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ARTICLE

PRAGMATISM OVER PRINCIPLES: THE INTERNATIONAL CRIMINAL COURT AND A HUMAN RIGHTS-BASED APPROACH TO JUDICIAL INTERPRETATION

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ABSTRACT

The interconnected relationship between international human rights law and international criminal law has long been an issue of scholarship. This article examines the last decade of practice at the International Criminal Court focusing on instances where the Court has either invoked a human rights interpretation of governing documents or rejected such an approach. The article concludes that the application of human rights is unclear and is largely driven by pragmatism rather than principle. Greater clarity, through a more consistent and transparent theory of international criminal law interpretation, is needed. In the meantime, the judges should remain reluctant from too easily conflating the two fields of law because to do so, at the expense of an accused, can undermine the very principles upon which fair and legitimate criminal proceedings operate.

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I. INTRODUCTION

The development of international human rights law and the development of international criminal law were both, to a great extent, inspired by a desire to ensure that the acts that took place under Nazi Germany could never happen again, or if they did happen, a system would be in place to address them.[1] As such, both fields of law largely share a considerable common base.[2] Where human rights obligations are directed towards State responsibility, international criminal courts focus on individual criminal responsibility for specific violations of international law. Although the international human rights framework developed at a faster pace following the Second World War, from the 1990s onwards the field of international criminal law has grown significantly. Indeed, the international community created modern international criminal tribunals, including the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Court ("ICC"), amongst others,[3] to address serious violations of human rights and humanitarian law. Likewise, human rights bodies, such as regional human rights courts in Africa, the Americas and Europe, continue to address issues relating to international crimes and the responsibility of States. The

1. ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 13 (3d ed. 2014).

2. *Id. See also* William A. Schabas, *Criminal Responsibility for Violations of Human Rights*, *in* HUMAN RIGHTS: INTERNATIONAL PROTECTION, MONITORING, ENFORCEMENT 281 (Janusz Symonides ed., Aldershot 2003).

3. Special Court for Sierra Leone ("SCSL"), Extraordinary Chambers in the Courts of Cambodia ("ECCC") and the Special Tribunal for Lebanon ("STL") are other examples.

two fields are therefore historically and presently linked. Indeed, when looking at the jurisprudence of the international criminal tribunals, it is clear that both the ICTY and ICTR have used human rights law to assist in interpreting substantive law and procedure.[4] It was therefore welcomed when the Rome Statute of the ICC included a reference to "internationally recognized human rights" within its Article 21(3) concerning the applicable law the judges should apply.[5] This provision seemed to reinforce the interconnected relationship between international criminal law and international human rights law.

Despite the numerous areas of overlap between international criminal law and international human rights law, it is nonetheless important to remember that the two fields are not the same and should not be treated as such.[6] Not all human rights violations will constitute crimes under international criminal law. Moreover, obligations under international human rights law are directed at States, not individuals. And, most importantly, where human rights norms and standards may be interpreted expansively in order to achieve their stated goals of broad protection, the principle of legality and the rights of an accused in a criminal process largely dictate that criminal law be strictly interpreted and in cases of ambiguity resolved in favour of an accused. Furthermore, while the ICC certainly deals with serious violations of human rights and human rights norms are listed as a secondary source of applicable law under the Statute,[7] the Court was never designed to operate as a human rights institution but rather as a

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4. *Prosecutor v. Kunarac*, Case No. IT-96-23 and IT-96-23/1, Judgment, ¶ 467 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, ¶ 608-15 (Int'l Crim. Trib. For the Former Yugoslavia Jan. 14, 2000); *Prosecutor v. Dokmanovic*, Case No. IT-95-13a-PT, Decision on the Motion for Release Decision by the Accused Slavo Dokmanović, ¶ 59-60 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 22, 1997); *Prosecutor v. Nahimana*, No. ICTR-99-52-T, Judgment, ¶ 983-1010 (Dec. 3, 2003); *Prosecutor v. Bikindi*, No. ICTR-01-72, Judgment, ¶ 378-97 (Dec. 2, 2008); see also Cryer, *supra* note 1, at 10.

5. *See, e.g.*, Mary Robinson, *High Commissioner for Human Rights welcomes Sixtieth Ratification of Statute of International Criminal Court*. United Nations Press Release, (April 11, 2002), http://www.un.org/press/en/2002/HR4583.doc.htm [https://perma.cc/SXC3-PCHY] (archived Feb. 27, 2018).

6. See Darryl Robinson, The Identity Crisis of International Criminal Law, 21 Leiden J. of Int'l L. 925 (2008); Markus Benzing, The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity, 7 Max Planck Y.B. of United Nations L. 591 (2003).

7. Rome Statute of the International Criminal Court art. 21, July 17, 1998, 2187 U.N.T.S. 90.

criminal court.[8] This distinction is important and begs the questions: to what extent has the ICC adopted an overtly human rights approach to interpretation of its substantive and procedural provisions and does it do so in a clear and principled manner?

Yet despite this important distinction, there has been a real fear by those working within international criminal law that international criminal institutions have been adopting "contradictory assumptions and methods of reasoning" from criminal law and international human rights law.[9] This amalgamation has manifested in internal contradictions and potentially unfair practices.[10] After briefly outlining the important distinctions between international human rights law and international criminal law, this Article will delve into a number of prominent instances where a human rights-based approach to interpretation was either embraced or rejected by the Court. This Article first highlights two examples in which ICC judges accord human rights norms precedent over restraining principles of criminal law, to the detriment of an accused. The examples were selected because of their importance both substantively and procedurally. This Article will go on to show that the picture is a complex one. Indeed, it demonstrates that many of the ICC judges seem to be aware that the Court cannot address all human rights issues, even if tangentially related to a case before it. Explaining this view, this Article highlights three prominent instances in which the Court has recognized a clear distinction between its responsibilities and those of a human rights body.

Drawing on these examples, the article shows that while the Court rightly promotes human rights norms and standards, thus far, it has, to a large extent, been reluctant to take on a broader human rights mandate, at least when not directly related to the criminal process against an accused. Overall, it is difficult to determine a clear pattern

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8. For instance, the Appeals Chamber has taken note of the fact that during the drafting of the Statute "many delegations believed that procedural fairness should not be a ground for the purpose of defining complementarity." *See Prosecutor v. Saif Al-Islam Gaddafi*, Case No. ICC-01/11-01/11-565, Judgment on the Appeal of Mr. Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled "Decision on the Admissibility of the Case against Abdullah Al-Senussi, ¶ 495 (July 24, 2014).

9. *See* Robinson, *supra* note 6, at 925; *See* Andrew Clapham, *Human Rights and International Criminal Law, in* CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW 11 (W.A. Schabas ed., Cambridge Univ. Press 2016); *see also* Masha Fedorova & Göran Sluiter, *Human Rights as Minimum Standards in International Criminal Proceedings,* 3 HUM. RTS. AND INT'L LEGAL DISCOURSE 9 (2009).

10. *See generally* Robinson, *supra* note 6 .

when the Court embraces human rights norms over restraining principles of criminal law. It has done so rather inconsistently, though some pragmatic and contextual explanations can be discerned from its reasoning. This Article argues that in order to reaffirm its liberal criminal justice approach, it should continue to avoid taking on a broader human rights mandate, particularly when to the detriment of the accused, if it wishes to avoid what Robinson coined as an "identity crisis" in the years to come.

II. HUMAN RIGHTS LAW AND BODIES

From the Second World War onwards, there has been a proliferation of international human rights instruments and bodies established for the protection human rights. Of the nine core international human rights treaties, there are ten mechanisms/committees set up to monitor human rights protection at the domestic level.[11] In addition to the international human rights treaty body regime, regional human rights bodies, most notably the Inter-American Commission on Human Rights, the Inter-American Court on Human Rights, the European Court of Human Rights, the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights provide another crucial layer of protection for individual human rights.

Almost all of the respective human rights mechanisms (excluding the Charter-based system which is not discussed in this Article) adopt a distinct approach to legal interpretation characteristic of human rights bodies. Using the Vienna Convention on the Law of

11. The nine core international human rights treaties and their corresponding treaty bodies include the International Covenant on Civil and Political Rights ("ICCPR") and the Human Rights Committee ("HRC"), International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the Committee on Economic, Social and Cultural Rights ("CESCR"), International Convention on the Elimination of Racial Discrimination ("ICERD") and the Committee on the Elimination of Racial Discrimination ("CERD"), Convention on the Elimination of Discrimination against Women ("CEDAW") and the Committee on the Elimination of Discrimination against Women ("CtDAW"), the Convention against Torture ("CAT") and the Committee against Torture ("CtAT") as well as the Subcommittee on the Prevention against Torture ("SPT"), The Convention on the Rights of the Child ("CRC") and the Committee on the Rights of the Child ("CtRC"), Convention on the Protection of the Rights of All Migrant Workers ("CPRMW") and the Committee on Migrant Workers ("CMW"), Convention for the Protection of All Persons from Enforced Disappearance ("CPED") and the Committee on Enforced Disappearances ("CED"), and Convention on the Rights of Persons with Disabilities ("CRPD") and the Committee on the Rights of Persons with Disabilities ("CtRPD").

Treaties,[12] and the interpretative methods provided under their respective treaties, judges and commissioners operating within human rights courts or bodies have developed a number of overarching approaches to interpretation.[13] First, human rights bodies acknowledge the primacy of the texts of human rights treaties.[14] Second, they often favour a teleological approach whereby they focus on the object and purpose of the treaty, which in the case of human rights is usually geared towards the protection of the rights of an individual vis-à-vis a State.[15] As such, they have a tendency to interpret rights in an expansive and progressive manner.[16] Indeed, there are many instances in which human rights bodies have expressly welcomed "liberal," "broad," "progressive," and "dynamic" interpretations of the law.[17] As noted by the former President of the Inter-American Court of Human Rights, Cecilia Medina, the Inter-American Court of Human Rights "does not see itself only as a guardian of the individual interests of one victim, but as the custodian

12. *See generally* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331.

13. D.L. SHELTON, ADVANCED INTRODUCTION TO INTERNATIONAL HUMAN RIGHTS LAW 110 (Edward Elgar ed., 2014); *see also* K. Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. OF TRANSNAT'L L. 905 (2009).

14. *See* Shelton, *supra* note 13, at 110.

15. *Id.* However, not all human rights bodies adopt a progressive interpretation approach all the time. Many of the human rights bodies defer to less progressive methods on sensitive issues. *See e.g.*,*Hatton v. United Kingdom*, App. No. 36022/97, Eur. Ct. H.R. at 122 (2003) (deferring to the margin of appreciation in the case of environmental human rights).

