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A Balancing Act: The Introduction of Restorative Justice in the International Criminal Court's Case of the Prosecutor V. Thomas Lubanga Dyilo

Mary Will

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A Balancing Act: The Introduction of Restorative Justice in the International Criminal Court's Case of the Prosecutor V. Thomas Lubanga Dyilo

Cover Page Footnote

J.D. Candidate, Florida State University College of Law, May 2008. The author would like to thank her parents and Josh for their love and support. She would also like to thank the members of the Journal of Transnational Law & Policy for their help editing this piece.

**A BALANCING ACT: THE INTRODUCTION OF
RESTORATIVE JUSTICE IN THE INTERNATIONAL
CRIMINAL COURT'S CASE OF *THE PROSECUTOR
V. THOMAS LUBANGA DYILO***

MARY WILL*

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I. INTRODUCTION

If one has ever been the victim of a serious crime, it is very clear that the harm does not necessarily end when the criminal action does.¹ Many victims require justice and public recognition of their suffering in order to be restored² or aided in their recovery. The relatively recent theory of restorative justice strongly supports victim involvement in the proceedings against their offender.³ Advocates of restorative justice feel that actual participation in the process is important to victims' sense of recovery as well as future well-being.⁴ The International Criminal Court (ICC) has recognized the importance of granting the victims of mass atrocities a forum in which to be heard⁵ and, perhaps, healed.⁶ This is the first time that an international criminal tribunal has permitted victims to participate in legal proceedings against their offenders⁷ and represents the international community's desire to see more rights given to victims of serious crimes.⁸ This Note will focus on the level of victim involvement in the first Confirmation of charges Hearing to take place before the ICC and analyze the extent to which that participation is consistent with the goals of restorative justice.

The ICC is currently overseeing its first case, *The Prosecutor v. Thomas Lubanga Dyilo*.⁹ Mr. Dyilo, a native of the Democratic Republic of the Congo,¹⁰ is the alleged founder of the *Union des Patriotes Congolais* (UPC), a political party, and its military wing, the *Forces patriotiques pour la libération du Congo* (FPLC).¹¹ He was arrested on March 17, 2006¹² for the charges (at that point yet-to-

1. See Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 457-58 (2006).

2. See Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127, 128 (1997).

3. Mills, *supra* note 1, at 458.

4. Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 24 (2003).

5. Gerard J. Mekjian & Mathew C. Varughese, *Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court*, 17 PACE INT'L L. REV. 1, 5 (2005).

6. *Id.* at 19.

7. Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1428 (2002).

8. Mekjian & Varughese, *supra* note 5.

9. Press Release, Int'l Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation (June 23, 2004), available at http://www.icc-cpi.int/pressrelease_details&id=26&1=en.html.

10. *Chronology of the Thomas Lubanga Dyilo Case*, INT'L CRIMINAL COURT NEWSLETTER (The Hague, Neth.), Nov. 2006, at 1, available at http://www.icc-cpi.int/library/about/newsletter/10/en_01.html.

11. *Id.* at 2.

12. *Id.*

be confirmed) of the war crimes of conscripting children into armed groups, enlisting children into armed groups, and using children to participate actively in hostilities.¹³ Each of these charges constitutes a crime under Article 25(3)(a) and Article 8(2)(e) of the Rome Statute.¹⁴

On January 29, 2007, the Pre-Trial Chamber of the ICC confirmed the charges brought by the Prosecutor, allowing the case to be set for trial.¹⁵ Prior to this confirmation of charges, the Pre-Trial Chamber of the ICC conducted a Confirmation of charges Hearing in order to determine if there was substantial evidence to proceed to trial.¹⁶ In accordance with the Rome Statute of the ICC¹⁷ and the Rules of Procedure and Evidence of the ICC,¹⁸ certain victims, represented by counsel, played an active role in this hearing.¹⁹ While subject to procedural restrictions, such as the inability to call their own witnesses,²⁰ the legal representatives of the victims made their presence known through forceful opening²¹ and closing²² remarks, as well as numerous document requests and even a question posed to the witness.²³ This hearing set the precedent for victims to play an important role in international criminal proceedings as they seek closure for the harms committed against them.

This Note will analyze the role of the victims in the Confirmation of charges Hearing in the case of *The Prosecutor v. Thomas*

13. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Warrant of Arrest (Feb. 10, 2006), available at <http://www.icc-cpi.int/cases/RDC/c0106.html>.

14. See *infra* note 17.

15. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Hearing: Decision of the Pre-Trial Chamber Following the Confirmation of Charge Hearing (Jan. 29, 2007), available at http://www.icc-cpi.int/cases/RDC/c0106/c0106_hs.html.

16. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Confirmation of charges Hearing (Nov. 9, 2006), [hereinafter Nov. 9 Confirmation of charges Hearing] available at http://www.icc-cpi.int/cases/RDC/c0106/c0106_hs.html (follow "English" hyperlink).

17. See Rome Statute of the International Criminal Court, art. 68, U.N. Doc. A/CONF. 189/9, July 17, 1998, reprinted in 37 I.L.M. 999 (1998), [hereinafter Rome Statute], available at <http://www.un.org/law/icc/statute/romefra.htm>.

18. See Rules of Procedure and Evidence, Rule 89, U.N. Doc. PCNICC/2000/1/Add.1, Nov. 2, 2000, [hereinafter ICC Rules of Procedure and Evidence], available at http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf.

19. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 4.

20. ICC Rules of Procedure and Evidence, *supra* note 18, at art. 89. The inability of victims to call their own witnesses is a reflection of the administrative and logistical constraints of the ICC as well as deference to the procedural rights of the defendant.

21. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 75.

22. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Confirmation of charges Hearing, (Nov. 28, 2006), [hereinafter Nov. 28 Confirmation of charges Hearing] available at http://www.icc-cpi.int/cases/RDC/c0106/c0106_hs.html.

23. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Confirmation of charges Hearing, (Nov. 21, 2006), [hereinafter Nov. 21 Confirmation of charges Hearing] available at http://www.icc-cpi.int/cases/RDC/c0106/c0106_hs.html.

Lubanga Dyilo and examine whether their participation served to fulfill the restorative justice aim of healing the victims by giving voice to their suffering. Their role as a third party to the proceedings will be explored in terms of the rights and restrictions placed upon the victims by the Rome Statute and the ICC Rules of Evidence. This Note will argue that the extent to which the Pre-Trial Chamber allowed victims to participate in this hearing illustrated the ICC's recognition of restorative justice through public expression and acknowledgment of the victims' suffering. In addition, it will show how the ICC has attempted to create a balance between restorative justice aims and purely retributive proceedings which focus solely on the individual wrongs of the offender. This Note will explore the incorporation of group reparation payments into the ICC as well as the Court's efforts to maintain the procedural rights of the defendant.

Section II of this Note begins with a background investigation of the limited role of victims in past international criminal tribunals. Section III then turns to the current system of the ICC and the specific role granted to victims. Section IV involves an overview of the victims' participation in the Confirmation of charges Hearing in the case of *The Prosecutor v. Thomas Lubanga Dyilo*. Next, Section V provides an introduction to restorative justice theory, as well as an analysis of whether or not the role of the victims in this hearing was consistent with the restorative aims that their inclusion was meant to accomplish. This section will explore the methods employed by the Pre-Trial Chamber to balance the role of restorative justice with that of retributive justice as well as the due process concerns of the defendant. Section VI will conclude with a brief forecast for future ICC proceedings and the role of victims and their legal representatives there.

II. VICTIM PARTICIPATION IN PAST INTERNATIONAL CRIMINAL TRIBUNALS

A. *Theories of Justice: Retributive and Restorative*

The first international criminal tribunals were primarily focused on dispensing retributive justice. The retributive approach "defines the state as victim, defines wrongful behavior as violation of rules, and sees the relationship between victim and offender as irrelevant."²⁴ In fact, retributive justice theory is not only thought of as a means of defining a system of justice but also the method

24. HOWARD ZEHR, CHANGING LENSES 184 (1990).

for carrying it out.²⁵ Restorative justice advocate Howard Zehr states that under retributive justice theory “crime is a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules.”²⁶ There is really no role given to the victim in a retributive justice proceeding other than that of a possible witness.²⁷ Critics of the retributive model argue that it leaves victims, society and even offenders unsatisfied and injured.²⁸ While retributive justice does seek to punish the offender, it was clear that, over time, this was not sufficient.²⁹

As a response to this, policy-makers, community leaders, and scholars began focusing on an approach known as restorative justice, which could be seen as both an alternative and a complement to the current retributive processes.³⁰ This Note will address the theory of restorative justice and its incorporation into the international criminal justice system in greater detail in Section V.

B. Nuremburg and Tokyo

The idea of international criminal tribunals that would impose individual liability for mass atrocities was first put into practice with the Nuremburg Tribunal following World War II.³¹ Here, the Allied nations united to prosecute many of those responsible for these crimes and hold the guilty parties accountable for their actions.³² This tribunal was influential in moving the prosecution of mass atrocities from the domestic sphere to the international.³³ Similarly, the Tokyo Tribunal following World War II sought to punish individuals on an international level for mass atrocities committed during the War.³⁴ While the perpetrators of these crimes were prosecuted by the Allied parties, the role of the vic-

25. *Id.*

26. *Id.* at 181.

27. *Id.* at 30.

28. GERRY JOHNSTONE & DANIEL W. VAN NESS, HANDBOOK OF RESTORATIVE JUSTICE 75 (2007).

29. Those who conducted research on victims of violent crimes found that “victims have multiple needs beyond the punishment of the offender.” Mills, *supra* note 1, at 463. Assuming a passive role in the proceedings against their offender was found to be insufficient compared to the restorative benefits that victims experienced when they assumed more active roles. *Id.*; see also ZEHR, *supra* note 24, at 184.

