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RESTORATIVE JUSTICE IN INTERNATIONAL CRIMINAL LAW: THE RIGHTS OF VICTIMS IN THE INTERNATIONAL CRIMINAL COURT

Dissertation submitted by

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ABSTRACT

Since the International Military Tribunal (IMT) at Nuremberg, the first international tribunal to try individuals for international crimes, the role of victims of international crimes in international criminal proceedings has been limited to that of witnesses. The ad hoc international tribunals – the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) did not change this position. As such, the International Criminal Court (ICC) is the first international criminal tribunal to provide for the rights of victims to participate in their own right in criminal proceedings. Similarly, it is the first such tribunal to provide for the right to reparations.

This thesis focuses on the right of victims to participation and to reparations under the Rome Statute of the International Criminal Court. It argues that the ICC offers an opportunity for the entrenchment of the concerns of victims in the international criminal process. However, it suggests that this depends on what framework of justice the Court adopts. The thesis further argues that previous international criminal tribunals – the IMT at Nuremberg and the ad hoc International Criminal Tribunals (ICTY, ICTR and SCSL) – operated on retributive and utilitarian theories of criminal justice that are exclusionary of and inimical to specific concerns of victims of international crimes. The largely retributive and utilitarian objects driving these systems limited victims to a peripheral status in the process and failed to address fully the harm occasioned to victims.

This thesis suggests that the ICC should adopt a restorative justice paradigm in order to give full effect to the rights of victims while protecting the rights of defendants and meeting the law enforcement functions of the Court. The thesis reviewed the relevant texts – the Rome Statute, its Rules of Evidence and Procedure and other instruments – and demonstrated the fact that the ICC framework provides a basis for such a restorative justice paradigm. In order to suggest a trajectory for the operationalisation of the ICC victims' rights regime underpinned by principles of restorative justice, the thesis attempts a systematic review of the rights of victims in criminal law processes in select domestic criminal justice systems, international human rights tribunals and other international courts. At the same time, the thesis reviews the implementation of reparations in various contexts and made suggestions as to how the

ICC and the Victim Trust Fund (VTF) should proceed in this regard within the relevant legal and institutional framework.

In relation to the right to participate, the thesis concludes that Article 68(3) of the Rome Statute – the general provision on the subject – strikes the right balance between the right of victims to participate, defence rights to an expeditious trial and the law enforcement function of the Prosecutor. However, the scope of victim participation at various stages of the proceedings will depend on, among others, the paradigm of justice adopted by the Court and, in view of the Prosecutor's seemingly knee-jerk opposition to victim participation, the attitude adopted by the Court itself to this new right of victims to participate. The thesis reviewed relevant texts and concluded that the Rome Statute's victims' rights regime presupposes a restorative model of justice – understood as values and principles rather than 'practices' and 'methods' as applied in some national criminal justice systems. Restorative justice contemplates a central role for victims of crime in relevant proceedings. Henceforth, the rights of defendants must not only be weighed against the concerns of the Prosecutor but also the right of victims to participate.

The thesis concluded further that the tests established for victims' participation – appropriateness, the requirement for their personal interests to be affected and the rights of defendants – present serious challenges in view of the fact that ICC crimes for the most part will involve mass atrocity. The number of victims who may eventually participate in particular proceedings is thus very small. The thesis notes that while the provision for legal representation of victims alleviates some of the difficulties associated with participation by a varied mix of victims in complex proceedings, it may be considered as diminishing the impact of direct participation. While the scope and modes of victim participation will vary at various phases of proceedings, current jurisprudence at the ICC shows that the Court seems to favour a broad presumption of victim participation. Since full realisation by victims of the right to participate will depend on the role that the Court will play, it is crucial that the right paradigm of justice is adopted.

With respect to the right to reparations, the thesis notes that this is perhaps the greatest innovation in the Rome Statute. The study found that the Rome Statute establishes two 'focal points' for purposes of reparations – the Court and the Victim Trust Fund (VTF) – in close relationship with each other. Drawing from the

experience of national criminal justice systems, the thesis acknowledged the practical difficulties involved in vesting a criminal court with a reparation function will pose particular challenges for the Court. These include the need to protect the right of a defendant to a speedy trial, the presumption of innocence and to conduct efficient proceedings. Having reviewed the texts and relevant jurisprudence, the study concluded that various mechanisms, including various permissive rules and the creation of the VTF make it possible to address some of the difficulties associated with the right to reparations in the ICC.

The thesis further noted that while a reading of the relevant provisions establishes the possibility of the Court and VTF instituting independent reparations schemes, it is imperative that the two collaborate in order to give full effect to that function. In any case, while Regulation 56 of the Court's Regulations provides for the possibility of considering reparations issues during the main trial, the fact that a reparation order against an accused is dependent on finding of guilt of the accused, it necessarily means that a definitive finding on reparation has to come after that. Further, the thesis concluded that in context of mass atrocities and the possibility that numerous victims may prove the requisite links to a case to obtain reparations, holding joint proceedings would complicate and burden the trial. However, the thesis endorsed the initial view of the Court that evidence concerning reparations could, at least in part – where appropriate, and in the interest of efficiency and victims – be considered during the trial.

The thesis further concluded that the VTF, which presents greater flexibility than the Court in terms of standards of proof, the requirement for criminal liability and various other mechanisms should be allowed a more prominent role in the processing of reparations. A survey of various mass reparation schemes – Holocaust reparations, South African TRC, the Rwandan *Gacaca* model and the United Nations Compensation Commission (UNCC), as well as the Alien Tort Claims Act (ATCA), a particular mass tort litigation mechanism – offer some useful lessons on a range of challenging reparation related questions.

The study concluded that while the Rome Statute offers an important opportunity for victims in terms of reparations, various challenges including shortage of funds and the large number of victims requires that situation countries – those states under investigation by the ICC and from which victims are drawn – cannot abandon

their primary responsibility of providing appropriate remedies for victims. The ICC is not, and cannot be a panacea for the concerns of victims of international crimes.

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DECLARATIONS

I declare that this dissertation is my own, unaided work. I further declare that this dissertation has never before been submitted for any degree or examination in any university.

GODFREY M MUSILA

Sign: Dated:

This thesis has been submitted with our permission as university supervisors.

PROF VINCENT O NMEHIELLE

Sign: Dated:

PROF THEUNIS ROUX

Sign: Dated:

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DEDICATION

To my parents Angelina (deceased) and John Musila, who encouraged my early steps on this academic journey.

LIST OF ABBREVIATIONS

AC	Appeals Chamber
AfCHPR	African Charter on Human and Peoples Rights
AFRC	Armed Forces Revolutionary Council
ASP	Assembly of States Parties
ATCA	Alien Torts Claims Act (USA)
CAT	Convention Against Torture
CDF	Civil Defence Forces
CEC	Cambodian Extraordinary Chambers
CPS	Crown Prosecution Service
CRT	Claim Resolution Tribunal
DRC	Democratic Republic of Congo
ECHR	European Court on Human Rights
FVWPA	Federal Victim and Witness Protection Act
HRC	Human Rights Committee
IACHtHR	Inter American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICEP	Independent Committee of Eminent Persons
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Right Law
ILC	International Law Commission
IMT	International Military Tribunal (Nuremberg)
IMTFE	International Military Tribunal for the Far East
NATO	North Atlantic Treaty Organization
NOVA	National Organization for Victim Association
OTP	Office of the Prosecutor
OPCV	Office of Public Counsel for Victims
PCIJ	Permanent Court of International Justice
PIL	Public International Law
PTC	Pre-Trial Chamber
RJ	Restorative Justice
RPE	Rules of Procedure and Evidence
RRC	Committee on Reparation and Rehabilitation
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
TC	Trial Chamber
TRC	Truth and Reconciliation Commission
TVPA	Torture Victim Protection Act
UN	United Nations
UNCC	United Nations Compensation Commission
UNGA	United Nations General Assembly

UNSC	United Nations Security Council
US	United States
VCA	Victim of Crime Act
VPRS	Victims Participation and Reparation Section
VRM	Victim Rights Movement
VTF	Victim Trust Fund
VWU	Victims and Witnesses Unit
WWI	World War I
WWII	World War II

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INTRODUCTION

The search by victims of serious atrocities – in particular genocide, war crimes and crimes against humanity – for effective remedies has been one punctuated by disappointment. While the establishment of the International Military Tribunal at Nuremberg (IMT) and Tokyo created a precedent that perpetrators of such atrocities would henceforth be liable to face justice, no mechanism existed to address specific concerns of victims. Victims played little role other than that of witness (for those selected). Reparation for harm suffered by victims was alien to international criminal justice processes. The suffering of victims, even when in large numbers, such as those victims of the World War II and the Rwandan genocide, was hardly acknowledged, or received mere lip service from those concerned. The criminal tribunals established by the UN in the early 1990s – the International Criminal Tribunal for Rwanda (ICTR) and the former Yugoslavia (ICTY) – did little to change the position of victims in international criminal justice for the better.

The establishment of the International Criminal Court (ICC), which is empowered to try individuals for genocide, crimes against humanity and war crimes changes drastically, at least formally, the position of victims. While reinforcing the right to protection as practised by previous international criminal tribunals, the Rome Statute establishing the Court provides for the right of victims to participate at all stages of the Court's proceedings and to reparations.[1] This study focuses on these two aspects of victims' rights – participation and reparations – and argues that the inclusion of these rights suggests a transformation of a hitherto retributive model of international criminal justice as practised by previous international tribunals to a restorative justice one. It argues that a restorative justice paradigm is the best way of giving full effect to these victims' rights.

While it may be argued that the ICC offers an opportunity for the entrenchment of the concerns of victims in the international criminal process, a number of questions to which the thesis attempts a response are raised. Firstly, does the new victims' rights regime constituted by the right to participation and reparations as well as several other

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[1] Arts 68 (3) and 75 Rome Statute of the International Criminal Court

concepts in the Rome Statute and its Rules of Procedure and Evidence (ICC RPE) such as 'in the interests of justice' presuppose a restorative justice paradigm? If so, what is the scope of this concept in view of both normative and institutional limitations since the ICC is primarily a criminal court? In view of the defendant's right to fair trial and the Prosecutor has a law enforcement function to perform, how should the rights of victims, in particular the right to participate, be read? In view of other interests that are traditionally protected in the criminal process (prosecutor and defence), does the new regime proffer a real change for victims of crimes, or will it in effect end up as merely superficial recognition? What is the role of the Court in developing content of victims' rights and giving effect to them in view of the named competing interests? In view of the novelty of the ICC victims' rights regime, what is the relevance of jurisprudence on related matters from national, human rights and other international bodies?

In responding the central question as to whether the new victims' rights bring to an end the marginalisation of victims from criminal process at international level, in particular the ICC, the thesis suggests that the outcome depends on what framework of justice the Court adopts. The Court can either use the traditional retributive model operated by similar tribunals or the restorative model proposed by the study. The thesis argues that previous international criminal tribunals operated on theories of criminal justice exclusionary of and inimical to specific concerns of victims of crimes. The largely retributive and utilitarian objects driving these systems limited victims to a peripheral status in the process and failed to address fully the harm occasioned to victims. In view of the objectives of the ICC discussed in detail in the next chapter, the thesis makes a case for the adoption of a restorative justice paradigm in the implementation of the victims' rights regime.

With many of the elements relating to the right to participation and reparations untested – these being innovations of the Rome statute – this study joins the nascent body of scholarship on the subject with a view to contributing to ongoing debates and perspectives on what trajectory should be charted for the new victims' regime. To achieve this goal, the thesis reviews the practice and jurisprudence of past international criminal tribunals; select national criminal justice systems and human rights tribunals. It does this in order to trace the development of the law relating to the victim in criminal processes to ascertain the rights of victims within the context of international criminal law (ICL), in particular rights relating to reparation and participation. Further,

it aims to establish what the Rome Statute provides in this regard and; ultimately to suggest how some of these issues should be interpreted in light of principles of restorative justice identified.

The study consists of seven chapters. Chapter one sets out the broad conceptual framework for the entire study. It introduces the concept of restorative justice and other key concepts, and identifies and briefly outlines the relevant issues of concern to victims set out in the Rome Statute. It outlines the main thrust of the thesis. It argues that the Rome Statute has changed the status of victims of international crimes in international criminal law and justice, but a restorative justice paradigm must be adopted by the Court to give this regime full effect. Noting that the notion of restorative justice is amenable to multiple interpretations under different disciplines, the chapter conceives restorative justice as limited to principles and values related to participation and full restoration of the effects of crime. It then argues that there is a normative basis for a restorative justice paradigm in the ICC. This chapter suggests that while the Rome Statute seems to endorse a victim-sensitive regime, the actual gains by victims will depend on how these provisions are interpreted and the framework of justice that underpins this process. In this regard, a strong restorative template for this process is proposed from the start in order to afford victims substantive justice and to give the full effect to victims' rights.

Chapter two provides context in international criminal law and justice for discussions on the ICC by revisiting the history of international war crimes tribunals from the aborted post WWI proposals to the ad hoc tribunals leading up to the establishment of the ICC. The chapter highlights the role of *realpolitik* in influencing the 'exclusion' of victims by previous international criminal tribunals beginning from Nuremberg. Thereafter, chapter three reviews generally the jurisprudence of the International Court of Justice (ICJ) and the main international human rights tribunals and identifies principles relating to victims that may be of relevance to the ICC regime. It explores how the state-centric framework within which the main courts operate, in particular the ICJ, may limit the full exercise of any recognised rights of victims. Additionally it examines in some detail the jurisprudence of international human rights oversight bodies relating to victims of crimes namely the Human Rights Committee, the Inter-American Court of Human Rights, the European Court on Human Rights and the African Commission on Human and Peoples Rights**.** In so doing, it aims to

establish to what extent the rights to participate in criminal proceedings and to reparations have been recognised by respective systems and whether such jurisprudence may be relevant in the interpretation of the ICC victims' rights. In view of the broad spectrum of rights over which these human rights tribunals adjudicate, the focus of this chapter is on human rights violations that may amount to international crimes.

Chapter four examines for the same reasons the victim rights movement and specific developments in the rights of victims in select national criminal justice systems. In chapter five, specific aspects of the right to participate at various stages of the ICC proceedings are discussed with respect to each stage of proceedings. It examines the participation framework to establish whether victims of crime are accorded the status the third party at the ICC and what tangible achievements they may attain in the process. Further, their relationship to the 'established' parties – prosecutor and defence – is scrutinised. The role of the Court in the application of participation criteria at all stages of proceedings is also examined.

Chapter six discusses in detail the right to reparations in the Rome Statute. It outlines the two focal points to reparations – the Court and the Victim Trust Fund (VTF). Seeking to inform the implementation of this framework within the context of mass and systematic crimes over which the ICC has jurisdiction, it discusses select past mass reparations programmes from varying contexts namely Holocaust reparations, the South African Truth and Reconciliation Commission (TRC), the Rwandan *Gacaca* system, the United Nations Claims Commission (UNCC) and the United States Alien Tort Claims Act (ATCA). From these experiences, the chapter highlights the challenges facing the ICC but also makes suggestions on how some of the reparations issues in the Rome Statute should be dealt with in the context of Articles 75 and 79 mandates of the Court and the Victims Trust Fund (VTF) respectively. Chapter seven consists of findings and conclusions.

CHAPTER ONE
THE NEW PROMISE OF INTERNATIONAL CRIMINAL LAW

1.1. Introduction

International criminal law (ICL), like municipal criminal law and practice, has until the adoption of the Rome Statute of the International Criminal Court (ICC) focused on the liability of perpetrators and relegated the interests of victims of international crimes to a secondary position. This reflects the view that criminal conduct should be considered first as a wrong against the entire society and that remedial measures focus on disrupted societal order. At the international level, measures taken by the United Nations Security Council (UNSC) to punish those responsible for international crimes such as war crimes, crimes against humanity and genocide have been conceived primarily – perhaps solely – as a means of restoring international peace and security.[1]

As argued in the next chapter, the creation of the International Military Tribunal Nuremberg Tribunal (Nuremberg Tribunal) and the International Military Tribunal for the Far East at Tokyo (Tokyo Tribunal),[2] the first of their kind in 1945 was similarly justified.[3] It is argued that justifying these steps in terms of 'international peace and security' considerations is not problematic in itself. In any case, the United Nations (UN) Charter, which vests the core function of maintaining international peace and security in the UNSC, demands such justification.[4] The problem, it is argued, is that the assumption that such action seems impliedly to take – that punishment of perpetrators alone will restore peace in embattled societies – is flawed, and arises from

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1 When deciding to establish these tribunals has consistently justified the action by justified on the basis that their commission threatens international peace and security. United Nations Charter Chapter VII; Resolutions establishing ICTR, ICTY, IMT Charters; *Tadic v Prosecutor* IT-94-1-T; *Akayesu v Prosecutor* IT-94-6-T Jurisdiction decisions support this view.

2 Charter of the International Military Tribunal For the Far East (Tokyo Tribunal) approved by the supreme Commander of the Allied Powers, General MacArthur on 19th January 1946 as amended by order of Supreme Commander, general Headquarters, APO 500, 26th April 1946.

3 International Military Tribunal at Nuremberg established by Charter of the International Military Tribunal (Nuremberg Charter) annexed to the London Agreement of 8th August 1945 between the United States, France, United Kingdom (and Northern Ireland) and the Soviet Union.

4 Art 39-42 Chapter VII of the UN Charter. See also *Tadic v Prosecutor* IT-94-1-T (ICTY) Appeals Chamber decision on the defence motion for interlocutory appeal on jurisdiction' paras 14-40; D Sarooshi, *The United Nations and the Development of Collective Security* (1999); generally DM Malone, *Decision-Making in the UN Security Council* (1998).

a narrow conception of what constitutes 'international peace and security'. As argued at some length in the next chapter, *realpolitik* coupled with this narrowly circumscribed concept of 'international peace and security' explains the fringe position previously allocated to victims in UN tribunals. As this thesis shows in ensuing chapters, the concerns of victims including the recognition of their suffering and restitution to them has been, and for the most part still is, an incidental issue, both at the domestic and international plane.

The Allied Powers had jointly articulated the view that the threat posed to the international order by expansionist Nazi Germany and Imperial Japan must attract international condemnation and retribution.[5] The Nuremberg Tribunal's mandate was to prosecute those responsible for crimes against humanity, war crimes and crimes against peace.[6] While World War II typically noted for the staggering numbers of civilian casualties and millions of survivors affected by it, victims' concerns were hardly articulated at the trials.[7] In fact, the focus of the trials was to punish major war criminals rather than address specific victims' concerns in their own right.[8] Consequently, victims mostly featured as a statistic to depict the horror of the war and thus served to aggravate the blame attributable to those indicted.

After Nuremberg and Tokyo, the tribunals created by the UN Security Council have all been justified by considerations of international peace and security.[9] The

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5 See notably the Moscow Declaration of 30th October 1943 signed by Roosevelt, Churchill and Stalin reprinted in 470 from 38 *AJIL* (Supp. 1944). See also R Bierzanek, 'War Crimes: History and Definition' in MC Bassiouni, & VP Nanda, *A Treatise on International Criminal Law* (1973) 559-586 573 detailing various declarations affirming that no war criminal would go unpunished.

6 These are contained in the Nuremberg Principles adopted by the UN General Assembly. See Gen Assembly resolution UN GA Res 95/1 of 11th December 1946.

7 The total estimated human loss of life caused by World War II was roughly 62 million people, of whom 37 million were civilians. See Wikipedia, the free encyclopedia, accessible at <http://en.wikipedia.org/wiki/World_War_II_casualties> (accessed on 10th January 2006). While this source may raise questions, the author uses this figure only to show the magnitude of civilian casualties.

8 Art 2 Statute of the IMT (Nuremberg Charter); Art 2 Tokyo Charter.

9 Following the adoption of the Nuremberg Principles by the International Law Commission (ILC) on request by the UN General Assembly, codification efforts aimed at compiling a draft international criminal code focused only on crimes with a political element and which concerned the maintenance of international peace and security. See LS Sunga, *The Emerging System of International Criminal Law Developments in Codification and Implementation* (1997) 4-5. See also General Assembly Resolution 177 (II) of 21 Nov 1947.

Statutes of the International Criminal Tribunal for Rwanda (ICTR),[10] the International Criminal Tribunal for the Former Yugoslavia (ICTY)[11] and that of the special Court for Sierra Leone (SCSL) clearly articulate that the imperative to try 'those who bear the highest responsibility' for genocide, war crimes and crimes against humanity is in the interest of international peace and security.[12] In their approach, which as the next chapter shows excludes victims, they fail to comprehend fully the dynamics within post conflict societies including the concerns of victims. The next chapter demonstrates how the normative framework of the ad hoc criminal tribunals and their subsequent practices reflect the fringe position accorded to victims. Victims' interests are only addressed within the general objective of maintaining international peace and security, within which, perhaps, their rights will not be violated again.[13] It is suggested that whereas this approach rightly assumes that the absence of peace and security creates an environment in which more crimes against victims are committed, it blinds itself to the fact that there are specific victims' concerns that need attention because of direct or indirect victimization of individuals.[14]

This chapter establishes the theoretical framework for the entire study. It introduces the concept of restorative justice generally and discusses the substantive basis for such framework in the Rome Statute and its Rules of Procedure and Evidence (ICC RPE). It introduces the argument that the inclusion of victims' rights to participation and to reparations in the Rome Statute and ICC RPE presupposes a different paradigm of justice from the retributive one as practised by previous international tribunals.

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10 UN Security Council Resolutions 955 (1994) of 8 November 1994 on the establishment of the ICTR and resolution 827 (1993) of 25 May 1993 on the establishment of the ICTY.

11 Resolution 827 (1993) of 25 May 1993 on the establishment of the ICTY also the recent SC resolution 1593 (2005) referring Darfur for investigation by the ICC.

12 The Security Council has always, in establishing international criminal tribunals, expressed that it is acting within its mandate under chapter VII of the United Nations charter (UN Charter). *Tadic v Prosecutor* IT-94-1-T (ICTY) Appeals Chamber decision on the defence motion for interlocutory appeal on jurisdiction' para 14-40.

13 See subsequent sections articulating the extent to which the prosecutions address victims' rights *per se*. R Aldana-Pindell, ´In vindication of justiciable victims' rights to truth and justice for state-sponsored crimes' (2002) *35 Vanderbilt J Transnat'l Law* 1399-1501.

14 Violation of a right gives rise to an imperative to remedy the wrong. Even at the level of state responsibility, an internationally wrongful act attributable to a state gives rise to an international responsibility of that state to supply reparations, irrespective of the restoration of peace. See article 1 ILC Articles on State Responsibility. See also *Case Concerning the Factory at Chorzów* (Germany v Poland) (Jurisdiction) 1927 PCIJ (ser. A) No. 9, at 21.

1.2. Theoretical Underpinnings of ICL

This thesis departs from the position that ICL, like municipal criminal law, has been founded on a paradigm of justice that focuses on the perpetrator, both as a target of criminal sanction and beneficiary of due process guarantees. Additionally, emphasis placed on the main function of criminal sanction in the restoration of societal order and protection of broad communal interests (international peace and security in the case of ICL) has led to the relegation of the victim of crime to a peripheral role in proceedings before international criminal tribunals.

A study of domestic criminal systems that have influenced the content and processes of ICL as well as international criminal tribunals as discussed in chapter three and four bears this out. These systems seem to be influenced largely by retributive and utilitarian theories of justice.[15] In general, these two theories of justice not only justify certain responses to crime, but also explain the function of ensuing responses. Despite minor variations and some doubts as to their exact content, retributive justice theories are in general characterised by their emphasis on the link between punishment and moral wrongdoing.[16] In terms of these theories, punishment is seen as just desert for wrongdoing. In these theories therefore, the focus seems entirely directed at the morally reprehensible conduct of the accused. Retributive justice systems strive for proportional punishments and consistent treatment of offenders.[17] Pursuit of these goals has a consequence that these systems 'often adhere to the ideas of state punishment and fair procedures for the accused.'[18]

As noted already, retributive justice is largely unaccommodating to victims of crime. However, some commentators have argued that punishment of an offender not

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15 See M Heikkila, *International Criminal Tribunals and Victims of Crime*: A study of the status of victims before international criminal tribunals and factors affecting this status (2004) 21-33; H Strang *Revenge or repair: Victims and Restorative Justice* (2002) 4-6.

16 Ibid, 25; CL Ten *Crime, guilt and punishment: a philosophical introduction* (1987) 38 cited in Heikkila (n 16 above) 25; generally T Kuhner 'The status of victims in the enforcement of international criminal law' (2004) 6 *Oregon Rev IL* 9.

17 J Dignan & M Cavadino 'Towards a framework for conceptualising and evaluating models of criminal justice from a victim's perspective' (1996) 4 *International Review of Victimology* 153-182 155; Heikkila (n 16 above) 26.

18 Heikkila (n 16 above), 26.

only constitutes an expression of 'solidarity with the victim' but also annuls the appearance of an offender's superiority, thereby affirming the victim's 'real value'.[19] For these reasons, it is argued that restorative justice is not incompatible with punishment, the main feature of retributive justice.[20] The conception of restorative justice advocated in this thesis does not, as in the earliest articulations of the concept, seek to replace prosecutions with restitution.[21] However, it is understood that the idea of trying perpetrators has its limits, and that 'affirmation of victims' real value' is as far as retributive justice goes in addressing victims' concerns. Victims rarely feature in retributive justice discourse. Reference to victims seems to be restricted to the assessment of wrongfulness for purposes of apportioning punishment. Apart from the mental state of the offender, wrongfulness of conduct also depends on the impact of the wrong on the victim. In this regard, the seriousness of the crime informs the punishment meted out.[22] Since the principal aim of retributive justice is to establish whether the accused person has committed a crime – and to mete out proportional punishment if the answer is in the affirmative – once punishment is assessed, the debate ends there.[23] It is the offender's guilt – not the victim's suffering – that is at issue. The view that victims' subjective experiences should not therefore affect the outcome of the trial requires that the prosecutor – rather than victims – take charge of

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19 Ibid, 26-7; GP Fletcher *With justice for some: victims' rights in criminal trials* (1995) 203; J Hampton 'A new theory of retribution' in RG Frey & CW Morris (eds) *Liability and responsibility: Essays in law and morals* (1991) 402.

20 L Zedner 'Reparation and retribution: are they reconcilable?'(1994*) Modern LR* 57 suggests that restorative justice is compatible with retributive justice and that it contains some retributive content, but it [RJ] offers something more. See also S Wilson 'The myth of restorative justice: Truth, reconciliation and the ethics of amnesty' (2001) 17 *SAJHR* 531.

21 Randy Barnett, perhaps the earliest exponent of restorative justice in the 1970s conceived restorative justice as substitution of criminal Court proceedings with restitution. See RE Barnett 'Restitution: a new paradigm of restitutive justice' (1977) Vol 86 Issue 4 *Ethics* 279-301. Barnett's 'theory' of restorative justice has been criticised for: not distinguishing clearly crimes and torts; and not acknowledging that crime has broader societal implications. See Heikkila (n 16 above) 37; R Pilon 'Criminal remedies: restitution, punishment or both?' (1978) Vol 88 Issue 4 *Ethics* 348-357; Dignan & Cavadino (n 17 above) 165.

22 However, Barnett (n 21 above) 284 notes rightly that there is never a simple rational connection between a term of imprisonment and harm caused to the victim. This is even more accurate in the case of international crimes, which infer numerous victims. Heikkila (n 16 above) 26 argues that for 'crimes of international concern', it appears that the perpetrator's mental state has been accorded greater significance in determination of wrongfulness since it is impossible to fashion punishment that would fit the suffering of victims. See s 6.5.4.1 Chapter 6 on assessment of harm.

23 See Heikkila (n 16 above) 27.

the prosecution and that the prosecution be 'depersonalised'.[24] This explains the relegation of victims to a passive, witness role in the criminal process.

Utilitarian justice theories emphasise the 'good consequences that punishment produces', not the wrongfulness of impugned conduct.[25] Criminal prosecution and punishment are seen as serving societal interests. Reduction of crime appears as a central goal of utilitarian theories of justice and is pursued through deterrence, reform and incapacitation.[26] The problem with utilitarian theories, from the point of view of victims, is that it focuses on societal interests and the offender and tends to overlook victims, especially when their interests are at odds with the former.[27] There are many examples in the context of mass atrocities. The opting by some countries for total or qualified impunity for international crimes characterised by amnesty laws has in the past been explained by the need to establish peace and stability after violent conflict. In some of these cases discussed in Chapter six of this thesis, one finds that factors not necessarily linked to victims' concerns have been deployed to determine outcomes of relevant processes at the expense of victims.

Punishment seems to be the common and main feature of most criminal justice systems, in particular the two outlined. For this reason, the tendency is to regard criminal justice systems as invariably retributive.[28] This view has been criticised on account of the fact that it seems to hold that a particular justice system can be explained by one single theory of justice. The critique rightly holds that no one system is based on a 'unitary set of coherent values and purposes'.[29]

It is argued that irrespective of the rationale for punishment in either case – retributive or utilitarian theories – both systems are understood to have, as the main focus, either societal interests and/or the offender, to the exclusion of the victims of

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24 W Cragg *The practice of punishment: towards a theory of restorative justice* (1992) 19 has however argued that the emphasis on impartiality is one of the strengths of retributive justice, depersonalisation of the criminal process … 'blinds justice to the crime's victim as well as to the personal characteristics of the offender'. See also Heikkila (n 16 above) 28.

25 Heikkila, 29.

26 Ten (n 16 above) 7; Heikkila, 29; Cragg (n 24 above), 30-31.

27 Heikkila, 31; GP Fletcher *With justice for some: victims' rights in criminal trials* (1995) 192-3

28 Heikkila, 24; A Von Hirsch *Censure and sanctions* (1993) 14.

29 RA Duff *Trials and Punishment* (1986) 5; Heikkila, 24. Even the use of 'retributive' has been criticised by commentators who emphasise that modern criminal justice systems are underpinned by a hybrid of philosophies of justice. See C Barton 'Empowerment and retribution in criminal justice' in H Strang & J Braithwaite (eds) *Restorative Justice: Philosophy of practice* (2000) 55-57; DW Van Ness & KH Strong, *Restoring Justice* 2nd ed (2002) 44.

crime. For the purposes of this thesis, all references to retributive justice are reflective of this understanding. While it may be argued that the utilitarian concept of justice addresses the concerns of victims in as far as the latter are subsumed in those of the general public, this is not accurate. It is suggested that the interests and concerns of victims are fairly specific, and do not always converge with those of the society as pursued by prosecutors through the system. Societal interests seem, in the main, to be broad concerns of peace and public order.

1.3. Rethinking International Criminal Law

The generally prevailing view of international criminal law is that it is preoccupied with the punishment of international crimes. Definitions by numerous commentators and approaches by previous international tribunals bear this out. As a branch of public international law (PIL), international criminal law (ICL) is concerned with the prohibition and processes of punishment of international crimes. Cassese observes that it is the body of international rules that proscribe international crimes and require states to prosecute and punish at least some of those crimes and regulates international proceedings related to this.[30]

Authors seem united in the above view. What seems a point of disagreement is whether 'international criminal law' is a unified body of law. Some consider the term inaccurate in as far as it is suggestive of a distinct, coherent branch of PIL. Sunga for instance suggests that 'norms of international criminal law form neither a coherent nor integrated system' and that 'currently established mechanisms do not provide a panacea to correct this situation.'[31]

ICL is a relatively new branch of PIL, having developed through various institutions since Nuremberg, and is not yet a coherent, self-sufficient system. As a developing body of law, 'its substantive, as well as procedural elements continue to

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30 A Cassese, *International Criminal Law* (2003) 15. See also MC Bassiouni & VP Nanda, *A Treatise on International Criminal Law* (1973); I Bantekas & S Nash, *International Criminal Law* (2003); G Schwarenberger 'The problem of an international criminal law' in J Dugard & C van den Wyngeart, (eds) *International Criminal Law and Procedure* (1996) 3-37 on the 'six meanings of ICL'.

31 See LS Sunga, *The Emerging System of International Criminal Law Developments in Codification and Implementation* (1997) 2-8 who traces the development of ICL since Nuremberg; Cassese (n 30 above) 16-19.

evolve through complex processes'. [32] However, there seems to be agreement that the ICC has changed, or perhaps more accurately, will change this, insofar as it streamlines and develops further this body of law hitherto marked by ad hoc arrangements.[33]

While the apparent exclusion of the 'national element' in the definition of ICL has raised some questions in view of the important role municipal law plays in ICL,[34] the more important question, it is suggested, relates to the changes introduced by the Rome Statute in two respects. The first is the participatory rights granted to victims, which as argued here in certain respects elevate the victim to the status of a unique party – a party *sui generis* in the ICC proceedings.[35] The second relates to the right to reparations accorded to victims in what is essentially a criminal court. It is suggested that the introduction of these two aspects must bring about fundamental changes to the conception of international criminal law irrespective of its core function. Accordingly, the traditional definition of ICL will no longer accurately reflect the actual scope of the discipline.

At the implementation level, it is argued that what is important is for this process to reflect the new objectives of ICL as contained in the Rome Statute, which is not only to punish perpetrators but also to deliver justice to victims. It is proposed that the new conception of international criminal justice must be restorative in character. As suggested in the following sections, the new victims' regime incorporates at a theoretical level basic principles of restorative justice. Consequently, these principles should underpin the interpretation of victim-specific provisions in the Rome Statute and Rules (ICC RPE). It is argued that the objectives of the Court and the victims' regime establish a basis for restorative justice as the predominant paradigm that should

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32 Cassese (n 30 above) 16; Sunga (n 30 above) 7.

33 On the possible role of the Rome Statute and its interplay with domestic systems, see generally D Shelton (ed) *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (2000); W Schabas, *An Introduction to the International Criminal Court* 2nd ed (2004) 24-25; *Prosecutor v Furundzija* (Case No. IT-95-17/IT), Judgement, 10 December 1998, para 227; *Prosecutor v Kristic* (Case No. IT-98-33-T) Judgement, 2 August 2001, para 541.

34 See Cassese (n 30 above) 1-2 suggesting that a contemporary conception of ICL should include various fundamental questions relating to the role played by national Courts in ICL on account that: they have contributed enormously to development of ICL; international tribunals take into account domestic case law; that the ICC is complementary to domestic Courts and that international tribunals rely on state cooperation for effective implementation of their mandates.

35 See art 68(3) Rome Statute and various Rules of the ICC RPE discussed in chapter six.

guide the ICC in its work. Taking a cue from the victim rights movement in which activists urged a redefinition of crime and thus criminal law to reflect a 'deserved' place for victims, this thesis argues that the new model of ICL must inform new ways in international criminal justice.[36]

1.4. Understanding Restorative Justice

The term 'restorative justice' does not lend itself to easy definition. More often that not, particular definitions adopted reflect the disparate disciplines and groups of people in this field.[37] Lamenting the lack of precision in definition, Coben and Harley observe that restorative justice may be considered an umbrella term for a spectrum of practices used in association with the criminal justice system, but more generally, to describe approaches to dispute resolution in disparate settings such as neighbourhoods, schools, and workplaces.[38] Other commentators prefer, because of these difficulties, 'to articulate basic principles and their implication for implementation' rather than attempt rigid definition.[39] Kurki notes that restorative justice is based on values that promote repairing harm, healing, and rebuilding relations among victims, the offenders, and the communities. It has participation and empowerment as its goals.[40] On occasion, restorative justice is used interchangeably with transformational or transitional justice to describe the work of truth and reconciliation commissions and such bodies.[41] In this context, it appears that the use of restorative justice reflects the desire to deploy

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36 See CJN Eisnaugle 'An international "truth commission": utilizing restorative justice as an alternative to retribution' (2003) 36 *Vanderbilt J of Transnational Law* 209-241 213. On the victim rights movement, see chapter four.

37 Eisnaugle, 211; L Kurki 'Restorative and Community Justice in the United States' (2000) 27 *Crime & Just*. 235-302 237 (comparing restorative justice to community justice).

38 J Coben & P Harley 'International conversations about restorative justice, mediation and the practice of law' (2004) 25 *Hamline J. Pub L & Policy* 235-234 239.

39 H Mika & H Zehr 'A restorative justice framework for community justice practice' in K McEvoy & T Newburn *Criminology, conflict resolution and restorative justice* at (2003) 135-152 138.

40 L Kurki (n 37 above) 235. See H Mika & H Zehr, (above) 140 notes that engagement is one of the foundational principles of restorative justice. He notes that 'in RJ, the primary parties affected by crime – victims, offenders and community – are treated as key stakeholders … and are thus offered significant roles in the justice process'.

41 J Coben & P Harley (n 38 above) 240. Even more loosely, and perhaps in a manner not particularly relevant to this study, restorative justice has been employed in association with 'community justice'. See for instance A Lanni 'The future of community justice' (2005) 40 *Harvard Civ Rgts-Civ Lib LR* 359. Others draw a sharp distinction, for instance L Kurki 'Restorative and Community Justice in the United States' (2000) 27 *Crime & Just*. 235.

mechanisms inclusive of victims. In general, these mechanisms depart from the strictures and narrow focus of 'traditional' formal criminal justice systems that in general limit themselves to a retributive approach to crime.[42]

In the African context, the term 'restorative justice' has been used to describe the African legal tradition consisting of a set of values and practices that emphasise mediation of truth, acknowledgement of wrongdoing, forgiveness and reconciliation rather than retribution.[43] The contemporary use of 'restorative justice' refers to a set of mechanisms operating outside or on the fringes of the formal justice system widely regarded as 'Western' in its origins.[44] In recent times, the relevance of traditional African justice mechanisms to the establishment of accountability for international crimes such as war crimes and crimes against humanity has been debated.[45] In the case of Uganda, one of the four African situations currently under investigation by the ICC, these mechanisms have been proposed as a possible response to crimes committed in Northern Uganda. The Juba Peace Agreement provides for the deployment of traditional justice mechanisms as practised by various ethnic groups in Northern Uganda: *Mat Oput* (Acholi); *Culo Kwor* (Langi and Acholi); Tonu Ci Koka (Madi); Kayo Cuk (Langi); and Ailuc (Iteso) to deal with some of the crimes.[46] In these communities, as elsewhere in Africa,[47] conflict resolution mechanisms focus on

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42 See H Mika & H Zehr (n 39 above) 138 noting that restorative justice 'constitutes a bold response to the conventional and punitive justice reflexes of contemporary societies'.

43 See generally DW Nabudere, 'Comprehensive research report on restorative justice and international humanitarian law' *The Marcus-Garvey Pan-Afrikan Institute* (June 2008) discussing restorative justice in different African contexts (on file with author).

44 See R Gargarella, P Domingo and T Roux (eds) '*Courts and Social Transformation: An Institutional Voice for the Poor?*' (2006). They discuss the use of traditional justice mechanisms in a number of African contexts to plug the shortcomings of formal systems in place ultimately enhancing access to justice for rural and illiterate populations.

45 L Hovil and JR Quinn, 'Peace first, justice later: traditional justice in Northern Uganda' Refugee Law Project Working Paper No 17 (2005). Accessible through <http:/www.refugeelawproject.org> (Accessed 19 September 2009); L Keller, 'Achieving Peace With Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms' (2008) 23 (2) *Connecticut J. of Int'l Law* 209-279.

46 Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, June 29, 2007 (Juba, Sudan). For a discussion of these mechanisms, see L Hovil and J Quin (n 45 above) 12-15.

47 Several other post conflict African countries including Mozambique and Sierra Leone have deployed traditional justice mechanisms, formally or informally. See CB Thomson, 'Beyond civil society: child soldiers as citizens in Mozambique' (1999) 26 (80) *Review of African Political Economy* 191-206; J Schafer 'Guerrillas and Violence in the War in Mozambique: De-Socialization or Re-Socialization? (2001) 100 (399) *African Affairs*, 215-237. See also in the case of Uganda and Sierra Leone, Susan McKay 'Reconstructing Fragile Lives: Girls' Social Reintegration in Northern Uganda and Sierra Leone' *Gender and Development*, (2004)

victims' needs and the reintegration of the 'accused' back into society. Broad based participation processes encompass rehabilitation, reconciliation, compensation, and restoration. The dominant approaches in many of these communities emphasise contextual factors, allowing focus on the root causes of the conflict.[48]

Within latter day (Western) formal criminal justice systems, restorative justice is said to consist of 'a wide-ranging movement' whose proponents seek 'to transform the systems that are in place to deal with interpersonal and intergroup conflict.'[49] Many commentators like Eisnaugle consider crime as a conflict, interpersonal in character. This has been regarded as the 'basic premise' of restorative justice.[50] As practised at the national level, restorative justice consists, on the one hand, of various 'mechanisms', 'processes', 'methods', or 'practices' and, on the other hand, of a set of values and principles that underlie these institutions.[51] As such, restorative justice is not bereft of philosophical or teleological underpinnings.[52] Cunnen agrees with the identification of restorative justice and reparations for human rights abuses as both practices and a set of values.[53] In the same vein, Coben & Harley conceive restorative justice beyond specific practices to include 'a set of principles, and even a

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12 (3), 19-30. Post-Genocide Rwanda provides another example where a traditional justice mechanism *Gacaca* has been employed to deal with mass atrocity and victimisation. For more on *Gacaca*, see chapter six in this study.

48 L Hovil and J Quin (n 45 above) 11; L Keller (n 45 above) 212.

49 Eisnaugle (n 36 above), 211 quoting P Hutchison & H Wray, *What Is Restorative Justice?, New World Outlook*, July/Aug (1999) 4. In some jurisdictions where the concept is recognized, restorative approaches are increasingly used in conflicts that do not disclose a crime, including problems in schools (bullying, truancy); workplaces (labour disputes, sexual harassment); and within families (child welfare, family violence). See in this regard MS Umbreit, RB. Coates, Betty Vos, *Community Peacemaking Project: Responding to Hate Crimes, Hate Incidents, Intolerance and Violence through Restorative Justice Dialogue* (2002) (using five community cases to examine a range of types of hate crimes, types of communities and uses of dialogue), available at <http://0-ssw.che.umn.edu.innopac.up.ac.za:80/rjp/Resources/Resource.htm> (accessed on 25 November 2005).