16. Shelton, *supra* note 13, at 110.

17. Robinson, *supra* note 6, at 933 n.30; HRC, *Kim v. Republic of Korea*, Communication No. 1786/2008, Views 1 February 2013, CCPR/C/106/D/1786/2008, Appendix V, ¶ 11 ('the Committee should maintain its progressive approach'); HRC, A. v. Australia, Communication No. 560/1993, Views 3 April 1997, A/52/40 (Vol. II), Annex VI, sect. L. (at 125-46) ('broadly and expansively'). In the Inter-American system, *see for example*, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. No. 2 (1985), Separate Opinion of Judge Rodolfo Piza, ¶ 6, 12 ('necessity of a broad interpretation of the norms that it guarantees and a restrictive interpretation of those that allow them to be limited'); *Bámaca Velásquez v. Guatemala*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 70 (2000), separate judgement of Judge Sergio Garcia Ramirez, ¶ 3 ('progressive interpretation', 'guiding momentum of international human rights law, which strives to take the real protection of human rights increasingly further'). In the European system, *see* Report of the Commission, 1 June 1973, ECHR Series B, No. 16 at 9 (the Convention is not to be narrowly interpreted having regard to the sovereignty of states, but rather given a broad interpretation to protect rights effectively); *East African Asians v. the United Kingdom*, Eur. Ct. H.R.2 (14 December 1973), ¶ 192-5;, *Stafford v. United Kingdom,* App. No. 46295/99, Eur. Ct. H.R. ¶ 68, (May 2002).

of the public order created by the system."[18] This, she says, reflects the true sense of a human rights court. The express acceptance of more progressive and dynamic interpretations of law by human rights bodies, many of which are composed of human rights experts and not necessarily judges, stands in contrast to accepted interpretative methods largely associated with criminal law adjudication.

In the liberal model, because the State is viewed as substantially more powerful than any of its citizens, and in order to protect the rights of a citizen vis-à-vis the State, limits need to be placed on State authority. The need for limits is particularly important in the field of criminal law, where States exert the ultimate power over an individual, namely the ability to detain or in some cases execute. Because the individual being accused may be marginalized and unpopular, criminal procedures adhering to strict standards of fair trial and due process rights are designed to lessen the imbalance of power and overcome stigma or bias against an accused. As such, liberal systems "embrace restraints on its pursuit of societal aims out of respect for the autonomy of the individuals who may be subject to the system."[19]

Liberal criminal justice systems therefore rely on and employ restraining principles in order to achieve accuracy and fairness in the process. Robinson emphasizes three important liberal criminal justice restraining principles that this article will also address: the principle of personal culpability, the principle of legality and the principle of fair labelling. The principle of personal culpability holds that individuals are only accountable for their own conduct. The principle requires a certain level of knowledge and intent in relation to the prohibited conduct in order to meet the *mens rea* requirement of culpability.[20] The principle of legality, or *nullum crimen sine lege*, holds that definitions of crimes not be applied retroactively and be strictly applied, so as to provide fair notice to individuals and restrain

18. C. Medina Quiroga, Column, *The Inter-American Court of Human Rights: 35 Years*, 7 NETH. Q. OF HUM. RTS. 118, 121 (2015).

19. Robinson, *supra* note 6, at 926.

20. *See generally id*; *Prosecutor v. Delalić et al.* (Čelebići), Case No. IT-96-21-T, Judgement, ¶ 424 (Nov. 16, 1998); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, 136-137 (Paola Gaetana et al. eds., 2003); ICC Rome Statute Arts 30-33 A/CONF/183/9 (16 July 2002); Gerhard Werle & Florian Jessberger, *Unless Otherwise Provided': Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law*, 3 J. OF INT'L CRIM. JUST. 35 (2005); Hans-Heinrich Jescheck, *The General Principles of the International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, 2 J. OF INT'L CRIM. JUST. 38, 44 (2004).

any arbitrary abuse of power.[21] Finally, the principle of fair labelling holds that the label of the offense should fairly and clearly express the wrongdoing of the accused so that any conviction corresponds to the wrongfulness of the act. In addition to these three important criminal law principles that have been recognized by international criminal courts, the principles of legal certainty and other fair trial rights are also relevant. The principle of legal certainty is closely related to the notion of predictability, the principle of legitimate expectation and the rule of law.[22] The principle of legal certainty refers to the requirement that legal rules be sufficiently clear and precise, and that situations and legal relationships remain foreseeable.[23] Furthermore, there are a number of fair trial rights that form the foundation of a liberal, restraining system. This Article addresses three, which the author views as particularly relevant in the case law of the ICC. These include the right to adequate time and facilities to prepare a defence, the right to an expeditious trial, and the right to be tried by an independent and impartial tribunal.[24]

III. INTERNATIONAL CRIMINAL COURT

The ICC is the only permanent international court with jurisdiction to prosecute individuals believed to be responsible for the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.[25] It has jurisdiction with respect to these crimes after July 1, 2002, when the Rome Statute entered into force, or once a State becomes a party to the Statute.[26] Presently, 123 States are party to the Rome Statute. The Court does not exercise universal jurisdiction. Rather, the Court's jurisdiction is limited to the nationals or territories of the States Parties, States accepting jurisdiction on an *ad hoc* basis, or when the Security Council acting pursuant to its

21. Rome Statute of the International Criminal Court art. 22, July 17, 1998, 2187 U.N.T.S. 90; Bruce Broomhall, *Nullum Crimen Sine Lege*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 447, 450-51 (Otto Triffterer ed., 1999).

22. JUHA RAITIO, THE PRINCIPLE OF LEGAL CERTAINTY IN EC LAW 127 (2003).

23. *Id.* at 126.

24. *See* International Covenant on Civil and Political Rights art. 14, December 16, 1996, 999 U.N.T.S. 171; *see also* Rome Statute of the International Criminal Court art. 67, July 17, 1998, 2187 U.N.T.S. 90.

25. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90.

26. *Id.* art. 11.

Chapter VII powers refers a situation to the Court.[27] Importantly, the principle of complementarity directs the relationship between the Court and States Parties. A case will only be admissible before the ICC if a State is unwilling or unable to genuinely carry out an investigation or prosecution.[28] Hence, the Court is designed to complement national prosecutions and is intended as a court of last resort.

The Rome Statute explicitly refers to "human rights" three times: Articles 21(3), 36(b)(ii) and 69(7). Article 21 refers to "Applicable Law" and lays out the law that the Court should apply. This includes the Statute, Elements of Crimes and its Rules of Procedure and Evidence, as well as, where appropriate, applicable treaties and principles of international law, and principles and rules of law as interpreted in its previous decisions. Article 21(3) provides additional guidance to the judges and requires that the application and interpretation of law must be consistent with recognized human rights standards. Article 36 concerns the qualifications, nomination and election of judges and sub-section 3(b)(ii) requires that every candidate have competence in relevant areas of international law such as the law of human rights. Article 69(7) provides that evidence obtained in violation of internationally recognized human rights, such as through torture or other questionable methods, will not be admissible if it could seriously damage the integrity of the proceedings or such a violation would render it suspiciously unreliable.

Of all three provisions, Article 21(3) is arguably the most relevant to this inquiry as it pertains to statutory interpretation and sources of law. At the Rome Conference,[29] the diplomatic conference where the drafting of the Rome Statute took place, there was "virtual unanimity" between the various delegations concerning the fact that the judges' interpretation of law would need to be "consistent with internationally recognized human rights."[30] McAuliffe de Guzman

27. *Id.* art. 12-13.

28. *Id.* art. 17. The principle of complementarity has proven contentious. *See* Michael A. Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?* 8 SANTA CLARA J. OF INT'L L. 115, 135-36 (2010).

29. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/13 (June 15-July 17, 1998).

30. Margaret McAuliffe de Guzman, *Article 21: Applicable Law*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 701, 711 (Otto Trifferer, ed., 2d ed. 2008).

and Arsanjani both hold the view that "although the original intention behind Article 21(3) was to limit the discretion of the Court by providing a 'boundary' within which interpretation and application of the law could be undertaken, its actual affect may be to broaden judicial competence."[31] Similarly, William Schabas, has described Article 21(3) as ensuring that "the Statute is full of promise for innovative interpretation in future years."[32] Some commentators view it as the most important advancement contained in the Statute,[33] and others believe that it holds a hierarchical position such that all applicable law is subject to internationally recognized human rights.[34] There is ambiguity, however, about whether the provision is intended to allow for expansive interpretations, particularly to the detriment of an accused.

Generally, most of the Court's jurisprudence "reflects the significant distinction between regarding it [human rights law] as a source of substantive law" versus as a general interpretative rule.[35] The Appeals Chamber has noted that it is an underlying rule of interpretation applicable when considering other sources of law and further noting that "article 21(3) of the Statute makes the interpretation as well as the application of the law applicable under

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31. Rebecca Young, *Internationally Recognized Human Rights Before the International Criminal Court*, 60 INT'L AND COMP. Q. 189, 191 (2011) (citing Manoush H. Arsanjani, The Rome Statute of the International Criminal Court, 93 Am. J. of Int'l L. 22, 28-29 (1993) and McAuliffe de Guzman, supra note 30, at 712).

32. William A. Schabas, An Introduction to the International Criminal Court 93 (Cambridge University, 2d ed. 2004).

33. THE ADVOCACY PROJECT, ON THE RECORD: INTERNATIONAL CRIMINAL COURT (July 7, 1998), http://www.advocacynet.org/wp-content/uploads/2015/06/Issue-13-ICC.pdf [https://perma.cc/F82V-YBCK] (archived Feb. 28, 2018).

34. Dapo Akande, *Sources of International Criminal Law*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 41, 47 (Oxford University Press 2009); Alain Pellet, *Applicable Law*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY VOL. II 1051, 1080-81 (Antonio Cassese et al. eds., Oxford University Press 2002).

35. Young, *supra* note 31, at 200. The Pre-Trial Chambers have also viewed Article 21(3) as being a general principle of interpretation. *See Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-257, Decision on the Joinder of the Cases against German Katanga and Mathieu Ngudjolo Chui, at 7 (Mar. 10, 2008); *Prosecutor v. German Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-330, Decision on the Powers of the Pre-Trial Chamber to Review Proprio Motu the Pretrial Detention of German Katanga, at 6 (Mar. 18 2008); *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ¶ 78 (May 15, 2008).

the Statute subject to internationally recognized human rights."[36] It has further stated that "[h]uman rights underpin the Statute; every aspect of it."[37] Article 21(3) can therefore best be characterized as a special rule of interpretation which, on occasion, has provided for potentially expansive recourse to substantive human rights norms accepted by the international community. Keeping this provision in mind, the following sections highlight two instances where judges have embraced a human rights approach to interpretation.