30. JOHNSTONE & VAN NESS, *supra* note 28, at 76.

31. Mekjian & Varughese, *supra* note 5, at 8.

32. *Id.* at 3.

33. Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Human Atrocities*, 84 WASH. U. L. Q. (forthcoming 2007), available at <http://ssrn.com/abstract=931567>.

34. Mekjian & Varughese, *supra* note 5, at 3.

tims in the proceedings was nonexistent.³⁵ In the Nuremburg tribunal, while the Prosecution did call a small number of witnesses, they were mainly low-level Allied prisoners of war who testified to insider information that they had against the defendants. Most of the prosecution's evidence was in the form of detailed documents kept by the Nazis.³⁶ Also, because the Nuremburg and Tokyo tribunals were organized based on the common-law, adversarial model for legal proceedings, the inclusion of victims as a third party to the proceedings was not considered.³⁷

C. ICTY

It was not until the early 1990's that another international criminal tribunal, the International Criminal Tribunal for the Former Yugoslavia (ICTY), was established.³⁸ Created in 1993, the ICTY is authorized to prosecute grave breaches of the 1949 Geneva Convention, violations of the laws of customs of war, genocide and crimes against humanity when these crimes occurred on the territory of the former Yugoslavia after January 1, 1991.³⁹ The ICTY only has jurisdiction over natural persons, excluding organizations, political parties, administrative entities, etc.⁴⁰ United Nations Security Council Resolution 827, which created the ICTY, stated that "the establishment of an international tribunal [is] for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law."⁴¹ This language suggests that there is no place for restorative justice in the ICTY and that the intent of the tribunal is to "limit redress for serious violations of international human rights law to punitive damages."⁴² In fact, victims of the crimes tried before the ICTY were not permitted to receive reparations or compensation for their suffering or

35. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBURG TRIALS* 184 (1992). There was disagreement amongst the Prosecution regarding the use of the main defendants (i.e., Goering) as prosecution witnesses (in exchange for a plea agreement) but ultimately, Chief Prosecutor Jackson decided against this.

36. M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 411 (2003). This abundance of Nazi documentation eliminated the need for victim testimony.

37. Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 *DUKE J. COMP. & INT'L L.* 519, 524 (1997).

38. ICTY at a Glance, available at <http://www.un.org/icty/glance-e/index.htm> (last visited Nov. 28, 2007).

39. *Id.*

40. *Id.*

41. S.C. Res. 827, ¶ 11, U.N. Doc. S/RES/827 (May 25, 1993), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf>.

42. Mekjian & Varughese, *supra* note 5, at 12; see also Nsongurua J. Udombana, *Pay Back Time in Sudan? Darfur in the International Criminal Court*, 13 *TULSA J. COMP. & INT'L L.* 1, 44 (2005).

participate in the proceedings aside from possibly being called as witnesses.⁴³ The Rules of the ICTY clearly delineate the procedures for witness testimony but do not include the rights of witnesses, who may in fact also be victims, to be represented by counsel or be heard outside of their testimony given during direct or cross-examination.⁴⁴ The Rules of the ICTY do assign the Registry the task of recommending protective measures for victims and witnesses, as well as providing counseling and support for them.⁴⁵

There are various theories regarding the lack of victim involvement in the ICTY procedures. As previously mentioned, Resolution 827 clearly limits the purpose of the ICTY to the prosecution of individuals for mass atrocities.⁴⁶ In addition, this ad hoc tribunal seems to be based more on an adversarial, common-law system in which only two parties, the prosecution and defense, operate.⁴⁷ In addition, the rules of the ICTY require any witness who testifies to take an oath of truthfulness⁴⁸ which creates the possibility of the victim/witness being held in contempt of court should they not tell the truth.⁴⁹ Quite clearly, the drafters of the ICTY Rules of Evidence did not intend for the victims to play an active role in the proceedings, relying instead on the prosecution to represent their interest in seeking justice.⁵⁰

Although the ICTY did not have the power to assign or enforce victim reparation payments itself,⁵¹ Rule 106 of the ICTY Rules of Procedure and Evidence states that:

(a) The Registrar shall transmit to the competent authorities of the States concerned the judgment finding the accused guilty of a crime which has caused injury to a victim. (b) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a na-

43. Mekjian & Varughese, *supra* note 5, at 12.

44. See Rules of Procedure and Evidence, Rule 90, U.N. Doc. IT/32/REV/39, Sept. 22, 2006, [hereinafter ICTY Rules of Evidence], available at: http://www.un.org/icty/legaldocs/basic/rpe/IT32_rev39.htm; see also, Press Release, ICTY, Remarks of Judge Richard May, Judge of the International Criminal Tribunal for the Former Yugoslavia, to the Fourth Session of the Preparatory Commission for the International Criminal Court (Mar. 20, 2000), available at <http://www.un.org/icty/pressreal/p479-e.htm>.

45. ICTY Rules of Evidence, *supra* note 44, at rule 34.

46. S.C. Res. 827, *supra* note 41.

47. Mekjian & Varughese, *supra* note 5, at 13.

48. ICTY Rules of Evidence, *supra* note 44.

49. Mekjian & Varughese, *supra* note 5, at 13.

50. *Id.*

51. Mark S. Ellis & Elizabeth Hutton, *Policy Implications of World War II Reparations and Restitution as Applied to the Former Yugoslavia*, 20 BERKELEY J. INT'L L. 342, 351 (2002).

tional court or other competent body to obtain compensation.⁵²

By allowing the legal representative of the victim to bring suit in a national court, the victim is able to be compensated through ICTY's standing power under the UN Security Council.⁵³ However, the cooperation of national governments is required for this to prove effective. Unfortunately, the governments of Serbia and Montenegro, as well as the Republica Srpska (which is the Bosnian-Serb) *de facto* government, have not been cooperative with the ICTY investigations nor have they acknowledged "the competence of the Tribunal."⁵⁴

In essence, the ICTY did not provide any real mechanisms for victim restoration aside from the scant possibility of being compensated via the national courts. Since the Security Council has not used its powers to enforce the orders of the ICTY in regards to individual defendants or States,⁵⁵ it is unlikely that the victims will ultimately receive reparations for the crimes committed against them.

D. ICTR

The second international criminal tribunal created in the 1990's was the International Criminal Tribunal for Rwanda (ICTR) which was established in 1994.⁵⁶ The purpose of the ICTR is to prosecute those responsible for genocide and serious crimes against international humanitarian law that took place in the territory of Rwanda during the calendar year of 1994.⁵⁷ While the ICTY allowed no participation for victims outside of the role of witnesses,⁵⁸ the ICTR did grant a very minimal role to victims as individual participants in the prosecutions of low level perpetrators.⁵⁹ Here, some victims were given restricted rights to participate in community gatherings where "they were asked to be judge and jury against low level perpetrators."⁶⁰ In this setting, an ICTR prosecutor questioned victims and witnesses about whether or not

52. ICTY Rules of Evidence, *supra* note 44.

53. Ellis & Hutton, *supra* note 51.

54. BASSIOUNI, *supra* note 36, at 429.

55. *Id.* at 430.

56. ICTR Rules of Procedure and Evidence, (Nov. 10, 2006), available at <http://69.94.11.53/default.htm> (follow "BASIC LEGAL TEXTS" hyperlink; then follow "Rules of Procedure and Evidence" hyperlink).

57. *Id.*

58. Mekjian & Varughese, *supra* note 5, at 13.

59. *Id.* at 15, n.52.

60. *Id.*

certain suspects being held in custody should be further investigated for crimes against humanity.⁶¹

In spite of this small improvement, the ICTR Statute, like that of the ICTY, granted very few individual rights to victims.⁶² One clear difference between the ICTY Rules and those of the ICTR is the inclusion in the ICTR Rules of “develop[ing] short and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family.”⁶³ The ICTY had no provision like this in its Rules of Procedure and Evidence.⁶⁴ This provision shows increased awareness of the need to offer victims additional safeguards to help them feel comfortable enough to testify before an international tribunal.

In spite of this, the focus of the ICTR remained primarily retributive⁶⁵ while also encouraging a fair and expeditious trial for the defendant.⁶⁶ The overall concern was that the inclusion of victims as a separate legal entity, without clearly defined rules of procedure governing their involvement, could significantly delay the proceedings of the tribunal and adversely affect the rights of those charged.⁶⁷ Specifically, it has been argued that since each individual victim is different, the need for “case-specific research and custom-made procedures” could prove time consuming and costly.⁶⁸ The drafters of the Rome Statute of the ICC took this into account and revolutionized victim participation in the international criminal arena.

III. THE ROME STATUTE AND RULES OF EVIDENCE AND PROCEDURE OF THE ICC: A DEFINITE ROLE FOR THE VICTIM

A. Becoming a Victim Participant in the ICC

The International Criminal Court is a permanent and independent criminal court that was established by the Rome Statute and adopted on July 17, 1998.⁶⁹ The Rome Statute became effective

61. *Id.*

62. *Id.* at 15.

63. ICTR Rules of Procedure and Evidence, *supra* note 56, at rule 34.

64. *See* ICTY Rules of Procedure and Evidence, *supra* note 44.

65. Adrian Di Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?*, 2 J. INT'L L. & REL. 25, 40 (2006).

66. Mekjian & Varughese, *supra* note 5, at 14.

67. *Id.*

68. Timothy K. Kuhner, *The Status of Victims in the Enforcement of International Criminal Law*, 6 OR. REV. INT'L L. 95, 142 (2004).

