

TOWARDS BUREAUCRATIZATION: AN ANALYSIS OF COMMON LEGAL REPRESENTATION PRACTICES BEFORE THE INTERNATIONAL CRIMINAL COURT

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Résumé de l'article

La place des victimes dans le projet pénal international a, depuis l'établissement de la Cour pénale internationale (CPI), été largement traitée par la littérature tant technique que critique. D'une manière tout à fait innovatrice, l'article 68(3) du *Statut de Rome* permet aux victimes de crimes de masse de présenter leurs vues et préoccupations devant la juridiction pénale internationale permanente. Or, l'évolution de la jurisprudence au cours de la dernière décennie indique que, à l'instar de leur rôle devant les autres tribunaux pénaux internationaux, les victimes n'auront finalement pas l'opportunité de participer directement aux procédures devant la CPI. En effet, le véritable acteur, voire la véritable voix des victimes, sera celle de leur représentant légal. C'est donc à travers cet acteur que le présent article souhaite traiter de la problématique de la participation des victimes devant la CPI. La représentation légale commune – soit la représentation de centaines, voire milliers de victimes par un seul avocat – s'est rapidement révélée inévitable. Dans un souci d'efficacité, la pratique actuelle a fait de la sélection du représentant légal, un choix institutionnalisé et incité à la dépersonnalisation de la relation avocat-clients. L'auteure s'attache à démontrer les similarités entre l'organisation de cette représentation légale commune et l'idéal type d'une bureaucratie imaginée par Weber.

TOWARDS BUREAUCRATIZATION: AN ANALYSIS OF COMMON LEGAL REPRESENTATION PRACTICES BEFORE THE INTERNATIONAL CRIMINAL COURT

*Marie-Laurence Hébert-Dolbec**

The status of victims in the international criminal project since the establishment of the International Criminal Court (ICC) is largely dealt with in the literature. Article 68(3) innovated as it allows victims of mass crimes to present their views and concerns before the first permanent international criminal jurisdiction. Yet, the case law over the last two decades shows that victims will not have the opportunity to directly take part in the ICC proceedings. Those who will participate to the trials are rather their legal representatives. This article explores victim participation through this new actor of international criminal trials. Common legal representation – *i.e.* the representation of hundreds, or even thousands, of victims by a sole lawyer – was promptly presented as unavoidable. To ensure operational efficiency, the selection of the legal representative was institutionalized. The practice of the Court prompted some impersonal lawyer-clients relationship. The author demonstrates the similarities between the organization of common legal representation in the ICC and the ideal-type of bureaucracy imagined by Weber.

La place des victimes dans le projet pénal international a, depuis l'établissement de la Cour pénale internationale (CPI), été largement traitée par la littérature tant technique que critique. D'une manière tout à fait innovatrice, l'article 68(3) du *Statut de Rome* permet aux victimes de crimes de masse de présenter leurs vues et préoccupations devant la juridiction pénale internationale permanente. Or, l'évolution de la jurisprudence au cours de la dernière décennie indique que, à l'instar de leur rôle devant les autres tribunaux pénaux internationaux, les victimes n'auront finalement pas l'opportunité de participer directement aux procédures devant la CPI. En effet, le véritable acteur, voire la véritable voix des victimes, sera celle de leur représentant légal. C'est donc à travers cet acteur que le présent article souhaite traiter de la problématique de la participation des victimes devant la CPI. La représentation légale commune – soit la représentation de centaines, voire milliers de victimes par un seul avocat – s'est rapidement révélée inévitable. Dans un souci d'efficacité, la pratique actuelle a fait de la sélection du représentant légal, un choix institutionnalisé et incité à la dépersonnalisation de la relation avocat-clients. L'auteure s'attache à démontrer les similarités entre l'organisation de cette représentation légale commune et l'idéal type d'une bureaucratie imaginée par Weber.

La situación de las víctimas en el proyecto penal internacional desde el establecimiento de la Corte Penal Internacional (CPI) ha sido analizada de fondo en la literatura. De manera totalmente innovadora, el artículo 68 (3) del *Estatuto de Roma* permite a las víctimas de crímenes en masa presentar sus puntos de vista y preocupaciones ante la jurisdicción penal internacional permanente. Sin embargo, la jurisprudencia en las últimas dos décadas demuestra que las víctimas no tendrán la oportunidad de participar directamente en los procedimientos de la CPI. Los que participan en los juicios son sobre todo sus representantes legales. Este artículo explora la participación de las víctimas a través de este nuevo actor de juicios penales internacionales. La representación legal en común - es decir, la representación de cientos, o incluso miles, de víctimas por un solo abogado – resultó rápidamente inevitable. En aras de eficiencia, la selección del representante legal se institucionalizó. La práctica de la Corte llevó a una despersonalización de la relación abogado-cliente. El autor demuestra las similitudes entre la organización de la representación legal en común en la CPI y el tipo ideal de burocracia imaginado por Weber.

Victims have, for long, been invoked as an ethical or moral justification for an emerging international criminal project.¹ Yet, even though the issue of victims has been ostensibly alluded to in the nascent international criminal procedures, the victim was seldom raised in its individuality as a potential actor or subject.² For instance, even if the 5 millions Jewish, 900,000 Rwandese, or the 8,000 Srebrenica victims were largely talked about in quantitative terms, they were – except for a handful of individuals – kept anonymous and out of court.³ Neither the international military tribunals (IMTs) in Nuremberg and Tokyo, the International Criminal Tribunal for former Yugoslavia (ICTY) nor the International Criminal Tribunal for Rwanda (ICTR) have legally considered the individual victim of crime, let alone in a passive – and necessarily objectified, since its narrative has to match that of the prosecution – witness role.⁴ Numerous individuals and specialists have criticized this *failure*.⁵ Associations of victims in Rwanda most notably refused to collaborate with the ICTR to denounce the way witnesses (i.e. victims) were treated.⁶ As an answer to these critics and following a national and transnational victim movement⁷, the International Criminal Court (hereinafter “the ICC” or “the Court”) grants victims a pro-eminent and innovative status.

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¹ Julien Pieret & Marie-Laurence Hébert-Dolbec, “La CPI face à ses victimes” (2015) 1 *Revue Nouvelle* 45.

² For instance, Benjamin Ferencz, Chief Prosecutor of the Einsatzgruppen case, argued that: “Victims are often forgotten, as people pay attention to the crimes and the criminals, ignoring the survivors”. Benjamin Ferencz, “The Experience of Nuremberg” in D Shelton (ed), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (Ardsley, NY: Transnational Publishers Inc, 2000). For the purpose of this paper, the concept of “actors” will be used to qualify victims in its generic sense. The distinction between actor and subject of law – the latter which excludes the NGOs – will be the object of further researches.

³ See Aurélien-Thibault Lemasson, *La victime devant la justice pénale internationale: Pour une action civile internationale* (Limoges: Pulim, 2012).

⁴ See e.g., *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 UNTS 15 (entered into force 8 August 1945) [*London Agreement*], where there is no mention of victim(s). See also *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, Res SC 827, UN SC, 48th sess, UN Doc S/RES/827 (1993) [ICTY Statute]; *Statute of the International Tribunal for Rwanda*, Res SC 955, UN SC, 49th sess, UN Doc S/RES/955 (1994) [ICTR Statute], in which “victim(s)” and “witness(es)” are two closely-entwined notions.

⁵ See e.g., Raquel Aldana-Pindell, “An Emerging Universality of Justiciable Victims’ Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes” (2004) 26 *Human Rights Quarterly* 605 at 659. See also Vladimir N Tochilovsky, “Victims’ Procedural Rights at Trial: Approach of Continental Europe and the International Tribunal for the Former Yugoslavia” in Jan J M van Dijk, Ron G H van Kaam & JoAnne Weemers (eds), *Caring for Crime Victims: Selected Proceedings of the 9th International Symposium on Victimology* (Monsey, NY: Criminal Justice Press, 1999), 287.

⁶ See generally FIDH, n°329/2, “Victims in the Balance: Challenges ahead for the International Criminal Tribunal for Rwanda” (November 2002), online: Refworld <<http://www.refworld.org/docid/46f146be0.html>>.

⁷ Charles P Trumbull, “The Victims of Victim Participation in International Criminal Proceedings” (2007-2008) 29 *Michigan Journal of International Law* 777 at 780-84.

“Victims” thus became a transversal concept of the *Rome Statute of the International Criminal Court* (hereinafter “the *Rome Statute*” or “the *Statute*”).⁸ Mentioned more than 40 times in the *Statute*, starting in the Preamble,⁹ victims are granted a right to protection,¹⁰ reparation,¹¹ and participation.¹² The right to participate, the object of this article, is enshrined in paragraph 68(3) of the *Rome Statute*. This provision envisions victims as full-fledged actors with specific legal interests deserving to be represented.¹³ This pioneering participative space – i.e. the first occasion in international criminal justice history for any other actor than the Prosecutor or the accused to have an independent voice or action in the international criminal proceedings – is, however, characterized by a handful of conceptual ambiguities.¹⁴ Concepts such as “personal interests”, “views and concerns”, and “appropriate stage of the proceedings” contained in paragraph 68(3) are deeply equivocal. The established framework only serves as guidelines and remains subjected to judicial interpretation.¹⁵ Yet, the case law regarding this issue remains a work in progress.¹⁶ In essence, the Court decided – in an incoherent yet extensive manner – that victims could participate in each and every stage of the proceedings (from investigation¹⁷ to reparation) through, amongst others, oral and written observations, witness questioning, and by being provided access to documents.¹⁸ This

⁸ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) [*Rome Statute*].

⁹ The second paragraph of the Preamble recognizes that “[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”.

¹⁰ *Rome Statute*, *supra* note 8, art 68(1).

¹¹ *Ibid.*, art 75.

¹² *Ibid.*, art 68(3).

¹³ Sara Kendall & Sarah Nouwen, “Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood” (2013) 76 *Law & ContempProbs* 235 at 238 [Kendall & Nouwen (2013)].