50 Eisnaugle, ibid.

51 Howard Zehr, the earliest exponent of perhaps the most influential school of restorative justice – victim-offender reparation – places emphasis on reconciliation and the empowerment of victims and offenders through mediation and private negotiations. See H Zehr *Retributive justice, restorative justice* (1985); H Zehr *Changing lenses* (1990); H Mika & H Zehr (n 39 above) 135-152.

52 See L Walgrave 'Restorative justice in comparison' in J Winteryk & L Cao *Lessons from international/Comparative/Criminology/Criminal Justice* (2004) 125-137 125 (2004) considers an outcome based approach, rather than the inclusive deliberative process element as 'the key characteristic of restorative justice'.

53 C Cunnen 'Reparations and restorative justice: responding to gross violations of human rights' in H Strang & J Braithwaite, *Restorative Justice and Civil Society* (2001) 83-98 93; See also J Braithwaite & H Strang 'Introduction: Restorative Justice and Civil Society' in H Strang & J Braithwaite, *Restorative Justice and Civil Society* (2001).

philosophical approach to life'.[54] Similarly, Eisnaugle adverts to 'a set of values and ideals that define a just reaction to the commission of a crime and the crime committer.'[55]

From the literature,[56] some of the identifiable principles or values that underpin restorative justice include healing and making amends,[57] reconciliation,[58] guarantees against repetition of crime(s) and restoration of or repairing harm caused to victims. This may entail 'offering some form of recompense involving where possible restitution, compensation and reparation. As a process, restorative justice 'brings[s] together those affected to establish truth and provide a framework for reconciliation.'[59] Conceived as such, the three most commonly used practices are victim offender mediation,[60] noted for its advantages within the criminal setting;[61] family group conferencing,[62] and circles.[63] Additionally, and perhaps of more relevance to this thesis, the offering of restitution, the writing of letters of apology, community service, and the use of victim impact panels or community reparation boards are considered as restorative justice practices.[64]

For the purposes of this study, the term restorative justice is used in a selective and rather nuanced manner. As the discussion above demonstrates, because of the multiplicity of contexts in which restorative justice has been used, one may be prone to

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54 Coben & Harley (n 38 above) 240.

55 Eisnaugle, (n 36 above) 211.

56 Mika & Zehr, (n 39 above) 141-147; Braithwaite & Strang in Strang & Braithwaite (n 53 above); Cunnen (n 53 above), 88-95; Zehr, 1985 (n 51 above), 184-85; Zehr, 1990 (n 51 above) 200-203.

57 See Braithwaite & Strang in Heather Strang & John Braithwaite (n 53 above) 55.

58 Cunnen (n 53 above) 88; Zehr 1985, (n 51 above) 184-85; Zehr 1990 (n 51 above) 200-203.

59 Cunnen, Ibid.

60 On mediation as a social process of conflict resolution, see generally RAB Bush & JP. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1994); CW Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 2nd ed (1996).

61 One advantage of victim-offender mediation is that it offers offenders a chance to initiate voluntary reparation to their victims, which reparation is not limited to financial payments but may include an apology and explanation of how the offence came about, as well as work for the victim, work for a community cause chosen by the victim, or a specific undertaking (e.g. to attend a counselling course) See Coben & Harley (n 38 above) 241; TF Marshall, 'Restorative Justice: An Overview', A report by the UK Home Office Research Development and Statistics Directorate (1998) 14.

62 The number of participants is expanded in family group conferencing to include the offender's family, the victim's family or supporters and community contacts of the offender (such as a teacher, neighbour, employer) who are interested in offering support or help.

63 This is a larger group, expanded to include community members. See Coben & Harley (n 38 above) 241.

64 Coben & Harley (n 38 above) 240.

confuse in what respect it is employed. Apart from clarity of demarcation, delineation is further necessitated by the fact that the term has largely been deployed in reform debates at national level and hardly in international law, much less in ICL.[65] This is not to indicate that the principles of restorative justice are new to public international law. Some commentators have located principles of restorative justice squarely in the debate on the law of state responsibility regarding reparations for human rights violations. Brownlie notes that 'restorative justice' is a broad term that encompasses a variety of measures that may be required of a defendant state including, but not limited to, restitution, compensation, apology, and prosecution of responsible persons and guarantees of non-repetition.[66]

The affirmation of restorative justice principles in PIL notwithstanding, the potential links between restorative justice and human rights violations is not well explored, a fact attested to by the dearth of literature on the subject.[67] The comment by Van Ness makes some useful, though incomplete reference to the possible links between restorative justice and criminal law standards.[68] It is useful, if only for the reason that it clarifies a bit more the possible parameters of restorative justice. Van Ness has argued that both restorative justice theory and international criminal standards exhort states to certain basic conduct. These include the requirements that: states balance the interests of victims, offenders and the public; victims and offenders must have access to formal and informal dispute resolution mechanisms. Furthermore, that states undertake comprehensive action in regard to crime prevention; governments provide impartial, formal judicial mechanisms for victims and offenders; and that there

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65 Recent debates within the context of ICL relate to how truth and reconciliation commissions can be used alongside mixed international tribunals such as the Special Court in Sierra Leone as a response to international crimes. See for instance W Schabas 'Conjoined Twins of justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court' 2 (2004) *J of International Criminal Justice* 1082-1099. See references to RJ by judges of the ICTY in their recommendations to the UN Security Council in their report 'Victims compensation and participation' of 13 Sep 2000 available at <http://www.un.org/icty/pressreal/p528-e.htm> (accessed on 20 Sep 2005).

66 I Brownlie, *Public International Law* (1998) 460; see also J Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Texts and Commentaries* on art 31; D Bodansky, JR Crook & D Shelton 'Righting wrongs: reparations in the articles on state responsibility' (2002) 96 *American JIL* 833; M du Plessis 'Reparations and International Law: How are Reparations to be Determined (Past Wrong or Current Effects), Against Whom, and What Form Should They Take?' (2003) 22 *Windsor YB of Access to* Justice 41.

67 See D Shelton *Remedies in international law* (2003) 9; Cunnen (n 53 above) 83.

68 Cunnen (n 53 above) 84.

must be help for the community reintegration of victims and offenders.[69] Various provisions in the Rome Statute relating to victims, the rights of defendants and the role of states parties as discussed in chapter five and six seem to embody these principles.

As evident in the discussion in chapter four, the perceived shortcomings of the retributive approach to crime informed the victim rights movement both in the United States and in Europe. At the national level, the victims' rights movement argued for reforms of the criminal justice systems because of its perceived failure to address the concerns of victims of crime.[70] Protagonists advocated for an approach that would constructively address the interests of the state to fight crime as well as the concerns of victims.[71] Measures such as restitution, reparations, participation and rehabilitation were identified as being integral to such an approach.[72]

1.5. Restorative Justice as the Framework for the ICC

Until now, restorative justice has been a somewhat stigmatised term in ICL discourse. Perhaps for this reason, ICL-specific literature seems to eschew the term almost entirely. One can attribute this to at least two causes. First, given that the main focus of international criminal tribunals, at least until the ICC, has been the prosecution of the most serious perpetrators of international crimes issues related to victims have not been central to the practice of these tribunals and discourse around such practice.[73] Secondly the 'baggage' restorative justice carries, in particular the often cumbersome 'procedures', 'methods' or 'practices' associated with it at the national level, could explain hesitancy to import the terminology into international criminal justice

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69 Van Ness & Strong (n 29 above) quoted in Cunnen (n 53 above) 84. See chapter four.

70 H Zehr *The Little Book of Restorative Justice* (2002) quoted in LN Henderson, 'The Wrongs of victims' rights' (1985) 37 *Stanford LR* 937-1021 1007 has observed that: '[r]estorative justice holds that criminal behaviour is primarily a violation of one individual by another. When a crime is committed, it is the victim who is harmed, not the state. Instead of the offender owing a debt to society, which must be 'paid back' by the offender being subjected to some form of state imposed punishment, the offender owes a specific debt to the victim – which can only be repaid by making good the damage caused.'

71 Ibid. See also J Gittler, 'Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems' 11 *Pepperdine LR* 117, (1984) 121-125; H Strang *Revenge: Victims and Restorative Justice* (2002) 44.

72 See A Morris & G Maxwell, *Restorative Justice for Juveniles* (2000); D Roche, *Accountability in Restorative Justice* (2003) 3 who states that four values are contained in restorative justice: personalism, reparation, participation and reintegration.

73 See generally chapter three and 4 of this thesis.

context.[74] Even at the national level, there is a tendency to relegate restorative justice practices to the fringes of the 'mainstream' criminal justice system and to regard such approaches as supplementary, rather than integral, to the system.[75] Hesitancy to integrate such mechanisms may well be justified. A criminal law framework must be such that certainty, efficiency and expedition are assured.

At the international level, in particular in ICL, the few references to restorative justice by judges,[76] commentators, and practitioners in this field reflect the inaccurate tendency to equate 'restorative justice' with 'reparations'.[77] Even when used in relation to accountability for crimes of an international character, the tendency is to consign restorative justice's application to the limited sphere of transitional justice as practised in truth commissions (TRC) and related institutions.[78] The few references to restorative justice in general ICL literature are in the main curt and tend towards vague and imprecise formulations such as 'victim-oriented justice', 'victim-centred justice' and the like.[79] It is argued that whatever meaning is intended by these descriptions, a 'victim-centred' or 'victim-oriented' approach said to be envisaged by recent

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74 See P Roberts 'Restoration and retribution in international criminal justice: an exploratory analysis' in A Von Hirsh, J Roberts & A Buttons (eds) *Restorative justice and Criminal justice: Competing or reconcilable paradigms?* (2003) 115, 223.

75 Literature on restorative justice approaches tends to focus on these fringe justice mechanisms.

76 However, the judges of the ICTR and ICTY have, in a previous report, recognised the broad ambit of restorative justice. They have noted that restorative justice encompasses inter alia allowing victims to participate in proceedings and by providing compensation to them for their injuries. See ICTR/ICTY 'Victims compensation and participation' ICTR and ICTY Judges' Report of 13 Sep 2000 to UN Security Council available at <http://www.un.org/icty/pressreal/p528-e.htm> (accessed on 20 Sep 2005).

77 See C Muttukumaru 'Reparations to victims' in RS Lee (ed) *The International Criminal Court: The making of the Rome Statute* (1999) 262-270 263-4 discussing debates relating to the provision on reparations by delegations at the Preparatory Committee. Views by delegations in support of including article 73 (art 75 in the final text) seem to reflect an understanding of 'reparations' as 'restorative justice'. Muttukumaru, at 264 remarks with respect to changing views on the reparations provision at the ICC Prep Com that it was … 'increasingly realised that victims not only had an interest in prosecution of offenders but also had an interest in restorative justice, whether in the form of compensation or restitution or some other form.' See Chapter 6.

78 Recent debates within the context of ICL relate to how truth and reconciliation commissions can be used alongside mixed international tribunals such as the Special Court in Sierra Leone as a response to international crimes. See for instance W Schabas (n 65 above) 1082-1099.

79 See for instance WA Schabas (n 33 above) 172 referring to a 'victim-oriented'; D Donat-Cattin 'article 68' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International criminal Court: observers' notes, article by article* 869; Muttukumaru (n 77 above) 264 (mentioning without elaboration restorative justice in the context of Prep COM discussions on art 73, later art 75 of the Rome Statute.

developments in ICL, must be restorative in character.[80] Further, this thesis does not disavow the broader interests of the international community that may be pursued through the punishment of perpetrators of international crimes. As argued already, a formulation that equates restorative justice to reparations is problematic in the sense that it considers crime as a purely interpersonal issue that does not implicate broader societal interests. This thesis argues that victims have specific interests and concerns that have to be protected within the criminal justice system and reparation is but one of them.

If the analysis of the use of restorative justice in the municipal context above is correct, the emerging view in mainstream ICL equating restorative justice to reparations is entirely inaccurate in as far as it excludes other core elements of the concept. It is argued that 'reparations', itself a composite term,[81] is but one of the elements constitutive of restorative justice or a restorative justice approach. This view underpins the approach adopted in the instant study. At least one other element must be deemed constitutive of restorative justice (or a restorative justice approach), namely participation by victims. The right, or in some cases the opportunity for victims of a particular crime to participate in related proceedings is central to a restorative approach as outlined. It is argued that a proper view of restorative justice is reflected in the array of 'modes' of reparations that may be ordered by the Court, as outlined in chapter six. As argued in that chapter, there is scope for other means such as apology and rehabilitation, beyond the 'traditional' compensation and restitution. This reflects the broad ambit of restorative justice as a concept.

It is the argument of this thesis that the Rome Statute and its Rules of Procedure and Evidence (ICC RPE) provide a firm basis for a restorative justice paradigm. For reasons outlined immediately below, it is argued that restorative justice provides the best understanding of how all the provisions of the Rome Statute fit together. First, the objectives of the ICC require a restorative justice approach by relevant actors in the ICC. These were formulated within the global context in which concern for victims at national and international planes had progressively increased

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80 Y Buruma 'Doubts on the upsurge of the victim's role in criminal law' in H Kaptein & M Kaptein (eds) *Crime, Victims and Justice: Essays on Principles and Practice* (2004) 1-15 distinguishes 'victim-oriented' or 'victim-centred' approach from restorative justice.

81 See section on terminology in Chapter five of this study.

since Nuremberg, in particular after the Rwanda and former Yugoslavia tribunals.[82] The ICC's core objective is to contribute to the fight against impunity by prosecuting persons who bear the greatest responsibility for the most serious crimes. But the Court has a wider goal – to provide justice for victims by ordering measures geared towards full repair of harm suffered by them.[83] More broadly, the Court is tasked in its functions with truth-searching as one of its main objectives – truth relating to responsibility for crimes, victimisation and establishing the historical record.[84] It is suggested that the thinking reflected in these objectives must inform the intended outlook of the new Court and of ICL in general.

The preparatory talks relating to the new victims regime, and the right to reparations in particular reflect that states intended such an approach for the ICC. Muttukumaru notes that 'it was increasingly realised that victims not only had an interest in prosecution of offenders but also had an interest in restorative justice, whether in the form of compensation or restitution or some other form.'[85] Further, the realisation that reparations could foster reconciliation and restoration of individuals and society in general convinced states to embrace what is evidently a broader concept of justice.

Secondly, apart from these objectives, the provision for an extensive participatory framework and the right to reparations discussed in detail in chapters 5 and 6 respectively are themselves not only an elaborate exposition of these objectives, but also reflect elements of restorative justice as outlined.

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82 See for United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 (GA/RES/40/34); Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Violations of International Human Rights and Humanitarian Law E/CN.4/Sub.2/1993/8 (Bassiouni Report); Council of Europe Recommendation on the position of the victim in the framework of criminal law and procedure (Recommendation (85/11); European Union Framework Decision on the Standing of victims in criminal proceedings, 2001 (2001/220/jHA); Commonwealth Guidelines on Treatment of Victims at <http://www.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/%7B99410136-47A1-478F-B549-DB753CF8B20B%7D_Victims%20of%20Crime.pdf> (Accessed on 12 August 2005)

83 *Situation in the DRC in the case of Prosecutor v Thomas Lubanga Dylo*, Decision on victims' participation No ICC-01/04-01/06 (Jan 18 2008) [Hereinafter *DRC Jan 18 2008 Trial Chamber I Decision*].

84 David Donat-Cattin in Triffterer (n 79 above) 873.

85 C Muttukumaru (n 77 above) 264.

Thirdly, a series of other mechanisms and frameworks entailed in certain concepts in the Statute such as 'interests of justice',[86] fair trial[87] and fairness,[88] provide additional normative imperatives to adopt a restorative justice approach. They also provide the framework to give effect to such an approach. These concepts are discussed in detail in the context of specific functions of the Registry, the Office of Prosecutor (OTP) and Chambers of the Court – Pre-Trial Chamber, Trial Chamber and Appeals Chamber in chapters 5 and 6.

Fourthly, it is suggested that Article 21 of the Statute – the sources of law provision –equips the Court with the requisite tool to enrich the interpretation of the Statute in general and the victims' regime in particular. It is submitted that in view of the novelty of the ICC victims' regime and the paucity of relevant jurisprudence from international criminal tribunals, it is imperative that the Court draws from municipal and other international tribunals when relevant. As discussed later in chapters 3 and 4 of this study, both spheres have, albeit in varying degrees, endorsed a restorative justice approach when dealing with victims' rights. The discussion in these two chapters discloses that the Court has already begun to refer to international and municipal jurisprudence, although its 'pick-and-choose approach' is unsystematic and does not appear rationalised. In our view, restorative justice proffers a theoretical framework for understanding Article 21 insofar as it relates to the analysis of victims as well as defendants' rights. This will enable the Court to fulfil its other general function of developing and streamlining international criminal law. This approach is adopted throughout this thesis.

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86 The term 'interests of justice' is mentioned in several contexts in the Statute and Rules. These are in relation to: the criteria for commencement or otherwise of an investigation; assignment of legal assistance to suspects during investigation; the appointment of counsel during confirmation hearing where the accused has fled or cannot be found; proceedings on admission of guilt, where TC considers it necessary for normal procedures of evidence to be followed; privileged information; restrictions on disclosure of confidential information by the prosecutor; the seat of ICC proceedings; and the possibility of joint and separate trials.

87 See JL D'Ambrosio 'Memorandum for the Office of the Prosecutor International Criminal Tribunal for Rwanda: Courtroom technology: A Comparative Analysis of its Application, Due Process and Public Policy Issues for Victims and the Accused' available at <http://www.nesl.edu/center/wcmemos/2002/dambrosio.pdf> at 7; C Chinkin, *Amicus Curiae Brief on protective Measures for Victims and Witnesses*, (1996) 7 *Crim LF* 179, 202. See chapter Six.

88 A fair process must be one that balances the interests of the defendants, victims and those of the international society to deal decisively with impunity.

It is suggested that Article 21 of the Statute supports an interpretation inclusive of a restorative justice paradigm. This interpretation is can be supported in two ways. First, as it relates to reference by the Court to national law and practice, it provides in its relevant part that this can be done as long as 'those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.'[89] Secondly, the Statute requires that 'application and interpretation of law pursuant to Article 21 'must be consistent with internationally recognized human rights.'[90] As advanced further in chapters 3 and 4 of this thesis, it is submitted that developments in the rights of victims of crime at national and international levels are such that these two provisions must be interpreted as not only inclusive of a restorative justice approach but as demanding such an approach by various actors, including the ICC in terms of its Statute. The thesis argues that the inclusion of the rights of participation and reparations for victims as well as other guarantees in the Statute supports this view. [91]

For purposes of this thesis, a particular understanding of restorative justice is adopted and applied throughout. Because of institutional and practical constraints, restorative justice as understood in some national systems – in terms of practices and principles – cannot apply wholesale to the ICC. This thesis therefore adopts a conception of restorative justice limited to constitutive principles and values. These values and principles are, from a victim's standpoint, intended to enhance the role of victims in criminal justice and envisage a system that responds adequately to the demands of justice by and for victims.

Apart from a limited number of practices mentioned in the last instance – restitution and apology considered further in chapter six, this thesis adopts a view of restorative justice as a set of values, some of which are mentioned above, rather than strict practices or methods of approaching criminal justice. To clarify therefore for the purpose of this thesis, by restorative justice is meant a conception of justice that takes into account the interests, as far as possible, of all parties in an international criminal prosecution. These include the international community (substituting the state at the

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89 Art 21 (1) (c) Rome Statute.

90 Art 21 (3) Rome Statute.

91 See I Caracciolo 'Applicable law' on article 21 Rome Statute in F Lattanzi & WA Schabas (eds) *Essays on the Rome Statute of the International Criminal Court,* vol I (1999).

national level) seeking ends achievable through the punishment of perpetrators of international crimes; defendants with fair trial guarantees; and victims whose right to participate, and to reparations is protected. It is suggested that such an approach would steer ICL away from the current model premised on a paradigm of retribution.

1.6. Justification for the Formulation of Restorative Justice Adopted in the Work

For clarity, restorative justice entails to the extent possible, the following principles and approaches to crime by the ICC: restorative justice is a set of principles, values and ideals that define a just reaction to the commission of a crime. These principles include healing and making amends; establishment of truth and reconciliation; guarantee against repetition of crime(s); restoration or repairing harm that may entail some form of recompense including restitution, compensation and reparation. The conceptual framework for restorative justice adopted above is justifiable on a number of grounds.

First, as a criminal Court established by treaty, the ICC is subject to strict institutional arrangements and is thus not amenable to ad hoc, fluid and flexible formulations such as traditional restorative justice practices demand. It is not conceivable that practices such as mediation, circles and conferencing could be given effect within the framework of a supranational forum adjudicating ICL. Even at the national level, the said practices seem to operate at the fringes of the mainstream criminal justice system.[92] Additionally, the fact that the seat of the ICC is geographically removed from likely concentrations of victims does not offer good prospects for these practices if instituted.[93] Yet, as disclosed in the discussion in chapter four certain principles of restorative justice have been effortlessly incorporated into the criminal justice system.

Secondly, if for our purposes we adopt a meaning of restorative justice inclusive of practices or methods, a difficulty arises relating to who should participate

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92 See H Strang & L Sherman 'Repairing the harm: victims and restorative justice' 2003 *Utah LR* 15-42 15.

93 The possibility of a 'circuit' ICC does not necessarily eliminate obstacles of mounting any of the restorative justice methods.

in view of the proposition central to restorative justice that crime should be seen as an interpersonal conflict between the perpetrator and victim. Given that the state is in many instances responsible for gross human rights violations, a difficulty arises in considering the state as a party to the conflict, especially in identifying proper participants in practices such as mediation and circles.[94] A similar problem does not arise with respect to prosecutions seen as a distinct category, because ICL asserts individual criminal responsibility for ICC crimes.[95]

Thirdly, the nature of ICC crimes and the peremptory obligations they impose favour the conception of restorative justice as a set of principles. The duty in international law to prosecute ICC crimes is mandatory. Variously referred to as 'gross human rights violations' and 'grave breaches' of humanitarian law most of these crimes give rise to an obligation *erga omnes*. They oblige states, among other things, to prosecute and to provide effective redress to victims.[96] In light of this, the adoption of approaches that oust or render prosecution impossible would not comport with international law.[97] In fact, a restorative approach is inherently compatible with the imperative to prosecute serious crimes. Indeed, one of the values of restorative justice is the guarantee against repetition, which may be achieved through deterrent effects of criminal sanction.[98]

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94 See Cunnen (n 53 above) 84 on the possible inadequacies that arise from the view of crime as a conflict between two parties especially where the perpetrator is the state, which is common for gross human rights violations.

95 See art 25 Rome Statute; generally E Van Sliedregt *The criminal responsibility of individuals for violations of International Humanitarian Law* (2003); AM Danner 'Guilty associations: joint criminal enterprise, command responsibility, and the development of international criminal law' (2005) *California LR* 75.

96 See MC Bassiouni *International Criminal Law* Vol I Crimes (1999) 44-46 on meaning of obligation *erga omnes*; generally ID Seiderman, *Hierarchy in International Law* (2001).

97 See generally ID Seiderman, above; B Chigara *Amnesty in International Law: the Legality under International Law of National Amnesty Laws* (2002) (on the inapplicability of amnesty to this order of international crimes) generally N Roht-Arriaza (ed) *Impunity and Human Rights in International Law and Practice* (1995); D Orentlicher 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1990) *100 Yale LJ* 25 37*;* R Aldana-Pindell, supra note 4 on the obligation to prosecute at least the most serious crimes.

98 Some form of guarantee against repetition is a key value in the restorative justice literature. See Cunnen (n 53 above) 93. See also Muttukumaru (n 77 above) documenting discussions on the right to reparations. States at the Prep Com seemed to agree and to emphasise that non-repetition must be guaranteed by the ICC but differed on how this could be achieved. Most states seemed to emphasise that the deterrent effects of punishment, and not necessarily reparations was sufficient to provide guarantees to non-repetition. See L Zedner (n 20 above) 57 suggests that restorative justtice is compatible with retributive justice and that restorative justice contains some retributive content, but it restorative justice offers something more.

In her article focusing on discourse as the fundamental principle of latter-day theories and models of justice, Hudson forcefully demonstrates that institutionalisation of restorative justice has the potential of restricting or distorting it [restorative justice], in particular the discursive and 'deliberative' principles that define it.[99] It is argued here that the limited conception of restorative justice adopted in this study as informed by conceptual and practical considerations seems to vindicate Hudson's observation, although she does not expressly contemplate the ICC but speaks to general theories and modes of justice. However, it is opined that while institutionalised restorative justice must necessarily conform to the limits imposed by the relevant institution – especially when restorative justice in its 'raw' or primary conception is seen as fitting outside the mainstream criminal justice system – the fundamental principles embodied in it remain intact. For instance, the fact that the broad and generally unrestricted participatory role of victims and perpetrators may be substantively and procedurally limited in the ICC does not mean that the right to participate is entirely precluded. Chapter five of this study argues, on a reading of the relevant provisions, that the ICC presumes a wide participatory role for victims.

Hudson suggests, without substantiation, that despite the distortions likely to arise from institutionalisation, 'other futures are possible' for restorative justice. In their discussion of principles of restorative justice, Mika and Zehr make important observations on the applicability of restorative justice principles at domestic level. First, they note that it is unlikely that restorative justice practice will incorporate all the elements. In their view, it is equally difficult to distinguish 'the critical mass of these elements' in order to distinguish retributive and restorative justice practice.[100] Secondly, they note that the principles are not static, and that their dynamism allow for response to changing needs, changing relationships and cultural values.[101] It is suggested that the Rome Statute circumscribes the bounds within which the principles can be applied in line with the objects of the ICC. Thirdly, they warn that the restorative justice lexicon and language conventions sometimes become 'barriers to shared meanings and understanding'. They cite definitional problems – of words such

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99 B Hudson 'The Institutionalisation of Restorative Justice: justice and ethics of discourse' in E van der Spuy, S Parmentier & A Dissel (eds) *Restorative Justice: Politics, policies and prospects* (2007) 56-72 56.

100 H Mika and H Zehr (n 39 above) 141.

101 Ibid.

as 'community', 'victim' as well as 'restoration' – and sometimes an aversion to use words such as 'victim' as particular concerns. Once again, it is suggested that the provisions of the Rome Statute provide a template for the judges to shape a restorative justice approach. The novelty of restorative justice, both as term and concept, acts as a barrier to the required incorporation of a restorative justice approach in the ICC process. It is argued generally, and in relation to particular aspects of the ICC's victims regime in subsequent chapters of this study, that what is imperative is for the Court to constructively, within its structures and procedures, give effect to a restorative justice approach unsaddled by the cumbersome 'practices' and 'methods' usually associated with it where it is practised.

1.7. Rights and Concerns of Victims: A General Outline

Although both were defined by their advocacy and assistance for victims, the victim rights movement in the United States and that in Europe took two distinct trajectories. While the former focused on victim rights, the latter dedicated its efforts to a less confrontational course – that of victim support.[102] The movement in the US, which from the start pursued a legislative agenda identified various concerns of crime victims in the municipal criminal justice system. These included the right to restitution (compensation), participation at the sentencing stage, assistance in participating in the criminal justice system and protection from intimidation by the defence, accused persons or their agents.[103] We return to these case studies in some detail in chapter four.

The Rome Statute and the ICC RPE provide for an extensive catalogue of rights and concerns of victims that for the most part reflect, but also go beyond the victim rights movement in various municipal jurisdictions. While the very adoption of the Statute affirms the now settled standard that it is the right of victims of human rights violations to see the perpetrators of at least the most egregious crimes

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102 For more on the global 'victim movement', see H Strang, *Repair or Revenge* (2002) 26-34

103 CS Goddu 'Victim's "rights" or fair trial wronged' 41 *Buffalo LR* 245-272 at 245. See also JH Stark & HW Goldstein *The rights of crime victims ACLU Handbook* (1985) 3-4.

prosecuted,[104] it recognizes that from a victim's standpoint, reparations including rehabilitation must be integral responses to such crimes. Also important to the process must be the effective participation by victims in the process, facilitated by adequate protections in this regard.

The modalities by which the views and concerns of victims are to be articulated before the ICC are inscribed in the RPE,[105] while the foundational principle is enacted in Article 68(3) of the Statute thus:

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

In chapter five and six, the thesis considers these concerns, analysing relevant provisions in the Statute and ICC RPE together with existing jurisprudence in order to properly locate the victim in the ICC in line with the restorative justice paradigm. In addition, provisions relating to reparations will be analysed in the same context.

The implementation of this new regime, in order to give victims a voice in proceedings, demands a delicate balance considering that the core mission of the ICC, like other international criminal tribunals discussed in chapter two, is to prosecute perpetrators under guarantees of fairness. Elizabeth Guigou's comment captures this aptly.[106] It also identifies a theme that runs through the discussion of specific provisions of the victims' participatory regime – the need to balance these concerns in

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104 The obligation to prosecute serious human rights violations (international crimes) is well established in international law. See generally N Melanczuk (ed.) (1997) *Akehurst's Modern Introduction to International Law* (7th ed.) [1997]; T Meron, *International Human Rights and Humanitarian Law as Custom (*1992); N Roht-Arriaza, (ed.) *Impunity and Human Rights in International Law and Practice* (1995); Ben Chigara, *Amnesty in International Law: the Legality under International Law of National Amnesty Laws* (2002); R Aldana-Pindell (n 13 above) 1438.

105 Section III Rules of Procedure and Evidence of the ICC (emphasis mine).

106 Elizabeth Guigou, French Minister for Justice noted at the Paris Seminar on Access of Victims to the International Criminal Court: Such is the magnitude of our mission: to put the individual back at the heart of international criminal justice system, by giving it the means to accord the victims their rightful place. A noble task, but one whose difficulty is readily appreciable by all. Since the aim is to allow the victims, concretely, to become parties to the international criminal proceedings, without undermining the effectiveness of the International Criminal Court, without diverting it from its task of law enforcement. Quoted in E Haslam 'Victim participation at the International Criminal Court: A triumph of hope over experience?' in D MacGoldrick, P Row & E Donnely (eds) *The Permanent International Criminal Court: Legal and Policy Issues*'315-334 316.

specific circumstances against other considerations whether of a legal or operational character, including the Court's law enforcement functions and guarantees afforded to suspected perpetrators. The rights of victims in the Rome Statute are briefly outlined below.

1.8.1 The Right to Participate in Proceedings

The Rome Statute has been praised for revolutionizing the international law of victims.[107] Some early commentators regard as 'landmark'[108] provisions that facilitate victim participation in the Court and cast them beyond their traditional role as witnesses, in which role commentators allege objectification.[109] While this accomplishment is new at the international level, the reform agenda for greater integration of victims of crime orchestrated by the victim's rights movement in a number of national jurisdictions had achieved a modicum of success in this regard.[110] The victim's rights movement in the United States focused its efforts to enhance victims' participation in the criminal process on their role at the sentencing stage, notably by making a statement in open Court.[111] According to Henderson, this approach appears to be ironical because one would expect that the most politically visible activity in the movement should focus on the beginning, rather than the end of the criminal process.[112] The argument for a right to restitution equally incorporated a right of the victim to participate in its determination, typically at the sentencing stage.[113]

It IS odd that this was the trajectory of the reform agenda with regard to participation. It is possible for one to speculate that perhaps it was because of the

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107 Ibid, 315; SA Fernandez de Gurmendi, 'Elaboration of the Rules of Procedure and Evidence' in Lee Roy S Lee (ed*) The International Criminal Court: Elements of crimes and Rules of Procedure* (2001) 235 255.

108 G Bitti & K Friman, 'Participation of victims in proceedings' in Lee (n 71 above) 456.

109 See E Haslam, (n 106 above) 17; MB Dembour & E Haslam 'Silencing hearings? Victim-witnesses at war crimes trials' (2004) 15 *European JIL* 151 that chronicles the woes of victims in a specific case before the ICTY *The Prosecutor v Radislav Kristic* (2nd August 2001), Case No IT-98-33-T, but reveals problems previously encountered by victims before international criminal tribunals.

110 Modest advancement was made both at federal and state level, with various states adopting what were dubbed 'Victims Bill of Rights'. See Henderson (n 70 above) and chapter three.

111 Ibid, 986.

112 Ibid.

113 Ibid, 1007.

impact that victim statements would have had on the outcome of the trial. Henderson seems to take this view in her attempt to explain the justification for victim participation at this stage through a number of theories including deterrence, incapacitation, retribution, 'fairness', 'due process' and 'recognition' noting that it was largely intended to influence the outcome of the trial by obtaining a finding 'favourable' to the victim. It is argued that if justice is entailed, not just in the outcome of a trial, but also in the process, the framework that permits broader participation in the entire process at the ICC must necessarily be a better one. Admittedly, tribute to the ICC is 'founded upon a widespread assumption that victims either do or can benefit from participation in the international criminal proceedings.'[114] Chapter five outlines in detail the right to participation.

For the purposes of this thesis, participation is not limited to the sentencing stage of the trial. It covers a range of 'roles' by victims in the procedure, from the start to the end, by which the victim's visibility in and centrality to the process is enhanced. This includes the right to be appropriately consulted and to information at various stages in the trial process.[115] Indeed, as seen in chapter five the Rome Statute expands the ambit of issues related to participation by victims in the process of the ICC from the investigation phase to the determination of reparations (assuming that this is done after the trial).

The basic principle that governs participation by victims in the process is established under Article 68(3) of the Statute, as complemented by various other substantive provisions in the Statute, and the RPE which set out the modalities of participation at all stages of the ICC proceedings.[116] This means that victims will, subject to Article 68(3), participate at the pre-trial, trial and sentencing stages, including determination of reparations. Chapter five assesses the possible scope of this participatory role and exposes the challenges that victims and other players are likely to face in the process.

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114 E Haslam (n 106 above) 315.

115 See W Pizzi & W Perron 'Crime victims in German Courtrooms: a comparative perspective on American problems' (1996) 32 *Stanford JIL* 37.

116 Art 89 Section III RPE.

1.8.2 The Right to Reparations

Restitution as a right of victims of crime has been central to the claims of the victim rights movement. Its centrality is acknowledged by many commentators who concur that restitution is perhaps the most important concern for victims of crime anywhere.[117] It is no surprise, perhaps, that the provision for reparations under Article 75 of the Rome Statute, read together with the provision for a Victims Fund in Article 79, have attracted the loudest plaudits in the ICC victims' regime.[118] As a matter of introduction, Article 75, in its relevant parts requires the Court to 'establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation and …. [to] determine the scope and extent of any damage, loss and injury to, or in respect of, victims.' This provision implicates a host of pertinent legal issues as well as questions relating mostly to its implementation to which the study returns in chapter six.

1.8.3 Right to Protection

The right to protection arises naturally from the participation of witnesses in the criminal process. The rights relates to the protection of witnesses in the criminal process, as well as providing safeguards for victims against 're-traumatisation' by virtue of their role in the process. Although one may expect that this right should be afforded to a victim who testifies in the prosecution, circumstances may arise where 'non-witness' victims require protection, especially where there is a backlash directed at a class of victims. The ICC's victims and witness protection framework builds on the protection practice at the ad hoc international tribunals which has for the most part been considered wanting.[119]

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117 Henderson (n 13 above) 1007 observes that 'While many propositions advanced on the behalf of past victims may be of marginal concern to them, compensation for injuries can be of central importance. If crime victims have 'rights,' the right to recover from the wrongdoer is the most tenable individually based right'.

118 See E Haslam (n 106 above) 74 ; WA Schabas (n 33 above) 174; D Donat-Cattin (n 79 above); Muttukumaru (n 77 above) 263; V Nainar 'Giving victims a voice in the International Criminal Court' (1999) *UN Chronicle* Issue 4 accessed at <http://www.iccwomen.org/sources/article.-unchronicle.htm> .

119 See for instance for the International Criminal Tribunal for Rwanda, G Sluiter 'The ICTR and the protection of witnesses' (2005) 3 *J Intl Crim Just* 962-975.

The Rome Statute establishes the general standard that all organs of the Court must respond appropriately to protect the privacy, dignity, physical and psychological well-being and the security of victims and witnesses, especially when the crimes involve sexual or gender violence, while fully respecting the rights of the accused.[120] To coordinate these functions, a Victims and Witnesses Unit (VWU) is established in the Registry of the Court, to provide 'protective measures and security arrangements, counselling and other appropriate assistance' for witnesses and victims including those victims 'who appear before the Court and others who are at risk on account of testimony'.[121] In its decision rendered on 18 January 2008, Trial Chamber I (TC I) has clarified the notion 'victims appearing before the Court' noting that victims at risk may be entitled to some measure of protection as soon as their completed application to participate (in a situation or a case)[122] has been received by the Court.[123] In the Chamber's view, the process of 'appearing before the Court' is not dependent on either an application to participate having accepted or the victim physically attending.[124] An Office of Public Counsel for Victims (OPCV), which will provide support and assistance to victims and victims' legal representatives, has been established.[125] It has a role to play in ensuring effective victim participation in the proceedings.

It is notable that witness protection is perhaps the only concern of victims that has hitherto received considerable attention in international criminal law, at least since the establishment of the ad hoc tribunals, which have overseen some interesting developments in this regard.[126] Despite this, it is argued that its application remains deficient, perhaps because the attribution of such rights to victims essentially constitutes a counter claim to the assertion by accused perpetrators of traditional fair

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120 Art 68 (1) Rome Statute and Rules 87 & 88 RPE.

121 Arts 43(6) and 68 (4) Rome Statute; Rules 16-19 ICC RPE.

122 'Situation' means the overall factual context over which the ICC may exercise its jurisdiction and from which individual cases may be developed. 'Situation', used in contradistinction to 'case' may cover an entire country (as in the case of CAR, DRC and Uganda) or a particular time period or geographical space (Côte d'Ivoire and Darfur). Cases against specific individulas are drawn from the situation.

123 Situation in the Democratic Republic of the Congo, Prosecutor v Thomas Dylo Lubanga, 'Decision on victims' participation' of 18 January 2008, ICC-01/04-01/06-1119, para 137.

124 Ibid.

125 On 19 September 2005. Regulations 114-117 Regulations of the Registry of the ICC. See the ICC Newsletter, November 2005 at <http://www.icc-cpi.int/library/about/newsletter/index_21.html>.

126 See Sluiter (n 119 above) 962 noting that protection of witnesses occupies a prominent place in 10 years of practice of the International Criminal Tribunal for Rwanda.

trial guarantees. That witness protection undercuts the rights of accused persons is a vehement assertion of some commentators. Among these, the accused's rights to a public trial and adequate time and facilities to prepare a defence are cited.[127] It becomes imperative that the international tribunal balances these competing claims. This study does not discuss the right to protection beyond this brief introduction, except insofar as it relates to the right to participation and reparations and the relevant functions of the VWU and the OPCV.

[127] Ibid, 972

CHAPTER TWO
FROM NUREMBERG TO SIERRA LEONE: THE DEVELOPMENT OF VICTIMS' RIGHTS IN INTERNATIONAL CRIMINAL LAW

2.1. Introduction: International Responses to International Crimes

Gross human rights violations have been, and continue to be, perpetrated in the course of numerous armed conflicts witnessed in recent times as well as in peacetime. While it might have been expected that the extent, seriousness and recurrence of atrocities committed would have elicited universal condemnation and triggered swift preventive and deterrent action from states in light of the purposes of the United Nations, the reality seems to have been the reverse.[1]

The international community has often reacted with indifference to even the most egregious atrocities.[2] In the face of state interest therefore, commitments to the ideal of human rights have been at best, rhetorical. Indeed, while in the modern era the Security Council is mandated to deal with threats to, and breaches of international peace and security,[3] it has mostly been inconsistent in its responses.[4] Since the need to establish a permanent international criminal tribunal was identified, several factors intervened to delay its realisation.[5] In particular, the role of *realpolitik* in impeding

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1 See art 1 (1) and 1 (3) Charter of the United Nations (UN Charter) which enact for two of the purposes of the UN: the maintenance of international peace and security; and the achievement of international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms.

2 A Cassese, *International Criminal Law* (2003) 4 noting that states tend to respond only when their own interests are at stake.

3 See Chapter VII UN Charter. The nexus between 'international peace and security' and initiatives by the Security Council to respond judicially to international crimes has been articulated by the *ad hoc* Tribunals in two landmark decisions: *Tadic v Prosecutor IT-94-1-T* (ICTY) and *Akayesu v Prosecutor* Case No. *ICTR*-94-T.

4 This inconsistency applies both to judicial and non-judicial responses. Notable examples of such conflicts include Cambodia, the Democratic Republic of Congo (DRC), Chechnya.

5 For a historical account of various initiatives see MC Bassiouni, 'Historical Survey: 1919-1998' in MC Bassiouni (ed) *Statute of the International Criminal Court: a documentary history* (1998); LS Wexler 'The Proposed Permanent International Criminal Court: An Appraisal' (1996) 29 *Cornel Int'l L.J*. 665; BB Ferencz, *An International Criminal Court: A Step Toward World Peace-A Documentary history and Analysis* (1980); MC Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997)10 *Harvard HRJ* 11; C Warbrick, The United Nations System: A Place for

these efforts, and in shaping any responses to the atrocities when this happened, has been lamented.[6] Even when various *ad hoc* tribunals and investigative commissions were established, their administration has been subordinated to *realpolitik*.[7] Seen in this context, prosecution of international crimes, let alone a genuine attempt to address victims' concerns could not have been a faultless undertaking. The adoption of the Rome Statute, which, as argued above, incorporates a new paradigm of international justice is *per se* a revolutionary feat.[8]

To put the new regime in historical perspective, this chapter reviews the practice of post World War II tribunals – the military tribunals at Nuremberg and Tokyo as well as the United Nations ad hoc criminal tribunals: the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL). It establishes that the international criminal justice system as constituted by these tribunals has been based on a paradigm of retribution driven mainly by a narrow understanding of the concept of 'interests of international peace and security', which, as noted in the previous chapter, has served as the justification for establishing these institutions. This chapter demonstrates that while there has been a progressive development in the norms relating to persons accused of international crimes as in other aspects of international criminal law (ICL), issues relating to victims have rarely arisen in ICL discourse and processes.