69. International Criminal Court, <http://www.icc-cpi.int/about/ataglance/establishment.html> (last visited Nov. 28, 2007).

on July 1, 2002 and today, one hundred and four States have become parties to the Statute.⁷⁰ The creation of the ICC represents a significant milestone in international affairs⁷¹ through its establishment of a permanent tribunal dedicated to eradicating the culture of impunity for international human rights violations.⁷² More specifically, the Rome Statute of the ICC, as well as the Rules of Procedure and Evidence of the ICC also include specific and much more significant roles for victims in the proceedings.⁷³

According to Rule 85 of the Rome Statute, victims include those who are “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”⁷⁴ Victims do not necessarily have to be individuals and “may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”⁷⁵

Victims must follow a specific application process if they would like to be granted the legal status of “victim” and given participatory rights in a criminal proceeding.⁷⁶ According to Rule 89 of the Rules of Procedure and Evidence, the Chamber of the ICC that has been assigned to a particular case has the discretion “on its own initiative or on the application of the Prosecutor or the defense” to determine if an applicant qualifies as a victim.⁷⁷ In order to qualify as a victim and be granted participatory status, one must send a written application to the Victims’ Participation and Reparation section of the Court Registrar.⁷⁸ The Registrar will then submit the application to a pre-trial chamber of judges who will decide the arrangements for their participation in the proceedings.⁷⁹ Applicants must present evidence showing that they “are victims of crimes which come under the competence of the Court.”⁸⁰ The Chamber

70. *Id.*

71. Ku & Nzelibe, *supra* note 33, at 1.

72. Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court*, 4 J. INT’L CRIM. JUST. 765, 768 (2006).

73. Aldana-Pindell, *supra* note 7, at 1414.

74. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 85.

75. *Id.*

76. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 89.

77. *Id.*

78. International Criminal Court, Participation of Victims in Proceedings, <http://www.icc-cpi.int/victimissues/victimsparticipation.html> (last visited Nov. 28, 2007).

79. *Id.*

80. *Id.* The evidence presented includes things that would help to prove they are victims of this crime. Such things that the Chamber looks for include proof of identity, ethnic tribe, address, information about the alleged crime, when and where the alleged events occurred, and whether or not there were other witnesses to the crime. *Id.*

possesses the right to reject any applicant who cannot meet its criteria.⁸¹ The ICC website contains applications and instructions to aid potential victims in the process.⁸² The application inquires about such things as an applicant's ethnic tribe, biographical information, medical history, reason for applying, and availability of witnesses to the crime.⁸³ Once granted the status of victim, the applicant may then choose a legal representative to assist him or have the Registrar appoint a legal representative.⁸⁴

B. The Victims and Witnesses Unit

The Rome Statute anticipated the need for an organization within the Court to coordinate and oversee all administrative matters concerning victims and witnesses. For this reason, Article 43(6) ordered the Registry of the ICC to create a Victims and Witnesses Unit.⁸⁵ This "Unit" provides "protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses."⁸⁶ The Rome Statute further states that the Victims and Witnesses Unit may alert the Court to certain safety measures and security arrangements that may be required for victims and witnesses in addition to other services, such as counseling.⁸⁷

The ICC Rules of Procedure and Evidence go into greater detail concerning the specific duties and functions of the Victims and Witnesses Unit.⁸⁸ Concerning victims in particular, the Unit works to help them obtain legal advice, secure legal representation and subsequently to provide all necessary support and assistance to the counsel who agree to represent the victims.⁸⁹ The Unit aids the victims and witnesses in all stages of the legal proceedings,⁹⁰ but also provides support and a relocation option for those victims and witnesses who are at risk.⁹¹ During the Confirmation of charges Hearing, all victims remained anonymous removing the urgency for relocation.⁹² It remains to be seen if these protective measures

81. *Id.*

82. *Id.*

83. *Id.*

84. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 90.

85. Rome Statute, *supra* note 17, at art. 43.

86. *Id.*

87. *Id.* at art. 68.

88. ICC Rules of Procedure and Evidence, *supra* note 18, at rules 16-18.

89. *Id.* at rule 16.

90. *Id.*

91. *Id.*

92. Nov. 9 Confirmation of charges Hearing, *supra* note 16.

will be used during the forthcoming trial of Thomas Lubanga Dyilo.⁹³

C. Victim Participation in the Proceedings

Victim participation begins in the initial stages of the investigation of any case being considered by the ICC.⁹⁴ In fact, Article 53 of the Rome Statute states that the Prosecutor, in deciding to investigate a case, should take into account the interests of the victims.⁹⁵ Additionally, Article 68(3) of the Statute provides that the Court is to permit the witnesses to express their views and concerns at “stages of the proceedings determined to be appropriate by the Court” when the “personal interests of the victims are affected.”⁹⁶ Although the Prosecution has expressed concern regarding the participation of victims in the investigation process, especially in the initial stages before a warrant of arrest has been issued,⁹⁷ the Pre-Trial Chamber in the Case of *The Prosecutor v. Thomas Lubanga Dyilo* recently held that victims may participate in the investigation phase in which the judges deem their “personal interests” to be affected.⁹⁸ While the Rome Statute provides a unique right of participation to the victims, it clearly places the extent of their involvement in the hands of the judges.⁹⁹ A criticism of the decision to allow victims to participate in the investigation can be found in the argument that while victims may participate, the Pre-Trial chamber did not clearly define their procedural rights,¹⁰⁰ leaving room for delay and confusion.

Victims and their legal representatives have the right to attend all preliminary hearings and participate in them orally unless the Pre-Trial Chamber judges feel that their participation should be limited to written submissions.¹⁰¹ When victims have been authorized to participate in proceedings, the Registrar possesses the duty to inform the victim or their legal representatives in a timely

93. Decision of the Pre-Trial Chamber, *supra* note 15.

94. Aldana-Pindell, *supra* note 7, at 1429. See, e.g., Jerome de Hemptine & Francesco Rindi, *ICC Pre-Trial Chamber Allows Victims To Participate in the Investigation Phase of Proceedings*, 4 J. INT'L CRIM. JUST. 342 (2006).

95. Rome Statute, *supra* note 17, at art. 53.

96. *Id.* at art. 68.

97. Hemptine & Rindi, *supra* note 94, at 343 (discussing the Prosecution's position that “the participation of victims in the investigation phase was not envisaged by the ICC Statute and allowing a third party to intervene at such an early stage of the proceedings could jeopardize the objectivity and integrity of the Prosecutor's work”).

98. *Id.* at 346.

99. *Id.*

100. Hemptine & Rindi, *supra* note 94, at 347.

101. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 91.

manner of the date and time of proceedings, as well as any motions of requests or submissions filed with the Court.¹⁰² During a hearing or trial, the victim may participate in accordance with the ruling of the Chamber as it interprets Rules 89 and 90.¹⁰³ In general, the scope and manner of victim involvement is determined by the Pre-Trial Chamber judges.¹⁰⁴ Victims, usually through their legal representatives, may pose questions to witnesses, experts or even the accused¹⁰⁵ if the judges feel that the question would not violate the rights of the accused or unfairly delay the trial.¹⁰⁶ Before posing a question, the victim must apply to the Chamber to be able to ask the question.¹⁰⁷ If the Chamber feels that it is necessary, it may require the victim to submit a written application of the questions, in which case, the questions will then be submitted for observation to the prosecutor and perhaps even the defense.¹⁰⁸

The ICC Rules of Procedure and Evidence do not state that victims may call their own witnesses or present their own evidence.¹⁰⁹ In essence, during the actual proceedings, victims are limited to opening and closing remarks, possible questioning of a witness, and access to most documents and submissions. During the Sentencing Hearing, the Court must take into account the specific harm caused to victims and their families.¹¹⁰ Furthermore, the Court may award reparations to individual victims,¹¹¹ representing the first time that an international criminal tribunal has permitted victims to recover any form of compensation for the harms committed against them.¹¹²

D. Reparations under the ICC

The Rome Statute directs the Court to develop procedures regarding the disbursement of reparation payments.¹¹³ Reparations to or in respect of victims are not necessarily monetary, but can include “restitution, compensation and rehabilitation.”¹¹⁴ After a trial, the Court will determine the “scope and extent of any dam-

102. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 92.

103. *Id.*

104. Aldana-Pindell, *supra* note 7, at 1431.

105. Mekjian & Varughese, *supra* note 5, at 26.

106. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 92.

107. *Id.*

108. *Id.*

109. See ICC Rules of Procedure and Evidence, *supra* note 18.

110. *Id.* at rule 145.

111. *Id.* at rule 96.

112. Mekjian & Varughese, *supra* note 5, at 17.

113. Rome Statute, *supra* note 17, at art. 75.

114. *Id.*

age, loss and injury to, or in respect of, victims and will state the principles on which it is acting.”¹¹⁵ Before deciding the reparations, the Court shall take into account the views of the victims, convicted persons and other interested parties, including States.¹¹⁶ States must give effect to the decisions of the ICC concerning reparations as if the provisions of Article 109¹¹⁷ apply.¹¹⁸

The Rules of Procedure and Evidence detail the process by which victims may receive reparations.¹¹⁹ They must file a written request with the Registrar containing numerous particulars.¹²⁰ The reparation proceedings are also encouraged to be done in a public manner so that the victims at issue, as well as other victims and States, will be aware of all measures being taken to restore them.¹²¹ After assessing the amount to be awarded for reparations, the Court can either decide to assign them on an individualized basis, a collective basis, or both.¹²² Experts can also be appointed to assess the amount of damage done if no readily available figures exist.¹²³ As an alternative to paying reparations to individual victims, the ICC has created a Victim Trust Fund.¹²⁴ This was created for situations where awarding reparations to individual victims is not currently possible.¹²⁵ While the Court does assign reparations on an individual basis, it could require the convicted offender to direct the money to a trust fund to be awarded to the individual

115. *Id.*

116. *Id.*

117. Rome Statute, *supra* note 17, at art. 109 (explaining how State parties must enforce fines and forfeiture measures ordered by the ICC and if the State is unable to recover forfeited property, it must take measures to secure the value of that property.)

