

CRIME VICTIMS ORGANIZATIONS AS AMICI CURIAE IN CRIMINAL TRIAL COURTS: A NEW BEGINNING?

SHAI FARBER[†]

ABSTRACT.....	236
I. INTRODUCTION	237
A. <i>Amici Curiae in Criminal Proceedings on Behalf of Crime Victims in U.S. Law</i>	238
B. <i>Principle Justifications for Adding Crime Victims' Organizations as Amici Curiae in Criminal Law</i>	242
1. <i>The General Trend of Crime Victims' Rights Movements in Modern Law</i>	242
2. <i>The Right of the Crime Victims to Express Themselves Fully in Criminal Proceedings</i>	247
3. <i>Inconsistency Between the Interests of the Crime Victims and the Interests of the Entities Tasked with their Representation</i>	250
4. <i>Striving for Better Judicial Decision-Making and Strengthening the Institutional Legitimacy of Courts</i>	253
C. <i>The Proper Model for Adding Crime Victims' Organizations as Amici Curiae in U.S. Criminal Law</i>	256
1. <i>The Importance of Using Amici Curiae for the Independent Representation of Crime Victims</i>	256
2. <i>Adequate Circumstances for Adding Crime Victims' Organizations as Amici Curiae in Criminal Procedures</i> ..	258
3. <i>Judicial Guarantees in Cases of the Addition of Crime Victims' Organizations as Amici Curiae in Criminal Trial Court Proceedings</i>	264
D. <i>Criticisms (and Possible Rebukes) Regarding the Addition of Crime Victims' Organizations as Amici Curiae in U.S. Criminal Law</i>	267
1. <i>Harming the Rights of Defendants</i>	267
2. <i>Additional Criticisms Regarding the Addition of Amici Curiae on Behalf of Crime Victims</i>	270

[†] Doctor of Law (Ph.D.), Lecturer at Bar-Ilan University, Faculty of Law. I would like to thank Prof. Arnold Anker, Prof. Nir Kedar, Prof. Edna Erez, Dr. Avi Osterman, Jim Champion, Sharon Achai, Dikla Tutian-Zaid, Daniel Bendor, and Ruth Eldar for their excellent comments on prior drafts of this Article.

3. <i>It is Not Customary to Add Crime Victims' Organizations as Amicus Curiae in Criminal Trial Court Proceedings under Common Law</i>	272
II. SUMMARY AND CONCLUSIONS.....	277

ABSTRACT

This Article examines judicial policy regarding adding crime victims' organizations as amici curiae in criminal cases in the U.S., with a special focus on criminal trial courts. The Article focuses on the principle legal position that objects to the addition of such crime victims' organizations as amici curiae in criminal proceedings, based mainly on the judicial common law tradition. This tradition holds that defendants are only supposed to face one prosecutor—the state or federal government—and are not to face additional third-party prosecutors such, as crime victims' organizations. In this Article, I argue that in spite of possible concerns, mainly regarding harming defendants' rights, in certain cases, and subject to certain judicial guarantees, the courts should allow the addition of crime victims' organizations as amici curiae. Such judicial policy should be carried out in an even-handed manner by maintaining the delicate balance between the rights of crime victims and the rights of defendants, subject to judicial guarantees ensuring the fairness of the process.

The thesis behind this Article is based on three main justifications: first, in the modern criminal process, decisions relate directly to the crime victims. If the interests of the crime victims are not fully represented, then such a process harms their dignity by viewing them solely as instruments for carrying out broader policy goals (this argument became more pronounced recently due to the "Me-Too" movement). Second, often there is an inconsistency between the interests of the crime victims and the interests of the entities tasked with their representation in courts. This inconsistency requires their independent representation on important issues as amici. Third, from an institutional perspective, listening to the independent position of crime victims as amici curiae could help facilitate a more comprehensive judicial decision-making process, one which is more informative, and may even strengthen the institutional legitimacy of the courts in the eyes of the public in general and crime victims in particular.

I. INTRODUCTION

The “Me-Too” movement, alongside other activities of various crime victims’ organizations in the U.S. and elsewhere—especially regarding violence and sex-related crimes that have taken place lately—has provoked a public and academic debate about the issue of expressing the self-interests of crime victims.¹ Although crime victims’ organizations serve a significant role in representing crime victims, including taking care of them and exercising their rights, in general, the court’s doors are closed to them in criminal proceedings.² The prevailing reason for the hostility of criminal procedural rules toward the inclusion of crime victims’ organizations as additional parties in criminal proceedings is based on established judicial tradition in the common law, which reasons that it is not appropriate for defendants to face an additional prosecutor. This principle holds that the accused will have to face only the representatives of the state and no other prosecutor (i.e., crime victims’ organizations).³

In this Article, I argue that despite this tradition, which fears for the fairness of the criminal process, in some criminal proceedings—subject to certain judicial guarantees—courts should allow the addition of crime victims’ organizations as amici curiae. This Article will show that in significant criminal proceedings, it is critically important for the decisionmaker to hear the broad interests of crime victims prior to rendering a final judicial decision. Such policy can raise various concerns, mainly that such organizations could become an “additional prosecutor” alongside the state and, as a result, infringe the rights of defendants.⁴ This Article does not ignore such concerns but deals with them head on. The Article suggests a more balanced approach, which will allow the addition of amici curiae in significant criminal cases with a direct impact on crime victims’ interests, subject to strict legal guarantees ensuring the fairness of the proceedings. On the basis of three

1. See, e.g., Alison Gash & Ryan Harding, *#MeToo? Legal Discourse and Everyday Responses to Sexual Violence*, 7 *LAWS* 21, 2–9 (2018); Michelle Rodino-Colocino, *Me too, #MeToo: Countering Cruelty with Empathy*, 15 *COMM. CRITICAL/CULTURAL STUD.* 96, 96–100 (2018); see also OLIVERA SIMIC, *SILENCED VICTIMS OF WARTIME SEXUAL VIOLENCE* 147–62 (2018).

2. See G.P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS’ RIGHT IN CRIMINAL TRIALS* (1995); ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 6–23 (1999).

3. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968). See generally JONATHAN SCHONSHECK, *ON CRIMINALIZATION: AN ESSAY IN THE PHILOSOPHY OF THE CRIMINAL LAW* (1994).

4. PACKER, *supra* note 3. See generally H. L. A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968).

fundamental justifications, I will argue that the approach suggested in this Article reaches a preferable balance between the rights of the crime victims and the rights of the defendants in criminal cases; this approach is one that should be adopted under U.S. law.

Part I will describe the existing legal landscape regarding the addition of crime victims' organizations as amici in U.S. criminal law. Part II will review the legal, intellectual, and institutional justification of making use of amici curiae in criminal law while tying it all together with general trends regarding the status of crime victims in the western world in recent years.⁵ This general theoretical framework will demonstrate how the use of the amicus curiae practice in criminal law by crime victims' organizations, separated from other means of representation, might cure—even if only slightly—the existing difficulties within prevailing judicial policy.

Part III will present the adequate model for integrating crime victims' organizations as amici curiae in criminal law in a way that creates a preferable balance between the interests of the crime victims and the defendants. This Part will emphasize the importance of independently developing the practice of amici curiae in criminal proceedings, while presenting certain situations when the use of amici curiae would be appropriate. Furthermore, this section will outline the legal guarantees that will be required of crime victims' organizations that wish to join as amici curiae in order to ensure the fairness of the process.

The Part IV will discuss criticisms, and possible responses to such criticisms, regarding the use of the amici curiae practice by crime victims' organizations in criminal proceedings. This Part will examine potential concerns and the responses to such concerns by relying on the accumulated legal experience in this field and utilizing a historical-comparative analysis, which will demonstrate similar concerns for courts in other jurisdictions. Finally, Part V will summarize the Article and provide conclusions.

A. Amici Curiae in Criminal Proceedings on Behalf of Crime Victims in U.S. Law

Amici curiae is a legal procedure that allows third parties who are not formally involved in the legal proceedings taking place to present

5. See generally Paul G. Cassell, *Introduction: The Maturing Victims' Rights Movement*, 13 OHIO ST. J. CRIM. L. 1, 1–5 (2015) (describing a symposium on the evolution of victims' rights); Marie Manikis, *Imagining the Future of Victims' Rights in Canada: A Comparative Perspective*, 13 OHIO ST. J. CRIM. L. 163 (2015) (discussing the evolution of victims' rights in Canada).

their point of view to the court by joining the proceedings.⁶ Usually, the courts allow submission of an amicus brief and, in certain instances, allow oral argument.⁷ There are differences in the application of amici curiae representation in different courts in the U.S., yet, generally, there are several purposes for amici curiae to join legal proceedings in the U.S.⁸

Often the amici provide additional legal arguments or facts which the formal parties to the proceedings did not present to the court.⁹ In some cases, the amici curiae provide certain types of information which are not available to the formal parties or which the formal parties are not interested in presenting to the court as it might adversely impact their interests. In other cases, the amici curiae repeat arguments which were already presented by one formal party, but they emphasize or present it differently.¹⁰ They might also express their support for certain positions and try to persuade the court to favor the position of the formal party which they support.¹¹

6. *Amicus Curiae*, BLACK'S LAW DICTIONARY (11th ed. 2019).

7. For a general overview of use of the amici curiae practice in the U.S., see PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING (2008); John Harrington, Note, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 CASE W. RES. L. REV. 667 (2005); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014). For a general overview of the amici curiae in civil law, see Steven Kochevar, Comment, *Amici Curiae in Civil Law Jurisdictions*, 122 YALE L.J. 1653 (2013). For a general overview of amici curiae in international law, see Ruth Mackenzie, *The Amicus Curiae in International Courts: Toward Common Procedural Approaches?*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 295 (Tullio Treves et al. eds., 2005); Jona Razzaque, *Changing Role of Friends of the Court in the International Courts and Tribunals*, 1 NON-STATE ACTORS & INT'L L. 169 (2002).

8. See Michael J. Harris, Note, *Amicus Curiae: Friend or Foe? The Limits of Friendship in American Jurisprudence*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2000) (discussing the differences between the evolutions of private and governmental amici); Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1244–45 (1992) (noting that amicus curiae serve as a judicial assistant, “lobbyist, [] advocate, and . . . the vindicator of the politically powerless.”).

9. Harris, *supra* note 8, at 2.

10. *Id.*; Lowman, *supra* note 8, at 1244–45.

11. Harris, *supra* note 8, at 2; Lowman, *supra* note 8 at 1244–45. Generally, in other common law countries (e.g., England, Canada, and Australia), the amicus curiae is considered as a more neutral third party that is invited by courts to submit an amicus brief to assist the courts in their work. See, e.g., David Berg, *The Limits of Friendship: The Amicus Curiae in Criminal Trial Courts*, 59 CRIM. L. Q. 67, 73 (2012). In order to clarify the rule of the amici, the Supreme Court of England changed the heading of its internal rules regarding the amici curiae, providing that it is no longer addressed as “Amicus Curiae” but “Advocate to the Court.” See JUSTICE & FRESHFIELDS BRUCKHAUS DERINGER,

Within the U.S. criminal justice system, neither crime victims nor their designated representative (their attorney or otherwise) have legal standing to participate in the criminal trial as amicus. While it is clear that the prosecuting attorney is tasked with advancing the interests of the State, there is no requirement for those same prosecutors to protect the interests of the crime victims. Thus, from the time of arrest through adjudication, the crime victim has no legal representation. Similarly, but even more restrictive, no other organization, entity, or individual has standing or a procedural role during trial proceedings to advance the crime victims' interests.

Upon conviction and appeal, it is customary for amicus briefs to be filed as "friends of the court" with leave of the appellate court.¹² While generally these briefs are not frequently filed in the appellate court system, they are filed in important criminal cases pending for consideration or disposition in the United States Supreme Court.¹³ In theory, there is no specific legal impediment regarding the submission of an amicus brief at the trial court level. However, most procedural rules are vague about it and in practice do not allow amicus submissions in the trial courts.

The main reason for the hostility towards adding amici in criminal trial court proceedings is the common law tradition that hinders the addition of crime victims' organizations (and any other entity that may harm the rights of defendants) as amici in criminal court proceedings.¹⁴

TO ASSIST THE COURT: THIRD PARTY INTERVENTIONS IN THE PUBLIC INTEREST 1, 6 (2016), <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/06/To-Assist-the-Court-Web.pdf> [<http://web.archive.org/web/20200112102925/https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/06/To-Assist-the-Court-Web.pdf>]. By using this approach, the judicial system was trying to emphasize that the English amicus curiae is not a "friend" of either party to the legal procedure but solely a friend of the court. See SUP. CT. R. 35 (U.K.).

12. For example, in *State v. Tedesco*, the Supreme Court of New Jersey allowed the victim to join as an amicus in the appeal of the defendant. 69 A.3d 103, 109 (N.J. 2013) ("The victim's arguments should be heard and evaluated, if not as a party with standing, then as an amicus under Rule 1:13-9." (emphasis in original)).