2.2. Squandered Opportunities: Versailles, Sevres and Lausanne

Attempts to conduct war crimes trials through an international war crimes tribunal after World War I were unsuccessful.[9] Although such a tribunal was envisaged in the

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Criminal Courts?, (1995) 5 *Translational L and Contemp. Probs* 237; LS Sadat 'The new International Criminal Court: an uneasy revolution' (2000) *Georgetown LJ*.

6 On *realpolitik* and international criminal justice, see generally JG Bass *Stay the Hand of Vengeance: The Politics of war Crimes Tribunals* (2000) (Bass, 2000); J Maogoto, *War Crimes and Realpolitik: International Justice from World War I into the 21st Century* (2004).

7 See MC Bassiouni, 'International Criminal Investigations and Prosecutions' (n 5 above) 31-86 31.

8 NS Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the new Millennium* 2nd ed (2000) 1.

9 On World War I war crimes and prosecutions see Bierzanek, R 'War Crimes: History and Definition' in MC Bassiouni & VP Nanda *A Treatise on International Criminal Law* (1973)

Treaty of Versailles[10] on the recommendation of the investigative Commission on Responsibilities established by the Allied Powers,[11] it did not come to fruition after Kaiser Wilhelm II, who was to face trial together with other German war criminals escaped into exile and was granted sanctuary in the Netherlands.[12] A similar tribunal to try suspected Turkish war criminals[13] did not materialize after the subsequent adoption of the Treaty of Lausanne, which ignored Turkish atrocities hence establishing a *de facto* blanket amnesty.[14] In the German case, the Allied Powers in the end consented to the trial of indicted German criminals by the German Supreme Court at Leipzig, after German authorities opposed their extradition on grounds that the German public would revolt.[15] These proceedings proved to be a sham.[16]

The failure by the Allied Powers to punish World War I war criminals was not attributable so much to the strength of opposing 'national sentiment' and the inability of the Powers to insist on compliance as to the novelty of the idea that war criminals could be called to account in an international tribunal. The failure to conduct these trials at all in an international forum and the mostly resigned attitude of the Allied Powers to the Leipzig parody of justice eliminated any chance that the concerns of victims from Allied territories could be raised.[17] In fact, it is unlikely that victims' concerns would have featured at all, as the treaties envisaged only trial of major war criminals. Although the decision to stage trials was partly in acknowledgement of the suffering of people in the territories, especially Armenians at the hands of the Turkish

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559-586; V Morris, & MP Scharf, *The International* Criminal *Tribunal for Rwanda* Vol 1 (1998) 2-3.

10 Treaty of Peace Between the Allied and Associated Powers and Germany, 28 June 1919 Arts 227-230.

11 See Report of the Commission on the Responsibility of the Authors of the War and Enforcement of Penalties, Conference of Paris 1919 reprinted in V Morris & MP Scharf, *The International* Criminal *Tribunal for Rwanda* Vol 2 (1998) 419-469.

12 Morris & Scharf, (n 9 above) 2.

13 See Treaty of Peace Between the Allied Powers and Turkey, 10 August 1920, Arts 226-230, reprinted in 15 *American JIL* 179 (Supp. 1921).

14 Treaty of Peace Between the Allied Powers and Turkey, 24 July 1923, 28 LNTS 11, reprinted in 18 *American JIL* 1 (Supp. 1924). See Bassiouni & Nanda, (n 2 above).

15 R Bierzanek, (n 2 above) 566.

16 Out of more than 800 indicted, only 14 were tried resulting in only one conviction, with a nominal prison sentence. R Bierzanek, (n 2 above) 568.

17 Ibid, 567 illustrating the attitude of the Allied Powers and their dithering views on the basis and conduct of war crimes trials by a 'High Tribunal'. See in particular, the views of Japan and United States.

government,[18] it is not entirely speculative to argue that nothing would have come out of this recognition that the relevant crimes concerned people, a fact that should have necessitated attention both within and without any possible criminal process. It appears that a great idea (that of staging prosecutions in possible judicial recognition of victims) became victim to its own novelty, and the hesitation of major players to act and implement it.

2.3. The International Criminal Tribunal Experiment

After the debacle of World War I war crimes trials, the consistent desire of the Allies to punish World War II criminals may have blurred their perspective regarding concerns of victims, which under the circumstances were considered incidental to the main thrust of what became the 'Nuremberg project'. The experience of WWI showed that the road to the establishment of an international criminal justice system would not be an easy one. It took the horror of World War II to jolt the 'Great Powers' to take unprecedented action to punish German and Japanese war criminals. The atrocious conduct of war by Nazi Germany and Imperial Japan caused states to abandon their demure inhibitions about the feasibility of an international war crimes tribunal that had marred post World War I initiatives. [19] As early as 1942, while the war was in full swing, the Allies and the occupied European states had repeatedly declared their unwavering resolve to rewrite history by staging both national and international trials of war criminals at the end of the war.[20] This was later to influence the approach of the Allies and the processes of the two tribunals.

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18 See Treaty of Sevres making reference to the atrocities against Armenians which have since come to be acknowledged as a genocide, a term that did not form part of rights discourse at the time of the massacres.

19 Pella has written in this regard that:
'[i]t was not until World War II and its lessons that the rulers of states finally decided to cast off the old armor of prejudice which had led them to declare any international penal justice system impossible as the idea of repressing acts committed by states as well as by individuals endangering directly or indirectly the supreme legal good i.e, peace was often regarded as the manifestation of a dangerous revolutionary sentiment.' See V Pella *La Guerre-Crime et les Criminels de Guerre* (1946) 16 quoted in R Bierzanek (n 2 above), 571.

20 See notably the Moscow Declaration of 30th October 1943 signed by Roosevelt, Churchill and Stalin reprinted in Morris & Scharf (n 9 above) 470 from 38 *American JIL* (Supp. 1944) See also R Bierzanek, (n 2 above) 573 detailing various declarations affirming that no war criminal would go unpunished.

2.4.1 The International Military Tribunals: Nuremberg and Tokyo

The solemn declarations by various states concretised in the establishment of the International Military Tribunal at Nuremberg (IMT),[21] in terms of the Nuremberg Charter concluded by the London Agreement[22] on recommendations by the Preparatory Commission on War Crimes.[23] Soon thereafter, the International Military Tribunal for the Far East (Tokyo tribunal) was promulgated by proclamation of the Supreme Commander of the Allied Forces in the Far East.[24] While the IMT was mandated to try war criminals of the European Axis for war crimes, crimes against humanity and crimes against peace,[25] which offences were deemed not to be limited to a particular geographical location, the Tokyo tribunal had a similar mandate with relation to members of the Japanese high command.[26] Since the tribunals could not possibly prosecute all war criminals, the London Agreement had reserved the right of various states to try other war criminals whose crimes were limited to their respective territories.[27] It was under this mandate that various countries staged trials related to the war.[28] Of the 26 people indicted at Nuremberg, 22 were convicted and sentenced to death, and four were acquitted.[29]

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21 On the Nuremberg Tribunal see generally MC Bassiouni 'The Nuremberg Legacy' in Bassiouni Vol III (Enforcement) 217-390; T Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1992); T Meron, *War Crimes Law Comes of Age: Essays*(1998); Memorandum Submitted by the Secretary-General, *The Charter and the Judgment of the Nuremberg Tribunal: History and Analysis* UN Doc. A CN 4/5 (1949).

22 Charter of the International Military Tribunal (Nuremberg Charter) annexed to the London Agreement of 8th August 1945 between the United States, France, United Kingdom (and Northern Ireland) and the Soviet Union.

23 United Nations Commission for the Investigation of War Crimes established in on 20th October 1943.

24 Charter of the International Military Tribunal For the Far East approved by the supreme Commander of the Allied Powers, General MacArthur on 19th January 1946 as amended by order of Supreme Commander, general Headquarters, APO 500, 26th April 1946.

25 Art 6 Nuremberg Charter.

26 Art 5 Charter of IMTFE.

27 Art 4 London Agreement. Trials of war related criminals were conducted in many countries including France, Israel, Australia and UK. See for instance Order No 10 promulgated by the Control Council of Germany that sanctioned trials in German Courts. For an account on national war crimes trials, see Jordan J Paust et al *International Criminal Law: Cases and materials* (2000) 633-637.

28 Domestic prosecution of international crimes, *infra* section 3.7.

29 See 'the Nuremberg Judgment' in GK McDonald & O Swaak-Goldman (eds) Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts Vol II Part 2 Documents and Cases (2000) 629-749.

2.4.2 The Nuremberg Precedent and Retributive Justice in ICL

From the mandates of the two tribunals, it can be deduced that the intention of the Allies was never to address the concerns of war victims beyond what the trial of key perpetrators could offer. As evidenced from the conduct of the Nuremberg trials themselves, prosecutors were mostly preoccupied with a concept of international peace and security, understood within the confines of the punitive and deterrent functions of criminal law. Bert Roling, a former judge at the Tokyo tribunal, has written that 'the European pursuit of peace coupled with the deep indignation with German criminality led to the Nuremberg trial and that [all] the counts justified a charge of crimes against peace.'[30] Although the Nuremberg Charter established competence over three crimes, the indictment against major German criminals concentrated on aggressive war.[31] In justifying US entry into the war, the American Prosecutor at Nuremberg, Justice Robert Jackson had remarked thus, underscoring the charge of crimes against peace:

> "… [t]herefore, our view is that this is not merely a case showing that these Nazi-Hitlerite people failed to be gentlemen in war; it is a matter of their having designed an illegal attack on international peace, which to our mind is a criminal offence by all common law tests, at least and the other atrocities were all preparatory to it or done in execution of it …."[32]

The prosecution therefore adopted an approach that subordinated crimes committed against people – war crimes and crimes against humanity – to the ultimate international crime: crimes against peace, which was projected as a violation of a universal standard accepted by all nations. Consequently, even when a specific group of victims was identifiable, as in the case of the Jews, no particular orders could be, and were actually ever made, as the expressed aim of any international proceeding was to mete out retributive justice.[33] A reading of all pre-Nuremberg declarations by various governments discussed above reiterates this position. Revealingly, neither the

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30 BVA Roling 'The Nuremberg and Tokyo Trials in Retrospect' in MC Bassiouni & VP Nanda *A Treatise on International Criminal Law* (1973) 590-608 593.

31 Ibid.

32 Report of RH Jackson, 384 quoted in B Roling, (n 30 above) 593.

33 See Joint Declaration of 17th December 1942 by the governments of United Kingdom, United States and the Soviet Union in which the expressed their resolve to ensure that war criminals responsible for crimes against persons of the Jewish race would not escape retribution. A proposal to include a specific provision charging perpetrators for crimes against Jews in the IMT Charter was nevertheless abandoned, although even this would have been limited to criminal sanction.

Nuremberg Charter nor the IMTFE Charter makes express mention of victims. The only provision in the Nuremberg Charter relevant directly to victims, but which did not import criminal sanction related to looted property. It provided that 'in addition to any punishment imposed by it, the tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany'.[34] This provision, which was not included in the IMTFE Charter, was never invoked at the trial.[35]

It is opined that even though the term 'human rights' did not form part of rights discourse in the pre-WW II period, victims' concerns, which had a basis in the natural law notion of 'natural rights', should have found greater expression in the processes of the tribunals.[36] Indicted war criminals had faired better. The Charters of both tribunals did incorporate a catalogue of fair trial guarantees, which, even though limited in scope, protected those accused by the standards of the time.[37] These formed the basis of the jurisprudential development in relation to the rights of those accused of crimes later encapsulated in major human rights instruments,[38] and the Rome Statute itself.[39] As a powerful antecedent to the latter-day international criminal tribunals, and indeed as the seed of international criminal law, the 'Nuremberg precedent' laid the foundation for the current paradigm in ICL, which focuses on perpetrators by affording them greater protections while regarding victims as an incidental concern whose rights should be subordinated to those of perpetrators.[40] There is no doubt that the IMT at Nuremberg laid the foundation for contemporary ICL.[41]

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34 Art 28 Nuremberg Charter.

35 The IMT had dealt with the issue of property, but within the context of war crimes. See Nuremberg Judgment in MacDonald and Goldman supra note 30 at 671-673.

36 The UN Charter inaugurated the term 'human rights' in international law discourse. See such references in prmbl, arts 1, 13 and 55 UN Charter. P Alston & HJ Steiner, *International Human Rights in Context; Law, Policy, Morals* 2nd ed (2000) 138-158.

37 Art 16 IMT Charter Statute included the requirements that defendant had a right to have a detailed indictment in a language they understood furnished to them within reasonable time before commencement of trial; the right to proceedings in a language they understood best; the right to conduct their own defence before the Tribunal or to have the assistance of counsel and the right through himself or through his Counsel to present evidence at the trial in support of his defence and to cross-examine any witness called by the prosecution. See also art 9 Tokyo Charter.

38 See arts 10, 7, 11 Universal Declaration of Human Rights; G.A. Res. 217A (III), U.N Doc A/810 at 71 (1948) and art 14 International Covenant on Civil and Political Rights (ICCPR) 1966, 999 *UNTS* 171, 6 ILM 368.

39 See art 67 Rome Statute and chapters 6 and 7.

40 Despite its less illustrious image, the Tokyo tribunal joined the Nuremberg tribunal in affirming the resolve that no person guilty of heinous crimes, irrespective of position of

2.4. Ad Hoc International Criminal Tribunals: ICTY and ICTR

The creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) by Security Council resolution pursuant to its Chapter VII powers[42] constituted the first time since Nuremberg that the international community had responded forcefully to atrocities by establishing a tribunal to try and punish alleged perpetrators.[43] This accomplishment was followed a year later by the establishment of the International Criminal Tribunal for Rwanda (ICTR) on similar terms.[44]

Fifty years later, the Nuremberg affirmation of 'never again!' had rung hollow as the World watched the former Yugoslavia and Rwanda descend into violence that left over a million people dead. While in the former Yugoslavia the government of the Republic of Serbia implemented an ethnic cleansing policy against ethnic Albanians, Bosnians and Muslims and ethnic Croats,[45] in Rwanda, the ethnic Hutu dominated government set out to exterminate the ethnic minority Tutsi and 'moderate' Hutus in a complex political conflict.[46] For the former Federal Republic of Yugoslavia, Serbian

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authority, would enjoy impunity. The Nuremberg judgment has been celebrated for its contribution in crystallizing and clarifying principles of international law. See in this regard R Bierzanek (n 2 above) 577.

41 The Nuremberg Principles were adopted by the UN General Assembly. See Gen Assembly resolution UN GA Res 95/1 of 11th December 1946. See generally MC Bassiouni (n 21 above) on 'the Nuremberg Precedent'.

42 See Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) presented 3 may 1993 (s/25704) Para 18-30 explaining the legal basis for the establishment of the international tribunal.

43 See SC res 827 (1993) of 25 May 1993 on the establishment of the ICTY. On the establishment and legislative history of the ICTY, see MC Bassiouni & P Manikas *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) 199-236.

44 See S.C. Res. 935 and S.C. Res. 955, (1994). On the legislative history of the ICTR, see generally Morris & Scharf (n 9 above).

45 For the background and account of the Balkan civil war see MC Bassiouni & P Manikas (n 43 above) 1-62 and *The Prosecutor v Dusko Tadic*, Case No. IT-94-1-T, Trial Chamber II, 'Opinion and judgment' in 7 May 1997 paras 53.

46 The atrocities of the Rwandan genocide and responses of the international community are well documented. See *Prosecutor v Jean Paul Akayesu* (ICTR-96-4-T) paras 78-111. See also A Des, Alison; *Leave None to Tell the Story: Genocide in Rwanda* (1999); P Gourevitch, *We Wish to Inform You that Tomorrow we Will Be Killed with Our Families* (1998); R Dallaire, *Shake hands with the devil; The failure of humanity in Rwanda* (2003) (Dallaire, 2003); G Prunier *The Rwanda* Crisis: *History of the Genocide* (1995); L Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (2000); M Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (2002); Samantha Power *A Problem from Hell: America and the Age of Genocide* (2002); S Feil, *How the Early Use of Force Might Have Succeeded in Rwanda* (1998).

expansionist aspirations by the Republic of Serbia to a 'greater Serbia' fuelled the conflict[47] during which widespread violations of international humanitarian law were witnessed, including, according to reports, 'mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property'.[48] Based on evidence of atrocities in both Rwanda and the former Yugoslavia, the Security Council decided to establish an international tribunal for each country as recommended by UN Commission of Experts.[49]

The tribunals have the competence to establish the individual criminal responsibility[50] of persons considered to have committed 'serious violations of international humanitarian law' in the territory of the former Yugoslavia from January 1991[51] and in the territory of Rwanda from 1 January to 31 December 1994.[52] As such, the reach of both tribunals is limited in both scope and purpose. Materially, they have the same jurisdiction over genocide[53] and crimes against humanity.[54] Additionally, while the ICTY's jurisdiction extends to grave breaches of the Geneva Conventions of 1949 applicable to international armed conflicts[55] and violations of the laws or customs

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47 See *Prosecutor v Dusko Tadic* IT-94-1-T (n 45 above) para.54.

48 See Report of Secretary General, Ibid at 6 reflecting the views of the Commission of Experts established by the Secretary-General on request by Security Council (res 780 of 6 October 1992) that provided evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.

49 See Interim Report of the Commission of Experts submitted by letter dated 9 February 1993 to the President of the Security Council by the Secretary-General (S/25274) and SC res 808 (1993). For Rwanda, see Report of Commission of Experts and accompanying letter dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, at 1, U.N. Doc. S/1994/1125 (1994).

50 Art 6 ICTR Statute.

51 Art 1 Statute of the International Criminal Tribunal established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 (ICTY Statute) originally published as annex to the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution *808* (1993) (U.N. Doc. S/25704) and adopted pursuant to SC res 827 (25 May 1993) and subsequently amended by UNSC resolutions 1166, 1329, 1411, 1431, 1481.

52 Art 1 of the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (ICTR Statute).

53 Art 4 ICTY Statute and art 2 ICTR Statute.

54 Art 5 ICTY Statute and art 3 ICTR Statute.

55 Art 2 ICTY Statute.

of war (war crimes),[56] that of the ICTR incorporates violations of Article 3 Common to the Geneva Conventions of 1949 and Additional Protocol II of the Geneva Conventions[57] both applicable to an internal armed conflict. Whilst the ICTY is an 'open-ended' tribunal, its end time not being defined,[58] the ICTR is temporally limited. Its competence extends only to relevant crimes committed between 31 January 1994 and 31 December of the same year.[59]

2.4.1 The Ad Hoc Tribunals and Victims: The Forgotten Parties?

In terms of the founding instruments, the ICTR and ICTY were established 'for the sole purpose of prosecuting persons responsible for serious violations of humanitarian law.'[60] The tribunals, like Nuremberg adopted a retributive approach to justice characterised by punishment of perpetrators.[61] The mandates of the tribunals constitute the main reason explaining the role of victims before these tribunals.[62] They do not provide for the possibility for victims to claim reparations either from perpetrators or otherwise.[63] However, the Rules leave open the possibility for victims to obtain compensation under national legislation or some other appropriate forum after a conviction at the tribunal.[64] Further, the statutes of both tribunals addressed the question of restitution of stolen property to be ordered as part of final sentence.[65]

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56 Art 3 ICTY Statute.

57 Art 4 ICTR Statute.

58 It has jurisdiction over atrocities committed between 1st Jan 1991 and a time that will be decided by the Security Council resolution.

59 Art 1 ICTR Statute.

60 UN SC Res 827 (1993) of 25 May 1993; UN SC Res 955 (1994) of 8 November 1994.

61 GJ Mekjian & MC Varughese 'Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the international criminal Court' (2005) XVII N 1 *Pace Univ School of LJ* 1-46 13 alluding to 'the punitive nature of the tribunals'.

62 Morris & Scharf have observed that the mandate of the ICTY indicates the intention of the UNSC to exclude the possibility of compensation before the tribunals. See V Morris & MP Scharf *An insider's guide to the International Criminal Tribunal for the former Yugoslavia* (1995) at 167, 286-87; V Morris & MP Scharf, *The International Criminal Tribunal for Rwanda* Vol 1 (1998).

63 See generally, JRWD Jones *The practice of the International Criminal Tribunals for the former Yugoslavia and Rwanda* (1998); A Rydberg 'victims in the International Criminal Tribunal for the former Yugoslavia' in H Kaptein & M Malsch - crime victims and justice: essays on principles and justice, 126-140 131; Mekjian & Varughese (n 61 above) 13.

64 Rule 106B ICTY RPE; Rule 106 ICTR RPE; UNSC Res 827 and 955 noted that 'the work of the International Tribunal shall be carried out without prejudice to the right of victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law". See ICTR/ICTY 'Victims compensation and participation'

The statutes and Rules of Procedure and Evidence of the two tribunals do not contain any provisions relating to victims' participation in the proceedings. As such, their participation is restricted – for those who get called either by the prosecutor, defence or the tribunal on its own initiative – to that of witnesses.[66] Despite the convergence of legal traditions in the procedure of the tribunals, they seem to have adopted an adversarial procedure in this respect, which is characteristic of common law systems in which the role of the victim in criminal procedure is restricted to that of witness.[67] The fact that victim-witnesses are open to charges of contempt if they don't tell the truth coupled with the fact that they do not have a right to be kept informed of the progress of proceedings[68] has led some to conclude that 'war crimes trials effectively silence, rather than hear victims.'[69]

Typical of retributive models of justice, the interests of victims are supposed to be represented by the prosecutor. However, the prosecutor is hardly the appropriate person to look out for victims' interests as these do not always converge with those of the prosecutor. The exclusionary manner in which plea bargaining procedure has been conducted before the tribunals attests to the fact that irrespective of independent victims' concerns, the prosecutor has been driven largely by the need to dispose off cases as efficiently as possible in pursuance of the tribunals' prosecutorial mandate.[70]

The Statutes and Rules of both tribunals made it a priority to safeguard the right of accused to a fair and expeditious trial.[71] The tribunals have emphasised

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ICTR and ICTY Judges' Report of 13 Sep 2000 to UN Security Council available at <http://www.un.org/icty/pressreal/p528-e.htm> (accessed on 20 Sep 2005); T Kuhner 'The status of victims in the enforcement of international criminal law' (2004) 6 *Oregon Rev IL* 95.

65 Arts 23(2) ICTR and art 24(3) ICTY Statute both under 'penalties' provide that in addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct to their rightful owner.provide for restitution of property or proceeds acquired by criminal conduct. See also Rule 105 ICTR RPE; Rule 105 ICTY RPE; ICTY Judges Compensation Report, 7.

66 Rule 98 ICTY RPE; Rules 54 and 98 ICTR RPE.

67 Mekjian & Varughese (n 61 above) 13. See also chapter three.

68 Rule 90 ICTY RPE; Rule 77 ICTR RPE; generally, JE Ackerman & E O'Sullivan *Practice and procedure of the International Criminal Tribunal for Rwanda* (2000) 436-43.

69 MB Dembour & E Haslam 'Silencing hearings? Victim-witnesses at war crimes trials' (2004) 15 *European JIL* 151; Mekjian & Varughese, 13. See also E Stover *The Witnesses* who has documented the experiences of victims from the former Yugoslavia in relation to the ICTY.

70 Art 15 ICTR Statute; art 16 ICTY Statute. On plea bargaining practice of the tribunals see A Tieger & M Shin 'Plea agreements in the ICTY' (2005) 3 *J of International Criminal Justice* 666-679 and chapter four of this thesis.

71 Art 21(4) ICTY Statute; art 19(1) ICTR Statute.

compliance with these defence rights.[72] Victims have largely been left out, save in cases where victim protection schemes have been instituted as required by the founding law and rules of the tribunals.[73] For the case of Rwanda, one major concern of victims has been that while in the opinion of genocide survivors those facing trial for genocide 'live like kings and queens', little is done to alleviate the suffering of survivors who struggle to deal with the effects of victimisation. Because of its perceived detachment from victims, many people in Rwanda, including the Rwandan government have considered the ICTR as a wasteful parody of justice.[74] While there have been complementary national processes in Rwanda that may be considered more responsive to victims such as *Gacaca* tribunals, the ICTR has been a failure in this regard. The modest achievements of *Gacaca* discussed in chapter six demonstrate the usefulness of such indigenous justice mechanisms in addressing intricate problems of justice by complementing formal processes of ICL and in particular, attending to the some of victims' concerns.[75]

Without doubt, the tribunals have made invaluable contribution since their establishment. Apart from playing a central role in establishing accountability for atrocities committed in the respective territories thus paving the way for a measure of peace, reconciliation and reconstruction after violent conflicts, they have also contributed to the development of the jurisprudence of international criminal law.[76] Morris & Scharf[77] observe with respect to the ICTR that its establishment constitutes one of the most important milestones in the history of international criminal law,

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72 See for instance *Prosecutor v Barayagwiza*, ICTR-97-29-T Decision on Defence Counsel Motion to Withdraw, Concurring and Separate Opinion of Judge Gunawardana, 2 November 2000; *Prosecutor v Milosevic*, IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel 4 April 2003; Mekjian & Varughese (n 61 above) 13.

73 See art 20 and 22 ICTY Statute and Rules 69, 75, 79 and 89 Rule of Procedure and Evidence of the ICTY and Art ICTR Statute.

74 For Rwanda's initial objections to the ICTR see MH Morris, 'The trials of concurrent jurisdiction: the case of Rwanda' (1997) 7 *Duke J. Comp. and Int'l L* 349 355-358.

75 On *Gacaca* and victims see M Goldstein-Bolocan 'Rwandan Gacaca: an experiment in transitional justice (2005) *J of Dispute Resolution* 355 363.

76 For the contribution of the ad hoc tribunals see PL Magnarella, 'Expanding the frontiers of humanitarian law: the international criminal tribunal for Rwanda' (1994) 9 *Florida JIL* 421; T Meron 'War Crimes in Yugoslavia and Development of International Law' (1994) 88 *American JIL* 78; generally T Meron, *War Crimes Law Comes of Age: Essays* (1998); KC Moghalu 'International humanitarian law from Nuremberg to Rome: the weighty precedents of the international criminal tribunal for Rwanda' (2002) 14 *Pace Int'l L. Rev*. 273; P Akhavan 'the international criminal tribunal for Rwanda: the politics and pragmatics of punishment' (1996) 90 *American JIL* 501.

77 Morris & Scharf (n 9 above) 1.

especially when viewed in its historical context that takes into account the difficulties encountered in efforts to create other *ad hoc* international criminal tribunals and in the protracted process that culminated in the Permanent International Criminal Court (ICC).

While the work of the tribunals is laudable in terms of institutional and jurisprudential developments, based on the narrow focus of their mandates, similar sentiments do not hold with respect to the rights of victims of the atrocities for which they were created to address. It is no surprise that they have so far focused only on establishing the criminal responsibility of suspected perpetrators. Even in this function, they have been handicapped due to their limited mandates, as well as practical considerations that have necessitated that they act selectively in prosecuting only a few people who bear the greatest responsibility.[78]

Both tribunals provide for measures protective of witnesses and victims who act in that capacity. These fairly standard measures include in camera hearings, closed sessions, expunging identifying information from the public records of the tribunals and testimony through image (or voice) altering devices. However, these measures, aimed at protecting the privacy and safety of victims and witnesses may only operate subject to the rights of the accused.[79] The ICTY seems to have made some strides in advancing the rights of victims in one major respect. In the most significant case on the subject, the trial Chamber found in favour of affording further protective measures for victims and witnesses effectively sanctions anonymous testimony in appropriate cases.[80] Applauded by proponents of victims' rights and vehemently criticized by those who consider it an infringement on fair trial guarantees, this decision is but a modest advancement of victims' rights.[81] It most importantly serves to highlight the tensions

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78 On the policy of indictment of the ICTY, see A Rydberg 'victims in the International Criminal Tribunal for the former Yugoslavia' in H Kaptein & M Malsch - crime victims and justice: essays on principles and justice, 126 128-131.

79 Rules 75 and 79 ICTR RPE; Rules 75 and 79 ICTY RPE. See generally C DeFrancia, 'Due Process in International Criminal Courts: Why Procedure Matters' (2001) 87 *Virginia LR* 1381

80 *Prosecutor v Dusko Tadic,* IT-94-1-T (Trial Chamber, ICTY, Aug 10 1995 Decision on the Prosecutor's motion Requesting Protective Measures for Victims and Witnesses). The tribunals allowed anonymous testimony owing to 'exceptional circumstances' and because serious concerns about victim safety warranted such a move.

81 See later decisions that seem to deviate from *The Prosecutor v. Radoslav Brdjanin and Momir Talic - Case No. IT-99-36-PT* (Trial Chamber II, ICTY, July 3, 2000); *Prosecutor v Blaskic,* Case No. IT-95-14-PT, (Trial Chamber I, ICTY, Mar. 2, 2000); C DeFrancia (n 79 above) 1420; C Chinkin, 'Amicus Curiae Brief On Protective Measures For Victims And Witnesses'

between the rights of victims and those of perpetrators the ICC has to address in operationalizing the new norms relating to victims. It is noteworthy that the Rome Statute endorses anonymous testimony.[82] The jurisprudence of the tribunals in this regard is therefore relevant for the ICC's interpretative mission.

In outlining ways in which the plight of victims can be dealt with, it is imperative to think beyond the judicial process. The Rwandan experience and the belated response by the UN to the crisis has demonstrated that while it is important to develop an international criminal process sensitive to victims, the effectiveness of complementary mechanisms of preventive intervention should be taken more seriously. Considering the limits of law in addressing large-scale human rights disasters, Smith[83] argues rightly that although the ICC is but one facet of international justice, its existence may diminish the possibilities for humanitarian intervention to prevent atrocities. His call for a parallel development and strengthening of existing political frameworks for intervention to balance the pursuit of international justice captures, within the context of victims rights, the multifaceted approach advocated for in this thesis.

2.5. Beyond Rwanda: New Responses to International Crimes

Rather than opt for fully fledged international tribunals as in Rwanda or Yugoslavia, the Security Council has in its recent judicial responses to atrocities chosen to establish or encourage the establishment of what have come to be known as 'special', 'hybrid' or 'mixed' tribunals.[84] In the case of Sierra Leone, the United Nations Special Court

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(1996) 7 Crim Law Forum 179, 202; D Lusty, 'Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials' (2002) 24 *Sydney LR* 361, 424.

82 Rule 74(7) (b), 76, 81 and 82 ICC RPE; Art 72 Rome Statute. See T Ingadottir, F Ngendahayo & PV Sellers, 'The International Criminal Court: The Victims and Witnesses Unit (Article 43.6 of the Rome Statute) A Discussion Paper,' 25 (March 2000); JL D'Ambrosio 'Memorandum for the Office of the Prosecutor International Criminal Tribunal for Rwanda: Courtroom technology: A Comparative Analysis of its Application, Due Process and Public Policy Issues for Victims and the Accused' available at <http://www.nesl.edu/center/wcmemos/2002/dambrosio.pdf> 31-32 (accessed on 12 March 2007).

83 TW Smith, 'Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legality' International Politics Volume 39, No 2 (2002) 175-192.

84 S Linton 'New approaches to international justice in East Timor and Cambodia' *IRRC* No 845 (2002), 93; H Strohmeyer, 'Collapse and reconstruction of a judicial system: The United Nations Missions in Kosovo and East Timor' (2001) 98 *American JIL* 46.

for Sierra Leone was established. For East Timor (Timor L'Est), the Special Panels for Serious Crimes have been charged with the prosecution of members of the Indonesian army and pro-Indonesian Timorese militia responsible for the atrocities associated with the 1999 UN-organised referendum that resulted in East Timor's independence.[85] More recently, the Cambodian Extraordinary Chambers (CEC) were created to prosecute crimes associated with the brutal Khmer Rouge regime in that country.[86] These latter-day approaches are based on an expedient combination of international and domestic elements in their composition, structure and material scope of jurisdiction. It is notable however that this is perhaps a more accurate description of the case of Cambodia than Sierra Leone, which for practical purposes may be regarded a 'mixed' tribunal in name only. Commenting on character of the Special Court, the Appeals Chamber of the SCSL has on several occasions reiterated that the SCSL is an international court. In one such decision, the Appeals Chamber noted that the Special Court 'is an international tribunal exercising its jurisdiction in an entirely international sphere and not within the system of the national courts of Sierra Leone'.[87]

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85 On East Timor, Summary of the report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste at <http://www.globalpolicy.org/intljustice/tribunals/timor/2005/0715report.pdf> (accessed on 29th September 2005); United Nations Transitional Administration in East Timor Regulation 2000/15; Amnesty International's open letter to all members of the Security Council dated 15th July 2005 at <http://web.amnesty.org/library/print/ENGASA570032005> (accessed on 24th September 2005); generally S Linton & C Reiger 'The evolving jurisprudence and practice of East Timor's Special Panels for Serious crimes on admission of guilt, duress and superior orders' in H Fischer and A McDonald (eds) *Yearbook of International Humanitarian Law* (2001) 167-212; S Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in international justice' 12 *Crim LF* (2001), 185; S Linton 'rising from the Ashes: The creation of a viable criminal justice system in East Timor' (2001) 25 *Melbourne Univ LR* 2001.

86 On Cambodian Extraordinary Chambers (CEC), see Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135 at <http://www1.umn.edu/humanrts/cambodia-1999.html> (accessed on 25th September 2005); Agreement Between the United Nations and the Royal Government Of Cambodia Concerning the Prosecution Under Cambodian Law Of Crimes Committed During the Period of Democratic Kampuchea of 6 June 2003 entered into force 29 April 2005, UN Doc. A/RES57/228B (Annex) available at <http://www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf> (accessed 20 June 2006); D Boyle 'The right of victims-participation, representation, protection, reparation' 4 (2006) *J of International Criminal Justice*, 307-313; 'An Introduction to The Khmer Rouge Trials' report produced by the Secretariat of the Royal Government Task Force, Office of the Council of Ministers, Kingdom of Cambodia at <http://www.cambodia.gov.kh/krt/english/introduction_eng/index.htm> (accessed on 25th September 2005).

87 See *Prosecution v. Kallon et al.,* SCSL-2004-15-AR72 (E), Special Court for Sierra Leone, Appeals Chamber, *Decision on Constitutionality and Lack of Jurisdiction*, 13 March 2004, para 80. See also *Prosecutor v. Taylor,* SCSL-2003-01-I, Special Court for Sierra Leone, *Decision*

While promotion of 'ownership' of processes of accountability in places like Sierra Leone, East Timor and Cambodia may have justified the choice of 'mixed' tribunals, lessons have been learnt from Rwanda and Yugoslavia that the international criminal tribunal option is not only expensive but also logistically onerous, often requiring pooling of massive resources. This move is therefore partly informed by practical reasons. Rather than establish an entirely new institution to which donor countries are increasingly reluctant to commit resources, it has been considered desirable to tap into existing local infrastructures and to buttress them with internationally solicited resources and personnel who in turn bequeath international legitimacy to such structures.

Although recent responses by the UNSC to atrocities demonstrate its preference for institutions demanding limited international input, it does not necessarily indicate a definite pattern of responses to similar situations in future. Obviously, each set of circumstances has its own politics that informs the response of the international community. As the recent response to the Darfur crisis demonstrates, while the route of a hybrid mechanism was available, proposals for a Rwanda-style tribunal seem to have been made by the US in order to forestall calls for ICC intervention, a move that may be interpreted as lending US legitimacy to an institution it has shunned.[88] Since 2005, the situation has been under ICC investigation after UNSC referral.[89] This may indicate that with the ICC in place, the need to make recourse to the more politicised and selective UNSC responses to international crimes may have been obviated. However, it is notable that the Rome Statute recognizes and endorses UNSC charter mandate in relation to international peace and security. It preserves the UNSC's option to refer a situation in which international crimes may

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on Immunity from Jurisdiction, 31 May 2004, para 57; and *Prosecutor v Moinina Fofana and Allieu Kondewa*, SCSL-2004-14-A, Special Court for Sierra Leone, Appeals Chamber, *Final Appeal Judgement*, 28 May 2008, para 561 in which the Appeals Chamber reemphasised that it is 'an international court with responsibility to protect and promote the norms and values of the international community, expressed not only as part of customary international law but also, in several international instruments.

88 See Human Rights Watch letter dated 21st January 2005 to Dr Condoleezza Rice, US Secretary of State urging support for a referral of Darfur to the ICC at <http://hrw.org/english/docs/2005/01/21/sudan10090.htm> and statement of Mrs. Patterson (US Rep SC) after adoption of SC res 1593 (2005).

89 See Security Council res 1593 (2005) referring Darfur to Prosecutor of the ICC adopted by Vote of 11 in Favour To None Against, with 4 Abstentions (Algeria, Brazil, China, United States).

have been committed to the ICC,[90] or to request that the Prosecutor of the ICC suspend an inquiry or prosecution of a particular situation or case.[91]

2.5.1 The Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL), is a hybrid tribunal established by agreement between the United Nations and the government of Sierra Leone[92] to try and punish persons 'who bear the greatest responsibility' for war crimes, crimes against humanity, breaches of international humanitarian law and violations of select Sierra Leonean laws committed during the civil war in that country.[93] While the option to establish a Rwanda-style tribunal was open to the Security Council, a 'Special Court' staffed by international judges appointed by the Secretary General, as well as Sierra Leonean judges was chosen.[94] The decision to create a Special Court was informed partly by concerns over the costs of running a fully-fledged international tribunal in view of waning interest in the enterprise and the need to promote ownership of the process.[95]

Apart from its composition, the SCSL differs from the ICTY and ICTR in several notable respects. Unlike these two tribunals, which were established by the Security Council under Chapter VII powers, the SCSL is a treaty-based Court established by agreement between the UN and Sierra Leone. This denies it powers to assert primacy over national Courts of third states or to order the surrender of a suspect

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90 Art 13(b) Rome Statute.

91 Art 16 Rome Statute.

92 See Annex to Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, U.N. Doc. S/2000/915.

93 See S.C. Res. 1315 (2000), 14 August 2000; Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, U.N. Doc. S/2000/915. Statute of the Special Court for Sierra Leone. On the SCSL generally see C Schocken 'The Special Court for Sierra Leone: Overview and Recommendations' 20 *Berkeley JIL* 436.

94 The Special Court has two Trial Chambers, each with two judges appointed by the Secretary-General and one judge appointed by the Government of Sierra Leone; and a five-member Appeals Chamber with three judges appointed by the Secretary-General and two judges appointed by the Government of Sierra Leone. The Secretary-General appoints the Chief Prosecutor and Registrar. The Deputy Prosecutor is appointed by Sierra Leone in consultation with the United Nations. See arts 12-16 Statute SCSL.

95 See Report of the Secretary-General, (n 91 above) paras 57-63. See D Wippman 'The International Criminal Court' in C Reus-Smit (ed) *The Politics of International Law* (2004)151-188 at 152 noting that to some extent, the Rome treaty was motivated by a desire to solve collective action problems and to reduce the transaction costs inherent in establishment of ad hoc tribunals.

located in any third state.[96] Like the ICTR and ICTY in their respective countries, it nevertheless has primacy over domestic prosecutions in Sierra Leone.[97]

The other difference relates to subject matter jurisdiction. While that of the ICTY and ICTR relates to violations of international humanitarian law, the Special Court's subject matter jurisdiction extends, in addition to war crimes and crimes against humanity,[98] to certain crimes under Sierra Leonean law, including abuse of a girl under 14 years of age, abduction of a girl for immoral purposes, and setting fire to dwelling-houses or public buildings.[99] Despite these differences, the SCSL is to be guided by the decisions of the appeals Chamber of the ICTY and ICTR,[100] and to apply the Rules of Procedure of the ICTR, though the judges can, in case of lacunae in the source rules, amend or adopt additional rules.[101]

The Special Court's temporal jurisdiction runs from 30 November 1996 to a date to be decided by a subsequent agreement between the UN and Sierra Leone. The commencement date was justified by the need to limit the burden on the Court given that the war had begun in 1991.[102] In 2003, the SCSL indicted 13 individuals although two indictments were subsequently withdrawn after the death of Foday Sankoh the RUF leader and Sam Bockarie, RUF member. The third, Samuel Hinga Norman, alleged leader of the Civil Defence Forces (CDF) died in custody on 22 February 2007 before judgment. The trials of three former leaders of the Armed Forces Revolutionary Council (AFRC) and of two members of the CDF have been completed, including appeals. Testimony has ended in the trial of three former Revolutionary United Front (RUF) leaders and judgement of the trial section was expected in late 2008. Charles Taylor, the former President of Liberia is facing trial before SCSL judges sitting in The Hague.[103] Johnny Paul Koroma, former AFRC chairman remains at large.

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96 This explains why the demands for the surrender of Charles Taylor by Nigeria to the SCSL were limited to diplomatic requests and not an assertion of the Court's powers. See art 8 (1) ICTR Statute and art ICTY Statute. With regard to ICTR, see Morris (N 74 above 1997), 362-374.

97 Art 8(2) Statute SCSL.

98 Art 2 Statute SCSL.

99 Art 5 Statute SCSL.

100 Art 20 (3) Statute SCSL.

101 Art 14 Statute SCSL.

102 See Report of Secretary General (n 93 above) para 26-27.

103 Those indicted include: five alleged leaders of the former Revolutionary United Front; three alleged leaders of the former Armed Forces Revolutionary Council and three alleged leaders of

2.5.2 The Sierra Leonean Truth and Reconciliation Commission

The Sierra Leone Truth and Reconciliation Commission (Sierra Leone TRC), envisaged in the Lomé Peace Agreement (Lome Accord)[104] was established by the Truth and Reconciliation Act 2000.[105] The Lomé Accord foresaw the TRC's role as a one of the structures 'for national reconciliation and the consolidation of peace.'[106] The objectives of the TRC were formulated in terms of the Lomé Accord as distilled into the TRC Act 2000. The first objective was, to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement. Secondly, to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.[107] The TRC was also required, among other things, to recommend measures to be taken for the rehabilitation of victims of human rights violations.[108]

Juxtaposing the Special Court and the TRC, the TRC saw its role as driven by 'largely restorative and healing objectives' while the SCSL has 'largely punitive and retributive aims'.[109] Despite this difference in focus of functions, the TRC recognized that there was convergence in the objectives of the two bodies.[110] On one of its main objectives -– fostering reconciliation – the TRC took the view that 'reconciliation' evolves from a notion of restorative justice, which 'focuses on restoring relations, as

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the former Civil Defence Forces and Charles Taylor. See <http://www.sc-sl.org> (accessed on 10 June 2008).