¹⁴ As for the general ambiguity of the *Rome Statute*, David Hunt underlined that “[f]rom a legal point of view, too, many of the rules and standards adopted in the *Statute* have been deservedly praised as welcome development. Other aspects, however, appear to have been sacrificed in the name of political compromise or diplomatic expediency. Both politicians and diplomats will see nothing wrong with such an approach, as compromise and expediency are required in order to ensure the greatest possible number of signatures, and it is hardly an unusual way for treaties to be concluded. But it does produce a somewhat flawed basis upon which an international criminal court should be expected to operate”. David Hunt, “The International Criminal Court: High Hopes, Creative Ambiguity and an Unfortunate Mistrust in International Judges” (2004) 2 *J Int'l Crim J* 56 at 58.

¹⁵ Emily Haslam & Rod Edmunds, “Common Legal Representation at the International Criminal Court: More Symbolic than Real?” (2012) 12:5 *International Criminal Law Review* 871 at 877 [Haslam & Edmunds (2012)]. FIDH, *Victims' Rights Before the International Criminal Court: Guide for Victims, their Legal Representatives and NGOs on Victims Rights Before the International Criminal Court*, 2010 at 3.

¹⁶ Haslam & Edmunds (2012), *supra* note 15 at 873.

¹⁷ *Situation in the Democratic Republic of Congo*, ICC-01/04-556, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD Against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of Pre-Trial Chamber I of 24 December 2007 (19 December 2008) (ICC, Appeals Chamber).

¹⁸ See for example at the Pre-Trial stage *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, 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 (13 May 2008) (ICC, Pre-Trial Chamber I); *The Prosecutor v*

legal and judicial effort to materialize the victim as an actor in international criminal procedures constitutes a shift from the ICTs approach. Although it can be seen as a sizeable progression, victim participation, or at least its in-court modalities, remains a complex judicial activity. If there is a place for a victim's voice before ICC, the real participants rather seem to be the lawyers, or the victims' (legal) representatives.

This article explores victim participation before ICC from the perspective of their (legal) representation. The literature on the subject already studied the content¹⁹ and the nature of this representation (is it symbolic or real?)²⁰ in broad terms, mainly within a problem-solving perspective. Several commentators have denounced the adverse effect this new participative space would have on the proceedings. More specifically, they doubt that participation in the international criminal proceedings is in the best interests of victims.²¹ Others have rather surveyed the sociological consequences of representation before the ICC. Kendall and Nouwen have underlined the widening gap between, on the one hand, the narrowing of the legal representation in the proceedings and, on the other hand, the way the Court invokes victims in a teleological fashion as if it was the *telos* of its existence.²² Building on the recent and a growing sociological scholarship on the Court and borrowing from Weber's analysis of bureaucratic systems, the purpose of this article is essentially analytical and descriptive.

Max Weber's conceptualization of bureaucracy entails "a type of formal organization characterized by an authority hierarchy, a clear division of labour, explicit rules, and impersonality."²³ The concept of bureaucratization thus applies to the principles set up in terms of the control and coordination of large organizations.²⁴ It is the purest example of legal rational authority, which allows high levels of regulation, efficiency, and calculability.²⁵ At a time when the Court has to sustain

Jean-Pierre Bemba Gombo, ICC-01/05-01/08-320, Fourth Decision on Victims' Participation (12 December 2008) (ICC, Pre-Trial Chamber III). At the Trial stage *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1788, Decision on the Modalities of Victim Participation at Trial (22 January 2010) (ICC, Trial Chamber II).

¹⁹ REDRESS, "Representing Victims before the ICC: Recommendations on the Legal Representation System" (April 2015), online: REDRESS <<http://www.redress.org/downloads/publications/1504RepresentingVictims.pdf>>; War Crimes Research Office, "Ensuring Effective and Efficient Representation of Victims at the International Criminal Court" (December 2011) at 36 online: Washington College of Law <<https://www.wcl.american.edu/warcrimes/icc/documents/WCROReport15-VictimRepresentation.pdf>> [WCRO (2011)].

²⁰ Haslam & Edmunds (2012), *supra* note 15.

²¹ See *inter alia* Charles P Trumbull IV, "The Victims of Victim Participation in the International Criminal Proceedings" (2007-2008) 29 Michigan Journal of International Law 777; Susana SáCouto and Katherine Cleary, *Victim Participation at the Case Stage of Proceedings* (Washington DC: War Crimes Research Office, Washington College of Law, American University, February 2009), online: WCRO <<http://www.wcl.american.edu/warcrimes/icc/documents/WCROReportonVictimParticipationattheCaseStageofProceedingsFebruary2009.pdf?rd=1>>.

²² Kendall & Nouwen (2013), *supra* note 13.

²³ Margaret L. Anderson & Howard E. Taylor, *Sociology. The Essentials* (Belmont: Wadsworth, 2013) at 134.

²⁴ Peter Blau & Marshall Meyer, *Bureaucracy in Modern Society* (NY: Random House, 1987) at 3.

²⁵ Jane Sell, "The Sociology of Groups Dynamics" in Clifton D Bryant & Dennis L Peack (ed), 21st Century Sociology: A Reference Handbook (London: Sage, 2007), 171 at 173.

several critics over its inefficiency²⁶ and justify over and over its legitimacy, the perspective its bureaucratization could at first sight sooth tensions. This is particularly true when it comes to victims' management. Facing a perpetually increasing number of victims applicants who wish to participate in the trials and victims participants, the ICC needs to find new ways to efficiently deal with the issue. The bureaucratization of legal representation seems to be one of the solutions provided by the jurisprudence.

This article argues that the Court's jurisprudence has contributed to the bureaucratization of victim's participation and thereby led, counter-intuitively, to a new form of victims' marginalization or invisibility within the international criminal system. In other words, institutionalization of the ICC has transformed victims into bureaucratic objects devoid of any political or legal agency. The argument unfolds as follows. First, it traces down the *positivisation* of victims – their insertion into substantive law – through the history of international criminal justice (I). It illustrates how, despite the apparent promises of the *Rome Statute*, the inevitability of common legal representation in order to manage victims' claims, which rapidly became a bureaucratic burden, prevented their blooming as subjects of international criminal law. In the second part, this article identifies who are the victims' representatives before concluding that the enforcement of common legal representation logically, even necessarily, led to its bureaucratization and, as a consequence, impeded any political use of the participative space intended to victims, which was created by Article 68(3) (II).

I. The *Positivisation* of Victims Within the International Criminal Project

The victim of mass criminality²⁷ is, since the adoption of the Rome Statute, taken into account (on paper at least) by international criminal law. In an attempt to turn survivors of international crimes into more than abstract, if not “imagined”²⁸, entities justifying international penal intervention, victims are granted rights, and more especially, participative rights (a). The exercise of these rights has quickly proven to be a judicially complex activity requiring a formal representative qualified and authorized to speak on behalf of the victims.²⁹ Moreover, given the number of

²⁶ See for instance David Davenport, “International Criminal Court: 12 Years, \$1 Billion, 2 Convictions” *Forbes* (12 March 2014), online: <http://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/>.

²⁷ This article will use international crimes mass crimes and mass atrocities interchangeably to refer to crimes punished under international criminal law *i.e.* genocide, crimes against humanity, and war crimes, for the time being.

²⁸ Laurel E. Fletcher, “Refracted Justice: The Imagined Victim and the International Criminal Court” in Christian De Vos, Sara Kendall and Carsten Stahn, *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015), 302.

²⁹ As one trial judge puts it: “It needs to be remembered that this is a court of law and, in particular, this is the criminal trial of the accused, and the presumption is that those who participate in the proceedings will be lawyers acting for individuals or for bodies, entities”, *The Prosecutor v Thomas Lubanga Dyilo*,

victims, common legal representation has become a decisive to *successful* international criminal proceedings (b) and slowly led to the marginalization of the victims in these same proceedings (c).

A. The *Rome Statute* Promise to Victim Participants

International criminal justice truly blossomed in the post-Cold War era which saw the establishment of *ad hoc* international criminal tribunals under Chapter VII of the UN Charter respectively for former Yugoslavia and Rwanda.³⁰ This period of rapid growth climaxed with the adoption of the *Rome Statute* and the creation of the ICC. Among the numerous characteristics that distinguish the ICC from its predecessors³¹ is the importance given to the victim(s).

Victims have never been considered in the pre-ICC era as full actors of the international criminal procedures. There was no mention of victims within the statutory and regulatory framework of the international military tribunals established in Nuremberg and Tokyo following World War II.³² Moreover, very few victims were called as witnesses.³³ This was in part due, on the one hand, to the state-centric nature of the indictments, which mainly targeted state crimes such as crimes against peace.³⁴ On the other hand, for Nuremberg at least, the Nazis technocratic zeal – and, therefore, the significant amount of material evidence available – made any victim testimony trivial. International criminal justice was then more or less stalled for more than half a century as a consequence of the Cold War. The international criminal project revived as an answer to mass atrocities committed early in the 1990s in former Yugoslavia and, subsequently, in 1994 in Rwanda. Despite some allusions to victims in their respective statute and rules,³⁵ both the ICTY and the ICTR grant victims

ICC-01/04-01/06-101-T-FR, Transcript of the Status Conference (12 January 2009) at 43: 11-14 (ICC, Trial Chamber I) as cited in Kendall & Nouwen (2013), *supra* note 13 at 247.

³⁰ UNSC RES 827, UNSCOR, 1993, UN Doc S/RES/827 [Res CS 827]; UNSC RES 955, UNSCOR, 1994, UN Doc S/RES/955.

³¹ *Inter alia* the fact that it is treaty-based, its permanency, its jurisdiction (by no means universal) that is neither country nor conflict-centered.