13. See, e.g., *Sample v. United States*, 139 S. Ct. 1545 (mem.) (2019) (granting leave for The National Association of Criminal Defense Lawyers to file an amicus brief).

14. As will be presented below, this policy is not only prevalent in most U.S. states' criminal procedural rules but is also present in the case law of other common law jurisdictions. See generally Jason Brickhill, *The Intervention of Amici Curiae in Criminal Matters: S v Zuma and S v Basson Considered*, 123 S. AFR. L.J. 391 (2006) (discussing admission of amicus curiae in criminal matters in countries like Canada and South Africa). This Article focuses on U.S. law in which adversary proceedings are practiced. However, in civil law and international law jurisdictions, crime victims are granted certain rights, such as joining as a subsidiary prosecutor in trial court proceedings. See, e.g., Anat

This common law judicial tradition does not view adding an additional prosecutor to convict the defendant favorably.¹⁵ Within the adversarial tradition of common law, the defendant has only one prosecutor to face: the State.¹⁶ Based on these fundamental principles, the criminal process is conducted solely by state prosecutors; the state alone is responsible for enforcing criminal law and prosecuting criminals.¹⁷

The state is the entity that brings charges under the criminal law, and it is represented by a prosecutor, who conducts the prosecution on the state's behalf. The adversarial system assumes that when two parties (the prosecution and the defense) argue opposite positions—for guilt or innocence of the defendant—they each endeavor to use their best efforts to prove their position, and as such, they will try to disprove or contradict the arguments of the opposing party.¹⁸ This process should cause all relevant information to be presented to the court and allow the truth to be revealed.¹⁹

Criminal law reflects a collection of behavioral norms, creating a border between what is permitted and what is prohibited based on public interest.²⁰ This means that criminal law regulates the legal relationship as a relationship between the state, which symbolizes society, and the individual committing the crime; criminal law is not based on a relationship between two individuals.²¹

Horovitz & Thomas Weigend, *Human Dignity and Victims' Rights in the German and Israeli Criminal Process*, 44 *ISR. L. REV.* 263, 290–91 (2011). G.P. Fletcher argues that there is room to adopt the inquisitorial approach regarding matters related to the victim in criminal proceedings, and to allow for greater intervention by the victim in the process alongside the prosecution. See FLETCHER, *supra* note 2; see also Berg, *supra* note 11 (discussing the use of amici to provide underrepresented defendants a fair trial).

15. Brickhill, *supra* note 14, at 397.

16. FLETCHER, *supra* note 2, at 195; ASHWORTH, *supra* note 2.

17. See Berg, *supra* note 11.

18. See FLETCHER, *supra* note 2, at 195–96.

19. See, e.g., Pamela J. Utz, *Two Models of Prosecutorial Professionalism*, in *THE PROSECUTOR* 99, 106 (1979).

20. ASHWORTH, *supra* note 2.

21. The exception to this rule is the procedure for a private criminal complaint. This exception is based on the assumption that there exists a certain type of case where the relationship between offender and offended is a dominant factor. Regarding such cases, it is desirable to allow the individual to conduct the criminal process in the event the state does not wish to pursue it. United States caselaw is very critical of the private criminal complaint procedures. The reasoning for such a critical approach is that a criminal process which is driven by a private prosecutor breaches the principle of separation of powers. Moreover, the constitutional principle of due process protects individuals against procedures that may have an element of frivolousness. See YALE KAMISAR ET. AL., *MODERN CRIMINAL PROCEDURE* 997–99 (2005); see also Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *STAN. L. REV.* 989, 1033 (2005) (arguing that criminal law infringes on the principle of separation of powers because the general

Therefore, the argument is that the acts of prosecuting a defendant and conducting a criminal trial interests society as a whole. This interest is not limited to crime victims or the organizations that represent them.²² Because the criminal process is part of the state's responsibility for maintaining social order, there is no room—allegedly—for participation of crime victims' organizations as amici in criminal proceedings. Even if the crime victims or the organizations that represent their interests have standing in the criminal process, such standing is incidental to the main process, which puts the state, the defendant, and public interest front and center.²³

B. Principle Justifications for Adding Crime Victims' Organizations as Amici Curiae in Criminal Law

In this Part, I will present justifications for the addition of crime victims' organizations as amici in criminal law. I will argue that the option to present the broad interests of crime victims as amici are rooted in broader and global trends related to strengthening the status of crime victims.²⁴ I will argue that loosening the rigid traditional adversarial system regarding the issue of allowing crime victims' organizations to join as amici in criminal trial court cases is related to courts' growing understanding that criminal law is composed of many public interests, some of which conflict.²⁵ Sometimes there is a discrepancy between the interests of the crime victims and the interests of the representatives of the state, and the court itself benefits by granting crime victims an independent expression.

1. The General Trend of Crime Victims' Rights Movements in Modern Law

The expansion of the participation of crime victims in criminal proceedings through the amicus practice is rooted and to a great degree

prosecution reaches decisions that have a judicial element to them without strong control mechanisms).

22. See generally HART, *supra* note 4.

23. Similar to the policy practiced in the U.S., in the case of *All India Democratic Women's Ass'n v. State*, the Madras High Court decided that prosecution was the sole responsibility of the general prosecutor and there was no reason for the intervention of third parties at the time. (1998) Crim LJ (HC) 2629, ¶ 20 (1997) (India).

24. See Sarah Ben-David, *Needed: Victim's Victimology*, in VICTIMOLOGY AT THE TRANSITION FROM THE 20TH TO THE 21ST CENTURY 55 (Paul C. Friday & Gerd Ferdinand Kirchhoff eds., 2000).

25. See generally ASHWORTH, *supra* note 2.

caused by trends and theories related to the rise of the status of crime victims in the western world in the last three decades (and in many respects even prior to that).²⁶ Generally in ancient societies, the family was the main social unit, and family members took care of the interests of the crime victims.²⁷ At that time, criminal law was part of private law.²⁸ Prior to the advent of royalty, chieftains, or other ruling parties, criminal disputes were handled between the family of the victim and the family of the offender.²⁹

The development of criminal law is related to, among other things, movements that tried to convince individuals not to take the law into their own hands. First, the blood revenge practice was replaced with the private claim and thereafter replaced with public litigation.³⁰ Moreover, with the rise of the sovereign state, such responsibility was granted to law enforcement agencies on behalf of the sovereign.³¹ As a result of this process, crime victims were distanced from the center stage of the criminal process and remained without formal standing in such proceedings.³² Not only was their standing revoked, but also in many cases, even the obligation for compensation was converted to the payment of a fine to the sovereign state and not to the victims themselves.³³

Gradually, the sovereign state nationalized the process and took complete control over the criminal process, preventing crime victims from taking an active part in the criminal process.³⁴ As a result, the "standing" of crime victims in the criminal process was weakened and their role was reduced to an instrumental function: providing the complaint and testifying in court.³⁵ Over the years, criminologists and

26. See Ben-David, *supra* note 24; SANDRA WALKLATE, *CRIMINOLOGY: THE BASICS* 141–69 (Routledge 2016).

27. Cherif Bassiouni, *A Survey of the Major Criminal Justice Systems of the World*, in *HANDBOOK OF CRIMINOLOGY* 527–92 (1974).

28. *Id.*; see generally HARRY R. DAMMER & JAY S. ALBANESE, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS* (2013).

29. Erin A. O'Hara, *Victim Participation in the Criminal Process*, 13 *J.L. & POL'Y* 229, 235 (2005).

30. *Id.* at 235–37.

31. *Id.* at 236.

32. *Id.* at 239–40.

33. See D. WHITELOCK, *THE BEGINNINGS OF ENGLISH SOCIETY* 139–42 (1952).

34. See STEPHEN SCHAFER, *COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME* 8 (2d ed. 1970) (noting that the state's takeover of the criminal procedure was a voluntary effort to help achieve justice).

35. The state's control over the criminal process and its exclusion of standing for crime victims in related proceedings relates to economic factors. For example, the king desired to gain further political power and enrich his coffers by transferring compensation payments from offenders to the kingdom instead of providing it to the actual victims. One

lawyers have expressed their dismay regarding the exclusion of crime victims from the criminal process.³⁶ This dismay, alongside the development of the modern welfare state, has contributed to a growing trend which started in the 19th century and led to the gradual enactment of laws in many countries which regulated the various rights related to the different needs of crime victims.³⁷ The many factors that contributed to the increased awareness for the status of crime victims include the realization that traditional punishments were not as effective; the rise in alternative dispute resolutions for the criminal process, and more specifically, punishment; and the strengthening of crime victims' organizations.³⁸

It should be noted that in the 20th century, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power influenced many countries to integrate such principles in their own jurisdictions.³⁹ The European Union instructed its member states to legislate various laws relating to crime victims (such as legislation that will take care of treatment and compensation in case the criminal is not apprehended).⁴⁰ Research conducted after the enactment

way or another, the sovereign has become the main link in the criminal process—capturing criminals, investigating crime scenes, prosecuting perpetrators, conducting trials, and delivering the sentence. See Andrew Ashworth, *Victims' Rights, Defendants' Rights and Criminal Procedures*, in *INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE: INTERNATIONAL DEBATES* 185 (2010).

36. Ashworth, *supra* note 35, at 197–98.

37. See Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 *CARDOZO L. REV.* 2313, 2331, 2337 n.109 (2013).

38. See generally O'Hara, *supra* note 29 (showing, among other things, the full range of political powers available to crime victims in the U.S.).

39. See G.A. Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985). Paragraph 4 of the Declaration calls on the countries of the world to advance the treatment of crime victims and to ensure that such victims are treated with compassion while maintaining their honor by providing the victims with information about the services they are entitled to, such as more accessible court procedures, greater standing, privacy, safety, and monetary compensation. *Id.* at ¶¶ 4–21. However, some doubt the ability of the United Nations Declaration to bring about political and social change. Ezzat A. Fattah, *The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: A Constructive Critique*, in *TOWARDS A CRITICAL VICTIMOLOGY* 401, 401–24 (1992). Others argue that the declaration does not force direct implementation, and therefore its ability to influence is weak. *Id.* Some even consider this declaration to be a de facto adaptation of U.S. political and legal models. See, e.g., MATTI JOUTSEN, *THE ROLE OF THE VICTIM OF CRIME IN EUROPEAN CRIMINAL JUSTICE SYSTEMS: A CROSS-NATIONAL STUDY OF THE ROLE OF THE VICTIM* (1987).

40. See Council Directive 2004/80/EC, 2004 O.J. (L 261) 15 (EU); see also Parliament & Council Regulation 1215/2012, 2012 O.J. (L 351) 1 (EU) (allowing crime victims to sue for compensation in additional States within the EU).

of the directive showed that most of the EU member states had implemented these laws in accordance with their needs and circumstances.⁴¹

Certain arrangements were established regarding crime victims through laws that were shaped at the turn of the 21st century (and in many cases prior to that).⁴² For example, in France, there was a rise in the rights of crime victims as they received increased attention from the legislature.⁴³ Statutory rules were enacted in order to improve the treatment of crime victims within units of the police, the ministry of the interior, and the justice ministry.⁴⁴ In each of these units, there are special departments that deal with providing assistance to crime victims, and crime victims are often referred to social workers and public psychologists.⁴⁵ In England, for example, there are government agencies that operate programs to treat and provide compensation for victims of serious or violent crimes.⁴⁶

A similar arrangement also exists in Scotland and other European countries, to provide compensation and other rights to the victims of serious or violent crimes (or to their successors, in accordance with

41. *Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the Application of Council Directive 2004/80/EC Relating to Compensation to Crime Victims*, COM (2009) 0170 final (Apr. 20, 2009).

42. David Miers, *Offender and State Compensation for Victims of Crime: Two Decades of Development and Change*, 20 INT'L REV. VICTIMOLOGY 145, 148 (2014).

43. *Id.*; see Romanova M. Meyer, *Victim Support Services in the EU: An Overview and Assessment of Victims' Rights in Practice*, FRANNET (2014), https://fra.europa.eu/sites/default/files/fra_uploads/country-study-victim-support-services-fr_0.pdf [http://web.archive.org/web/20200111145207/https://fra.europa.eu/sites/default/files/fra_uploads/country-study-victim-support-services-fr_0.pdf].