104 Lomé Peace Agreement signed between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone in Lomé on 7 July 1999.

105 On the mandate of the TRC see Art XXVI Lomé Peace Agreement Sierra Leone Truth and Reconciliation Act 2000; Final SL TRC Report, Vol 1 Chapter One, paras 1-12.

106 Art VI (2) (ix) Lomé Agreement.

107 Art 6(1) Sierra Leone TRC Act; Art XXVI (1) Lomé Agreement.

108 Art XXVI (2) Lomé Agreement.

109 Final TRC Report, Vol II Chapter 1, para 71.

110 The TRC noted that the institutions 'seek truth about a conflict, although in different forms; both attempt to assign responsibilities for atrocities; both work with similar bodies of law; both are aimed at establishing peace and preventing future conflict.' Final TRC Report, Vol II Chapter 1, para 71. See also S Berewa, 'Addressing Impunity using divergent Approaches: The Truth and Reconciliation Commission and the Special Court' in UNAMSIL, *Truth and Reconciliation in Sierra Leone a Compilation of Articles on the Sierra Leone Truth and Reconciliation Commission,* Freetown (2001) 55.

far as possible, between victims and perpetrators and between perpetrators and the communities to which they belong.'[111] The TRC considered a broad range of measures such as accountability, acknowledgment, truth telling and reparations as central to achieving reconciliation at the national, community and individual levels.[112]

2.5.2.1 Participation, Truth and Reconciliation

In view of the multiplicity of elements facilitative of reconciliation, the TRC is, because of its flexible procedures and broad mandate, perhaps better suited in this regard than the Special Court.[113] Although the Special Court also has a truth-finding role, the truth it establishes – judicial truth – is for the most part limited to the criminal responsibility of the accused. This version of truth is further diminished by the Court's mandate restricted to criminal responsibility of perpetrators 'who bear the greatest responsibility'. As such, the TRC was perhaps better suited for a broader inquiry into the causes, nature and circumstances of the conflict.[114]

The TRC, considering the establishment of the historical record as a key component in its functions invested much effort to these ends.[115] The TRC took the view that establishing 'social truth' was crucial and therefore saw its role as facilitating dialogue and interaction between parties to the conflict, and the various components of civil society, state institutions and constituencies such as women, youth and children, in order that they might come together for debate and exchange.[116] In its view, the TRC provided an avenue to establish 'healing and restorative truth' achievable through acknowledgement by perpetrators and offering apology to victims.[117]

The broad participatory process and a deeper understanding of the dynamics of the conflict has been said to enable 'collective catharsis' and creates a conducive

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111 Ibid, para 74.
112 Ibid.
113 The Lomé Peace Agreement declared that one of the purposes of the TRC was to 'get a clear picture of the past in order to facilitate genuine healing and reconciliation'. See Memorandum of Objects and Reasons attached to the Truth and Reconciliation Act 2000.
114 Final Report of the Sierra Leone Truth and Reconciliation Commission (hereinafter Sierra Leone TRC Report), Volume 1: Chapter 3, Para 11.
115 See Final SC TRC Report, Vol 1, Chapter 3.
116 Ibid, paras 27.
117 Ibi, paras 28-29.

environment for reconciliation.[118] In its report, the TRC established a firm link between truth, reparation and reconciliation. It noted that reparations without truth telling could be perceived by victims as an attempt to buy their silence. Conversely, truth telling without reparations is problematic, in the sense that it 'could conceivably be perceived by the victims to be an incomplete process in which they have revealed their pain and suffering without any mechanism being put in place to deal with the consequences of the pain.' Similarly, reparations without truth telling could be perceived by the beneficiaries as an attempt to buy their silence. [119] It rightly concluded that restorative justice requires not only truth, but reparations, which enhances the reconciliation process.

2.5.2.2 Reparations, Restoration and Reconciliation

The TRC was mandated to make recommendations with specific objectives in mind: to help prevent repetition of the violations or abuses suffered, respond to the needs of the victims and to promote healing and reconciliation.[120] When the TRC concluded its work, it issued a detailed report of its findings and set out recommendations for a reparations programme.[121] On eligibility for reparations, the TRC took a broad view of the harm – injury, loss or damage – required. It seemed to suggest that anyone who had suffered human rights violations should benefit from reparations. It identified five broad categories of victims that should receive reparations based on their degree of vulnerability: war wounded; amputees; victims of sexual abuse; children, who had suffered psychological or physical harm, had been forcibly conscripted or lost a parent; and war widows.[122] Through consultation with victims and service providers, the TRC recommended that a reparations programme should focus on mental and physical healthcare, education, skills training, micro credit as well as community and symbolic reparations.[123]

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118 Ibid, para 12.
119 Final SC TRC Report, Vol 1, Chapter 3, para 33.
120 Section 15(2) of the TRC Act; Vol 2 Chapter 1, para 80.
121 Final Sierra Leone TRC Report, Vol II Chapter 4 Reparations pp 227-270.
122 Ibid, Vol 2 Chapter 1 para 84.
123 Ibid, para 85.

As regards the determination of individual reparations, the TRC proposed that the needs of the victim could be used to determine reparations.[124] In its recognition of the fact that circumscribing so broadly the group of eligible victims would create practical and resource problems, the TRC cautioned that each of the categories of beneficiaries it proposed 'should be carefully defined to fit specific parameters and conditions'.[125] It is suggested that the proposal by the TRC may still yield many victims in respect of whom resources may not be available for individualised reparations. In view of resource constraints, a stricter criterion of 'seriousness' and a narrower demarcation of 'indirect victims' may be necessary to limit the number of victims in this category.

In recognition of the government's primary responsibility for reparations,[126] the TRC recommended that the National Commission on Social Action (NaCSA) be established to coordinate and implement the reparations programme and to administer the Special Fund for War Victims proposed. The NaCSA was to be assisted by an advisory committee.[127] In response, the government issued a White Paper a year later in 2005 before finally approving NaCSA. It also appointed a reparations task force.[128] However, the TRC's recommendation that NaCSA starts work on implementing the most urgent reparations within 6 months was not effected. Further, despite continuing calls from civil society, the implementation of the reparations programe has not begun, some three years later.[129]

The Lomé Agreement had proposed a Special Fund for War Victims to be established by the government with the support of the international community for the rehabilitation of war victims.[130] Unfortunately, the fund had not been established as at the end of 2008. Many organisations have called on the government to act in order to

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124 Ibid, para 80.

125 Ibid, para 84.

126 Ibid, para 81 making reference to Sierra Leone's responsibility under international law and Sierra Leonean Constitution 1991 on redress for violation of fundamental human rights.

127 Ibid, para 87.

128 Amnesty International *Sierra Leone: Getting reparations right for survivors of sexual violence*, report of 1 Nov 2007 available at <http://www.amnesty.org/en/library/asset/AFR51/005/2007/en/AFR510052007en.html> [hereinafter Amnesty Reparations Report, 2007], 13.

129 Ibid, 13.

130 Article XXIX Lomé Agreement.

provide much needed assistance to victims.[131] It has been suggested that failure to implement this important aspect of the Lomé Accord and related TRC recommendations is not due to lack of funds or commitment by international partners, but to a misplaced government policy, belated and inappropriate responses to TRC recommendations.[132] However, this is entirely accurate. In a poor country emerging from long years of conflict such as Sierra Leone, prioritisation of service delivery, and other more pressing concerns naturally capture the attention of a new government at the expense of victims. The case of post-Apartheid South Africa, a far more economically endowed country than Sierra Leone, amply demonstrates that availability of funds to a government does not always ensure that appropriate reparations programmes will be instituted.[133] Priorities may lie elsewhere.

2.5.2.3 Lessons From Sierra Leone

The case of Sierra Leone – where a Special Court operated alongside a TRC – furnishes a number of lessons for the ICC or mechanisms associated with it that may be established to deal with international crimes. First, Sierra Leone demonstrates the unsuitability of criminal tribunals, in particular those based on a retributive paradigm, to deal satisfactorily with the concerns of victims that require their participation as well as reparation. It must however be acknowledged that the utility of a criminal tribunal is by its nature limited.

Secondly, the case of Sierra Leone demonstrates that recourse to 'hybrid tribunals' can facilitate the deployment of domestic options for restorative justice mechanisms hand in hand with pursuit of criminal justice often emphasised by international players. The mere possibility that a 'national law component' and presence of host state judges in the composition of the Special Court may help steer these tribunals in a direction favourable, if not conducive to the interest of victims.

Thirdly, unlike the ICTR and ICTY both of which operate from a second country, the fact that the 'mixed' tribunals – like the SCSL – are located in countries

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131 Amnesty Reparations Report (n 128 above) 14.

132 A UN official has stated that ' When the war ended, NGOs and the UN made it known to the government that we were prepared to fund or provide services for reparations. The government never asked. It sent the wrong message'. See Ibid, 1.

133 See chapter six.

ravaged by conflict enhances access by victims to proceedings as observers or witnesses. Perhaps more importantly, in countries where impunity has been the order of the day, the trial of perpetrators within their communities may be crucial in the development of a new narrative of the rule of law and respect for human rights.

Fourthly, the operation of the TRC side by side with the Special Court has permitted the Sierra Leonean government an option for restorative justice through the TRC in a post conflict society in dire need of truth, reconciliation and reconstruction.[134] It is true that the Sierra Leonean TRC's options were limited statutorily and in terms of resources as far as ordering reparations is concerned. However, to the extent that it provided a less adversarial forum, which permitted victims, including special categories such as children, a friendlier environment for expression, it must be considered more suited for these specific victims' concerns.[135] All in all, the case of Sierra Leone underscores the fact that the search for mechanisms responsive to the concerns and interests of victims of international crimes may be an elusive one and that this enterprise necessarily requires the deployment of a range of judicial and non-judicial approaches.

Beyond the criminal tribunals, the search by victims of international crimes for responsive avenues of redress has always been a continuing one. They have been confronted by the challenge of a bifurcated international criminal justice system – divided between 'the international' and 'the national' and also internally divided, as evidenced by the multiplicity of tribunals that may present alternative, but not necessarily appropriate avenues for victims. Since Nuremberg, parallel developments in general international law, discussed at some length in the next chapter, have seen the emergence of various norms – those requiring states to prosecute at least the most

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134 See generally W Schabas 'Conjoined Twins of Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court' (2004) 2 *J of International Criminal Justice* 1082-1099.

135 See Report compiled by N Mann & B Theuermann for UNICEF National Forum for Human Rights UNAMSIL/Human Rights 'Children and the Truth and Reconciliation Commission for Sierra Leone: Recommendations for policies and procedures for addressing and involving children in the Truth and Reconciliation Commission' <http://www.unicef.org/emerg/files/SierraLeone-RCReport.pdf. > (Accessed on 15th September 2005); Schabas, 1090; DM Amann 'Calling children to account: the proposal for a Juvenile Chamber in the Special Court for Sierra Leone' 29 *Pepperdine Univ. LR* (2001) 167; Report of the TRC dedicated a considerable amount of space to the question of child soldiers. See chapter six of thesis.

serious crimes and victim-specific ones obliging states to adopt mechanisms that respond appropriately to victims' concerns.

CHAPTER THREE
VICTIMS IN THE STATE RESPONSIBILITY FRAMEWORK: THE INTERNATIONAL COURT OF JUSTICE AND HUMAN RIGHTS TRIBUNALS

3.1 Introduction

The previous chapter looked at developments in the various *ad hoc* tribunals on which the ICC might draw in developing its victims' rights regime. This chapter conducts a similar survey of developments in the case law of international tribunals. It reviews jurisprudence relevant to victims within the state responsibility framework and explores victims' rights under the main human rights treaties. The chapter argues that although human rights treaties – both universal and regional – make no specific reference to victims of crime, respective treaty oversight bodies have progressively interpreted certain key provisions as including key entitlements for victims of human rights violations, the most serious of which amount to crimes under international law. In particular, the chapter identifies these rights and various principles relating to core victims' entitlements – the right to participate in proceedings related to establishing accountability for serious human rights violations and the right to reparations. Quite apart from the possibility that victims of such atrocities can espouse alternative claims before these human rights tribunals,[1] the jurisprudence elaborated by them can illuminate the interpretation of the ICC victims' regime.

3.2 The State Responsibility Framework

Classical international law had established a framework of responsibility based on states as the principal actors, who were thus the only parties with standing to espouse claims before international tribunals. Under this model, state responsibility may be

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[1] The Rome Statute provides only for individual responsibility – criminal and civil. State responsibility is thus excluded. However, since victims' recourse to the ICC does not prejudice their rights under national or international law terms of article 75 (6) of the Rome Statute, victims may still obtain remedies for human rights violations that constitute such crimes before various human rights tribunals through their petition/communications procedures.

incurred directly by way of injury to another state through the actions of the agents or organs of the offending state, or indirectly through injury to the person or property of another state's nationals.[2] This conception of international state responsibility entails that injury to an individual that is attributable to a state other than that of which he or she is a national can only be espoused internationally by the state of nationality, in exercise of its right to diplomatic protection.[3] While contemporary international law has yielded in the sphere of human rights, and permitted individuals to bring petitions directly against states before international human rights tribunals, as discussed below, the state-centric nature of international law is still an evident reality.[4]

While victims whose injury is attributable to another state can and have had recourse through their nationality state before international tribunals and sometimes through negotiated inter-state monetary awards, the state responsibility model is ill-suited to addressing victims' concerns. Shelton rightly argues that this framework is inadequate because 'it derives from inter-state cases between juridically equal parties, where diplomatic concerns and broader issues of cooperation or conflict affect the results.'[5] While at a fundamental level injury to a national is considered as injury to the state of nationality in this framework,[6] the relationship between relevant states and the politics of diplomacy involved have often been an impediment to the articulation of general victims' concerns, when these are raised at all. Rosenne has wondered why in such cases, although the individual is the object of proceedings, he is not 'granted any

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2 J Dugard *International Law: A South African Perspective* 3rd ed (2005) 270.

3 See ILC Articles on the Responsibility of States for Internationally Wrongful Acts Annexed to GA Res. 56/83, (12 December 2001); C Bassiouni 'International recognition of victims' rights' *Human Rights LR* 6:2 (2006) 203 -279 at 211-212; *Liechtenstein* v *Paraguay* (*Notteboohm* Case); Jennings & Watts (eds) *Oppenheim's International Law* 9th ed (1992) 846.

4 D Shelton *Remedies in International Human Rights Law* (1999) 55. See also generally on various aspects of state responsibility MC Bassiouni 'Combating impunity for international crimes (2000) 71 *Univ of Colorado LR* 409; MC Bassiouni 'Searching for Justice in the world of realpolitik' (2000) 12 *Pace Int'l L.R* 213; R Lillich *International Law of State Responsibility*: Injury to aliens (1989); Carbonneau 'The convergence of the international law of state responsibility for injury to aliens and international human rights law' 99 *Vanderbilt JIL* (1984)

5 Shelton, (n 4 above) 2.

6 Jennings & Watts (n 3 above) 846; Vattel *Les Droits des gens, principes de la loi naturelle appliqué a la conduite des affaires des nations souverains* (1773) 289 cited in MC Bassiouni 'International recognition of victims' rights' *Human Rights LR*6:2 (2006) 203-279; *Mavromatis Palestine Concessions Case* (Greece v U.K), 1924 PCIJ (ser. A) No. 2, 13.

opportunity to make known to the Court, in his own way, his own views on the questions of fact and questions of law involved'.[7]

In any case, only few of the cases before the International Court of Justice (ICJ) and its predecessor the Permanent Court of International Justice (PCIJ), disclose any victim-related issues, under disparate branches of international law.[8] For their part, decisions of varied arbitral tribunals[9] as well as international claims commissions, (like most ICJ cases brought on behalf individuals), deal mostly with restitution of property and are thus of limited relevance to victims of crime.[10] It is noteworthy however that the recent United Nations Claims Commission relating to Iraq's international responsibility arising out of its invasion of Kuwait proffers some principles relating to the assessment of harm for purposes of quantifying reparations discussed in chapter six of this thesis.[11] These principles have relevance for the ICC in view of the fact that

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7 S Rosenne 'Reflections on the position of the individual in inter-state litigation in the International Court of Justice' in Pieter Sanders (ed) *International arbitration Liber amicorum for Martin Domke* (1967) 240-251 241.

8 For a discussion of the human rights jurisprudence of the PCIJ and ICJ to date, see SRS Bedi *The development of human rights law by the judges of the International Court of Justice* (2007); R Goy *La Court Internationale de Justice et les Droits de l'homme* (2002). Among the most notable cases include*:* Paramilitary Activities in Nicaragua (*Nicaragua v United States*); Barcelona Traction, Light and Power Company Case (*Belgium v Spain*) ICJ Reports 1970, para 33-4; Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Hetzegovina v Serbia*) ICJ Decision (Merits) 2007. Available at <http://www.icj-cij.org/docket/index.php?p1=3&k=f4&case=91&code=bhy&p3=4> (Accessed on 15 May 2007).

9 On the Permanent Court of Arbitration which has presided in over 30 cases including the Iran-US Arbitration see P Sands, R Mackenzie & Y Shany *Manual on international Courts and tribunals* (1999) 23-38; A M Stuyt *Survey of Internatinal Arbitrations* (1972) 1794-1970; HJ Schlochaur 'The Permanent Court of Arbitration' (1981) in R Benhardt (ed) *Encyclopaedia of public international law* (1981) 157; BE Shifman 'The revitalisation of the permanent Court of arbitration' (1995) 23 *International J of Legal Information* 284.

10 International law of state responsibility relating to injury to aliens, because of the nature of claims with which it is predominantly concerned (property claims, and only to a limited extent non wealth claims), proffers even less guidance with respect to victims of international crimes, save to reiterate *Chorzow* in affirming that state practice in this area of law indicates that there exists a rule of customary international law requiring equitable compensation for breach of an international obligation, in this case, expropriation or injury to private interests and the person of foreign nationals. A brief study of various lump-sum payments, as well as awards by claims commissions aptly illustrate this point. See various authors, and in particular RB Lillich, 'International Claims: their settlement by lump sum agreements' in in Pieter Sanders (ed) *International arbitration Liber amicorum for Martin DomkeI* (1967) 143-156; Richard Lillich *International Law of State Responsibility*: Injury to aliens (1989); Carbonneau 'The convergence of the international law of state responsibility for injury to aliens and international human rights law' (1984) 99 *Vanderbilt J. Intl law*.

11 See JR Crook, 'Current Development: the United Nations Compensation Commission - A New Structure to Enforce State Responsibility', (1993) 87 *American JIL* 144 and Chapter 6 of this thesis.

other than property claims, the UNCC also dealt with claims related to human rights and humanitarian law violations – murder, torture and illegal detention.

It is understandable that cases brought by states before the ICJ, even when on behalf of their citizens, would hardly raise the actual issues of importance to victims. Revealingly, only a handful of cases before the ICJ have involved specific allegations of state responsibility for international crimes – genocide, war crimes and crimes against humanity.[12] In the main, the case law of these tribunals, especially with respect to violations against individuals, is dedicated to the exposition of general principles. Additionally, given that these cases have not been specifically brought to address victims' issues, such inquiry into principles as turns out to be relevant to victims has been mainly *en passant*, and aimed at facilitating findings on more central, unrelated issues of the case.

3.2.1 The International Court of Justice

Like its predecessor the PCIJ, the ICJ was established as one of the principal organs of the UN[13] and the main judicial organ,[14] and has two key functions: settlement of disputes between states and the rendering of advisory opinions when requested by the Security Council (UNSC) and the General Assembly (UNGA).[15] The ICJ now has elaborated a substantial corpus of jurisprudence, relating both to contentious cases as well as advisory opinions.[16]

A survey of the case law reveals that of the more than 60 cases so far decided by the ICJ, only a handful address, directly or indirectly, concerns of victims of human rights violations (and international crimes). Invariably, the majority of cases at the

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12 *Case relating to Armed Activities on the Territory of the Congo* (*Congo v Uganda*) ICJ Decision (Merits) 2005. Available at <http://www.icj-cij.org/docket/files/116/10455.pdf> (accessed on 10 May 2007); *Bosnia and Hetzegovina v Serbia* (n 8 above); and Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v Serbia*) ICJ Decision (Jurisdiction) 2008. Available at <http://www.icj-cij.org/docket/index.php?p1=3&k=73&case=118&code=cry&p3=4> (Accessed on 11 January 2009).

13 Article 7 UN Charter.

14 Article 92 UN Charter ; art 1 ICJ Statute.

15 See S Rosenne *The World Court: What it is and how it works* 4th Ed (1989) 27-; Terry D Gill *Rosenne's World Court - What it is and how it works* 6th ed (2003).

16 As at January 2007, the ICJ has rendered judgement with regard to 60 contentious matters as well as 5 advisory opinions. See Bedi (n 8 above) 3.

PCIJ[17] as well as the ICJ[18] not only address interstate disputes, but also issues unrelated to injury to individuals, outside the context of crime or human rights violations. For these two reasons, the relevance of the jurisprudence of the PCIJ and ICJ is limited to general principles of international law that may form the background against which, the Rome Statute, and the victim's regime in particular will be elaborated. While some principles relating to reparations may be gleaned from this body of law, it seems of little and perhaps no utility with regard to victims' rights to participation in the criminal process.

Two cases, one decided by the PCIJ and the other by an arbitral tribunal, stand out for their articulation of specific issues relating to reparations. The *Case Concerning the Factory at Chorzów (Chorzów Factory case)* is considered the authoritative statement of the basic principle of state responsibility, and by extension responsibility incurred for breach of any international obligation. The PCIJ stated that:

> [i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. [19]

Additionally, the reiteration by the PCIJ in the same case that 'it is a general principle of international law, and indeed even a general conception of law, that any breach of an engagement involves a responsibility to make reparation',[20] while elaborated in the context of inter-state relations, equally applies to non-state relations. It establishes a customary obligation in respect of which states are required to ensure that injury to

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17 According to Gray, about one third of the cases at the PCIJ involved a claim for damages. However, they deal with issues unrelated to individuals, in particular loss of property. See CD Gray *Judicial remedies in international law* (1990) 77.

18 Recent cases at the ICJ in which reparations are requested include *LaGrand (Germany v U.S.); Fisheries Jurisdiction (Spain v Canada); Armed Activities on the Territory of the Congo (Congo v Uganda; Congo v Rwanda; Congo v Burundi); Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria); Aerial Incident of 10 August 1999 (Pakistan v India); Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro (n 8 above); Aerial Incident of 3 July 1988 (Iran v U.S.); Gab!íkovo-Nagymaros Project (Hungary v Slovakia); and Arrest Warrant of 11 April 2000 (Congo v Belgium)*. (all available at <http://www.icj-cij.org>.

19 *Case Concerning the Factory at Chorzów* (Germany v Poland) (Jurisdiction) 1927 PCIJ (ser. A) No. 9, at 21. This principle has been reaffirmed in a number of other cases. See for instance, *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, 1949 ICJ REP. 174, para. 184.

20 *Case Concerning the Factory at Chorzów* (*Germany v Poland*) (Claim for Indemnity) (1928). PCIJ ser A, No. 17, 4 at 29; D Shelton 'Righting wrongs: reparations in the articles on state responsibility' 96 *American J of Int'l Law* 933-856 836.

individuals attracts a remedy from whoever is responsible.[21] In terms of *Chorzów*, international law would require that victims of international crimes – genocide, war crimes and crimes against humanity – should have the injury suffered appropriately repaired. It is argued that the victims' regime in the ICC, while it excludes state responsibility for these crimes, is part of an array of mechanisms intended to achieve such reparation, especially in cases where national systems do not offer real options.

In its oft-quoted pronouncement, the PCIJ spoke authoritatively with respect to the obligation imported by an international delict:

> The essential principle contained in the actual notion of an illegal act . . . is that reparation must, so far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[22]

As discussed in more detail in chapter six, but also as revealed by the jurisprudence of human rights tribunals in this chapter, this statement speaks to the *appropriateness* of reparative measures, and is thus of relevance to the scope and nature of reparations to be ordered by the ICC with respect to victims of crime.[23] The *Lusitania Arbitral Decision*[24] outlined the criteria applicable when determining the quantum of reparations payable to a victim's next of kin. Part of this decision has been cited with approval in at least one case decided by the Inter-American Court for Human Rights.[25]

A few other cases articulate less significant issues. For instance, the ICJ considered orbiter in the *Barcelona Traction Case*[26] the normative status of the prohibitions against genocide and basic human rights guarantees relating to discrimination and slavery, noting that they imported obligations *erga omnes* owed by

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21 See N Roht-Arriaza, (ed) *Impunity and Human Rights in International Law and Practice* (1995) 17 noting that the idea that violations should be redressed, that reparation should be made to the injured is 'among the most venerable and most central of legal principles'.

22 *Chorzów Factory Case*, Indemnity, 47. See recent ICJ decisions which reiterate this principle *Gabcíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, ICJ Reports (1997), p. 81, para. 152; *Avena and Other Mexican Nationals* (*Mexico v United States of America*), Judgment, ICJ Reports (2004), p. 59, para. 119).

23 D Shelton (n 20 above) 836 notes that *Chorzów* 'remains the cornerstone of international claims for reparations, whether presented by states or other litigants'.

24 *Lusitania Case*, (*Portugal v Germany*) RIAA 1928.

25 *Aloeboetoe et al v Suriname* Inter. Am Ct Hr (Reparations, 1993).

26 Barcelona Traction, Light and Power Company Case (*Belgium v Spain*) ICJ Reports 1970, para 33-4. See also Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide , Advisory Opinion ICJ Reports 1951, p 23.

a state to the international community as a whole. In a recent case *Democratic Republic of Congo v Uganda & others*[27] brought by the DRC on its own behalf, the ICJ found Uganda internationally responsible – and thus liable to pay reparations – for, amongst others: violations of international human rights and humanitarian law arising from the commission of acts of violence against Congolese nationals and destroying their property; failing to prevent such acts by persons under its control; and failure to distinguish between civilian and military objectives during armed conflict.[28] While this decision is important insofar as it reiterates the inviolability of certain human rights and humanitarian law norms, and state responsibility – even for occupying powers – it seems to shed no light on the issues at hand.[29]

The more recent case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Hetzegovina v Serbia and Montenegro*),[30] related to the alleged failure by Serbia to abide by its obligations under the Genocide Convention. Although more relevant in terms of the breaches of international law alleged, the case raises similar issues to the *DRC v Uganda* case above: the nature of state obligations and consequences of a breach of such obligations. Having concluded that it had jurisdiction to adjudicate on the dispute between Bosnia and Serbia based on article IX of the Genocide Convention (relating to the interpretation, application or fulfilment of the convention),[31] the ICJ stated that the obligations imposed on states parties by article IX were not limited to legislating, and to prosecuting or extraditing but include an obligation to prevent[32] and not to commit genocide and the other related acts enumerated in article III of the Convention. However, as opposed to an individual, the obligation not to commit genocide imposed on states parties is not criminal in nature.[33]

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27 *Case Armed Activities on the Territory of the Congo* (*Congo v Uganda*) ICJ Decision (Merits) 2005. Available at <http://www.icj-cij.org/docket/files/116/10455.pdf> (accessed on 10 May 2007).

28 Ibid, at 205-212, paras 200-215.

29 The Court cited with approval prior cases on reparations *Factory at Chorzów, Jurisdiction*, 1927, P.C.I.J.,Series A, No. 9, p. 21; *Gabcíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, ICJ Reports 1997, para. 152; and *Avena and Other Mexican Nationals* (*Mexico v United States of America*), Judgment, ICJ. Reports 2004, para. 119)

30 *Bosnia and Hetzegovina v Serbia and Montenegro*, (n 12 above).

31 Ibid, para 140, 147.

32 Ibid, para 160-65.

33 Ibid, para 167-79.

The Court found Serbia in breach of its international obligations by failing to prevent the Srebrenica genocide[34] and by failing to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the ICTY – thus failing to fully co-operate with that Tribunal.[35] In terms of remedies, the Court held that since the case was not one in which either an order for payment of compensation, or, (in respect of the violation of the obligation to prevent), a direction to provide assurances and guarantees of non-repetition, would be appropriate, the Court's declaration of breach in each case (and a call to cooperate in respect of Mladic) constituted appropriate satisfaction.[36] Like the other cases discussed in this section, this case has limited relevance for victim-specific issues, although it retains some interpretative value in the context of Article 21 of the Rome Statute insofar as the elaboration of substantive provisions on the crime of genocide is concerned.

As the discussions in the following sections demonstrate, human rights cases offer more possibilities as a source of relevant jurisprudence.

3.3 Reliance on International Human Rights Law by the ICC

Bassiouni has identified, as one of the problems one confronts when engaging with issues related to victims, the numerous disciplines and by extension various branches of international law that deal with the issue – and thus the disparate goals, approaches, and methodologies deployed by these disciplines. Addressing the question of the effectiveness in redressing victim's rights, Bassiouni remarks that:

> [a] significant gap exists between international human rights law [IHRL] and international criminal law [ICL]. The parallel nature of these two bodies of law limits the reach of [ICL] to punish fundamental human rights violations ... If the concept of victims' rights continues to develop in a compartmentalised fashion with gaps and overlaps, victims' rights will never be effectively addressed.[37]

In view of this, the key question for our purposes is whether the ICC, as an international criminal court, can rely on the jurisprudence of international human rights tribunals. It is argued that irrespective of the supposed 'parallel nature of IHRL

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34 *Bosnia and Hetzegovina v Serbia and Montenegro*, (n 12 above) para 438.

35 Ibid, paras 439-50.

36 Ibid, paras 167-79; para 463-65, 67.

37 MC Bassiouni 'International recognition of victims' rights' *Human Rights LR*6:2 (2006) 203 - 279 204-205. See also MC Bassiouni 'The proscribing function of international criminal law in the protection of human rights' (1982) 9 *Yale J of World Public Order* 193.

and ICL' there is no impediment at the conceptual level (there may be at a practical level) to the ICC's reliance on principles of IHRL in elaborating the ICC's victims' rights regime. Mendez,[38] in treating the relationship between IHRL, IHL and ICL has rightly noted that ICL is a convergence of both human rights and humanitarian law and that they are not entirely alien bodies of law. Despite the conceptual divergence – ICL is based on individual responsibility while IHRL is based on the state responsibility framework – the fact that there are common underlying principles allows one to draw from both bodies of law in developing the theory and principles.

Article 21 of the Rome Statute, the sources of law clause, contemplates such interplay. Having established that the Rome Statute itself, Elements of Crimes and its Rules of Procedure and Evidence (ICC RPE) are the primary sources of law for the Court,[39] it provides that the Court may apply in the second place, and where appropriate, 'applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.[40] These 'principles and rules of international law' include those derived from IHRL. Additionally, the Statute notes that the interpretation and application of the listed sources of law must be 'consistent with internationally recognized human rights'.[41] As such, IHRL is not only envisaged as a source of principles and rules that may be applied by the Court – for our purposes, those relating to the rights of crime victims – but it also constitutes the framework of principles within which the interpretation and application of the entire gamut of ICC law should take place. In chapter one, it was argued that other than the objects of the Rome Statute and other specific concepts entailed in the Statute which imply a restorative justice approach, Article 21 provides a further possibility for the Court to import restorative justice principles into the Court's jurisprudence through its reference to human rights. The following sections consider the jurisprudence of various human rights bodies relating to victims of serious violations.

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38 J Mendez, 'International Human Rights, International Humanitarian Law and International Criminal Law and Procedure: New Relationships in D Shelton (ed) *International Crimes, Peace and Human Rights: The role of the International Criminal Court* (2000) 66.

39 Art 21(a) Rome Statute.

40 Art 21(b) Rome Statute.

41 Art 21(3) Rome Statute.

3.4 Victims and Human Rights Oversight Bodies

The main 'exception' to the law of state responsibility is international human rights law, in the sense that it is the first area of international law where individuals may bring actions against states in international tribunals.[42] While victims, in particular crime victims, 'are missing' in human rights treaties, international human rights oversight bodies have elaborated a substantial jurisprudence relevant to victims.[43] Victims-related comments made by these tribunals relate in large part to their interpretation of the right to access to justice or the right to be heard and the right to an effective remedy. This case law also relates to other key rights (such as the right to life and personal integrity), the violation of which is considered serious and may in itself amount to an international crime (such as torture), or relate to elements constitutive of ICC crimes. The discussion that follows focuses on these two broad 'categories', but also on any other references to victims by these tribunals that may be relevant to the theory and content of victims' rights.

3.4.1 The Human Rights Committee (HRC)

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[44] and the International Covenant on Civil and Political Rights (ICCPR)[45] provide for the right of victims of torture and other human rights violations

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42 Shelton (n 4 above) 2. However, there have been developments in other areas of international law that do not concern this study. Recent developments have granted to none state actors greater rights of standing. See for instance the Convention on Settlement of Investment Settlement Disputes between States and Nationals of Other States, UNTS 159; the Seabed Dispute Chamber of the Sea Tribunal (UNCLOS, Arts 186-7), 21 ILM 1261; the North American Agreement on Environmental Cooperation (1993) 32 ILM 1480; and the Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1990) 30 ILM 1 all of which allow non state actors to bring complaints against states in certain cases.

43 For a brief but useful overview of some case law of the major human rights bodies, see T Meron *Human Rights and Humanitarian Norms as Customary Law* (1989) 136-154; M O'Flaherty *Human Rights and the United Nations: Practice before the treaty bodies* (1996); D McGoldrick *The Human Rights Committee* (1991).

44 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *reprinted in* 23 ILM 1027 (1984).

45 International Covenant on Civil and Political Rights 1966, 999 UNTS 171, 6 ILM 368. On the ICCPR and Human Rights Committee, see generally MJ Bossuyt *Guide to the travaux préparatoires of the International Covenant on Civil and Political Rights* (1987).

to an effective remedy,[46] which may be judicial or non-judicial.[47] Articles 1 and 2(3) of the ICCPR are relevant to the rights of victims of crime. Article 1, which is similar to Article 1 of CAT, provides for the general obligations of the state to give effect to the treaty. Article 2(3) ICCPR is specific to the right to an effective remedy. Article 2(3) ICCPR provides that:

> [e]ach state party to the present covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming a such remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; to ensure that the competent authorities shall enforce such remedies when granted.

While Article 2(3) ICCPR does not specify the applicable remedies,[48] the Human Rights Committee (HRC) has consistently interpreted this provision to include a remedy of prosecution for victims of serious violations,[49] compensation in appropriate cases[50] and guarantees of non repetition.[51] In particular, the HRC has stated that this provision requires states to conduct an effective prosecution to remedy the harm caused to victims of serious violations – those relating to the right to life and personal integrity. In numerous cases involving arbitrary detentions, forced disappearances, torture, and extrajudicial executions – all of which affect in one way or the other the right to life and personal integrity of the individual – the HRC has held that an effective remedy due to victims must include a criminal investigation that brings to justice those responsible.[52] In these cases, monetary damages or disciplinary sanctions have been held not to be an appropriate remedy.[53]

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46 For a brief overview of the HRC's jurisprudence on this question, see R Aldana-Pindell 'In vindication of justiciable victims' right to truth and justice for state-sponsored crimes' rights in the criminal process to curtail impunity for state-sponsored crimes' 35 (2002) *Vanderbilt J. Transnat'l L.* 1399 at 1416-1417; See also M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 58.

47 Nowak,58; *Chonwe v Zambia* (HRC Communication 821/98) para 7.

48 See Schachter 'The obligation to implement the covenant in domestic law' in L Henkin (ed) *The bill of rights: the covenant on civil and political rights* (1981) 311 325.

49 The HRC has granted the remedy of prosecutions to direct victims of right to life and personal integrity violations-torture, inhuman and degrading treatment as well as disappearance and family members Raquel Aldana-Pindell 'An emerging universality of justiciable victims' rights in the criminal process to curtail impunity for state-sponsored crimes' *Human Rights Q.* 1416 1417.

50 See for instance *Vicente v Colombia*, Communication No. 612/1995, P 10 (1997).

51 See for instance *Magana v Zaire* (Communication 90/1981). The HRC also made orders on *restitution in integrum* requiring that the offending state return the complainant's property.

52 *Chonwe v Zambia*, (Communication No. 821/1998) para 7 (2000); *Vicente et al. v Colombia*, (Communication No. 612/1995) para 10 (1997) relating to arbitrary detention, torture, and

3.5 Regional Human Rights Bodies

3.5.1 The Inter-American Court

The Inter-American human rights system, founded on the American Declaration of Rights and Duties of Man (American Declaration)[54] and the American Convention on Human Rights (American Convention),[55] has perhaps, of the three regional systems, the most advanced jurisprudence on victims, in particular victims of gross human rights violations. Although the two instruments like other human rights treaties make no specific mention of victims, the two oversight bodies in that system – the American Commission on Human Rights (Inter-American Commission) and the Inter-American Court on Human Rights (Inter-American Court)[56] have elucidated a sizeable case law on a range of issues of relevance to victims of human rights.[57] The jurisprudence of the Inter-American Court is commendable because although the Convention was adopted at a time when concerns relating to victims were hardly an issue that captured the attention of commentators let alone that of Courts, the Convention has been interpreted to accommodate developing norms on victims.

The relevant case law for our purposes relates to two broad issues – the right to an effective remedy for human rights violations as well as the right to access justice on the one hand and the right to life as well as rights relating to personal integrity of the

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forced disappearance; *Atachahua v Peru*, (Communication No. 540/1993) para 10 (1996); *Bautista v Colombia*, (Communication No. 563/1993) P 10 (1995); *Rodríguez v Uruguay,* Communication No. 322/1988, P 14 (1994); *Tshiongo v Zaire*, (Communication No. 366/1989) para 7 (1993).

53 See *Bautista v Colombia*, (Communication No. 563/1993), P 8.2 (1995) "[P]urely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies … in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life."); *Vicente v Colombia,* Communication No. 612/1995, P 8.2 (1997); *Sarma v Sri Lanka* (2003) Aldana-Pindell, (n 46 above) 1416-1417.

54 O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

55 American Convention on Human Rights, 9 I.L.M. 673 (1970); 1144 U.N.T.S. 123

56 Both established under article 33 of the American Convention.

57 On the practice of the Inter-American Court of Human Rights see generally Jo M Pasqualucci *The Practice and procedure of the Inter-American Court of Human Rights* (2003); T Buergenthal & D Shelton *Protecting human rights in the Americas: case and materials* 4th Ed (1995); D Harris & S Livingstone *The Inter American system of human rights* (1996); CM Quiroga *The battle for human rights: gross, systematic violations and the Inter-American System* (1992) 113-184.

individual. On the other.[58] A survey of this jurisprudence discloses several key entitlements of victims: 1) the state duty to investigate and prosecute crimes that violate an individual's right to life and personal integrity and the affirmation of a victim's right to an effective prosecution;[59] 2) victims' right to participate in proceedings; 3) victims' right of standing to monitor the state's actions and to advance their interests; 4) the right to truth (related to duty to investigate); and 5) reparations.

3.5.1.1 Duty to Investigate and the Right to Truth

To start with, the Inter-American Court has consistently held that the state has a duty to investigate alleged violations and to punish those responsible. This duty is closely linked to the rights of victims of serious violations to a prosecution, as well as the right to access criminal proceedings. As articulate in the leading case of *Velásquez Rodriquez v Honduras*,[60] this duty to investigate 'constitute[s] part of the reparation of the consequences of the violations of rights and freedoms'. The duty to investigate exists because relatives of direct victims have the right to know all the facts.[61] In the Court's view, as expressed in *Bámaca Velásquez v Guatemala*[62] and other cases, there is a direct correlation between the state denying human rights victims access to effective justice or to procedural fairness in criminal trials and their right to learn the truth, which includes obtaining knowledge of the circumstances of the crime and the identification of those responsible. The Court noted in *Bámaca* that the 'right to truth is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations.[63]

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58 For a brief discussion, see Aldana-Pindell (n 46 above) 1399; and more generally Jo M Pasqualucci, Ibid.

59 For a detailed discussion of victims' right to prosecution see Raquel Aldana-Pindell 'An emerging universality of justiciable victims' rights in the criminal process to curtail impunity for state-sponsored crimes' *Human Rights Q*.

60 *Velásquez Rodríguez v Honduras* (Compensatory Damages, 1989) para 33.

61 *Las Palmeras v Colombia* (Merits), Inter-Am. Ct HR (2001) Ser. C No 90 para 69.

62 Bámaca Velásquez, Case No. 70, Inter-Am. C.H.R., ser. C, para 201. See also *Castillo Páez* Case No. 43, Inter-Am. C.H.R., OEA/ser. C, para 85; *Barrios Altos* (Chumbipuma Aguirre et al.) Case No. 75, Inter-Am. C.H.R., OEA/ser. C, para 48.

63 *Bámaca Velásquez*, para 201.

The Court has reiterated that the state is equally under an obligation, as part of this right of victims, to publish the results of the investigation.[64] Publication of results contributes to the rehabilitation of the victims' reputations,[65] hence of their 'dignity in the public mind … and in some measure make it possible to make amends for the damage done.'[66]

3.5.1.2 Right to an Effective Prosecution

From the Inter-American Court's case law, the right to truth is linked to the victim's right to an effective prosecution. The provisions of the American Convention relevant to this right and other aspects of victims' rights relate to the general obligation of the state to give effect to the rights protected in the Convention,[67] the right to be heard[68] and the right to an effective recourse for those who allege a violation of their rights.[69] Read together, these provisions have been consistently interpreted as enjoining states to provide victims of violations of the right to life and personal integrity an effective prosecution as a remedy.[70]

In its first interpretation of Article 63(1) of the American Convention, the Court stated in *Velásquez Rodriquez v Honduras* that:

> [t]he state has legal duty to take reasonable steps to prevent human rights violations and to use means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose appropriate punishment and to ensure the victim adequate compensation.[71]

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64 *Barrios Altos Case* (Merits, 2000) para 5; *Bámaca Velásquez* , para 8.