³² The International Military Tribunals (IMTs) were established by the Allies in Nuremberg and Tokyo in 1945 and 1946, respectively. See *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 UNTS 15 (entered into force 8 August 1945); *Charter of the International Military Tribunal for the Far East at Tokyo*, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, TIAS No 1589.

³³ See generally Luke Moffett, “The Role of Victims in the International Criminal Tribunals of the Second World War” (2012) 12:2 *International Criminal Law Review* 245.

³⁴ “The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole”, IMT, Judgment of 1 October 1946, in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (22nd August, 1946 to 1st October, 1946) at 421.

³⁵ *Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, Doc Off ICTY, Doc ICTY IT/32/Rev. 49 (as amended 22 May 2013) [RPE ICTY], rule 69 (“Protection of Victims and Witnesses”), 75 (“Measures for the Protection of Victims and Witnesses”), and 106

neither procedural rights nor rights to seek reparations. At best, the two statutes confine victims to a witness role.³⁶ Finding traces of a highly bureaucratized military operation as occurred in Germany was unlikely. This is due mainly to the nature of conflicts as part of which the prosecuted crimes were committed: civil wars occurring in delinquent states with weak administrative apparatus. Witness testimonies were thus well needed.³⁷ Despite their minor legal role, victims were nonetheless allowed to speak up on the international criminal law scene. Some judges even attempted to individualize victims by naming them rather than pointing out a nameless collectivity³⁸. Still, the Security Council when creating the ICTs disregarded the victims in two ways: they could not personally be active in the procedures and they were not authorized to seek reparations.³⁹ One of the reasons invoked by the authors of the ICTs statutes was that the tribunals were designed to deal with highly emotive high-casualty crimes, and that, therefore, the participation– or representation – of victims could be a potential threat to one of the ICTs main goals: protecting the rights of the accused.⁴⁰

Still, the approach adopted by the ICTs towards victims has repeatedly been the target of more criticisms. For instance, some victims perceived this situation as a lack of diligence. Among other things, with regards to the ICTR, the victims denounced the fact they could not participate autonomously into the proceedings whereas the Rwandan legal system allowed them to petition as a *partie civile* and to even hold the State liable under civil law.⁴¹ Even more significant was the decision of some victims' associations who warned that they would stop collaborating with

("Compensation to Victims"); *Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda*, Doc Off ICTR, Doc ICTR ICTR/3/Rev.1 (as amended 13 May 2015) [*RPE ICTR*], rule 69 ("Protection of Victims and Witnesses"), 75 ("Measures for the Protection of Victims and Witnesses"), and art 106 ("Compensation to Victims").

³⁶ As in common law systems, the victim, to be a witness, must be called to the bar by one of the two parties and shall answer their questions. His or her testimony must be useful to the establishment of the truth as well as it must be efficient. The victim will testify under oath; any lie is subject to sanctions. As a simple witness, the victim can neither be represented nor he or she can access the case file. *RPE ICTY*, *ibid*, rule 77, 85, 90 and 91. See generally Susana SáCouto & Katherine Cleary, *Victim Participation Before the International Criminal Court* (Washington DC: War Crimes Research Office, Washington College of Law, American University, 2007) at 12 [SáCouto & Cleary (2007)].

³⁷ Lemasson (2012), *supra* note 3 at 38.

³⁸ See for instance *Prosecutor v Dusko Tadic alias "Dule"*, IT-94-1-T, Sentencing Judgment (14 July 1997) at 11-55 (ICTY, Trial Chamber) (in which the judge examined the fate of each individual victim and the role of the accused in their harm). See also *Prosecutor v Dragomir Milosevic*, IT-98-29/1-T, Judgment (12 December 2007) at 247 ss (TPIY, Trial Chamber III).

³⁹ Claude Jorda & Jérôme de Hemptinne, "The Status and the Role of the Victim" in Antonio Cassese, Paola Gaeta & JRDW Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, Oxford University Press, 2002), 1387 at 1388.

⁴⁰ Namely, the right to an impartial and express trial. See Birte Timm, "The Legal Position of Victims in the Rules of Procedure and Evidence" in Horst Fischer, Claus Kreß & Sascha Rolf Lüder (eds), *International and National Prosecution of Crimes Under International Law: Current Developments* (Berlin: Berlin Verlag Arno Spitz GmbH, 2001), 289 at 293.

⁴¹ Luc Walley, "Victimes et témoins de crimes internationaux : du droit à une protection au droit à la parole" (2002) 84 RICC 51 at 59. See also Gasana Ndobu, "Les victimes face à la justice. Rwanda, deux ans après le génocide: quelles juridictions pour quels criminels?" in Alain Destexhe & Michel Forêt (eds), *De Nuremberg à La Haye et Arusha* (Brussels: Bruylant, 1997), 93.

Arusha.⁴² These criticisms – along with a strong transnational movement in favour of victims’ rights⁴³ and a growing recognition of victims’ rights in international human rights law⁴⁴ – caused the negotiators in Rome to embed the notion of victim in both the statutory and regulatory frame of the ICC.

The *Rome Statute* grants to victims of mass atrocities several rights, namely the right to protection⁴⁵, to reparation⁴⁶ and to participation. This article will focus on the latter, which is specified by paragraph 68(3). It reads as follows:

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 Evidence⁴⁷.

According to this disposition, the participation of victims is a requirement rather than a simple possibility. Be as it may, however, the modalities of this participation are left to the judges’ discretion. Indeed, the *Rome Statute* contains several ambiguous elements including the concepts of “personal interests”, “stages of the proceedings determined to be appropriate”, and “views and concerns” featured in article 68(3). The Rules of Procedure and Evidence (RPE), written after the Statute in 2002, offer some answers. First, it defines what or who is a victim. Rule 85 states that:

“Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court [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.⁴⁸

Second, a whole subsection of the RPE is devoted to victims’ participation.⁴⁹ Without providing clear guidelines about what participation precisely entails, those five provisions offer a few hints into how to access this new participative space and what could involve participation before the ICC. For instance, rule 89 provides that

⁴² See generally FIDH, Situation Report n°329/2, “Victims in the Balance: Challenges ahead for the International Criminal Tribunal for Rwanda” (November 2002), online: Coalition for the International Criminal Court <<http://www.iccnw.org/documents/FIDHrwVictimsBalanceNov2003.pdf>> [FIDH, Victims in the Balance].

⁴³ Charles P Trumbull VI, “The Victims of Victim Participation in International Criminal Proceedings” (2007-2008) 29 *Michigan Journal of International Law* 777 at 780-84.

⁴⁴ See inter alia *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GA, 40th Sess, UN Doc A/RES/40/34 (1985).

⁴⁵ *Rome Statute*, supra note 8, art 43 and 69(1).

⁴⁶ *Ibid*, art 75.

⁴⁷ *Ibid*, art 68(3).

⁴⁸ *Rule of Procedure and Evidence*, Doc off ASP ICC, 1st sess, Doc ICC-ASP/1/3 (2002), rule 85 [ICC RPE].

⁴⁹ *Ibid*, subsection 3.

those victims who want to participate must each submit an individual written application.⁵⁰ More especially, rule 91 explicitly alludes to legal representation. If article 68(3) conceives representation as a possibility (“views and concerns may be presented by the legal representatives of the victims”), the RPE only evokes the participation of the legal representative in the proceedings (and not of the victims themselves).⁵¹ Therefore, as of the adoption of these rules, it became obvious that victim participation would exclusively occur through legal representation.

In essence, the authors of the *Rome Statute* appeared to promise an autonomous voice to the victims in the proceedings. This commitment is, however, tempered by authors of the RPE who appear to have envisioned victim participation as a sort of legal representative enterprise. Thus, legal representation soon aroused as a necessity and not simply a mere choice.

B. The Necessity for (Common) Representation

Legal representation is apprehended since the redaction of the *Rome Statute*. The wording of article 68(3) addresses it as a possibility rather than as an obligation.⁵² The victim participant could then act alone or be represented,⁵³ even though self-representation seems highly unlikely.⁵⁴ Due to its complexity, international criminal law appears out of reach for the lay public, especially when as it faces a “daunting procedural labyrinth of an unfamiliar, alien, international legal forum”.⁵⁵ Managing self-represented participants could add an undesirable burden on the Court, which it is ill-equipped to face. Despite the provision of the Rules of Procedure and Evidence that states that a victim can choose her own legal representative,⁵⁶ the Court stated early on that there was no “absolute right to be represented by a legal representative of their choosing”.⁵⁷ Individual representation – as much as self-representation –

⁵⁰ *Ibid*, rule 89.

⁵¹ See for instance, *ibid*, rule 91.

⁵² “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 [our emphasis].” *Rome Statute*, *supra* note 8, art 68(3) *in fine*. It looks like the “victim’s right to present his or her ‘views and concerns’” is independent from that victim being or not being able to rely on a Legal Representative. ” *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen*, ICC-02/04-01/05-134, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on 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 (1 February 2007) at para 3 (ICC, Pre-Trial Chamber II). This idea is also conveyed by Rules 92 and 93 of the ICC RPE, *supra* note 48.

⁵³ The RPE even specify the proceedings and the manner of participation of a victim without a legal representative. ICC RPE, *ibid*, rule 89(1).

⁵⁴ The Single Judge considered it was in the interests of justice to provide the victims with a Legal Representative. *Situation in Uganda*, ICC-02/04-105, Decision on legal representation of Victims a/0101/06 and a/0119/06 (28 August 2007) at 4-5 (ICC, Pre-Trial Chamber II).

⁵⁵ Haslam & Edmunds (2012), *supra* note 15 at 877.

⁵⁶ ICC RPE, *supra* note 48, Rule 90.

⁵⁷ *The Prosecutor v Abdallah Banda Abakarer Nourain*, ICC-02/05-03/09-337, Decision on Common Legal Representation (25 May 2012) at para 12 (ICC, Trial Chamber IV) [*Banda* (25 May 2012)].

threatens the successful conduct of the proceedings.