44. Miers, *supra* note 42, at 148.

45. See CODE DE PROCÉDURE PÉNAL [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 85 (Fr.) ("Any person claiming to have suffered harm from a felony or misdemeanour may petition to become a civil party by filing a complaint with the competent investigating judge . . ."); see also Documentaire Envoyé spécial, *DOCUMENTAIRE CHOC 2017 Viol à domicile*, YOUTUBE (Mar. 26, 2017), <https://www.youtube.com/watch?v=TdgYYiFmk9s> (noting an rape case that was widely discussed in Paris in 2009 and covered in the media at length). Accused of raping no less than 15 young women, the defendant claimed that the racism he experienced led him to commit his crimes. *Id.* During the hearing, the victims of the crime presented the damage caused to them; the hearing allowed the court to award the victims immediate compensation without the need for civil proceedings. *Id.* (The Editors of the *Wayne Law Review* rely upon the author's expertise regarding untranslated French-language sources.)

46. For additional research that shows the importance of compensation to crime victims as part of the rehabilitation process, see Miers, *supra* note 42, at 152.

mechanisms established in the applicable laws).⁴⁷ In Canada, for instance, the Victims Bill of Rights of 2015 granted a series of rights to crime victims.⁴⁸ The Canadian legislation emphasizes, among other things, the classic objectives of criminal law, the responsibility of the offender for the damage he or she has caused to the crime victim, and the swift and justified remediation of the damage the crime victim incurred.⁴⁹

In the U.S., the rights of victims have been established via legislation (mainly since the 1980s and sometimes even prior to that) as constitutional rights in many states.⁵⁰ In 1984, the first federal law dealing with crime victims was enacted, and thereafter, other federal laws were enacted.⁵¹ The growing focus on the rights of the crime victim is closely related to the increased activities of various crime victims' organizations.⁵² The work of these organizations in the public and media include lobbying Congress and contributing to the enactment of the Crime Victims' Rights Act.⁵³ This Act provides crime victims with a broad set of rights including: the right to be protected from the defendant, the right not to be included in the criminal proceedings, the right to speak at criminal proceedings, the right to consult with the prosecutor, the right to conduct the proceedings in reasonable time, the right to fair treatment, and the right to privacy.⁵⁴

47. Different studies have shown the various damages that are suffered by crime victims including: *direct* economic damages (as a result of medical or psychological treatment), *indirect* economic damages (such as loss of investment and savings) as a result of the burden of the direct economic damages, and liability incurred by the public (such as the costs of state rehabilitation services). In addition to these damages, the direct and indirect costs and expenses incurred by the families of the crime victims should be added. See Uri Yanay, *Victims of Violent Crimes in Germany: Legal, Support and Compensation Rights*, 65 SOCIAL SECURITY 84, 84-110 (2004). (The Editors of the *Wayne Law Review* rely upon the author's expertise regarding untranslated Hebrew-language sources.)

48. Canadian Victims Bill of Rights, S.C. 2015, c 13, s 2.

49. See Manikis, *supra* note 5, 165-66.

50. See Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 521-31 (1985); Erin C. Blondel, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237 (2008); Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 15 UTAH L. REV. 15, 521-32 (2003) (discussing the limitation of the criminal process in providing the various tools required to enable crime victims to receive recognition for their damage).

51. Strang & Sherman, *supra* note 50, at 521-32.

52. In addition, the public felt uneasy due to high crime rates and a lack of personal security. See Christopher R. Goddu, Comment, *Victim's "Rights" or a Fair Trial Wronged?*, 41 BUFF. L. REV. 245, 248 (1993).

53. O'Hara, *supra* note 29, at 242-47.

54. See JOANNA SHAPLAND ET AL., VICTIMS IN THE CRIMINAL JUSTICE SYSTEM (1985); see also Blondel, *supra* note 50 (showing that despite reforming and adjusting for the

As such, the perception gradually materialized that the criminal proceeding is not limited to the relationship between the defendant and the general public, but it has a direct impact on the crime victims as well.⁵⁵ Within this framework, the recognition of the unique needs and interests of crime victims has increased across the legal, economic, and therapeutic spectrums.⁵⁶ Several movements related to the protection of the rights and interests of crime victims indicated various types of damages that are caused to crime because of the way criminal proceedings are conducted in their case.⁵⁷ Accordingly, scholars began to realize the power of crime victims' organizations as a way to provide crime victims full and independent expression, while minimizing any damages to criminal proceedings. As such, courts should provide greater representation to crime victims, which in turn, may even contribute to their rehabilitation.⁵⁸

2. The Right of the Crime Victims to Express Themselves Fully in Criminal Proceedings

The approach that advocates for the addition of amici to represent crime victims in certain criminal cases is based on three fundamental justifications. First, this approach provides crime victims with more meaningful expression during criminal proceedings. This is based on a recognition of the right of crime victims to fully express their interests through their representatives as part of their fabric of rights in the criminal process.⁵⁹ We no longer view the crime victim through an instrumental lens as someone who is added to the criminal process solely for convenience and functional efficiency by providing a complaint to the police or testimony in court.⁶⁰ The prevailing approach is that the

adversary principles in criminal law, criminal proceedings are still not tailored to meet the needs of the victims).

55. O'Hara, *supra* note 29, 239–47.

56. See Pamela Tontodonato & Edna Erez, *Crime, Punishment, and Victim Distress*, 3 INT'L REV. OF VICTIMOLOGY 33, 34 (1994).

57. See, e.g., Kerstin Svensson, *Victim Support in a Changing Welfare State*, 5 SOC. WORK & SOC'Y 123, 129–31 (2007). See generally Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIM. 1 (1977).

58. Svensson, *supra* note 57.

59. See LeRoy Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 WAYNE L. REV. 125, 147 (1987); Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 J.L. & SOC'Y 294 (2005); Edna Erez, *Who's Afraid of The Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV. 545, 556 (1999).

60. See generally AARON BARAK, *HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT* (2014).

criminal process is not limited to the relationship between the defendant and the general public; it has a direct impact on the crime victim.⁶¹

Just as the criminal process protects the rights of the defendant, it should also protect the rights of the crime victim. Various studies conducted over the years have indicated the damage caused to crime victims as a result of the lack of full and adequate expression of their interests in criminal proceedings conducted in their case.⁶² For instance, an empirical study showed the damages caused to crime victims who learned at a late stage in the process about a plea deal that was established with the defendant.⁶³ This study shows that the participation of crime victims in the process has great therapeutic value for them.⁶⁴ Morrison Torrey demonstrated the negative impact on sexual crime victims because of the mismanagement of their criminal proceedings.⁶⁵ Angelynne Amick-McMullan and others showed the importance of full participation of homicide victims' family members in criminal matters conducted in their cases.⁶⁶ Other empirical studies show that the court system systematically and continuously damage crime victims from disadvantages groups.⁶⁷ Insights from these and other studies have led to a search for corrective actions that will minimize the damage to crime victims in criminal proceedings and will turn the courts into a force that provides greater expression to their interests.⁶⁸ This is especially important in fundamental proceedings that have a direct impact on crime victims' rights.⁶⁹

In light of that, it is expected that the court system will treat the interests of crime victims with full respect, integrity, and decency—at

61. O'Hara, *supra* note 29.

62. Svensson, *supra* note 57, at 128–31; see also Jo-Anne Wemmers, *International Handbook of Victimology: The Meaning of Justice for Victims*, in INTERNATIONAL HANDBOOK OF VICTIMOLOGY 27 (Shlomo Giora Shoham et. al. eds., 2010).

63. See Edna Erez et al., *Victim Welfare and Participation Reforms in the United States: a Therapeutic Jurisprudence Perspective*, in THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES 15 (2011); Antony Pemberton & Sandra Reynaers, *The Controversial Nature of Victim Participation: Therapeutic Benefits in Victim Impact Statements*, in THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES 4–8 (2011).

64. Erez et al., *supra* note 63.

65. See Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1042–45 (1991).

66. See Angelynne Amick-McMullan et al., *Family Survivors of Homicide Victims: Theoretical Perspectives and an Exploratory Study*, 2 J. TRAUMATIC STRESS 21, 21–35 (1989).

67. See Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. REV. 255, 352 (2005).

68. *Id.* at 348–49.

69. *Id.*

least to the same extent the courts respect the interests of defendants.⁷⁰ Such decency should be expressed by expanding the participation of crime victims' organizations, in certain cases, through independent interests of the crime victims presented as amici. Professor Andrew Ashworth expressed this eloquently when he argued, "Criminal justice systems rely heavily on victims for information about crimes and about offenders, and for evidence in court. It is only fair that, in return, the system should ensure that they receive the proper help and support."⁷¹

The ability to present crime victims' perspectives in criminal proceedings through the addition of organizations that represent them as amici could help alleviate such concerns, even if only slightly. In suitable cases, this representation will allow them to deal with concrete and subjective day to day issues that may arise throughout their cases, and it will provide them with an additional mechanism, one which will anticipate the future and the broader impact on crime victims' as a whole. In the criminal process, many decisions are being made that could be perceived as particular disputes between the defendant and the state; however, such decisions encapsulate within them broader impacts on crime victims.⁷² Not allowing their interests to be independently heard hurts what should be a legitimate right to be partners to the process and to present their views regarding the process that directly affects them.⁷³ As part of their participation in the criminal process and as part of the fabric of their rights in such a process, crime victims should have an independent expression of their position or interests regarding the fundamental issues that have broad implications for their lives.⁷⁴

The use of amici in their name will expand the existing representation mechanisms and will provide them with a more comprehensive means of expression.⁷⁵ The use of the amicus curiae practice will allow the presentation of professional, legal, and social arguments regarding legal precedents and desired jurisprudential policy

70. See generally ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE (Cambridge Univ. Press, 6th ed. 2015).

71. *Id.* at 341. See generally Sara Thunberg et al., *Crime Victims in Limbo: The Importance of Collaboration Between the Municipal Social Services and Victim Support Organisations*, 6 NORDIC SOC. WORK RES. 53 (2016).

72. See Erez et al, *supra* note 63, at xii.

73. See *id.*

74. For more information about the current debate taking place in England regarding the independent representations for crime victims to minimize secondary victimization, see Helen Reeves & Peter Dunn, *The Status of Crime Victims and Witnesses in the Twenty-First Century*, in HEARING THE VICTIM: ADVERSARIAL JUSTICE, CRIMES VICTIMS AND THE STATE 26 (2010).

75. See Erez, *supra* note 5, at 550–56 (discussing research that illustrates the importance of fully hearing the positions of crime victims).

regarding crime victims. This will allow the court to understand the broad effects of a judicial decisions on additional groups in society, specifically crime victims. In addition, amicus curiae practice will expose the court to general, broad public perspectives relating to crime victims, as well as material information that is outside the classic discourse of the state and defendant.⁷⁶

Furthermore, some argue that the right to dignity for crime victims has constitutional status.⁷⁷ If that were the case, the state would have an obligation to protect the dignity of crime victims. This is especially relevant in circumstances when the injury to their dignity is caused by the state itself as a result of its control over the criminal process.⁷⁸ Therefore, the state should protect the dignity of crime victims because the criminal process is conducted solely by the state. Crime victims are exposed to having their dignity damaged, often as a result of their lack of participation in these decision-making processes.⁷⁹

3. Inconsistency Between the Interests of the Crime Victims and the Interests of the Entities Tasked with their Representation

An additional justification for the approach advocating the addition of crime victims' organizations as amici in connection to legal issues with broad implications is the inconsistency between the interests of the crime victims and the interests of the entities tasked with representing them.⁸⁰ At face value, the interests of the crime victims are perceived as

76. In this respect, it can be argued that the right of crime victims to fully express themselves is also related to therapeutic judicial conduct, which is growing and established, and where the focus is on emphatic conduct, understanding the point of view of the parties, and granting the parties the right to voice their views. See, e.g., THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES 15 (2011). The use of the amicus curiae procedure partially enables this when the court allows the individual to make the defendant listen to the voices of individuals who have been hurt.

77. For an in-depth argument, see Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282 (2003).

78. For an examination of the various damages that are caused to crime victims, see Joanna Shapland & Matthew Hall, *What Do We Know About the Effects of Crime on Victims?*, 14 INT'L REV. VICTIMOLOGY 175, 177–79 (2007); see also Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. TRAUMATIC STRESS 182, 182–88 (2010).