A. Human Rights at Play

There are, at least, two important areas were the ICC judges have embraced a human rights-based approach to interpretation, the first substantive and the second procedural. The first example has to do with a specific decision in the *Katanga and Ngudjolo* case pertaining to Regulation 55 of the Regulations of the Court.[38] In this case the Judges decided to re-characterize the facts almost six months after the close of trial and after the accused had testified on his own behalf, which resulted in a new mode of liability being applied to convict the accused.[39] The second example relates to a multitude of decisions by the Court relating to the procedural rights afforded to victims participating in the criminal process.[40]

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36. Situation in the Dem. Rep. Congo, Case No. ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chambers I's 31 March 2006 Decision Denying Leave to Appeal, ¶ 11 (July 13, 2006). *See also Prosecutor v. Lubanga Dyilo,* Case No. ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, ¶ 36 (Dec. 14, 2006). However, other Chambers, have treated Article 21(3) as a "gap-filling" mechanism whereby it becomes a substantive source of applicable law. *Cf.* Situation in the Dem. Rep. Congo, Case No. ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ¶ 81 (Jan. 17, 2006), *and Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 44 (Mar. 4, 2009).

37. *Lubanga Dyilo,* Case No. ICC-01/04-01/06-772, ¶ 37.

38. *Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-3319-tENG/FRA, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons (Nov. 21, 2012).

39. *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-3363, Judgment on the Appeal of Mr. Germain Katanga against the Decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons," ¶ 30, 33, 62 and 99 (Mar. 27, 2013).

40. *See* Section III.A.2 for specific examples.

1. Katanga Case: Re-characterization of the Facts

In the *Katanga and Ngudjolo* case, prior to the cases being separated, the Prosecutor originally charged Germain Katanga and Mathieu Ngudjolo Chui with three counts of crimes against humanity and seven counts of war crimes allegedly committed during an attack on Bogoro, a village in eastern Democratic Republic of Congo ("DRC"). Both men were accused under Article 25(3)(a) of having committed the crimes through the mode of liability referred to as "indirect co-perpetration." As indirect co-perpetrators, the men allegedly used hierarchical organizations, the Ituri Patriotic Resistance Force ("FRPI") and the Nationalist and Integrationist Front ("FNI"), to carry out the crimes in accordance with their common plan, namely to destroy Bogoro.

Nearly six months after the close of the trial, a majority of the Trial Chamber, acting under Regulation 55 of the Regulations of the Court, notified the parties and participants that it would likely change Katanga's mode of liability to "common purpose" liability under Article 25(3)(d)(ii). Under Regulation 55, judges may make changes to the legal charges or mode of liability alleged against an accused at any stage of the trial as long as the change does not exceed the facts and circumstances confirmed by the Pre-Trial Chamber. As a result, the Judges severed the two cases and acquitted Ngudjolo on December 18, 2012. Part of their legal justification for their late application of Regulation 55 rested on the fact that the Appeals Chamber in the *Lubanga* case had previously held that "a principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Statute."[41] The Trial Chamber then went on to cite case law from the European Court of Human Rights ("ECHR") and Inter-American Court of Human Rights to justify its finding that the rights of the accused were protected despite the late application of this regulation and its expansive application.[42]

Trial Chamber Judge Christine Van den Wyngaert disagreed with the position taken by the majority and argued in a strongly worded dissent that the majority had overstepped its position. She argued that the majority created a new narrative of the case, which

41. *Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-3319-tENG/FRA, ¶ 12; *Katanga*, Case No. ICC-01/04-01/07-3363, ¶ 104.

42. *Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-3319-tENG/FRA, ¶¶ 16-18, 22, 37, 43, 48.

failed to reflect key distinctions made in the confirmation of charges and at trial. The new narrative, she argued, presented a "fundamentally different case" that the defense must answer.[43] She also lamented that the majority added "significantly new elements" and new factual allegations to what had been confirmed by the Pre-Trial Chamber,[44] and as such, exceeded the facts and circumstances of what was included in the confirmation of charges decision. In her view, months after the close of trial, Katanga now faced a completely new case and the notice provided by the Trial Chamber was not enough to protect his fair trial rights. She emphasized that the appearance of bias was alarming, noting that:

> [b]y having to formulate what can only be described as new charges, the Majority finds itself in the uncomfortable position of being accuser and judge at the same time. The fact that judges have started these proceedings down a path so unclear that new charges had to be formulated at the end of a trial, after all the Prosecution's evidence has been heard, inevitably creates an appearance of bias.[45]

She pleaded with the majority to refrain from considering any changes to the mode of liability against Katanga and to proceed immediately to render its final judgment based on the original set of facts. Katanga's defense team appealed the Trial Chamber's decision to re-characterize the facts, but a majority of the Appeals Chamber did not find any error.[46] However, the Appeals Chamber did note that the Trial Chamber's decision lacked detail about the factual basis for the new charges.[47]

In its Judgment, the majority of the Trial Chamber did change the mode of liability, convicting Katanga under the newly, re-characterized facts. As a result, Katanga was convicted of crimes on the basis of an uncharged and un-litigated mode of liability that the Trial Chamber first mentioned more than six months after the end of a thirty-month trial. Once again, Judge Van den Wyngaert drafted a strongly-worded dissent in which she detailed what she saw as the errors committed by the majority and highlighted the fair trial

43. *Id.* ¶ 11 (Wyngaert, J., dissenting).

44. *Id.* ¶ 15 (Wyngaert, J., dissenting).

45. *Id.* at ¶ 39.

46. *Katanga*, Case No. ICC-01/04-01/07-3363, ¶ 7 (Tarfusser, J., dissenting). Interestingly, in his dissent, Judge Tarfusser references European Court of Human Rights case law to show a different reading would put into question the use of Regulation 55 in this case.

47. *Id.* at ¶ 102.

violations that she saw to have taken place. Kevin John Heller, a prominent international criminal law scholar, has referred to Judge Van den Wyngaert's dissent "as the lone bright spot in an otherwise dismal case — one that has resulted in perhaps the most unfair conviction in the history of international criminal law."[48]

The majority of the Trial Chamber's interpretative approach in determining that Regulation 55 was appropriate rested in part on the argument that "a principal purpose of Regulation 55 is to close accountability gaps," which they viewed as fully consistent with the Statute.[49] They came to this conclusion after briefly examining relevant restraining principles of criminal law but choosing instead to focus on the very broad notion of the importance of ending impunity for crimes.[50] While the goal of ending impunity for crimes is certainly affirmed in the Preamble to the Rome Statute, it arguably should not be achieved at the cost of the liberal criminal justice system, which emphasizes fair trial rights and restraining principles of law such as legal certainty and legality, which are recognized in Article 67 of the Statute. The Trial Chamber addressed issues of the appearance of partiality,[51] the right to be informed,[52] the right to adequate time and facilities,[53] the right from undue delay[54] and the right against self-incrimination (given that the accused had testified on his own behalf prior to the re-characterization).[55]For each fair trial right, the Court is largely dismissive of concerns and attempts to back up its arguments with human rights case law.[56]

For instance, without the decision to apply Regulation 55, Katanga would have arguably received his final judgment on December 18, 2012, and he would likely have been acquitted. Instead, his final judgment was handed down in March 2014 and he was convicted. This long delay, during which he remained in detention, was directly linked to Trial Chamber's decision to apply Regulation

48. Kevin Jon Heller, *Quote of the Day – Katanga Dissent*, OPINIO JURIS (May 22, 2014, 7:20 AM), http://opiniojuris.org/2014/05/22/quote-day-katanga-dissent/ [https://perma.cc/AP7V-LU66] (archived Feb. 28, 2018).

49. *Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-3319-tENG/FRA, ¶ 12; *see also Katanga*, Case No. ICC-01/04-01/07-3363, ¶¶ 73-87, 104.

50. *See generally Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-3319-tENG/FRA.

51. *Id.* at ¶¶ 19-20.

52. *Id.* at ¶¶ 21-34.

53. *Id.* at ¶¶ 35-42.

54. *Id.* at ¶¶ 43-46.

55. *Id.* at ¶¶ 47-52.

56. *See supra* notes 51-55.

55, yet, the majority easily concluded that the late application of the re-characterization and the right to a trial without undue delay was not violated.[57] In order to show that their interpretation was not inconsistent with human rights norms the majority referenced case law from regional human rights courts, namely the ECHR where they argued that similar provisions were enacted in a late stage of trial, namely the deliberation stage of the first-instance bench.[58] Judge Van den Wyngaert aptly points out, however, that the majority uncritically transplants the jurisprudence from one domain to the other without taking into account the differences of both, which unnecessarily conflates the two domains.[59] She rightly highlights that the majority failed to acknowledge the differences from the context of the European Court cases relied upon by the majority with how the *Katanga* case had been conducted, including the extended length of the trial.[60] For example, one of the main cases relied upon to justify the late application of the Regulation is that of *Pélissier and Sassi v. France*.[61] Though the majority recognizes that this case was "distinct in nature" it nevertheless wholly adopts the reasoning without detailing the differences of that distinct nature.[62]

With regard to the right to be tried by an independent and impartial tribunal, the majority does little more than recognize the concern and then dismiss it. This fair trial principle implies that the judges must be seen to be independent and impartial and while they may exercise a truth-seeking role, they should be reluctant to play too great a role in shaping the case. In this situation, the majority arguably overstepped their role by formulating a new mode of liability so late into the process; a mode of liability that arguably ensured the conviction of the accused.[63] The ambivalence of the majority towards relevant principles and fair trial rights in order to secure a conviction indicates how a system that strives to be a model of liberal criminal

57. *Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-3319-tENG/FRA, ¶ 46.

58. *Id.* ¶ 18.

59. *Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-3319-tENG/FRA, ¶ 32 (Wyngaert, J., dissenting).

60. *Id.* at ¶ 96 (Wyngaert, J., dissenting).

61. *Pélissier and Sassi v. France*, 30 Eur. H. R. Rep. 715 (1999).

62. *Id*. In fact, *Pélissier* is a case about criminal bankruptcy by the forging of commercial documents and fraud. The final sentence imposed was a suspended sentence of eighteen months and a fine of FRF30,000, the then equivalent of approximately US$5,500.