The drafters of the ICC regulatory frame convey the impression they knew that common legal representation would be inescapable. As a matter of fact, a great share of Rule 90 of the RPE is devoted to the latter practice. As regards to common legal representation, this disposition provides in its second paragraph that:

Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, *inter alia*, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.

The Regulations of the Court later adopted (2004) by the first ICC judges also devoted their section on legal representatives to common legal representation.⁵⁸ Every provision refers to a singular legal representative of plural victims.⁵⁹ Besides, the appointment of a common legal representative of victims by a Chamber is enshrined in Regulation 80.⁶⁰ The authors of both the RPE and the Regulations of the Court were thus obviously aware that common legal representation would be an undeniable reality.

As a matter of fact, the Court soon acknowledged the unavailability of the common legal representation. In the first decision on victims' participation in the trial against Thomas Lubanga Dyilo (hereinafter "Lubanga"), a Congolese national, the Judges in Trial Chamber I reasoned that "the personal appearance of a large number of victims could affect the expeditiousness and the fairness of the proceedings, and given that the victims' common views and concerns may sometimes be better presented by a common legal representative".⁶¹ Still, in this case, the number of victims remained low, with 120 victims who were represented by five teams of lawyers during the trial.⁶² The flexible approach then adopted by the judges had some observable consequences on the proceedings. Brianne McGonigle Leyh underlines that in addition to the Prosecutor and the Defence four of the victim representatives

⁵⁸ *Regulations of the Court*, Doc off ICC, 5th sess, Doc ICC-BD/01-01-04 (2004), Regulations 79-82.

⁵⁹ See for instance *ibid*, Regulations 80(1), 81(4) and 82.

⁶⁰ *Ibid*, Regulation 80. According to Regulation 81, the named common legal representative can be a counsel from the Office of the Public Counsel for Victims (OPCV), an organ created within the Registry responsible to assist legal representatives and victims on legal and judicial issues.

⁶¹ *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1119, Decision on victims' participation (18 January 2008) at para 116 (ICC, Trial Chamber I).

⁶² Brianne McGonigle Leyh, *Procedural Justice?: Victim Participation in International Criminal Proceedings* (Cambridge: Intersentia, 2011) at 327 [McGonigle (2011)]. And one should note that there were only four victims represented by two lawyers in the pre-trial phase. *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-745, Observations écrites du représentant légal de la victime a/0105/06 (1 December 2006) (ICC, Legal Representative); *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-750, Observations présentées à l'audience de confirmation des charges pour les victimes a/001/06, a/002/06 et a/003/06 (4 December 2006) (ICC, Legal Representative).

each questioned a same witness and as a result slowed down the judicial process.⁶³ The problems encountered in the Lubanga trial were to repeat themselves in the subsequent cases as the number of victims who wish to participate increases. The reorganization of common legal representation has emerged as the best mean to minimize the further impacts of more victims.

Since common legal representation has emerged as the compulsory path: every single case involved common legal representation. In Lubanga, the first to be held before the ICC, “[t]he relatively low number of victims participating allowed victims to have the lawyers of their choice”.⁶⁴ Trial Chamber I never issued any order or decision on the organization of common legal representation in this case: it was taken care of by the victims. The portrait turned out to be different in the subsequent cases, namely because of the increasing number of victims involved. Thus, in the case against Germain Katanga and Mathieu Ngudjolo Chui⁶⁵ (hereinafter “Katanga”), Trial Chamber II considered that, the moment it has received all applications for participation in the case, it was fortunate to organize the common legal representation.⁶⁶ The judges decided that the victims would be split into two groups: one legal representative would represent all participants except for the child soldiers.⁶⁷ In the end, it was more than 365 victims who would be represented by two legal teams.⁶⁸

Common legal representation became common currency afterwards. Hence, in the case against Jean-Pierre Bemba (hereinafter “Bemba”), thousands of victims were to be represented by two legal representatives⁶⁹. In the William Samoei Ruto and Joseph Arap Sang case (hereinafter “Ruto & Sang”), there were 949 victims for one common legal representative.⁷⁰ The count stood at 839 under the charge of a single representative in the case against the Kenyan president Uhuru Muigai Kenyatta (hereinafter “Kenyatta”).⁷¹ In the Abdallah Banda Abakaer Nourain case (hereinafter

⁶³ McGonigle (2011), *supra* note 62 at 327.

⁶⁴ *Ibid.*

⁶⁵ Mathieu Ngudjolo Chui was acquitted in December 2012. See *The Prosecutor v Mathieu Ngudjolo Chui*, ICC-01/04-02/12-3-tENG, Judgment pursuant to article 74 of the Statute (18 December 2012) (ICC, Trial Chamber II).

⁶⁶ *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1328, Order on the organisation of common legal representation (22 July 2009) at para 9 (ICC, Trial Chamber II) [Katanga & Ngudjolo (22 July 2009)].

⁶⁷ *Ibid* at para 12-13.

⁶⁸ WCRO (2011), *supra* note 19 at 36.

⁶⁹ More specifically, the victims were separated in four groups based on the geographical location where their prejudice occurred. One group constituted by the victims from Bangui had its own representative. The remaining three groups were to share their representative. *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1005, Decision on Common Legal Representation of Victims for the Purpose of Trial (10 November 2010) at para 18 (ICC, Trial Chamber IV) [Bemba (10 November 2010)].

⁷⁰ *The Prosecutor v William Samoei Ruto and Joseph Arap Sang*, ICC-01/09-01/11-1933-AnxA, Annex A: Sixteenth Periodic Report on the general situation of victims in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* and the activities of the VPRS and the Common Legal Representative in the field (23 July 2015) at 2 (ICC, Registrar).

⁷¹ Against who the charges were eventually withdrawn. *The Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11-998-AnxA, Annex A: Thirteenth Periodic Report on the general situation of victims in the

“Banda”), all victims – specifically, 103⁷² – are as well represented by a sole representative⁷³. More recently, and as we will later develop, common legal representation has been organized before any victims had been recognized as participants. Thus, in the case against Laurent Gbagbo and Charles Blé Goudé (hereinafter “Gbagbo & Blé Goudé”), the grouping of victims was designed as the applications were transmitted to the Chamber.⁷⁴ 668 victims are represented by a lawyer from the Office of the Public Counsel for Victims (OPCV) helped by an external lawyer in the field.⁷⁵ A similar pattern was followed in the most recent trial against Bosco Ntaganda (hereinafter “Ntaganda”), in which the OPCV acts on behalf of more than 2000 victims.⁷⁶

case and the activities of the Victims Participation and Reparations Section and the Common Legal Representative in the field (21 January 2015) at para 1 (ICC, Registrar).

⁷² ICC, *Case Information Sheet. Situation in Darfur, Sudan: The Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-PIDS-CIS-04-006/15_Eng, 23 March 2015, online: ICC <<http://www.icc-cpi.int/iccdocs/PIDS/publications/BandaEng.pdf>>.

⁷³ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-209, Order inviting the Registrar to appoint a common legal representative (6 September 2011) (ICC, Trial Chamber IV).

⁷⁴ *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-120, Proposal for the common legal representation of victims (16 May 2012) (ICC, Registrar).

⁷⁵ *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-800, Decision on victim participation (6 mars 2015) at para 61-63 (ICC, Trial Chamber I). ICC, *Case Information Sheet, Situation in Côte d'Ivoire: The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-PIDS-CIS-CI-04-02/15_Eng, 31 March 2015, online: ICC <<http://www.icc-cpi.int/iccdocs/PIDS/publications/Gbagbo-and-BleGoudeEng.pdf>>.

⁷⁶ *Case Information Sheet, Situation in Democratic Republic of the Congo, The Prosecutor v. Bosco Ntaganda*, ICC-PIDS-CIS-DRC-02-010/15_Eng, 3 July 2015.

Figure 1: Number of victim participants vs. number of legal representatives in selected cases⁷⁷

Case	Number of victims	Number of legal representatives
<i>The Prosecutor v Thomas Lubanga Dyilo</i> ICC-01/04-01/06	129	5 (up to 7 ⁷⁸)
<i>The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui</i> ICC-01/04-01/07	366	1 (up to 2 ⁷⁹)
<i>The Prosecutor v Jean-Pierre Bemba Gombo</i> ICC-01/05-01/08	5229	1 (up to 2 ⁸⁰)
<i>The Prosecutor v William Samoei Ruto and Joseph Arap Sang</i> ICC-01/09-01/11	628	1
<i>The Prosecutor v Uhuru Muigai Kenyatta</i> ICC-01/09-02/11	725	1
<i>The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus</i> ICC-02/05-03/09	103	2
<i>The Prosecutor v Laurent Gbagbo and Charles Blé Goudé</i> ICC-02/11-01/15	668	1 (OCPV)
<i>The Prosecutor v Bosco Ntaganda</i> ICC-01/04-02/06	2149	2 (OPCV)

⁷⁷ The datas included in this table are from the case information sheets provided by the ICC on its website as of December 2015. See online: ICC <<http://www.icc-cpi.int>>.

⁷⁸ See for instance *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2220, Demande de participation à l'audition du témoin Radhika COOMARASWAMY (22 December 2012) at p 2 (ICC, Legal Representatives for Victims).

⁷⁹ Katanga & Ngudjolo (22 July 2009), *supra* note 66.

⁸⁰ Bemba (10 November 2010), *supra* note 69.