79. Beloof, *Constitutional Implications*, *supra* note 77, at 295–97.

80. As elaborated upon below, the claim that crime victims are weak because they cannot fully express themselves, as a result of the differences between their interests and the interests of the state, is a claim that can be disputed. Some of the legal writings on this subject examine the status of defendants in criminal proceedings and the perception that they are a weak and unrepresented group. See, e.g., Heidi M. Hurd, *Expressing Doubts*

aligned with the public interest and, as such, are represented by powerful groups in the legislative, executive, and judicial branches.⁸¹ However, this perception is not truly indicative of the reality on the ground. There is an inconsistency between the interests of the crime victims and the entities responsible for formulating the public opinion to the courts. As a result, when certain legal proceedings have a broad impact on crime victims, there is a need for self-expression and to ensure certain protections through the use of representation by the amici.⁸²

The inconsistency between the interests of crime victims and the interests of the entities tasked with their representation could arise in connection to principle legal issues that the courts examine. Moreover, the discrepancy could arise in connection to the many interactions relating to the conduct of the criminal process including: the scope of information that crime victims deserve to receive, the interpretation regarding conducting the criminal proceedings of violent or sex crimes in a reasonable period of time, and the scope of expression permitted to crime victims to express their position to the parole committee or regarding pardons as opposite of the prosecution policy.⁸³ The inconsistency also arises at the legislative level.⁸⁴ For example, as a result of crime victims' organizations, efforts have been made to advance legislative processes that will benefit their situation or that of future crime victims; however, the opposing side argues that these legislative changes should not occur.⁸⁵

About Expressivism, 2005 U. CHI. LEGAL F. 405, 408 (2005). Some argue that criminal defendants suffer from racism and inadequate representation compared to crime victims. See, e.g., LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 89 (1987). Some legal writing on this subject claims that crime victims are the ones receiving broad representation as a result of a perception that their interest is represented by the executive branch and state prosecutors, who are participants in the litigation process. See generally Hadar Dancig-Rosenberg & Dana Pugach, *Pain, Love, and Voice: The Role of Domestic Violence Victims in Sentencing*, 18 MICH. J. GENDER & L. 423 (2011).

81. See, e.g., Beloof, *Constitutional Implications*, *supra* note 77.

82. Kenneth O. Eikenberry claims that the rights of crime victims should be established at the constitutional level in order to both establish such rights and prevent their change on the whims of the electorate. Kenneth O. Eikenberry, *Victims of Crime/Victims of Justice*, 34 WAYNE L. REV. 29, 33–36 (1987); see also Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 64–68 (1987); Karyn Ellen Polito, Note, *The Rights of Crime Victims in the Criminal Justice System: Is Justice Blind to the Victims of Crime?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 260–68 (1990).

83. See David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623, 624–26 (2008).

84. See generally *id.*

85. *Id.* at 647–62, 675–81.

Frequently, however, the issue is not about the inconsistency of interests at a material level, but the desire of crime victims' organizations to clarify and emphasize certain aspects that have emerged during the criminal process.⁸⁶ There are certain situations in which the prosecution, would like to focus on certain legal arguments, but the crime victims would like to present and focus on different legal arguments or present additional social aspects arising from a broader perspective.⁸⁷

Neither the accuser nor the state represent the crime victims and cannot speak on their behalf when a conflict of interest is revealed.⁸⁸ In some cases, the crime victims are not the "agents of revenge" as they are sometimes depicted in relevant literature, but are those who wish to present lenient and forgiving positions in opposition to the position of the state.⁸⁹ A portion of these conflicts could be addressed by using the existing representation mechanisms. However, for cases that are not adequately addressed by current mechanisms enshrined in the law, especially in cases and trial court proceedings where issues of broad implications might arise, it is desirable that crime victims be allowed to present their position independently through the use of amici.

In certain cases, the issue at hand is not an inconsistency between the interests of the crime victims and the interests of the entities tasked with the representations of crime victims, but rather is an inconsistency between different groups of crime victims.⁹⁰ The variation and diversity of crime victims and their different (often conflicting) interests also justify the use of amici to independently express their specific and diverse interests. The interests of deceased crime victims' family members are not similar to the interests of those victimized by fraud crimes, and the interests of sex crime victims are not like those of cybercrime victims, and so forth. The variety of interests between the types of crime victims and the needs of each group requires that, in certain cases, each crime victims' group should be able, if it wishes, to

86. Polito, *supra* note 82, at 260–68.

87. *Id.*

88. Beloof, *supra* note 67, at 337. From my experience as a former prosecutor, sometimes there is a paternalist approach by the state regarding crime victims. This is not desirable and does not align with modern legislation that deals with the rights of crime victims, which aims to provide crime victims with an independent status that empowers them and provides them visibility (even if they are not truly visible) in the legal process.

89. See Hurd, *supra* note 80, at 408. A significant portion of researchers in the field assume as an axiom that the crime victims will always wish to increase punishment. See generally Diane Whiteley, *The Victim and the Justification of Punishment*, 17 CRIM. JUST. ETHICS 42 (1998).

90. Janine Robben, *Victims' Rights Comes of Age*, OR. ST. B. BULL. 9, 9–11 (May 2006).

express its independent view in fundamental issues that impact it through the use of *amicus curiae*.⁹¹

Eventually, if not so common, it is possible that there will also be an inconsistency between the interests of crime victims themselves and the interests of the crime victims' organizations who wish to join as amici. There could be instances in which the crime victims' organizations ask to present broad interests relating to the rights of crime victims, while the crime victim asks to present a position that will seek to benefit the offender. Such scenarios usually happen when crime victims ask for leniency for the offender for various reasons (such as economic dependency, unrequited love, threats or fear for future retaliations, etc.).

In summary, the interests of crime victims are not always fully consistent, and they are not fully aligned with the interests of the entities tasked with representing crime victims generally. In light of such inconsistency, if fundamental legal issues that have a broad impact on crime victims are presented and if the organization complies with the guarantee requirements for fairness in the legal process, the addition of crime victims' organizations to represent such victims, should be allowed. The use of amici is not a substitute for the state in its material function in the criminal process, but it is intended to present the court with a different public perspective of such crime victims' interests regarding legal or social issues especially when such interests are not aligned with those of the state.

4. Striving for Better Judicial Decision-Making and Strengthening the Institutional Legitimacy of Courts

A third justification for the addition of crime victims' organizations as amici in criminal proceedings is that allowing such organizations to join as *amicus curiae* may assist the courts in two intertwined respects. First, the information that such amici will present to the courts may assist the them in reaching more comprehensive decisions based on greater information from all parties impacted by this process. Second, the participation of amici in criminal proceedings dealing with fundamental

91. Douglas E. Beloof has shown, for example, that crime victims from disadvantaged groups of society are systematically damaged in courts (beyond the initial damage caused by the offender). See Douglas E. Beloof, *supra* note 67, at 257 n.7; see also Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC. JUST. RES. 313, 321–24 (2002) (noting that there might be instances where there is an inconsistency between different crime victims in connection with a specific legal proceeding).

legal issues can increase the courts' institutional legitimacy from the crime victims' perspective.⁹²

In the first respect, the use of the information the amici present regarding the broad impact of the process on crime victims (or additional types of information, such as adequate interpretation to the existing rights of crime victims) may decrease judicial mistakes and bring about, at least potentially, a more comprehensive court decision.⁹³

The practice of the amicus curiae will introduce to the court information from various interdisciplinary fields, which are broader than the information presented by the formal parties to the process.⁹⁴ The use of the amicus curiae does not necessarily ensure the best judicial decision in the criminal process; however, it may improve the likelihood of that occurring when compared to a situation where the court makes its decision without an informed social perspective and without being aware of how its decision affects the group of crime victims. The use of amicus curiae may allow organizations to expose the court to all materials relevant to the process, presented by a broad spectrum of parties.⁹⁵

Studies that have examined the impact of the information presented by amicus curiae in U.S. federal courts support such a position.⁹⁶ These studies have shown that amicus briefs assist judges to better understand

92. The institutional legitimacy of the courts is expressed in the level of respect and compliance of the public and its elected officials with judicial decisions. *See generally* James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 L. & SOC'Y REV. 469 (1989). Institutional legitimacy is dependent on the way courts conduct the process, the judicial reasoning for its decisions, and the prevailing perception of the courts among public. *See also* Tom Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 379–80 (2006) (discussing the factors contributing to institutional legitimacy and its effects on compliance). *See generally* Tom Tyler, *Procedural Justice*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 435 (Austin Sarat ed., 2004).

93. *See generally* Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

94. *See Erez, supra* note 59, at 548, 555 (noting that the statements of crime victims contribute to a more accurate verdict because the judge reaches the decision based on a broader scope of information).

95. Dean G. Kilpatrick & Randy K. Otto have argued that presenting the position of crime victims in the criminal process will assist the court in expanding its knowledge on the implications of crimes for the victims. Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 26 (1987). The ability to understand the perspective of crime victims will allow judges to comprehend the overall complexity of the process and the various implications of the issues at hand, which will assist in uncovering the truth. *See id.*

96. *See* Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 696–98 (2008).

the general implications of their decisions because of the fuller range of available information presented to them.⁹⁷ In such studies, it was discovered that one of the main reasons that judges allowed amici to join the legal proceedings was that such amici presented them with material information that was not presented by the formal parties to the proceedings, mainly regarding the broad social implications of the verdict on additional groups in society.⁹⁸ The material presented by amici to the courts may rely on similar information sources as the formal parties to the proceedings, but the formal parties typically use this information without taking into consideration the interests of the crime victims.⁹⁹

In the second respect, allowing crime victims the opportunity to present their position, even without accepting it and without referring to it directly in the courts' decision, might strengthen the institutional legitimacy of the courts. The level of respect and compliance of the public and its elected officials to the courts' judicial decisions confers the institutional legitimacy of the courts.¹⁰⁰ This institutional legitimacy depends on the nature of the decision-making process, its judicial reasoning, and the prevailing conception by the public of the status of the courts.¹⁰¹ Broadening the participation of the public through the use of amicus curiae and establishing public legitimacy neutralizes resistance pockets to the courts.

If the courts are willing to listen to organizations that represent crime victims as amici, this inclusion will generate a higher moral commitment for crime victims to respect the courts' decisions, even if the content of those decisions do not align with their expectations.¹⁰² Various studies

97. See P. Stephen Gidierre III, *The Facts and Fictions of Amicus Curiae Practice in the Eleventh Circuit Court of Appeals*, 5 SETON HALL CIR. REV. 1, 15–16 (2008); Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185, 190 (2009).

98. Simard, *supra* note 96, at 646, 698 (reporting that courts found information from interest groups to be helpful). *But see id.* at 695 (reporting that lower courts did not find new information presented by amici to be helpful). See also, Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 36 (2004).

99. See, e.g., Benjamin R.D. Alarie & Andrew J. Green, *Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance*, 48 OSGOODE HALL L.J. 381, 386–87 (2010).

100. See Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC'Y REV. 513, 516–18 (2003).

101. *Id.*

102. Some may argue that crime victims will be even more despaired because, even though the courts listened to them, the results did not change, creating a feeling that

have indicated that damage is inflicted upon crime victims because they were denied the full expression of their position in the proceedings taking place in connection with their cases.¹⁰³ Therefore, allowing amici to present their position, even without necessarily accepting their position, is an expression by the court that it is investing efforts to the hear the positions of crime victims independently and to allow them to have their day in court.

Crime victims experienced a positive effect when courts seriously considered their arguments and heard their voices and their stories through the amici. Even without taking account of that in the actual ruling, this experience can increase trust in the courts from the position of crime victims.¹⁰⁴ The use of the amici in criminal proceedings will allow crime victims to express their point of view and, as result, it will provide them with a sense of self-worth, procedural justice, and a commitment to both the process and the outcome.¹⁰⁵

C. The Proper Model for Adding Crime Victims' Organizations as Amici Curiae in U.S. Criminal Law

1. The Importance of Using Amici Curiae for the Independent Representation of Crime Victims

Today, crime victims in most states have the right to express their position during the criminal trial, mostly when the criminal process is close to its end.¹⁰⁶ For instance, a victim impact statement is a written or an oral statement made as part of the judicial process, which provides crime victims the opportunity to voice their position during the defendant's sentencing or at subsequent parole hearings.¹⁰⁷

"everybody knows the dice was loaded—the poor stay poor and the rich get rich." LEONARD COHEN, *EVERYBODY KNOWS* (Columbia Records 1988).

103. See, e.g., Christie, *supra* note 57, at 7–8.

104. For a general overview of the public's trust and procedural justice, see Roger K. Warren, *Public Trust and Procedural Justice*, 37 CT. REV. 12 (Fall 2000); John Koch, Note and Comment, *Making Room: New Directions in Third Party Intervention*, 48 U. TORONTO FAC. L. REV. 151, 152–54 (1990). For an overview of the development in the problem of the public trust in the courts in the U.S., see G. ALAN TARR, *JUDICIAL PROCESS AND JUDICIAL POLICYMAKING* 233–43 (3d ed. 2003).

105. See, e.g., Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 NEGOT. J. 271 (1999); see also O'Hara, *supra* note 29.

106. Beloof, *Constitutional Implications*, *supra* note 77, at 286 (noting that all 50 states allow crime victims to speak in some capacity at sentencing).

107. Julian V. Roberts, *Listening to the Crime Victim: Evaluating Input at Sentencing and Parole*, 38 CRIME & JUST. 347, 349 (2009).