63. Dov Jacobs, *A Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court and the Uses of Regulation* 18 (Grotius Centre for Int'l Legal Stud., Working Paper 2013/004-ICL, 2011).

justice has embraced illiberal and contradictory doctrines.[64] It affirms what Amann refers to as the *impartiality deficit* of international criminal institutions.[65] The impartiality deficit has to do with an international criminal court's compulsion to convict and downplay the rights of the accused so as to fulfill its mandate of ending impunity and providing justice to victims.[66] The following section addresses how, in addition to this substantive issue, the conflation of the two fields of law has manifested itself in the most adjudicated procedural issue to arise at the Court: the issue of victim participation.

2. Victim Participation

In response to the harms suffered by victims of crimes falling under the Court's jurisdiction, the ICC became the first international criminal tribunal to endorse victim participation in its proceedings.[67] The Rome Statute, Rules of Procedure and Evidence (the "Rules") and Regulations of the Court,[68] provide victims with the right to participate, other than as witnesses, in Court proceedings providing their participation is not prejudicial to or inconsistent with the rights of an accused and a fair and impartial trial.[69] The procedural rights afforded to victims have been heralded and praised by many commentators.[70] However, the Judges continue to struggle to find the

64. *See generally* Robinson, *supra* note 6.

65. *See generally* Diane M. Amann, *Impartiality Deficit and International Criminal Judging*, *in* ATROCITIES AND INTERNATIONAL ACCOUNTABILITY: BEYOND TRANSITIONAL JUSTICE 208, 209-11 (Edel Hughes et al., eds., 2007).

66. BRIANNE MCGONIGLE LEYH, PROCEDURAL JUSTICE? VICTIM PARTICIPATION IN INTERNATIONAL CRIMINAL PROCEEDINGS 348 (Intersentia 2011).

67. *Id*. at 225-331.

68. Although the Statute and Rules were largely drafted by state representatives, the Regulations of the Court were drafted by the Judges and adopted at the 5th Plenary Session on May 26, 2004. *See* Regulations of the Court, ICC-BD/01-01-04 (Fifth Plenary Session May 17-28, 2004).

69. Rome Statute of the International Criminal Court art. 68, July 17, 1998, 2187 U.N.T.S. 90.

70. *See, e.g.*, Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. OF INT'L L. 144, 167-68 (1999); Silvia. A. Fernández de Gurmendi, *Definition of Victims and General Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 427, 427 (Roy S. Lee et al. eds., 2001); Claude Jorda & Jérŏme de Hemptinne, *The Status and Role of the Victims*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1387, 1390 (Antonio Cassese, et al. eds., 2002); Emily Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?*, *in* THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 315, 315 (Dominic McGoldrick et al. eds., 2004).

most appropriate way to afford victims participatory rights in the proceedings without affecting the Court's primary goals of investigation, prosecution and punishment as well as without adversely affecting the rights of the accused.[71] Thus, although the victim participation scheme was a well-intentioned attempt to address perceived shortcomings from previous international tribunals, its application has, at times, challenged the liberal foundations of the criminal process.[72] The most important provision providing for participation is Article 68(3) of the Rome Statute, which provides:[73]

> Where the personal interests of the victims are affected, the Court *shall* permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence (RPE).[74] (Emphasis added).

Article 68(3) reproduces text found in Article 6(b) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[75] As often happens when language is adopted from General Assembly declarations not meant for direct application, it is inherently vague.[76] As a result of this vagueness, the Rules provide for a number of more specific participatory rights, such as the right to choose a legal representative.[77] The Rules also state that legal

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71. *See* Leyh, *supra* note 66.

72. *Id.* at 127-128.

73. David Donat-Cattin, *Article 68*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1275 (Otto Triffterer, eds., 2d ed. 2008).

74. Rome Statute of the International Criminal Court art. 68, July 17, 1998, 2187 U.N.T.S. 90.

75. Article 6(b) of the Victims' Declaration reads: "The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system." Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Access to justice and fair treatment, U.N. Doc. A/RES/40/34/Access to justice and fair treatment (Nov. 29, 1985).

76. Brianne McGonigle-Leyh, *Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls*, 12 INT'L CRIM. L. REV. 375, 404 (2012).

77. ICC Rules of Procedure and Evidence, Rule 90, ICC-ASP/1/3 and Corr.1 (Sep. 3-10, 2002).

representatives may attend and participate in proceedings unless the relevant Chamber believes their interventions should be confined to written observations; they may be permitted to make opening and closing statements,[78] present their views and concerns;[79] make representations in writing to the Pre-Trial Chamber concerning a request for the authorisation of an investigation;[80] submit observations concerning challenges to the jurisdiction of the Court or the admissibility of a case;[81] request protective measures;[82] and apply to the Court to question witnesses.[83] Their ability to participate is directly related to their right to be informed about proceedings and developments in a case pursuant to Rule 92.[84] In order to ensure the fairness of proceedings, the prosecution and the defence have the opportunity to reply to any oral or written observation submitted by victims.[85]

The substance and scope of many participatory rights are not explicitly provided for in the governing documents.[86] Accordingly, the various Chambers each have a wide discretion to decide upon the proper modalities of participation.[87] This has not been an easy task. To be sure, "[n]o single legal issue […] has garnered as much attention as the manner in which the ICC judges have interpreted the right of victims to participate in [the] proceedings."[88] This Article is not able to address all of the decisions and issues related to victim participation. However, there are two decisions, one from the Pre-

78. *Id.* Rule 89, ¶ 1.

79. Rome Statute of the International Criminal Court art. 68, July 17, 1998, 2187 U.N.T.S. 90; *Id.* at Rule 89.

80. Rome Statute of the International Criminal Court art. 15, July 17, 1998, 2187 U.N.T.S. 90; ICC Rules of Procedure and Evidence, Rule 50, ¶ 3, ICC-ASP/1/3 and Corr.1 (Sep. 3-10, 2002).

81. Rome Statute of the International Criminal Court art. 19, ¶ 3, July 17, 1998, 2187 U.N.T.S. 90.

82. *Id.* art. 68, ¶ 1 & art. 88, ¶ 1.

83. ICC Rules of Procedure and Evidence, Rule 91, ¶ 3, ICC-ASP/1/3 and Corr.1 (Sep. 3-10, 2002).

84. *Id.* Rule 92, ¶ 5.

85. *Id.* Rule 91, ¶ 2.

86. *See generally* Court's Revised Strategy in Relation to Victims, Assembly of State Parties, 11th Session, ICC-ASP/11/38 (Nov. 5, 2012).

87. ICC Rules of Procedure and Evidence, Rule 89, ¶ 1, ICC-ASP/1/3 and Corr.1 (Sep. 3-10, 2002) ("[T]he Chamber shall . . . specify the proceedings and manner in which participation is considered appropriate. . . .").

88. Christine H. Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?*, 6 NW. J. OF INT'L HUM. RTS. 459, 459 (2008).

Trial and one from the Trial stage, that stand out due to their reliance on human rights standards to support an expansive interpretation of participatory rights for victims before the ICC.

Relying on human rights law notions, the Single Pre-Trial Judge in *Katanga and Ngudjolo* adopted a broad interpretation of Article 68(3). Judge Sylvia Steiner found that victims have a core interest in the determination of the facts, the identification of those responsible, and the declaration of their responsibility.[89] She found that these interests are found to be at the root of a well-established right to truth, which is a right derived from the right to a remedy in human rights law.[90] And, when the right to truth is satisfied through criminal proceedings victims have a general interest in the outcome of the proceedings because such proceedings bring clarity about what happened and "close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth."[91] The issue of guilt or innocence, the Single Judge found, is inherently linked to the right to truth and that the search for truth can only be satisfied if those responsible are declared guilty and those not responsible are acquitted so that the search for those who are criminally liable can continue.[92] Moreover, she found that the interests of victims go beyond the determination of what happened and the identification of those responsible. The interests of victims extend to securing a certain degree of punishment for those found criminally responsible.[93] Thus, identification, prosecution and punishment are all "at the root" of the right to justice for victims of serious violations of human rights and are independent from an interest in reparation.[94] Judge Steiner therefore concluded that victims

89. *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-474, Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ¶ 32 (May 13, 2008).

90. *Id.*

91. *Id.* ¶ 34.

92. *Id.* ¶¶ 35-36.

93. *Id.* ¶ 38.

94. *Id.* ¶ 39; *see also Prosecutor v. Kony*, Case No. ICC-02/04-01/05-252, Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ¶¶ 9-11 (Aug. 10, 2007). Similar to the Pre-Trial Chamber in *Katanga*, the Pre-Trial Chamber in *Abu Garda* found that the personal interests of victims may include (i) the right to truth, i.e., the desire to have a declaration of truth by a competent body; (ii) the right to justice, i.e., their desire to identify, prosecute and punish those responsible for their harm; and (iii) the right to reparation. *See Prosecutor v. Abu Garda*, Case No. ICC-02/05-02/09-121, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, ¶ 3 (Sept. 25, 2009).

have a personal interest in the outcome of the pre-trial stage of a case which determines whether there is sufficient evidence providing substantial grounds to believe that the suspect(s) are responsible for the crimes charged.[95]

As a result, when carrying out an Article 68(3) determination, the Single Judge concluded that those individuals who meet the criteria of Rule 85 (defining who qualifies as a victim) and who are granted victim status in the case will always have a personal interest in participating in all pre-trial proceedings.[96] In other words, the determinations of whether a victim's personal interests are affected were carried out, in the broadest of terms, with respect to all victims collectively rather than on an individual basis. Furthermore, she found that this assessment should be carried out in relation to all pre-trial proceedings rather than in relation to specific proceedings arising during the pre-trial stage or specific pieces of evidence.[97]

This broad approach has also been followed in the *Bemba* pre-trial stage,[98] and, to some extent, acknowledged in the *Katanga and Ngudjolo* trial stage.[99] The benefit of such an approach is that it relieves the Judges from making individual assessments throughout the proceedings. The drawback of this approach is that it essentially invalidates the personal interest precondition found in Article 68(3) and makes their interests paramount to other considerations. Later Chambers have further streamlined the process, allowing the Registry or legal representatives for victims to vet individuals wanting victim status rather than judges when they do not wish to speak directly in proceedings.[100] Kendall and Nouwen argue this streamlining, based initially on human rights norms, was done for practical purposes.[101]

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95. *Katanga*, Case No. ICC-01/04-01/07-474, ¶ 43.

96. *Id.* ¶ 41-44.

97. *Id.* ¶ 45.

98. *See generally Prosecutor v. Bemba*, Case No. ICC-01/05-01/08-320, Fourth Decision on Victims' Participation (Dec. 12, 2008).

