argues that “one of the advantages of placing the Unit within Registry is that it provides for a sufficiently neutral place, which can take the interests of the witness,

⁸⁴ According to Landsman, “To make its lasting historical record, the Nuremberg prosecution focused not on witnesses but on Nazi documents, a virtually unimpeachable source.” See S. Landsman, *Those who remember...*, cit., p. 1571.

⁸⁵ The paragraphs read as follows: “*The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.*”

⁸⁶ The ICTY Statute provides, just like the ICTR Statute, that “*The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity.*”

⁸⁷ See articles 15 and 16 of the Statutes of the ICTY and ICTR respectively.

⁸⁸ See V. Morris, M. Scharf, *An Insider’s Guide...*, cit., p. 166.

⁸⁹ Hereinafter “Unit”.

regardless of his or her role in the trial, into consideration rather the interest of the Prosecutor or the accused.”⁹⁰

Rule 34 of both Tribunals created the Unit within the Registry, a Unit meant to “provide counselling and support”⁹¹ for these special groups and that may even recommend protective measures for them. This indicates that at least in theory, the Unit has a particularly active role in promoting the interests of victims and witnesses.

Rule 75⁹² provides a list of the protective measures at the victims’ and witnesses’ disposal. It must be noted that all the parties to the proceedings can request them, and that the Judge, can order them *proprio motu*. The measures include protection of victims and witnesses from the accused as well as from the media⁹³ through *in camera* proceedings, anonymity among others.

Morris and Scharf note that in the context of the ICTY the possibility of appointing counsel for victims was discussed. If such measure had been incorporated in the Statute, the defence of victims’ interests would be threefold. Firstly, through the prosecutor, albeit indirectly. Secondly through the Unit, but only in matters of protection.

⁹⁰ See A. Rydberg, *The Protection of the Interests...*, cit., p.459.

⁹¹ Rule 34 of the RPEs reads as follows: “(A) *There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to: (i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and (ii) provide counselling and support for them, in particular in cases of rape and sexual assault. (B) Due consideration shall be given, in the appointment of staff, to the employment of qualified women.*”

⁹² The relevant paragraphs of Rule 75 read as follows:

“(A) *A Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.*

(B) A Chamber may hold an in camera proceeding to determine whether to order: (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as: (a) expunging names and identifying information from the Tribunal's public records; (b) non-disclosure to the public of any records identifying the victim; (c) giving of testimony through image- or voice- altering devices or closed circuit television; and (d) assignment of a pseudonym; (ii) closed sessions, in accordance with Rule 79; (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) The Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75 (F).

(D) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation (...).”

⁹³ For a detailed analysis of these Rules see C. Chinkin, *The Protection of Victims...*, cit.,

Thirdly by defence counsel, directly. The authors then enumerate the reasons why this proposal was not adopted. It was argued that the interests of victims “would be adequately protected by the Prosecutor” and that “the participation of counsel for defence as a third party to the criminal proceeding could lead to interference with the case presented by the Prosecutor or divert the attention of the Court from the relevant issues in the criminal proceeding thereby prolonging the trial.”⁹⁴ Moreover, the authors note that the *amicus curiae* mechanism is the solution in cases where “a victim’s interests are not considered to be adequately represented by the Prosecutor.”⁹⁵

In practice the measures contained in the RPEs have proved to be problematic enough because the underlying concerns with due process, fair trial and the rights of the accused must be kept in mind at all stages of the proceedings. Bachrach notes that “the ICT provisions relating to victims were much easier to read than to see implemented. Even when applied, the provisions required lengthy interlocutory appeals. Despite the struggles, however, jurisprudence has brought forth some significant, albeit overdue advances.”⁹⁶

The Tadic decision on protective measures is the landmark ruling in this matter. On the basis of the Articles and Rules previously analysed, the prosecutor of the ICTY filed a motion requesting a number of protective measures for alleged victims and witnesses. The defence opposed some of the requests of anonymity because it contended that this would pose an obstacle to the right of the accused to examine witnesses.⁹⁷

According to Chinkin, “[t]he crucial question was to balance the requirements of a fair trial in accordance with its Statute and the European Convention on Human Rights against the rights of the victims and witnesses to security and privacy, and the interests of the international community in the fair administration of international criminal justice.”⁹⁸

After enumerating and describing the sources of law that should be applied by the court, the Trial Chamber reviewed the requests of the prosecutor and finally the majority

pp. 460-465 and V. Morris, M. Scharf, *An Insider’s Guide...*, cit., pp. 242-246.

⁹⁴ See V. Morris, M. Scharf, *ibidem*, p. 167.

⁹⁵ *Ibidem*.

⁹⁶ See M. Bachrach, *The Protection and Rights...*, cit., p. 14.

⁹⁷ See Decision on the Prosecutor’s Motion requesting Protective Measures for Victims and Witnesses (“Tadic Decision”), 10 August 1995, Trial Chamber, Tadic IT-94-1, paragraphs 7 and 8.

decided to order anonymity to a few of the witnesses, despite the dissent of Judge Stephen. However, it was stressed throughout the ruling that this should be the exception rather than the rule, that these measures must be proportionate and necessary, while representing the minimum obstacle possible to the offender's rights.⁹⁹

This decision has since then been subject to criticisms by scholars like Leigh Monroe, who argued that “[t]he result is that the prisoner *may* be convicted on the basis of tainted evidence.”¹⁰⁰ Chinkin replied to this critique noting that “[t]he Chamber’s decision is carefully constructed to give appropriate weight to both sets of interests and not give automatic priority to those of the accused” and that “the decision is to be welcomed for its recognition that individual rights cannot always be absolute but must be weighed against those of other individuals.”¹⁰¹

These interesting discussions notwithstanding, the provisions have proved to be globally effective. One could enumerate several cases where issues similar to those in the Tadic case were successfully raised before the courts.¹⁰²

c) *Amicus Curiae* brief

The possibility of filing an *amicus curiae* brief on behalf of victims is, as suggested above by Morris and Scharf, one of the tools to defend victims’ interests before the international tribunals. Rule 74 determines that “[a] Chamber may, if it considers it desirable for the proper administration of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber.” Morris and Scharf argue that this rule “is broad enough to ensure that

⁹⁸ See C. Chinkin, *The Protection of Victims...*, cit., p. 469.

⁹⁹ See “Tadic Decision”, paragraphs 62-66.

¹⁰⁰ L. Monroe, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, in «American Journal of International Law», vol. 90, 1996, p. 235.

¹⁰¹ C. Chinkin, *Due Process and Witness Anonymity*, in «American Journal of International Law», vol. 91, 1997, p. 79.

¹⁰² See for instance the decisions on protective measures for witnesses in Nikolic and Meakic, before the ICTY and Bicamumpaka before the ICTR.

the interests of victims will be adequately represented throughout the proceedings”¹⁰³ and that this is consistent with the Victim Declaration.¹⁰⁴

The practice of both *ad hoc* Tribunals shows that the *amicus curiae* provision is clearly insufficient to defend victim’s interests that go beyond issues of protection of privacy and security. The fact that the Trial Chamber has to authorise the submission of the brief poses yet another obstacle to those interested in defending the victims’ views. The Bagasora case before the ICTR is an example of a failed attempt to act on behalf of victims’ interests in the matter of compensation. The Kingdom of Belgium filed a brief to represent Belgian victims of the Rwandan genocide and to defend their interests as plaintiffs. Noting that this part of the proceedings is only open to the defence and the prosecutor, the Chamber ruled that “[a]t this juncture, the Trial Chamber is of the view that this question is not yet ripe for our consideration.”¹⁰⁵

The victims are therefore regarded as mere instruments in the procedure, while their interests have little chances of being addressed by the courts.

d) Restitution and compensation

Finally, one must consider the Rules on restitution and compensation to victims. This is the third and last moment after the protective measures and the *amicus curiae* brief provisions, where the ICTY and ICTR Statutes and RPEs show some concern for victims.

Rules 105 and 106 of the RPEs deal with the issues of restitution and compensation. The first Rule was designed to solve questions of unlawful taking of property and it determines that the Trial Chamber may hold a special hearing to decide the restitution to the rightful owner.¹⁰⁶ The second one deals with the possibility of

¹⁰³ See V. Morris, M. Scharf, *An Insider’s Guide...*, cit., p. 270. The authors also note that “[t]he possibility of such third-party participation may address the concerns of those who would have preferred to grant victims the right to plead and be represented by counsel in the proceedings.” *Ibidem*.

¹⁰⁴ *Ibidem*, p. 270, footnote 701.

¹⁰⁵ See Decision on the *Amicus Curiae* Application by the Government of the Kingdom of Belgium of 6 June 1998, Prosecutor v. Bagasora, case no ICTR-96-7-T, paragraph 3 of the deliberation.