118. *Id.* at art. 75.

119. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 94.

120. *Id.* These requirements include:

- (a) The identity and address of the claimant; (b) A description of the injury, loss or harm; (c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm; (d) Where restitution of assets, property or other tangible items is sought, a description of them; (e) Claims for compensation; (f) claims for rehabilitation and other forms of remedy; (g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.

Id.

121. *Id.* at rule 96.

122. *Id.* at rule 97.

123. *Id.* At the Court’s invitation, the victims, their legal representatives and the convicted offender will have an opportunity to comment on the assessments made by the experts. *Id.*

124. *Id.* at rule 98.

125. *Id.* It may be impossible or impracticable to simply award a sum of money to a victim at any given time due to possible relocation, trauma, etc. The money is held for the victim and awarded to them through the Trust Fund as soon as possible. *Id.*

victim at a later date.¹²⁶

IV. THE CONFIRMATION OF CHARGES HEARING OF THE CASE OF *THE PROSECUTOR V. THOMAS LUBANGA DYILO*

A. Opening Statements

On March 3, 2004, the situation in the Democratic Republic of the Congo¹²⁷ was reported to the prosecutor of the ICC.¹²⁸ On June 23, 2004, the Prosecutor announced his decision to open an official investigation, and on February 10, 2006, an arrest warrant was issued for Mr. Thomas Lubanga Dyilo.¹²⁹ On March 6, 2006, Mr. Dyilo made his initial appearance before the ICC in a public hearing.¹³⁰ The Confirmation of charges Hearing, which is required by and detailed in Article 61 of the Rome Statute,¹³¹ officially began on November 9, 2006.¹³² Although legal representatives for those victims that had been granted participatory rights had been involved in previous preliminary hearings and investigations,¹³³ this Confirmation Hearing was the first time that they spoke in general terms about their clients and their mission.¹³⁴

The hearing began on November 9, 2006 when the presiding judge of the Pre-Trial Chamber, Judge Claude Jorda,¹³⁵ called the Court to order at 9:44 a.m.¹³⁶ As this was the first day of the Confirmation of charges Hearing, Judge Jorda began by emphasizing certain points. He pointed out to the Prosecution, Defense, Legal Representatives of the Victims, and the observing public¹³⁷ that this hearing was most certainly not a trial.¹³⁸ He also presented a

126. *Id.*

127. For purposes of this article, the situation in the Democratic Republic of the Congo will refer to the conflict allegedly involving Mr. Thomas Lubanga Dyilo, the UPC, and the FPC in the Ituri province between the years 2002-2004.

128. *Chronology of the Thomas Lubanga Dyilo Case*, *supra* note 10, at 1.

129. *Background to the Case The Prosecutor v. Thomas Lubanga Dyilo*, INT'L CRIMINAL COURT NEWSLETTER, (The Hague, Neth.), Nov. 2006, at 3, available at http://www.icc-cpi.int/library/about/newsletter/10/en_03.html.

130. *Id.*

131. Rome Statute, *supra* note 17, at art. 61.

132. Nov. 9 Confirmation of charges Hearing, *supra* note 16.

133. See Hemptine & Rindi, *supra* note 94; see also Mekjian & Varughese, *supra* note 5, at 22.

134. Nov. 9 Confirmation of charges Hearing, *supra* note 16.

135. International Criminal Court, http://www.icc-cpi.int/chambers/judges/Jorda_Claude.html (last visited Nov. 28, 2007). Judge Claude Jorda, of France, served as President of the ICTY before joining the ICC.

136. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 2.

137. The public nature of these proceedings is extremely important to the theory of restorative justice. See Mika, *infra* note 237, at 35.

138. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 6.

summary of the subsequent proceedings in the case leading up to the hearing.¹³⁹ Judge Jorda had the members of the Prosecution, Defense, Registry, and the Legal Representatives of the Victims all introduce themselves.¹⁴⁰

Four victims, represented by their counsel, and given numerical labels to protect their anonymity,¹⁴¹ were authorized to participate in this Confirmation Hearing.¹⁴² These victims, exercising their right to remain anonymous until the actual trial,¹⁴³ were not present during this hearing. Their legal representatives were Mr. Luc Walley, who informed the Court that he is assisted by Mr. Frank Mulenda and represented victims 01-03, and Mr. Gebbie, who represented victim 05, and is accompanied by Ms. Carine Bapita.¹⁴⁴ Judge Jorda, in his preliminary statements to the Court, detailed the role of the victims and their legal representatives in this proceeding.¹⁴⁵ He stated that while the victims have certain rights within the statute,¹⁴⁶ “[t]hey of course don’t have the same rights” as the Prosecution and Defense.¹⁴⁷ He also informed the Court that one of the rights that the legal representatives of the victims do have is the right to make an opening statement and that they would be making such a statement that day.¹⁴⁸ Before entertaining comments from any of the parties, Judge Jorda also stated that the legal representatives for the victims have the right to ask the judge to intervene on their behalf at any time during the trial, and the judges will rule on their requests on a “case-by-case basis.”¹⁴⁹ He further explained that the legal representatives for the victims would be permitted to make closing statements at the end of the hearing.¹⁵⁰

After the Prosecution completed its opening statement, Judge Jorda turned to the legal representatives of the victims.¹⁵¹ Mr. Walley began by stating that

139. *Id.*

140. *Id.* at 2.

141. The victims were labeled 01, 02, 03, and 05.

142. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 8.

143. Rome Statute, *supra* note 17, at art. 68(5).

144. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 4.

145. *Id.* at 9.

146. Referring to the Rome Statute, *supra* note 17.

147. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 9. When Judge Jorda stated that they do not have the “same rights,” he was referring to the same rights as the Prosecution and Defense. The right of victims to participate in ICC proceedings is not as broad as the rights of the Prosecution and Defense. *Id.*

148. *Id.*

149. *Id.* at 10.

150. *Id.*

151. *Id.* at 75.

[T]oday for the first time in the history of international criminal justice, victims can express their viewpoints and concerns through their counsel. In ad hoc Courts, like the Courts of Nuremburg and Tokyo, the victims were absent, or at the very most they were questioned as witnesses of the Prosecutor. Today, they can express themselves.¹⁵²

He presented some notes on behalf of his absent co-counsel, Mr. Mulenda, which described the background of the case.¹⁵³ Mr. Mulenda's notes explained how Mr. Dyilo was responsible for the abduction and forced conscription of many children into his militia.¹⁵⁴ Mr. Walleyne went on to explain how the Congolese justice system is not equipped to handle international crimes with so many victims.¹⁵⁵ This is precisely why "the Congolese victims put their hope in the International Criminal Court."¹⁵⁶ Mr. Walleyne described his victims as being unable to attend school anymore and being haunted by demons.¹⁵⁷ He emphasized how entire families are affected by conscription and enlistment of these children, not just the children themselves.¹⁵⁸

Mr. Walleyne clearly stated that he was grateful to the Court for allowing his clients to participate in the Confirmation of charges Hearing while remaining anonymous.¹⁵⁹ He mentioned that due to this anonymity, his clients "exercise less rights than those provided for in the Rules of Procedure and Evidence,"¹⁶⁰ however, his clients do not wish to waive their anonymity because they fear "reprisals from the UPC movement."¹⁶¹

Mr. Walleyne ended his dramatic recount of the horrors suffered by his clients by stating:

[W]e hope that in the coming months the presence of

152. *Id.* at 76.

153. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 76.

154. *Id.* at 77.

155. *Id.* at 79.

156. *Id.* For this hearing, only four victims were granted participatory status despite the fact that the ICC Registrar received numerous applications. *Id.* at 8. The application process to become a victim participant requires that varying degrees of evidence be presented to the court. See ICC Rules of Procedure and Evidence, *supra* note 18, at rule 89. This is the result of administrative convenience, logistics, and adherence to the procedural rights of the defendant. *Id.*

157. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 81.

158. *Id.*

159. *Id.* at 82.

160. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 82 (referring to the ICC Rules of Procedure and Evidence, *supra* note 18).

161. *Id.* By "UPC movement" Mr. Walleyne was referring to those loyal to Mr. Dyilo.

the victims will remind all the participants that these proceedings are not an intellectual exercise; that it is not an absorbing exchange between the Prosecution and the Defense, but that the destruction of the thousands of young lives -- of thousands of young lives will be at the centre of discussions.¹⁶²

When Mr. Walley concluded his opening statement, Judge Jorda turned to the legal representative for victim 05, Mr. Gebbie.¹⁶³ Mr. Gebbie began by stating that the most important thing was that his client holds Mr. Dyilo "criminally responsible in respect of the totality of his complaint of recruitment and deployment as a child soldier."¹⁶⁴ Recognizing that this hearing was the first of its kind for victim participation, Mr. Gebbie announced,

The primary concern of the victim is his recognition as a human being, who is entitled to the dignity and respect that we are all entitled to. The victim requires this recognition, firstly, in the sight of the Court; he requires it in the sight of the world; and, most especially, he requires it in the sight of the person whom he holds criminally responsible -- Thomas Lubanga Dyilo.¹⁶⁵

Mr. Gebbie continued his opening remarks by explaining the limits to which victims may participate in the proceedings of the ICC.¹⁶⁶ He pointed out that victims have no say in the charges brought before the Court, nor are they eligible to introduce evidence or call witnesses.¹⁶⁷ He also mentioned that the Court, in applying Rule 121(10) of the ICC Rules of Procedure and Evidence,¹⁶⁸ does not have to make all documents available to the legal representatives of the victims and that the legal representatives may only have access to those documents that are available to the general public.¹⁶⁹ Mr. Gebbie explained that the victims' representatives do not even have the right to be present during closed sessions in which the Prosecution and Defense may request to have issues ad-

162. *Id.* at 91.