99. *See generally Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-1788-tENG, Decision on the Modalities of Victim Participation at Trial (Jan. 22, 2010).

100. *See* generally *Prosecutor v. Muthaura*, Case No. ICC-01/09-02/11-498, Decision on Victims' Representation and Participation (Oct. 3, 2012); *see also Prosecutor v. Ruto*, Case No. ICC-01/09-01/11-460 (Oct. 3, 2012); *see also Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06-449, Decision on Victims' Participation in Trial Proceedings (Feb. 6, 2015).

101. Sara Kendall & Sarah Nouwen, Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood, 76 L. & CONTEMP. PROBS. 235, 249, n.59 (2013).

As with pre-trial proceedings, judges during trial proceedings have also broadly interpreted statutory provisions to the benefit of victim participants, which are, at times, detrimental to the accused. At trial, questions surrounding the proper role of victims and the scope of their participation arose early on in the *Lubanga* case.[102] More specifically, the issue of whether victims would be permitted to lead and challenge evidence on the guilt of the accused at trial similar to the prosecution was particularly contentious.[103] This issue was especially delicate given that the drafting papers of the Rome Statue indicate that no agreement could be reached by the drafters on the matter and the Statute only acknowledges the rights of the parties, and not the victim participants, to tender evidence and the Court to request evidence.[104] Article 69(3) of the Rome Statute, which relates to evidence, provides that: "The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth."[105] The wording of Article 69(3) is significant. The first part seems to implicitly recognize the partiality and subjectivity of the adversarial parties in that it only requires the presentation of their evidence to be relevant. There is no requirement that their evidence assists the Court in determining the truth. In contrast, the second part seems to recognize the Court as an objective and impartial truth-seeker and implies that the evidence it requests will (at least in the Judges' view) aid in the determination of the truth. Undeniably, the inclusion of the second part of this provision was to ensure that the Court was not restricted in its evaluation of a case to the extent that it could only review evidence provided by the parties.[106] However, no one foresaw that this second part would be used as the means through which victims would regularly tender and elicit evidence—often on the guilt of the accused.

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102. *See generally Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on victims' participation (Jan. 18, 2008).

103. *Id*. ¶11-12 & ¶40.

104. Rome Statute of the International Criminal Court art. 69, ¶ 3, July 17, 1998, 2187 U.N.T.S. 90.

105. *Id.*

106. *See* Donald K. Piragoff & Hans-Jörg Behrens, *Article 69 Evidence*, *in* COMMENTARY ON THE ROME STATUE OF THE INTERNATIONAL CRIMINAL COURT 889 (Otto Triffterer, ed., 1999).

When this issue first arose in the *Lubanga* case, both the prosecution and defence argued that victims did not have a right to lead and challenge evidence. The defence argued that if the Court were to grant victims the same rights as those traditionally reserved for the parties, they would be violating the principle of equality of arms and prejudicing the rights of the accused by having the defence face two accusers.[107] Nevertheless, the Trial Chamber held that victims did, in fact, have the right to lead and challenge evidence.[108] Although the Chamber noted that the primary responsibility for the presentation and challenging of evidence lies with the parties, victims, it concluded, should also be able to do so if it assists the Chamber in the determination of the truth and if the Court has in some way "requested" the evidence.[109] A majority of the Appeals Chamber agreed.[110] Therefore, although Article 66(2) states that the onus is on the prosecutor to prove the guilt of the accused, the Appeals Chamber concluded that Trial Chambers may permit victims to tender and elicit evidence if it will assist in the determination of the truth and the Court "requests" the evidence in accordance with Article 69(3).[111] Accordingly, Trial Chambers may consider the issue of the guilt of the accused as a subject that affects the personal interests of victims

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107. *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-1220, Defense Appeal Against Trial Chamber I's 18 January 2008 Decision on Victims' Participation, ¶¶ 51-52 (Mar. 10, 2008).

108. *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-1119, Decision on Victims' Participation, ¶ 109 (Jan. 18, 2008).

109. *Id.* ¶ 108.

110. Disagreeing with the Appeals Chamber's Judgment, Judge Pikis dissented, arguing instead that according to the Statute and Rules victims can neither adduce evidence on the guilt or innocence of the accused nor challenge the admissibility or relevance of evidence. *See Prosecutor v. Lubanga Dyilo*, Case no. ICC-01/04-01/06-1432, Judgment on the Appeals of the Prosecutor and the Defense against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶¶ 4-6 (July 11, 2008) (Pikis, J., dissenting in part); Similarly, Judge Kirsch, who also dissented from the judgment, and agreed with Judge Pikis on this point, referred to Article 69(3), dealing with evidence at trial, to argue that the Statute is unambiguous. Article 69(3) clearly states that "the parties may submit evidence relevant to the case" and not by any other participant, such as the victims. *See id.* ¶¶ 21, 35-37.

111. *Lubanga Dyilo*, Case No. ICC-01/04-01/06-1119, ¶ 108; *Prosecutor v. Katanga and Ngudjolo*, Case no. ICC-01/04-01/07-1788-tENG, Decision on the Modalities of Victim Participation at Trial, ¶¶ 81-84 (Jan. 22, 2010); *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08-807-Corr, Corrigendum to Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings, ¶¶ 29-37 (July 12, 2010); *Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-2288, Judgment on the Appeal of Mr. Katanga against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial," ¶¶ 37-40 (July 16, 2010); *see also Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-1432, ¶ 94**.**

and may authorise legal representatives to question witnesses on the issue of guilt.[112]

Chambers have approached this idea that victims' evidence is related to the broader purpose of the Court to determine the truth in dramatically different ways. The *Lubanga* and *Bemba* Trial Chambers, for example, have viewed the scope of participation broadly. In this sense they regularly allowed victims' legal representatives to question witnesses on the guilt of the accused, linking this right with helping the Court to determine the truth.[113] When questioning prosecution witnesses, legal representatives for victims have not had to confine their questions to the context of crimes, the harm suffered by their clients or reparation issues. Instead, legal representatives often attempted to establish the guilt of the accused, similar to the attempts of the prosecution.[114] Legal representatives of victims in *Lubanga* questioned a number of witnesses about the funding of the UPC in an attempt to link Lubanga to such financial support in order to help establish his role in the UPC leadership structure.[115] In another instance, the legal representatives of the victims asked questions of a witness, who worked with the child protection unit of United Nations Mission for the Stabilization of the Democratic Republic of Congo (MONUSCO), about specific contact she had with the accused and his knowledge of the use of child soldiers in an attempt to establish his knowledge of the crimes.[116]

On the one hand, this approach acknowledges the partiality of the victims and their desire, in this case, to have the accused convicted. On the other hand, their interventions, unlike those of the other parties, are linked with the notion of assisting the Court in establishing the truth, which implies some sort of objectivity. Moreover, this approach essentially allows for multiple accusers in

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112. *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-2127, Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, ¶ 25 (September 16, 2009); *see also Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-2288, ¶ 48.

113. *Lubanga Dyilo*, Case No. ICC-01/04-01/06-2127, ¶ 27.

114. It was not necessary for the prosecution to show that Lubanga enlisted and recruited child soldiers himself. Rather, he was found criminally responsible for being part of a group that did. In other words, the prosecution needed to show that Lubanga was part of a group of persons that had a "common plan."

115. Transcript, *Prosecutor v. Lubanga Dyilo* (Feb. 12, 2009), at 73; Transcript, *Prosecutor v. Lubanga Dyilo* (Mar. 24, 2009), at 83-88; Transcript, *Prosecutor v. Lubanga Dyilo* (May 62009), 8-9; Transcript, *Prosecutor v. Lubanga Dyilo* (July 2, 2009), at 2.

116. Transcript, *Prosecutor v. Lubanga Dyilo* (July 9, 2009), at 24-25.

the courtroom. Defence teams must be prepared to be confronted with accusations not only from the prosecution but also from victims and, to an extent, judges. Chung argues that the mere fact that the defence teams must prepare to meet additional evidence risks prejudicing their rights.[117] The effect of multiple accusers against an accused impacts not only on the time and resources of defence counsel in having to respond to multiple arguments but also could relieve part of the burden of proof from the prosecution. There is a difference in the judges exercising their power at the behest of victims versus requesting certain evidence at their own initiative. When done repeatedly at the victims' request, judges can be seen as less objective. Zappalà asks whether it is desirable for the prosecution's burden of proof to be shared by the prosecution, the victims and the judges collectively.[118] It is certainly more difficult for the defence to challenge evidence requested by the judges, who would undoubtedly argue they are requesting the evidence as an impartial tribunal even when on behalf of victims, than to challenge evidence requested by the prosecution.

In both the Pre-Trial and Trial Chamber decisions on victim participation discussed above, the judges have sought to expand the participatory rights of victims by relying on an arguably indeterminate human rights concept not found in the Statute, the right to truth.[119] One of the major problems in international criminal law is that judges relying upon the right to truth are doing so in such an expansive manner. Expansive uses refer to the broad references to the right to truth where they are not connected to any context, legal doctrine or specific relationship between the victim and accused.[120] These examples highlight situations where judges are less willing to emphasize liberal values focused on the defendant (and his rights) to a more victim-oriented focus. Such a shift has already occurred within the human rights system (most notably in the Inter-American system),

117. Chung, *supra* note 88, at 519, n.242.

118. Salvatore Zappalá, *The Rights of Victims v. the Rights of the Accused*, 8 J. OF INT'L CRIM. JUST. 137, 148 (2010).

119. *See* Brianne McGonigle Leyh, *The Right to Truth in International Criminal Proceedings: An Indeterminate Concept from Human Rights Law*, *in* THE REALISATION OF HUMAN RIGHTS: WHEN THEORY MEETS PRACTICE 293 (Yves Haeck et al., eds., Intersentia 2013).

120. J. Benton Heath, *Human Dignity at Trial: Hard Cases and Broad Concepts in International Criminal Law*, 44 GEO. WASH. INT'L. L. REV. 317, 323 (2012).

which, as set out above, has different focuses and purposes than the ICC.[121]

Looked at in isolation the various restraining principles and fair trial rights affected by participation may not seem problematic, but it is the combined effect of the edging away of these rights and values that matters most. The edging away of liberal criminal law values is alarming not least of which because international courts have already witnessed the relaxing of procedural and evidentiary rules that negatively affect the rights of an accused. However, despite the de-emphasis on liberal values, there are a handful of instances where the judges draw clear boundaries between international criminal law and human rights law, suggesting a reluctance, at least in some instances, by the Court to take on a more human rights-related role in general.