¹⁰⁶ Rule 105 paragraphs (a) and (b) determine that:

“(A) After a judgement of conviction containing a specific finding as provided in Rule 98 ter (B), the Trial Chamber shall, at the request of the Prosecutor, or may, *proprio motu*, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such

national courts determining compensation claims by victims on the basis of convictions determined by the international tribunals.¹⁰⁷

According to Ferstman, while the first Rule has “yet to be applied”, the second one “has not been of particular use to victims.”¹⁰⁸ Indeed, the second Rule is of extreme importance to victims because as Morris and Scharf note, “the principle that a victim of a crime or a human rights violation is entitled to compensation from the convicted person or the responsible national authorities is recognized in a number of international human rights instruments (...).”¹⁰⁹ However, since the main purpose of the court is to punish the perpetrators of crimes, the issue of compensation is secondary, thus a matter for national courts to deal with. Morris and Scharf argue that “[t]he proposal to have the International Tribunal also function as a claims commission could not be reconciled with existing financial constraints.”¹¹⁰ Understandably, the fact that victims have the burden to address domestic courts to solve issues of compensation means that if they do not possess the financial means to do so, or if the national judicial system does not function adequately, they will not be able to use decisions of the ICTY or the ICTR in their favour to obtain compensation. This may explain why Rule 106 in particular does not benefit victims.¹¹¹

provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.

(B) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty.”

¹⁰⁷ Rule 106 reads as follows:

“(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.

(B) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.

(C) For the purposes of a claim made under paragraph (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.”

¹⁰⁸ C. Ferstman, *The Reparation Regime of the International Criminal Court: Practical Considerations*, in «Leiden Journal of International Law », vol. 15, 2002, p. 671.

¹⁰⁹ See V. Morris, M. Scharf, *An Insider’s Guide...*, cit., pp. 286-287.

¹¹⁰ *Ibidem*, p. 286.

¹¹¹ Bachrach notes that: “During the conference that led to the ICC’s creation, much debate ensued over the proper restitution that should be granted to victims. To a great extent, this debate ensued because similar provisions of the Statutes and Rules of the ICTY and the ICTR were ineffective.” See M. Bachrach, *The Protection and Rights...*, cit., p. 16.

3.3 - Comments and critiques

The previous analysis has shown that the provisions on victims of the *ad hoc* Tribunals' Statutes and RPEs are somewhat conservative. If one bears in mind the fact that the developments of international standards on victims' rights took place in the eighties, and that the principles therein expressed have since then been incorporated into domestic legislation, one could expect the same evolution at the level of international criminal law. Perhaps this *status quo* is justified by the special circumstances in which the Tribunals were created and even by the fact that the judges were entrusted with the function of drafting the RPEs.

The analysis of the provisions relating to protection has shown that at least this mechanism seems to be relatively pragmatic and useful. However, the Units entrusted with the function of providing assistance to victims and witnesses have so far failed to be effective. Due to several constraints such as the considerable number of victims and the lack of funds, the Units have not been as effective as could be expected. In theory, the Units have a considerable range of powers, but in practice little can be done.

It seems that the basic framework for the protection of victims was thought to be sufficiently broad so as to address the issue of victims adequately. Given the need to strike a balance between these interests and those of the accused, one could defend that the result incorporated in the RPEs analysed above is satisfactory enough. However, as for the issues of *amicus curiae* and reparation, the performance of the Tribunals has been rather negative. The provisions have so far been of little use for victims, failing to address their concerns. This does not seem to be in accordance with the Victim Declaration.

It appears as though in spite of the importance of the international standards mentioned above, in spite of the strong victim movement affecting municipal law, in the context of the *ad hoc* Tribunals priority was given to the offenders' rights, while the Victim Declaration's principles were only partially considered. The measures regarded as being too contentious were left aside and, as will be seen further, only to be brought back into discussion in the context of the ICC.

Jorda and Hemptinne strongly criticise the approach of the international Tribunals' Statutes and RPEs on victims. The authors argue that because, on the one

hand, victims are not allowed to participate in the proceedings, and, on the other hand, there is no compensation scheme, the tribunals adopted a “deleterious (...) conception of international criminal justice.”¹¹² The authors note that victim participation may contribute to the proper functioning of the court, the discovery of the truth and to the rehabilitation of all those involved. The victim’s role in these courts is thus limited to that of a witness, as the victim “appears to be extraneous to the conduct of the proceedings, which are entirely confined to a contest between the Prosecutor and the defence.”¹¹³

The authors enumerate a certain number of arguments that were used to explain this situation. First of all, the *ad hoc* Tribunals’ main purpose is to punish offenders. Secondly the similarity of the procedure with the Anglo-American model, even if civil law procedures have also been incorporated in the Statutes and RPEs. Thirdly, the fact that the Prosecutor is “the principal custodian of the interests of the international community”, and has the task of “looking after the concerns of the victim.”¹¹⁴

Jorda and Hemptine disagree with these arguments, and understandably so. They are unconvincing and do not recognise the possibility of reconciling all these interests. The authors agree with the fact that “[i]n order to allow victims to participate in the trial, it would therefore have been necessary to provide for complex procedural means (...) to prevent the victim, who represents only a specific individual interest, from diverting the enforcement of international criminal law away from its course of protecting public order”¹¹⁵ but this is not an insurmountable obstacle, as the examples of civil law countries have shown.

The authors argue that the discretionary power of the prosecutor whether or not to investigate and prosecute should be maintained, but that granting the victims a right to question such decisions would contribute to the fairness of the proceedings. Furthermore, during the Trial, the prosecutor often forgets the interests of the international community as well as those of the victims, leaving them as “an ‘instrument’ serving the strategic

¹¹² C. Jorda and J. de Hemptinne, *The Status and Role of the Victim*, in A. Cassese, P. Gaeta, J. Jones, (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, p. 1388.

¹¹³ *Ibidem*, p. 1390.

¹¹⁴ *Ibidem*, p. 1392.

¹¹⁵ *Ibidem*, p. 1393.

aims of the prosecution”¹¹⁶, so there should be more direct mechanisms to allow for the victims’ interests to be defended in court.

Moreover, the authors contend that the fact that victims cannot be directly compensated by the Tribunals, means that they are deprived of “an essential criterion for the restoration of social harmony between communities which have been at war with each other and a sine qua non for the establishment of a deep-rooted and lasting peace.”¹¹⁷

This very negative critique stems from two strong supporters of the victim cause. It is naturally a partial view, but the only one that seems to recognise the importance of the Victim Declaration and the principles enshrined therein. It seems that most commentators accepted the scope of the provisions of the ICTY and ICTR Statutes and RPEs on victims without considering the need to expand victims’ rights.

Even if the provisions analysed above, in the context of Nuremberg and Tokyo, as well as in the context of the *ad hoc* Tribunals are not strictly akin to the focus of this work on procedural rights of victims, they are the precedent that the ICC negotiators had before them. And in spite of all the criticisms that one may direct to the procedural norms of the *ad hoc* Tribunals’ RPEs, in particular, they are extremely useful, along with the Courts’ practice and jurisprudence, to understand why a more ambitious approach to victims’ rights is necessary. This provided the delegations before the ICC negotiations with a useful and insightful precedent on which to base the discussion for the Rome Statute and the RPEs.

¹¹⁶ *Ibidem*, p. 1396.

¹¹⁷ *Ibidem*, p. 1398.

4 - The International Criminal Court

4.1 - Introductory remarks

The focus of this part will be on the procedural provisions of the ICC Statute and RPEs related to victims. It is important to start this analysis with a few preliminary remarks.

Firstly, it should be noted that one of the purposes of the Court is, according to the Preamble to the Rome Statute, “*to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of these crimes.*” But it is also acknowledged that “*during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity*”. One could argue that, from the outset, this recognition of the extent of victimisation due to crimes of international concern might constitute an early indication of a new approach to the issue of victims.

Secondly, it must be noted that the Rome Statute contains a set of detailed and innovative provisions and that the Rules “not only provide for an important contribution to the interpretation and implementation of the Statute, but also constitute the indispensable procedural legal basis for the functioning of the Court.”¹¹⁸ Unlike in the case of the *ad hoc* Tribunals, where the RPEs were drafted by the judges, the ICC’s Rules were drafted by the States-Parties. Furthermore, since in many issues the Court will have no precedent to draw inspiration on, “[t]he inevitable gaps, the open solutions and constructive ambiguity in some of the Rules show the recognition that the Court will be able to assert implied powers with respect to its own procedures in the exercise of which it will be able to fill the voids and engineer its own approach to some issues through its own decisions and practice.”¹¹⁹ This flexibility might become an important tool for the Court in the years to come, especially when confronted with difficult questions such as those related to victims.

¹¹⁸ S. A. Fernández de Gurmendi, *Elaboration of the Rules of Procedure and Evidence*, in R. S. Lee, (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, New York, Transnational Publishers, 2001, p. 235.

¹¹⁹ *Ibidem*, p. 240.