65 Pasqualucci, (n 57 above) 243.

66 See Chilean Supreme Decree No. 365 (25 April 1990) Establishing the National Commission on Truth and Reconciliation cited in Pasqualucci (n 57 above) 243.

67 Art 1 American Convention.

68 Art 8 American Convention.

69 Article 25 provides in full: 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent Court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted.

70 For a general discussion, see Aldana-Pindell, (n 46 above) 1417.

71 *Velásquez Rodríguez* IACtHR Series C 4 (Merits, 1988) para 174.

More specifically in the case of *Paniagua Morales v Guatemala,*[72] the Inter-American Court has noted that the right to be heard enacted under Article 8 of the Convention contemplates victims' rights to have the crime investigated and to have those responsible prosecuted and punished when appropriate. The obligation to prosecute and punish perpetrators of serious human rights violations has been reiterated in numerous other cases.[73] National laws, in particular amnesty laws[74] that shield perpetrators from prosecution have been condemned on the grounds that they deny victims the right to know the truth and eliminate the possibility of prosecutions of those responsible.[75]

The Court's jurisprudence on this issue not only reinforces the stand represented by the ICC that certain serious human rights violations – those that amount to international crimes – must attract criminal sanction, but also proffers pointers on how national amnesties, though not specifically dealt with by the Rome Statute, should be dealt with.[76]

3.5.1.3 Right to Access and Participation

The Inter-American Court has stated that Article 25 of the American Convention read together with Article 8(1) of the same treaty guarantees victims access to the Courts, and by extension criminal proceedings. Article 25 enacts that:

> [e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent Court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even

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72 *Paniagua Morales v Guatemala*, Case No. 37, Inter-Am. C.H.R., OEA/ser.C, PP 155-56 (1998).

73 *Durand and Ugarte*, Case No. 68, Inter-Am. C.H.R., OEA/ser.C, P 130; *Genie Lacayo v Nicaragua*, Case No. 30, Inter-Am. C.H.R., OEA/ser. C, P 76 (1998), available at http://www.corteidh.or.cr; Blake, Case No. 48, Inter-Am. C.H.R., OEA/ser. C, P 97; *Villagrán Morales*, Case No. 63, Inter-Am. C.H.R., ser. C, P 227; *Bámaca Velásquez v Guatemala* (n 55 above) 182-83. See also Aldana-Pindell, (n 39 above) 1418.

74 On the duty to investigate, right to truth and the amnesty question see generally D Orentlicher 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1990) *100 Yale LJ 2537*; N Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1997) 78 *California LR* 451; Jo M Pasqualucci 'The whole truth and nothing but the truth: truth commissions, impunity and the Inter-American Human Rights System' (1994) 12 *Boston Univ Int'l LJ* 321.

75 Numerous cases address the question of amnesties: *Constitutional Court v Peru* (Merits), 2001) para 123; *Bámaca Velasquez* (n 62 above) 173.

76 See analysis in chapter six of the complementarity regime.

> though such violation may have been committed by persons acting in the course of their official duties.

The Inter-American Court has interpreted this provision to entail a victim's right to access to criminal proceedings. In the case of *Castillo Páez v Peru*, the Court held that victims' access to criminal proceedings is included in the right to access to a 'simple and rapid recourse' to competent tribunals.[77] Such access is to facilitate the trial of perpetrators and for victims to obtain reparations.

Apart from stating *why* victims should have access, the Court has not prescribed or indicated what 'form' such (participation) must take or what is their actual entitlement. On the face of it, it is thus not clear whether the Court endorses a role for victims beyond that of witnesses in respective national criminal justice processes. With respect to obtaining reparations, since the Court has not been prescriptive as to the forum in which this should be obtained, one can conclude that it is not necessarily before a criminal court. To the extent that chapter five of this thesis considers among other things, the form victim participation should take within the criminal process as well as at what stage reparations issues should be considered in view of Article 68(3) of the Rome Statute, the Inter-American Court's jurisprudence is of little utility. However, it can be argued that failure by the Court to prescribe modes of participation and the stage at which reparations should be considered is indicative of the Inter-American Court's deference to national systems, which demonstrate in general 'diverse accommodation of victims' both in terms of their role in the criminal process and how they obtain reparations.[78]

When the derivative right to participate is understood within the context of the Inter-American Court's jurisprudence on the more developed right to truth and of an effective prosecution, it could be argued that victims must have an active role in both civil and criminal processes in which violations are addressed. In what is perhaps the least elaborate element in the Inter-American regime of rights of victims of serious violations, the court appears not to have considered two of the three issues (arising from the tripartite interests in the criminal process) that the ICC will have to deal with: whether such participation advances prosecution of the perpetrators of these serious

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77 *Castillo Páez* (n 62 above) para 106; *Suarez Rosero Case* para 65; *Paniagua Morales et al* (1998) Series C. No 37, para 169.

78 Aldana-Pindell (n 46 above) 1407.

violations; and whether, irrespective of any benefits derivable from there by participating victims, they are detrimentally affected in particular being exposed to danger. Although the Inter-American Court has not mentioned this specifically, participation would not only serve an accountability function. Victims are also afforded an opportunity to advance their own interests.[79] As stated in the discussions on reparations below, victims have the right personally to articulate their personal interests before the Court or do so through a designated legal representative.[80] With respect to the third prong of interests, the Court has not conducted an in-depth analysis of defendants' rights in relation to the duty to prosecute and victims' interests. However by linking in its passing remarks, the right of victims to access the tribunals to Article 8 (1) rights – rights to a hearing and fair trial – the Inter-American Court indicated in *Castillo Páez* that fair trial guarantees must apply when perpetrators of serious violations are tried.[81]

3.5.1.4 Reparations

Of the three regional bodies, the American Court has probably been the most creative in its fashioning of reparations.[82] Of various human rights tribunals, its jurisprudence seems to be the most relevant for our purposes. This case law is significant as it responds to several concerns raised by the ICC reparations regime, including 'types', nature, extent (quantum) of reparations as well as responses to a variety of victims and mass atrocity. As discussed below, the remedies ordered by the Inter-American Court have been in general influenced by a number of factors: the nature of the violation; the number of victims; and the effects of the violation on the victims.

The Court's power to order reparations is provided for under Article 63(1) of the American Convention:

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79 Ibid.

80 Article 23, 2001 Rules of Procedure of the Inter-American Court; Pasqualucci (n 57 above) 183.

81 See *Castillo Páez*, 106.

82 See D Shelton, 'Reparations in the Inter-American System' in D Harris & S Livingstone (eds) *The Inter-American System of Human Rights* (1998) 151-172 153 noting that 'while the Court's jurisprudence reveals less generosity…than might be expected on the basis of the text of article 63(1)'… the Court's judgements represent the most far-reaching remedies afforded in international human rights law'.

> If the Court finds that there has been a violation of a right… [it] shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.[83]

In terms of this provision, and supported by the Inter-American Court's practice, the Court has a broad mandate:[84] to ensure future respect for rights or freedoms that have been violated; to remedy the consequences of the violation; and to order compensation for the harm. The Inter-American Court in its very first case – *Velásquez Rodriquez v Honduras* – noted that this provision is an endorsement of the customary law principle and 'general concept of law' articulated in *Chorzów* that 'every violation of an international obligation that results in harm creates a duty to make adequate reparation'.[85] It can be argued that the Inter-American Court's early acceptance of the centrality of the reparations provision and its own role in the realization of the rights in the Convention has enabled it to set a strong principled foundation, as well as deliver real results to victims. This runs through its reparations jurisprudence.[86]

To begin with, the Inter-American Court's rich case law reflects its recognition that *reparations* is a composite term that encompasses various remedial measures that may be deployed to address the breach of an international obligation (in this case the requirement that states respect and ensure the respect for human rights). In *Castillo Páez*, the Court noted that reparations 'covers…*restitutio in integrum*, indemnisation (compensation), satisfaction, assurances of guarantees that the violations will not be repeated and others…'.[87] However, it should be added that the Court has lacked consistency in this regard,[88] and may be regarded as conservative in its approach,

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83 Art 63(1) American Convention.

84 On the legislative history of art 63 (1) disclosing the state's intention, see Pasqualucci (n 50 above) 233; Shelton (n 75 above) 152.

85 *Velásquez Rodríguez v Honduras* (Compensatory Damages, 1989) para 25.

86 See *Paniagua Morales et al. v Guatemala* (Reparations, 2001) para 78; *Aloeboetoe et al v Suriname* (Reparations, 1993) para 15. See Jo M Pasqualucci (n 57 above2) 233.

87 See *Castillo Páez* (reparations) para 48; *Aloeboetoe* (n 25 above) para 49 where the Court stated with respect to *restitutio in integrum* that it 'is not the only way in which [the effect of an international unlawful act] must be redressed….in certain cases, such reparation may not be possible, sufficient or appropriate'. See also *Blake v Guatemala* (Reparations, 1999) para 114

88 D Shelton (n 75 above) 154.

having generally limited its orders to *restitution in integrum*, compensation, and guarantees of non-repetition.[89] We return to the issue of non-pecuniary damages later.

As a basis for reparations, the Court has maintained as a general rule that it is required to order *restitutio in integrum,* which means that a victim of a violation should be restored, to the extent possible, to the situation preceding the violation. In the *Barrios Altos Case*, the Court held that:

> Reparation for damage caused by a breach of an international obligation requires, whenever possible, full restitution (restitutio in integrum), which consists in establishing the previous situation. If that [is] not possible, the international Court must order that steps be taken to guarantee the rights infringed, redress the consequences of the infringements, and determine payment of indemnification as compensation for damage caused. [90]

More specifically, the Court indicated in *Castillo Páez v Peru* that in an attempt to meet the goals of full restitution, compensation, satisfaction and guarantees of non-repetition may be ordered.[91] Proportionality of reparations so awarded to the nature and seriousness of violations suffered is a key consideration.[92]

Having been confronted with cases where *restitutio in integrum* was not always 'possible, sufficient or appropriate,'[93] the Court has held that such cases must attract pecuniary compensation, in addition to other reparative measures. In this regard, the Court has held consistently that in matters involving violations of the right to life[94] (and personal integrity guarantees in general), reparation must of necessity be in the form of pecuniary compensation, given the nature of the right violated. In these instances, which constitute the most serious violations, the s*tatus quo ante* cannot be re-established. The case of *Aloeboetoe*, in which several tribesmen had been killed by soldiers, and numerous summary executions and 'disappearances' had occurred, illustrates this category of cases.[95]

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89 See Dissenting Opinion by Judge AC Trindade in *El Amparo v Venezuela* (Reparations, 1995) relating to non-pecuniary reparations in which he notes that reparations go beyond restitution and indemnification to include rehabilitation, satisfaction, and guarantees to non repetition.

90 *Barrios Altos (Chumbipuma Aguirre et al v Peru)* (Reparations, 2001) Inter-Am Ct HR, Ser C No 87 para 25. See also *Velásquez Rodríguez* (Compensatory Damages) para 26.

91 *Castillo Páez v Peru* (Reparations, 1998), para 48; Pasqualucci (n 57 above*)* 239.

92 *Castillo Páez* (Reparations) para 51; Pasqualucci 239.

93 *Aloeboetoe et al* (n 25 above) para 49.

94 *Castillo Páez* para 52; *Garrido and Baigorria Case* (Reparations, 1998) para 41.

95 *Aloeboetoe et al* para 46; *Velásquez Rodríguez Case*, (Merits, 1988) Series C No. 4, para. 189; *Godínez Cruz Case*, (1989) Series C No. 5, para.199.

With respect to the applicable law – whether international law or domestic law, as well as the amount and form compensation should take – the Inter-American Court has, rejecting contentions by states on a number of occasions, asserted that these must be determined in terms of international law. In *Castillo Páez*, the Court reiterated its longstanding approach:

> The obligation to make reparation established by international Courts is governed, as has been universally accepted, by international law in all its aspects: scope, nature, modality and determination of beneficiaries, none of which the respondent state may alter by invoking its domestic law.[96]

This position is particularly useful given the often varied, contradictory and inferior levels of protection that exist under domestic law. In the *Velásquez Rodríguez* case, while the law under which Honduras proposed to compute compensation offered the most favourable national regime, it was considered by the Court to fall short of the appropriate international standards.[97] However, the Court seems to have since adopted a flexible stance, in some cases endorsing national law on some aspects, in particular where there are gaps respecting specific issues in the international. This is best illustrated in the *Aloeboetoe* case in which the 'effective law' relating to succession – the tribal law of victims – was applied to establish beneficiaries. Chapter 6 considers whether such flexibility is available to the ICC.

Tied closely to the question of which law applies is the question of who should be awarded reparations after a breach of an obligation is established. The American Convention does not define who is a victim. Article 63(1) provides that 'fair compensation [should] be paid to the injured party'.[98] In the case law, this term has been used synonymously with 'victim' in reference to the person(s) affected by the violation.[99] The victim may be the person who directly suffers the violation and/or the next of kin[100] in case of certain violations such as extrajudicial killings or forced disappearance.[101]

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96 *Castillo Páez* para 49 ; *Velásquez Rodríguez* (Compensatory Damages) paras 27, 30 and 54.

97 *Velásquez Rodríguez* (n 53 above) para 11.

98 Pasqualucci (n 57 above) 235.

99 Ibid.

100 Defined in article 2(15) 2001Rules of Procedure of the Inter-American Court as 'direct ants and ascendants, siblings, spouses, or permanent companions, or those determined by the Court if applicable'.

101 See *Bámaca Velásquez* (Merits) Inter-Am Ct HR, 25 November 2000, Ser. C No 70 para 160; *Garrido and Baigorria* (Reparations, 1998) para 50; *Blake v Guatemala* (Reparations, 1999)

The Court's assertion that the determination of beneficiaries is to be governed by international law has not prevented it from reverting to domestic law – or the effective law governing relationships among a particular group of petitioners.[102] In *Aloeboetoe*, having found that the formal legal system had limited reach among the ethnic Saramaka from whom the petitioners were drawn, the Court applied *Saramakan* tribal law for purposes of determining who the beneficiaries of reparations should be. Among this group, due to the close-knit and matrilineal nature of the tribe, the circle of dependants was much wider, in conformity with polygamous Saramakan society, although Surinamese law did not recognise polygamy. However, the Court has limited the definition of 'injured party' to a victim's next of kin and dependants.[103]

Of importance to the victims' claim to reparations is the question of who may espouse these claims. While in general the American Commission presents such claims to the Inter-American Court where they are not settled amicably, victims have *locus standi* and can independently make representations in reparations proceedings.[104] This is relevant because, as family or dependants, they have a separate claim independent of the deceased or 'disappeared' person, which entitles them to be considered as victims in their own right.[105] With aims that resonate with the ICC's victim participation regime, this right allows the injured party to defend his or her own interests during the reparations proceedings.

With respect to the evidentiary standard of proof, the Inter-American Court has cited with approval decisions of other international tribunals on the question. In *Castillo Páez,*[106] the Court reiterated that proceedings before the Court, as in other international tribunals, are distinguishable from domestic legal proceedings without detriment to relevant principles. The Court singled out procedural flexibility, in particular the evidentiary standard of proof, as one such instance where international

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para 114. See also UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defining 'victim' to include, where appropriate, the immediate family or dependants of the direct victim'.

102 Shelton (n 75 above) 161; *Aloeboetoe* para 44.

103 *Aloeboetoe*, para 83.

104 Article 23 Inter American Court Rules of Procedure.

105 See *Castillo Páez*, paras 58 – 60; *Neira Alegria et al* (Reparations) para 54; *Aloeboetoe*, para 42. See the ECtHR jurisprudence cited approvingly by the IACtHR *Timurtas v Turkey* 33 Eur. H.R. Rep. 6 (2000), which has established factors by which the next of kin may also be considered as victims, cited in *Bámaca Velásquez* (2000) para 163.

106 *Castillo Páez Case* (Reparations), 38.

jurisprudence discloses the freedom with which courts weigh evidence and their avoidance of rigid rules on the amount of evidence required to support a judgment.[107] The Inter-American Court has adopted this standard in its case law.[108] As discussed in detail in chapter six, these standards are of great relevance to the operationalisation of the ICC reparations regime, which does not furnish any detail regarding how various reparations issues should be dealt with.

One main feature of proceedings before the Inter-American Court, as is the case for other human rights tribunals, is that when it comes to reparations (in particular pecuniary reparations), only those victims, usually individuals, who are able to marshal resources to approach the tribunal, can obtain a remedy. Victims who have sustained similar violations but are unable to approach an international adjudicatory body do not benefit from the Court's orders. While the Inter-American Court blazed the trail in the *Aloeboetoe case* by ordering the creation of a fund for the benefit of all members of a tribe from which petitioning victims hailed – that is, beyond the traditional requirements that beneficiaries have to be family members and/or dependants – criticism of the Inter-American Court reparations jurisprudence has been directed partly at its failure to adopt a principled approach and establish general victims' funds for victims in all cases.[109] It is argued that given the nature of violations – mass atrocities that involved hundreds and sometimes thousands of victims – the general victim fund route would have been the most appropriate approach.[110]

Though in a different context, while the states parties to the ICC may have anticipated this criticism by acting in solidarity with victims of international crimes and established the Victims' Trust Fund (VTF), it is argued that the fund may lack the

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107 See Cf. Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), Merits, Judgment, I.C.J. Reports 1986, paras. 29-30 and 59-60; Corfu Channel, Merits, Judgment, I.C.J. Reports 1949.

108 *Castillo Páez Case* (Reparations) paras 38 and 40; *Loayza Tamayo Case,* (Reparations, 1998) Series C No. 42, para. 37 and 38; *Velásquez Rodríguez* (1988) Series C No. 4, para. 127; *Godínez Cruz Case*, (1989) Series C No 5, para. 133; *Fairén Garbi and Solís Corrales Case*, (*Garbi and Corrales v Honduras*, 1989). Series C No. 6, para. 130).

109 Jo Pasqualucci 'The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law' 26 *Inter-American Law LR* 297 331-2 cited in Shelton (n 82 above) 170 who for this reason criticises the Court for its failure to advance international law of reparations.

110 See Pasqualucci (n 57 above) 232; see also the report of the Honduran Human Rights Commissioner *Rights speak for themselves-preliminary report on the disappeared in Honduras* 1980-1993 pointing to the 'unfairness' of only a few victims obtaining reparations at the IACtHR (in the *Velásquez Rodriquez* and *Godinez Cruz* Cases) while there were hundreds of similar cases in Honduras.

flexibility necessary to effectively to address the vast numbers of victims expected to approach the ICC.[111]

For the Inter-American Court, fair compensation for injury as used in Article 63(1) of the Convention includes material and moral damages, but excludes 'punitive damages', which concept does not exist in international law in the Court's view.[112] As noted above, the Court has elaborated a separate duty to investigate, prosecute and to punish those who violate rights. Material (pecuniary) damages, as used in case law covers a range of issues: loss of income, medical expenses, costs incurred in searching for the victim (where the state engages in a cover-up or fails to investigate), and other expenses of a pecuniary character resulting from the violation.[113]

Moral damages, which in the Inter-American Court's view may result from 'the psychological impact' suffered by the victim or survivors due to the violations,[114] or as in the case of *Aloeboetoe*, the assault on the dignity and self worth of victims, family and tribal members, have been ordered as part of the package of reparative measures. To this end, the state has been ordered to pay a sum of money to each eligible survivor (family and dependants), to make a public apology (by the President and Congress), to return bodies for burial as well as undertake other far-reaching measures within the affected communities.[115] In *Aloeboetoe,* where the state was required to institute a range of socio-economic projects such as construction of schools, hospitals, as well to memorialise the victims by way of monuments or street names, represents the most elaborate case of moral damages so far.[116] Apart from these measures to be undertaken by the State, the Inter-American Court has taken the view that a judgment of the Court condemning conduct that violates the Convention is in itself 'a type of reparation and moral satisfaction for victims'.[117] The range of moral damages ordered by the Inter-American Court proffers a veritable list of possible options for the ICC.

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111 See Chapters 5 and 7 of this thesis.

112 *Velásquez Rodríguez* (Reparations) para 39.

113 Pasqualucci, (n 57 above) 255; *Trujillo Oroza v Bolivia* (Reparations, 2002) para 74.

114 *Velásquez Rodríguez,* para 50.

115 *Aloeboetoe*, paras 80-87 moral damages were based on the death of loved ones, denial of information about victims and their inability to obtain and bury their bodies. See also *Velásquez Rodriquez* 39-42.

116 *Aloeboetoe* para 85-7.

117 *Velásquez Rodriquez* (Reparations) para 36.

3.5.2 The European Court of Human Rights (ECHR)

The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)[118] established both a Court[119] and a Commission.[120] Before both institutions were abolished and a new ECHR Court inaugurated in 1998,[121] they had operated alongside each other in complementary fashion.[122] Although as noted by Harris et al the initial purpose of the Convention was not primarily to offer a remedy to specific individual victims of human rights violations, the ECHR and Commission's approach eventually took this trajectory.[123]

Three main provisions in the European Convention[124] – those relating to the right to life,[125] the prohibition against inhuman treatment[126] and the right to an effective remedy,[127] have been relevant to the elaboration of victims' rights that could be applied to the criminal process. The ECHR has taken the view that these three provisions grant victims certain rights in the criminal process.[128] As the ECHR's approach changed from the initial stance of 'abstention' every time national remedies were called into question to one of engagement with the issues, the Court also began to explore the inclusion of the concerns of victims and witnesses in the criminal justice system in its

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118 European Convention for the protection of Human Rights and Fundamental Freedoms 213 U.N.T.S 221 (1953) signed at Rome November 4, 1950; entered into force September 3, 1953.

119 Article 38 and 56 European Convention.

120 Article 19 European Convention.

121 European Convention Protocol 11, 11 May 1994 E.T.S No 155 (1994).

122 See MW Janis, RS Kay & AW Bradley *European Human Rights Law: Text and Materials* (1995) 30-64 discussing the functions of the Commission including acting as protector of the Court's judicial function, mediator and fact finder. See also D Shelton (n 4 above) 189-194; generally AH Robertson and JG Merrills *Human Rights in Europe - A study of the European convention on human rights* 3rd Ed (1993) chapters 6 and 7.

123 D.J Harris, M O'Boyle & C Warbrick at 33 *Law of the European Convention on Human Rights* (1995). Shelton has noted that that it took the old ECHR more than ten years to pronounce itself on remedies. Shelton (n 4 above) 194.

124 European Convention for the Protection on Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1995) (as amended through Nov. 1998).

125 Art 2 European Convention.

126 Article 3 European Convention.

127 Art 13 European Convention.

128 For a brief, but useful discussion of the ECHR's jurisprudence, see Aldana-Pindell, (n 46 above) 1419-1422.

interpretation of Article 6, which had previously been interpreted as protecting defendants' rights exclusively.[129]

Because an entrenched culture of human rights in most of Europe has meant that fewer cases of gross human rights violations occur and that when they do happen, they are dealt with appropriately at the national level, limiting the Court's caseload relating to this category of cases (Turkey and United Kingdom being the main sources); and also because engagement with victims' rights is a relatively recent feature of the European human rights system,[130] the ECHR has not had as much 'material' to work with as the Inter-American Court. Robertson and Merrills have rightly fingered the 'problematic' nature of Article 13 as responsible for the paucity of remedies jurisprudence, observing that 'in view of the obstacles which applicants must surmount, successful claims under this article are never likely to be numerous'.[131]

Although for these reasons, and perhaps because the European Court's mandate with respect to remedies as discussed below is less broad than its Inter-American counterpart, the European case law is much less rich, it *has* elaborated a sizeable body of jurisprudence relating to the rights of victims of serious violations of human rights (crimes). Like the Inter-American Court, the ECHR has attributed the rights discussed below to the direct victim of the violation or to his or her legal representative or next of kin,[132] determined not by family links but the actual closeness of the relationship.[133] Close family members may espouse claims as representatives of the deceased or in their own right.[134]

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129 Article 6 European Convention provides for the right to access to justice and stipulates fair trial guarantees.

130 P Rock *Constructing victims' rights* (2005) has argued that the real concern for victims at the ECHR began in the mid 1990s.

131 AH Robertson & JG Merrills *Human Rights in Europe: A study of the European convention on human rights* 3rd Ed (1993)170.

132 *Gül v Turkey*, 34 European H.R. Report 28 (2000); *Salman v Turkey*, 34 European H.R. Rep. (2000) 17.

133 In *Timurtas v Turkey*, ECHR, (2000) para 95 the ECHR set out criteria next of kin have to meet to bring representative claims: including 'the closeness of the family relationship, the particular circumstances of the relationship with the victim, the degree to which the family was a witness of the events related to the disappearance, the way the family member was involved in attempts to obtain information about the disappearance of the victim and the state's response to the steps taken.' See also *Cakici v Turkey*, ECHR, (1999) para 98.

134 *Ilhan v Turkey* 34 European H.R. Report (2000) 36 53-4.

3.5.2.1 Right to Prosecution

In its elaboration of Article 13,[135] which is similar to Article 25 of the American Convention, the European Court considers that the provision includes the duty to prosecute perpetrators as part of the effective remedy due to victims of violent crime. This accords with the mandate of the ICC and the obligation on states to prosecute perpetrators of genocide, war crimes and crimes against humanity. The ECHR has consistently found a violation of Article 13 in cases in which no criminal investigation was conducted into alleged right to life or personal integrity violations,[136] or where the investigation was ineffective or riddled with major mistakes.[137]

In the first place, the Court has found in these cases a violation of the right to life and/or the prohibition of inhuman treatment. By reading Article 13 together with Article 1, which obliges states 'to secure to everyone within their jurisdiction the rights and freedoms defined [therein]',[138] the Court has ruled that states are required to conduct an effective investigation capable of leading to the identification and punishment of those responsible. As in the case of *McCann v United Kingdom,* relating to the right to life,[139] the ECHR has consistently found a separate violation of the right to an effective remedy where such an investigation does not occur, thus reiterating the

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135 It provides that every person alleging a violation of the European Convention has a right to an effective remedy before a national authority. Together with article 41, which vests the Court with powers to order remedies, they constitute the 'remedies regime' in the European Convention.

136 See for instance *Kaya v Turkey*, 28 Eur. H.R. Rep. 1 (1998) where the Court found double violation of the right to life and effective remedy after the death of the applicant's brother was not subjected to any proper investigation by the Public Prosecutor.

137 See *Cakici v Turkey*, 31 Eur. H.R. Rep. 5 (1999); *Timurtas v Turkey*, 33 Eur. H.R. Rep. 6 (2000); *Kaya v Turkey*, 28 Eur. H.R. Rep. 1 (1998); *Gulec v Turkey*, 28 Eur. H.R. Rep. 121 (1998); *Ergi*, 32 Eur. H.R. Rep. 18; *Ogur v Turkey*, 31 Eur. H.R. Rep. 40 (1999); *Tanrikulu v Turkey*, 30 Eur. H.R. Rep. 950 (1999); *Mahmut Kaya v Turkey*, App. No. 22535/93, 1416 Eur. Ct. H.R. 253 (2000); *Kilic v Turkey*, 33 Eur. H.R. Rep. 58 (2000); *Salman v Turkey*, 34 Eur. H.R. Rep. 17 (date?); and numerous other cases involving extrajudicial executions in Turkey cited by Aldana-Pindell (n 39 above) 1420.

138 The Court has reaffirmed that the duty go give effect to protected rights lies with the state. In *Z and others v United Kingdom* the ECHR recently reiterated that '[i]t is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, the Court exerting its supervisory role subject to the principle of subsidiarity.

139 *McCann v United Kingdom*, 21 Eur. H.R. Rep. 97, 161 (1996). See also *Kaya v Turkey*, 28 Eur. H.R. Rep. 1 (1998).

positive obligation on the state to prosecute serious violations.[140] In *McCann*, the Court found a violation of Article 2 because: the police investigation was not adequately independent as it was conducted by same entity accused of colluding with the murderers; the coroner's inquest did not constitute an effective investigation for want of proper scope; and that the delay of ten years in instituting the investigation did not meet the requirement of an effective investigation. [141]

The duty to conduct an effective investigation has a bearing on victims' rights to participate, which is discussed below.

3.5.2.2 Access and Participation in the Criminal Process

Recent cases have expanded the significance of Article 2 of the European Convention to include victims' rights. This provision, which protects the right to life, has also been interpreted as conferring upon victims certain participatory rights in criminal proceedings.[142] As was the case in *Jordan v United Kingdom,*[143] the Court has taken the view that the entitlement to the right to life requires that a criminal investigation must not only be prompt, independent and effective, but also that it must be accountable, an attribute secured by open possibilities of 'sufficient public scrutiny'. The Court is yet to expound on the possibility that the prohibition against inhuman treatment in Article 3 also incorporates victims' participatory rights in the associated criminal process. It is argued that there is no reason why the reasoning applied to the right to life violation to elaborate participatory rights should not be extended to other serious breaches of the Convention when the opportunity arises.

A victim's right to participate is facilitated by effective rights to obtain information regarding measures taken by the state after notice of violation. In this

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140 The European Court has interpreted Articles 2 (right to life) and 3 (prohibition of torture) of the European Convention, when read in conjunction with the state's general duty under Article 1 of the European Convention, to secure to everyone within their jurisdiction the rights and freedoms defined in . . . [the] Convention as requiring states to carry out an effective official investigation capable of leading to the identification and punishment of those responsible. See in relation to Article 2.

141 *McCann v United Kingdom*, 21 Eur. Ct. H.R. (Ser. B) 97, 140 (1996); para 75-80.

142 *See Jordan v United Kingdom*, App. No. 24746/94, 1020 Eur. Ct. H.R. 300 (2001); *McKerr v United Kingdom*, 34 Eur. H.R. Rep. 20 (2002); *Kelly v United Kingdom*, App. No. 30054/96, 2004 Eur. Ct. H.R. 240 (2001); *Shanaghan v United Kingdom*, App. No. 37715/97, 1814 Eur. Ct. H.R. 400 (2001).

143 *Jordan v United Kingdom*, App. No. 24746/94.

regard, the Court has affirmed the right to be informed in the *Ogur v Turkey*,[144] deciding that Turkey violated Article 2 when it failed to inform victims or close relatives of the state's decision not to prosecute.[145] If for no other purpose, information would allow victims to approach a higher authority. When an investigation is commenced, the Court has taken the view that the right to be informed would require the investigating authorities to allow victims access to the investigation and court documents. In *Gül v Turkey,* the Court found violations of Article 2 against Turkey in a case where this had not happened.[146] In *Ogur v Turkey*, where the decision of the relevant national tribunal was based solely on the record prepared by state prosecutors, and where next of kin had had no opportunity to introduce evidence, the right to access was held to have been breached.[147] In *Jordan*, as in other cases, the European Court considered the inability of the next of kin to obtain copies of witness statements prior to their oral testimony as problematic,[148] for the reason that it prejudiced victims' preparation and ability to participate in questioning.[149]

Perhaps most importantly for our purposes, the Court held in *McKerr v United Kingdom*[150] that the invocation of 'public interest immunity' in the United Kingdom to prevent the posing of certain questions or the disclosure of certain documents that were material to the investigation also hindered an effective investigation. The Court, however, appeared to allow some leeway to the state, noting that the right to access the record was not an automatic one, and that it may happen later in the proceedings if the state can demonstrate that the contents must be kept confidential until later stages of the prosecution to safeguard the efficiency and efficacy of the procedures.[151] While this decision may be wrongly cited by authorities as denying victims access to proceedings

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144 *Ogur v Turkey*, 31 Eur. H.R. Rep. 40, 92.

145 *Ogur v Turkey*, App. No. 21594/93, 92 (1999). In *Jordan*, 1020 Eur. Ct. H.R. 300, the Court criticized the British criminal justice system for not requiring the prosecutor to justify the decision not to prosecute and not subjecting such decision to judicial review.

146 *Gül v Turkey*, 34 Eur. H.R. Rep. 28, 93 (1999); *Ogur*, 31 Eur. H.R. Rep. 40, 92.

147 *Ogur*, 31 Eur. H.R. Rep. 40, 92 (held that since the Administrative Court made its decision solely on the basis of state produced paper on file, the proceedings had been inaccessible to the victim's relatives).

148 *Jordan*, 1020 Eur. Ct. H.R. 300, 133; *McKerr*, 34 Eur. H.R. Rep. 20, 147; *Kelly*, 2004 Eur. Ct. H.R. 240, 116; *Shanaghan*, 1814 Eur. Ct. H.R. 400, ¶ 106.

149 *Jordan*, 1020 Eur. Ct. H.R. 300, ¶ 134; *McKerr*, 34 Eur. H.R. Rep. 20, 148; *Kelly*, 2004 Eur. Ct. H.R 240, 128; *Shanaghan*, 1814 Eur. Ct. H.R. 400, 117.

150 *McKerr*, 34 Eur. H.R. Rep. 20, ¶ 151.

151 *Kelly*, 2004 Eur. Ct. H.R. 240, 115; *McKerr*, 34 Eur. H.R. Rep. 20, 129; *Shanaghan*, 1814 Eur. Ct. H.R. 400, 105; *Jordan*, 1020 Eur. Ct. H.R. 300, 121.

and relevant documents, it is argued that the justification for making it a conditional right is in keeping with the need that may arise from time to time to bar access to sensitive documents and protect defendants' rights. As discussed in chapter five, issues relating to the right to be informed are easily some of the most difficult in the ICC, where the prosecutor is likely to plead confidentiality and the integrity of investigations among other reasons to prevent victim access to the 'dossier'.

3.5.2.3 Reparations

The mandate of the ECHR with respect to remedies is narrower than that of the Inter-American Court. Article 41 of the Convention provides that:

> [i]f the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the convention, and if the internal law of the said party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford *just satisfaction* to the injured party. (Emphasis mine)

The ECHR has taken the view that Article 41 limits its powers to make orders for pecuniary compensation.[152] In making orders for remedial measures, the Court has invoked Article 41 read with Article 13 of the Convention. In spite of initial doubts, Article 13 has been held to enact a free standing right.[153] In *Klass v Federal Republic of Germany*,[154] the ECHR stated that:

> [a]rticle 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order to have both his claim decided and if appropriate, to obtain redress. Thus, Article 13 must be interpreted as guaranteeing an 'effective remedy before a national authority' to everyone who claims that his rights and freedoms under the Convention have been violated.

In *Aydin v Turkey*[155] and other cases, the Court has consistently stated that national remedies provided in compliance with this provision may take one form or another as

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152 Pasqualucci (n 57 above) 234.

153 For a decisive verdict on the Court's twenty-year non committal stand on art 13, see Dissenting Opinion of Justices Matscher and Pinheiro Farina in *Malone v United Kingdom*, 1984 (No 82) 7 EHHR 14, 48 cited in MW Janis et al *European Human Rights Law*: *Text and Materials* 433. For early comments on article 13 ECHR, see Gray 'Remedies for individuals under the European Convention on Human Rights' 6 *Human Rights Review* (1981).

154 *Klass v Federal Republic of Germany* Series A, No 28, 2 Euro. HRR 214 (1978) para 28.

155 *Aydin v Turkey* (57/1996/676/866) 25 (1997) para 103.

long as they meet the effectiveness standard. Accordingly, it has indicated that, as in the case of the ICCPR, these remedies may be either judicial or non-judicial.[156]

The European Court has developed a practice where compensation is almost invariably ordered whenever it finds a violation of the Convention. However, in its view the notion of an effective remedy entails more than compensation of the victim.[157] While *restitutio in integrum* is a central principle in this jurisprudence,[158] on occasion, the Court has ordered non-pecuniary reparations, indicating that a particular piece of legislation is not in keeping with Convention standards. Some commentators however have argued that it lacks the competence to nullify or amend the nonconforming national legislation.[159] Apart from compensation (pecuniary damages), the Court has also made declarations, orders for non-pecuniary damages and costs and expenses.[160]

A number of principles can be teased out of the European Court's jurisprudence that are of relevance to victims of human rights violations in general: a state has a responsibility in international law to give effect to provisions in human rights treaties and to remedy human rights violations; for every violation, there must be *restitutio in integrum*; the state's obligation with respect to violations goes beyond compensating the victim. It includes systemic changes geared towards wholesale reform. Measures taken should, for instance, target offending laws. There is recognition that monetary relief is not the sole remedy and that (Court moved towards non-repetition.[161]

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156 *Aydin v Turkey*, para 103; Robertson & Merrills (n above) 169; *Soering v United Kingdom* 14038/88 [1989] ECHR 14 (1989).

157 A number of recent cases articulate this point. See *Papamichalopoulos and Others v Greece* (1995) 330B Eur.Ct.H.R (ser. A) para 34 (noting that a judgement in which the Court finds a breach imposes on the respondent state a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach) and *Scozzari and Giunta v Italy* (2002) 35 E.H.R.R 12.

158 *Restitutio in integrum* in the jurisprudence of the ECHR.

159 See S Thomsen, 'Restitution' in R Bernhardt (ed) 10 *Encyclopaedia of Public International Law* (1987) 378; Report of Committee of Experts on Human Rights to the European Committee of Ministers (1950) in Council of Europe, *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights* (1975) vol III (I *Travaux Préparatoires*) at 246-7 cited in D Shelton, (n 4 above) at 193.

160 Shelton (n 4 above) 194-195 discussing the early practice of the Court regarding remedies (1972-1998) which she argues was inflexible owing to the Court's conservatism and lack of enthusiasm for article 51 European Convention which provides in part that 'the decision of the Court shall, if necessary, afford just satisfaction to the injured party'. See also R Higgins 'Damages for Violation of One's Human Rights' in NA Sims (ed) *Explorations in Ethics and International Relations* (1981) 45.

161 Robertson & Merrils (n 131 above) 199.

3.5.3 The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (African Commission) is the regional treaty oversight body established under the African Charter on Human and Peoples' Rights[162] with the mandate, among others, of receiving and determining inter-state[163] and individual petitions[164] alleging human rights violations. Unlike the American Convention, European Convention and the ICCPR, the African Charter does not provide specifically for the right to an effective remedy.[165] Commentators attribute the deliberate exclusion of certain key rights in the African Charter to particular circumstances under which the Charter was adopted, including the historical legacy of repressive postcolonial African regimes.[166] Furthermore, its has been argued that the Charter's silence on remedies is a consequence of its 'ambiguity about individual complaints and its pre-occupation with serious or massive violations'.[167]

However, despite the Charter's silence on remedies, the Commission has made reference to victims' general right to an effective remedy in two contexts: through its

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162 African [Banjul] Charter on Human and Peoples' Rights adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982), entered into force 21st October 1986. On the charter generally, see F Ouguegouz, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* 2003); E Kodjo 'The African Charter on Human and Peoples' Rights' 1990 11 *Human Rights LJ* 271; F Viljoen, *Internatioal Human Rights Law in Africa* (2007) 236-259; VOO Nmehielle *The African Human Rights System: Its Laws, Practice, and Institutions* (2001).

163 Article 54 African Charter.

164 The right to file an individual petition alleging human rights violations is not evident in the Charter. The commission interpreted reference to 'other communications' in article 55 of the Charter to include individual complaints. On art 55, see see F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray (eds) The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000 (2002) 61-99.

165 Cf. *Protocol Establishing* an *African Court* on Human and Peoples' Rights, adopted 9 June 1998, entered into force on January 1, 2004. Art 27(1) provides that 'if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation'.

166 See CA Odinkalu 'The role of case and complaints procedures in the reform of the African regional human rights system' 2 *African Human Rights LJ* 225-246; F Viljoen (n 162 above); M Hansungule 'The African Charter on Human and Peoples' Rights' (2000) 8 *African YB of Int'l L* 265; C Heyns 'Civil and political rights in the African Charter' in M Evans & R Murray (n 5 above), alluding to substantive inadequacies of the Charter in this regard.

167 F Viljoen (n 162 above) 355.

admissibility jurisprudence[168] and, as this author has argued elsewhere, the interpretation of several provisions relating to substantive rights.[169]

Until recently, the Commission's exercise of its interpretative function has been marked by tentativeness and restraint, with great deference shown to states. As a result, even its jurisprudence on the 'derivative' right to an effective remedy is but skeletal and ill-developed.[170] While the Commission has emphasised that the African Charter, like other human rights treaties creates binding obligations for states, including the requirement that human rights violations must be remedied,[171] the Commission refrained in its earliest cases from indicating any specific remedies even when a breach of the Charter was established.[172] Although the Commission's 'remedies jurisprudence' has improved – tending towards greater clarity –, it still reveals an unprincipled and uncoordinated approach.[173] Furthermore, a survey of its jurisprudence does not disclose any cases interpreting provisions analogous to article 2(3) of the ICCPR, articles 1, 8 and 25 of the American Convention and articles 1 and 13 of the European Convention in a manner that creates or recognises victims' rights in the criminal process.[174] For purposes of this thesis therefore, the jurisprudence of the African Commission is limited only to reiterating the general state obligation

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168 On the African Commission's practice regarding the admissibility procedure generally, F Viljoen (n 164 above) 69-99; NJ Udombana 'So far, so fair: The local remedies rule in the jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 *American J of Int'l L* 1.

169 GM Musila 'The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights' (2006) *African Human Rights LJ* vol 6 no 2 442-464 444.

170 See GM Musila, above 442; F Viljoen, (n 162 above) 353-356; D Shelton *Remedies* 219-226; Rachel Murray 'Decisions of the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights' (1998) 46 *International & Comparative Law Q*. 412.

171 On the interpretation of article 1 of the African Charter (general provision on State obligations), see *Commission Nationale v Chad* (communication no. 74/92 (1995)); *Social and Economic Rights Action Centre (SERAC) and The Centre for Economic and Social Rights (CESR)* v. *Nigeria* (2001) Communication No. 155/96.