163. *Id.* at 93.

164. *Id.*

165. *Id.* at 96.

166. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 97.

167. *Id.*

168. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 121.

169. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 97.

dressed.¹⁷⁰

In conclusion, though, he did reaffirm the right of the victims to participate, to make opening and closing statements, and to make requests to the Court should they wish to question a witness.¹⁷¹ He added that throughout the trial, it will be his duty to ensure that the victims' rights are carried out to the utmost by, among other things, asking the Court at each public session if something may have arisen during a closed session that "impacted the interests and concerns of the victims".¹⁷²

B. Questioning the Witness

During the Confirmation of charges Hearing, the Prosecution chose to call only one witness, Ms. Christine Peduto, an employee of the High Commissioner for Human Rights for issues relating to children.¹⁷³ Ms. Peduto worked in Ituri, in the Democratic Republic of Congo, from May of 2003 until June of 2004,¹⁷⁴ as a child protection advisor for the United Nations Organization Mission in the Democratic Republic of Congo (MONUC).¹⁷⁵ Ms. Peduto took the stand as a witness on November 15, 2006.¹⁷⁶ She was questioned by the Prosecution at length about her involvement in the Democratic Republic of the Congo and her knowledge of the situation involving Mr. Dyilo.¹⁷⁷

On November 20, 2006, the Defense, led by Mr. Dyilo's attorney, Mr. Jean Flamme,¹⁷⁸ began its cross-examination of Ms. Peduto.¹⁷⁹ On November 21, 2006, after the midday recess but before the cross-examination was complete, Mr. Mulenda, legal represen-

170. *Id.* Although the right to call witnesses, present evidence, and have unlimited access to documents would further promote the aims of restorative justice, these restrictions should not diminish the importance of the rights that victim participants do have before the ICC. It is unlikely that victims will ever have the same full procedural rights as the prosecution and defense because the court must remain committed to ensuring the defendant receives a fair trial. Furthermore, the ICC has both limited time and a limited budget and is unable to accommodate every victim applicant and request.

171. *Id.* at 98.

172. *Id.* at 101-02.

173. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Confirmation of charges Hearing, (Nov. 15, 2006), at 7, available at http://www.icc-cpi.int/RDC/c0106/c0106_hs.html.

174. *Id.* at 11.

175. *Id.* at 12.

176. *Id.* at 4.

177. *Id.*

178. Jean Flamme, of Belgium, was selected by Thomas Lubanga Dyilo as his personal counsel on April 13, 2006. *Background to the Case*, *supra* note 129, at 1.

179. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Confirmation of charges Hearing, (Nov. 20, 2006) at 5, available at http://www.icc-cpi.int/RDC/c0106/c0106_hs.html.

tative of victims 01-03,¹⁸⁰ informed Judge Jorda that he had a question that he would like to put to the witness.¹⁸¹ Judge Jorda asked Mr. Mulenda if he wished to pose his question during a closed session, but Mr. Mulenda replied that he would prefer to ask it before that.¹⁸² In response, Judge Jorda suggested that Mr. Mulenda pose his question near the end of that day's hearing, and then the judges would deliberate and decide whether or not to authorize the question.¹⁸³

Around 4:00 p.m. that afternoon, Judge Jorda referred to Mr. Mulenda's request by stating "I would like to consult my colleagues to know if we should take your question by -- in writing or orally."¹⁸⁴ I assume that Judge Jorda signaled for Mr. Mulenda to ask the question orally because immediately thereafter, Mr. Mulenda said:

The witness saw several parents in Bunia. These parents came to see her, either to help in the demobilisation process of their children or to help them find their children, and therefore I would like to know whether the witness started a written procedure. Did she take notes during the interview she had with these parents; that was my question.¹⁸⁵

Before coming to a decision about allowing the witness to answer the question, Judge Jorda stated that he wanted to ask the Prosecution and Defense counsel what they thought about the question.¹⁸⁶ Mr. Withopf,¹⁸⁷ for the Prosecution, answered that he had no problem with the question being asked to the witness.¹⁸⁸ However, Mr. Flamme, for the Defense, stated that he would prefer to wait and respond after the break.¹⁸⁹ Judge Jorda agreed to allow this and the hearing adjourned with the proceedings to continue in closed session.¹⁹⁰ As a result, it is not clear whether or not Mr. Mulenda was permitted to ask Ms. Peduto this question. When the hearing resumed in open session on November 22, 2006, no refer-

180. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 4.

181. Nov. 21 Confirmation of charges Hearing, *supra* note 23, at 95.

182. *Id.* at 96.

183. *Id.*

184. *Id.* at 141.

185. *Id.* at 142.

186. *Id.*

187. Senior Trial Lawyer, Mr. Ekkehard Withopf.

188. Nov. 21 Confirmation of charges Hearing, *supra* note 23, at 142.

189. *Id.*

190. *Id.*

ence was made to the question.¹⁹¹

C. Document Requests

According to the ICC Rules of Procedure and Evidence, the victims or their legal representatives are entitled to have access to records of all proceedings before the ICC as well as all documents transmitted to the Chamber subject only to “restrictions concerning confidentiality and the protection of national security information. . . .”¹⁹² On November 24, 2006, during the Confirmation of the charges Hearing, Mr. Flamme mentioned that his client, Mr. Dyilo, did not have any money because his assets had been frozen several months prior to the hearing.¹⁹³ Mr. Flamme addressed this issue in response to allegations that Mr. Dyilo had continued funding UPC operations out of his own pocket.¹⁹⁴ In order to prove that Mr. Dyilo’s assets had been frozen, Mr. Flamme requested that the Registrar produce a report regarding the freezing of assets.¹⁹⁵

In concurrence, Mr. Walley, as legal representative of victims 01-03,¹⁹⁶ asked leave of the Court to state:

[W]e support the request of the Defense, which aims . . . to ask for a report from the Registrar with regards to the results of the freezing of the assets which was made several months ago. This is something that would be of interest to the victims, and possibly as well to envisage reminders with regards to certain States, which perhaps haven’t yet produced reports with regards to this request.¹⁹⁷

Judge Jorda responded that the Chamber would address Mr. Walley’s request in due course and proceeded to ask the representative of the Registrar whether or not those documents, or a reference to them, had been included in the evidence.¹⁹⁸ According to the transcripts, the Registrar must have expressed that the docu-

191. See *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Confirmation of charges Hearing, (Nov. 22, 2006), available at http://www.icc-cpi.int/RDC/c0106/c0106_hs.html.

192. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 121.

193. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Confirmation of charges Hearing, (Nov. 24, 2006), at 5, [hereinafter Nov. 24 Confirmation of charges Hearing] available at http://www.icc-cpi.int/RDC/c0106/c0106_hs.html.

194. *Id.*

195. *Id.*

196. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 8.

197. Nov. 24 Confirmation of charges Hearing, *supra* note 193, at 8-9.

198. *Id.*

ments were included because Judge Jorda replied, “[w]ill there be reference for it? Yes? Thank you.”¹⁹⁹

The other document request occurred on November 27, 2006 when Mr. Walleyne asked the Court if he could have access to a piece of evidence that was discussed in the Confirmation of charges Hearing on November 24, 2006.²⁰⁰ He explained that the Prosecution had disclosed to the Court and to the Defense a piece of information concerning a confidential witness.²⁰¹ Mr. Walleyne requested that this document, or at least a redacted version of it, be made available to the legal representatives of the victims.²⁰² Judge Jorda addressed Prosecution counsel, Mr. Withopf, who stated that he would have no problem giving a redacted version of this document to the legal representatives of the victims.²⁰³

D. Closing Statements

The Confirmation of charges Hearing concluded on November 28, 2006.²⁰⁴ The legal representatives of the victims were permitted to make closing statements. Before Ms. Bapita, one of the legal representatives of victim 05, began her closing statements, Judge Jorda commented about the important role of the legal representatives of the victims.²⁰⁵ He stated, “we are listening to you very carefully, because what you have to say is perhaps what is most important, especially in view of the Statute of the ICC. Madame Bapita the floor is yours.”²⁰⁶ Ms. Bapita began by explaining the background events in the DRC leading up to the alleged recruitment and enlistment of child soldiers.²⁰⁷ She discussed the characterization of the situation as an armed conflict.²⁰⁸ Then, she specifically discussed the enlistment of victim 05 and this child’s involvement in the UPC.²⁰⁹ Ms. Bapita summarized some of the documents that had been submitted into evidence as providing support for the charges against Mr. Dyilo.²¹⁰ She concluded by stat-

199. *Id.*

200. The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Confirmation of charges Hearing, (Nov. 27, 2006), at 2, available at http://www.icc-cpi.int/RDC/c0106/c0106_hs.html.

201. *Id.*

202. *Id.*

203. *Id.* at 3.

204. Nov. 28 Confirmation of charges Hearing, *supra* note 22, at 1.

205. *Id.* at 45.

206. *Id.*

207. *Id.* at 47.