Thirdly, Gurmendi notes how difficult the drafting process of the RPEs was, due to the need to accommodate various competing legal systems and initially incompatible systems of values. On the specific issue of victims, the author notes that “[t]he crafting of the regime on victims was probably the most challenging task undertaken by the Preparatory Commission” and that “[i]n many of the issues in this area, more than elsewhere in the Rules, the drafters were moving in an unknown territory without the benefit of precedents and could not, therefore, rely on past or current international practice. Only through the future practice of the Court will one be able to test the soundness of the decisions made.”¹²⁰

Fourthly, it should be noted that a number of delegations played a particularly active role in the area of victims. Countries like France, Canada among others pushed the case for a substantial role for victims and were backed in that task by extremely active NGOs.¹²¹

4.2 - Analysis of the relevant provisions

Bearing in mind these notes, due attention must now be paid to the Articles of the Rome Statute and the Rules that develop a framework of participation, protection, assistance, and reparation to victims. However, it must be noted that the critical appraisal of these norms is the focus of the fourth part of this work. At the present stage, the only issue at stake is the mere content of the rules.

¹²⁰ *Ibidem*, p. 257.

¹²¹ It has been noted that “[t]he efforts of the Coalition relating to victims have been guided by the Victims’ Rights Working Group (...) since before the Rome Diplomatic Conference, which has demonstrated a high level of organisation and has incorporated the expertise of NGOs from around the world” and that “[t]he ICC’s Rules secure a higher level of protection than those of the ICTY or the ICTR. That achievement is equally attributable to the efforts of the Coalition, to the LMG and to the delegation of France, which was particularly supportive of victims rights throughout.” W. Pace and J. Schense, *The Coalition of the International Criminal Court at the Preparatory Commission*, in R. S. Lee, *ibidem*, pp. 729, 731.

a) Definition of victims

The first important feature of the Rules is the definition of victims. The discussions related to the content of Rule 85 were directly linked to those on the participation of victims, owing to the fact that the delegations soon realised the paramount importance of this provision, as, logically, the broadest the definition, the more victims would be entitled to participate.

Gurmendi describes the difficulties that the delegations found in reaching a definition of victims. Indeed, the task proved to be so daunting that instead of waiting for consensus, the delegations decided to postpone the discussions until the exact range of participation of the victim in the proceedings had been agreed upon.¹²² Some delegations viewed the Victim Declaration's definition of victims as "the international law standard applicable also to victims of international crimes for the purposes of the Rome Statute"¹²³, and supported its incorporation by the Rules, whereas others defended there should either be no definition at all, or a very broad one.¹²⁴

The parties ended up agreeing on a "compromise formulation"¹²⁵ that seemed to please the majority:

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

(a) 'Victims' means any natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.

(b) Victims may include organizations or institutions that have sustained direct harm to any of their 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."

¹²² For more on this see S. A. Fernández de Gurmendi, *Definition of Victims and General Principle*, in R. S. Lee, *ibidem*, p. 430.

¹²³ *Ibidem*.

¹²⁴ *Ibidem*, p. 432.

b) Participation in the proceedings

The Rome Statute of the ICC entered in uncharted territory to provide victims with participatory rights. Unlike the *ad hoc* Tribunals, which, as seen above, limited the victim participation to the role of witnesses, the ICC goes substantially further. This matter generated great controversy, but it has been noted that “[w]hatever the perspective and particular views, it was recognized by all that the access of victims to ICC proceedings would necessarily entail logistic constraints. (...) It was considered absolutely necessary to devise a realistic system that would give satisfaction to those who had suffered harm without jeopardizing the ability of the Court to proceed against those who had committed the crimes.”¹²⁶ With this optimistic approach on victims working as a background to the discussions, one could anticipate a productive debate and a pioneering result.

i. Pre-Trial phase

At this preliminary stage, the proceedings set out by the Statute and the Rules are generally intended to be expeditious and simple, which justifies the limited access to the Pre Trial Chamber¹²⁷ by other parties than the Prosecutor. And yet, coherent mechanisms were found to allow for a certain degree of victim participation.

According to article 15(3)¹²⁸ of the Statute, the Rules are meant to specify the way in which victims are allowed to make representations before the PTC to present their views on the decisions of the Prosecutor to proceed with investigations. Rule 50 further explains that the victims known to the Prosecutor or to the Unit have the right to be informed by the former of the intentions to request for authorisation to carry on a full investigation. Victims may make representations to the PTC in writing and express their views on the matter but in certain cases they may even have the possibility to be heard by the PTC.¹²⁹

¹²⁵ *Ibidem*, p. 433.

¹²⁶ *Ibidem*, p. 429.

¹²⁷ Hereinafter PTC.

¹²⁸ Article 15 (3): “*If the Prosecutor concludes that there is sufficient basis to proceed with an investigation he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.*”

¹²⁹ Rule 50, paragraphs 3 and 4 read as follows:

The content of Rule 50 generated lively discussion as the extent to which the victim should be allowed to participate in such an early phase of the proceedings. According to Holmes, the solution adopted through this rule “reflects a balanced approach that respects the provisions of the Statute on the participation of victims, by creating a special procedure applicable only at these early stages of the proceedings. At the same time, the Rule gives flexibility to the Prosecutor and the Pre Trial Chamber so as to ensure an expeditious process.”¹³⁰

Reports on the discussions during the drafting process of the RPEs show that some delegations argued the necessity of granting more participatory rights to victims under Article 18 proceedings. However, since the victim participation in this early phase had already been dealt with under Article 15 proceedings, the idea was abandoned.¹³¹

ii. Trial phase

Apart from the special rules on the participation during the Pre-Trial phase, there is a considerable range of procedural rights for victims during the remaining phases of the proceedings. Bitti and Friman give a detailed account of the negotiation process and stress the difficulties of the delegations in agreeing on the right model of victim participation. Of course, some of these delegations’ views stemmed from particularly open criminal justice systems that allow for a wide range of victim participation. Others, on the contrary, have no legal tradition of this sort and were accordingly more reluctant to accept broad rights to victims.¹³²

The starting point of this analysis is 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 and a fair and impartial trial. Such views and concerns may be presented by*

“3. Following information given in accordance with sub-rule 1, victims may make representations in writing to the Pre-Trial Chamber within such time limit as set forth in the Regulations.

4. The Pre-Trial Chamber, in deciding on the procedure to be followed, may request additional information from the Prosecutor and from any of the victims who have made representations, and, if it considers it appropriate, may hold a hearing.”

¹³⁰ J. T. Holmes, *Jurisdiction and Admissibility*, in R. S. Lee, *The International Criminal Court: Elements...*, cit., p. 333.

¹³¹ For more on this issue see J. T. Holmes, *ibidem*, p. 343.

the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”¹³³

The States-Parties developed this general principle of victim participation through Rules 89 to 93, separately from the special participation in the Pre Trial proceedings. These Rules deal with such issues as the way in which victims may address the Chambers (89), legal representation of victims (90), the type of participation of the legal representatives in the proceedings (91), notification to victims and their representatives (92) and finally the matters on which the Chambers may seek the victims’ views (93).

As for the application for participation, the general rule is that it will be made in writing and addressed to the Registrar, who will transmit it to the Chamber and the other parties in the proceedings. The Chamber will then determine the type of participation it deems appropriate within a certain degree of flexibility and always taking into consideration the rights of the accused, as stressed by the wording of Article 68(3).

The legal representation of victims is yet another crucial element in this area. Indeed, behind the presumption that victims’ interests must be adequately defended before the Court, lie concerns with the problems that may arise when a great number of victims are involved. In order to guarantee the efficacy of the mechanisms for victims, as well as to maintain the expeditiousness of the proceedings, Rule 90 presents several possibilities. On the one hand, the victim has a right to choose counsel (sub-rule 1), but on the other hand, in some cases the Chamber will request the victims to choose one common representative (sub-rule 2). The Registry plays a very important role in assuring the communication between the victims and the Chamber and in helping the victims to appoint a legal representative. In addition, the Court may even provide financial help to victims that are not able to afford the services of a legal representative. This mechanism is essential to guarantee that the victims actually have an opportunity to make use of their rights.

The type of participation of the legal representative is developed by Rule 91. Of course this will depend, in each case, on the specific ruling under Rule 89. Depending on

¹³² See G. Bitti, H. Friman, *Participation of Victims in the Proceedings*, in R. S. Lee, *ibidem*, pp. 456-474.

¹³³ It is important to note that “all the norms contained in article 68 are applicable throughout the entire penal process (...)”, D. Donat-Cattin, *Article 68*, in O. Triffterer, (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos Verlagsgesellschaft, 1999, p. 873.

the content of the decision of the Chamber, the legal representative will have the power to question witnesses, the power to participate in hearings or simply to submit written observations.

Likewise, Rule 92 deals with the right of victims to be notified by the Court of all the relevant decisions such as the Prosecutor's decision not to pursue an investigation or not to prosecute (sub-rule 2), the Court's decision to hold a hearing under Article 61 (sub-rule 3), among others. The Registrar shall inform the victims of all other important aspects related to the participation in the proceedings. This duty of the Court is once again decisive for the victims as it allows them to exercise the rights they are entitled to.

Finally, Rule 93 sets out the principle that the Chamber may at any time seek the victims' view "without requiring them to formally participate in the proceedings."¹³⁴ This provision acknowledges that beyond the victim's personal interest in being heard by the Court, lies the interest that the very organs of the Court may have in knowing the victim's views.