172 See F Viljoen (n 162 above) 355 citing a number of cases. See for instance, *Amnesty International v Zambia* (Comm. No. 212/98 (1999) para 39 and 40 where the Commission found violation of various provisions but made no order regarding remedies.

173 GM Musila (n 169 above) 461; F Viljoen (n 162 above) 366.

174 Article 1 of the African Charter codifies he general obligation of the state to give effect to rights, entailing, as per the *SERAC Case* four duties-respects, protect, promote and fulfil. Article 7 enacts that every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.

respecting human rights violations, including the obligation to ensure that victims obtain an effective remedy.

3.5.4 Relevance of Human Rights Case Law

IHRL, as can be discerned from various sources including the jurisprudence of international human rights tribunals is central to the elaboration of victims' rights to participation and reparations. In the discussions above, it emerged that in terms of Article 21 of the Rome Statute, the ICC may apply 'principles and rules of international law' including those derived from IHRL as secondary sources of law (the Rome Statute itself, Elements of Crimes and its Rules being the primary source). In spite of conceptual divergence between ICL (based on individual responsibility) and IHRL (based on the state responsibility framework), both bodies are underlain by common principles. More importantly, the requirement in Article 21(3) of the Rome Statute that interpretation and application of the listed sources of law must be 'consistent with internationally recognized human rights' means that IHRL, as interpreted by various tribunals, serves as the framework of principles within which the interpretation and application of the entire gamut of ICC law should take place.

Apart from other conclusions reached in the discussions in preceding sections, the case law relating to key entitlements in relevant human rights instruments as elaborated by the Inter-American Court and the European Court of Human Rights is relevant to the ICC victims' regime in several other specific ways. The jurisprudence affirms the duty of states to prosecute perpetrators of violent crime as part of an effective remedy due to victims. This duty finds expression in the mandate of the ICC and the obligation the Rome Statute requiring states to prosecute perpetrators of genocide, war crimes and crimes against humanity.

The case law of these human rights bodies also asserts the right of individuals whose basic entitlements to life and to bodily integrity are violated to participate in related criminal proceedings to articulate their concerns and to learn the truth about criminality and if possible, obtain reparations. Although these tribunals have articulated with clarity the right to participate and why victims should have such access to proceedings, they don't seem to prescribe what 'form' or 'modes' such participation must take or what is their actual entitlement. On this account, the

jurisprudence seems less helpful in the elaboration of the broad and multifaceted right to participate under Article 68(3) Rome Statute and the ICC RPE outlined in detail in chapter five. In the discussion of the right to participation as elaborated by the Inter-American Court, it was noted that the lack of detail on modes of participation and the stage at which reparations should be determined is indicative of deference accorded to national systems.

The jurisprudence of the two human rights tribunals relating to reparations is richest and most relevant for the ICC. Apart from repeatedly affirming the right to reparations for victims of violent crime, this case law, in particular that elaborated by the Inter-American Court proffers guidance on a range of issues including different modes of reparations, quantum of reparations and ways of structuring reparations schemes in case of mass victimisation. Chapter 6 addresses these questions in some detail within the context of the ICC.

CHAPTER FOUR

VICTIMS IN SELECT DOMESTIC CRIMINAL JUSTICE SYSTEMS

> Enhanced awareness of victim's rights and the passage of victims' bills of rights in many countries in the last two decades may give the impression that victims of crime are much better off now than they have ever been. It may suggest that the criminal justice system has finally moved from its singular emphasis on the offender and its longstanding obsession with punishment to victim centred or victim-oriented policies and objectives. Alas! The reality is far different from the popular perception and the political rhetoric.[1]

4.1 ICC Sources of Law and National Criminal Law

Chapter one introduced the idea that the ICC presents an important opportunity for the incorporation of a nuanced paradigm of restorative justice in the international criminal process. Chapters 2 and 3 reviewed the jurisprudence of pre-ICC international criminal tribunals and other international tribunals (ICJ and human rights tribunals). As its main objective, this chapter sets out to inquire into the role and treatment of victims in domestic criminal law. It does this by exploring the rights of victims in select jurisdictions with a view to suggesting ways of operationalising the new ICC victims' regime. This chapter suggests that various domestic systems have long provided for victims' right to participation and reparations and suggests that irrespective of the seemingly inferior station conferred on domestic law and practice in the hierarchy of the ICC's sources of law, the Court will inevitably refer to the jurisprudence of certain domestic criminal justice systems.

The rationale and normative basis for relying on the suggested domestic experiences to develop the ICC victims' regime must first be established. To start with, there are at least two linkages between the ICC and domestic criminal systems around which elements in the Rome Statute and international criminal law generally are based, justified and given effect, besides other general principles of international law that may be of relevance. The first stems from the complementarity facility of the Rome Statute that establishes the national sphere as the primary site for the implementation of the Statute.[2] The second relates to national criminal law and practice as sources of law and

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1 E Fattah 'Gearing justice action to victim satisfaction: Contrasting two justice philosophies: retribution and redress' in law' in H Kaptein and M Kaptein (eds) *Crime, Victims and Justice: Essays on Principles and Practice* (2004) 16-30 16.

2 Arts 1 and 17, prmbl Rome Statute.

points of reference in the interpretation and elaboration of the provisions of the Statute. While complementarity is of relevance, this chapter focuses on it only to a limited extent – in considering how the dynamics of the complementary relationship between the ICC and national systems may influence the implementation of the ICC victims' regime. We return to this later.

As opposed to related branches of international law such as international human rights law (IHRL), international criminal law (ICL) has in its development relied, and continues to rely, quite substantially on national criminal law.[3] For the reasons suggested – novelty and paucity of relevant jurisprudence from similar tribunals – the elaboration of the ICC's victims' rights regime requires such an approach. In its codification of the sources of law, having established that the Rome Statute itself, Elements of Crimes and its Rules of Procedure and Evidence (ICC RPE) are the primary sources of law for the Court, followed by, in appropriate cases, 'applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict',[4] Article 21, captioned 'applicable law', provides at 21(c) that:

> "[f]ailing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."

In view of this, the Court will only refer to national law and practice if it fails to obtain relevant guidance from the other sources outlined in this scheme. It seems evident that the Rome Statute assigns an auxiliary station to domestic law and practice. Reliance on domestic law is subject to only one condition – such domestic jurisprudence should be in keeping with 'international law and internationally recognised norms and standards'. For the purposes of this thesis, these standards include fundamental guarantees for accused persons, the customary principle to provide redress for serious human rights violations and the inviolability of the judicial process. The sections that follow in this chapter proceed to examine relevant laws and practices relating to the place of victims in select domestic criminal justice systems.

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3 LS Sunga, *The Emerging System of International Criminal Law Developments in Codification and Implementation* (1997) 4-5; See A Cassese *International criminal Law* (2003).

4 Art 21 (a) and (b) Rome Statute.

4.2 The Victim Rights Movement and National Experiences

Unlike in ICL, victims of crime have had rights of participation and to reparations in a number of jurisdictions, both of the civil and common law tradition, for a considerably long time. While the concerns of victims precede it, gains in victims' rights owe much to the victim rights movement (VRM) both in the United States and Europe. The movement began in the mid 1950s when the work of activists and civil society drew attention of reformists to the plight of victims within criminal justice systems. Victims were hitherto subject to deplorable treatment by the system.[5] Unlike the VRM in Europe which for the earlier years focused on victim support and advocacy, that in the United States pursued a rights-based approach in championing the concerns of victims of crime. The US movement sought to change through legislation, both at state and federal level, the rules relating to the place of the victim in the criminal process. These concerns were in its advocacy rhetoric articulated as 'victims' rights'.[6] In both cases however, the work of the movement resulted in reforms of the criminal justice systems to enhance focus on victims of crime.

The discussion in this chapter reveals two broad approaches to victims' issues in national criminal justice systems. For many of these, the state's interests are fore-grounded and those of the accused closely guarded, while victims remain largely on the fringes of the process. For this reason, victims have been described variously as the 'missing party' and 'the lost party'.[7] A fewer countries afford victims rights of participation and reparation. At both levels, the role of victims has been for the most part limited to that of witnesses, in which capacity they serve to advance the prosecution's interests of law enforcement.

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5 For more on the global 'victim rights movement', see H Strang, *Repair or Revenge* (2002) 26-34

6 See F Carrington & G Nicholson, 'The Victim's Rights Movement: An Idea Whose Time Has Come' (1984) 11 *Pepperdine LR* 1. In 1965, California became the first state to pass legislation providing compensation to crime victims. Many states followed suit. In this work, only federal initiatives are considered.

7 CS Goddu 'Victim's "rights" or fair trial wronged' 41 *Buffalo LR* 245-272 at 248; M Hekkila *International Criminal Tribunals and Victims of Crime: A study of the Statues of Victims before International Criminal Tribunals and the Factors Affecting this Status* (2004) 57-136 at 52 citing MP de Liege 'Concrete achievements towards the implementation of fundamental justice for victims in France' in MC Bassiouni *International protection of victims* (1988) noting that even in France, which is considered a very progressive system this is still the case.

4.3 United States of America: Law Reforms Relating to Victim Participation and Restitution

Within the United States, VRM proposals to redress victim wrongs took two distinct trajectories. On the one hand, there were proposals calling for compensation, medical aid and restitution; and on the other, those aimed at securing greater and more effective participation for the victim in the criminal process.[8] The law-making achievements of the US movement are reflected in a series of revolutionary legislative initiatives at the federal level: the Federal Victims and Witnesses Protection Act (1982),[9] the Victims of Crime Act (1984), and the stalled proposal to add to the 6th Amendment with a view to constitutionally entrench participatory rights of victims at all stages of the criminal process.[10]

Proposals regarding participation of victims included, for instance, suggestions to provide limited standing and due process rights to the victim;[11] legal assistance;[12] cutting down on postponements to expedite trials; granting the victim the right to review a prosecutor's decision not to prosecute;[13] and requiring the state to notify the victim of the status of the case as it progresses through the judicial system. Arguments were also made in favour of allowing the victim to express an opinion about negotiated pleas and right to make statements before and during trial as well as at sentencing.[14] Other proposals have contemplated victim-initiated criminal actions as well as representation by counsel.[15] These are considered in depth below when assessing the participatory rights under various federal initiatives.

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8 RP Peerenboom at 68 citing R Aynes, 'Constitutional Considerations: Government Responsibility and the Right Not to be a Victim', 11 *Pepperdine LR* 63-4 (1984); J Gittler, 'Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems' 11 *Pepperdine LR* 117, (1984) 121-125 (summarizing recommendations and initiatives for better treatment of victims as witnesses and expanded role of victims in criminal process).

9 Pub. L. No 97-291, 96 Stat. 1248 (codified in scattered sections of 18 USC and Fed. R. Crim. P. 32 (c) (2).

10 See generally D Chappel, 'The implementation of victims' rights in North America' in MC Bassiouni (ed) *International Protection of Victims 7 Nouvelles Etudes Pénales* (1988) 337-384;

11 P Hudson, 36-37; Aynes (n 8 above), 72-75.

12 Hudson, 59.

13 Hudson, 58; Aynes (n 8 above), 97-107 (also advocating allowing the victim greater say in determining what crimes are investigated).

14 Gittler (n 8 above) 124.

15 Ibid, 150-76; MA Young 'A Constitutional Amendment for Victims of Crime: The Victim's Perspective' in (1988) 34 *Wayne LR* 51 56-7; A Goldstein 'Defining the Role of the Victim in Criminal Prosecution' (1982) 52 *Mississippi LJ* 511, 558-60.

Federal reforms in the United States began with the recommendations of the President's Task Force on Victims of Crime, which was commissioned by President Reagan in 1982 to examine problems confronted by victims when facing the justice system and to suggest improvements in their treatment.[16] In the same year Congress passed the Federal Victim and Witness Protection Act which provided for among others, restitution, use of victim impact statements at the sentencing stage in federal cases, and victim and witness protection.[17]

As the federal government's first attempt to respond to victims' concerns following criticism that the federal criminal justice system was 'offender-oriented,'[18] and thus unresponsive and insensitive to the needs of victims and witnesses,[19] the Federal Victims and Witness Protection Act (FVWPA)'s stated objective was 'to improve the treatment of victims and witnesses in the federal criminal system'.[20] It provided for among others, restitution, use of victim impact statements at sentencing in federal cases, and victim and witness protection.[21] For its part, the Victims of Crime Act (VCA) established the Crime Victims' Fund.[22] The Fund, which is used 'to compensate victims of federal crimes and to provide assistance for eligible state victim compensation programmes and public and private victim assistance organizations' through grants'[23] receives funds from various federal revenue sources including criminal fines collected from convicted federal defendants, forfeited appearance bonds and bail bonds, and various other criminal penalties.[24]

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16 Proclamation No. 4831, 3 C.F.R. 18 (1982) cited in DL Roland (1989) 17 *Pepperdine LR* 'Progress in the victim reform movement: no longer the "forgotten victim"' 35 at 36.

17 Victim and Witness Protection Act of 1982, Pub L No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §§ 1512-1515, 3579-3580 (Supp. IV 1986) and Fed.R.Crim.P 32(c (2). See generally Merritt 'Corrections Law Developments: Restitution Under the Victim and Witness Protection Act of 1982' (1984) 20 *Criminal Law Bulletin* 44.

18 See Slavin & Sorin, 507 citing Bureau of Justice Statistics, U.S. Dep't of Justice, Victim and Witness Assistance: New State Laws and the System's Response 1 (1983).

19 Slavin & Sorin (n 18 above) citing Senate Report, 10; New State Laws, 1

20 See 18 U.S.C. § 1512 note (1982) (Federal Guidelines for Treatment of Crime Victims and Witnesses in the Criminal Justice System).

21 Victim and Witness Protection Act of 1982, Pub L No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §§ 1512-1515, 3579-3580 (Supp. IV 1986) and Fed.R.Crim.P. 32(c)(2)). See generally Merritt (n 17 above).

22 Roland (n 16 above) 37.

23 Ibid 43-48.

24 See WG Foote 'State compensation for victims of crime'1992-*MAR Army Law*. 51 at 52 citing Program Guidelines for the Victims' Compensation Program Under the Victims of Crime Act, 55 Fed.Reg. 3180 (1990).

The VWPA introduced restitution beyond its previous sole use as a condition for probation,[25] thus making it applicable alongside other forms of punishment that a Court could order with the intention of compensating victims to 'the greatest extent possible' to achieve 'ultimate justice.'[26] However, it imposed two conditions. The judge could only order restitution if such an order would 'not unduly complicate or prolong the sentencing process,'[27] or infringe upon the defendant's constitutional rights.[28] These conditions – expeditious trials and other the rights of the accused – constitute the usual concerns of any criminal court, which are necessarily implicated in the functioning of an international criminal court that incorporates restorative justice. These are considered at some length within the US debate on constitutional entrenchment of victim rights and in the next chapter on participation.

More recently, the Victims' Rights and Restitution Act of 1990[29] re-enacted the right to restitution[30] and added further victim rights such as the right to be notified[31] and be present at all public court proceedings unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial,[32] and the right to confer with the government's attorney in the case.[33] The Act directs federal departments and agencies that are engaged in the detection, investigation, and prosecution of crime to 'make their best efforts' to ensure that the victims of violent crimes are accorded their rights as described in the Act.[34] Legislation

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25 See Slavin & Sorin (n 18 above) 508 affirming this by citing Implementation of the Restitution Provisions of the Victim and Witness Protection Act of 1982 at 4; see 18 U.S.C. § 3651 (1982) (restitution as condition of probation).

26 Ibid, 508 citing 128 Cong. Rec. H8209 (daily ed. Sept. 30, 1982) (remarks of Rep. Fish); id. at H8207 (remarks of Rep. McCollum).

27 Ibid, 507 noting that this provision was included 'to prevent sentencing hearings from becoming prolonged and complicated trials on the question of damages' Senate Report, supra note 1, at 31, reprinted in 1982 U.S. Code Cong. and Ad. News at 2537.

28 Ibid. 18 U.S.C. § 1512 note (1982) (Federal Guidelines for Treatment of Crime Victims and Witnesses in the Criminal Justice System).

29 Victims' Bill of Rights, part of Crime Control Act of 1990, Pub L. No. 101-647, 104 Stat. 4820 (codified in 42 U.S.C. § 10606 (1994).

30 See 42 USC § 10606 (b) (6) (1994). See AM Cellini 'The proposed victims' rights amendment to the Constitution of the United States: Opening the door of the criminal justice system to the victim' (1997) *14 Arizona J. Int'l and Comp. L.* 839 854.

31 See 42 U.S.C. § 10606 (b) (3) (1994).

32 See 42 U.S.C. § 10606 (b) (4) (1994).

33 See 42 U.S.C. § 10606 (b) (5) (1994).

34 See 42 U.S.C. § 10606(a) which provides: 'Officers employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded the rights described in subsection (b) of this section.' See Foote (n 24 above) 52.

providing for victim impact testimony in capital punishment hearings was enacted in 1994.[35]

4.3.1 Judicial Interpretation and the Constitutional Amendment Debate

Under current legislation, while restitution has received wide coverage at federal and state levels, victim participation is limited to Victim Impact Statements at the sentencing stage. The President's Task Force recommended that the 6th amendment to the United States Constitution should be amended to guarantee victims participatory rights at all stages of the criminal judicial proceedings.[36] This recommendation, which provoked opposition from various groups, is unlikely to be implemented at the federal level.[37]

Arguments against constitutional entrenchment of victims' rights at the federal level resonate with those opposed to the extension of participatory rights of victims beyond the current entitlement – victim impact statements. The reasoning behind this stand reflects how courts deal with victims' issues today. The President's Task Force had warned that making changes to the Sixth Amendment as proposed to allow victims to be present and to be heard at all critical stages of judicial proceedings had the potential of unduly burdening or disrupting the criminal justice system.[38] A number of commentators have subsequently endorsed this view, pointing to the potentially prejudicial effects of victim participation.[39] Similarly, when the House and Senate versions of federal victims' rights amendments were introduced in April of 1996,[40] antagonists cautioned in rather alarmist terms against possible 'staggering' Court costs,

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35 See 18 USC § 3593 (1994).

36 Roland (n 16 above) For an extensive analysis of the task force proposal, see LL Lamborn, 'Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment' (1987) 34 *Wayne LR* 125, 172-200. The task force recommended that the sixth amendment be changed. Having recited defendants' rights, it proposed to add …. 'Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings'.

37 Dolliver criticised the proposal noting that it 'is a bad idea whose time should never come'. See JM Dolliver 'Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come' (1987) 34 *Wayne LR* 87.

38 Cellini (n 30 above) 866-867 citing Presidential Task Force 114-15.

39 Dolliver (n 37 above) 90 noting that victim participation in a criminal proceeding 'places the victim in direct conflict with the accused' and is 'less than fully civilized.' See also Goddu (n 7 above) 246 alluding to 'potentially prejudicial role' of victims in trials.

40 See S.J. Res. 52, 104th Cong. § 2 (1996); H.J. Res. 173, 104th Cong. § 2 (1996); H.J. Res. 174, 104th Cong. § 2 (1996).

a 'litigation debacle,' and 'distortion of the Courts [that] undermines impartiality, judicial administration and the rule of law to the risk of us all'.[41] It is suggested that these concerns represent the issues that the ICC has to deal with when interpreting provisions relating to victims. The following two chapters consider this issue in some detail.

The concerns alluded to above seem to have dictated the implementation of the restitution legislation and the treatment of the concerns of victims by United States Courts. The invocation by Courts of rules on standing to defeat the victim's right to participate in the criminal justice process has been singled out as the main problem which necessitates constitutional entrenchment on the same footing as fair trial rights for defendants.[42] Reviewing cases under the VWPA, Cellini observes that these decisions 'are marked by invocation of a rigid formalism to avoid the 'uncomfortable issues' that might arise if a role for the victim in the criminal law process were to be recognized'.[43] For example in *United States v McVeigh,*[44] the presiding district Court judge ruled that victims or survivors of victims who chose to attend the trial proceedings or watch the closed circuit telecast of the trial would be barred from presenting victim impact statements at any subsequent sentencing hearing. When the victims and the National Organization for Victim Assistance (NOVA) sought to appear in the proceedings to assert their rights under relevant statutes[45] to view trial proceedings whether or not they would testify as victim impact witnesses at sentencing, the district judge ruled that while victims may have certain rights under those statutes, they lacked standing to appear in the proceedings to assert those rights.[46] Cellini has criticised this ruling, noting that it represents 'perhaps the most extreme

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41 Cellini (n 30 above) 866-867 citing the Proposed "Victims' Rights" Amendment, Hearing on H.J. Res. 173 and H.J. Res. 174 Before the Judiciary Comm. of the United States House of Representatives, 104th Cong., 104-91 (1996) (written statement of Elisabeth A. Semel on behalf of the Nat'l Assn. of Criminal Defense Lawyers).

42 Cellini has stated in this regard that: […] despite extensive state and federal legislation authorizing victim participation at several stages of a criminal proceeding, victims continue to be 'doubly victimised' because they are denied any forum to protest a judicially decreed denial of their statutory rights…[w]hile treatment of the victim has generally improved, the victim's actual participation in the criminal justice process is still very limited. In spite of Congress' clear intent to assure restitution to the victim, awards of restitution continue to be problematic and a victim has no avenue for complaint. See Ibid 856; Dolliver (n 37 above) 82.

43 Cellini (n 30 above) 857.

44 *United States v McVeigh*, No. 96-CR-68-M (D. Colo. Feb. 27, 1996).

45 The Victims' Bill of Rights, 42 U.S.C. § 10606 (b)(4) (1995) and the Closed Circuit Televised Proceedings for Victims Provision, 42 U.S.C. § 10608(a)(2) (1996).

46 Cellini (n 30 above) 858.

manifestation of the judicial system's hostility toward recognition of standing for crime victims'.[47]

In a jurisdiction where private prosecutions are not recognised,[48] the victim has limited possibilities of advancing his or her interests. Administrative and judicial procedures and extensive case precedent have over the years developed around the constitutionally guaranteed rights of an accused offender.[49] On the other hand, in the absence of specific mention of victims' rights in the Bill of Rights, 'no comparable body of law has developed for their protection'. Courts have instinctively applied the defendant's familiar constitutional trump when claims to rights by victims (for instance to be present at trial proceedings) appear in any way to impact a fair trial for the defendant.[50] Under these circumstances, victims can be left without any avenue of recourse. Although the Ninth Amendment guarantees 'unenumerated rights,' which may be thought to offer a footing for victims' rights to participation absent a specific constitutional amendment,[51] the attitude of the courts seems to indicate that victims are without any protected interest in the criminal process.[52]

4.3.2 US and the ICC Victims' Rights Regime

While the United States experience may be of little relevance to the ICC, especially with respect to victim participation (limited at the federal level to Victim Impact Statements at the sentencing stage), it can inform the implementation of the Statute in various states party to the ICC. One main feature of the reforms undertaken in that country was extensive reparation programmes. Despite legal reforms, victims remain

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47 Cellini (n 30 above) 858.

48 See JD Bessler 'The public interest and the unconstitutionality of private prosecutions' (1994) 47 *Arkansas LR* 511; *Linda R. S. v Richard D., 410 U.S.* 614, 619 (1973) in which the Supreme Court held that 'a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another,' and that 'a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.' For a critical review of this case, see AS Goldstein, 'Defining the Role of the Victim in Criminal Prosecution' (1982) 52 *Mississippi L.J* 515, 517.

49 See constitutional amendments IV –VII. Const Amendment VI provides for rights relating to the trial: right to a speedy, public trial, by an impartial jury; to have notice of charges; to confront witnesses; and the right to an attorney.

50 Cellini (n 30 above) 849.

51 See generally TB McAffee 'Federalism and the protection of rights: the modern ninth amendment's spreading confusion' *Brigham Young Univ LR* 351-388.

52 Cellini (n 30 above) 849 notes that the result of the Courts' attitude has been victims – most affected by a crime 'can be denied even the access to the trial allowed the general public'.

dissatisfied in large part due to the susceptibility of their claims to constitutional attack. Experience shows that the rights of defendants, with an established constitutional tradition, have been used to override victims' claims. The solution to this seems to be the elevate victims rights to participation to a constitutional footing.[53]

Secondly, the United States experience demonstrates the difficulties – administrative, legal and otherwise – that may be occasioned by a shift, however slight, in the penal justice paradigm especially for countries where victims have traditionally played a very limited role. Even those with some level of recognition, are reminded of these challenges. Whatever avenue is chosen, states parties to the ICC will have to enhance existing mechanisms of victim involvement or institute new ones that approximate to the ICC standard.

Thirdly, it illustrates that reforms to the penal systems that are aimed at genuinely improving the status of victims must receive appropriate legislative, including constitutional footing. Fourthly, it underscores the fact that innovative ways must be sought of generating money for victims' funds that may be established at domestic level. Unfortunately, some of the facilities that are available to a national government such as taxation, targeted levies and fines are not available to the ICC.

4.4 United Kingdom and Common Law Jurisdictions

In general, the common law tradition is regarded as less victim-friendly than the civil law tradition.[54] Of note is the fact that victims' role in the criminal justice system is limited to that of witness, should they be called at all,[55] with little or no participation beyond that.[56] As is the case of the United States, a few common law countries allow for written Victim Impact Statements or victims' statements of opinion at the sentencing stage and/or allow victims to be heard in parole hearings.[57] As argued here, while it may not always be possible or advisable to involve victims, one can point to

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53 See Dolliver (n 37 above) 7.

54 M Hekkila, (n 7 above) 46.

55 Due to the adversarial nature of proceedings, victims could be summoned by either the prosecutor or the defence, who generally guide what such a victim says. See LN Henderson, 'The Wrongs of victims' rights' (1985) 37 *Stanford LR* 937-1021 1007.

56 See PM Tobolwsky *Crime victims and remedies* (2001) at 151 and 123-149 cited in Hekkila (n 37 above) 46.

57 Ibid, 47.

the complete exclusion of victims from plea bargaining arrangements that often involve reduction and acceptance of lesser sentences as a further illustration of the unresponsiveness of these systems to victims.[58] From the United Kingdom example, one can sense a reluctance in common law countries to afford victims a greater say in criminal cases because of the potentially 'disruptive' effects of such steps on the criminal justice system. Commentators attribute this to the emphasis on the separation between crime and tort. This is addressed further below.[59]

The victim rights movement began in Britain in the early 1970s with the establishment of the Bristol Victims-Offenders' Group out of which grew the National Victims Association (Victim Support) in 1973. Inspired by the United States movement, the developments in Britain, Scotland, Northern Ireland and the Republic of Northern Ireland were soon replicated elsewhere in Europe, in particular in France and the Netherlands.[60] Unlike the United States movement, which articulated its agenda in terms of 'victims' rights' the movement in the United Kingdom, at least until the mid 1990s, focused on victim support. The focus on *needs*, rather than *rights* of victims changed in 1995 when Victim Support published a seminal report embodying a fundamental shift in strategy.[61] At this time, victims' issues had become increasingly topical and politicised due to interest from politicians and policy makers.[62] Criminal justice agencies began more fully to discuss victims.[63] When the system began to engage seriously with the issues, it immediately became apparent that there was not much common ground. Many issues elicited divergence of opinion despite the

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58 Henderson (n 55 above) 981 notes that this can be problematic as a 'victim who is not notified about a possible plea bargain, particularly one in which the defendant pleads to a lesser charge, may view the bargain as an invalidation of his or her experience.'

59 See related discussion on civil law jurisdictions.

60 On the history of the UK movement see generally B Williams *Working with victims of crime: Policies, politics and practice*s (2000).

61 See generally Victim Support *The Rights of Victims of Crime* (1995).

62 See P Rock *Constructing victims' rights* (2005) 263-330 discussing compensation and reparation in the United Kingdom.

63 Rock (above) 7 attributes the new focus on victims issues in the United Kingdom to a number of factors, which resonate with the US experience: the unrelenting work of Victim Support within policy making circles; the dawning apprehensions about the dangers of alienating victims and witnesses from the criminal justice system; responses to international declarations on victims' rights; the occupation by victims of crime of greater and salient positions within the criminal justice system; and discovery of the suffering hitherto unrecognised groups of victims of rape, abuse (children) and domestic violence.

widespread agreement that something had to be done to ameliorate the status of victims.[64]

4.4.1 The Right to Participate and Related Rights

Vicims of crime have no locus standi in the criminal justice process and are not recognised as a party but may commence proceedings against a perpetrator as a private prosecutor.[65] The role of the victim in the criminal process fetured prominently in most proposals for reforms. In its 1995 report, Victim Support elaborated the following rights as those it considered due to victims, partly in terms of already-existing law, and partly as proposals for reform: the right to provide and receive information; the rights to protection and compensation; and the rights to respect, recognition and support.[66] Given that these proposals were based on the assumed 'exclusion' of victims, it is notable that this report made no claim to the right of victims to be consulted and to participate in the system beyond their witness role.[67]

With regard to access to information, in the United Kingdom as in a number of Western European jurisdictions, 'practice guidelines' require that the police and law enforcement officers at the first port of call inform victims of their rights, including the availability of compensation schemes.[68] In practice, even such a right may be meaningless to victims. Brienen and Hoegan have remarked that 'because the victim of crime has no *locus standi* in the criminal proceedings … there is very little procedural

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64 Rock (n 7 above) 248 has described this aptly: The position of the victim was ill-defined and contested in the mid 1990s. Who were eligible to be treated as victims was undecided. What their entitlement should be was undecided. How much encouragement should be given o their alleged demands was unresolved. Different segments of the criminal justice system were manifestly at odds about how best to respond, but they *were* in accord that it was imperative to exercise extraordinary caution whatever might be done. On the one hand, victims were taken to have expectations and demands that had to be met if the criminal justice system was to continue function. On the other hand, it was understood that an imprudent response would carry risks of victims becoming over mighty and upsetting the integrity of criminal justice'.

65 M Brienen & E Hoegen *Victims of crime in 22 European criminal justice systems* (2000) 244

66 Williams (n 60 above) 13.

67 Ibid, 13; Rock (n 62 above) 9.

68 For instance in Scotland, guidelines relating to how the police and lawyers deal with rape victims exist. Similar 'Practice Directions' issued by the Director of Public Prosecutions apply in Ireland. See M Joutsen 'Listening to the victim: the victim's role in European criminal justice systems' (1987) 34 *Wayne LR* 95 104.

incentive to inform him of the developments in his case, unless he is required to testify as a witness.'[69]

The use of Victim Impact Statements, widely in use in the United States, had been mooted in 1990 and piloted after 1996 as a new Victims' Charter standard in various courts in the United Kingdom. Uncertainty over their precise aims, indecision by relevant authorities and opposition from lawyers and judges for their supposed 'disruptive'[70] effects on the trial process prevented further implementation and prompted a change in approach. It was urged that the American model, primarily directed towards influencing sentencing, should be eschewed in favour of a model that does not expose the victim unnecessarily to trauma arising from exposure to an unfriendly courtroom situation.[71] Uncertainty over whether victims should be allowed to make a statement at the beginning of the criminal process (thus directed towards providing information on a range of issues including victims' needs) or towards the end (aimed at influencing sentencing), still linger.[72]

Another element relevant to participation generally is plea-bargaining. This prosecutorial tool of common law provenance is used widely in the United States and United Kingdom.[73] Commentators have lamented that, at the expense of victims, serious charges are dropped by the prosecution to avoid the expense of a trial, though they note that the matter seems to be a political one rather than one of prosecutorial discretion.[74] At the international level plea bargaining entered the practice of two international tribunals – ICTR and ICTY – in the last few years, apparently as a necessary response to heavy case loads, the need to address complex crimes and dwindling resources.[75] Plea bargaining raises a number of concerns seen within the context of the tribunals' objectives: i) the rights and opportunity of victims to be

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69 M Brienen & E Hoegen (n 65 above) 285; Rock (n 62 above) 168.
70 For a discussion of relevant case law, see Rock (n 62 above) 176-178.
71 Rock (n 62 above) 175.
72 Ibid 184-185.
73 Williams (n 60 above) 108
74 Ibid. See also S Lees (n 74 above).
75 See A Tieger & M Shin 'Plea agreements in the ICTY' (2005) 3 *J of International Criminal Justice* 666-679.

heard;[76] ii) the impact on the historical record; iii) the dismissal of charges; iv) equal treatment of offenders; and v) the reduction of sentences for increased efficiency.[77]

Following concerns that the practice of nondisclosure by the prosecutor of the contents of these agreements had serious implications in the manner outlined, a new rule was added to the ICTY's RPE providing that a Chamber 'shall not be bound' by a plea agreement and that the Chamber 'shall require the disclosure of the agreement in open session or, on a showing of a good cause, in closed session'.[78] No comparable provision exists in the ICC RPE. Should it become necessary to adopt such a rule, the ICC should draw from the relevant experience of national jurisdictions as well as the tribunals paying particular attention to victim-related concerns.

4.4.2 Compensation and Reparations

As in many European countries, a number of statutory reforms and policy changes were undertaken in Britain to address the concerns of victims in the criminal justice system.[79] Before the 1995 proposals, the Home Office had issued a victim rights Charter in 1990 followed by another in 1996. Among the rights detailed in the first (unenforceable) instrument[80] included the right to access to information on their cases, the right to seek compensation and a number of rights related to their presence in court.[81] The 1996 Charter was formulated in imperative terms and at first glance seemed to go a little further. It was more detailed and explicit with respect to the four main obligations: provision of information; taking victims' views into account; treating victims with respect and sensitivity in court; and providing emotional and

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76 Ibid, 674 arguing that since trials 'are often viewed as the opportunity for the voice of the victims', the absence of the trial process may be perceived as muting and disempowering victims'.

77 Ibid, 667.

78 Rule 62*ter* ICTY RPE.

79 See generally P Rock *Helping victims of crime* (1990) cited in Cellini (n 30 above) 855 (discussing the development of English and Welsh law and policy concerning victims); generally Rock (n 62 above).

80 Although the Charter, which listed 'guiding principles', had some implications for police, prosecution and probation, action on their part was discretionary. On the Victims' Charter, see Williams, 75-80; Rock (n 62 above) 155.

81 See JO10368 RP2/93, cited in H Fenwick 'Rights of Victims in the Criminal Justice System: Rhetoric or Reality?' *Criminal LR* Nov 1995 843. Cellini (n 30 above) 855.

practical support.[82] However, with time, the language of *rights* associated with it was jettisoned. Rather, it became a mere 'statement of standards'.[83] In the end, the only right that victims could enforce within the system remained compensation (introduced in the 1970s), which received full legislative re-enactment in 1995.[84]

4.4.3 Relevance of the United Kingdom Experience

The dilemmas raised by victims' concerns in the United Kingdom are not different from those, which engaged commentators and law reformers in the United States. Although the United Kingdom was ahead in Europe terms of championing victims' concerns, closely following the United States experience, other European countries, notably of the civil law tradition, undertook far-reaching reform measures beyond victim support while the United Kingdom position remained largely unchanged. Consequently, victims' rights in the United Kingdom, as in the United States, are still in the main limited to compensation, reparation and to limited rights to be informed. Secondly, as in the case of the United States, and as will be seen below the continental countries' implementation of existing victims' laws has been the main problem in the United Kingdom.[85] State compensation of victims, which has been part of United Kingdom law since 1970s, has suffered due to budget cuts, and the diversion of funds into punishment and law enforcement (policing).[86] However, apart from being the first European country to introduce state compensation, it has the most extensive scheme in Europe[87] despite problems in implementation.[88] Thirdly, the United Kingdom criminal justice system has remained largely offender-oriented, finding it difficult to accommodate victims. While victims' concerns are no longer on the back burner, one commentator has observed that 'the boundaries of their role and identity … [have

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82 Rock (n 62 above) 157.

83 Ibid160 describing the discomfort of both defence and victims' lawyers, in attributing the term 'rights' to an instrument which promised much but delivered little in terms of hard enforceable entitlements.

84 Criminal Justice Compensation Act, 1995, ch. 53 (Eng.); see also DS Greer, 'A Transatlantic Perspective on the Compensation of Crime Victims in the United States' (1994) 85 *J of Crim L and Criminology* 333, 335-36 (describing the British scheme for victim compensation).

85 See Williams (n 60 above) 14-16.

86 Ibid 15.

87 Brienen & Hoegan (n 65 above) 244.

88 S 104 Criminal Justice Act, 1988; Williams (n 60 above) 15; See also D Moxon, 'Use of compensation orders in Magistrates' Courts' *Research Bulletin 25*, Home Office.

been] closely patrolled by lawyers and judges and those responsible for mounting trials who … [are] mindful of the precarious equilibrium of the criminal hearing and their duty to preserve the defendant's rights in particular.'[89] Finally, confidentiality issues, in particular the privacy rights of defendants, often get in the way of the right of victims to be informed.[90]

4.5 Civil Law Tradition: France and Continental Europe

While one cannot be prescriptive as to a 'model' domestic victims' regime,[91] in a number of respects the French criminal justice system, among a select group of civil law countries in Europe, may be considered one of the most progressive in its responsiveness to the concerns of victims. Victims have enjoyed an elevated status in the penal system since campaigns for reforms in the 1970s culminated into legislative enactments in 1981 and in subsequent years.[92] It is perhaps not surprising that the initiative to include specific victims' rights within the ICC were spearheaded by the governments of France and the United Kingdom during the preparatory talks for the adoption of the ICC and at the Rome Conference.[93] For this reason alone, an understanding of the French penal system, and similar civil law experiences,[94] despite certain limitations,[95] is essential to the discussions relating to the implementation of at least some of the provisions in the ICC victims' regime.

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89 Rock (n 62 above) 213.

90 Ibid, 214.

91 Joutsen (n 68 above) 95. Civil law countries have long provided for victim participation in criminal proceedings in *partie civile* proceedings and to make claims for restitution and compensation. See generally M Joutsen, 'Alternatives in providing justice for victims: the European Experience' in MC Bassiouni (ed) *International Protection of Victims 7 Nouvelles Etudes penales* (1988) 385-392.

92 A number of that introduced amendments to the Penal Code include: Loi du 2 févr. 1981; Loi du 8 juillet 1983; *Loi du* 15 juin 2000 and *Loi du* 9 mars 2004.

93 See French Proposal to Preparatory Committee charge of elaborating the Statute (1996); K Bonneau, Permanent delegate of the International Federation of Human Rights' Leagues before the ICC, address at the Grotius Centre for International Legal Studies.

94 Certain former Eastern Bloc (socialist) countries and some in Western Europe such as Austria and Germany have, in some respects advanced provisions on specific areas of victim concerns. See discussion of the German experience in Brienen & Hoegan (n 69 above) 353-388.

95 The ICC victim's regime does not duplicate any national criminal system, and is not comparable, at least in material scope, even to the most progressive national criminal justice systems where victims rights are recognised.

The victims' regime in the French penal system, as is the case in a number of other continental systems, affords victims of crime five distinct rights: (1) the right to file a complaint; (2) the right to initiate prosecution; (3) the right to participate and be heard as a party in any prosecution; (4) the right to attach a claim for civil damages to the prosecution, the *partie civile*; and (5) the right to be informed.[96] Varying combinations of these rights are enjoyed by victims in other continental European countries.[97]

4.5.1 The Right to File a Complaint

Continental systems generally grant victims the right to file a complaint. In France, it may be *plainte simple,* raising only issues of criminal responsibility or *plainte avec constitution de partie civile* that combines a criminal complaint and a civil claim.[98] Such complaint may be deposited at any police station or gendarmerie, irrespective of where the infringement occurred. The police then transmit the complaint and any further information from a subsequent investigation to the public prosecutor who can shelve it or charge the alleged perpetrator before a competent tribunal.[99] In the ICC, victims have no such right, although they may send information to the Prosecutor, as they have done in the past, relating to alleged violations with which the Court is concerned.[100] Such victim involvement nevertheless falls outside the ambit of victim participation, which is subject to provisions of the Statute, notably Article 68.[101]

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96 See generally R Frase, *Introduction to the French code of criminal procedure* (1988) 1-40 (G. Kock and R. Frase trans. 1988) 20-21 (discussing rights of civil party injured by commission of a crime); Campbell, 'A Comparative Study of Victim Compensation Procedures in France and the United States: A Modest Proposal' (1980) 3 *Hastings Int'l and Comp LR* (describing French procedure (action civile) by which a party may institute a civil suit against a defendant in criminal Court); Pugh, Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived From a Study of the French System, (1976) 36 *Los Angeles LR* 947 (1976) at 965-66 (commenting on civil party's occasional domination of state interest in prosecution, and noting that French appellate Courts spend approximately 20% of their time on civil aspects of such "mixed" cases).

97 For a discussion of various experiences, see generally Brienen & Hoegan (n 65 above).

98 On *constitution de partie civile* see S Guinchard & J Buisson *Procédure Pénale* (3e éd) (2005)

99 See Ministère de la justice, 2003 'Les droits des victimes' <http://www.justice.gouv.fr/publicat/dvictimes1.htm> (Accessed on 24 November 2006).

100 See *ICC Booklet on Victim Participation* at 12.

101 *ICC Booklet* Victims before the International Criminal Court: A guide for the participation of victims in the proceedings of the Court' (2006) at (*ICC Booklet on Victim Participation*) at 12

4.5.2 The Right to Initiate a Prosecution

The right of victims to initiate a prosecution or to appeal to a Court if a prosecution is not forthcoming allows victims to commence proceedings where the prosecutor is unwilling to do so.[102] This is also the case in the Netherlands.[103] If the public prosecutor has chosen not to begin criminal proceedings against an accused, the crime victim may also institute an *action civile* for damages before a criminal tribunal, thereby forcing the Court to conduct the criminal inquiry as well.[104] As such, it is a countermeasure to abusive exercise of prosecutorial discretion. However, studies show that victims, at least in France, use this procedure infrequently. [105] Some reasons why this is so have been advanced. Frase notes that the very existence of the procedure is 'highly successful in goading prosecutors to file charges.' Additionally, victims are dissuaded from initiating prosecutions because of existing measures intended 'to prevent frivolous charges.' These include the requirement that victims post a bond and the further risk that they might be required to pay costs and damages.[106]

The ICC does not provide for victim-initiated prosecution. Victims may only participate once the Prosecutor has initiated an investigation, triggered by the reference of a situation to the Court by the Security Council such as the case of Darfur,[107] by a state party to the ICC including self-referral[108] or pursuant to proceedings commenced by the Prosecutor *proprio motu*.[109] Even if victims were allowed to initiate a prosecution before the ICC, giving effect to their rights in this manner would require a Court enabled to actively participate in an investigation such as that found in the

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102 Se S Frase, 'Comparative criminal justice as a guide to American law reform: how do the French do it, how can we find out, and why should we care?' (1990) 78 *California LR* 539 669.