208. *Id.* at 49.

209. *Id.* at 51.

210. Nov. 28 Confirmation of charges Hearing, *supra* note 22, at 57.

ing:

I hope you will remember that, on top of my victim, millions of other victims would also have liked to participate in these proceedings and I hope you will remember that thousands of others will not be able to even want to, as they died on the battlefield. I hope, through the confirmation of charges, you will give us justice. Thank you.²¹¹

After Ms. Bapita finished, Mr. Mulenda, legal representative of victims 01-03,²¹² was able to speak.²¹³ He discussed, among other things, a search and seizure conducted in the DRC that had been ruled illegal by the Kisangani Appeals Court.²¹⁴ Mr. Mulenda also discussed how the Rome Statute permits summaries of witness interviews to be used in proceedings leading up to the trial.²¹⁵ In order to protect the anonymity of certain witnesses, Article 61 of the Rome Statute permits “[t]he Prosecutor [to] rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.”²¹⁶ He also reminded the Court that, in spite of the Defense’s criticism of allowing anonymity of witnesses, the Rome Statute specifically permits this.²¹⁷

Mr. Mulenda was followed by Mr. Walley, the last of the legal representatives of the victims to make closing remarks.²¹⁸ He began with:

Mr. President, your Honors, the representatives of the victims have had the honour over the last three weeks to participate in this first confirmation hearing before your Court. We have listened at length. We have listened far more than we have spoken, and we have studied -- studied those materials we were allowed to examine, and we have observed²¹⁹

211. *Id.* at 59.

212. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 2.

213. Nov. 28 Confirmation of charges Hearing, *supra* note 22, at 59.

214. *Id.* at 61. The defense argued that any evidence procured during this search is inadmissible because the Kisangani Court held the search to be illegal. *Id.* The evidence collected here was not relied on heavily during the Confirmation of charges Hearing but may become an issue for the ICC judges that preside over Mr. Dyilo’s actual trial. *Id.*

215. Rome Statute, *supra* note 17, at art. 61(5).

216. *Id.*

217. *Id.* at art. 68(5).

218. Nov. 28 Confirmation of charges Hearing, *supra* note 22, at 70.

219. *Id.*

Mr. Walley proceeded to explain how his clients were in fact forced to participate in the UPC militia and were not there voluntarily.²²⁰ He also noted that the victims are not primarily motivated by the desire for financial compensation, claiming “[a]t this stage in the proceedings, the priority for the victims is that the truth be established.”²²¹ He concluded by stating that he sincerely hoped that the Court would confirm the charges brought against Mr. Dyilo based on the years of investigative work culminating in the evidence and statements presented to the Court during the hearing.²²²

The Confirmation of charges Hearing concluded at 4:57 p.m. on November 28, 2006.²²³ Judge Jorda informed the Court that the judges of the Pre-Trial Chamber have sixty days to decide whether or not to confirm the charges.²²⁴ He concluded the Confirmation of charges Hearing by setting January 29, 2007 as the deadline for deciding whether or not the case of *The Prosecutor v. Thomas Lubanga Dyilo* will go to trial.²²⁵

V. WAS THE ROLE OF THE VICTIMS DURING THE CONFIRMATION OF CHARGES HEARING CONSISTENT WITH THE RESTORATIVE JUSTICE INTENTIONS OF THE DRAFTERS OF THE ICC?

The idea of victim-focused prosecutions is not entirely new.²²⁶ In many South American and European countries practicing civil law, victims are considered to be those most deserving of prosecuting their offenders.²²⁷ On the other hand, countries like the United States do not permit victim participation in the prosecution of offenders (aside from possible participation as a witness), leaving that role entirely to the State.²²⁸ Recently, however, there has been an increased international recognition of the need and right of victims to be involved in the prosecution of those offenders who commit crimes against them.²²⁹ This recognition is manifested in the Rome Statute and Rules of Procedure and Evidence of the

220. *Id.* at 73.

221. *Id.* at 74.

222. *Id.* at 86.

223. *Id.* at 151; see also *First ICC Confirmation of Charges Hearing Concludes*, INT'L CRIMINAL COURT NEWSLETTER, (The Hague, Neth.), Dec. 2006, at 4, available at http://www.icc-cpi.int/library/about/newsletter/11/en_04.html.

224. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 151.

225. *Id.*

226. Aldana-Pindell, *supra* note 7, at 1406.

227. *Id.*

228. *Id.* Victims may bring tort suits against their offender in the form of a civil suit. However, the monetary costs of a tort suit may be too substantial for many victims.

229. Mekjian & Varughese, *supra* note 5, at 2. See also Mills, *supra* note 1, at 458.

ICC.²³⁰ The drafters of the Rome Statute realized that victims of mass atrocities were not only concerned with the criminal prosecution of offenders but were also concerned with being restored.²³¹

A. Restorative Justice

The concept of restorative justice “focuses on the impact of the offender’s actions on the victim and a defined community.”²³² It has developed as a complement,²³³ or alternative, to the retributive justice model which considers crime to be an action against the State.²³⁴ Retributive justice theory is based on punishing the individual offender for the good of society with little or no focus given to the individual victim.²³⁵ Conversely, restorative justice seeks to determine: “Who has been hurt? What do they need? Whose obligations and responsibilities are these? Who has a stake in this situation? What is the process that can involve the stakeholders in finding a solution?”²³⁶ The restorative justice process also permits and encourages victims to participate in the proceedings involving their offender.²³⁷

The science of victimology, or the study of victims, is the “companion” to criminology and offers helpful insight into the needs of victims.²³⁸ Studies in this area have shown that the victims need more than simply punishment of their offender.²³⁹ Research shows that when victims are given an active role in a criminal justice process that “was designed to restore, rather than simply to punish, [they] were much more satisfied with the criminal justice system overall.”²⁴⁰ In fact, victims gain much more when actively involved in a program focused on restorative healing as opposed to having only a passive role in the prosecution of their offender.²⁴¹ Restorative justice does not only include the idea of allowing vic-

230. Di Giovanni, *supra* note 65, at 40.

231. *Id.*

232. Mills, *supra* note 1, at 463.

233. Under the Rome Statute and ICC Rules of Procedure and Evidence, restorative justice is designed to complement, not replace, retributive justice. *See* Rome Statute, *supra* note 17; *see also* ICC Rules of Procedure and Evidence, *supra* note 18.

234. Jonathan Todres, *Toward Healing and Restoration for All: Reframing Medical Malpractice Reform*, 39 CONN. L. REV. 667, 706 (2006).

235. Mills, *supra* note 1, at 463.

236. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 63 (2002).

237. Harry Mika, et al., *Listening to Victims- A Critique of Restorative Justice Policy and Practice in the United States*, 68 FED. PROBATION 32, 33 (2004).

238. Mills, *supra* note 1, at 462.

239. *Id.*

240. *Id.* at 492; *see also* Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 24 (2003).

241. Strang & Sherman, *supra* note 240, at 15.

tims to have a greater role in the proceedings against their offender. In addition, it also encourages the victim to engage in self-reflection of the crime and consider which elements of the crime could have possibly been prevented.²⁴² Ultimately, some victims will even request a meeting with their offender in which they seek to obtain an apology or a showing of remorse.²⁴³ Restorative justice researchers Strang and Sherman noted the results of a study showing that when victims met with their offender through a mediation program, they later experienced less fear and a greater sense of personal security than other victims.²⁴⁴

Restorative justice theorists feel that valuing the role of the victim helps the victim heal but also deters future crime.²⁴⁵ Studies show that violence can be transferable, turning victims into future victimizers.²⁴⁶ In many instances, victims will become victimizers for "vendetta, vengeance, reprisal, retaliation, [sic] getting even, paying back, settling of accounts, as well as cases of self-defense, vigilante action, auto-justice or taking the law into one's own hands."²⁴⁷ Statistics support a clear link between the "interchangeability of victim and victimizer."²⁴⁸ One study showed that, in addition to a strong likelihood that victims could cross over and become offenders, this propensity toward violence could also be passed to future generations.²⁴⁹ The implications of these findings show support for the importance of victim healing and restoration.

In order to be successful, restorative justice practices must be implemented to ensure that victims feel secure. These practices should guarantee specific rights to the victims "such as confidentiality, the ability to choose to become involved or to cease involvement, the option of reconsidering an outcome, and the ability to give voice to their own needs and aspirations (in lieu of being side-stepped by surrogate voices, such as prosecution)."²⁵⁰ Furthermore, victims participating in restorative justice programs should receive all necessary information regarding the status of the case and all

242. Mills, *supra* note 1, at 463.

243. *Id.*

244. Strang & Sherman, *supra* note 240, at 29-30. It is important to note that these studies were conducted in a domestic setting absent civil conflict. To the author's knowledge, no study on the implementation of restorative justice theory in a foreign country undergoing civil conflict exists.

245. Mills, *supra* note 1, at 481.

246. Ezzat A. Fattah, *The Vital Role of Victimology in the Rehabilitation of Offenders and Their Reintegration into Society*, 56 RESOURCE MATERIAL SERIES 71, 82 (2000) (Can.), available at http://www.unafei.or.jp/english/pdf/PDF_rms/no56/56-07.pdf.

247. *Id.* at 79-80.

248. Mills, *supra* note 1, at 481.

249. *Id.* at 482.