An important feature of participatory rights of victims in some countries is the right to appeal decisions that affect them. Under the ICC's Statute and Rules, victims that are allowed to participate in the proceedings under Rules 89-91 may not bring an appeal of decisions of the organs of the Court. However, in their position of claimants for reparations, it has been argued that victims "are clearly 'parties' and have an explicit right under Article 82, paragraph 4 to appeal an order for reparations. However, according to the statutory provision, this right can only be exercised through 'a legal representative.'"¹³⁵ It has also been argued that victims may have the possibility of bringing an appeal of an order for a protective or special measure under Rule 87, but this issue will have to be dealt with by the Appeals Chamber.¹³⁶

It has been argued that "[t]his participation is not meant to undermine the prerogatives of the Prosecutor or the rights of the accused but to allow victims to present their views and legitimate concerns. The hope is that this will make a contribution to not

¹³⁴ See G. Bitti, H. Friman, *Participation of Victims...*, in R. S. Lee, *The International Criminal Court: Elements...*, cit., p. 473.

¹³⁵ See H. Brady, *Appeals and Revisions*, *ibidem*, p. 594.

¹³⁶ *Ibidem*, p. 596.

only a punitive but also a restorative role of the Court.”¹³⁷ Bearing in mind the margin given to the Court to determine the actual extent of the victims’ participatory rights on a case-by-case basis, there is little risk that the concerns with the prosecutor and the accused will be justified. Conversely, it would be contrary to the purposes of the Statute and the principles enshrined therein, if this margin would be too far-reaching. In order for victims to be able to exercise their rights in an orderly yet effective way, the Court must not pose too many obstacles to their participation. And if it does so, there must be a consistent justification to back it. As Donat-Cattin rightfully argued, “[t]he judges must ensure that victims (or representatives) make a correct use of their right to intervene. Such a form of control, however, shall orient the decision towards the appropriate phase in which victims (or representatives) are to intervene, without denying to victims the exercise of their right.”¹³⁸

c) Protective and special measures for victims and witnesses

According to Article 68(1) of the Statute victims and witnesses are entitled to protection by the ICC in particular circumstances. The same article provides for exceptional measures such as *in camera* proceedings, in particular for cases of sexual violence and children. Article 69(2) is equally relevant in this matter as it deals with the issues that may arise when victims and witnesses testify before the Court. All these norms were inspired by the wording of the *ad hoc* Tribunals’ Statutes and RPEs, as well as by their experience in order to build a new framework of protection for victims and witnesses. Brady contends that “the rules reflect a delicate balance between two fundamental and yet often competing interests in a criminal justice system”¹³⁹, i.e., on the one hand, due process and fair trial, on the other hand, the protection of the victims and witnesses’ interests.

Rules 86 to 89 drew upon these articles in order to specify the exact protection afforded to victims and witnesses. The first Rule sets the general principle that shall

¹³⁷ *Ibidem*, p. 474.

¹³⁸ See D. Donat-Cattin, Article 68, in O. Triffterer, (Ed.), *Commentary...*, cit., p. 880.

¹³⁹ H. Brady, *Protective and Special Measures for Victims and Witnesses*, in R. S. Lee, *The International Criminal Cour: Elements...*, cit., p. 436.

guide the Court at all stages of the proceedings, according to which all organs of the Court shall take the needs of victims into account.¹⁴⁰ In the light of this basic principle, the following Rules determine the measures that can be ordered by the Chambers as well as the parties that are entitled to request them. Rule 87 deals with protective measures, while Rule 88 deals with the special measures referred to in Article 68(2).¹⁴¹

d) Assistance and support

The Victims and Witnesses Unit created within the Registry is directly linked to the previous two mechanisms for the benefit of victims, i.e., participation and protection. Indeed according to Article 43(6)¹⁴² this Unit will provide the victims and witnesses with a type of support and assistance similar to the one offered by the Units of the *ad hoc* Tribunals. Yet, because the Statute and the Rules grant victims procedural rights, one could expect the Unit to have more duties vis-à-vis victims. But in fact, the Registry took over the functions related to the victim participation, as the duty to inform the victim of relevant decisions of the Court, in Rule 16(1)(b). The Unit is entrusted solely with the issues of protection and assistance for victims and witnesses.¹⁴³

e) Reparation

As has been seen above, it appears as though the *ad hoc* Tribunals' provisions on compensation were unsatisfactory and ineffective. This led to extensive discussions at the time of the negotiation of the Rome Statute and of the Rules, because the delegations

¹⁴⁰ Rule 86: “A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.”

¹⁴¹ Since the basic issues that arise in relation to protective measures have already been touched upon in the context of the *ad hoc* Tribunals, especially the disputes over the rights of the accused, and since the Rome Statute provides for participatory rights to victims, which is precisely the topic of this work, we will not dwell any further on article 68(1) and (2) and the relevant rules. For an analysis of these provisions see Brady, *Protective and Special Measures...*, in R. S. Lee, *The International Criminal Court: Elements...*, cit., pp. 434-456.

¹⁴² Article 43(6) reads as follows: “6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.”

acknowledged the importance of providing redress to victims. However, the delegations also recognised that this new restorative approach to international criminal law needed to be reconciled with the limited means of the Court and its essentially punitive function.¹⁴⁴ It must be noted at the outset how different the Rome Statute provisions are from those of the Statutes of *ad hoc* Tribunals. Victims may request reparation directly to the Court, not indirectly through the national courts.

Article 75 of the Statute¹⁴⁵ and Rules 94 to 97 are the main provisions on reparations. This framework allows for victims to request the Court for reparations (94) but the Court can raise the issue *propriu motu* under Rule 95. The victims have the right to be notified of the proceedings (96) by the Registrar but since this task may prove to be difficult, the Court may seek the co-operation of states and organisations for that effect (sub-rule 2). Under Rule 97 the Court will assess the extent of reparations to be awarded, on an individual or on a collective basis (sub-rule 1).

Article 79 and Rule 98 specify the Trust Fund's function in matters of reparation. It is the body entitled with the administration of collective damages to be awarded to victims.¹⁴⁶

¹⁴³ For more on the Unit see A. Rydberg, *The Protection of the Interests...*, cit., pp. 465-467.

¹⁴⁴ For more on reparations in the ICC see, for instance C. Muttukumaru, *Reparation to Victims*, in R. S. Lee, *The International Criminal Court: the making of the Rome Statute--issues, negotiations, results*, The Hague, Kluwer Law International, 1999, pp. 262-270. See also Ferstman, *The Reparation Regime...* cit., pp. 669-677 and D. Donat-Cattin, *Article 75*, in O. Triffterer, (Ed.), *Commentary...*, cit.

¹⁴⁵ Article 75 reads as follows:

"1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law."

¹⁴⁶ For more on the role of the Trust Fund see T. Ingardottir, *The Trust Fund of the ICC*, in D. Shelton, (Ed.), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court*, Ardsley, New York, Transnational Publishers, 2000.

5 - Conclusion

The concept of victims' rights has evolved at the level of international criminal law according to different factors such as political choices and historical circumstances. Whereas in Nuremberg and Tokyo, the IMTs created after the II World War there were no concerns with the *locus standi* of victims in the proceedings, in the *ad hoc* Tribunals there was a substantial improvement. The ICTY and the ICTR incorporated the "services model" of protection and assistance to victims (and witnesses). The ICC appears to have combined the "services model" with the "rights model" as victims have been granted several opportunities of participating in the proceedings.

It appears at first sight that the provisions on victims applicable in the context of the ICC are wide ranging, while dealing with new issues as participation and reparation and with known issues such as protection and assistance. According to Roy S. Lee, "this new court has been transformed from an instrument initially designed for punishing individual perpetrators of atrocious crimes to an international court administering restorative justice"¹⁴⁷, and this is due to the new status of victims before the International Criminal Court. How effective these provisions will be is a matter to analyse in a few years time, after the Court starts its work. Until then, one can merely criticise this framework, and this will be the focus of the next part of this work.

¹⁴⁷ See R. S Lee, *Introduction*, in R. S. Lee, *The International Criminal Court: Elements...*, cit., p. lxiv.

Part IV - Issues and Results

1 - Introduction

The focus of this part will be on the critical appraisal of the victim-related provisions of the Rome Statute and the RPEs of the ICC, particularly those on participation in the proceedings. The first section will endeavour to determine the extent to which the international standards on victims analysed in the beginning of this work are upheld by the international criminal justice system in the context of the ICC. In the light of these considerations, the second section will be devoted to the critique of the above mentioned victim-related provisions. A number of key issues will then be discussed that will help shed light on the adequacy – for the moment, of course, in a purely theoretical fashion – of the victim participation scheme before the ICC.

2 - The International standards on victims and the ICC

2.1 - Introduction

This next section will gather the comments made earlier in Part II on the documents representing the international standards on victims, the UN Victim Declaration and the Recommendation R (85) 11 of the Council of Europe, with the description of the ICC Articles and RPEs made in Part III.