Numerous factors led to this observed unavoidability (or the “appropriateness”⁸¹, “necessity”⁸²) of common legal representation. The most important in my view is the little selectivity affected in the selection process. In fact, the ICC has a clear desire to accommodate the willingness to participate of an increasing number of potentially recognizable victims. In the first place, the Chambers broadly and liberally interpreted Rule 85, which issues a definition of what is a victim. Secondly, the Chambers and the Registry keep simplifying the application form to be filled by the victims who wish to participate.⁸³ From a lengthy 17-page document⁸⁴ through an 8-page short form⁸⁵ to a one-page optional form⁸⁶, the Court has facilitated the treatment of these applications – as well as victims’ access to procedures. However, whatever the form, the process has always been burdensome for the Registry, the Parties and the Chambers. The goal here is not to minimize the benefits of a large access to the procedures by the victims. The goal is rather to show how common legal representation is now (at least, presented as) unavoidable. As Trial Chamber II underlined, “[c]ommon legal representation is the primary procedural mechanism for reconciling the conflicting requirements of having fair and expeditious proceedings, whilst at the same time ensuring meaningful participation by potentially thousands of victims, all within the bounds of what is practically possible.”⁸⁷ The collectivization of victim representation actually looks indeed as the best mechanism to mobilize and promote victims interests without compromising the international criminal process. Whilst the reasons underlying the importance given to common legal representation are understandable, its organization to this point had a clear impact on the scope and nature of victim participation in the proceedings.

C. The Mirage of Victim Agency

As aforementioned, the number of participants rapidly increased as the practice of the Court ensued. This popularity of the ICC led to a constant evolution in the organization of the common legal representation of victims. For instance, it was

⁸¹ *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, 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 (10 August 2007) at paras 80; 162 (ICC, Pre-Trial Chamber II); *Situation in Uganda*, ICC-02/05-125, Prosecution's Document in Support of Appeal against the 6 December 2007 Decision on the Victims' Applications for Participation in the Proceedings (18 February 2008) (ICC, Appeals Chamber).

⁸² *Situation in Uganda*, ICC-02/04-117, Decision on legal representation of Victims a/0090/06, a/0098/06, a/010/06, a/0112/06, a/0118/06, a/0119/06 and a/0122/06 (15 February 2008) at 5 (ICC, Pre-Trial Chamber II).

⁸³ ICC RPE, *supra* note 48, rule 89(1); *Regulations of the Court*, *supra* note 58, regulation 86.

⁸⁴ T Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford: Oxford University Press, 2010) at Appendix VII.

⁸⁵ ICC, *Application Form for Individuals: Request for Participation in Proceedings and Reparations at the ICC for Individual Victims*, 2010, online: ICC <<http://www.icc-cpi.int/NR/rdonlyres/48A75CF0-E38E-48A7-A9E0-026ADD32553D/0/SAFIndividualEng.pdf>>.

⁸⁶ See for instance *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-67-Anx, Application for Victims' Participation (28 May 2013) (ICC, Pre-Trial Chamber II).

⁸⁷ *Katanga & Ngudjolo* (22 July 2009), *supra* note 66 at para 11.

institutionally inconceivable to treat the representation of the several thousands of victims in the Bemba trial in the same way it was taken care of as for the 129 victims in the Lubanga trial. However, as this section will demonstrate, the quest for a better organization of common legal representation restrained the potential gains in terms of agency for victims.

In this respect, the jurisprudence soon departed from the flexible approach adopted in Lubanga. In this first case treated by the ICC, there was a clear will to open a participative space for victims. First of all, the number of victim participants was kept low compared to the number of representatives. It is thus 129 victims who were represented by five counsels, easing the lawyer-client contact.⁸⁸ In addition, the applicants – individuals who sought to be recognized as victims before the Court – and the victims were able to designate (or, at least, choose from the ones on duty) their legal representative.⁸⁹ The practice adopted by Trial Chamber I in regards to victim representation was, however, heavily criticized, notably considering its impact on the length of the proceedings.⁹⁰

The Katanga case signalled what became a new trend emphasizing the protection of the integrity of the trial at the expense of victims' interests and rights. The Judges of Trial Chamber II identified in this case "three overriding concerns" which should guide the organization of common legal representation.⁹¹ Firstly, victim participation shall be meaningful rather than purely symbolic.⁹² Secondly, the proceedings shall be conducted efficiently and with appropriate celerity.⁹³ And, finally, participation shall not override the rights of the accused and a fair trial.⁹⁴ A fourth concern or requirement was later added in the Kenyan cases. It relates to "the purpose of common legal representation, which is not only to represent the views and concerns of the victims, but also to allow victims to follow and understand the development of the trial."⁹⁵ Although the judges do not give priority to any of these concerns, there is a resolute jurisprudential preference towards the second one. Trial Chamber II, in a matter of facts, favoured a proposition made by the Registry rather than the one formulated by the Legal Representatives already in place.⁹⁶ The 345 victims have then been divided in two groups: one for the child soldiers and one for

⁸⁸ ICC, *Case Information Sheet, Situation in the Democratic Republic of Congo, The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Doc off ICC ICC-PIDS-CIS-DRC-01/012/15_ENG (25 March 2015).

⁸⁹ "[U]ntil the designation of a legal representative by the applicant [our translation]". *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1879, Désignation du Bureau du conseil public pour les victimes pour la représentation légale du demandeur a/0523/08 (15 May 2009) at 4 (ICC, Trial Chamber I).

⁹⁰ See for instance WCRO (2011), *supra* note 19 at 35.

⁹¹ Katanga & Ngudjolo (22 July 2009), *supra* note 66 at para 9.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *The Prosecutor v William Samoei Ruto & Joshua Arap Sang*, ICC-01/09-01/11-460, Decision on victims' representation and participation (3 October 2012) at para 59 (ICC, Trial Chamber V); *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-498, Decision on victims' representation and participation (3 October 2012) at para 58 (ICC, Trial Chamber V).

⁹⁶ Katanga & Ngudjolo (22 July 2009), *supra* note 66.

the remaining individuals. For Haslam and Edmunds, the Court's endeavour to minimize the number of victim groups "marks a tendency towards prizing procedural efficiency as a key determinant".⁹⁷ This tendency can also be observed in the Bemba trial in which more than 1,300 victims were grouped under geographical criteria. In other words, while underlining that it was unlikely "that there will be sufficient time to contact all victims"⁹⁸, the judges formed four victim groups, each linked to a Central African Republic region.⁹⁹ A similar approach was adopted in the Mbarushimana pre-trial proceedings.¹⁰⁰ Indubitably, this kind of geographical organization of common legal representation has some direct benefits for the Registry.¹⁰¹ It represents a clear economy of resources – human, material and financial – but still, expunges some relevant factors that Article 68(1) of the Rome Statute compels the Court to have regards to, namely (but not exclusively) "age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children."

This tendency to reduce the number of groups represented coincides with the fact that the Registry and the Chambers soon ascertained that the victims' interests could constitute a more or less homogeneous whole. In other words, there was (and is) a growing assumption among Court's officials that victims' views could be reduced to a unique voice. One fine example of this assumption can be observed from the jurisprudence from the Banda trial. In this case, the facts concerned an attack carried against an African Union Mission in Sudan (AMIS) base camp in Darfur. Only two of the admitted victims were Darfuri, the others being African Union soldiers and their families. First represented by lawyers of their choice, the two Darfuri victims were later forcibly rattached to the principal group of victims by the Chamber.¹⁰² To this end, the Registry purposely summarized the victims' interests "to a desire for justice and/or reparations, these interests may substantially coincide."¹⁰³ The Court accepted the Registry arguments concluding that the interests of the Darfuri victims substantially coincide with those of the other victims as they sustained similar harms as a result of the crimes committed.¹⁰⁴

More recently, the Ntaganda and Ivorian cases fell within a straight continuation of the tendency operating. For each of these cases, all victims were

⁹⁷ Haslam & Edmunds (2012), *supra* note 15 at 885.

⁹⁸ *The Prosecutor v Jean-Pierre Bemba*, ICC-01/05-01/08-1005, Decision on common legal representation of victims for purpose of trial (10 November 2010) at para 17 (ICC, Trial Chamber III).

⁹⁹ *Ibid* at para 18.

¹⁰⁰ *The Prosecutor v Calixte Mbarushimana*, ICC-01/04-01/10-379, Report on the legal representation of participating victims (16 August 2011) (ICC, Registry).

¹⁰¹ Haslam & Edmunds (2012), *supra* note 15 at 886.

¹⁰² *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohamed Jerbo Jamus*, ICC-02/05-03/09-337, Decision on common legal representation (25 May 2012) (ICC, Trial Chamber IV) [Banda & Jerbo (25 May 2012)].

¹⁰³ *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohamed Jerbo Jamus*, ICC-02/05-03/09-203-Anx2, Proposal for the common legal representation (23 August 2011) at para 7 (ICC, Registry).

¹⁰⁴ Banda & Jerbo (25 May 2012), *supra* note 102 at para 44.

respectively regrouped with a limited consultation under a sole representation team consisted of a lawyer from the OCPV who acted before the Court on behalf of or assisted by a common legal representative situated in the field. On the other hand, in the Ruto and Muthaura trials, the victims who did not want to participate individually only had to register upon the common legal representative rather than submit a complete individual application as requested by Rule 89(1). While it results in great economy of resources and time for the Court, the Parties and the Registry, which did not have to analyze and comment each application, it had a further impact on victim agency.¹⁰⁵ The declaration made by the victims in the application form has indeed been considered as the main direct mode of participation for victims.

To sum up, the very idea of a victim agency in the ICC proceedings was virtually obliterated, partly due to the manner in which common legal representation was organized over time. As a result, the figure of the legal representative turns out to be particularly important. Despite the generalized intention to enable meaningful participation, it is obvious that, as a trial judge – Sir Adrian Fulford – reported during Lubanga trial, “[i]t needs to be remembered that this is a court of law and, in particular, this is the criminal trial of the accused, and the presumption is that those who participate in the proceedings will be lawyers, lawyers acting for individuals or for bodies, for entities.”¹⁰⁶ The next section will look at their identity and their impact on the scope of participative space created by Article 68(3).