B. Reluctance by the Court to take on a More Human-Rights Related Role

Though the Court is mindful of the importance that human rights play in criminal proceedings more generally there have been some important instances where it has been reluctant to embrace an overtly human rights approach. Interestingly, in these instances, this reluctance is generally not to the benefit of the accused or individual (who is not a victim) requesting greater human rights considerations. The following section will address three instances where the Court has made clear the distinction between its role and the role of a human rights court or mechanism. Importantly, these examples are less directly related to the criminal charges of a specific individual. The first concerns the situation in Libya and the Court's attempts to exert its jurisdiction. The second example concerns the situation in the *Katanga and Ngudjolo* case when witnesses requested asylum in the Netherlands, and the third example deals with the reparations decision by the Appeals Chamber in *Lubanga*.

1. The Libya example

On February 26, 2011 the UN Security Council adopted Resolution 1970 unanimously referring the situation in Libya to the

121. *See* Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of Unity of International Law*, 21 EUR. J. INT'L. L. 585 (2010).

ICC.[122] Libya is not a party to the Rome Statute,[123] but the UN Security Council referral allows the Court to exercise jurisdiction.[124] In March of 2011, then ICC Chief Prosecutor, Luis Moreno Ocampo, opened an official investigation and soon afterwards announced that his office identified widespread evidence of crimes against humanity and war crimes.[125] The Prosecutor speedily sought and was granted approval for arrest warrants for Libya's former leader Muammar Gaddafi, his son Saif al-Islam, and intelligence chief Abdullah Senussi. It was later learned that Muammar Gaddafi died while in the custody of rebel fighters, leaving only his son, Saif al-Islam, and Senussi left to face charges before the ICC.[126] Libyans, however, felt that these men should be tried in Libya by Libyans, which resulted in the new Libyan government requesting permission to try the men domestically.[127]

Importantly, as mentioned above, the ICC is not designed to replace national prosecutions. Rather, under the principle of complementarity, it is intended to supplement or compliment national jurisdictions. As such, the principle of complementarity rests on the notion that national jurisdictions have the primary responsibility for investigating and prosecuting serious crimes.[128] This primacy is largely based on practical and pragmatic considerations since States will often have better access to evidence and witnesses. Article 17 of the Rome Statute deals with admissibility and provides that a case will be inadmissible if a State is investigating or prosecuting the case or has already done so, unless the State is *unwilling* or *unable* to

122. S.C. Res. 1970 (Feb. 26, 2011).

123. *See The States Parties to the Rome Statute*, ICC Official Website, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [https://perma.cc/UR4C-6HSB] (last visited Mar. 1, 2018).

124. *See* Rome Statute of the International Criminal Court art. 13, ¶ b, July 17, 1998, 2187 U.N.T.S. 90.

125. *See ICC Prosecutor to Open an Investigation in Libya*, RELIEFWEB (Mar. 2, 2011), //reliefweb.int/report/libya/icc-prosecutor-open-investigation-libya [https://perma.cc/9AHB-F65Q] (archived Mar. 1, 2018).

126. *Situation in Libya ICC-01/11*, ICC Official Website, https://www.icc-cpi.int/libya [https://perma.cc/4E25-46HU] (last visited Mar. 1, 2018).

127. *See generally Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Senussi*, ICC-01/11-01/11-130-Red, Application on Behalf of the Government of Libya pursuant to Article 19 of the ICC Statute (May 1, 2012).

128. *See* Rome Statute of the International Criminal Court Preamble, art. 1, art 17, ¶ 1(a), July 17, 1998, 2187 U.N.T.S. 90.

genuinely carry out proceedings.[129] Through its jurisprudence, the Court has further found that the national proceedings must encompass both the same person and conduct which are at issue before the Court.[130] The "unwilling" element of Article 17 is largely subjective and requires the Court to look at the motives of the State and whether it is trying to shield the suspect from criminal prosecution. The Court must assess whether the national proceedings are being conducted independently or impartially or in a manner inconsistent with an intent to bring the person concerned to justice. The "inability" element of Article 17 is objective and provides, in part, that the State must be able to obtain the accused or the necessary evidence to carry out its proceedings.[131]

In the case of Saif al-Islam Gaddafi, the Pre-Trial Chamber concluded, and the Appeals Chamber agreed, that the Court had not been provided with enough evidence to demonstrate that the Libyan and the ICC investigations covered the same conduct and that Libya was able to genuinely carry out an investigation against Gaddafi.[132] Specifically, the Court noted that Libya was unable to carry out proceedings because it had not been able to provide Gaddafi with defense counsel despite the fact that Libyan law guaranteed him one.[133] In focusing on this point, the Court stressed that Libya was unable to carry out proceedings against Gaddafi in compliance with its *national* laws, namely the 2011 Libyan Constitutional Declaration, ignoring *international* due process standards when assessing admissibility under the Statute.[134] While unsuccessful with

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129. *Id.* art. 17 ("The Court shall determine that a case is inadmissible where: [t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.").

130. *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-2-US, Decision on the Prosecutor's Application for a Warrant of Arrest, ¶ 31 (Feb. 10, 2006).

131. *See generally* Sharon A. Willians & William A. Schabas, *Article 17 Issues of Admissibility, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (2nd ed., 2008).

132. *See generally Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Senussi*, ICC-01/11-01/11-344-Red, Decision on the Admissibility of the Case against Saif al-Islam Gaddafi (May 31, 2013); *Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Senussi*, ICC-01/11-01/11-387, Decision on the Request for Suspensive Effect and Related Issues, Appeals Chamber, ¶¶ 135, 205 (July 18, 2013).

133. *Saif al-Islam Gaddafi and Abdullah al-Senussi*, ICC-01/11-01/11-387, ¶¶ 212-14.

134. *See The Principle of Complementarity in Practice*, (ICC-OTP, Informal Expert Paper No. ICC-01/04-01/07-1008-AnxA, Mar. 30, 2009); cf. Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L. FORUM 255 (2006).

regard to Saif al-Gaddafi, Libya was successful in arguing that it could prosecute Sanussi domestically,[135] which his defence team appealed based in part on the fact that his basic due process rights, under international human rights standards, were not being met. Nevertheless, the Appeals Chamber upheld the earlier decision, which again focused on domestic standards.[136] To counter defence arguments that the Court should look into whether Libya was meeting international human rights (fair trial) standards, the Appeals Chamber went so far as to state, "Indeed, the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights".'"[137] This statement is telling of the distinction the Court was willing to make in this situation between its role and that of a human rights body.

Through its case law, the Court has indicated that international fair trial considerations are not the focus of Article 17 determinations.[138] This is despite the fact that international human rights standards are specifically mentioned in Article 21(3) and "[h]uman rights underpin the Statute; every aspect of it."[139] This reluctant approach has allowed the Court to provide greater leeway to the domestic system and focus on its role as an anti-impunity mechanism rather than a human rights court reviewing a State's domestic practices. In this regard, the Court seems to suggest that it is important to give domestic judiciaries an opportunity, at least until it becomes patently clear that violations of due process, rather than just being worrying in themselves, call into question the very ability to prosecute an accused.[140] Yet, if Libya did not meet that standard it is hard to imagine what would. In the end, Libya never transferred Gaddafi to the Court in The Hague. Instead, it carried on with its

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135. *See generally Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the Admissibility of the Case against Abdullah Al-Senussi (Oct. 11, 2013).

136. *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565, Judgment on the Appeal of Mr. Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled, "Decision on the admissibility of the case against Abdullah Al-Senussi" (May 24, 2014).

137. *Id.* ¶ 219.

138. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565, n.495.

139. *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr Thomas Lubanga Dylo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, ¶ 37 (Dec. 14, 2006).

140. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565, ¶¶ 1-3.

questionable domestic proceedings against both men, and ultimately both were later sentenced to death.[141] One year later, however, in the summer of 2016, it was reported in the media that the government quashed his sentence,[142] and in 2017 he was released by the Zintan militia.[143]

2. Katanga Witnesses Example

The second example of reluctance to adopt an outright human rights approach concerns a situation that arose with witnesses in the *Katanga and Ngudjolo* case. Following an agreement between the ICC and the DRC, in March 2011, Floribert Njabu, Pierre Celèstin Mbodina Iribi and Sharif Manda Ndadza, three witnesses in the case, were transferred from the DRC to the ICC to testify.[144] The three witnesses were held at the ICC Detention Center because prior to giving testimony in The Hague the three men had been in detention (for over six years) in the DRC for their alleged role in the murder of UN peacekeepers.[145] However, DRC officials never brought charges against them in this regard.[146]

While in the custody of the ICC, on May 12, 2011 the witnesses requested asylum in the Netherlands, arguing they would face persecution and safety risks, torture, ill treatment or even death if they were sent back to prison in the DRC because they implicated the current President of the DRC, Joseph Kabila, with their

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141. *Gaddafi's Son Saif al-Islam Sentenced to Death*, AL JAZEERA (July 28, 2015), http://www.aljazeera.com/news/2015/07/gaddafi-son-saif-al-islam-libya-sentenced-death-150728084429303.html [https://perma.cc/6HN5-BBND] (archived Mar. 1, 2018).

142. Chris Stephen, *Gaddafi son Saif al-Islam "freed after death sentence quashed,"* THE GUARDIAN (July 7, 2016), https://www.theguardian.com/world/2016/jul/07/gaddafi-son-saif-al-islam-freed-after-death-sentence-quashed [https://perma.cc/BBF2-F79B] (archived Mar. 1, 2018).

143. Chris Stephen, *Gaddafi son Saif al-Islam freed by Libyan militia*, THE GUARDIAN, https://www.theguardian.com/world/2017/jun/11/gaddafi-son-saif-al-islam-freed-by-libyan-militia [https://perma.cc/T2V9-YKQY] (archived Mar. 20, 2018).

144. Transfer of Detained Witnesses, ICC Standard Operating Procedure [Transfèrement des Témoins Détenus, Procédure de Fonctionnement Standard], ICC-01/04-01/06-2732-Conf-Exp-Anxl (May 9, 2011).

145. *Netherlands: Do not return ICC witnesses at risk of death penalty, ill-treatment and unfair trials to the Democratic Republic of the Congo*, AMNESTY INTERNATIONAL (June 30, 2014), https://www.amnesty.org/en/documents/EUR35/001/2014/es/ [https://perma.cc/5WMM-X39Q] (archived Mar. 20, 2018).