Before the comparison of the standards with the rules, one must bear in mind a few preliminary remarks. The UN Handbook on Justice for Victims, mentioned in Part II of this work, contains a reference that is worthy of note. While explaining the concept of victim participation in criminal proceedings it is noted that “[a]ll victims should have access to the justice system, including customary justice, traditional proceedings (...) and

international tribunals”¹⁴⁸, which reflects the idea that both national criminal justice systems as well as international ones are considered as targets of the international standards on victims. One must bear in mind that the Victim Declaration and the Recommendation R (85) 11 do not bind states, and considering that these documents encompass mere flexible recommendations, it would be unrealistic to expect all countries to allow for victims to participate directly in the proceedings, regardless of their legal traditions. National criminal justice systems may very well be urged to incorporate the international standards on victims but the ways in which they will do so may vary substantially from country to country.

If this is the case at the national level, it is only natural to expect the same flexibility at the international level. It would certainly be desirable, though perhaps unrealistic, to expect international criminal courts to comply strictly with these standards, especially because the standards are themselves vague and flexible. The international criminal justice system will encounter the same problems as the national ones when dealing with controversial issues such as victims’ rights in as much as it needs to accommodate diverging interests and principles.

Considering the lack of compliance of the ICTY and ICTR Statutes and RPEs in many issues with the above-mentioned standards, it remains to be seen where the ICC stands in comparison to the *ad hoc* Tribunals. The following sub-sections of this work will focus on each of the victim-related aspects of the ICC Statute and RPEs in order to emphasise the improvements in the implementation of the standards on victims. The fact that the UN Handbook on Victims highlighted that the work of the ICC Preparatory Committee had “given positive consideration to provisions related to victims”¹⁴⁹ is a first hint of the victim-oriented approach adopted by the States-Parties.

¹⁴⁸ See *UN Handbook...*, cit., p. 34.

¹⁴⁹ *Ibidem*, p. 2.

2.2 - The Definition of victim

It has been pointed out above how the definition included in the Victim Declaration paved the way for the debate about the RPEs of the ICC. Although the final version of the definition adopted by the States-Parties drew inspiration from the VD they are not identical.

On the one hand, it could be argued in favour of Rule 85 that it is broader than the definition included in the ICTY and ICTR Statutes but on the other hand it does not seem to be as broad as the one contained in the Victim Declaration. Firstly, because unlike the latter, Rule 85 does not expressly include family members of the victim. Thus it could be argued that they would not be considered as victims for the purpose of the ICC. However, sub-paragraph (a) of Rule 85 could be interpreted so as to include family members, provided there is evidence that they have also been victimised. In fact, this norm seems to be wide enough to include others than the direct victims of the crimes. Secondly, Rule 85 does not include a discrimination safeguard, but one could argue that the RPEs, as well as the Rome Statute are bound by human rights principles such as that of non discrimination. Thus it seems that the discrepancies between the two definitions may easily be dissipated through interpretation.

In sum, it seems that the definition adopted in the RPEs is similar enough to the international standard, which is an extremely positive starting point. In any case, it is worth mentioning that the hypothetical victims will imperatively need to pass a test to determine whether or not they are regarded as victims for the purposes of the proceedings before the ICC. Their relevance to the case will be scrutinised by the competent organs of the Court and in that precise moment the definition contained in Rule 85 will be central to the discussion. In spite of the exigency of this critical test, a relatively broad definition of victims like that of Rule 85 allows for a greater number of persons to be eligible for participation, which is definitely beneficial for victims.

2.3 - Participation

Bearing in mind the importance of the rather wide-ranging definition of victims, the paramount issue now lies in the extent of the procedural rights granted to them. On

this issue it has been noted in Part II that the international standards emphatically stress that victims should be allowed to participate in the proceedings.

Paragraph 6 (b) of the Victim Declaration points out the importance of allowing the views of the victims to be presented at all appropriate stages of the proceedings. This formulation is similar to the one included in Article 68(3) of the Rome Statute and further developed by Rules 89 to 93¹⁵⁰, thus it could be argued that these provisions meet the standard contained in the Victim Declaration.

Nevertheless, the RPEs do not seem to comply with the more stringent standard incorporated in guideline 7 of R (85) 11, according to which victims should have the right to ask for the review of a decision not to prosecute or the right to institute private proceedings. In accordance with sub-rule 2 of Rule 92, the Court must notify the victims of a decision of the prosecutor not to prosecute, pursuant to Article 53, in order for victims to apply for participation before the PTC. However, Rules 105, 106, 109, and 110 show that victims cannot ask for a review of this decision. They may only participate in the process of review if and when it takes place.¹⁵¹

Therefore the provisions on participation and procedural rights seem to comply with the lower standard of the Victim Declaration but not with the higher one of the Recommendation of the Council of Europe.

2.4 - The right to information

Both the Victim Declaration and R (85) 11 stress the importance of informing the victims of their rights at all stages of the proceedings as well as of all the decisions that may affect their interests.¹⁵² Rules 50, 59, 96, 144, 151 and 143, and in particular Rule 92, require that the Court, in some circumstances, or the Registrar in others, inform the victims of all the rights and facts that may affect them. The provisions appear to be sufficiently clear and detailed for the standard to be met. However, it must be noted that the non-observance of the duty to inform victims does not entail sanctions. Indeed, the

¹⁵⁰ See *supra* Part III, section 3-2 b).

¹⁵¹ See G. Bitti, H. Friman, *Participation of Victims...*, in R. S. Lee, *The International Criminal Court: Elements*, cit., p. 470.

¹⁵² See Victim Declaration paragraph 6(a) and Recommendation (85) 11 guidelines 2, 6, and 9.

organs of the Court should inform victims, as frequently as the Rules require them to do so, but when many victims are involved this may turn out to be a rather difficult task. Therefore, it would be wiser if victims maintained, whenever possible, close contact with both the Registrar and the Unit in order to keep themselves updated. NGOs dedicated to helping victims could play an important role in this field by facilitating their access to information.

2.5 - Protection

Protection of victims and witnesses is viewed by both the Victim Declaration and R (85) 11 as a necessary tool to facilitate victims' access to justice.¹⁵³ Bearing in mind the thorough presentation of the relevant provisions on protection of victims and witnesses undertaken in Part III of this work, the conclusions to be drawn at this stage are twofold. On the one hand, it appears as though the provisions of the *ad hoc* Tribunals' Statutes and RPEs meet the international standards on this issue, since they comprise so far successful methods of protection for victims. On the other hand, considering that the provisions of the Rome Statute and the RPEs were inspired by the practice of the ICTY and ICTR, then one could expect the ICC to provide appropriate protection to victims as well as witnesses whenever that might be necessary. Thus the international standards on victim protection seem to be upheld in the context of the ICC, at least in theory.

2.6 - Assistance

Assistance is yet another important aspect of the Victim Declaration and the Recommendation of the Council of Europe. Paragraph 6(c) and in particular paragraphs 14 to 17 of the former stress the need to create mechanisms focused in providing assistance to victims throughout the proceedings, including “*the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.*”¹⁵⁴ Recommendation R (85) 11 is rather more

¹⁵³ See Victim Declaration paragraph 6(d) and Recommendation (85) 11 guidelines 8, 15 and 16.

¹⁵⁴ Paragraph 14.

discrete in this issue but still refers to training police officers and to their duty to inform the victims “about the possibility of obtaining assistance, practical and legal advice (...).”¹⁵⁵

Similarly to what had been done by the RPEs of the *ad hoc* Tribunals, the RPEs of the International Criminal Court created the Victim and Witness Unit to provide the necessary services to those groups. As shown in Part III, the RPEs entrusted the Unit with a range of functions necessary to address the wide variety of problems that might affect victims before, during and after the proceedings. Thus the Tribunals and the ICC appear to have created a net of support for victims consistent with the international standards. Nevertheless, one should bear in mind the practical difficulties met by the Units of the ICTY and the ICTR due to the limited resources and personnel available. So far it has been difficult to provide adequate services to all the victims and witnesses that required them. The Unit of the ICC is likely to come across even more of the same problems because of the broader definition of victims upon which it is based.

2.7 - Reparation

Finally, due attention must be paid to the issues of reparation, restitution and compensation developed by the Victim Declaration and R (85) 11. The provisions on compensation of the RPEs are innovative in comparison with those of the ICTY and ICTR Statutes and RPEs because they allow for a criminal court to order compensation, whereas before this was not possible, thus upholding guideline 10 of the Recommendation, according to which “[i]t should be possible for a criminal court to order compensation by the offender to the victim.”

It has been noted above in Part III that Article 75 of the Rome Statute is the core of the provisions on reparations but it must be stressed how different it is from the Victim Declaration: unlike the paragraph 12 of the Victim Declaration, the Rules do not add a new definition of victims for the purposes of reparations and work with the one provided initially in Rule 85.

Furthermore, a Trust Fund has been created to deal with the administration of the reparation orders to victims. This meets the requirements of paragraph 13 of the Victim

¹⁵⁵ Guideline 2.

Declaration as well as of guideline 14 of the Recommendation. Little is known at this stage about how the Fund will deal with funds other than those contributed by convicted persons, even though this possibility is included in sub-rule 5 of Rule 98.¹⁵⁶

Generally it seems that the international standards on reparations to victims are being met. It remains to be seen, however, how judges that are not used to dealing with civil claims in criminal courts will deal with the victims' claims for reparation under Article 75. Again, one must reiterate the importance of keeping the victims updated with due information about the exact extent of their right to reparation. Otherwise, as has been pointed out above, they will not be able to make use of this right.