II. The bureaucratic implications of (common) legal representation

As the first part of this article pointed out, common legal representation was soon depicted by the jurisprudence as the unavoidable answer to the new challenges brought about by victim participation. Common legal representation appeared as the best solution to conjugate the participation of an increasing number of victims with the imperatives of efficiency to which the ICC is subjected.¹⁰⁷ The legal representatives are thus the sole authorized users of the participative space created by article 68(3) of the *Rome Statute*. They are the only interlocutors acting on behalf of victims in the day-to-day proceedings. In this respect, an analysis of who are the legal representatives and of the organization of common legal representation seems crucial

¹⁰⁵ See amongst others Mariana Pena and Gaele Carayon, “Is the ICC Making the Most of Victim Participation?” (2013) 7:3 International Journal of Transitional Justice 518 at 528.

¹⁰⁶ *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-101-ENG, Transcript of Status Conference (12 January 2009) at 43: 11-14 (ICC, Trial Chamber I).

¹⁰⁷ This *urge* for efficiency comes mainly from two sources. On the one hand, it remains a priority for the funders of the Court, i.e. State Parties. See e.g. International Bar Association, *Enhancing Efficiency and Effectiveness of ICC Proceedings: A Work in Progress*, January 2011. On the other hand, the Court must ensure efficient proceedings in respect with the rights of the accused. See *Rome Statute*, *supra* note 8, art 67. , the enhancement of the Court's efficiency and effectiveness is a top priority. ICC, Press Release, “Enhancing the Court's efficiency and effectiveness – a top priority for ICC Officials” (24 November 2015), online: ICC <https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1177.aspx>.

to understand the scope and nature of victim participation. As I lay out in the next part, the evolution of jurisprudence on these two issues gives some hints of an ongoing bureaucratization.

Bureaucratization “applies to organizing principles that are intended to achieve control and coordination of work in large organization”.¹⁰⁸ It presents numerous advantages such as precision, speed, unambiguity, continuity and reduction of costs,¹⁰⁹ which are undeniably attractive in a context such as the one created by massive victim participation. Many major characteristics of the ideal type of bureaucracy have been identified from Weber’s work. A high division of labour and specialization, hierarchy of authority, and impersonal relationships mainly characterized bureaucracies.¹¹⁰ These characteristics are also observable in the organization of the representation of victims. Based on the analysis of victims’ representatives’ curriculum and of the ICC jurisprudence, the next section first details what was the organization of common legal representation envisaged by the statutory and regulatory frames of the ICC and its consequences on the identity of the representatives (a). Second, it will point out how the decision to grant the choice of representatives to the Court led to an enhanced specialization of the function (b). Third, it will further demonstrate with three jurisprudential examples how relations between Court and victims tend to be impersonalized.

A. Who Can Be a Legal Representative? The Rules

The different rules and regulations of the ICC already set the table for a future bureaucratization of legal representation. Some rules exist regarding who can perform the duties of legal representative. First, prospected victims’ counsels have to fulfill the same requirements as the defence counsels.¹¹¹ Rule 22(1) of the RPE requires for this purpose a high level of competence:

A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise.

The Regulations of the Court specified that the “necessary relevant experience” entailed 10 years of experience as a professional of justice.¹¹² Despite this necessary and rigorous requirement of expertise, it should be noted that there is no

¹⁰⁸ Blau & Meyer (1987), *supra* note 24 at 179.

¹⁰⁹ Craig Calhoun, Joseph Gerteis, James Moody, Steven Plaff and Inderhoman Virk, eds, *Classical Sociological Theory*, 2nd ed (Malden, MA: Blackwell, 2007) at 269.

¹¹⁰ Anderson & Taylor, *supra* note 23 at 135. See also George Ritzer, *Sociological Theory*, 8th ed (New York: McGraw-Hill), 2010 at 130-31.

¹¹¹ RPE ICC, *supra* note 48, rule 90(6).

¹¹² *Regulations of the Court*, *supra* note 58, regulation 67(1).

requirement to be a specialist of international criminal justice. Rule 22(1) of the RPE rather specifies that the aspiring counsel must be competent either in “international or criminal law and procedure”. Counsel satisfying all criteria contained in the regulatory frame can be added, following a number of formal procedures,¹¹³ to the *List of counsels*. The latter is a combined list of all available counsels, either for the Defence or the victims.¹¹⁴ Individuals on this list can thus be called either as a victims’ legal representative or to represent an accused. This allows a form of porosity between the two functions. For instance, a former victims’ representative in the Banda case (Situation in Darfur)¹¹⁵ is now the Defence counsel of Dominic Ongwen (Situation in Uganda).¹¹⁶

The regulatory frame concerning the scope of who can be a victim representative was thus well developed before the beginning of the activities of the Court. In addition, it should be reiterated that the Rules of Procedures and Evidence state that “[a] victim shall be free to choose a legal representative”.¹¹⁷ Furthermore, some of the rules and regulations cover specifically the option of common legal representation of victims. Rule 90(4) demands that the distinct interests of the victims be respected and conflicts of interests avoided.¹¹⁸

The early practice of the ICC formally applied these rules. The majority of the legal representatives in the Lubanga case were from the Democratic Republic of the Congo (DRC). From the five counsels¹¹⁹ who represented victims by the end of the trial, four of them are or were members of a DRC Bar Association.¹²⁰ This can be

¹¹³ *Ibid*, regulation 69.

¹¹⁴ ICC, *List of counsels* (16 September 2015), online: ICC <http://www.icc-cpi.int/iccdocs/PIDS/other/Web_List_of_counsel_16.09.2015-EN.pdf> [ICC List of counsels].

¹¹⁵ *The Prosecutor v Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09-536, Notification following the appointment of legal representatives (30 January 2014) (ICC, Trial Chamber IV).

¹¹⁶ *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/05-416, Notification of the appointment of Ms. Hélène Cisse as Duty Counsel of Mr. Dominic Ongwen (21 January 2015) (ICC, Pre-Trial Chamber II).

¹¹⁷ RPE ICC, *supra* note 48, rule 90(1).

¹¹⁸ *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1119, Decision on victims' participation (18 janvier 2008) at para 124 (ICC, Trial Chamber I) [Lubanga (18 janvier 2008)]. See also *The Prosecutor v Jean-Pierre Bemba*, ICC-01/05-01/08-322, Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims (16 December 2008) at para 8 (ICC, Pre-Trial Chamber III) [Bemba (16 December 2008)].

¹¹⁹ A sixth counsels, Hervé Diakiese, was dropped from the list of counsels in August 2011 following his one-year-suspension from the Matadi and DRC National Bar as a disciplinary sanction. *The Registrar v Mr Hervé Diakiese*, DO-01-2010, Decision of the Disciplinary Board (9 July 2010) (ICC, Disciplinary Board).

¹²⁰ See generally: ICC, *List of counsels*, *supra* note 114. And more especially, see Franck Mulenda Luetete, *Annuaire des avocats 2013-2014*, Barreau de Kinshasa-Gombe, online: Barreau de la Gombe <<http://www.barreaudelagombe.cd/index.php/annuaire-des-avocats-3?pid=44&sid=214:MULENDA-LUETETE-Franck>>; Paul Kabongo Tshibangu, *Annuaire des avocats 2013-2014*, Barreau de Kinshasa Gombe, online: Barreau de la Gombe <<http://barreaudelagombe.emelweb.biz/index.php/annuaire-des-avocats-3?pid=44&sid=315:KABONGO-TSHIBANGU-Paul>>; Joseph Keta Orwinyo, *Annuaire des avocats 2013-2014*, Barreau de Kinshasa Gombe, ICC, online: Barreau de la Gombe <<http://www.barreaudelagombe.cd/index.php/annuaire-des-avocats-3?pid=44&sid=1581:KETA-ORWINDYO-Joseph>>. For Carine Bapita Buyangandu, no more documents can be find on the websites of the Congolese bar associations. However, some official documents of the Court list her as a lawyer

explained by the fact that the victims were then still able to choose their legal representative. The fifth one was a Belgian lawyer and Lawyers Without Borders (Belgian section) former president. He was their delegate during the Rome negotiations.¹²¹ In the same vein, one of the Congolese lawyers maintained some links with international NGOs (namely, the FIDH and the Victims' Rights Working Group) notably through a local organization she founded.¹²² There were clear links between the civil society and the legal representatives at the beginning of the ICC activities. For example, after helping some victims to fill out an application to be recognized as participants before the ICC, the FIDH asked some lawyers from its *Groupe d'action judiciaire* (GAJ) to act as legal representative.¹²³ It was no surprise since numerous NGOs pushed forward victims' participation from the beginning of the negotiations and wanted to continue their work to this end.¹²⁴ In this first phase of the jurisprudence, which can be qualified as *utopian*, upheld the letter of the *Rome Statute* and the diverse rules. Victims were able to choose legal representatives from the same area who – as though they had the qualifications required by Rule 22(1) of the RPE – were not professionals of international criminal justice but rather came from civil society. A similar pattern can be observed in the Mbarushimana trial – where both lawyers were from DRC¹²⁵ – and partly in the Katanga trial in which one of the two lawyers was mission chief for Lawyers Without Borders.¹²⁶

Quickly though, another approach was deemed necessary by the Chambers (and the Registry), which, considering the high number of victims, could not cope with these high standards. The judges decided they could not detail in advance the exact criteria to determine whether a common legal representative is appropriate or not. Instead, the Chambers envisaged various *considerations* aimed at protecting the distinct interests of victims. In order to organize common legal representation, the language of the victims and the proposed representative; the temporal, geographical

at that moment to the Appeals Court of Kinshasa-Matete. See for instance, *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-929-Anx1-t-ENG, Registration of the power of attorney given by Ms Bapita to the Principal Counsel of the Office of Public Counsel for Victims (20 octobre 2010) (ICC, Registrar).

¹²¹ Walley (2002), *supra* note 41 at 51.

¹²² See inter alia FIDH, "Actes de harcèlement à l'encontre de Me Carine Bapita/Poursuite de la campagne de dénigrement contre la FIDH et ses organisations affiliées", COD 006/0708/OBS 120, 15 juillet 2008, online: FIDH <<https://www.fidh.org/Actes-de-harcelement-a-l-encontre-de-Me-Carine>>.