146. *Id.*

testimonies.[147] On June 9, 2011, the Trial Chamber issued a decision to delay the witnesses' return to the DRC in compliance with Article 93(7)(b) of the Rome Statute,[148] holding that a return would violate, according to Article 21(3) of the Rome Statute, the Court's obligations to protect witnesses, the witnesses' human right to apply for asylum, the non-refoulement principle, and the right to an effective remedy.[149] Importantly, in the Court's view, however, the Statute only requires the Court to protect witnesses from risks related to their cooperation with the ICC. It does not imply a broader duty to protect witnesses from the risk of persecution they may suffer once they return home.[150]

More specifically, the Trial Chamber found that the Court does not have to apply the principle of non-refoulement, which prohibits the expulsion of refugees to places where their lives could be in danger.[151] The Court emphasized that Article 21(3) "only requires the Chambers to ensure that the Statute and other sources of law set forth in Article 21(1) and 21(2) are applied in a manner which is not inconsistent with or in violation of internationally recognised human rights."[152] As such, the Court held that it must enable the witnesses to exercise their right to seek asylum by, for example, allowing the witnesses to meet and correspond with their lawyers of choice so that they can access asylum procedures.[153] For this purpose, it delayed the return of the witnesses to the DRC but was reluctant to take on a bigger role by accepting responsibility for their legal protection.

Initially, the Dutch authorities were critical of the actions of the ICC, which essentially required the Dutch government to process the asylum requests of the three witnesses. The Dutch authorities

147. *See generally Prosecutor v. Katanga*, ICC-01/04-01/07-2968, Request for Leave to Submit Amicus Curiae Observations by Mr. Shuller and Mr. Sluiter, Council in Dutch Asylum Proceedings of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, DRC-D02-P-0350, Counsel for Witnesses (May 25, 2011).

148. Rome Statute of the International Criminal Court art. 93, ¶ 7(b), July 17, 1998, 2187 ("A person thus transferred shall remain in custody and once the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.").

149. *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-3003-tENG, Decision on an Amicus Curiae Application and on the 'Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile', ¶35 (June 9, 2011).

150. *Id.* ¶¶ 59-63.

151. In this sense, the ICC's evaluation differs from the evaluation a State should make in response to an asylum application. See *id.* ¶ 63.

152. *Id.* ¶ 62.

153. *Id.* ¶ 73.

continuously sought to exempt the witnesses from the Dutch asylum procedures, arguing, amongst other things, that the witnesses' applications should be considered mere "requests for protection" over which the Dutch Alien Act (*Vreemdelingenwet*) did not apply.[154] Instead, they sought to evaluate the witnesses' requests on the basis of a *sui generis* procedure whereby they would only determine whether the non-refoulement principle obstructs the Netherlands from excluding the witnesses from asylum.[155] However, in its decision of December 28, 2011, the District Court of The Hague prevented the Dutch authorities from pursuing this approach and determined that neither Dutch immigration law nor the regulations concerning the relations between the Netherlands and the ICC exempt the witnesses from the regular asylum procedure.[156] Meanwhile, the Congolese authorities were insisting on the return of the witnesses to the DRC upon completion of their testimony.[157] As a result, the Court found the situation problematic from a state cooperation standpoint.

In October 2012, the asylum applications of the witnesses were denied by decisions from the Dutch Minister for Immigration, Integration and Asylum under the application of Article 1(f) of the Refugee Convention.[158] This provision provides that refugee status cannot be granted when there are "serious reasons for considering" that the applicant committed war crimes or crimes against humanity, amongst other crimes.[159] But the question of whether they could be returned, possibly in violation of the principle of non-refoulement was still unanswered and the witnesses appealed the denial of asylum. On June 4, 2014, after a number of legal pleadings and appeals, as well as consultations between all parties involved, the witnesses were transferred from the ICC Detention Center to the Dutch authorities. At this point, the ICC was satisfied with the assurances provided by

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154. Marjolein Cupido & Joris van Wijk, *Testifying Behind Bars: Detained ICC witnesses and Human Rights Protection*, SSRN (Jan. 4, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2374678 [https://perma.cc/Z5ZC-DLRP] (archived Mar. 1, 2018).

155. *Id.* (citing Rechtbank Den Haag, § 8.2, Dec. 28, 2011).

156. *Id.* (citing Rechtbank Den Haag, § 9.9, Dec. 28, 2011).

157. *See Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-3405-tENG, Decision on the Application for the Interim Release of Detained Witnesses DRCD02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, ¶19 (Oct. 1, 2013).

158. HR 4 April 2014, NJ 2014, 481 m.nt. (Neth.). All detainees were in the Detention Centre of the International Criminal Court, Scheveningen, municipality of The Hague/The State of the Netherlands.

159. Convention Relating to the Status of Refugees art. 1(F), July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

the DRC to protect them if they would be returned, namely that no death penalty would be imposed and that their cases would be added to the roster for national proceedings.[160] Interestingly, no assurances were provided by the DRC to the Netherlands itself.[161] On June 27, 2014, the Dutch Council of State denied the witnesses' asylum application confirming the applicability of the Article 1(f) exception of the Refugee Convention. Its decision quashed an earlier Amsterdam District Court's decision from October 2013, stating that they could not be sent back, and thus authorized their transfer back to the DRC.[162] A short time later the witnesses were returned to Kinshasa in the DRC.[163]

The case presented a number of legal and human rights-related questions for the Court to address. One such question is who was responsible for the witnesses' protection upon their return. Following the agreement between the DRC and the ICC, the witnesses remained under Congolese custody. The DRC repeatedly emphasized this point when asking for the return of the witnesses.[164] However, in practice, the DRC did not have effective control over the witnesses since they were not present physically on its territory. The witnesses were physically present in the Netherlands and, more specifically, on the ICC's premises. Thus, it could be argued that the ICC was the one with effective control over them. However, according to Article 44 of the Headquarters Agreement, the competent authorities at the Court's request shall carry out the transport of persons in custody of the ICC.[165] Since the ICC is not a State, it does not have the means to carry on any transfer on its own; it requires the cooperation of the

160. Press Release, ICC, ICC transfers three detained witnesses to Dutch custody (June 4, 2014), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1010.aspx [https://perma.cc/7E5A-XNKK] (archived Mar. 1, 2018).

161. Letter from Richard Dicker, Director, International Justice Program, to Fred Teeven, Secretary of State, The Netherlands, (Jul. 4, 2014) (on file with HUMAN RIGHTS WATCH), http://www.hrw.org/news/2014/07/04/letter-netherlands-state-secretary-security-and-justice-deportation-three-internatio [https://perma.cc/GVC6-SJVD] (archived Mar. 1, 2018).

162. *Alien/The State of the Netherlands*, Administrative Jurisdiction Division of the Council of State [ARRvS][Afdeling Rechtspraak van de Raad van State], (27 June 2014) 201310217/1/V1 (Neth.).

163. Press Release, ICC, *supra* note 160.

164. *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-2952, Order to Provide Further Assurances Regarding the Security of DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, ¶ 1 (May 24, 2011).

165. Headquarters Agreement between the International Criminal Court and the Host State, Mar. 1 2008, ICC-BD/04-01-08.

host State. Therefore, it appeared to be a situation of shared responsibility.[166] However, throughout the long process, both the Netherlands and the ICC tried to excuse themselves from the responsibility of assessing the protection concerns raised by the witnesses.[167]

For its part, the Court found that unlike the Netherlands, which is party to the ICCPR and the ECHR, the Court has a more restrictive regime to act under. In other words, it does not work under a human rights framework as a State would. Evidence of this restrictive approach is the Trial Chamber's decision of August 24, 2011 stating that the requirements of Article 68 of the Rome Statute, dealing with protection of witnesses, were limited to risks related to the cooperation of the witnesses with the ICC.[168] Thus, the Trial Chamber concluded it could not take any position regarding the potential violation of the witnesses' human rights or alleged persecution by the DRC authorities.[169] However, this interpretation of Article 68 is not so clear cut.

The International Court of Justice has established in one of its advisory opinions that "international organizations are subjects of international law, and as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[170] The principle of non-refoulement would arguably apply to international organisations such as the ICC. Moreover, Article 57 of the Draft Articles on State Responsibility,[171] enacted by the International Law Commission ("ILC"), recognizes that international organisations may be held internationally responsible, further supporting the notion that international organisations have a duty to respect international obligations such as the principle of non-refoulement.[172] The international responsibility of international organisations can also be found in the Draft Articles on the

166. Göran Sluiter, *Shared Responsibility in International Criminal Justice, the ICC and Asylum*, 10 J. INT'L CRIM. JUST. 661, 671 (2012).

167. Cupido & Wijk, *supra* note 154; Sluiter, *supra* note 166, at 661.

168. *Prosecutor v. Katanga*, ICC-01/04-01/07-3128, Decision on the Security Situation or Witness DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, ¶14 (May. 24, 2011).

169. *Id.*

170. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, International Court of Justice (Dec. 20, 1980), at 73.

171. Draft Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission (Supplement No. 10, A/56/10, November 2001).

172. *Id.*

Responsibility of International Organizations ("DARIO")[173] enacted by the ILC in 2011. The DARIO acknowledge that every action or omission attributable to a certain organisation under international law that constitutes a breach of an international obligation entails the international responsibility of that organisation.[174] While the application of the principle of non-refoulement to the ICC is not straight forward the Judges shied away from addressing its own institutional role.

In its decision, the Appeals Chamber did not take into account the fact that the obligation underlying the non-refoulement principle is absolute.[175] Rather than address the absolute prohibition under human rights law, it instead choose to confine itself to its State cooperation obligations under Article 93(7). While behind the scenes the Court was working to gain protection assurances from the DRC in order to secure some human rights for the witnesses, its official position maintained that the Statute does not impose on the Court the obligation to protect witnesses from human rights violations that do not derive from their participation before the Court. Its assessment of whether there was a link between the potential risk that the witnesses faced upon return and their testimony before the ICC was generally narrower than one that might be applied by a human rights body considering a question of non-refoulement.[176] The existence of a context of gross human rights violations in the DRC detention centers, their illegal detention prior to their transfer to the ICC and the content of their testimony are all important factors that were not given much weight by the Court.

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173. The D.A.R.I.O. were adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. *See* Draft Article on the Responsibilities of International Organizations, International Law Commission (A/66/10, 2011), ¶ 87.

174. Draft Article on the Responsibilities of International Organizations arts. 3, 4, International Law Commission (A/66/10, 2011).

175. *See generally Prosecutor v. Ngudjolo*, ICC.01/04-02/12-158, Order on the Implementation of the Cooperation Agreement between the Court and the Democratic Republic of the Congo Concluded pursuant to Article 93(7) of the Statute (January 20, 2014).