Until recently, many crime victims were denied the opportunity to voice their position to the court regarding the extent of their suffering or their views about the appropriate punishment.¹⁰⁸ All fifty states now allow victim impact statements at some phase of the sentencing process.¹⁰⁹ Most states permit the submission of impact statements at parole hearings, and victim impact information is generally included in the pre-sentencing report presented to the judge.¹¹⁰

As this section will demonstrate, compared to victim impact statements,¹¹¹ which present specific and subjective issues related to individual cases, amicus briefs present broad public perspectives.¹¹² Usually, amicus briefs include legal arguments about the desired interpretation of the law or present various social arguments for the courts to use.¹¹³ The presented issues are of such a nature that, as a rule, crime victims cannot testify about them, and there is no need for such testimony (for example, in proceedings relating to the interpretation of a clause under criminal law).¹¹⁴

108. Rachelle K. Hong, Note, *Nothing to Fear: Establishing an Equality of Rights for Crime Victims through the Victims' Rights Amendment*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 207, 237 n.48 (2002).

109. Beloff, *Constitutional Implications*, *supra* note 77, at 286.

110. The purpose of victim impact statements is to allow crime victims to describe to the court or parole board the impact of the crime during the decision-making process for sentencing or parole. *Victim-Impact Statement*, BLACK'S LAW DICTIONARY (11th ed. 2019). A judge may use information from these statements to help determine an offender's sentence, and a parole board may use such information to help decide whether to grant parole and what conditions to impose in releasing an offender. Victim impact statements may include descriptions of physical, emotional, psychological, and financial damages caused by the crime, including any damages suffered by the victim's family. Carrie L. Mulholland, *Sentencing Criminals: The Constitutionality of Victim Impact Statements*, 60 MO. L. REV. 731, 731 (1995). See generally Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996).

111. See PETER BROOKS, *TROUBLING CONFESSIONS, SPEAKING GUILT IN LAW & LITERATURE* (2000). For the position that objects to the submission of victim impact statements on the ground that they may adversely influence the court, see FLETCHER, *supra* note 2, at 198. For a discussion of the status of victim impact statements, see generally Dancig-Rosenberg & Pugach, *supra* note 80.

112. Judge Neal Nettesheim & Clare Ryan, *Friend of the Court Briefs: What the Curiae Wants in an Amicus*, 80 WIS. LAW. 11, 11–12 (2007).

113. See *id.*

114. See e.g., *State v. Brown*, 342 P.3d 239, 242 (Utah 2014) (discussing the status of crime victims as a "limited-purpose party" with the right to file some motions).

2. Adequate Circumstances for Adding Crime Victims' Organizations as Amici Curiae in Criminal Procedures

While the function of the victim impact statement is usually to discuss specific facts and evidence which have been presented to the court from a personal perspective, the function of the amici is to represent interests that should be heard by the court from a public perspective—especially when such interests or perspectives can impact groups beyond the formal parties to the proceedings.¹¹⁵ The practice of the amici is, therefore, different than the existing representation mechanisms available for crime victims. This practice fills in the void by expressing the public interests of crime victims in criminal processes.

In previous Parts, I have examined the possible role of the amici in trial court proceedings in the U.S. and the justifications to use the amicus curiae in such instances. In light of that, a question arises: What are the circumstances in which it would be proper to add crime victims' organizations as amici in criminal proceedings, especially at the trial court level?

The courts should approve the request of crime victims' organizations to join criminal proceedings when such organizations wish to present to the court the perspective of a group of crime victims, or to offer their unique interests in fundamental legal issues that have a direct impact on such crime victims.¹¹⁶ For instance, the positions of such organizations should be heard when a legal issue arises relating to the interpretation of the rights of crime victims under the applicable law or to the relationship between the crime victims' rights and the interpretation of other laws. For example, the right to conduct the proceedings related

115. The Federal Circuit Rules for appellate courts in the U.S. allow invitations to expert amici from an exhaustive list. *See* FED. CIR. R. 29(b) ("The clerk will maintain a list of bar associations and other organizations to be invited to file amicus curiae briefs when the court directs. Bar associations and other organizations will be placed on the list if they request.").

116. Obviously, such requests will be subject to compliance with court rules in connection with using an amici, which differ from court to court. *See* Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907, 909–12 (2011) (challenging the U.S. Supreme Court's alleged interference with the adversarial system through its discretion to appoint amici); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Fact-Finding*, 61 DUKE L.J. 1, 3–5, 7 (2011) (questioning amicus curiae participation as a means of obtaining off-the-record facts that were not tested through adversarial adjudication).

to sex and violent crimes in a reasonable period of time must be balanced against the right of defendants to fully exhaust their line of defense.¹¹⁷

When we deal with cases where crime victims' organizations ask to join as amici in order to present a fundamental argument in a legal issue which is critically important to crime victims, it becomes clear that these organizations do not have a neutral agenda. However, the information they present, the different perspectives they bring, and the implications on a broad spectrum of different segments of crime victims' groups are of utmost importance and may provide essential help to the courts.¹¹⁸

Each state may have differences in how it conducts the criminal process, for instance, regarding the admissibility of evidence, the summoning of witnesses, the different procedural protocols for the defense attorneys, and so forth.¹¹⁹ When the purpose of the crime victims' organizations in joining the process may directly interfere with the prosecution's work, relating to adversarial issues or the management of the criminal process, then such intervention is not desirable. For instance, the crime victims' organization should not be heard as amicus curiae when the organization is disputing the state's position with respect to prosecution's acceptance of certain procedural requests of the defense (such as extensions and postponement of hearings in a collegial manner, change in the order of witnesses, or different procedural agreements in the context of trying to narrow the cause of the dispute).¹²⁰

In addition, crime victims' organizations should not interfere as amici in the discretion of the prosecution regarding the venue of the trial or the manner in which the hearings should be conducted (such as moving the process to criminal mediation in appropriate cases or

117. See *State v. Tedesco*, 69 A.3d 103, 109 (N.J. 2013) (holding that, with respect to a challenge to the victim's standing to address the defendant at sentencing, "[t]he victim's arguments should be heard and evaluated, if not as a party with standing, then as an amicus under Rule 1:13-9.").

118. In this context it is important to differentiate between the use of amicus curiae and Near Intervenors, as "Near Intervenors are people or groups likely to be affected by a case but whose interest is not sufficient for intervention." Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361, 381-82 (2015) ("The Near Intervenor should be distinguished from the amicus curiae who is interested in the outcome because it has a similar case pending, one that could be controlled by precedent set in the instant case.").

119. See Peter L. Davis, *The Crime Victim's "Right" to a Criminal Prosecution: A Proposed Model Statute for the Governance of Private Criminal Prosecutions*, 38 DEPAUL L. REV. 329, 331-34 (1989). Studies have shown that in cases where the crime victims were involved in pre-trial proceedings, criminal cases were concluded faster than when the crime victims were not involved. See Karen Gorbach Rebrovich, *Factors Affecting the Plea-Bargaining Process in Erie County: Some Tentative Findings*, 26 BUFF. L. REV. 693, 699-707 (1977).

120. 3B C.J.S. *Amicus Curiae* § 20 (2019).

transferring the case to community court).¹²¹ In general, the conduct of the criminal process, including the summoning of witnesses to testify, the manner in which the hearing is conducted (such as, closed court hearings), the presentation of the evidence, and the presentation of punishment are in the context of the adversarial system exclusively reserved to the state.¹²²

The concern in such cases is abusing the *amicus curiae* in order to impair the rights of the defendant. Such an intervention may force the court to make unnecessary decisions that are incidental to the criminal process and that will adversely impact the perception of the role of the criminal process in society.

In contrast, the categorical objection to the addition of crime victims' organizations that wish to present their views to the court as *amici* on the ground that they constitute an additional prosecutor does not convey the entire complexity of their involvement in the criminal process.¹²³ The purpose of adding them as *amici* does not necessarily intervene on the prosecution's independent discretion regarding the conduct of criminal proceedings, and it is not even necessarily in order to advocate for increasing the defendant's sentence. Rather, the purpose of their addition as *amici* is to present the broad interests of crime victims.¹²⁴

Viewing such *amici* as additional prosecutors may be correctly perceived in cases where they attempt to intervene in the various adversarial proceedings in the criminal process. However, the situation is different when *amici* request to join the proceeding to present the perspective of crime victims regarding fundamental legal and social issues.¹²⁵ In such cases, where the crime victims' organizations seek solely to present future implications or when they only wish to present an additional public perspective emphasizing the probable future

121. See Lowman, *supra* note 8, at 1255 n.76.

122. See KAMISAR ET. AL., *supra* note 21, at 997-99 (2005); see also Barkow, *supra* note 21, at 1033.

123. Cf. Davis, *supra* note 119, at 334-41.

124. *Id.*

125. It seems that many professionals in this field do not adequately consider hearing the interests of crime victims because they assume axiomatically that the crime victim's desire is to advocate for an increase in sentencing and persecute the defendants. See, e.g., Hurd, *supra* note 80, at 408. Consequentialist theorists, such as H. L. A. Hart, mainly focus on the social benefit and do not give enough emphasis to the rights of crime victims. See H. L. A. Hart, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 1-27 (1969). Similarly, theories which focus on the rehabilitation of convicts do not emphasize the rights of crime victims enough. See, e.g., Berryl Gordon Thompson, Comment, *The Justification, Purposes and Functions of Punishment in Our Domestic Society*, 26 S.U. L. REV. 265, 270 (1999).

implications for crime victims, the court should approve the request and add them as amici.¹²⁶

In addition, in instances where there is a procedural agreement between the formal parties of the criminal process regarding the addition of crime victims' organization to the proceedings, the courts should allow such organization to join as amicus curiae. The common practice in most states in the U.S is that, even if the formal parties have agreed to allow the addition of a third party or amicus curiae, then the court still reserves the discretion to approve such request.¹²⁷ This means despite the formal parties' agreement or lack of objection to the criminal process, courts can still reject the request.¹²⁸

Some U.S. states allow the submission of amicus briefs subject to the approval of the formal parties or the court (this is the case in Alaska, Arizona, Iowa, Maine, Missouri, and Nebraska).¹²⁹ In contrast, some states allow the submission of amicus briefs only upon the approval of the court, even if the formal parties have agreed to such submission (such states include California, Colorado, Delaware, Massachusetts, and Tennessee).¹³⁰ In a few states (Texas, Georgia, and Pennsylvania), it is permissible to submit an amicus brief without receiving the consent of the parties or the court, but the courts may reject amicus briefs at their sole discretion.¹³¹ Regardless of any rules, all state courts have the authority to appoint amici at their discretion.¹³²

Therefore, in cases where the formal parties to the criminal process reach a procedural agreement to allow the addition of amici, this should weigh in favor of adding the crime victims' organizations as amici.¹³³ To illustrate a procedural agreement between the formal parties regarding the addition of a crime victims' organization as amici, the following

126. For a study showing the importance of hearing the position of crime victims fully and independently, see generally Erez et al., *supra* note 63.

127. ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES* 684 (8th ed. 2002).

128. *Id.*

129. See Anderson, *supra* note 118, at 397 n.205 (citing ALASKA R. APP. P. 212(A)(9); ARIZ. R. CIV. APP. P. 16(A); IOWA R. APP. P. 6.906(1); ME. R. APP. P. 9(E)(1); MO. SUP. CT. R. 84.05(F); NEV. R. APP. P. 29(A)).

130. See *id.* at 397 n.206 (citing CAL. CT. R. 8.520(f); COLO. APP. R. 29; DEL. SUP. CT. R. 28(a); MASS. R. APP. P. 17; TENN. R. APP. P. 31(A)).

131. See *id.* at 397 n.207 and accompanying text (citing GA. SUP. CT. R. 23; PA. R. APP. P. 531(a); TEX. R. APP. P. 11).

132. *Id.* at 397.

133. Procedural agreements between the formal parties have significant importance to the conduct of the proceedings in the adversarial system, as opposed to the civil law system, in which the significance of procedural agreements is considerably less important. See Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004) (noting that "[e]veryone pleads guilty").

scenario is proposed: the defense attorneys are interested in adding as amicus curiae an organization that specializes in representing defendants because they think that this organization and the arguments that it will present (assuming that it will be willing to join) might assist the defendant with the case. In contrast, the attorneys of the prosecution will be willing (or will not object) to add a crime victims' organization as amicus curiae, because they assume that it will advance their interests in the case, or at least will not derogate from the current position.