¹²³ FIDH, "Report of the FIDH Legal Action Group: Supporting the participation of victims from DRC before the International Criminal Court. The historic decision of 17 January 2006" (November 2006), online: FIDH <https://www.fidh.org/IMG/pdf/Note_RDC_CPI_FINALE_EN_nov2006.pdf> at 15.

¹²⁴ See on the work done by the NGOs in the Rome negotiations in general: Marlies Glasius, *The International Criminal Court: A Global Society Civil Achievement* (London/New York: Routledge, 2006). See also William R Pace and Mark Thieroff, "Participation of Non-Governmental Organizations" in Roy S Lee, ed, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (The Hague: Kluwer Law International, 1999), 391.

¹²⁵ However, both are members of the Paris bar. See Mayombo Kassongo's LinkedIn profile, online: LinkedIn <<https://www.linkedin.com/pub/mayombo-kassongo/28/a73/2b6>>; see Ghislain Mabanga's résumé, online: JuriTravail.com Avocats <<http://www.juritruavail.com/avocat/maitre-mabanga-ghislain>>.

¹²⁶ See Fidel Luvengika Nsita's LinkedIn profile, online: LinkedIn <<https://www.linkedin.com/pub/fidel-luvengika-nsita/12/577/830>>.

and circumstantial links between the victims; the crimes allegedly committed against them; their views; as well as the local traditions should be pondered among others.¹²⁷ Furthermore, it was now expected from the legal representative to be fully committed to the case, i.e. to be available full-time for the whole trial.¹²⁸ This new approach led to the establishment of a certain hierarchy in the choice of the legal representatives and to a progressive specialization of the function of legal representative.

B. Who is a Victim Representative? Institutional Choice and Specialization of the Common Legal Representatives

The authors of the Rules and Regulations have elaborated clear structure on who could be a counsel. This structure requires that the victims' representatives must be highly qualified. However, this only requirement did not provide an efficient organization of victims' representation. The Court had to find a better way to take care of its issue. This (re)structuration of common legal representation in the jurisprudence used the incorporation of hierarchy, specialization and impersonal relationships to ensure that victim participation would not have any more counterproductive effects on the trials.

The judges first decided to incorporate some degree of hierarchy – or a *chain of command* – when it comes to choosing a legal representative for the victims. This choice would now be institutionalized or, in other words, made by the Registry and the judges. I already described how victims were denied to choose their own representative early in the jurisprudence.¹²⁹ This decision did not have an immediate impact on the identity of the victims' counsels. In the Bemba trial for instance, after expressing its preference towards a representative from the situation country rather than the OCPV, Trial Chamber III assigned an active member of CAR civil society as the common legal representative for what should be more than 4,000 victims.¹³⁰ She was, among other things, the chairwoman of a local NGO, which she associated with the CICC.¹³¹

The fact that the Court made itself responsible for choosing who would represent victims soon led to the emergence of a new professionalized class of legal representative. Put another way, common legal representation, in the cases that came after Lubanga, entered in a *specialization* phase. For instance, in the Katanga case, one of the counsels was a Defence lawyer before the ICTR and the Deputy General Prosecutor in charge of the repression of international crimes for the United Nations

¹²⁷ Bemba (16 December 2008), *supra* note 118 at para 9. Lubanga (18 janvier 2008), *supra* note 118 at para 124 (ICC, Trial Chamber I).

¹²⁸ *Ibid.*

¹²⁹ *Supra* Part I, section (c) The Mirage of Victim Agency.

¹³⁰ Bemba (10 November 2010), *supra* note 69.

¹³¹ Réseau des ONG de promotion et défense des Droits de l'Homme en République Centrafricaine (RONGDH), "Coordination nationale", online: RONGDH <<https://rongdhrca.wordpress.com/a-propos/coordination-nationale/>>.

Transitional Administration of East Timor.¹³² In the Banda case, both representatives previously served in other international tribunals. The first one, who was later to be named Ntaganda lawyer, was a former Hissène Habré attorney.¹³³ The second one was a defence and counsel attorney before the ICTY and was before the ICC an *ad hoc* counsel on behalf of Kony.¹³⁴ Similarly, in the Kenyan cases, the selected representatives had relevant experience on the international criminal scene. Thus, in the Ruto case, the assigned counsel is the president of the Kenyan section of the International Commission of Jurists and served as a lawyer before the ICTR.¹³⁵ As for the Muthaura case, the legal representative worked for the Office of the Prosecutor for ICTY as well as ICTR and was a legal adviser to the UN International Independent Investigation Commission Lebanon.¹³⁶ The Court designated lawyers who knew international criminal proceedings well in the hope of increasing the efficiency of its trials.

This jurisprudential trend to favour specialization of legal representation was taken further in the most recent trials, namely against Ntaganda or Gbagbo and Blé Goudé. In these cases, lawyers from the OCPV were assigned as legal representatives.¹³⁷ Interestingly, the Court in these affairs departed from previous judgments. Whereas, the reflection was different in these more recent cases than in previous trials, where the physical and cultural proximity to the victims was preferred¹³⁸. In Ntaganda, the judges, considering if a DRC counsel should replace the OCPV already in place, took into account that the current LRVs have been working on the case since December 2013 and are thus familiar with the voluminous record of the case, as well as the procedural history. In the Majority's view, besides

¹³² Xharde Gilissen Xharde – Cabinet d'avocats, "En savoir plus: Jean-Louis Gilissen", online: Xharde Gilissen Xharde <<http://www.xgx.be/jeanlouisgilissen.htm>>.

¹³³ "Ongwen lawyer: Who is Helene Cisse?", *New Vision* (29 January 2015), online: New Vision <<http://www.newvision.co.ug/news/664234-ongwen-lawyer-who-is-helene-cisse.html>>.

¹³⁴ Bedford Row International, "Jens Dieckmann", online: 9 Bedford Row International <<http://9bri.com/associated-members/jens-dieckmann/>>.

¹³⁵ See International Commission of Jurists – Kenyan Section, "Previous ICJ-Kenya Chairmen. Mr. Wilfred Nderitu (2005-2009)", online: ICJ Kenyan Section <<http://www.icj-kenya.org/index.php/about-us/structure/previous-icj-kenya-chairmen/240-mr-wilfred-nderitu-2005-2009>>.

¹³⁶ See Fergal Gaynor's LinkedIn profile, online: LinkedIn <<https://www.linkedin.com/pub/fergal-gaynor/8/b33/714>>.

¹³⁷ In Ntaganda but also in the Bemba trial, the legal representatives – i.e. lawyers from the OCPV – are assisted by field counsels from the situation countries. Yet, there is little information available on these assistants. The *Regulations of the Registry* although provide some indications on who can be an assistant to counsel. Thus, "[p]ersons who assist counsel in the presentation of the case before a Chamber, as referred to in regulation 68 of the Regulations of the Court, shall have either five years of relevant experience in criminal proceedings or specific competence in international or criminal law and procedure". As for the principal counsels, a list is created. *Regulations of the Registry*, Doc off ICC, Doc ICC-BD/03-01-06-Rev.1 (2006), Regulations 112-13.

¹³⁸ See for instance, in the Katanga trial, the judges evoked: "At the same time, the Chamber considers that it would be desirable if the common legal representative (or at least one member of his or her team) has a strong connection with the local situation of the victims and the region in general. This will assist the common legal representative in presenting the genuine perspective of the victims, as is his or her primary role". Katanga & Ngudjolo (22 July 2009), *supra* note 66 at para 15. See also Bemba (10 November 2010), *supra* note 69 at para 11.

the importance of continuity and the general requirement of possessing the necessary skills, proximity to the victims is a relevant consideration to be taken into account when deciding who should represent these victims. In this regard, it considers that proximity to the victims does not necessarily require physical proximity. Any counsel representing victims should have knowledge of the victims' culture, the context in which the alleged crimes took place (i.e. the armed conflict) and – in order to assess the impact of the alleged crimes on the individual victims – also the circumstances in which the victims live.¹³⁹

For the magistrates, the lawyers of the OCPV have a “high degree of understanding of the situation on the ground and the needs of victims in general, as well as the specific circumstances of the victims in this case”.¹⁴⁰ The legal representation was from this point destined to be something remote from victims, as maybe was already international criminal justice as a whole. This observation is coherent with the efforts that appeared to be made by the ICC to keep the relationship between the legal representatives and their victims impersonal.

C. The Victims as Bureaucratic Objects: Aiming at an Impersonal Relationship Between the Victims and their Legal Representative

Besides, when they considered that Rule 90(4) of the RPE should be approached in a flexible manner, the judges and the Registry inherently indicated that the relation between the counsel and its clients did not have to be personal. This comment also suggests an embryonic bureaucratization. The Court tried to keep the relationships between the victims and their legal representatives impersonal. This can best be illustrated by the efforts made by the Court to impede any actual or potential political use of the participative space created by Article 68(3). Here are three jurisprudential examples.

The first example in this sense is an attempt made by the legal representatives in the Lubanga trial to modify the charges against the accused through Regulation 55(2). This disposition provides that the Chamber has the possibility to modify the legal characterization of facts without exceeding the facts contained in the charges. The charges retained against Lubanga, first accused before the ICC, were limited to crimes in relation to child soldiers.¹⁴¹ However, it was well-documented that sexual violence was a widespread practice towards children – especially girls – forcibly recruited by the armed group headed by Lubanga.¹⁴² The – then eight – legal

¹³⁹ *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-650, Second decision on victims' participation in trial proceedings (16 February 2015) at para 28 (ICC, Trial Chamber).

¹⁴⁰ *Ibid* at para 29.

¹⁴¹ Lubanga was inculpated for the charges of enlisting and conscription children under the age of fifteen years and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute. *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges (29 January 2007) (ICC, Pre-Trial Chamber I).