2.8 - Final remarks

There are a number of other issues that were addressed in the two documents but that are not relevant for the analysis undertaken in this Part. The general remarks just made reflect the idea that at first glance the Statute and the RPEs of the ICC endorse the guidelines enshrined in the two documents. However, that does not necessarily mean that they have reached adequate standards in every case, that they could not have gone further in certain aspects, as in respect to procedural rights of victims.

3 - Critical appraisal

Despite the relatively positive results of the comparison with the Victim Declaration and the Recommendation notwithstanding, a few negative aspects of the victim-oriented provisions of the ICC Statute and RPEs must be pointed out.

¹⁵⁶ According to sub-rule 5, “[o]ther resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.”

3.1 - The victim as a potential participant in the proceedings

Despite the widespread recognition of the progressive character of the Rome Statute and the RPEs, particularly of the procedural rights it grants to victims, some scholars have contended that in fact victims are granted only a potential right to participate.¹⁵⁷ This, it is claimed, undermines their status in the proceedings before the ICC. The idea that victims only have potential rights stems from the fact that their participation is dependent on the discretionary power of the organs of the Court. During the Pre-Trial stage as well as during Trial proceedings, as has been duly noted in Part III, the PTC and the Chamber have the possibility of barring the access of victims to the Court if it is their opinion that it is not the appropriate moment for them to participate. Their participation is not a certainty, but a mere possibility.

It has been noted that the RPEs draw upon the principle enshrined in 68(3) and “lay down complex mechanisms designed to give victims potential but significant rights to intervene”, but Jorda and de Hemptinne contend that “nevertheless, the victim does not become a true party to the trial in the sense of having rights and powers equivalent to those enjoyed by the prosecution or the defence.”¹⁵⁸ Indeed, there are a number of mechanisms that the victim is not allowed to activate like for instance having access to the strategy and evidence gathered by the prosecutor.¹⁵⁹

3.2 - The victim and the prosecutor

One of the main impediments to the full-scale participation of the victim in the proceedings before the ICC is the constant presence of the prosecutor. Whether before the Trial or during Trial proceedings, the victim will be required to interact with the prosecutor in several ways in order to be allowed to take part in the justice system.

However, the RPEs have not comprehensively detailed the relationship between the two actors. Aldana-Pindell notes that, for instance, in spite of the fact that once an

¹⁵⁷ According to Jorda and de Hemptinne, the ICC Statute and RPEs “have conferred on them [the victims] a potential right to participate in the proceedings and to obtain reparation.” C. Jorda, J. de Hemptinne, *The Status and Role...*, in A. Cassese, P. Gaeta, J. Jones, (Eds.), *The Rome Statute...*, cit., p. 1399.

¹⁵⁸ *Ibidem*, p.1405.

investigation is under way the prosecutor is expected to “respect the interests and personal circumstances of victims”¹⁶⁰, the RPEs do not specify how this would take place and whether the victims have the power to request evidence or not. This alludes to one of the flaws of the RPEs, i.e., the lack of a detailed description of the victims’ powers, which has left many unanswered questions. The prosecutor and the PTC are assigned the task of determining on a case to case basis, which acts the victims may or may not carry through. Despite the long and lively debate opposing the delegations of the States-Parties, it seems as though some issues were deliberately left unsolved.

At this point it might be interesting to mention the provisions on victims’ rights of the East-Timor Special Court. Victims are granted ample rights of participation during the proceedings and this includes requesting the prosecutor to investigate certain facts.¹⁶¹ Although the prosecutor has the power to decide when to accept such requests or when to refuse them, the powers of the victim regarding investigation are specified. This is an example of what the States-Parties could have easily agreed upon in the context of the ICC in order to ameliorate the position of the victim. Without this, however, the victim depends entirely on the discretionary power of the prosecutor.

Jorda and de Hemptinne also note that a positive aspect of this victim-oriented framework is the fact that since the prosecutor no longer has the task of defending victims’ interests, he “can devote all his efforts to the protection of international public order”¹⁶², whilst the victims themselves are empowered to defend their own interests. This is true, to a certain extent, and it is obvious that, when allowed to participate, victims will probably defend their own interests better than the prosecutor would. Nevertheless, in the cases where the Court bars the participation of the victims the prosecutor will have

¹⁵⁹ Jorda and de Hemptinne list other actions barred to the victims such as calling witnesses, although they are allowed to question witnesses called by other parties in the hearings they have access to. The authors also mention that victims have no right of appeal of the decisions of the Court. *Ibidem*, p. 1406.

¹⁶⁰ R. Aldana-Pindell, *In Vindication of Justiciable Victims’ Rights to Truth and Justice for State-Sponsored Crimes*, in «Vanderbilt Journal of Transnational Law», no. 35, November 2002, p. 1408.

¹⁶¹ See regulation 2000/30 of the East-Timor Special Court, sub-rule 12.6 “*The victim has the right to request the Public Prosecutor to conduct specific investigations or to take specific measures in order to prove the guilt of the suspect. The Public Prosecutor may accept or reject the request.*” For more on this see <http://www.easttimor-reconciliation.org/Documents.htm> .

¹⁶² C. Jorda and J. de Hemptinne, *The Status and the Role...*, in A. Cassese, P. Gaeta, J. Jones, (Eds.), *The Rome Statute...*, cit., p. 1408.

to protect their interests, residually, or at least take them into consideration. As seen above, since the RPEs do not stipulate how the prosecutor is meant to take victims' interests and views into consideration, Jorda and de Hemptinne's remark is only applicable to the cases when victims are authorised to participate in the proceedings. In the remaining situations, little should be expected from the prosecutor on behalf of the victims.

It has been claimed that the underlying idea, reflected in the provision applicable in the *ad hoc* Tribunals, that the interests of victims are equivalent to those of the prosecutor, is another negative aspect of this framework.¹⁶³ The RPEs of the ICC norms are distinct from those of the *ad hoc* Tribunals because they empower victims to defend their own interests, thus recognising the potential difference between the two sets of interests. One can imagine a number of situations where the interests of the victims are frustrated by incompatible policy choices made by the prosecutor. And since the participation of the victim is only potential, victims' interests are bound to be frustrated very often.

Linked to this problem is the question of how the interests of victims might be taken into consideration and influence the investigation and the related question of how the prosecutor will exercise his discretion. Morris contends that normally at the national level victims' interests "are in part distinct from the broader societal interests in criminal justice."¹⁶⁴ At the international level this may turn out to be problematic because "not only the principally affected state and the victims, but also the broader community of States Parties to the ICC Treaty will have potentially divergent interests in handling of crimes within ICC jurisdiction."¹⁶⁵ Morris's analysis of the RPEs of the ICC leads to the following conclusion: in most cases the prosecutor will not be inclined to take victims' interests into account.¹⁶⁶ According to the author, "[t]he prosecutor is likely to be satisfied by a rather small number of trials" whereas "[w]here crimes have been

¹⁶³ *Ibidem*, pp. 1394-1395.

¹⁶⁴ M. Morris, *Complementarity and its Discontents: States, Victims and the International Criminal Court*, in D. Shelton, (Ed.), *International Crimes...*, cit., p. 179.

¹⁶⁵ *Ibidem*.

¹⁶⁶ See Morris, *ibidem*, p. 182.

committed on a mass scale, by numerous perpetrators against many victims, the interests of victims are unlikely to be met by a few trials.”¹⁶⁷

Furthermore, Morris notes that a “minimalist”¹⁶⁸ approach to the Treaty, which would imply the prosecution of “only a small number of the most culpable perpetrators”¹⁶⁹, would be “damaging” for victims and for justice, because it would push ill-prepared criminal systems to deal with the cases the ICC refused. And to those that argue that giving substantial weight to the victims’ interests may be incompatible with the limited resources of the Court, the author replies that “ICC budget projections and resource allocations should be made in a manner that reflects the full range of interests intended to be served.”¹⁷⁰

Moreover, it is claimed that this policy may have an impact on the concurrent jurisdiction exercised by states. States may pursue justice at the national level in the cases where the ICC, for one reason or another, fails to do so. Even if prosecutions at the domestic level uphold the victims’ right to justice¹⁷¹, national provisions might be less favourable to them than those in the context of the ICC, and might not even allow for victims’ participation. Morris argues that there should be some sort of policy to guide the prosecutor’s discretion, because “[i]n the absence of carefully developed and articulated policies to guide ICC practice on complementarity, there exists the very real risk that the ICC will create injustice rather than justice as it fails to serve the interests of states and victims and perhaps even impedes the fulfillment of those interests in state proceedings.”¹⁷²

Morris’s analysis is extremely appealing as it points out the potentially deeper consequences of the lack of a comprehensive victim-oriented policy in the ICC Statute and RPEs. Of course this view stems from an interpretation of the Articles and the Rules: the actual practice of the prosecutor might turn out to be much more victim-oriented than expected. Moreover, victims’ interests may often be more akin to vengeance than to the

¹⁶⁷ *Ibidem*, pp. 184-185.