As we can see in this hypothetical situation, both parties compete to add amicus curiae to their side. In such cases, mutual agreement of both parties on the addition of amicus curiae for each side could save all parties considerable litigation time.¹³⁴ This dynamic can be described as follows: "the other party shall not object to my amicus curiae and I will not object to their amicus curiae." In this way, amici who wish to present the interests of crime victims (provided that they comply with the rest of the requirements for adding amicus curiae) should be entitled to present their positions. It is understood that sometimes the procedural agreement for the addition of amicus curiae is not necessarily related to the tactics of managing the criminal process but relates solely to collegial agreements.¹³⁵

Another situation in which the court should approve the crime victims' organization as amicus curiae is when a certain legal issue arises that has a broad impact on crime victims when the crime victim is not

134. In the U.S. Supreme Court, a practice formed in which the formal parties tend not to refuse amicus requests, even if the information presented by them could conflict with the interests of one party or the other. See, e.g., Donald R. Songer & Reginald S. Sheehan, *Interest Group Success in the Courts: Amicus Participation in the Supreme Court*, 46 POL. RES. Q. 339 (1993). Among litigants pleading their case in the U.S. Supreme Court, it is known that objecting to a request for amicus, even if such amicus' interests conflict with those of one of the parties, will lead the amicus to ask the Court to approve the request, and in most cases, it will. See, e.g., Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639, 650 (1993) (noting that, for example, in 1990, only one application to file an amicus brief out of 115 was rejected by the Supreme Court). The requests of amici to the Court for approval take significant judicial time; therefore, the formal parties may fear that if they object to such requests of interest groups to join as amici, they might be perceived as wasting limited judicial time and resources. Therefore, there is an informal understanding that the parties to the proceedings will not object, except in rare cases, to amicus requests by amici who support the other party, in an effort to benefit the overall process. See, e.g., Lawrence S. Ebner, *Representing Amici Curiae*, in STRATEGIES FOR APPELLATE LITIGATION *4 (Aspatore Mar. 2013), available at 2013 WL 574525 ("Few appellate courts will deny permission to file a timely amicus brief simply because the opposing party objects.").

135. Even in such cases, in many courts, the approval of the court is required for such agreements. See, e.g., ALASKA R. APP. P. 212(A)(9); ARIZ. R. CIV. APP. P. 16(A); IOWA R. APP. P. 6.906(1); ME. R. APP. P. 9(e)(1); MO. SUP. CT. R. 84.05(f); NEV. R. APP. P. 29(a).

formally present in the process (or their family members in cases of deceased victims). For instance, there are cases where the court should unconditionally hear from the crime victims. However, the crime victims may not have the financial ability to hire legal representation in order to present their independent interests; they may lack the mental ability to deal once more with the defendant; and they may suffer additional trauma in the court.¹³⁶ A similar example is where the victims participate in the proceedings, but they represented their own interests. There will be cases where the courts will want to understand the broader implications of these cases from the perspective of crime victims' organizations.¹³⁷

The court will likely also want to know about the probable impact of its decision on other crime victims who are not represented in the process, as well as, the broader implications for future crime victims.¹³⁸ In other words, we are dealing with a situation where the position of crime victims was not properly represented, or not represented at all, and a crime victims' organization joins as *amicus curiae* in order to present broad legal arguments as they relate to crime victims.

Organizations are motivated to join the criminal process because of a concern that the court might reach a principle decision on a broad issue that impacts the crime victims' groups without hearing their voices. As such, in cases where legal issues arise that could impact the crime victims' group, but there is no entity representing its interest, the court should approve the addition of such organizations as *amici* in order to allow the court to hear their interests.¹³⁹

In conclusion, we must differentiate between the foregoing possible situations, in which the court should consider favorably the addition of crime victims' organizations as *amici*, and situations in which such *amici*

136. For an examination of secondary damages of crime victims, see Jo-Anne Wemmers, *Victims' Experiences in the Criminal Justice System and Their Recovery from Crime*, 19 INT'L REV. VICTIMOLOGY 221, 221-33 (2013); see also MARTIN WASIK ET AL., CRIMINAL JUSTICE: TEXT AND MATERIALS 98 (1999). For literature discussing how secondary damages to sexual crime victims felt like another assault, see Torrey, *supra* note 65, at 1038-45.

137. As described above, there might even be cases in which there is an inconsistency between the interests of an individual crime victim and the interests of a crime victims' organization seeking to join as *amicus*. For instance, the organization may ask to present the broad interests related to the defense of crime victims, while the individual crime victim may ask to present a position which will try to benefit the defendant (because of economic dependency or threats on her life).

138. SUP. CT. R. 37.1; FED. R. APP. P. 29; Anderson, *supra* note 118.

139. As emphasized above, these circumstances do not necessarily cover the full range of possible scenarios which may allow for the inclusion of crime victims' organizations. These situations are not intended as an exhaustive list but are illustrative examples meant to demonstrate the general outlines, which should guide the test for adding such organizations as *amici*.

are trying to intervene in the conduct of the criminal process. As a general rule, the intervention of crime victims' organizations in the conduct of the process is not a desirable legal outcome.¹⁴⁰ Such intervention could also raise a conceptual question regarding the nature of the criminal process, its objectives, and its function in the common law.

3. Judicial Guarantees in Cases of the Addition of Crime Victims' Organizations as Amici Curiae in Criminal Trial Court Proceedings

Making the distinction between crime victims' organizations joining the criminal process as amici to present on behalf of the general public interest of the crime victims and such organizations joining the process in order to intervene with the fairness of the process is a delicate distinction to make. Legal guarantees should be offered to ensure that the addition of such organizations to the criminal process will not damage the fairness of the process. This Part examines the optimal way to provide such procedural guarantees, which on the one hand will allow crime victims' organizations to join as amici, while on the other hand will not derogate from the rights of the defendants.

This section will present a few guarantees that may ease concerns regarding the addition of those acting on behalf of crime victims as amici. These legal guarantees are not intended as an exhaustive list, but they may assist the court's decision-making when considering whether to approve the requests to add organizations as amicus curiae. Courts are entitled to add additional guarantees to supplement those suggested herein, in accordance with the specific facts and circumstances of each case.

Furthermore, courts should be able to pick and choose between guarantees and are not obligated to choose and apply them all in a specific case. Alternatively, courts may decide that in certain cases in which crime victims' organizations ask to join as amici, there is no need for any guarantee because there is no risk of harming the fairness of the process, specially the rights of the defendants.

The first guarantee is that the courts will add additional procedural requirements, in cases where there is a request to join as amicus curiae on behalf of crime victims. This would be in addition to the regular requirements, which are in place for joining as amicus curiae to currently conducted procedures,¹⁴¹ such as: (1) when crime victims' organizations asking to join as amicus curiae have vital information that none of the

140. See, e.g., FLETCHER, *supra* note 2, at 195-96.

141. See Anderson, *supra* note 118.

formal parties to the process have, or which the formal parties do not wish to present to the court; or (2) when the information offered to be presented by *amicus curiae* is required to reach a "just outcome" and failing to present those interests to the court might harm a just outcome.¹⁴²

First, the assumption at the basis of these guarantees is that the court's approval of the addition of *amici* will be given in important and fundamental cases where the *amicus curiae* have vital information that is necessary to the work of the court or when allowing the *amicus curiae* to join the process will achieve justice in that case. Courts are not obligated to add *amicus curiae* to the process.¹⁴³ Also, *amici* do not have an unequivocal right to join the process.¹⁴⁴ Adding such additional requirements may help the court establish that crime victims' organizations will join the proceedings only in cases where there is a public legal issue with broad implications on the group of crime victims and when the information such *amici* wish to present will enable reaching a just outcome.

Second, in all criminal processes in which crime victims' organizations wish to join as *amicus curiae*, the court should issue a reasoned decision about any such request and examine whether it stands up to the criteria the courts established.¹⁴⁵ As a result, in each case where such a request is submitted by a crime victims' organization, the court will hand down a decision specifying its reasons and arguments regarding the request.¹⁴⁶ Even today, every request to join as *amicus curiae*, whether by a crime victims' organization or another entity, is required to comply with the requirements set out by the courts.¹⁴⁷

142. See, e.g., *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615 (7th Cir. 2000) (demonstrating Judge Posner's rigid approach regarding *amici*).

143. See Lowman, *supra* note 8, at 1256 n.76.

144. *Id.* at 1258-61.

145. This means that organizations wishing to join as *amici* to criminal proceedings will have to prove that they are complying with all the criteria established by the court in which the request is submitted. Specifically, they will have to prove the contribution of the position that they wish to present (unlike, for instance, arguments for increased sentencing of a specific defendant). See, e.g., SUP. CT. R. 37.1 ("An *amicus curiae* brief that brings to the attention of the court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the court, and its filing is not favored.").

146. Lowman, *supra* note 8, at 1293.

147. See, e.g., ALA. R. APP. P. 29; ALASKA R. APP. P. 212(9); COLO. APP. R. 29; ME. R. APP. P. 9(e)(1); MASS. R. APP. P. 17; OHIO APP. R. 17; R.I. SUP. CT. R. 16(h); S.C. APP. CT. R. 213.

However, a reasoned judicial decision may reject some of the cases that harm the fairness of the criminal process and allow only the suitable cases in which such organizations would assist the courts by joining as amicus curiae. Furthermore, a well-reasoned judicial decision that examines all the required tests regarding such requests will allow a party that is disadvantaged from such decisions to appeal them, even allowing, if necessary, judicial review of the process.¹⁴⁸ A well-reasoned decision by the court regarding requests to join as amicus curiae will have some measure of guaranteeing the rights of the defendant in the process. When the court is required to specify its reasoning when deciding amicus curiae requests, some of the organizations asking to present their position as amici will not successfully comply with the court's requirements.

An additional possible guarantee is related to ensuring the balance of powers in the criminal process and may assist, to a certain degree, in ensuring the fairness of the process and in presenting the overall interests in the issue at hand. This guarantee is based on the assumption that if a crime victims' organization is allowed to join as amicus curiae for a fundamental issue which has a broad impact on crime victims, then the court may approve adding interest groups that represent defendants in order for the court to hear all the arguments and interests involved.¹⁴⁹

When an organization representing defendants is added as amicus curiae, the courts will be inclined to approve the addition of organizations that represent crime victims. This will not always be necessary. This guarantee is intended to level the playing field for all parties (organizations representing crime victims and organizations representing defendants as amici) in representing the various public interests they wish to advance.¹⁵⁰

As previously stated, courts will be able to add additional legal guarantees that will be modified to the specific circumstances of each case, and, as such, they will decrease the concern of potential harms to defendants. In addition, courts will be allowed to use some of the guarantees suggested above or decide that there is no need for any

148. See note 145 and accompanying text.

149. See generally Janet M. Box-Steffensmeier et al., *Quality Over Quantity: Amici Influence and Judicial Decision Making*, 107 AM. POL. SCI. REV. 446 (2013).

150. For example, whenever fundamental questions of law arise in the U.S. Supreme Court, organizations representing both sides ask the court to allow them to present their position through the submission of amicus briefs. See generally Paul M. Collins et al., *Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 LAW & SOC'Y REV. 917 (2015). Conservative organizations will want to counter the briefs of liberal organizations, green organizations will want to counter the briefs of energy companies, and so forth.

guarantees because there is no concern that the rights of the defendant will be harmed as a result.

D. Criticisms (and Possible Rebukes) Regarding the Addition of Crime Victims' Organizations as Amici Curiae in U.S. Criminal Law

The thesis presented in this Article is not immune from criticism. This Part presents possible criticisms to the use of amicus curiae practice in criminal cases by crime victims' organizations. This criticism and the possible answers to it are based on the descriptive and theoretical chapters of this Article. As we shall see, the main criticism regarding adding crime victims' organizations as amici deals with the possible harm to the rights of defendants.

1. Harming the Rights of Defendants

The main critics of this Article's thesis will argue that the addition of crime victims' organizations as amici might harm the rights of defendants. The adversarial tradition under U.S. common law is that the defendant has just one prosecutor: the state; the conduct of the criminal process is solely at the hand of the state.¹⁵¹ The state is the one that is exclusively responsible for the enforcement of criminal laws. A criminal offense reflects a deviation from the behavior allowed under the law, and as such, the criminal offense reflects harm to the public as a whole. Therefore, conducting the criminal process is in the interest society as a whole and not just in the crime victim's interest.

Even if the crime victims or the organizations representing them have standing in the criminal process, such standing is incidental to the main process, which is headed by the state and the offender—and in the center, there is the public interest. The use of the amicus curiae practice against defendants may grant such amici the status of an additional prosecutor, which may harm the defendant and which would raise a theoretical question about the goals and function of criminal law.