103 This may be achieved through an appeal to Court. See Brienen & Hoegan (n 65 above) at

104 Cellini (n 30 above) 844; DP Kelly 'Victims' (1986) 34 *Wayne LR* 69 76; Cardenas, 'The crime victim in the prosecutorial process' (1986) 9 *Harvard J.L and Pub Pol*. 385.

105 The risk of being held liable to pay costs and damages, together with the requirement that victims post a bond *consignation* to be set by the judge have been deterrent factors. See RS Frase, *French System* at 20-21; Guinchard & Buisson, *Procedure Penal* (2005) 703-704.

106 The risk of being held liable to pay costs and damages, together with the requirement that victims post a bond *consignation* to be set by the judge have been deterrent factors. Guinchard & Buisson , Ibid, 703-704; Frase, *French System* at 20-21.

107 Art 16 Rome Statute.

108 Art Rome Statute. While the first situations before the Court have arisen from states referring themselves, or rather relevant situations on their own territories, this was not envisaged under the Statute. Uganda, Central African Republic (CAR) and the DRC are cases in point.

109 Arts 15 and 53 Rome Statute. See D Sarooshi, 'Prosecutorial policy and the ICC: Prosecutor's Proprio motu action or denial?' (2004) 2 *J of International Criminal Justice* 940-943.

French and civil law inquisitorial systems generally. However, as discussed later, prosecutorial discretion of the ICC Prosecutor is limited. Apart from the requirement that the interests of victims have to be taken into consideration in his/her work, the Prosecutor's decisions are subject to judicial approval and review, notably by the Pre-Trial Chamber, which may legally refuse to confirm charges brought against a person.[110] Despite this, however, it is unlikely that the Court would direct the Prosecutor to investigate or charge a specific person.[111]

4.5.3 The Right to Participate in Criminal Proceedings

This right is of particular relevance to the ICC regime. Under French criminal procedure, the victim has the right to participate and to be heard through counsel in the prosecution of the criminal charge.[112] Once a victim applies through the *constitution de partie civile* to be joined to the criminal proceedings in order to articulate his or her interests, including restitution, she/he becomes a party in the process.[113] The role of participating victim being incompatible with that of witness, once a victim becomes a party to the proceedings they can no longer serve in the capacity of witness.[114] Unlike under the procedure of most continental systems notably the German and the French, in the Netherlands the victim is not considered a party to the criminal proceedings but has the right, as under the Rome Statute,[115] to be represented by an attorney during the proceedings[116] and to have access, subject to conditions, to the record of the case.[117]

The incompatibility of victim and witness roles may apply to the ICC, before which those who have been granted the right to participate in terms of the Statute can through counsel address the Court in their own right.[118] While the right to participate in criminal proceedings has been comparatively narrower, and still is, in domestic

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110 See for instance art 17 (d) where the Court may refuse to admit a case 'where [it] not of sufficient gravity to justify further action by the Court'.

111 The practice of the ad hoc tribunals as well as the Rome Statute and Rules of Procedure and Evidence, support this view.

112 Cellini (n 30 above) 844. See also RS. Frase (n 102 above) 669-70.

113 See G Stefani, G Levasseur & B Bouloc *Procédure Pénale* (19th ed) 283.

114 Arts 335 and 336 Fr. CPP.

115 Rome Statute and REP.

116 See Dutch Code of Criminal Procedure art. 12f-1.

117 See ibid art. 12f-2.

118 *ICC Booklet ICC Booklet on Victim Participation* (n 12 above) 13.

jurisdictions that provide for it,[119] even after the establishment of the ICC, a recent amendment in French law approximates the ICC regime on participation which grants victims the right to participate at all stages of the proceedings.[120] Although victims have long enjoyed an enhanced role in the criminal justice system, the amendment, which follows the ratification of the Rome Statute, constitutes the first specific legal affirmation of the guarantee of victims' rights in that country.[121] I t enunciates that 'the judicial authorities oversee the information and the guarantee of the rights of victims during the entire penal process.[122] This provision captures the essence of Article 68 (3) of the Rome Statute, which guarantees the right to participate but subjects it to judicial determination of appropriateness.[123]

4.5.4 The Right to Restitution and Compensation

As a substantive right, the right to restitution, or some form of material recompense to victims, has been central to penal system reforms in the countries under study. In France, as in the other countries of Western Europe and former Eastern Bloc countries, victims are assured the right to restitution, or in some cases state compensation. The French penal code establishes the right to civil action (*action civile*) for victims who have suffered direct injury caused by the commission of a crime.[124] It establishes which right can be exercised before the criminal court (as *partie civile*, in which victims can bring a civil claim for restitution within a criminal proceeding)[125] or separately before a civil court.[126]

In the countries where *partie civile* or 'adhesion' proceedings are possible, such as France, Austria and Germany, the dichotomy between the two bodies of law is less pronounced. Cellini suggests that this is so because 'no conflict is thought to exist

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119 For most, it is limited to Victim Impact Statements at the sentencing stage. The most progressive states such, including France before the amendment limited participation to the prosecution but with broader rights to information.

120 *Trial Chamber I Decision on Applications for Participation*, n 45 above.

121 Guinchard & Buisson (n 105 above) 536.

122 Art 1 Fr. CPP introduced by Loi du 9 mars 2004

123 See Chapter 3; *Trial Chamber I Decision on Applications for Participation*, note 45 above.

124 Art 2 Fr. Code de Procédure Pénal (Fr. CPP); Guinchard & Buisson (n 105 above) 536.

125 Art 3 Fr CPP; Guinchard & Buisson (n 105 above) 536.

126 Art 4 Fr. CPP; Cellini (n 30 above) 843; J Larguier 'The Civil Action for Damages in French Criminal Procedure' 39 (1965) *Tulane LR* 687 cited in Cellini (n 30 above) 843.

between the victim's and state's interests.'[127] This thesis argues that despite this, there will be moments when these interests will clash, or rather be at odds with each other within a specific proceeding, and that this clash will require balancing. Further, such 'merger' of proceedings that reconciles civil law and criminal law, to achieve what Guinchard and Buisson refer to as *l'unité du procès civil et penal*,[128] does not eliminate the debate on the civil law-criminal law dichotomy. This debate raises important questions on the functioning of the ICC, given that it brings together countries that generally adopt two different approaches to the question.

While countries of the civil law tradition generally tend to downplay the dichotomy, therefore collapsing into one proceeding the interests of the state (the raison d'être of criminal law) and those of an individual (the concern of civil law), the distinction is pronounced for common law countries. In responding to the difficulty of defining criminal law as distinguished from civil law (tort or delict), Kenny, focusing on procedure, has argued convincingly that the only proper criterion of distinction is the degree of control exercised by the state over the proceedings. [129] Thus even in the case where victims have a right to a civil action within the process, this procedure remains auxiliary. Guinchard and Buisson note with respect to France, which comment applies to similarly placed civil law jurisdictions, that 'in the logic of our procedure, the victim retains a secondary role to the prosecutor'.[130] Likewise, the Prosecutor of the ICC exercises general control of proceedings subject to review by the Chambers. This issue is revisited later.

For the ICC, the question is how the reparations component will be most effectively and appropriately implemented, whether within or alongside the criminal proceedings which have a longer pedigree in ICL. By including the adjudication of reparations (restitution and other forms) in a criminal Court, the Rome Statute seems to imitate the French and many civil law jurisdictions, which as already noted

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127 Cellini (n 30 above) 847.

128 Guinchard & Buisson (n 105 above) 537.

129 Kenny *Outlines of criminal law* (15th ed) 1951 discounts the use of various criteria:(i) the degree of activity manifested by the state in the two types of proceedings (arguing that although the 'contrast is a genuine and a vivid one' it was incapable of being applied with precision); (ii) both criminal and civil cases may be heard by the same Courts; (iii) the object of the proceedings (arguing that while *punishment* is always the object of criminal proceedings, the award of civil damages in civil proceedings is equally punitive; (iv) while criminal sanctions never enriched any individual, it was not true to say that all civil actions do.

130 Guinchard & Buisson (n 105 above) 538.

generally disregard or downplay the criminal law/civil law distinction, at least with respect to civil claims associated with the commission of a crime. As noted in the discussion below, even in this case, victims still retain the option to pursue damages in separate civil proceedings. The constitutional amendment debate in the United States discussed above illustrates the presumed 'incompatibility' of the bodies of law. Among other reasons, fair trial guarantees have been deployed to preserve these 'neat' categories of law, which without doubt employ different standards in a number of respects.[131] However, is this a well-founded presumption? What are the benefits to victims, and to the administration of justice, of merging the two into one institution thereby adopting a restorative justice paradigm for criminal law? Conversely, what are the disadvantages? While some of these questions are already addressed in the discussion on the United States victims' regime, in particular with respect to the proposed constitutional amendment to entrench victims' rights alongside fair trial guarantees, here, the discussion is taken further by examining how Courts in civil law jurisdictions deal with the question. This is of particular pertinence to the ICC.

The joinder of civil claims to penal proceedings presents a number of positives. First, by permitting victims to be party to the prosecution, albeit in an auxiliary prosecutorial role, it not only empowers them but also offers them a measure of retribution while allowing them to obtain damages faster than would be possible before a civil jurisdiction. This allows for economy and maximisation of judicial and administrative resources.[132] This can be cheaper for the victim as court costs are lower than for a separate civil claim and the results of the official investigation are available for use in documenting the victim's claim. The burden to prove the case is removed from the victim.[133]

Secondly, the fact that one court adjudicates both civil and criminal proceedings assured consistency in court decisions.[134] Thirdly, the victim may be able to learn facts, and gain access to information that the court can obtain through the coercive mechanisms at its disposal, which would otherwise remain undisclosed in a

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131 Apart from the parties to a civil case which differ from those in a traditional criminal case, the two bodies have different standards relating to proof, the strict requirement for intent (*mens rea* for crimes). See JC Smith & B Hogan *Criminal Law* (6th ed) (1988)17-24.

132 Guinchard & Buisson (n 105 above) 703; Joutsen (n 68 above) 116.

133 Frase (n 102 above) 670; Joutsen (n 68 above) 116.

134 M Joutsen (n 68 above) 116.

civil setting. This has the potential of facilitating closure and the healing of the victim.[135] Fourthly, as already noted, where *constitution de partie civile* is available, it militates against prosecutorial inaction by compelling the institution of charges. Fifthly, considering criminal and civil liability together endorses the fight against impunity through deterrence. At this level, as well as for the ICC, the centrality of victims in proceedings, and in particular a reparative policy, is in keeping with the comprehensive view of justice. This approach, as reflected in the initial fears that incorporating reparations within an essentially criminal tribunal is bad for an international criminal tribunal, is not without its critics, who have been vehement in their disapproval.

First, for this system to work, it requires a good measure of knowledge of procedure and enterprise by the victim. Given that victims are generally not well versed in such matters, fears that this may slow down and delay the criminal process, with the resultant infringement of defendants' rights to a speedy trial, are not unfounded. Within the ICC, the fact that some victims will come from countries where the very concept of participation in a capacity other than that of witness is alien does not help matters.[136]

Secondly, some have argued that joinder of proceedings may unnecessarily complicate the process. For instance, in Germany and Austria where these objections are emphasised, studies show that this procedure is infrequently used.[137] Complications and delays could be attributed to at least two factors: i) civil and criminal proceedings require different tests and standards in the assessment of liability; and ii) assessment of damages is often a long and complex process.[138] While the requirement for the knowledge of procedure may be addressed in the ICC by the provision of counsel for participating victims, the other elements still present concerns.

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135 Guinchard & Buisson (n 105 above) 703

136 In the *Lubanga* case currently before the ICC, the fact that the country of the accused, as well as the victims recognises this concept has made it easier for them to request to be joined to the criminal proceedings. The legal tradition of counsel will certainly be a factor.

137 Joutsen (n 68 above) 116 citing Riess 'Die Rechtsstellung des Verletzen im Strafverfahren' *in* Gutachten C Fur Den 55 *Deutschen Juristentag* (Munich 1984) C35-38.

138 Larguier (n 126 above) 688 records that '… French appellate Courts, passing upon penal proceedings must devote approximately seventy per cent of their time to resolving civil questions'.

If direct participation, at least for those who are granted permission to do so, has benefits beyond the possibility of presenting one's concerns that may impact the trial, this unique opportunity is available through legal representation. It may be advisable that the determination of reparations be made in an associated proceeding after the criminal prosecution is finished, which would make the civil proceeding a mere formality especially where there has been a conviction. Initial indications are that this may be the approach of the Court.[139]

Thirdly, in terms of the adage that 'no-one can be a witness in their own cause' once a victim becomes a party to proceedings, he or she is barred, in countries with *partie civile* or adhesion procedures, from serving as witness in the same case.[140] Further, when they initiate a prosecution and the case is dismissed, such victim may be subject to two adverse procedures: i) they may be arraigned by the prosecutor before a 'correctional tribunal' *(tribunal correctionnel)* for abuse of procedure and liable to pay damages (*amende civile*);[141] and ii) they may be pursued by the person wrongly or maliciously accused and could be liable to pay damages.[142] Since the ICC does not provide for victim-initiated prosecutions, this will not arise. Furthermore, the Court, by applying relevant tests, will only admit deserving victims to join as parties. As seen in chapter five, it is notable that there is nothing in the Rome Statute or RPE that prevents a participating victim from serving as witness in the same case.

Fourthly, making the civil claim ancillary to the main criminal proceedings means that the civil claim, which may be all that victims want or deserve, may not receive full attention from the Court.[143] As emerges from the discussion in chapter five, current debates on the ICC reflect that little or no space has been accorded to issues relating to reparations by commentators who are more familiar, or perhaps more comfortable with, traditional international criminal justice issues. Adhesion or *partie civile* procedure works satisfactorily in jurisdictions where it has been instituted.[144]

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139 See *ICC Booklet on Victim Participation* (n 12 above) 11 on 'stages of proceedings'.

140 Guinchard & Buisson (n 105 above) 703.

141 Arts 91(1) and 177(2) Fr. CPP; Guinchard & Buisson (n 105 above) 703.

142 Ibid, 716-719.

143 Joutsen (n 68 above) 117.

144 This applies widely in Nordic and Eastern European countries. See Joutsen (n 68 above) 117 citing Eser, 'Die Rechtsstellung des Beschudigten und das Verletzten im Strafprozesscht de Bundesrepublik Deutschland', in H Jescheck, G Kaiser and A Eser (eds) *Zweites Deutsch-Sowjetischeskolloquium Uber Strafrecht und Kriminologie* (1984) 218 at 225.

Contrary to negative assessments, Cardenas notes with respect to France that 'there are no reports of disruption or delay in the efficiency of the prosecutorial system'.[145]

4.5.5 The Right to Be Informed

The difficulty of obtaining information has been the main problem for victims who want to assert their rights in the criminal justice process.[146] Yet, this procedural right is central to the entire victim rights regime. Among other things, procedural information is important for the victim to know how to enforce their rights-what they can do, when and how. Equally, in a proceeding still largely controlled by the prosecutor, the victim may want to know what actions have been taken. For instance, it is absolutely essential, as the law recognises, for the victim to be informed when the prosecutor decides not to press charges, in order to allow the victim to pursue other available avenues of recourse.[147] The victim may want to conduct a private prosecution or cause the Court to open an inquiry or he or she may want to commence civil proceedings for damages. As noted already, for victims of international crimes, the ICC does not proffer an option as to choice of proceedings at the international level. However, depending on where an ICC-related prosecution is conducted nationally, victims would have more options than that on offer at the ICC itself, such as those outlined in the preceding sections.[148]

In France, Germany, Netherlands and a number of Eastern European countries, as the entry point to the justice system, the police are required to inform victims of their rights and their role in the criminal justice process. This duty falls on the prosecuting authorities when the prosecutor chooses not to prefer charges.[149] In some countries, the law requires that the victim be informed of the possibility of filing a civil

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145 Cardenas (n 104 above) 385.

146 Joutsen (n 68 above) 102.

147 Ibid 105; French Code of Crim Proc. Arts 88, 420-421.

148 See section on complementarity.

149 Joutsen (n 68 above) 103 discussing the various mechanisms of implementing the right, entailing either legislation (as the case of Eastern Europe) or Ministry of Justice 'guidelines' or 'practice rules' for those involved in law enforcement in Western European countries such as France, Germany, Austria, Ireland, Netherlands.

claim when this happens.[150] In the case of the ICC this duty falls, at different stages of proceedings, on different authorities. The Prosecutor, as the custodian of all information and evidence,[151] must for instance inform victims should a decision be made not to proceed with an investigation.[152] The Registrar, who is the main channel of communication of the Court and heads the Victims Participation and Reparations Section (VPRS), has the responsibility of informing victims of their rights relating to participation and reparations. The Registrar is required to assist victims in obtaining legal representation and to provide their counsel with adequate support, information and facilities necessary for the performance of their duties and protection of their rights during all stages of the proceedings.[153] Naturally, the victims' counsel also bears the duty to keep victims informed.[154]

The right to be informed extends beyond the institution of charges. Most jurisdictions have instituted the right to be informed on the progress of the case[155] and the right to access and review documentation relating to the case. Because of complexities in procedure, countries such as Germany provide for the right to legal counsel during the criminal process.[156] In a number of European countries, parties to a trial, including prosecutor and *partie civile*, have a general right to review official documentation.[157] A number of important questions are raised in this regard with respect to the ICC. First is whether the right of victims to be informed would extend to the investigation stage of the proceedings when the Prosecutor is yet to decide who to charge with what crimes. Secondly, in view of the classification of matters that may be considered by the Court – into situation and case[158] with two resultant categories of victims, i.e. victims of the situation and victims of the case,[159] – do both classes of victims enjoy this right, and what does it entail?

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150 See for instance *Code of Judicial Procedure* ch 22, s 2(2) (1969), Sweden; Austrian Code of Criminal Procedure, s 365 (1975) and Jutsen, 104.

151 Rule 10 ICC RPE.

152 Art 15 Rome Statute; See chapter three.

153 Rule 16 (1) ICC RPE.

154 Rule 13 ICC RPE; also *ICC Booklet on Victim Participation* at 13.

155 Germany, France, Austria; Stefani et al (n 113 above) 284.

156 Germ. Code of Crim Proc 395-397a (1987).

157 Joutsen (n 68 above) 106. See for instance Fr. Code of Crim Proc. art 118(3) (1957); Aus. Code of Crim Proc. s 47(2); Neth. Code of Crim Proc art 333 (2).

158 ICC recent case on victim participation.

159 See *Trial Chamber I Decision on Applications for Participation*; *ICC Booklet on Victim participation* (n 12 above) 19.

Because law enforcement officers often find reasons not to disclose information, it is important to have this right, especially to access relevant documentation, enacted by law. Even for ICC, the prosecutor may not want to divulge certain information due to the fear that it may tamper with investigations, expose witnesses to danger or generally throw a wrench in the prosecution's strategy. While justice by ambush is not encouraged, there are certain things the prosecutor may legitimately want to keep secret or expose to a limited number of people before trial that disclosure to victims (reading the file) does not assure.

4.6 National Courts and the Question of Complementarity

The jurisdiction of the ICC is complementary to national criminal justice systems. This means that the ICC has a subsidiary role vis-à-vis relevant national criminal processes – investigations or prosecution of an accused[160] – and will only assume jurisdiction where 'the State is unwilling or unable genuinely to carry out [an] investigation or prosecution'[161] The Prosecutor's policy on prosecution, in particular choice of situations to investigate, is organised in part around this key principle'.[162]

The key question for the purposes of this thesis is this: is a discussion on complementarity relevant when considering victim participation and reparations given that presumably, that victims will only appear before the ICC when there is a criminal prosecution before it? The assumption is that there will be no inquiry into victims' concerns, in particular into any reparations that may be ordered independent of a criminal prosecution. This view finds support in at least two related but distinct realities.

First, given the decidedly auxiliary character of reparations proceedings, it is unlikely that victims who are not associated with a case before the Court will benefit from reparations. Secondly, the very nature of the complementary relationship between the ICC and national systems is defined in terms 'investigation and

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160 D Sarooshi (n 109 above) 940.

161 Art 17 (a) Rome Statute.

162 See 'Paper on some policy issues before the ICC' at http:/www.icc-cpi.int/library/organs/otp/030905-Policy-Paper.pdf (accessed on 23 November 2006). See also Sarooshi (n 109 above) 940.

prosecution.' No mention of victims is made in this context.[163] In effect, the object of the complementarity facility is acknowledged to be 'the encouragement of prosecution of persons accused of crimes … in as many states' domestic legal systems as possible'.[164] Accordingly, there must be recognition of the fact that the ICC, while an important cog in the system of international criminal justice, is not a panacea to its problems, especially those related to justice for victims. Domestic systems will have to deal with the bulk of victims and must be so enabled. While there is room to argue that failure to address victims' concerns in an investigation or prosecution in terms of Article 17 admissibility criteria (with the result that proceedings are considered a sham) could amount to failure by the state thereby engaging ICC jurisdiction, it is highly unlikely that a domestic process could be disregarded solely for this reason.

One striking feature of the states that have so far adopted ICC-related legislation is that focus has been on providing a framework for the prosecution of ICC crimes and cooperation with the Court. They generally do not make provision for victim-related concerns, in particular reparations, which as stated are as much a novelty at the international level as they are alien to most domestic systems. Presumably, their existing frameworks (assuming that they have them) for victim participation and reparations apply in the absence of new enactment.[165] Most domestic frameworks remain inadequate in comparison to the ICC victims' regime.[166]

In view of the above, there are a number of scenarios, some of which are already playing out in the current practice of the ICC, that necessitate a discussion on the intercourse between the ICC and national criminal justice systems from a victim's vantage point: i) what happens to victims when a state refers itself, or rather a situation on its territory, to the ICC? (At first blush, the temptation is to assume that the state has presumably divested itself of all responsibility to address victims' concerns); ii) a given situation may give rise to a number of cases before the ICC, alternatively before the ICC and domestic tribunals; iv) the prosecution may take place in a state other than

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163 Art 17 Rome Statute.

164 Sarooshi (n 109 above) 940-941. See also *ICC Prosecutor's Policy Paper* on 'the complementarity nature of the ICC', 177.

165 See in the case of South Africa Rome Statute Act, 2000; Kenyan International Crimes Bill 2008 and Senegal's Loi N° 2007-05 du 12 février 2007. See however, Canadian Crimes Against Humanity and War Crimes Act (2000) which establishes a fund for victims (s 30).

166 Some countries, such as France have adjusted domestic legislation (2004 amendment to CPP) to conform with the ICC on the question of victims.

that of victims' nationality; iv) if reparations proceedings depend on successful prosecution of an alleged perpetrator, questions may arise when such perpetrator is acquitted, say on a technicality, with the distinct possibility that he or she will not be prosecuted again elsewhere or be released before commencement of trial on adjudication of a Pre-trial Chamber that 'the case is not of sufficient gravity to justify further action by the Court.'[167]

4.7 Locating Domestic Law and Practice in the ICC

The Statute prescribes the extent to which the ICC may rely on national law and practice. Yet, the Statute seems to relegate domestic law to a subsidiary role. For this reason alone, it may appear that the lessons the ICC may draw from domestic experience are limited, given that this source of law is only of subsidiary rank.[168] It was argued that given the lack of jurisprudence on many aspects of the victims' regime any available resource that may inform its interpretation would be used by the Court. This makes domestic experience relevant, especially those that reflect in varying degrees fundamentals of the new victims' regime.

There is no single national regime that may be considered a model of victim rights, though certain countries from the civil law tradition were singled out as being particularly progressive and informative. The ICC will have to consider what lessons it may extract from these experiences in interpreting the right to participation and to reparations in the Rome Statute. The fact that the ICC, like the ad hoc tribunals, is a 'mixed' tribunal, uniting elements of both adversarial and inquisitorial legal traditions should make it easier to draw on these lessons.

In all the countries sampled – the United States, United Kingdom as well as the continental European countries – various laws have bestowed upon victims, in varying degrees, various procedural rights as well as the right to restitution and compensation.[169] Procedural rights include the right to participate at various stages of the criminal process, to be kept informed by the prosecuting authorities of

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167 Art 17 (1)(d) Rome Statute.

168 See *Trial Chamber I Decision on Applications for Participation*.

169 M Groenhuijsen 'Victim's rights ad restorative justice: piecemeal reform of the criminal justice system or a change of paradigm? in H Kaptein & M Kaptein (eds) *Crime, Victims and Justice: Essays on Principles and Practice* (2004) 63-79 at 63 for an overview of these developments.

developments in the case, supplying information to the prosecutor beyond witness roles. Other non-procedural rights include the right to consult and be represented by counsel in the case, and that to increased protection, in due consideration of security and privacy. Since these issues seem to be a summation of the concerns expressed in the Rome Statute regarding victims, the chapter concluded that challenges associated with their implementation in the countries under discussion are instructive for the ICC.

Contrary to the seemingly inflexible view taken by those opposed to victim-centric criminal justice systems, it was noted that successful inclusion of victims in the criminal proceedings of civil law systems, and some surviving instances of the private prosecutor concept in common law criminal proceedings, reveal that victim participation can be achieved without disruptive results or compromising of the goals of the criminal justice system.[170]

This chapter also identified reasons that have prevented victims from fully benefiting from reforms. Among these, two stand out: the implementation of the reforms in place; and the ascertainment of the precise theoretical nature of the reforms.[171] Both issues are absolutely crucial to the ICC. Given that the Statute is drafted in broad terms, requiring in one instance that the Court 'develop principles' in particular in respect of reparations, the Court must take a leading role in its implementation. Quite clearly, given that the Prosecutor may be driven by a singular objective – that of law enforcement, with the consequence that the concerns of may be disregarded – the Court must take seriously the role of custodian of victims' that it has in terms of the Statute.

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[170] Cellini (n 30 above) 867; in the case of the US where even the introduction of victim impact statements were opposed at introduction but have since been successfully applied, see GA Fait 'Victims' rights regime-where do we go from here? More than a modest proposal' (2002) 33 *McGeorge LR* 705.

[171] Groenhuijsen (n 169 above) 664.

CHAPTER FIVE
OPERATIONALISING THE VICTIMS' REGIME: THE RIGHT TO PARTICIPATE IN PROCEEDINGS

> … [I]n the drama that is called the criminal trial, there can only be one leading actor. And that is the one who acted, not the one who suffered. No compassion with victims, no disappointment with the current state of criminal justice can change that.[1]

5.1 Legal Framework of Participation

Having argued in chapter one that for various reasons a 'pure' version of restorative justice conceived as practices and principles (values) is unlikely within the ICC, the chapter considers what 'future'[2] restorative justice has in the Rome Statute framework by examining one aspect of restorative justice – participation. With reference to discussions on national and international tribunals in previous chapters, the chapter discusses the operationalisation of various elements of this right as contained in the ICC Statute and its Rules of Procedure and Evidence (ICC RPE). It also discusses the forms of participation possible at various stages of the process, the initiation of proceedings, the appointment of legal representatives and the giving of evidence and particular interventions at various stages of the proceedings.

The Statute and ICC RPE contain various provisions, both general and specific. The general principle that victims have a right to participate, subject to certain considerations, is encapsulated in Article 68(3) of the Statute. Section III of the ICC RPE then sets out in greater detail the provisions applicable to the participation of victims at various stages of the ICC proceedings – pre-trial, trial and post-trial (review and appeals). Various other provisions in the Statute itself also provide specific instances when victims can participate. The conditions of participation set out in Article 68 (3) determine the nature and scope of this right:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented

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1 Y Buruma, 'Doubts on the upsurge of the victim's role in criminal law' in H Kaptein & M Kaptein (eds) *Crime, Victims and Justice: Essays on Principles and Practice* (2004) 14.

2 See B Hudson 'The Institutionalisation of Restorative Justice: justice and ethics of discourse' in E van der Spuy (ed), *Restorative Justice: Politics, Polices and Prospects* (2007) 56-72 56 who refers to other possibilities of restorative justice as 'futures' of restorative justice.

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

As such, this provision is not only the general one relating to victims' participatory rights but is also a focal point in the 'balancing' of tripartite interests – those of the prosecutor, defence and victims. More specifically, the Statute and ICC RPE specify circumstances in which victims may participate. In particular victims have: an absolute right to attend trial proceedings;[3] a discretionary right to participate in specific circumstances – put questions to the accused, witness or experts;[4] the faculty to make representations before the Court even in Pre-Trial procedure;[5] the right to be heard before decisions on reparation;[6] and the right to intervene in appeals concerning reparation orders.[7]

Despite these extensive stipulations – which, if implemented well, will have far-reaching implications for victims and for international criminal justice system – Lee[8] has observed that 'victims do not have the right to become a genuine party to the proceedings, but they do have the right to be represented before the ICC.' For his part Donat-Cattin does not consider victims essential parties to the proceedings: 'if the prosecution and the defence are necessary parties to the Court's process, victims are 'potential' parties, because their participation is not *strictu sensu* essential'.[9] Donat-Cattin however rightly acknowledges that the possibility of a trial taking place without victims does not mean that they do not have a right to participate or interests to protect in the process. Further, their potential contribution to the accomplishment of the

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3 Rule 91(2) ICC RPE.

4 Rule 91(3) (a) ICC RPE provides: When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.

5 Art 15 (3) Rome Statute.

6 Art 75(3) Rome Statute.

7 Article 82 (4) Rome Statute.

8 RS Lee 'XI' in Roy S Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*.

9 D Donat-Cattin 'article 68' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article* 869 873.

Court's main objective – truth searching – renders them indispensable.[10] Their participation at any given stage is subject to a judicial verdict in terms of Article 68(3).

Before discussing in detail each phase of proceedings and the modes of victim participation at each stage, the following sections outline some general themes.

5.2 Prosecutor, Defendants and Victims: A Three-Legged Stool?

By affirming the right of victims to participate, the Statute has introduced a third 'party' to criminal proceedings besides the traditional two – prosecution and defence. It has been feared, as advanced by some commentators,[11] that granting participatory rights to victims beyond their 'traditional' role of witnesses would impact negatively on the criminal process – both on law enforcement and on fair trial guarantees. As we have seen, these arguments are not new in debates around victims' rights, having been raised in national criminal justice systems when related reforms were contemplated.[12] Among others, commentators raised, as a bulwark against reforms, defendants' rights they claimed would be adversely affected, in turn impairing fair trial and efficient justice. The claim was that the criminal process would be 'burdened' with victims' concerns. As seen in the previous chapter, some of these concerns seem not to occupy commentators in some domestic criminal justice systems – predominantly civil law countries – that have a long tradition of victims' rights to participate and to reparation in the criminal justice system.

Whether a victim is merely a 'potential' party to the proceedings as suggested by Donat-Cattin[13] or not, the Statute and ICC RPE introduce a new dynamic to international criminal procedure. They are only a 'potential' party because they do not have an automatic right to participate, as is the case for the Prosecutor and the defence.

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10 Ibid.

11 Some delegates at the Rome conference mostly having the adversarial model in mind, had feared the 'crippling effect' a large number of victims would have in any given ICC trial. GJ Mekjian & MC Varughese 'Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the international criminal Court' (2005) XVII 1 *Pace Univ School of LJ* 1-46 19.

12 J Dolliver 'Victims' rights constitutional amendment: a bad idea whose time should not come' (1987) 34 *Wayne LR* 87; AM Cellini 'The proposed victims' rights amendment to the Constitution of the United States: Opening the door of the criminal justice system to the victim' (1997) *14 Arizona J. Int'l & Comp. L* 839 856.

13 Donat-Cattin (n 9 above) 873.

However, the provisions in the ICC statute and RPE accord victims specific rights such that they can no longer be treated merely as witnesses. The Statute specifically provides for victims to participate in the proceedings of the Court. Participation by victims directly or through their representatives serves a number of purposes. Firstly, it aims to protect their interests within the criminal trial; related to this, participation has an accountability function, ensuring that the Prosecutor and the Court in general act openly and transparently. Furthermore, it serves to ensure that victims realize their right to justice before the Court;[14] through participation, relevant conflict societies and victims are afforded a contact point to international justice.[15] As noted in the discussion on the concept of 'interests of justice' below, participating victims, just like the prosecutor and defence, have a role to play towards the achievement of the objectives of the ICC. In considering the role of the Court in proceedings, it is emphasised that balancing of interests will be required because each 'party' has different interests to pursue and protect within that process.

5.2.1 Prosecutor and Law Enforcement: Trumping Other Interests?

The functions of the Prosecutor and the Office of the Prosecutor (OTP) are set out in the Statute. These are rooted in the fundamental objective of the ICC – to ensure that 'the most serious crimes of concern to the international community do not go unpunished and that effective prosecution must be ensured.'[16] Accordingly, the basic function of the Prosecutor is that of law enforcement – to bring to trial, in terms if the Statute and Rules of Procedure and Evidence (RPE), persons alleged to have committed genocide, war crimes and crimes against humanity. Article 42 of the Statute provides:

> The Office of the Prosecutor shall act independently as a separate organ of the Court. *It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court*. A member of the Office shall not seek or act on instructions from any external source.[17]

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14 Donat-Cattin (n 9 above) 873.
15 Ibid 871.
16 Para IV Prmbl, Rome Statute. See O Triffterer 'Preamble' in O Triffterer (1999) 1-16 11
17 Art 42 Rome Statute (emphasis mine).

The above provision refers to 'referrals', which should be understood to refer to two of the three trigger mechanisms – referrals from the Security Council and states. Apart from this, the Prosecutor is empowered to commence investigations independently subject to specific conditions,[18] including Pre-Trial Chamber (PTC) approval.[19] Article 42 is supplemented by Articles 53 and 54 of the Statute. Article 53, the first under the general rubric 'initiation of an investigation'[20] is of particular relevance to victims' rights. This is examined further below.[21] Article 54 sets out in greater detail the duties and powers of the Prosecutor with respect to investigations. Of direct relevance to victims, Article 54 (1) (b) requires the Prosecutor to:

> [t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in Article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children

Various provisions read independently or together lead to the conclusion that the Prosecutor will be required to balance the imperatives to prosecute crimes in terms of the statute and respect and protection of the rights of victims and witnesses as well as accused and defendants. In this regard, Article 54 (1) (c) of the Rome Statute requires the Prosecutor to 'fully respect the rights of persons arising under [the] Statute.' The Court, in particular the PTC, will be an important 'mediator' and 'guarantor' of guaranteed rights. The relation between the Prosecutor and various persons under the Statute on one hand, and the Court on the other, are expounded upon at a later stage in our discussion of specific aspects of victims' right to participate.

5.2.2 Re-Examining Fair Trial

The Rome Statute predicates victim participation at particular stages of the ICC process on, among others, its benign effects on defendant's rights, its conformity with fair trial guarantees and the efficiency of the Court in delivering its mandate.[22] The PTC will therefore only permit particular victims to participate or intervene if their

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18 Art 15 Rome Statute.
19 Art 61 Rome Statute.
20 Part V Rome Statute.
21 Art 53 Rome Statute, see section below.
22 Generally, art 68 Rome Statute.

intervention would not be 'prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'[23] and if the role apportioned to them does not overly burden the Court so as to encumber its efficiency.

But, what is a fair trial? Before the victim's regime in the ICC, it would be granted, and indeed would have been accurate, to regard 'fair trial' synonymously with the rights of suspects and accused persons. This is not entirely accurate in a process where a third leg of rights and interests are imperative – those of victims. Further, the proper understanding of 'interests of justice' in the Statute, which necessarily incorporates the interests of suspects and accused persons, those of the international community as represented by the Prosecutor and those of victims, supports this view.[24] Donat-Cattin rightly distinguishes between defendant's rights and 'fair trial', accepting the overlap of the two concepts. To him, fair trial means 'equitable justice for defendants, victims and the international society.'[25] It must therefore be considered as a composite concept that entails at least three interests. The ICC's mandate must be seen in this light.

The Rome Statute and rules contain several provisions relating to rights of suspects and accused persons. Article 67 of the Rome Statute catalogues fair trial guarantees substantially similar to those contained in major human rights instruments.[26] A number of these, which we discuss in some detail, are of relevance to this discussion: the right to be tried without undue delay;[27] the right to examine personally or through representation of witnesses under same conditions as the said witnesses;[28] and presumption of innocence.[29] The Trial Chamber (TC) is obliged to 'ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'.[30]

Article 68(3) of the Rome Statute, which establishes victims right to be heard and to participate as well as the framework within which this is to happen, specifically

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23 Art 68(3) Rome Statute.
24 See discussion of 'interests of justice' below.
25 Donat-Cattin (n 9 above) 877.
26 See art 14 International Covenant on Civil and Political Rights; European Convention on Human Rights; arts 6 and 7 African Charter on Human and Peoples' Rights; and American Convention on Human and Peoples Rights.
27 Arts 66 & 67 (c) Rome Statute.
28 Art 67 (e) Rome Statute.
29 Art 67 (g) Rome Statute.
30 Art 64 Rome Statute.

refers to defendants' rights in the scheme of criteria. The discussion to follow of specific aspects of the right to participate canvasses how relevant defendants' rights may be impacted, and whether such impact would fall within the parameters delineated by Article 68(3).

5.2.3 'The Interests of Justice'

The Statute and ICC RPE do not furnish a definition of 'interests of justice'. The texts do not elaborate on specific factors or circumstances to be taken into consideration in discussions and application of the term as used in the Statute. The term is mentioned in several contexts in the Statute and in the ICC RPE: criteria for commencement or otherwise of an investigation;[31] assignment of legal assistance to suspects during investigation;[32] appointment of counsel during confirmation hearings where the accused has fled or cannot be found;[33] proceedings on admission of guilt, where TRIAL CHAMBER considers it necessary for normal procedures of evidence to be followed;[34] privileged information;[35] restrictions on disclosure of confidential information by the prosecutor;[36] seat of ICC proceedings;[37] and the possibility of joint and separate trials.[38]

In each of these contexts, it is possible that different considerations apply in interpreting what the 'interests of justice' are. No doubt, 'interests of justice' is a concept that is central to the prosecutorial function as it relates to investigation to the

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31 Art 53 (1) (b) Rome Statute

32 Art 55 (2) (c): To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it.

33 Art 61(2) (b) Rome Statute.

34 Art 65 (4) (b) Rome Statute.
Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:
(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or
(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

35 Rule 73 ICC RPE.

36 Rule 82 ICC RPE and article 54 (3) (e) Rome Statute.

37 Rule 100 ICC RPE.

38 Rule 136 ICC RPE.

conclusion of the prosecution. It necessarily underpins the victims' rights regime and the understanding of the relationships between various players in the ICC. The policy document on the interests of justice from the OTP suggests that at the preliminary level, 'interests of justice' will serve as directive principle in one specific context – in the making of decisions relating to whether or not the prosecutor should commence an investigation in a particular matter.[39]

While this concept may have different elements depending on the stage of proceedings, the main object of the ICC – punishing and prevention of serious international crimes - will have far-reaching implications as a benchmark in determining 'the interests of justice' in any given circumstance.[40] A number of other considerations, which hinge on that broad objective, appear to be necessary factors in the understanding of 'interests of justice'.

First, from a victim's standpoint, the need to seize every opportunity to ensure that victims' suffering is appropriately acknowledged, and that they have a say in the criminal process, is an important consideration. Secondly, it is in the interest of justice that the process is conducted in such a manner that the rights of suspects, accused persons and defendants are respected. In the discussion relating to Article 68(3) of the Rome Statute below, the chapter considers how these are balanced in particular circumstances.

Thirdly, the need to uphold fairness – to conduct a fair trial in which each of the interests involved are afforded ample consideration in terms of the Statute -must be an elemental factor of 'the interest of justice'. Donat-Cattin emphasizes the importance of victim participation, noting that 'the participation of victims and contribution to the Court's process leads to the 'development of a fair, effective and comprehensive proceedings'.[41] It is apparent 'the interest of justice,' entails multiple elements. As such, the Court and other actors in the Court may use it to rationalize specific action and orders by the Court.

For victims, 'the interests of justice' would require that their right to participation represented in Article 68(3) should be interpreted in its fullness and that

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39 See Office of the Prosecutor, 'Policy paper on the interests of justice' (OP Policy Paper) available at <http://www.icc-cpi.int/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf> at 1 (Accessed on 2 October 2007).

40 Ibid, 4 referring to the objectives of the ICC as 'significant touchstones'.

41 Donat-Cattin (n 9 above) 873.

no unnecessary obstacles should be erected in their path. In particular, the interests of the accused should not be used as a blanket trump of victims' rights to participate in particular proceedings. Neither should the prosecution's law enforcement function operate in the same automatic way. As seen above, the trend so far has been that the Prosecutor has opted to oppose automatically any attempt by victims to participate in all proceedings, a practice that has not only the potential of impeding victims' exercise of their right to participate, but also the right of defendants to an expeditious trial by dragging out proceedings given the fact that victims would be expected to defend their right to participate in every proceeding. The interests of justice would dictate a case-by-case approach, which would allow only for objections to participation that have merit.

For defendants have a right to legal counsel in the proceedings, which may necessitate legal aid in case of inability of defendants and accused persons to marshal their own resources. Fairness and the imperative of fair trial direct such action. A fundamental approach in achieving fairness – one that cannot be avoided in the context of a multiplicity of interests – will be that of balancing the interests at various stages, hence the role of the Court. These general elements of the 'interests of justice' and others are revisited elsewhere in this chapter in our discussion of pre-trial, trial and 'post trial' proceedings, in particular when considering the interests of victims and those of various other parties to the proceedings.