¹⁶⁸ *Ibidem*, p. 185.

¹⁶⁹ *Ibidem*, p. 185.

¹⁷⁰ *Ibidem*, p. 186.

¹⁷¹ See D. Donat-Cattin, *Victims in the ICC Proceedings*, in F. Lattanzi, W. A. Schabas, (Eds.), *Essays on the Rome Statute of the International Criminal Court*, Ripa Fagnano Alto, Il Sirente, vol. 1, 1999, pp. 254-255, 272.

¹⁷² M. Morris, *Complementarity...*, in D. Shelton, (Ed.), *International Crimes...*, cit., p. 201.

concept of justice and due process embraced by international criminal law. Therefore, in the cases where the victims' interests are incompatible with the principles enshrined in the Rome Statute, it is natural for the prosecutor to disregard them. Conversely, the more the prosecutor disregards the victims' legitimate interests, the fewer victims will have an opportunity to participate in the trials. If the Court is meant to contribute to peace and reconciliation, as well as to justice and rehabilitation, then victims' legitimate views and interests should be given adequate consideration. Morris's suggestion of guidelines to regulate the prosecutor's activities may facilitate the complex interaction with the victims, thus solving the problems that may arise.

3.3 - The victim and the judges

Additionally to the lacunae regarding the victims' relationship with the prosecutor, the Rome Statute and the RPEs are affected by the lack of a detailed description of the interaction between the victims and the PTC and the Chambers. Important issues such as the precise role victims will play and the requirements for their participation in the proceedings have been left open. Jorda and de Hemptinne stress the urgency in establishing guidelines to facilitate the Court's task when confronted with victims' claims to participate.¹⁷³ Thus it seems that the extent to which victims may affect the expeditiousness of the trial and eventually hinder the legitimate interests of the accused depends greatly on the speediness and correctness of the judges when addressing these issues. Indeed such guidelines would be hugely beneficial both for the victims as for the parties to the proceedings. These guidelines may come about through the practice of the court, which means that in the first cases before the ICC the judges will not have previous rulings to rely on as precedents. Nevertheless, adequate amendments to the RPEs would perform this task in a more comprehensive fashion while conferring more certainty and reliability to the judges' rulings on the participation of victims.

¹⁷³ C. Jorda and J. de Hemptinne, *The Status and the Role...*, in A. Cassese, P. Gaeta, J. Jones, (Eds.), *The Rome Statute...*, cit., p. 1409.

Moreover, Jorda and de Hemptine claim that this situation is aggravated by the fact that only certain features of the inquisitorial model were adopted. Indeed, the authors contend that if the States-Parties intended the victims to play an extended role in the proceedings then they should have adjusted the remaining traits of the criminal justice system accordingly. The authors argue that similarly to some civil law countries governed by the inquisitorial model, the judges of the ICC must have more far-reaching prerogatives if they are to deal promptly and adequately with all the victims' requests for participation.

The authors have put forward a convincing argument in favour of a greater influence of the inquisitorial model in international criminal procedure but this does not alter the underlying problems noted above. The judges will still have before them the daunting task of balancing the interests of the victims with the rights of the accused and due process. In practice, this could reflect in a situation where “[t]he judges, not having at their disposal the documents gathered by the prosecution and the defence in the course of their respective investigations, will often not be in a position to assess the relevance to the case of the observations made to them by the victims during the hearing (...).”¹⁷⁴ This is bound to cause delays, which might be prejudicial to all the parties. Furthermore, since the victims are not considered as true parties to the proceedings, and consequently have no access to the evidence gathered by the prosecutor and the defence, their strategies will not be aligned with that of the prosecutor, which might undermine the prosecutor's case.¹⁷⁵

Jorda and de Hemptinne envisage two possible solutions to overcome these problems. Firstly, “to allow the victim to participate in the entire process from start to finish but to give the judge[s] greater powers to control the proceedings”¹⁷⁶, i.e., giving them the powers of an investigating judge. This, however, would require substantial changes to RPEs and possibly to the Rome Statute. One must bear in mind that amendments to these instruments are part of a cumbersome process based on Articles

¹⁷⁴ *Ibidem*, p. 1412.

¹⁷⁵ *Ibidem*.

¹⁷⁶ *Ibidem*, p. 1413.

51¹⁷⁷ and 121¹⁷⁸. Indeed, through this proposal Jorda and de Hemptinne cleverly point out a possible solution to the victims' fragile status in the proceedings in as much as a stronger judge would definitely be better prepared to deal with victims' requests and claims. Nevertheless, this proposal would undoubtedly be regarded as being too far-fetched and contentious by most States-Parties, considering the difficulties faced by the delegations during the negotiations. Hence the few chances of meeting the requirements of Articles 51 and 121 of the Rome Statute. In any case, this does not seem to be a viable option, at least not in the near future.

The second option would consist in “split[ting] the hearing into two separate, successive parts.”¹⁷⁹ During the first one, the participation of the victim would be very limited, as the part's function would be to allow for the parties to present their arguments, whereas the second part would be entirely dedicated to the victims, thus allowing them to play an important role.¹⁸⁰ The authors argue that this second part, unlike the first one, “would be much more inquisitorial, since it would be conducted under the strict control of the judge.”¹⁸¹ Thus Jorda and de Hemptinne emphasise yet again the benefits of the traditionally inquisitorial proceedings for the amelioration of the status of the victim. Similarly the their first proposal, splitting the hearing into two parts may be a convenient mechanism to ensure the speediness and efficacy of the proceedings, but its implementation would require equally contentious amendments to the RPEs. Both proposals are interesting though rather unrealistic.

¹⁷⁷ See Article 51 paragraph 2: “2. Amendments to the Rules of Procedure and Evidence may be proposed by: (a) Any State Party; (b) The judges acting by an absolute majority; or (c) The Prosecutor. Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.”

¹⁷⁸ See Article 121 paragraph 1: “1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.”

¹⁷⁹ C. Jorda and J. de Hemptinne, *The Status and the Role...*, in A. Cassese, P. Gaeta, J. Jones, (Eds.), *The Rome Statute...*, cit., p. 1414.

¹⁸⁰ According to the authors, during the second part the victims “could orally put forward their views and arguments and, where appropriate and with the leave of the Court, call witnesses.” *Ibidem*.

¹⁸¹ *Ibidem*.

3.4 - Conclusions

In sum, despite the rather comprehensive incorporation of the international standards on victims in the Rome Statute and the RPEs of the ICC, despite the relatively elaborate victim-related RPEs, the proceedings are not meticulous enough. Morris, as well as Jorda and de Hemptinne have pointed out these shortcomings while bringing forward new proposals that may help solve these problems. Whether through soft-law guidelines or through amendments to the Statute and the RPEs, it is obvious that the current proceedings are not sufficiently victim-oriented.

4 - Key issues

4.1 - Adversarial model vs. Inquisitorial model

The previous analysis sheds some light on the undeniable difficulties of building an international criminal justice system that allows for the participation of the victim, even when high standards of due process and victims' rights are followed.

One of the explanations for the fragile approach to victims' rights before the ICC lies in the historical legacy upon which the Court is grounded. The previous part of this work showed how the adversarial model of criminal justice has largely influenced international tribunals and the consequences of this fact have been duly noted. The eternal rivalry between the accusatorial and inquisitorial models appears to be in the centre of the heated debate on victims.

Theo Van Boven analyses the position of the victim in the ICC Statute and concludes that one of the justifications for the recent advancements since the ad hoc Tribunals lies in the growing influence of the civil law model of criminal justice in international proceedings. The author argues that “[t]he strengthening of the position of the victim in the ICC Statute is a happy illustration of the fact that in many ways the

Statute is not the product of one predominant legal system and culture but the result of a healthy cross-fertilization of several legal systems and cultures.”¹⁸²

In fact, it seems that most scholars recognise that the ICC system is predominantly adversarial¹⁸³ in spite of the introduction of features of the inquisitorial model. However it has been noted that “[a]n International Criminal Court should in its law and procedure be as universal as possible. This means that it should be balanced in the degree to which it reflects each one of the major criminal justice model systems. Because of its specific function it has to choose from each of the major systems those elements that serve best the administration of justice. One therefore can expect the law of procedure to be an amalgam of the major systems.”¹⁸⁴

If this is the case then it appears as though the States-Parties thought that the participation of the victims would contribute to the realisation of justice. Therefore they drew inspiration from the inquisitorial model and introduced procedural rights for victims. Because of the precedential influence of the adversarial model and of the prevalence of the idea that this model protects the offender’s rights more adequately, which remains as the main priority, other features of the inquisitorial model were not added to complete these procedural rights. Cassese points out that “[i]n spite of the basic incorporation of the adversarial system into international proceedings, in the procedure before the ICTY, the ICTR, and the ICC some elements of the inquisitorial system have been added so as to reduce some of the major disadvantages of the other system.”¹⁸⁵ States-Parties introduced positive features of each model in order to raise the quality of the proceedings and to improve the standing of all the parties.