This criticism is strengthened even more in light of the claim that, in general, defendants in criminal law are already disadvantage compared to the state. Therefore, the addition of amicus curiae on behalf of crime victims has the potential to further increase the unfairness of the criminal process and the rights of defendants.¹⁵²

The disadvantages faced by a defendant include the following: the defense attorney reaches the investigation scene late in the

151. Utz, *supra* note 19.

152. See Miller, *supra* note 133, at 1252.

investigation—the scene is usually handled solely by the state, the normative implication of using the right to remain silent, and the conviction for criminal offenses based on statements made outside the courthouse. In addition, the ethos of the prosecution as the defender of the public and the assumption of the integrity of the authorities are in a sense conflicting with the defense of the defendants. Also, the enforcement agencies (supplied by the state) usually enjoy greater allocation of resources and manpower, while on the other side, a suspect or defendant must handle the charges or suspicions facing him or her alone.¹⁵³

Another possible concern is that the crime victims' organizations that join as amici exert additional pressure on the judges to increase the defendant's sentence at various stages of the process.¹⁵⁴ This concern is increased in light of the growing criticism of the courts, which argues that without an empirical basis for the current sentencing policy, the judges are influenced by the public and the discourse of the media when determining sentences (this is certainly the case when it comes to judges who are elected).¹⁵⁵ This conception is in contrast to the expectation that judges will fulfill their position in an objective manner and remain detached from external pressures.¹⁵⁶ Another empirical concern in this regard is that politicians will use the amici process to appear in courts in order to promote more severe sentencing policies and gain public favor.¹⁵⁷

Indeed, these are real concerns. However, these concerns can be alleviated and can greatly reduce the risk that the rights of defendants will be harmed. First, as previously stated, the goal of submitting amicus briefs on behalf of crime victims is for the broad inclusion of crime victims and their families, not for the purpose of substituting the discretion of the prosecution or interfering with its decisions.¹⁵⁸ Crime

153. In contrast, sometimes this lack of equality may be manifested in reverse. Sometimes the defendant is represented by a skilled and experienced attorney and has a relative advantage over the state, which is sometimes represented by a less experienced or qualified prosecutor.

154. For a description of the relationship between the courts and the media, see LIEVE GIES, *LAW AND THE MEDIA: THE FUTURE OF AN UNEASY RELATIONSHIP* 108–09 (2008).

155. JULIAN V. ROBERTS ET AL., *PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES* 22–23 (2003).

156. See GIES, *supra* note 154 (examining the relationship between the media and the courts).

157. For a view of crime victims and the politicians who purport to represent the public interest as “revenge agents” seeking to bring about greater punishments for offenders, see Hurd, *supra* note 80, at 408; see also Andrew Ashworth, *Victim Impact Statements and Sentencing*, *CRIM. L. REV.* 498, 499 (1993).

158. For an in-depth view, see Beloof, *Constitutional Implications*, *supra* note 77.

victims' organizations do not necessarily act against the interests of defendants but work to present their own points of view. Therefore, it cannot be assumed that their inclusion will definitely result in harm to the rights of defendants. Again, their role is to present the legal issue from a different perspective, not to interfere with the adversarial process.¹⁵⁹

Second, as mentioned above, it is desirable that in each criminal process for which crime victims' organizations wish to join as *amicus curiae*, the court will hand down a reasoned legal decision about such requests and determine whether they are compliant with all the requirements the court established.¹⁶⁰ A well-reasoned judicial decision will allow the court to reject those requests which cause harm to the fairness of the process and approve only the cases in which adding the organizations as *amici* will assist the court's work.

Third, it will be possible to use the guarantee, described in the previous section, that if the crime victims' organization is allowed to join as *amicus curiae* regarding the fundamental issue, then the courts will be more inclined (but still not obligated) to approve the addition of organizations that represent the interests of the defendants, in order to hear the full spectrum of interests in the matter. Similarly, when an organization representing the defendants is added as *amicus curiae*, the court will be more inclined to approve the addition of organizations that represent crime victims.

Fourth, some attempts to exert pressure on the courts are already taking place by parties involved in the conduct of the trial (such as using media interviews during the criminal process or leaking materials from the investigation) and the addition of the *amici* on behalf of crime victims will not necessarily add or derogate from this already existing reality.¹⁶¹

Fifth, even if there is the concern that adding crime victims' organizations will harm the fairness of the criminal process, the

159. See Blondel, *supra* note 50, at 241–48 (discussing the argument that the criminal process today is not a classical adversarial process and is becoming increasingly flexible, i.e., how the institution of the private complaint was developed and used and how it is interfering in the classical adversarial process).

160. See, e.g., ALA. R. APP. P. 29; ALASKA R. APP. P. 212(9); COLO. APP. R. 29; ME. R. APP. P. 9(e)(1); MASS. R. APP. P. 17; OHIO APP. R. 17; R.I. SUP. CT. R. 16(h); S.C. APP. CT. R. 213.

161. Some of the literature suggests that defense attorneys must use the media in order to serve the interests of their clients as part of the right to a fair trial. Beth A. Wilkinson & Steven H. Schulman, *When Talk is Not Cheap: Communications with the Media, the Government and Other Parties in High Profile White Collar Criminal Cases*, 39 AM. CRIM. L. REV. 203, 212 (2002).

aggregate benefit of adding crime victims as amici outweighs the possible harm to the rights of the defendants. In the last three decades, criminal law in many countries around the world has strengthened the status of crime victims.¹⁶² Such strengthening of their status is manifest in special laws ensuring the rights of crime victims, legislation that deals with their rights, court decisions that have expanded their rights, and various government decisions.¹⁶³

Therefore, justice requires, in this case of balancing the relevant interests, that the presentation of crime victims' interest through organizations that will represent them as amici is a preferable outcome. Criminal offenses are not just a violation of abstract legal norms, but they also have caused actual injury to real humans, each with a personal story. Therefore, in appropriate cases, the courts should allow crime victims' organizations to present their position.

In conclusion, according to the proposed model in this Article, the risk that defendants' rights will be harmed is minor because of the following reasons: crime victims' organizations will be added only to cases dealing with fundamental issues; the courts will have to provide a well-reasoned decision on whether such an organization has complied with all the requirements of the law; such addition might happen as a result of the defendant's approval; and there is the option to add an organization that represents the interests of defendants in order to ensure, as much as possible, that the process is fair. Furthermore, even if there is some risk to harming the defendant's rights, in light of the justifications described above, in the overall balance between the interests of the parties, the addition of crime victims' organizations should prevail.

2. Additional Criticisms Regarding the Addition of Amici Curiae on Behalf of Crime Victims

Alongside the main criticism about adding amici on behalf crime victims, there are additional possible criticisms that should be examined. First, the involvement of crime victims' organizations as amici in criminal processes could cause a politicization of the criminal process. The use of amicus curiae by crime victims' organizations could turn the criminal process into an arena promoting conflicting interests by competing groups. The use of the amicus curiae to promote crime victims' rights could parallel disputes taking place in the legislative

162. See G.A. Res. 40/34, *supra* note 39.

163. *Report from the Commission to the Council*, *supra* note 41.

branch and bring them into the courts.¹⁶⁴ A possible answer to this criticism is that when using amicus curiae there is no significant difference between interest groups who are promoting the rights of defendants and those organizations that are promoting the interests of crime victims. Both sides could bring outside debates and methods into the legal proceedings.

An additional criticism is that in some states, the criminal procedural rules are more hostile towards the addition of third parties in criminal proceedings, especially in trial court proceedings.¹⁶⁵ Even where the law is silent, it can be argued that new rights should not be added to existing laws that are not explicitly granted therein. However, even if in some states there is no clear reference to adding amici in criminal proceedings, this omission does not mean that the opportunity to submit amicus briefs by organizations that represent crime victims is unavailable. Lawmakers should introduce the necessary legislative amendments that will allow the possibility offered in this Article, subject to legal guarantees that will not harm the fairness of the process.

Furthermore, additional criticisms relating to the general use of the amicus curiae practice should be mentioned, as well as, criticisms that might increase with the addition of crime victims' organizations as amici in criminal proceedings. First, often the information that is presented by amici is not novel to the court, as the amici tend to replicate arguments that were already argued by the formal parties in a different manner.¹⁶⁶ Second, adding amici to existing proceedings could, in certain cases, increase the length of the judicial proceedings, wasting judicial time and resources. Third, the addition of amici increases the costs associated with the proceedings and causes the process to become long and complex.¹⁶⁷

164. It should be mentioned that in courts around the world and especially in the U.S., there is the impression that sometimes interest groups attempt to influence the decision-making process of the courts using amici. Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807, 814-15 (2004). The basic assumption is that the formal parties to the process with more amici on their side probably have amici with greater influence in Congress or the media—and therefore have a greater chance of winning the case. *Id.*

165. See YALE KAMISAR ET. AL., note 21, at 997-99.

166. See *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). A possible answer to this criticism is that although sometimes the argument appearing in the amicus brief does not introduce the issue in an innovative way, courts should still accept these briefs because they update the courts about the public lobby that stands behind a particular side and the interests groups working on the matter. Collins, *supra* note 164, at 814-15.

167. Judge Posner from the Seventh Circuit Court of Appeals portrayed this criticism. See *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615 (7th Cir. 2000). On several occasions, Judge Posner decided that the use of the amicus curiae failed in its function to

Fourth, some amici present studies and different types of information that are not properly based and, therefore, the courts may have difficulty examining the information presented to them.¹⁶⁸ The answer to these criticisms is that today, the courts allow the addition of amici on behalf of defendants despite such concerns. Therefore, the addition of amici on behalf of crime victims on fundamental issues likely will not change the current legal landscape.¹⁶⁹ The same tests the courts conduct for amici who wish to express a position that will assist defendants will also be applied to the amici asking to present the interests of crime victims (and maybe even additional tests, if the court concludes that additional guarantees are required).

3. It is Not Customary to Add Crime Victims' Organizations as Amicus Curiae in Criminal Trial Court Proceedings under Common Law

Another possible criticism regarding the addition of crime victims' organizations is that an examination of the use of the amicus curiae has shown that previously there was little use of the amicus curiae practice to present the interests of crime victims in criminal proceedings. The common law tradition is that there is an interest in maintaining fair representation, especially when legal aid is hard to receive. The provision of legal aid by defense attorneys in their position as amici was intended to allow the defendant to fulfill their rights; courts may appoint defense attorneys as amici because conducting the criminal proceedings when the

assist the courts. *See Ryan*, 125 F.3d at 1063. In his view, the amici are burdening the courts and making it harder for them to work while wasting judicial time, thus increasing the costs of the legal process. *See id.*; *see also Sciotto v. Marple Newtown Sch. Dist.*, 70 F. Supp. 2d 553, 555 (E.D. Pa. 1999). This approach is not accepted by all appeals court judges. *See, e.g., Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 133 (3d Cir. 2002) (noting that Justice Alito rejected Judge Posner's approach).

168. *See Larsen, supra* note 7, at 1784–88. A possible answer to this criticism is to examine the information presented by the amici. For instance, Michael Rustad and Thomas Koenig argue that in light of the possibility of amici to present information in an exaggerated or unreliable manner (a phenomenon sometimes called “junk science”), the courts should appoint a professional expert who can provide independent and critical consultation to amici that would include different types of information, specifically from the field of social science. Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 157–58 (1993).

169. *See generally* Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. APP. PRAC. & PROCESS 279 (1999) (discussing the perspective that takes into account the risks and chances related to the use of the amicus and arguing that the benefits outweigh the disadvantages).

defendant is not represented is much more complex from a procedural perspective.

Therefore, in relatively exceptional cases where there is no statutory obligation to appoint a defense attorney, but the court still wants the defendant to be represented, the court can appoint a defense attorney in the capacity of amici.¹⁷⁰ For example, the Supreme Court of South Dakota appointed an attorney as amicus to a defendant who was sentenced to death.¹⁷¹ The court ordered this unique appointment after it saw that the previous defense attorney instructed the defendant to accept the death penalty.¹⁷²

With respect to fundamental issues relating to the rights of the defendant, the case of *Miranda v. Arizona* is well-known.¹⁷³ This case dealt with the right to avoid self-incrimination; amicus briefs were submitted in support of the rights of defendants.¹⁷⁴ The case of *Escobedo v. Illinois* is another familiar one; there, the U.S. Supreme Court decided, based on the amicus brief of the American Civil Liberties Union (ACLU), that the Sixth Amendment grants suspects the right to consult with an attorney during the investigation.¹⁷⁵

Moreover, it might be a good idea to notice what is done in criminal tribunals under international law, which routinely allow organizations representing the interests of crime victims to join as amici.¹⁷⁶ In the

170. See Mary-Christine Sungaila, *The IADC Amicus Brief Program: Its Increasing Success and Influence*, 81 DEF. COUNS. J. 32, 34 (2014).

171. *State v. Robert*, 820 N.W.2d 136 (S.D. 2012).

172. *Id.* at 140–41 n.7 (“This Court is aware of society’s interest in the constitutional imposition of the death penalty. This interest exists independent of the State’s interest in punishing [defendant] for his crimes.”). *But see* *State v. Ross*, 863 A.2d 654, 674 (Conn. 2005) (rejecting an amicus brief by a public defender association, reasoning that the court was not required to “grant a request to appear as amicus curiae if the parties to a proceeding have taken nonadversarial positions on an issue on which the person seeking to be admitted as an amicus curiae takes an opposing view.”).

173. *Miranda v. Arizona*, 384 U.S. 436 (1966).

174. *Id.* at 470.