250. Mika, *supra* note 237, at 35.

possible outcomes.²⁵¹ Because taking an active role in the criminal proceedings of their offenders is an important component of restorative justice, there should be an audience to observe this participation.²⁵² If victims speak but no one listens, individual victims may receive some minimal benefit but nothing inures to the victim community at large.²⁵³ Judicial proceedings provide an appropriate setting for restorative justice aims.²⁵⁴ There, victims can be assured that they will be safe and that they will have a forum for their concerns. The legal system will also specifically define the “role[s] that victims may play in contributing both to the prosecution of their victimizers and to their own healing.”²⁵⁵

Some restorative justice theorists strongly advocate victim-offender mediation sessions.²⁵⁶ These sessions originally involved only the victim, offender and a third-party facilitator.²⁵⁷ However, as time went on, the sessions grew in size to involve other participants, such as family members of the victims and other supporters.²⁵⁸ Today, many forms of victim-offender mediation sessions exist that are based on the idea of fostering meaningful communication between the parties so that the conflict can hopefully be resolved.²⁵⁹ These mediation sessions typically occur during “[d]iversion [programs], pre-court, post-process adjudication, [or] post-sentence.”²⁶⁰ The main goal of these interactions is to create a secure environment for the offender and victim to discuss the crime and its aftermath²⁶¹ in an effort to move forward and allow the offender to begin making amends.²⁶² Studies have shown that victims who engage in mediation sessions with their offender feel “a significant reduction in fear and a significant increase in their sense of security.”²⁶³

Restorative justice can also involve healing the victim through reparations made by the offender.²⁶⁴ Traditionally, reparation has

251. *Id.*

252. *Id.*

253. *Id.*

254. Mills, *supra* note 1, at 482.

255. *Id.*

256. JOHNSTONE & VAN NESS, *supra* note 28, at 212.

257. *Id.* at 214.

258. *Id.* at 213-15. Other forms include Family Group Conferencing (where families of victims are brought together with the offenders) and Circles (where all interested stakeholders such as victims, offenders, family members and community members sit in a circle and speak when they are in possession of the “talking piece”). *Id.*

259. *Id.* at 213.

260. *Id.*

261. *Id.* at 217.

262. *Id.* at 224.

263. Mills, *supra* note 1, at 463.

264. JOHNSTONE & VAN NESS, *supra* note 28, at 28.

come to mean "a kind of recompense, which means to give back or give something of equivalent value."²⁶⁵ There are two main forms of reparations, or manners in which an offender can make amends: material reparation and symbolic reparation.²⁶⁶ While the two are not mutually exclusive, material reparations usually involve the offering of something concrete such as money, property, counseling, transportation, employment, or medical treatment.²⁶⁷ Symbolic reparation usually involves an apology by the offender, but could also include an explanation by the offender of why the crime was committed and an acknowledgment that it was wrong.²⁶⁸ Howard Zehr, a leading restorative justice theorist, argues that the appropriate form of reparation is one that "is tailored to meet a victim's particular needs, when the terms of the reparation are chosen by those most directly involved and when it is offered rather than ordered."²⁶⁹ In spite of this plan for ideal implementation, there are many instances where this level of detail and refinement is simply not possible. Overall, it is important to note that any attempt toward reparation is consistent with restorative justice since reparation is aimed at achieving "repair, vindication, the location of responsibility and the restoration of equilibrium."²⁷⁰

While many proponents of traditional adversarial systems have argued its incompatibility with restorative justice, the contradiction is not necessarily self-evident.²⁷¹ In fact, studies have shown that the inclusion of programs and services designed to restore victims and "move beyond guilt and punishment opens a new door into fighting crime."²⁷² When restorative justice programs are implemented with respect to the procedural rights of the defendant and in regard to the needs of the prosecution, the aims of both punishment and healing should successfully coexist.

B. The Role of Restorative Justice in the ICC

The drafters of the Rome Statute of the ICC specifically focused on increasing the role of the victim in international criminal proceedings.²⁷³ The victim's increased role involved participation in the actual criminal proceedings as well as the right to collect repa-

265. *Id.* at 24.

266. *Id.* at 27.

267. *Id.*

268. *Id.* at 28.

269. *Id.* at 29.

270. *Id.* at 37.

271. Mills, *supra* note 1, at 464.

272. *Id.* at 465 (citing Fattah, *supra* note 246).

273. Di Giovanni, *supra* note 65, at 40.

ration payments directly from the offender.²⁷⁴ In fact, the drafters were very much aware of the fact that there should be, as reflected in the Rome Statute, the idea that victims cared not only about retributive justice for their offenders, but also restorative justice in the form of “compensation, restitution, or otherwise.”²⁷⁵ The ICC was described as a

new court . . . administering restorative justice. Under this system reparations will be made to victims, and victims will also be able to take part in proceedings, with rights to privacy, representation, and to security of person. The newly finalized Rules protect and promote these rights and interests, and establish a procedural framework to give meaning and effect to these important provisions, without in any way infringing upon the rights of the accused. A mechanism is also provided in the Rules to set up institutional support to victims through the Victims and Witnesses Unit.²⁷⁶

The increased concern for the rights of victims during the Rome Conference and the General Assembly’s Preparatory Committee for the Draft Statute of the ICC was due largely in part to the limited role allowed to victims in the previous international criminal tribunals.²⁷⁷ During the drafting process, many Non-Governmental Organizations (NGOs) also championed the rights and role of the victim in the ICC.²⁷⁸ As a result of increased global recognition of the devastation and suffering caused by mass atrocities,²⁷⁹ the role of the victims, and their need to be healed, has gained prominence.²⁸⁰

In practice, the incorporation of some aspects of restorative justice into ICC proceedings is meant to complement the traditional retributive justice approach.²⁸¹ Roy S. Lee states that the ICC has jurisdiction to “impose penalties and to make reparation to victims.”²⁸² Similarly, the participation of victims was described as

274. *Id.*

275. *Id.*

276. ROY S. LEE, *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE*, at lxiv (2001).

277. Mekjian & Varughese, *supra* note 5, at 16.

278. Peter G. Fischer, *The Victims' Trust Fund of the International Criminal Court - Formation of a Functional Reparations Scheme*, 17 *EMORY INT'L L. REV.* 187, 195 (2003).

279. Mekjian & Varughese, *supra* note 5, at 2.

280. Aldana-Pindell, *supra* note 7, at 1407.

281. LEE, *supra* note 276, at lix.

282. *Id.*

important “because the Court’s role should not purely be punitive but also restorative.”²⁸³ Clearly, the ICC is still focused on punishing the offender in an effort to avoid having injuries go unpunished and conflicts continuing to arise.²⁸⁴

As in common-law adversarial systems that are based on retributive justice theory, the ICC employs a prosecutor to conduct both the investigation and the prosecution.²⁸⁵ A Pre-Trial Chamber of Justices is appointed to monitor the activity of the Prosecutor and be sure that he or she is not abusing their authority.²⁸⁶ An interesting incorporation of restorative justice is seen in the ability of victims to participate in the investigation.²⁸⁷ Additionally, the incorporation of restorative justice into ICC procedure has changed the traditional two-party system of Prosecution and Defense into a three party system in which victims are given their own unique role.²⁸⁸

The Rome Statute and the Rules of Procedure and Evidence clearly establish a role for the victim in most ICC proceedings.²⁸⁹ However, these documents seem in many ways to place the extent of the victims’ participation in court proceedings in the hands of the judges, to be decided on an individual basis.²⁹⁰ This could largely be based on the ICC’s desire to provide a voice to the victims while also maintaining the right of the defense to a fair trial and the right of the prosecution to present its case. While drafting the Rules of Procedure and Evidence that accompany the Rome Statute, it was established that while the Rules should

guide the Court when making orders for protective and special measures, they should not be overly prescriptive or exhaustive. They should allow the Court sufficient flexibility to respond to the particular interests, needs or personal circumstances of individuals in a particular case. The . . . most crucial was

283. Gilbert Bitti & Håkan Friman, *Participation of Victims in the Proceedings*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 456, 457 (Roy S. Lee ed., 2001).

284. LEE, *supra* note 276, at lix.

285. *Id.* at lx.

286. *Id.*

287. Hemptine & Rindi, *supra* note 94, at 344.

288. LEE, *supra* note 276, at lxiv.

289. Rome Statute, *supra* note 17; *see also* ICC Rules of Procedure and Evidence, *supra* note 18.

290. Hemptine & Rindi, *supra* note 94, at 343; *see also* Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 10 (explaining that while victims do have rights in the ICC proceedings, they do not have the same rights and that their participation will be decided on a “case-by-case” basis).

that the rules -- as a vital cog in the machinery of international justice -- must strike an appropriate balance between protecting victims and witnesses and respecting the rights of an accused under the Statute and international law.²⁹¹

Perhaps the newness of the Court and the novelty of incorporating restorative justice aims were considered in deciding to allow the Court flexibility. The fact that the extent of victim involvement is largely decided on a case-by-case basis²⁹² is very likely a response to the drafters' concerns about maintaining the due process rights of the defendant as well as the ability of the prosecution to try its case. When the rights of victims to participate in the proceedings come in conflict with the other roles of the tribunal (i.e. retributive justice aims of the prosecution and the procedural rights of the defendant) the Court will have the flexibility to limit or expand victim involvement.

C. Pre-Trial Chamber in The Prosecutor v. Thomas Lubanga Dyilo Upholds the Incorporation of Restorative Justice Aims

As demonstrated in the previous sections of this Note, the drafters of the Rome Statute clearly wanted a more active role for victims than that in previous international criminal tribunals. However, the incorporation of restorative justice practices into a traditionally retributive arena remained to be seen. The recent Confirmation of charges Hearing in the case of *The Prosecutor v. Thomas Lubanga Dyilo* provided the first illustration of the limits to which the ICC judges would go to permit victim participation in ICC proceedings. This Section will explore the ways in which the Confirmation of charges Hearing upheld restorative justice aims and the ways in which it failed to do so.