¹⁴² *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1229-AnxA, Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict

representatives made a joint application in response to the situation to ask the Court to apply regulation 55 and requalify the facts to include cruel or inhumane treatment and sexual slavery.¹⁴³ Two of the three Trial Chamber I's judges were inclined to the representatives' request and, consequently, was issued a notification of the possibility of legal re-characterization.¹⁴⁴ Even though the document issued by the Court only concerned a hypothetical re-characterization of the charges, the parties (i.e. the Office of Prosecutor and the Defence) were keen to request leave to appeal the Decision, which was granted.¹⁴⁵ This resulted in an order of the Appeals Chamber, which overturned the Trial Chamber interpretation of Regulation 55.¹⁴⁶ The legal representatives made a final attempt to see the charges re-characterize in regards of the interpretation offered by the highest Chamber of the ICC but the Trial Chamber rejected their observations.¹⁴⁷ It was the first major setback for victims (more specifically, their legal representatives) as regards to political use of the participative space created by paragraph 68(3). They were promptly silenced in their attempt to counter the (political) decision of the Office of the Prosecutor to limit the charges to enlistment and conscription of child soldiers in order to put forward their clients' interests.

Following this undertaking of a political victims' action, the Court made sure to intervene upstream. The second and third examples thus illustrate how the Court tries to preclude individuals with political interests from being a legal representative. In the Banda trial, as aforementioned, two Darfuri victims were represented by

Submitted in application of Rule 103 of the Rules of Procedure and Evidence (18 March 2008) at para 22-26 (ICC, Other Participants).

¹⁴³ *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1890, Demande conjointe des représentants légaux des victimes aux fins de mise en œuvre de la procédure en vertu de la norme 55 du Règlement de la Cour (22 May 2009) (ICC, Legal Representatives of Victims).

¹⁴⁴ *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2049, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court (14 July 2009) (ICC, Trial Chamber I).

¹⁴⁵ *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2073, Requête de la Défense sollicitant l'autorisation d'interjeter appel de la « Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court » rendue le 14 juillet 2009 (11 August 2009) (ICC, Defence); *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2074, Prosecution's Application for Leave to Appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) (12 August 2009) (ICC, Office of the Prosecutor).

¹⁴⁶ *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2205, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" (8 December 2009) (ICC, Appeals Chamber).

¹⁴⁷ *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2211, Observations conjointes des Représentants Légaux des Victimes quant aux conséquences de l'arrêt de la Chambre d'appel du 8 décembre 2009 (15 December 2009) (ICC, Legal Representatives of Victims); *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2223, Decision on the Legal Representatives' Joint Submissions concerning the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court (8 January 2010) (ICC, Trial Chamber I).

lawyers usually acting on behalf NGOs closely linked to the Sudanese government.¹⁴⁸ Previously, these two individuals had tried to contest the Court's competence through *amici curiae*.¹⁴⁹ The Office of the Prosecutor contested their role as victims' representatives and denounced the fact they found "new proxies through which to make their submissions".¹⁵⁰ The judges rejected the request regarding the termination of representation since they found no concrete evidence in that respect. In the meantime, however, the Chamber decided that a distinct representation for the Darfuri victims was not needed anymore. The two contested representatives had to withdraw from the case.¹⁵¹ Whether it was a coincidence or not, it still involved in a depoliticization of the way the participative space for victims is apprehended.

Finally, in the Gbagbo trial, where stands our last example, a field counsel, assisting the OPCV, was set aside because of his political affiliations. He was a former Ivorian judge was well-known for having signed the nationality certificate of Alassane Ouattara, actual president of Côte d'Ivoire and the accused's rival during the 2011 elections.¹⁵² He was appointed in the trial against Charles Blé Goudé "as legal assistant in the field and paid under the Court's legal aid scheme".¹⁵³ This field counsel later resigned for professional reasons in January 2015.¹⁵⁴ Once again, as in the previous example, whilst his resignation may be a good thing for the appearance of justice, it results in a negation of any political aims for the victims.

Those three episodes are fine examples of how the Court seeks to restrain either potential political use of victim participation. In other words, the goal seems to repel any political appearance around the victims (and, more broadly, around the trials in general). Without necessarily disagreeing with what the victims (representatives) want to provide to the trial, the judges clearly pursue to retain control on what may be conveyed through the victim channel. *Id est*, there is a will to sterilize common legal representation: the individuals with political affiliations or will, in their names or on behalf of particular victims are evacuated from the duty.

The figure of the legal representative has thus evolved along with the organization of common legal representation throughout the practice of the ICC. This compendious review of the victims' representation case law reveals a clear trend towards the bureaucratization of the function of legal representative for victims. In the first *utopian* phase, there seems like some space was made for the local community in leaving to the victims the choice of their lawyers. Indeed, a great proportion of the

¹⁴⁸ *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-110, Prosecution Objection to the Continued Representation of Victims a/1646/10 and a/1647/10 by Messrs Geoffrey Nice and Rodney Dixon (6 December 2010) at para 2 (ICC, Office of the Prosecutor).

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ Banda, *supra* note 104 at para 44.

¹⁵² Elimane Fall, "Epiphane Zoro Bi-Ballo", *Jeune Afrique* (3 March 2004), online: Jeune Afrique <<http://www.jeuneafrique.com/60255/archives-thematique/epiphane-zoro-bi-ballo/>>.

¹⁵³ *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-53, Information on Common Legal Representation of Victims in the Proceedings (15 May 2015) at para 7 (ICC, OPCV).

¹⁵⁴ *Ibid* at para 11.

first legal representatives are from the situation countries. Anyhow, having to deal with an increasing number of victims – and, in parallel, an increasing amount of critics towards its management of victims – the Court began to take over the task of designating the victims' counsels. The tendency to minimize the number of groups of victims represented in each case and, as a result, to assume the homogeneity of the victims' interests leads the judges to gradually prioritize international criminal justice professionals over local lawyers from affected communities. This preference over experienced international criminal lawyers and especially over counsels from the OPCV is understandable since it grants clear gains in terms of resources – economic, human as well as temporal – and has secured better representation for victims on a strictly legal point of view. Despite these upsides, the bureaucratization of legal representatives had an impact on how is used the participative space created by Article 68(3). A simple analysis of the treatment of the legal representatives' identity leads us to find that there is a propensity, even a willingness, to halt or prevent any politicization of the victims' voice. In other words, the bureaucratization of the function of legal representative has silenced any efforts to politicize the participative space created by Article 68(3).

Jurisprudence on (common) legal representation has largely evolved in the last decade. From a wide-open position where the victims still had a word to say on who may act and what was said on their behalf, the current case law leans towards an OPCV monopoly when it comes to victim representation. The path taken so far led, in our view, to the bureaucratization – in a Weberian sense – of this institution.

This article does not pretend to be an exhaustive application of the model proposed by Weber to victim representation, and even less to international criminal justice as a whole. It rather has the will to show how the current state of jurisprudence displays some similarities with the ideal-type imagined by Weber. The organization of common legal representation is gradually transformed into a bureaucracy. As in the “mechanized routinized world”¹⁵⁵, described by the German sociologist, the assignation of representation tasks mainly to the OPCV constitutes, in a way, a concentration of activities within the Court.¹⁵⁶ The victims no longer designated their representatives, contributing as a consequence of the bureaucratization of the Court. As Weber stated, “[t]he pure type of bureaucratic official is appointed by a superior authority. An official elected by the governed is not a purely bureaucratic figure”.¹⁵⁷ The duties are distributed to individuals who went through “thorough and expert

¹⁵⁵ George Ritzer, “Professionalization, Bureaucratization and Rationalization: The Views of Max Weber” (1975) 53:4 *Social Forces* 627 at 633 [Ritzer (1975)].

¹⁵⁶ Hans H Gerth & Charles Wright Mills, *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1958) at 196.

¹⁵⁷ *Ibid* at 200.

training”.¹⁵⁸ In fact, we saw from the analysis of the legal representatives’ curriculum that from mostly local lawyers in the first cases, the victim counsels specialized through times. First were involved in international criminal justice professionals who built their career within the field that, lately, made way to lawyers from the OPCV. As Weber was observing from bureaucrats, the Court asks from the representatives their “full-working capacity”¹⁵⁹: the jurisprudence requires them to be full-time available for the case. Finally, as for the impersonalization of duty-holders required by bureaucratization, Weber insisted on the fact that “office-holding is not considered a source to be exploited”.¹⁶⁰ In fact, the assignment of the OPCV fulfills this requirement in such that the chosen counsel no longer have to be loyal to the victims he represented but rather to their general interests and the ones of the ICC. In sum, the impersonality, the hierarchy and the control embodied by bureaucratization are now increasingly characterizing the development of the organization of the duties in relation to representation.¹⁶¹

The aim here is not to judge if bureaucratization is a good or a bad thing for victims or, more largely, for international criminal justice. Admittedly, it has its advantages considering the many critics the Court is facing in relation to victims, namely the efficiency praised by Weber.¹⁶² Moreover, the representation of all victims by the OCPV, without a doubt, brings some calculable results to victim participation; victims always being represented by the same office will increase its predictability. Finally, it allows an optimal reaction time, and is economical since its employees are already in The Hague.¹⁶³ Yet, it cannot be disputed that international criminal justice presents itself as apolitical and that this will is reflected in its treatment of victims. Even though the defenders of victims’ rights may denounce this situation where victims are stripped of the potential agency they could have gained through *Rome Statute*, we can still doubt what victims (and the Court) could realistically obtain through their politicization. Undoubtedly, victims have interests in justice, but, within the current state of the case law where they seem condemned to be simple bureaucratic objects, the question remains whether the ICC is really a forum for their voice to be heard.

¹⁵⁸ *Ibid* at 198.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid* at 199.

¹⁶¹ *Ibid.*

¹⁶² Ritzer (1975), *supra* note 155 at 633.

¹⁶³ Weber underlined these advantages of bureaucracy. See Calhoun, *supra* note 109 at 269-70.