This method is designed to ensure that the criminal procedure before the ICC is as effective as possible, but it has its own drawbacks. It seems that there will always be competition between features of the two models, and there is only so much States-Parties

¹⁸² T. van Boven, *The Position of the Victim in the Statute of the International Criminal Court*, in H. von Hebel, J. G. Lammers, J. Schukking, (Eds.), *Reflections on the International Criminal Court : essays in honour of Adriaan Bos*, The Hague, Asser Press , 1999, p. 88.

¹⁸³ On this issue see A. Cassese, *International Criminal Law*, Oxford, Oxford University Press, 2003, p. 386, A. Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC*, in A. Cassese, P. Gaeta, J. Jones, (Eds.), *The Rome Statute...*, cit., p. 1477 and S. Zappalà, *Human Rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, p. 25.

¹⁸⁴ See A. Orie, *ibidem*, p.1442.

¹⁸⁵ See A. Cassese, *International Criminal...*, cit., p. 386.

can achieve through their combination. In fact, this might even turn out to be prejudicial for the parties, as it probably will raise doubts and confusions, especially on the issues where the RPEs are silent, as has been noted above. The organs of the Court will have to depend on ‘trial and error’ to find the correct measure of influence of each model’s features in each case.

Perhaps the best would be to create a new procedural model altogether, one that would eventually combine features of both models in a more unbiased fashion. But at the same time it is not reasonable to expect that States-Parties would manage to obtain consensus on procedures that have not been tested previously at the national level. In sum, it seems that the right balance is difficult to find, and “[t]he significant progress towards a procedural scheme still largely adversarial but enshrining important features of the other model is likely to need further honing with the passage of time and increased experience.”¹⁸⁶

Orie concluded that the ICC needs more time to find the right balance between the various elements of different systems. This may possibly arise through practice, although it could also take place through adjustments that will need to be made in the long-term, i.e., amendments to the RPEs. This remark is particularly legitimate in the area of victims’ rights where only national experiences can so far be used as precedent.¹⁸⁷

4.2 - Victims’ procedural rights: achievements and drawbacks

The RPEs of the ICC could be regarded as the consolidated version of the principles of international criminal law recognised by all nations. The fact that representatives of states instead of judges drafted these RPEs contributed to a more democratic and open drafting process. Moreover, it allowed non-state actors –such as NGOs– to convey their views and carry substantial weight in the decisions. Therefore, the RPEs and the Rome Statute represent a miscellany of various trends and principles that every State-Party generally accepted.

¹⁸⁶ *Ibidem*, p.387.

¹⁸⁷ See A. Orie, *Accusatorial v. Inquisitorial...*, in A. Cassese, P. Gaeta, J. Jones, (Eds.), *The Rome Statute...*, cit., p. 1478.

However, to argue that it is consolidated is different from arguing it is a final version. Changes and amendments, though not necessarily beneficial for the victims' cause, will surely be made in the future, despite the fact that the amendment process of the ICC rules is more cumbersome than the one for the ICTY and ICTR. As for the position of the victim in the *ad hoc* Tribunals, there is little hope that it will change in the future. Indeed, the judges may continue to amend the rules but they will not be able to extend beyond the scope of the Articles and principles laid down in the Statutes. Therefore, one cannot expect the appropriate forum for the improvement of the status of the victim to be the *ad hoc* Tribunals, but rather the ICC.

It can be said that the ICC framework for victims represents an achievement, but there is obviously room to go further. In this line of thought, Zappalà argues that “[t]he condition of individuals in the international criminal justice system has undoubtedly improved. There has been progress in both directions: the rights of defendants, on the one hand, and the rights of victims, on the other. This process has certainly not exhausted its potential for change.”¹⁸⁸ However, the author contends that these improvements “may be counterproductive, particularly considering the procedural rights of victims, in that it may allow too many subjects to present their views under the relevant rules.”¹⁸⁹ Zappalà fully embraces the recent developments on the position of the victim, but faces rather cautiously any further improvements. On the one hand, the author's hesitance is legitimate, considering the amount of potential victims that might address the Court, thus possibly delaying procedures. On the other hand, the author does not seem to consider that a more detailed set of RPEs on victims' procedural rights may help victims as well as the organs of the Court and the parties to the proceedings. Guidelines on the Court's attitude towards victims' claims to participate would benefit every party involved, as it would reduce the length and improve the quality of the PTC and Chamber's rulings. Similarly, guidelines on the relationship between the prosecutor and the victims, as well as on the specific powers of the latter in the investigation, would allow both parties to cooperate rather than to compete and hinder each other's strategies.

¹⁸⁸ See S. Zappalà, *Human Rights...*, cit., p. 25.

¹⁸⁹ *Ibidem*, p.221.

Furthermore, Zappalà recalls the terminology used previously in this work: the ‘services model’ and the ‘rights model’. According to the author, “[i]n the system of the *ad hoc* Tribunals, attention was essentially given to the ‘service’ dimension, while in the ICC Statute an attempt has been made to increase the procedural rights of victims and expand them to the procedural dimension.”¹⁹⁰ In fact, this evolution is analogous to the development of international standards on victims. At the outset, international standards were mainly concerned with the type of services that should be provided for victims. Now it can be said that the real priority lies in increasing the volume of participation of victims. Other issues such as the possibility of victims influencing the sentencing and early release decision-making process remain unsolved and will, once again, depend on the case to case decisions of the judges. This does not necessarily imply that the victims will be ignored in practice, but that is also a real possibility that should be considered.

In the light of the remarks presented throughout this part, proposals for the improvement of this rights framework before the ICC will have to be advanced as soon as the first Pre-trial and trial proceedings are activated before the PTC and the Chamber. It is hard to anticipate how the prosecutor and the judges will deal with victims or to foresee how these organs will fill in the gaps found in the RPEs. But insofar as victims are informed about their potential procedural rights and keep track of relevant decisions, nothing should pose an obstacle to the chance for victims to express their legitimate views. That is the purpose of the Articles and Rules, because it was felt that the participation of the victim would be valuable. Therefore, the contribution of victims in the proceedings should not be disregarded, in spite of the consequences it might entail.

¹⁹⁰ *Ibidem*.

Part V - Conclusion

In spite of all the difficulties the victims' cause faces at the national and international level, the last decades have demonstrated how crucial this issue has become for every type of criminal justice system. The early scepticism experienced in systems ruled by the adversarial model has been gradually replaced by the acceptance of the victims' role in the conduction of the proceedings. A global trend has emerged, materialised through international and regional human rights instruments, through national legislation and through rules of international criminal courts.

Originally, the struggle for adequate services and assistance for victims prevailed over the concern with victims' procedural rights. Since then, comprehensive mechanisms have been developed for that purpose and although occasionally the need for improvements may arise, victims' satisfaction is not hard to obtain. Provided that these institutions have sufficient funds, competent personnel and an effective organisation, the international standards on victims' services will easily be met.

Parts II, III and IV of this work showed the difficulties of deploying satisfactory frameworks of victims' rights, both at the national and international level. Unlike victims' services, victims' rights depend on philosophical and political rather than financial decisions, which explains why the procedural provisions on victims in the context of the ICC remain to a certain extent incomplete. In fact, States-Parties could not agree on more detailed provisions, thus they deliberately decided to rely on the prosecutor and the judges' interpretations of the RPEs. The prosecutor and the judges will have to balance victims' and defendants' rights, traditionally adversarial procedures and inquisitorial ones.

Part II of this work described how domestic criminal justice systems incorporated the international standards on victims, whereas Part III and IV focused on the influence of these standards in the international criminal justice system. The effect of national

experiences and models in the international arena being obvious from what was said above, it remains to be seen how the international experiences of the ICC will influence national systems. It has been pointed out that the rules of international courts “may hold valuable lessons”¹⁹¹ for domestic courts because of their concern with individual perpetrators. Indeed, it could even be argued that the RPEs’ approach and future practice on victims might also become an example for national systems, especially those where victims normally do not enjoy an important standing in the proceedings. This is a desirable ‘side effect’ of the difficult process that cannot be forgotten.

When rights and duties are involved, expectations arise that cannot always be fulfilled. Secondary victimisation and frustration with the outcomes of justice made by the ICC will probably arise quite often among victims, whether they are or not allowed participation in the proceedings. Even if the existing rules are rigorously respected, the lacunae noted above will often entail negative consequences for the victims. Guidelines and amendments to the RPEs specifying the role of the prosecutor and the judges in addressing victims’ claims and concerns are the only solution to the problems that will undoubtedly arise in the future. Similarly, the position of the victim in domestic jurisdictions should be periodically re-evaluated and new legislation introduced in order to solidify the principles recognised by the international standards.

The “Golden Age of the Victim” described by Schafer in part I of this work has since then not yet been repeated, but the revival the author had anticipated came true in a remarkable fashion. Victims now actually have procedural rights, even if only potentially, in some cases, and as soon as the Council of the European Union Framework Decision on the standing of victims in criminal procedure produces its effects, new outcomes will need to be analysed. The victims’ rights cause has definitely not yet reached its ultimate stage of development, as the continuous cross-fertilisation between national and international proceedings and traditions will show.

¹⁹¹ J. Doak, *The victim and the criminal process...*, cit., p. 8.

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