To begin, the level of victim participation was consistent with the active role advocated by restorative justice theorists. An active role in the justice proceedings of their offender has been shown to aid victims in feeling more satisfied with the criminal justice system as a whole.²⁹³ In accordance with Article 68 of the Rome Statute²⁹⁴ and Rule 91 of the ICC Rules of Procedure and Evidence,²⁹⁵

291. Helen Brady, *Protective and Special Measures for Victims and Witnesses*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 434, 436 (Roy S. Lee ed., 2001).

292. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 10.

293. Strang & Sherman, *supra* note 240, at 15.

294. Rome Statute, *supra* note 17, at art. 68.

Where the personal interests of the victims are affected, the Court shall

Judge Jorda and the other judges of the Pre-Trial Chamber recognized that the personal interests of these individuals were affected and that their participation in the hearing would not be limited to written observations or submissions. In fact, the legal representatives of the victims were given the same amount of time for their opening statements as the prosecution.²⁹⁶ The legal representatives of the victims were present each day of the hearing and actively participated in each instance where the Rules permitted it.²⁹⁷ In addition to opening statements, this participation included a question posed to the witness, document requests, and closing statements.²⁹⁸ The ability to question a witness was not intended to replace the line of questioning traditionally conducted by the prosecution.²⁹⁹ It was meant to supplement it, particularly as a way to gain more information for determining possible reparations and payments in the event of a guilty verdict.³⁰⁰ Accordingly, the fact that there was only one question posed to the witness is not necessarily indicative of a lack of victim involvement. On the contrary, the fact that Mr. Mulenda's inquiry was in regard to notes taken during interviews with the families of victims speaks to the possibility of records that could be used to determine financial need down the road.³⁰¹ It is also important to note that the document request made by Mr. Walley on November 24, 2006 con-

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 [to] 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.

Id.

295. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 91.

A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions.

Id.

296. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 36, 92, 102 (allowing ninety minutes each for the opening statements of the Prosecution and the legal representatives of the victims, and two hours and fifteen minutes for the opening statement of the Defense).

297. *Id.*

298. *Id.* at 9, 94.

299. Bitti & Friman, *supra* note 283, at 467.

300. *Id.* (indicating that the drafters felt that this type of questioning during the trial and pre-trial proceedings would "avoid repeated appearances of witnesses before the Court").

301. Nov. 21 Confirmation of charges Hearing, *supra* note 23.

cerned the freezing of Mr. Dyilo's assets.³⁰² Considering the fact that under international criminal law, victims had never been able to engage in any of these processes before, it seems as though this level of participation could be considered an "active" role.³⁰³

Next, restorative justice seeks to make the proceedings public, or open to the community, so that the victims' concerns can be understood and also so that the community can take steps to monitor criminal behavior.³⁰⁴ It is important that the public, and not only the offenders, be made aware of victim trauma.³⁰⁵ Here, the Confirmation of charges Hearing was open to the public.³⁰⁶ In addition, the transcripts of all parts of the hearing that occurred in Open Session are available on the ICC website.³⁰⁷ It is not possible to know exactly what occurred during the Closed Session Hearings. In this sense, the public nature of the hearing was hindered. We do know that the Court was concerned with making the hearings as public as possible.³⁰⁸ For the majority of the proceedings, the legal representatives of the victims had a vast audience to hear their views.

Third, restorative justice theory focuses on maintaining the safety and security of the victims, thereby enabling them to assume an active role in the proceedings against their offenders.³⁰⁹ In fact, restoring the victim's sense of security overall is a major goal of the restorative justice process.³¹⁰ The drafters of the Rome Statute recognized that the success of the ICC would depend largely on whether victims and witnesses were secure enough to come forward with information.³¹¹ Similarly, the judges of the Pre-Trial Chamber felt that the situation warranted permitting the victims to remain anonymous during the hearing, while still allowing their voice to be heard.³¹² Mr. Walley, legal representative for Victims 01-03, stated that the victims in this case do not want to waive their right to anonymity because they are afraid that the

302. Nov. 24 Confirmation of charges Hearing, *supra* note 193, at 8.

303. Strang & Sherman, *supra* note 240, at 15.

304. JOHNSTONE & VAN NESS, *supra* note 28, at 235.

305. Mika, *supra* note 237, at 35.

306. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 2, 6. Judge Jorda specifically made reference to the fact that these proceedings were open to the public. In addition, reporters and photographers were granted time before the hearing began to take pictures of the participants. The proceedings were not broadcast on television. The background of the case as well as status updates were also posted on the ICC website.

307. http://www.icc-cpi.int/RDC/c0106/c0106_hs.html (last visited Jan. 8, 2008).

308. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 99.

309. Mika, *supra* note 237, at 35.

310. Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1841 (1999).

311. Brady, *supra* note 291, at 434.

312. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 82-83.

UPC will retaliate against them.³¹³ The Rome Statute states that the Prosecutor may withhold a witness' identity from the defense "prior to the commencement of the trial" if the information could seriously endanger the witness or his family.³¹⁴ This provision, while clearly pertaining to the Confirmation of charges Hearing, may not apply during the actual trial. Based on the plain language of the article, it seems as though the witnesses (some of whom are also victims in this case as well) will not be permitted to remain anonymous during the actual trial. If the victims are forced to disclose their identities, it is only to ensure that the defense has time to prepare an adequate response to their testimony.³¹⁵ Granting the defendant the right to a fair trial must not be forgotten in the quest to keep victims safe.³¹⁶

Reparation payments are also a component of restorative justice.³¹⁷ As explained earlier in this Note, the ICC has implemented a novel procedure for ensuring that victims receive reparations if the Court decides to award them. Because of the fact that the Confirmation of charges Hearing was only held to determine if the defendant should stand trial,³¹⁸ the issue of reparations did not arise here. It is important to reiterate though, that the Rome Statute and the Rules of Procedure and Evidence of the ICC clearly dictate the method for awarding reparation payments.³¹⁹ It will be interesting to see if the Court chooses to award reparations, and if so how much, after the upcoming trial.

Although the majority of the Court's decisions concerning the victims were consistent with restorative justice aims, there was one notable exception. The ICC does not have a system in place to facilitate victim-offender mediation sessions. As a result, there will likely be cases where the defendant neither expresses remorse, nor apologizes at any stage in the proceedings. Restorative justice theorists believe that this could be detrimental to the healing of both the offender and the victim.³²⁰ In the case of this Confirmation of charges Hearing, the defendant maintained and attempted to prove his innocence.³²¹ As the case will be proceeding to trial, we will have to wait to see whether or not the ultimate verdict may

313. *Id.*

314. Rome Statute, *supra* note 17, at art. 68(5).

315. ICC Rules of Procedure and Evidence, *supra* note 18, at rule 87.

316. Brady, *supra* note 291, at 436.

317. JOHNSTONE & VAN NESS, *supra* note 28, at 28.

318. Nov. 9 Confirmation of charges Hearing, *supra* note 16, at 6.

319. Rome Statute, *supra* note 17, at art. 75; ICC Rules of Procedure and Evidence, *supra* note 18, at rule 94-99.

320. JOHNSTONE & VAN NESS, *supra* note 28, at 224.

321. Nov. 9 Confirmation of charges Hearing, *supra* note 16.

lead to an expression of regret.

VI. CONCLUSION

The uniqueness of the ICC stems foremost from being the first permanent international criminal tribunal but also from its inclusion of restorative justice theory. In ICC proceedings, certain victims may be granted third party status and actively participate in various stages of the prosecution of their offender. Through the Rome Statute and the Rules of Procedure and Evidence of the ICC, the world community professes its dedication to eradicating the culture of impunity for those who commit mass atrocities. The world community also recognizes the suffering of the victims and seeks to aid their recovery by permitting their voices to be heard.

The Confirmation of charges Hearing in the case of *The Prosecutor v. Thomas Lubanga Dyilo* provided the first glimpse of how victim participation in ICC proceedings would be implemented. While the presiding judge initially stated that victim participation would largely be decided on a case-specific basis, the victim participants played an active and notable role. Their legal representatives delivered forceful opening and closing statements and were also able to obtain most documents, as well as pose a question to the witness. The restorative justice aims of victim involvement and public recognition of the crimes committed were upheld. Other restorative justice components, such as victim-offender mediation sessions and the payment of reparations, did not occur in this phase of the proceedings. Because this proceeding was only a Confirmation of charges Hearing, no verdict that could possibly have resulted in reparation payments was handed down. It remains to be seen how the ICC will implement this piece of restorative justice theory in upcoming proceedings. Unfortunately, the ICC does not have a system in place for victim-offender mediation sessions. While these sessions are frequently considered to be effective for both victims and offenders,³²² a confrontation like this could not possibly have occurred during the Confirmation of charges Hearing as a result of the victims maintaining anonymity and the defendant maintaining his innocence.

Ultimately, the ICC has taken important steps toward recognizing the voices of victims of mass atrocities and permitting those voices to be heard by the world at large. As the case of *The Prosecutor v. Thomas Lubanga Dyilo* proceeds to trial, I anticipate a larger role for the victims in that proceeding. There, victims will no

322. When the sessions are conducted in the domestic setting absent civil conflict.

longer be anonymous and will probably pose more questions to witnesses and may even make personal statements themselves.³²³ As restorative justice advocates suggest, an active role for the victim is essential to aid their healing, reduce further criminal behavior, and alert the community to take steps to prevent such atrocities from happening again. The ICC seems to be an important vehicle for the incorporation of restorative justice in both theory and practice.

323. The victims may wish to make a statement instead of having their legal representatives speak for them.