176. The Committee Against Torture, for example, established in its General Comment No. 1 that, when assessing if an individual would be in danger of being subjected to torture, it would take into account "[I]f the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the state in question." *See* Committee Against Torture, U.N. Doc. A/53/44, at 52 (1998).

In this specific case, the witnesses implicated the President of the DRC in their testimonies. Such actions arguably made them particularly vulnerable to the risk of torture or ill treatment on their return. The position of the Appeals Chamber in this situation seems to stand in stark contrast to statements in the *Lubanga* case where it held that "human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognised human rights."[177] The internal incoherence is striking. The position of the Court in this situation seems to suggest that it may only officially be interested in human rights norms that affect some individuals, such as victims and accused. Whereas the rights of other individuals, such as witnesses, may be of a lower priority. This is not to say that the Court had the power or capacity to take decisive action. However, as with many human rights bodies, this is also the case. Nevertheless, the Court had the opportunity to pronounce upon the principle of non-refoulement and its institutional role vis-à-vis the individuals, including their testimony and their concerns about returning to the DRC.

3. Reparations Decisions

The third, and final, example of where the Court has shown reluctance to adopt a broader human rights approach has to do with the Appeals Chamber judgment on reparations in the *Lubanga* case. On March 3, 2015 the Appeals Chamber handed down its much-awaited judgment on the appeal against the *Lubanga* Trial Chamber "Decision establishing the principles and procedures to be applied to reparations."[178] The Appeals Chamber noted the errors and shortcomings of the Trial Chamber's decision and clarified how Trial Chambers should approach reparations decisions in the future. The Appeals Chamber refrained from adopting too broad a mandate with regard to reparations.[179]

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177. *Prosecutor v. Lubanga Dyilo*, ICC- 01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, ¶37 (Dec. 14, 2006).

178. *See generally Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06-3129, Judgment on the Appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with Amended Order for Reparations (Annex A) and Public Annexes 1 and 2 (Mar. 3, 2015).

179. *Id.* ¶ 212.

In its Judgment, the Appeals Chamber laid out five general elements that all orders for reparations must include: (1) an order for reparations must be made against the convicted person; (2) the order must establish and inform the convicted person of his or her liability; (3) the order must specify the type of reparations that are to be awarded, including whether they will be individual, collective or both; (4) the order must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted and identify the appropriate modalities of reparations (such as restitution, compensation, etc.) based on the circumstances of the case; and (5) the order must identify the victims that are eligible to benefit from the reparations or set out the criteria for eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.[180]

Unlike the earlier position of the Trial Chamber, the Appeals Chamber clarified that "reparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence."[181] As a consequence, the Court held that a convicted person's liability for reparations must be proportionate to the harm caused and his or her participation in the commission of the crimes for which he/she was found guilty, in the specific circumstances of the case.[182] The judgment addressed that part of the Trial Chamber decision which seemed to open the door to reparation awards for victims who suffered from gender and sexual-based violence, crimes for which Lubanga had not been convicted of, but which could be argued were proximately caused by the crime of the enlistment and recruitment of child soldiers, for which Lubanga had been convicted.[183]

As for the identification of victims eligible to benefit from the reparations award, the Appeals Chamber once again stressed that only those victims who suffered harm as a result of the commission of crimes for which Lubanga was convicted may claim reparations

180. *Id.* ¶ 32.

181. *Id.* ¶ 65.

182. *Id*. ¶ 6.

183. *Id.* ¶¶ 6, 192-99; *see also Prosecutor v. Lubanga-Dylio*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute (Mar. 14, 2012; *Prosecutor v. Lubanga-Dylio*, ICC-01/04-01/06-3122, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against his Conviction, ¶ 117 (Dec. 1, 2014).

against him.[184] As such, when a reparations award is made to the benefit of a community, only members of that community who meet the relevant criteria are eligible to benefit directly from the reparation awarded.[185] It held that it is not proper to impose liability on Lubanga for reparations for individuals who did not suffer harm (directly or indirectly) that did not result from crimes for which he was found guilty.[186] Therefore, the Appeals Chamber judgment limited the number and type of victims that were recognized in the Trial Chamber decision.

The Judgment embraced restraining principles, most notably related to personal culpability, and upholds the character of the ICC as a criminal court that may issue reparation orders linked with the conviction of an accused. It refrains from adopting a broader reparations mandate that would be more victim-oriented. Instead, it leaves the broader mandate to the Trust Fund for Victims ("TFV"), which is arguably better placed to exercise these types of functions through its assistance mandate. This approach stands in stark contrast to the reparations ordered by the Inter-American Court of Human Rights, for example, which are largely heralded for being progressive and inclusive.[187] One can see that the Appeals Chamber took note of the different approach taken by the Inter-American Court of Human Rights and the context in which they operate, and decided not to follow it.[188]

A final decision on reparations has yet to be issued in the *Lubanga* case; yet, the first-ever reparations decision of the ICC came out in the *Katanga* case in March 2017.[189] In the *Katanga* reparations decision, the Court follows the restraining principles as laid out by the Appeals Chamber in *Lubanga*. While it makes numerous references to Inter-American Court case law to support a finding that damages for psychological harm do not have to be proven by victims or their direct family members and to support the awarding of both collective and

184. *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, ¶ 8.

185. *Id.*

186. *Id*. ¶¶ 212-14.

187. *See* Diana Contreras-Garduño & Sebastiaan Rombouts, *Collective Reparations for Indigenous Communities Before the Inter-American Court of Human Rights*, 27 UTRECHT J. OF INT'L AND EUR. L. 4 (2010).

188. *Lubanga Dyilo*, ICC-01/04-01/06-3129, ¶¶ 128-29.

189. *See generally Prosecutor v. Kataganga,* ICC-01/04-01/07, Order for Reparations pursuant to Article 75 of the Statute (March 24, 2017).

individual reparations,[190] it does so within the scope of the *Lubanga* Appeals Chamber Judgment.

IV. HUMAN RIGHTS AT THE ICC? WHERE TO GO FROM HERE?

Based on the five situations presented above, it seems that the ICC, at times, embraces ideological assumptions about human rights and the expansive interpretation of the law without considering fundamental, restraining principles of criminal law. This certainly appeared to be the case in the *Katanga* Trial Chamber Judgment based on Regulation 55 and the approach taken by many Chambers regarding broad victim participation rights in proceedings. Here, the uncritical assumptions and preferences seemed to discount a number of restraining principles and rights, including the principles of legality, legal certainty and fair trial considerations. These decisions while compliant with human rights law, can be seen to be detrimental to an accused in a criminal process. However, the Court also, at times, rejects a conflation of the two fields of law and makes clear that its role is one of an anti-impunity mechanism and not more.

The last three examples suggest that despite serious instances where the two fields of law conflate to the detriment of an accused, the Court has recognized the distinction between its role as a criminal court and that of a human rights body. In both the asylum seekers example and the Libya example the Court was reluctant to substantively or structurally converge the fields of international criminal law and human rights law. In this sense, it stuck closely to a strict reading of the Statute, though the beneficiaries of this approach were certainly not the individuals seeking protection under the human rights principle of non-refoulement and international fair trial standards respectively. In the reparations judgment the Court refrained from adopting a victim-focused teleological reasoning and instead stuck closely to principles of culpability and fair labelling. Nevertheless, in this situation, it was arguably willing to do so because it could rely on the TFV to potentially address the broader needs of victims. In these examples, the Court showed great reluctance of transplanting concepts from one domain to the other, despite doing so in other situations. The situation which emerges from this analysis is, unsurprisingly, complex.

190. *Id.* ¶¶ 127, 231-32, 283.

While the examples set out above differ in context, the last three are less directly related to the criminal case against a specific individual, one common thread amongst the five examples is the fact that the Court seems to adopt or refrain from adopting a greater human rights approach when it suits other practical considerations. In other words, the Court is pragmatic. When it is useful to adopt a progressive approach it does so, like when it helps to secure a conviction (and discount alleged fair trial violations) or when it makes victim participation assessments easier and more streamlined. When it is not practical to adopt a human rights approach, like when state cooperation is an issue, such as in the Libya situation or with the asylum situation, or when there is another body to address the greater needs of victims it will refrain from adopting a greater human rights approach. This commonality, however, should not be exaggerated. The approach of the Court is largely unclear and inconsistent. While the examples addressed in this study highlight some of the more prominent situations where human rights issues arose at the ICC, more research needs to be done into judicial administration and interpretation.

There is no denying that there is overlap between international criminal law and human rights law. The ICC deals with the prosecution of individuals accused of serious violations of human rights (and international humanitarian law). Moreover, international human rights standards are listed as a secondary source of applicable law under the Statute. However, since the ICC was never designed to operate as a human rights institution but rather as a criminal court, obvious tensions ensue. While this distinction is important, what is needed is a more comprehensive and transparent approach by the judges towards such tensions in the future. To this end, prominent academics are calling for the Court to adopt a consistent theory of international criminal law that includes a principled interpretation of the Rome Statute.[191] To move in any other direction would further entrench the inconsistent approach adopted thus far. Should a future theory of interpretation be developed and adopted, it should reflect a

191. *See generally* Kai Ambos, *Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law*, 33 OXFORD J. OF LEGAL STUD. 293 (2013); Leila N. Sadat & Jarrod M. Jolly, *Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot*, 21 LEIDEN J. OF INT'L L. 755 (2015).

more critical awareness of the reasoning techniques and assumptions adopted by previous courts.

V. CONCLUSION

Whereas in a liberal system a court would be sensitive to the importance of the restraints of the use of the State's coercive power against an individual, in international criminal law, prosecution and conviction are often viewed as the fulfilment of a victim's human right to a remedy.[192] This sort of conceptualization emboldens the use of human rights interpretation and application and shifts the focus of the system from the individual culpability of an accused to one that is more victim-focused on harms generally. If the ICC is in fact a liberal criminal law institution, its judges will need to adhere to international human rights standards without discounting or diminishing the important role played by restraining principles of criminal law. After examining a number of prominent instances arising at the Court, it appears that the ICC is unclear about the extent of its human rights obligations and its desired role in facilitating the interpretation of human rights. It is largely driven by pragmatism rather than principle. Greater clarity, through a more consistent and transparent theory of international criminal law interpretation, is needed. In the meantime, the judges should remain reluctant from conflating the two fields of law, with the exception of benefiting an accused at trial, because to do otherwise can undermine the very principles upon which fair and legitimate criminal proceedings operate.

192. *See* Amann, *supra* note 65; *see also* Robinson, *supra* note 6.