175. *Escobedo v. Illinois*, 378 U.S. 478, 490–91 (1964). Another example is a case out of the Sixth Circuit, *United States v. Michigan*, which involved a suit by the federal government against the State of Michigan over prison conditions. 940 F.2d 143, 145–46 (6th Cir. 1991). The would-be intervenors were a group of prisoners who eventually were represented by the ACLU and a prisoners’ rights group. *Id.* at 146. While the trial court denied them permission to intervene as real parties in interest, it allowed the prisoners to continue as amicus curiae. *Id.*

176. I do not claim that there is an equivalence between what is done under U.S. criminal law and the criminal institutions of international law. The difference is significant. Nevertheless, the purpose of this possible answer is modest: to present an additional model with many years of experience which allows the use of amicus curiae in criminal proceedings on behalf of crime victims’ organizations. Fletcher argues that there is room to consider adopting comparative approaches from outside of the U.S. regarding

1990s, international criminal tribunals allowed crime victims' organizations to argue as *amicus curiae*.¹⁷⁷ Examples of the practice are found in the International Criminal Tribunal for the Former Yugoslavia (ICTY),¹⁷⁸ the International Criminal Tribunal for Rwanda (ICTR),¹⁷⁹ and in the Special Court for Sierra Leone (SCSL).¹⁸⁰

For instance, in the matter of the prosecution of the war criminal Karadzic, the ICTY invited a group of experts in the field of crime victims to present information and evidence to the tribunal as amici about "the practice of rape and sexual assault as part of ethnic cleansing in Bosnia and Herzegovina since 1992."¹⁸¹ Similarly, in the matter of prosecution of the Croatian general Blaškić, the ICTY approved the addition of several amici.¹⁸² These amici presented the war crimes Blaškić committed (crimes against humanity and prosecution based on racist and political motivation) to the tribunal.¹⁸³ In addition, in *Prosecutor v. Tadić*, several crime victims' organizations were allowed to join as amici, including: International Clinic of Women for Human Rights, The Center for Human Rights of New York, Refugee Center of Harvard, and Legal Aid Program of Cambridge.¹⁸⁴

the handling of crime victims' interests in the criminal process while allowing for greater involvement of the crime victims. See generally FLETCHER, *supra* note 2.

177. Sarah Williams & Hannah Woolaver, *The Role of the Amicus Curiae Before International Criminal Tribunals*, 6 INT'L CRIM. L. REV. 151, 154–58 (2006).

178. Int'l Crim. Trib. for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, Rule 74, U.N. Doc. IT/32/Rev. 50 (July 8, 2015).

179. Int'l Crim. Trib. for Rwanda, Rules of Procedure and Evidence, Rule 74, U.N. Doc. ITR/3/REV. 1 (June 29, 1995).

180. Special Court for Sierra Leone, Practice Direction on filing *Amicus Curiae* Applications, Rules of Procedure and Evidence, Rule 74 (Oct. 20, 2004), http://www.rscsl.org/Documents/PRACTICE_DIRECTION_Amicus_Curiae.pdf [http://web.archive.org/web/20191118035947/http://www.rscsl.org/Documents/PRACTICE_DIRECTION_Amicus_Curiae.pdf].

181. Williams & Woolaver, *supra* note 177, at 156 (quoting Oral Order, June 27, 1996, T960627, at 17).

182. *Id.* at 156–57.

183. *Id.*; *Prosecutor v. Blaškić*, Case No. IT-95-14-PT., Order Submitting the Matter to Trial Chamber II and Inviting Amicus Curiae (Int'l Crim. Trib. for the Former Yugoslavia Mar. 14, 1997). For the list of amici who participated in the discussion as noted in the tribunal decision, see *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997).

184. *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 10 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995) ("The briefs submitted by the two *amicus curiae* generally support the position of the Prosecutor.").

Similarly, in *Prosecutor v. Akayesu*, which was discussed in ICTR, the Coalition for Women's Human Rights in Conflict Situations submitted a request to join as amicus curiae.¹⁸⁵ The organization asked that the tribunal instruct the prosecution to amend the indictment by adding sex crime allegations, that the defendant allegedly committed, against the women of the Tutsi tribe in Rwanda.¹⁸⁶ Although the tribunal did not make any official decision regarding the request, it would seem that the request to join as amicus curiae influenced the prosecution, as it amended the indictment to include allegations of sex crimes committed by the defendant.¹⁸⁷

Moreover, the SCSL allowed the addition of amici to present the interests of crime victims, specifically in the prosecution of the former president of Liberia, Charles Ghankay Taylor.¹⁸⁸ The tribunal invited several amici to present legal arguments regarding the removal of Taylor's immunity.¹⁸⁹ Similarly, in *Prosecutor v. Norman*, an issue arose regarding the interpretation of the law regarding the use of children for warfare.¹⁹⁰ In this matter, UNICEF and the Human Rights Clinic of the University of Toronto were added as amici.¹⁹¹

Crime victims' organizations were also added in the matter of *Prosecutor v. Kallon and Kamara*.¹⁹² In this matter, a question arose regarding the validity of a parole agreement that was made with the defendants prior to their trial.¹⁹³ In order to decide this issue, the tribunal invited Professor Orentlicher to join the proceedings as an amicus.¹⁹⁴ In addition, the crime victims' organization Redress Trust asked to join as an amicus curiae, and its request was approved.¹⁹⁵ The information presented by the amici in these cases was not in conflict with the

185. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Order Granting Leave for Amicus Curiae to Appear (Int'l Crim. Trib. for Rwanda Feb. 12, 1998) (discussing Coalition for Women's Human Rights in Conflict Situations).

186. See *id.*

187. See Williams & Woolaver, *supra* note 177, at 173-74.

188. *Prosecutor v. Taylor*, Case No. SCSL-2003-01-1, Application to Appear as an Amicus Curiae in *Prosecutor vs. Charles Ghankay Taylor* (Special Ct. for Sierra Leone Nov. 28, 2003).

189. See *id.*

190. *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E) (UNICEF), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (Special Ct. for Sierra Leone May 31, 2004).

191. *Id.*

192. *Prosecutor v. Kallon and Kamara*, Case No. SCSL-2004-PT-15-059-I and II, Decision on Constitutionality and Lack of Jurisdiction (Special Ct. for Sierra Leone Mar. 13, 2004).

193. *Id.*

194. *Id.*

195. *Id.*

interests of the defendants, and this information was comprehensively addressed in the decisions.

Furthermore, the rules of the International Criminal Court of The Hague stated that the Court may invite or allow third parties (states, organizations, or even persons) to submit oral or written arguments in any matter that the Court finds adequate—whether such third party supports the defendants or the crime victims.¹⁹⁶ The Court has established that it may approve the addition of third parties as amici regardless of who it helps, as long as the information presented assists the Court. Indeed, the Court has, in recent years, approved the submission of many amicus briefs by organizations that presented the broad interests of crime victims and their interpretation of international law.¹⁹⁷

Often, the crime victims' organizations assisted the Court with more than presenting legal arguments relating to crime victims; they also presented information such as authentic documentary evidence of victims' testimonies in conflict areas to present the victims' voices in Court.¹⁹⁸ The international courts' and tribunals' approach to allow crime victims to present their position to the court through the practice of amicus is rooted in the continuing trend in international law of presenting a comprehensive picture of the issues at hand to the courts or tribunals. This includes presenting the positions of the crime victims and the general public interest concerns.¹⁹⁹

International crimes are crimes against the international community as a whole, and the international community has an interest in prosecuting such criminals. Nevertheless, the experience that was gained in such courts and tribunals shows that while the function of the

196. Int'l Crim. Ct., Rules of Procedure and Evidence, Rule 103.1 (2019), <https://www.icc-cpi.int/resource-library/Documents/RulesProcedureEvidenceEng.pdf> [<http://web.archive.org/web/20191118045037/https://www.icc-cpi.int/resource-library/Documents/RulesProcedureEvidenceEng.pdf>].

197. See Williams & Woolaver, *supra* note 177, at 176.

198. It should be noted that in several cases, the international tribunals objected to the addition of amici on behalf of crime victims. For example, in the case of Bagosora, conducted in the International Criminal Tribunal for Rwanda, the Court rejected two requests of the Belgian government as amici who asked to present the interests of crime victims. See *Prosecutor v. Bagosora*, Case No. ICTR-96-7-T, Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium (June 6, 1998). From the decision of the Court, it appears that the Court does not have any principle objection to adding amici who wish to present interests that conflict with the interests of the defendants. For a criticism of the use of amici in international criminal law, see Katia Fach Gómez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 FORDHAM INT'L L.J. 510, 548–53 (2012).

199. Williams & Woolaver, *supra* note 177, at 184–89.

prosecution is to represent the public interest in prosecuting such criminals, decisions made during the process have often caused certain crime victims' groups to feel that their voices were not heard and positions not properly presented.²⁰⁰ The practice of submitting amicus briefs to international criminal courts and tribunals ensures, to a certain extent, that the viewpoints of the crime victims—especially if they belong to a disadvantaged group—are heard.²⁰¹

II. SUMMARY AND CONCLUSIONS

This Article deals with the use of amicus practice in criminal proceedings in the U.S., and especially in trial court proceedings. I have argued that we should reevaluate the proper balance between the interests of the crime victims and the interests of defendants regarding the addition of amicus curiae to criminal proceedings. Despite the concerns in this matter, the courts should allow in criminal proceedings the addition of crime victims' organizations to present their position as amici, even if the proceedings are taking place in trial courts.

Three justifications are at the basis of this argument: First, as part of their participation in the criminal process and as part of their rights, the interests of crime victims should receive independent and broad expression beyond the existing representation mechanisms. The use of the amicus curiae by crime victims' organizations will allow them to present their interests in an independent manner. Second, sometimes there is an inconsistency between the interests of the crime victims and the interests of the entities that are tasked with their representation. The use of the amicus practice is not a substitute for the function of the

200. For instance, in the *Akayesu* case, which was conducted by the ICTR, the actions of the crime victims eventually led to the conviction of the defendant for sex crimes, even though such allegations were not presented in the original indictment. Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Order Granting Leave for Amicus Curiae to Appear (Feb. 12, 1998). The Coalition for Women's Human Rights in Conflict Situations sought leave to submit an amicus curiae brief requesting the Trial Chamber to call upon the Prosecutor to amend the indictment to include charges of sexual violence. *Id.*

201. See generally LUKE MOFFETT, JUSTICE FOR VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT (2014); Mykola Sorochinsky, *Prosecuting Torturers, Protecting "Child Molesters": Toward a Power Balance Model of Criminal Process for International Human Rights Law*, 31 MICH. J. INT'L L. 157 (2009). In Mykola Sorochinsky's view, the international legal system conveys a confusing message to the states' legal systems by maintaining the fairness of the process for the defendants while at the same time supposedly protecting the crime victims. Sorochinsky, *supra* at 169–76, 186–204. The solution she suggests is a model criminal court based on a balance of power between the parties. *Id.* at 218–26. For an in-depth review of the status of crime victims in criminal law, see generally Jona Razzaque, *supra* note 7.

prosecution, but instead provides for the interests of the crime victims, especially when they are not necessarily the same as the interests as the state. Third, hearing the voices of the crime victims' organizations as amici, even without accepting their position, could lead to a more knowledgeable decision based on a more comprehensive set of information as provided by all parties that may be affected by such decision. At the same time, it may increase the institutional legitimacy of the courts.

The use of *amicus curiae* by crime victims' organizations at criminal trial courts is not without concerns. The main criticism of such use is the concern that the rights of defendants will be infringed upon and that undue pressure will be exerted on courts to increase sentencing. In order to mitigate such concerns, several legal guarantees were suggested.

A just society is measured in the way it treats both the rights of defendants and the rights of the crime victims. The approach suggested in this Article is not to reject the requests of crime victims' organizations to become amici outright, but to examine the requests. This approach suggests examining whether they would make a significant contribution to the decision-making process and, on the other hand, to examine whether it would harm the defendants. The balance between the rights of defendants and those of crime victims is not necessarily a zero-sum game. Such amici should not be viewed as additional prosecutors that are able to intervene with the prosecutor's discretion, for their goal is to present their unique perspectives regarding fundamental issues that affect crime victims.

In an overall perspective, the use of the *amicus curiae* in criminal law has broad normative implications, which go beyond the boundaries of the classic adversary system. Broader use of the *amicus* practice by crime victims in criminal law will provide greater consideration to the broad public interest. The expansion of the forum of the criminal process by adding crime victims' organizations as amici expresses another level of development in modern criminal law. It is an additional stage in the transformation from the public model in which the state was the only actor acting on behalf of the crime victims to a more softened and flexible model that is more tolerable of third-party interests.

The participation of crime victims' organizations as amici in criminal proceedings indicates that there are additional perspectives besides those of the traditional parties in the adversary process, and that in certain cases, adding those amici is the proper way to present their interests.