5.3 Participation and Legal Representation

5.3.1 The Ad Hoc Tribunals and National Jurisdictions

As outlined in more detail below, victims are entitled to a legal representative to facilitate their participation in the proceedings in their capacity as victims. The ad hoc tribunals, which did not provide for the right to participate for victims, offer no guidance in this regard. At the normative level, general international law presents a different picture. The 1985 UN Victims' Declaration provided for the right of victims to counsel.[42]. Although it is now more than twenty years since the adoption of the

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[42] United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 (GA/RES/40/34); Council of Europe Recommendation on the position of the

Declaration, in the majority of countries victims of serious crime, unlike criminal defendants, do not have a right to legal representation.[43] In jurisdictions that have Victim Rights Charters such as South Africa, Canada, Jamaica, Ireland and Hong Kong, the right to counsel is entirely excluded or is afforded what is merely rhetorical recognition.[44] In many countries, awareness has seen the involvement of private and non-governmental organizations to assist victims by providing legal aid and advice.

To illustrate the trend indicating strong constitutional guarantees for defendants while victims of crime lack protection, in the US for instance the 6th Amendment has been interpreted to include the right to assisted legal representation in federal and some state prosecutions for defendants. Victims do not have a comparable right.[45] The same applies in the United Kingdom, as is the case in many countries.[46] This situation poses major problems relating to access to justice. Without assistance to navigate a complex criminal process in an unfriendly environment, victims of crime find themselves with difficult and often dangerous tasks.[47] Importantly, their rights are met with the constitutionally entrenched and thus 'trumping' rights of defendants. In general, victims are unaware of legal alternatives

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victim in the framework of criminal law and procedure (Recommendation (85/11); European Union Framework Decision on the Standing of victims in criminal proceedings, 2001 (2001/220/jHA); Commonwealth Guidelines on Treatment of Victims at <http://www.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/%7B99410136-47A1-478F-B549-DB753CF8B20B%7D_Victims%20of%20Crime.pdf> (accessed on 17 September 2005). See also the Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power, which seeks to implement the 1985 declaration in binding treaty form.

43 See with respect to Europe M Brienen & E Hoegen *Victims of crime in 22 European criminal justice systems* (2000). Australia and New Zealand have specific laws -Victims of Crime Assistance Act 1996 and the New Zealand Victims' Rights Act 2002 which provide for state assistance in this regard.

44 See South African Service Charter for Victims of Crime in South Africa (Victims' Charter); Hong Kong Victim Rights Charter; Canadian Statement of Basic Principles of Justice for Victims of Crime, 2003; United Kingdom Code of Practice for Victims' Rights.

45 See the earliest cases in each instance: *Johnson v Zerbst*, 304 US 458 (1938) 462 in which the supreme Court held that a person charged with crime in a federal Court is entitled by the Sixth Amendment to the assistance of counsel for his defense and *Gideon v Wainwright*, 372 US 355 (1963) holding that 'that in our adversary system of criminal justice, any person haled into Court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him'; *Scott v Illinois*, 440 U.S 367 (1979) extended this right to misdemeanors in which imprisonment is imposed. See also P Bower 'Access to Justice: The Judge's Role' *Michigan Bar Council J* (2002) 79(1) 1.

46 See generally Brienen & Hoegan (n 43 above); for a brief overview C Stahn, H Olasolo & K Gibson 'Participation of victims in pre-trial proceedings' (2006) 4 *J of International Criminal Justice* 219-238.

47 PC Bower (n 45 above) 1.

available to them and lack means and direction to obtain counselling to protect their interests.[48] A similar situation obtains in civil law countries, although the plight of victims is somewhat ameliorated by the role of the investigative judge involved actively in the case, as for instance in *partie civile* proceedings. This does not however obviate the need for legal counsel since a victim may need to assess their options before and during proceedings.[49]

5.3.2 ICC Representation Framework

To facilitate their participation, victims[50] have the right to be legally represented in the ICC proceedings.[51] The right is rightly considered 'the most important and most procedurally challenging aspect to apply within the ICC'.[52] The importance of the right to legal representation from a victim's standpoint is not difficult to see when one considers the complex nature of procedures involved in the ICC. The Pre-Trial Chamber II has acknowledged the importance of representation to the effective participation of victims.[53] Rule 90(1) ICC RPE provides for the right of a victim to choose an appropriately qualified[54] legal representative.[55] Where there are a number of victims, they may be requested by the Chamber to choose a common legal representative or representatives.[56] One suggested reason for such request is 'ensuring the effectiveness of the proceedings.'[57] It may become necessary, in case victims are unable to choose a common legal representative(s) within acceptable time limits for the Registrar to designate common legal representative (s) on request from the Chamber. This has happened severally in the cases currently

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48 Ibid; Generally, MA Young 'A Constitutional Amendment for Victims of Crime: The Victim's Perspective' in 34 *Wayne LR* 51 1987-1988.

49 M Joutsen 'Listening to the Victim: The Victim's Role in European Criminal Justice Systems' in (1987) 34 *Wayne LR* 95 104.

50 Mekjian & Varughese (n 11 above) 16 'The ICC definition of 'victim' in Rule 85 ICC RPE is wider than the ad hoc tribunals'.

51 Rule 90(1) ICC ICC RPE.

52 Mekjian & Varughese (n 11 above) 22.

53 Situation in Uganda, In the case of the *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, 10 August 2007 Decision on victims' applications for participation, No: ICC-02/04-*Uganda Situation* [Uganda Participation *Decision*] para 55.

54 Rules 90(6) and 22 (1) ICC ICC RPE.

55 Rule 90 (1) ICC ICC RPE.

56 Rule 90 (2) ICC ICC RPE.

57 Ibid.

before the Court, with Office of Public Counsel for Victims (OPCV) stepping in to represent victims not represented by the common counsel.[58]

In designating common legal representative(s), two considerations for the Victims and Witnesses Unit in the Registry are relevant.[59] The *distinct interests* of the relevant victims as stipulated in Article 68(1) Rome Statute[60] should be represented and conflict of interest (among victims) should be avoided.[61] The duty imposed on the Registrar in this regard is 'all reasonable steps'. The Registry may provide assistance including financial assistance to a victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court.[62]

5.3.3 Some Thoughts on the Challenges of Representation

The first challenge consists in the fact that proceedings could potentially attract tens or hundreds of persons who qualify as victims. For practical considerations, apart from limiting the number of 'victims of a case', it may become inevitable that a group of victims are jointly represented in proceedings. This raises a number of pertinent questions: why do victims participate? Does representation not, especially where victims with a multiplicity of interests are grouped together, negate not only the very essence of participation but also the tenets of restorative justice embodied in the ICC? In other words, is the need – indeed the imperative – of 'bundling' of victims incompatible with the right of a particular victim(s) to participate?

As provided by the ICC RPE, an individual victim's right to choice of counsel is protected. A cursory reading of Rule 90(2) ICC RPE suggests that the right still

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58 Rule 90(3) ICC ICC RPE. See for instance in the *Prosecutor v Jean-Pierre Bemba Gombo* case, 'Decision on Participation' Pre-Trial Chamber III, 12 September 2008, ICC-01/05-01/08-103-tENG-Corr, pp 5 and 6.

59 See Art 43(6) Rome Statute.

60 Article 68(1) stipulates: The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

61 Rule 90(4) ICC ICC RPE.

62 Rule 90(5) ICC ICC RPE.

applies even where there are several victims in one case. Accordingly, where the Court acting through the Registry intervenes to designate a representative, this right is called into question. It is necessary not only to motivate such action, but also to do so by raising a weightier consideration. The assumption behind the choice of counsel argument, which may indeed be inaccurate, is that a particular victim is best placed to appoint a representative to articulate and protect his/her interests. This is one factor informing the 'interference' by the Court in ordering the designation of a representative(s), rationalized by an effectiveness of proceedings argument, which also takes into consideration the complexity of procedures and the time factor in view of defendants right to expeditious trial.[63] While the rights of defendants are not specifically mentioned under Rule 90, this is an underlying consideration as codified under the regulatory Article 68(3) Rome Statute.[64]

The argument in favour of victims appointing their own representatives perhaps reflects the dilemma of victims who may be forced, for reasons of effectiveness and efficiency of the Court, to appoint representatives or have these appointed for them rather than directly represent themselves. This focuses attention to the question of why victims participate. Can the current arrangement – the requirement for victims to participate through proxy – be considered a negation of the right championed so vigorously by the victim rights movement?

A comprehensive response to this question may require us to wade into a deeper and problematic question – what do victims want? While for want of requisite tools we cannot accomplish an inquiry of any significant depth into this question, it is often suggested – in line with the central claim of the victim rights movement – that participation by victims in the criminal justice process is necessary for victims to articulate and protect their interests.[65] The claim made, and correctly so, is that

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63 D Boyle 'the rights of victims: participation, representation, protection, reparation' *J of International Criminal Justice* 4 (2006) 307-313 at 311 (arguing that joint legal representation provides a supplementary means of organizing effective victim participation).

64 This consideration has been raised in current proceedings before the ICC. See Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims in *Prosecutor v Jean-Pierre Gombo*, of 16 December 2008, para 7, PTC III stated that in view of art 68(3) of the Rome Statute, appointing common counsel was appropriate to ensure effectiveness of pre-trial proceedings. See also Trial Chamber I, 'Decision on victims' participation' ICC-01'04-01 06-1119, para. 123.

65 See in the context of the ICTY Eric Stover *The Witnesses: The Witnesses: War Crimes and the Promise of Justice in The Hague* (2003).

victims' interests do not always converge with those of the prosecutor and are thus at risk of being ignored by a prosecution focused on law enforcement. Others have proposed - usually without much empirical evidence – that direct participation by victims has cathartic benefits to individual victims.[66] Another group – not necessarily opposed to this position have argued that inclusion of victims in the process would associate and bring victims closer to the goals of justice being pursued.[67] Applying this logic to the international arena, in particular the ICC, the imperative of dealing with post-conflict societies cannot be achieved without involving victims of international crimes.

However, while, the propositions on the question – why victims' participatory rights – are as varied as the disparate disciplines that have engaged with the question of victims in one degree or another[68] all, at national and international level victims have however been united in the need to have their interests adequately represented and protected. In our view, given the questionable cathartic benefits of direct participation by victims especially in view of the possibility of 're-victimization'[69] of vulnerable victims in an adversarial process, what should be sought for and by victims is effective representation. It should not be an issue who articulates victims concerns as long as they are made forcefully in a manner that impacts relevant processes and outcomes.

The ICC RPE provides for what appear to be sufficient guarantees for victims. Rules 90(2) and 90(4), by making reference to 'effective proceedings' – which by no means excludes adequate and timely representation of victims' 'interests – and the requirement that the registry in designating a representative(s) should take', all

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66 A Tieger & M Shin 'Plea agreements in the ICTY' (2005) 3 *J of International Criminal Justice* 666-679. The first plea agreement in the history of the ICTY was the negotiated guilty plea in *Prosecutor v Erdemovic*, Case No : IT-96-22-T, (1997) 674; B Hamber, 'Do Sleeping Dogs Lie? The Psychological Implications of the Truth and Reconciliation Commission in South Africa', seminar presented at the Centre for the Study of Violence and Reconciliation, Johannesburg, 26 July 1995, quoted in Stover (n 64 above) 20; LN Henderson, "The Wrongs of victims' rights' (1985) 37 *Stanford LR* 937-1021.

67 See H Strang & J Braithwaite, *Restorative Justice and Civil Society* (2001) 83-98 93; See also J Braithwaite & H Strang 'Introduction: Restorative Justice and Civil Society' in H Strang & J Braithwaite, *Restorative Justice and Civil Society* (2001).

68 MC Bassiouni 'International recognition of victims' rights' *Human Rights LR* (2006) 6:2 203 - 279 211-212 noting the variety of approaches in the victims' movement.

69 A Tieger & M Shin (n 66 above) 674; Stover (n 65 above 2-3) noting that the argument rests upon the premise that Courtroom testimony is at least as likely to be painful and traumatic as therapeutic.

reasonable steps' to protect *distinct interests*, seek to institute a regime of representation responsive to the imperatives of participation. Regulation 79(2) preserves the right of victims to be consulted when this choice of counsel is made while respecting local traditions.[70] Rule 90(4) and this regulation permit the Registrar through the Victims and Witnesses Unit to designate special representatives for particular categories of victims, including women, children and relatives of direct victims. However, the prospect that one or several special representatives may in no way represent each category in any particular case guarantees effective representation. As we discuss under the section on 'trial phase', the Court may exclude these representatives from proceedings on grounds of 'efficiency'. The importance of the provision on legal aid, which aims to address affordability of representation in view of the indigence of victims, also cannot be overstated.[71]

Having outlined the framework of representation and concerns relating to 'how', we turn to consider the specific forms and modes of participation by victim representative(s) at the three main stages of proceedings – investigations, trial and appeals. Proceedings relating to reparations are dealt with in the next chapter.

5.4 FORMS OF VICTIM PARTICIPATION: PRE-TRIAL PHASE

5.4.1 Basis for the Right to Participate

Despite concerted objections from the Office of the Prosecutor (OTP) as to the applicability of Article 68(3) to the investigation stage, the Court, by use of terminological, contextual and teleological argument affirmed in its seminal decision on participation that victims are entitled to participate at the investigation stage of proceedings. In its view, the right applies even before a decision is made to charge anyone suspected of an ICC crime(s). [72] In the relevant segment of the judgment, the

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70 When choosing a common legal representative for victims in accordance with rule 90, sub-rule 3, consideration should be given to the views of the victims, and the need to respect local traditions and to assist specific groups of victims.

71 As outlined in later discussions this procedure embodied in Rule 90 ICC ICC RPE reflects the practice in a limited number of national jurisdictions in which victims are entitled to participate in criminal proceedings.

72 See *Situation in the Democratic Republic of the Congo*, In *the case of the Prosecutor v Thomas Lubanga Dyilo*, Prosecution's Observations on the Applications for Participation of Applicants a/0001/06 to a/0003/06, 6 June 2006 Doc. No.: ICC-01/04-01/06 [DRC Situation Participation Decision].

PTC I emphasized that victim participation at the investigation stage is consistent with the object and purpose of the ICC victims' participation regime.[73] The second decision relating to the situation in Uganda confirms this position.[74]

The right of a victim to participate at this stage is however subject to two considerations stipulated in Article 68(3): 1) it must be appropriate for the victim to participate; 2) the personal interests of the particular victim must be affected. As regards appropriateness, the Prosecutor argued in the *DRC Participation Case* that third party intervention at this stage would: 1) jeopardize the appearance of integrity and objectivity of the investigation; and 2) involve a measure of disclosure which would be inconsistent with basic considerations of efficiency and security.[75]

Rejecting both propositions, PTC I stated that the participation of victims during investigations of a situation does not in itself compromise the appearance of integrity and objectivity of the investigation. Further, the Court did not consider this inherently inconsistent with basic considerations of efficiency and security.[76] To the Court, the extent of a victim's participation and not their participation per se is the core consideration in determining the adverse impact on the investigation.[77] In my view, this core criterion should underlie the entire victim participation regime.

The Statute, in particular Article 68(3) and the rules provide a framework in which any assertion either by the Prosecutor or by defence tending to show such adverse impact can be tested. In view of the express right of victims in Article 68(3) and other provisions, any argument that mere participation of victims is improper is made in futility. The OTP's position betrays its view that any concession to victims' rights to participate operates as an encumbrance to its prosecutorial function. Yet, there are sufficient safeguards in the Statute and RPE in terms of which the PTC is entitled, as the PTC itself has confirmed, to take measures when victims participate to preserve the integrity of the proceedings in terms of the Statute[78] and to ensure that

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73 Ibid, para 50.
74 *Uganda Situation Participation Decision* (n 53 above).
75 *DRC Situation Participation Decision* (n 72 above) para 56.
76 Ibid, para 57.
77 Ibid, para 58.
78 See arts 56 and 57 Rome Statute; Ibid para 60.

victims' participation 'is not prejudicial to or inconsistent with the rights of the defence.[79]

Article 68(3) does not specify 'victims' interests' that have to be affected for one to exercise his or her or one's right to participate. Neither does it offer any guidance on how these may be identified. This lack of clarity may be understandable, in view of the fact that a particular case, let alone a situation, will have many victims with varying interests. Moreover, the interest of particular victims vying for recognition and or protection may vary at different stages of the proceedings. The Court's seminal decision is, perhaps for these reasons, vague. The Court only ventured to suggest *why* victims' interests would be affected and left open for deduction which interests these are:

> The personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators and to solicit reparations.[80]

While a victim may assist in clarifying facts, and hence is potentially a witness later on, serving as witness is separate from the ICC victims' rights regime. There is some doubt that it serving as witness can be considered 'an interest' of victims. Haslam suggests that the said interests must be a 'judicially recognizable' interest.[81] Though not specifically referred to as such, the statement discloses two examples 'victims' interests. First, it is generally an interest of victims to have perpetrators of crimes punished. Secondly, whenever a victim satisfies requirements to seek reparations, his/her interest is affected.[82]

The approach taken by the Court cannot be heavily criticized on this account. The decision should be considered as a 'framework' ruling on the issue of participation. The Court rightly recognised that a multiplicity of interests could be in issue and left the door open for a case-by-case determination of requisite victim's interests:

> This general assessment … which relates to the whole of the proceedings before it, does not rule out the possibility of a more specific assessment of victims' personal interests based on the

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79 *DRC Situation Participation Decision* (n 72 above) 70.

80 Ibid, para 63.

81 See E Haslam 'Victim participation at the International Criminal Court: A triumph of hope over experience?' in D MacGoldrick, P Row & E Donnely (eds) *The Permanent International Criminal Court: Legal and Policy Issues*'315-334 326.

82 Art 68(3) Rome Statute; *DRC Participation Decision* (n 72 above) para 62.

> applications filed by victims in accordance with the modalities of the participation of victims in the proceedings …[83]

The ICC Appeals Chamber has had occasion to indirectly comment on this issue in its first decision on victim participation related to PTC I confirmation decision. In a separate opinion attached to that decision of the Appeals Chamber, Judge Song elaborated two general interests of victims: to obtain reparations and to receive justice.[84] Judge Song considered that victims might have interests in procedural questions, as they are important for the outcome of substantive questions.[85] In the same proceedings, victims submitted that their interests in participating in the proceedings are diverse, and include obtaining reparations, expressing their views and concerns, verifying facts, protecting their dignity during the hearings and securing recognition as victims.[86] The Appeals Chamber agreed that victims have multiple interests to protect, but that these must be linked to evidence brought to substantiate specific charges against the accused.[87] Some, if not all of these interests would be encompassed in Judge Song's formulation of 'justice' above.

In our discussion below of specific modalities of participation at various stages, we attempt to identify victims' interests that may be at issue in particular proceedings. It is noteworthy that while the criterion of 'victim's interests' is not included in other provisions (other than Article 68(3)) that confer specific participatory rights to victims, it is an additional requirement that has to be met in those specific instances when the right is claimed.[88]

Rule 85 ICC RPE sheds some light on this issue by requiring that the personal interests claimed by a victim must be causally connected with the specific ICC crimes charged, the commission of which occasioned them harm.[89] The PTC has emphasised

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83 See arts 15 (3) and 19 (3) Rome Statute; *DRC Participation Decision, para* 64.

84 Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decisions of the Appeals Chamber" of 2 February 2007, 1CC-01/04-01/06-925. Separate Opinion of Judge Song, para 10.

85 1CC-01/04-01/06-925, Separate Opinion of Judge Song, para 19.

86 Appeals Chamber Decision (n 84 above) para 39.

87 Ibid, para 97.

88 In *DRC Situation Participation Decision* (n 72 above) para 62.

89 Art 85 ICC RPE, a victim is a natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the Court. Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes. See *Uganda Situation Participation Decision*, para 105.

this requirement.[90] Causal connection is a primary condition which must be met before the actual interests claimed by a victim are examined. An individual (or group) would have to show that he or she is indeed a victim of a particular crime charged, and as a result they have a specific interest they would like to assert and to have protected. This will for instance be that they would like to furnish evidence that would lead to punishment of the perpetrator and or that they seek reparations as a result thereof.

The PTC I rightly distinguished two categories of victims: 'victims of a situation', these being victims of crimes from a general context, usually a country under investigation, and 'victims of a case', being the victims allowed by the Court to participate in particular hearings after the issuance of a warrant.[91] The causal requirement means that only those in the latter category have a right to participate. means that out of the large pool of victims from any given situation, say the DRC with which the ICC is currently seized, only a few may participate in the investigation itself and perhaps even fewer in the eventual case resulting from such investigation. In essence, the right of victims to participate in the investigation is merely a 'potential' one until the PTC makes a determination.[92]

Before examining the specific forms participation of victims in pre-trial proceedings may take, the role of the PTC is first considered.

5.4.2 Role of PTC in Pre-Trial Proceedings

The PTC has a central role in the victim participation scheme. Given the novelty of the right to participate in international criminal justice, the dogged resistance from the Prosecutor who has made and will continue to make attempts to limit its scope as much as possible and the generally adversarial nature of the ICC among other factors, it is impossible to consider victims' participatory rights to any appreciable extent in isolation of the PTC's mandate.

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90 See *Situation in the Democratic Republic of the Congo*, *Prosecutor v Thomas Lubanga Dyilo*, paras 9 & 10 of Prosecution's Observations on the Applications for Participation of Applicants a/0001/06 to a/0003/06 (ICC-01/04-01/06) that echo these views.

91 See *DRC Situation Participation Decision* (n 72 above) para 65-66; See OP Policy paper (n 39 above) 2.

92 Donat-Cattin (n 9 above) 873.

One commentator notes with respect to the PTC's role at the investigation stage, which is relevant to the other stages of the proceedings, that 'the question of victims' participation in the investigation stage is intrinsically intertwined with the powers of the Pre-Trial Chamber vis-à-vis those of the Prosecutor'.[93] This speaks to the PTC's control function, which manifests in a number of ways at various stages of the proceedings.[94] In the context of victims rights, the PTC's control function converges with its other function – that of ensuring a fair and expeditious trial.

The PTC's general mandate in this regard is codified in Article 68(3), which provides for conditional participation by victims. Two main criteria, which will be subject to interpretation every time victims make an application to participate are: determining the appropriate stage in the proceedings, as well as the modes of victim participation; and determining whether such participation may occasion prejudice to accused persons. Donat-Cattin, observes with respect to the PTC's exercise of control that 'such a form of control... shall orient the decision towards the appropriate phase in which victims (or representatives) are to intervene, without denying the victims the exercise of their right'.[95]

Donat-Cattin's remark, or more aptly counsel, recognizes the centrality of the PTC to the realization of this right by victims. It is perfectly likely that the Prosecutor would not want to be 'encumbered' by victims' concerns in the performance of his fairly straightforward mandate, which requires him or her to establish the guilt or otherwise of those charged as efficiently as possible. By citing the OTP's initial stance on this issue, which has tried to limit as much as possible the scope of victims' right to participate through its arguments in initial applications at the PTCs, this argument can be sustained without fear of contradiction.[96]

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93 J de Hemptinne & F Rindi 'ICC Pre-Trial Chamber allows victims to participate in the investigation stage of proceedings' *J of international Criminal Justice* 4 (2006) 342-350 at 349

94 See with respect to investigations in proceedings commenced *proprio motu* art 15(3) Rome Statute and investigations relating to proceedings arising from a referral – art 53(3)(a). The varied extend of the PTC's powers in the two instances is considered below under our discussion relating to the first phase of ICC proceedings.

95 Donat-Cattin (n 9 above) 880.

96 See Situation in the Democratic Republic of the Congo, In the case of the *Prosecutor v Thomas Lubanga Dyilo,* Prosecution's Observations on the Applications for Participation of Applicants a/0001/06 to a/0003/06, 6 June 2006 Doc. No ICC-01/04-01/06; *DRC Situation Participation Decision* 17 Jan 2006.

The PTC has a major role to play in determining whether charges should be proffered against a particular suspect, informed by the criterion of 'gravity'.[97] While the PTC's finding on this question may not necessarily be motivated by its desire for victims of alleged crimes to participate at a later stage, the nature of suspected actions, number of victims and nature of victimization would certainly feature in the determination of 'gravity' of alleged crimes. In any case, the PTC may allow victims' presentations during the process to furnish evidence in favour of a finding that crimes proposed by the Prosecutor are serious enough to warrant further consideration by the Court.[98]

In the relationship between the Prosecutor and PTC lies an open space for a potentially crippling struggle for control, which may undermine victims' right to participate at particular stages especially where it is optional. In considering initial decisions so far rendered by the PTC (in particular PTC I), commentators see a desire by the Court to assert itself.[99] With respect to victims' role at the investigation stage, in a comment that may equally apply to the rest of the proceedings, De Hemptinne and Rindi consider the manner in which PTC will interpret what appear to be its limited powers as the most decisive factor in shaping the form and scope of victim participation.[100] While the Court seems to want to assert a greater role in investigations, as shown in the ICC Regulations in terms of which it can request the Prosecutor 'to provide specific or additional information or documents in his or her possession',[101] there is still ambiguity regarding the actual scope of PTC's investigative powers which will in the end determine 'appropriate levels of victims' participation in proceedings.'[102]

5.4.3 Forms of Participation at the Investigation Stage

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97 Art 17 (b) Rome Statute.

98 Article 15 (3) Rome Statute supports this interpretation.

99 See generally J de Hemptinne & F Rindi (n 93 above) 342-350.

100 Ibid 349.

101 The Pre-Trial Chamber may request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof, that the Pre-Trial Chamber considers necessary in order to exercise the functions and responsibilities set forth in article 53, paragraph 3 (b), article 56, paragraph 3 (a), and article 57, paragraph 3 (c).

102 Hemptinne & Rindi (n 93 above) 350.

The Rome Statute does not envisage victim-initiated prosecutions.[103] The prosecutorial function in general and the decision to commence investigations and to proffer charges in particular lie entirely with the Prosecutor.[104] Although it may appear that for this reason victims are entirely excluded from the investigation stage of the proceedings, this is not the case. As our ensuing discussion shows, a number of provisions formally recognize their input in specific instances: various provisions require that victim's views be taken into account by the appropriate officials responsible for the decisions; and the Statute and ICC RPE secure the right of victims to be informed of the proceedings.[105]

A discussion of the modalities of participation in terms of various provisions follows. First, Article 68(3), which enacts the right of victims to be heard, imposes an obligation on the Court vis-à-vis persons recognised as victims in terms of which they are authorised, irrespective of 'any specific proceedings being conducted in the framework of such an investigation, to be heard by the Chamber in order to present their views and concerns and to file documents pertaining … [to an] investigation of … [a] situation'.[106] Although not expressly commented on by PTC I, it is evident that Article 68(3) entails both substantive and procedural elements of the right to participation. It affords individuals standing to claim their status as victims and to assert their recognised rights.

5.4.3.1 Measures Protective of Persons and Evidence

The first instance in which victims have a specific right to participate relates to the PTC's powers, in particular relating to when the PTC adopts measures in relation to persons and evidence : the protection and privacy of witnesses and victims; preservation of evidence; protection of arrested persons or those who have appeared in

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103 See Aldana-Pindell, 'In vindication of justiciable victims' right to truth and justice for state-sponsored crimes' rights in the criminal process to curtail impunity for state-sponsored crimes' 35 *Vanderbilt J Transnat'l Law* 1399-1501 1429 noting that 'the Rome Statute and ICC RPE do not grant victims complete autonomy to make decisions regarding either the initiation of criminal investigation or how the investigation should proceed before trial'; Mekjian & Varughese (n 11 above) 19.

104 Art 42 Rome Statute.

105 R Aldana-Pindell (n 103 above) 1429; Mekjian & Varughese (n 11 above) 19.

106 Although made with respect to the situation in the DRC, the PTC I view applies to any situation or case in general. See *DRC Participation Decision* 17th Jan 2006 para 200-237.

response to summons; and the protection of national security information.[107] Equally, a unique investigative opportunity may arise (which requires quick action to secure evidence) necessitating adoption of measures considered essential for the defence at trial in case of such unique investigatory opportunity.[108] It appears that in these cases, only victims known to the OTP and Registry will be afforded an opportunity to express themselves in such proceedings.

5.4.3.2 Specific Proceedings Under Art 68(3)

As a framework provision on participation, Article 68(3) seems sufficiently broad to found all sorts of applications by the Prosecutor, defence or victims and their representatives on this specific question. PTC I has confirmed this view, noting that situations when specific proceedings are initiated by the Prosecutor or Defence Counsel and other requests by victims in terms of this article present an open opportunity for victims to voice their concerns.[109] Procedural issues relating to such applications by victims are dealt with in the RPE.[110] In the PTC I's view applications by victims will be decided on a case-by-case basis to determine the impact on their (the victims') interests.[111] In all instances, the Court retains the power to determine the possibility and actual form victim participation will take.[112]

5.4.3.3 Authorisation of an Investigation Proprio Motu by Prosecutor

Article 15 of the Statute, which governs the Prosecutor's proprio motu investigative powers in general, is the first instance in which victims are vested with procedural rights outside the context of a case.[113] Article 15(3) Rome Statute, which falls under the general rubric of prosecutor-initiated investigations (as opposed to investigations

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107 In terms of art 57(3) (c) Rome Statute; art 54(3) (f) relating to the duties of the Prosecutor in this regard.

108 Art 56(3)a Rome Statute.

109 *DRC Situation Participation Decision* (n 72 above) para 74.

110 Rule 89 ICC RPE.

111 *DRC Situation Participation Decision* (n 72 above) para 75.

112 See J Hemptinne & F Rindi (n 93 above) 346 noting, in response that victims' rights at this stage are only potential, that the PTC 'wishes exercise strict control over the actual implementation of the victims' right of participation'.

113 *Uganda Situation Participation Decision*, para 93.

arising from referrals either from the UN Security Council or a state party to the ICC),[114] provides the possibility of victims participating before the full investigation phase of the proceedings when the Prosecutor seeks authority to commence such investigations:

> If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.[115]

In terms of this provision, once the Prosecutor concludes that there is reasonable basis to commence an investigation, victims – those who have had some prior contact with the Court and are known either to the Prosecutor or the Victims and Witnesses Unit[116] - have the first opportunity to participate by making written representation to the PTC.[117] This means that victims can participate from the start. Their participation may have at least two objectives – to support an argument for or against commencement of an investigation and eventually a case; and 2) to begin to assert their interests early in the proceedings. The Court noted in the *DRC Case* that victims' interests are affected since this is the crucial stage when perpetrators of crimes at issue are identified.[118] In the *Uganda Case*, PTC II was of the view that victims' interests are affected as their views may help establish the factual and legal elements for the decision to authorise the investigations.[119]

The permissive 'may' rather than a peremptory 'shall' used in Article 15 (3) speaks to the non-compulsory nature of this entitlement – it signifies that relevant victims merely have the possibility of intervening as prescribed in pre-trial procedure.[120] The facultative nature of this right diminishes substantially the possibility of victims asserting any influence on the proceedings at this stage. Essentially, this

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114 In this case, victims are only involved when the referring party – UNSC or the state seeks confirmation.

115 *Uganda decision* para 90 on victim's role under art 15 Rome Statute.

116 Rule 50 (1) ICC RPE. Prosecutor has an obligation to inform them (or their representatives) unless such action would pose a danger to the integrity of investigations or well being of victims; Uganda Participation Decision (n 53 above) para 91.

117 Rule 50 (3) ICC RPE; Regulation 50(1), ICC Regulations; Uganda Participation Decision para 91 reiterating that the Prosecutor has an obligation to inform known victims before commencing these proceedings before PTC.

118 *DRC Situation Participation Decision* (n 72 above) para 72.

119 *Uganda Situation participation Decision* (n 53 above above) para 90.

120 Donat-Cattin (n 9 above) and GJ Meksjian & MC Varughese (n 11 above) both use the term 'faculty'.

means that victims may be faced with the prospect of being spectators – and being 'appended' to the process at a later stage. The impact of victims on the process, in view of the broad restorative justice goal of the ICC, must be asserted from the start, with concessions to the efficiency of Prosecutor's functions. This logic was central to the victim rights movement that articulated the necessity of expanding victim influence from the end of the process (sentencing) to all stages of the proceedings. In the current arrangement, where the prosecutor is merely exhorted to consider victims, they risk becoming 'hostage' to the Prosecutor's functions.

While victims may not have actual control over how an investigation should proceed, or if it should be initiated at all, and what charges should be proffered – these being in the exclusive province of the Prosecutor – the imprint of victims' concerns on these decisions other than through direct input can be achieved through the conduct and standards expected of the Prosecutor when initiating an investigation in terms of Article 53 and 54 Statute.[121]

5.4.3.4 Confirmation: To Investigate or Not?

When deciding whether to initiate an investigation, the prosecutor is obliged to consider – in addition to the admissibility of the relevant ICC crime alleged[122] – the gravity of the crime and the interests of victims.[123] While the rules do not clarify the two terms – 'gravity' and 'interests of victims' – the extent of the effect the alleged crime has had on the victim(s) is one of the elements to be considered in assessing 'gravity' of the crime.

When an ICC crime has been committed and the admissibility requirement is met but the Prosecutor decides *not* to continue with an investigation on grounds that it would not be 'in the interests of justice' to do so, s/he is obligated to inform the PTC.[124] In the same vein, after investigation, if he or she decides not to prosecute on the same grounds – gravity of crime and interest of justice – this decision must be

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121 Arts 53 and 54 govern investigations generally irrespective of how the matter came to the ICC through either of three trigger mechanisms.

122 In terms of art 53(1) (a) and (b) Rome Statute, there should be reasonable basis that an ICC crime has been committed, and that admissibility requirements in terms of art 17 Rome Statute have been met.

123 See wording and general tenor of art 53, in particular art 53 (1) (c) Rome Statute.

124 Art 53(1)(c) Rome Statute.

communicated to the PTC. In both instances, the PTC is empowered to bring its powers of review to bear, and may force the Prosecutor to reconsider and reopen investigation (or prosecution).[125]

The confirmation proceeding may be initiated by the state that made the referral or the Security Council[126] or by the PTC on its own initiative.[127] An obvious handicap to victims is the fact that it appears that they do not have a similar right. Yet, they often will have, from a victim's standpoint, more important interests to protect than states. It could, however, be argued that victims' interests are partly covered since PTC's decision shall be communicated to all parties involved in the review.[128]

The endorsement or otherwise by the PTC of the Prosecutor's decision not to investigate or proceed with an investigation is necessarily a balancing one which involves a consideration of, among others, victims' concerns. The PTC would have to consider whether in the particular circumstances victims are better served by restraint from prosecution rather than by insisting that the prosecutor should investigate and eventually charge and prosecute suspects. The important issue here would be how the Court interprets 'interests of justice' in any particular situation. One factor that may confront the Court and which will have a bearing on this finding include, apart from the suspects' rights, is whether there are other ongoing processes, usually at the national level - political or otherwise – aimed at addressing to one extent or another victims concerns. Such alternatives, considered further below, will include subsequent peace and transitional justice mechanisms – TRCs and the like – that incorporate accountability for crimes under investigation by the ICC. The centrality of the PTC in the decision once again highlights the salient point that the role afforded to victims will, irrespective of what appear in the Statute and Rules as peremptory roles for victims depend on how the PTC exercises its review and investigative mandates.

5.4.3.5 Charging, Confirmation of Charges and Prosecutorial Discretion

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125 Rule 110 (1) and (2) ICC RPE empowers the PTC to request the Prosecutor to reconsider the decision not to prosecute on the grounds of gravity of the crime and interest of justice.

126 Art 53(3) (a) Rome Statute.

127 Art 53(3)(a) Rome Statute.

128 Rule 110(1) ICC ICC RPE. In terms of Rule 110(2) ICC ICC RPE, the decision reviewing the Prosecutor's position requires a majority of PTC judges concurring.

Once the prosecutor has gathered evidence in respect of specific crimes, he or she is expected to bring charges against identified individuals. The Statute confirms the Prosecutor's overall authority over prosecutions, in particular charging of suspects.[129] Article 61 relating to confirmation of charges does not provide for participation by victims or their counsel, nor does it expressly refer to either. However, PTC I, by reading a multiplicity of relevant provisions, allowed victims to participate through counsel in *Lubanga Confirmation hearing*.[130] This is likely to be a standard practice in future. In terms of modes of participation, Pre-Trial Chamber I ordered that victims; may make opening and closing statements;[131] may, through legal representative participate at public hearings on a case-by-case basis; and would not be permitted to add any point of fact or any evidence and may only be allowed to question or propose questions for witnesses subject to conditions.[132] As discussed later on, the Appeals Chamber has taken a different view on the possibility of victims contributing in terms of fact and bringing evidence.[133] Although victims may participate in these forms at this stage, victims do not seem to have a real chance of shaping the charge sheet. Proceedings in the *Lubanga Case* seem to support this view. In this case, in which Thomas Lubanga Dylo was charged with enlisting or conscripting children under fifteen years or using them actively in hostilities in the context of an internal armed conflict, victims' complaints that he should have been charged with more crimes went unheeded.[134]

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129 Art 61 Rome Statute.

130 Arts 57(3) (c), 61(5), 61(7), 67 and 68(3) Rome Statute and Rules 87, 88, 89(1), 121 and 122 ICC RPE. See *Situation in the Democratic Republic of Congo*, *The Prosecutor v Thomas Lubanga Dylo,* Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006. Victims' counsel were able to make opening and closing statements as well as to file written observations following the confirmation hearing.

131 Ibid, page 6-7.

132 Having initially barred participating victims from questioning the sole prosecution witness on account of their anonymity status, PTC I later allowed them to propose a question. See ICC-01/04-01/06-T-39-ENG. pages 95 and 141.

133 Infra, note 201.

134 See Document Containing the Charges, filed on 26 August 2006; charges in terms of Arts 8(2) (B) (XXVI) and 8(2)(E)(VII) Rome Statute; *Situation in the Democratic Republic of Congo*, *The Prosecutor v Thomas Lubanga Dylo*, *Decision on Confirmation of Charges* (*Lubanga Confirmation Decision*), para 9.

By contrast, the PTC has wide powers to influence the Prosecutor's decision.[135] In the *Lubanga Case*, the PTC reminded the OTP that the charge sheet should have included another charge relating to the same crime but committed in an international armed conflict. The Court provided no other reason for its view than that the Rome Statute provides the same protection in relation to conscription and use of child soldiers.[136] In our view, there are at least two grounds upon which the PTC can have an influence on what crimes the Prosecutor should proffer against an accused: in general through the confirmation of charges proceedings or even earlier – coherence of jurisprudence and 'sufficient gravity test.[137] If PTC contemplated these, it did not expressly articulate them. After the sweeping statement above regarding similar protection, the PTC I appeared to base its decision solely on a factual analysis of the situation at all material times tending to show the co-existence of internal and international armed conflicts.[138]

The first ground we suggest seems to be the imperative that the Court needs to develop coherent jurisprudence with respect to particular ICC crimes. Although the PTC in *Lubanga* did not specifically mention this, it seems to be the main factor underlying its refusal to adjourn proceedings in terms of Article 61(7) Rome Statute so that the charges could be amended.[139] The Rome Statute seems to needlessly create a dichotomy between comparatively similar crimes on the basis only of the context in which they were committed. The only justification for such dichotomy could be that international humanitarian law instruments have maintained the dichotomy between the two types of conflicts and that this must necessarily be reflected in the Rome Statute, which draws the war crimes provisions from both contexts.

In the *Lubanga Case*, it did not make sense that Lubanga was only charged with the war crime of conscripting or using children under fifteen years in hostilities in

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135 Art 61(7) Rome Statute confers upon the PTC powers to: confirm charges; decline to confirm charges where there is insufficient evidence; adjourn and request for more evidence; and to ask the Prosecutor to amend charges to reflect those provable by available evidence.

136 *Lubanga Confirmation Decision*, para 204 PTC I agreed with counsel for victim a/0001/06 that the Rome Statute provided the same protection with respect to the crime charged, whether it was committed in an internal or international conflict.

137 Art 61 Rome Statute.

138 *Lubanga Confirmation Decision*, para 71-.

139 Art 61(7) Rome Statute confers upon the PTC powers to: confirm charges; decline to confirm charges where there is insufficient evidence; adjourn and request for more evidence; and to ask the Prosecutor to amend charges to reflect those provable by available evidence.

an internal armed conflict, yet the conflict at all material times demonstrated elements of an international armed conflict as well. While this outcome of the *Lubanga Confirmation Decision* may indicate a contestation of turf between the Office of the Prosecutor and the Pre-trial Chamber,[140] the PTC is justified in its move which seems to be motivated by the need for coherence in the Court's jurisprudence.

The second ground on which the PTC can influence the Prosecutor's decision derives from the 'sufficient gravity test' provided for under admissibility requirements in terms of which the Court can refuse to admit a matter on the basis that crimes alleged are not of sufficient gravity.[141] While the test may operate preponderantly to lead to the exclusion of charges on grounds that they are not sufficiently grave to warrant attention from the Court, it is perfectly possible that the Court, on the basis of available evidence, will ask the Prosecutor to amend the charge sheet to include or augment the charge to a graver crime. The PTC's powers under Article 61(7)(c)(ii) support this view.[142]

Although complaints from victims that there was evidence to support graver crimes committed in the conflict in the DRC by the accused were rebuffed by the Prosecutor and were not canvassed by the PTC, the ruling the *Lubanga Confirmation Case* seems to support the view that the Court is willing to interfere with prosecutorial discretion in relation to charging.[143] As such, there is room for it to act to advance victims' interests in this sphere. However, the Prosecutor seems to have chosen, as he is entitled to, to proffer charges he could easily prove against Lubanga. There is doubt however, in view of victims' rights in the ICC, whether the inclination by the OTP not to entertain concerns from victims when framing charges is tenable and sustainable under the ICC.

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140 OP says PTC overreached its power under art 61(7) Rome Statute.

141 Art 17(1) (d) Rome Statute.

142 7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:
…
(c) Adjourn the hearing and request the Prosecutor to consider:
…
(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

143 It is notable that art 61 seems to exclude victims entirely from the process. The Prosecutor, the accused, and PTC are the only ones entitled to participate in confirmation proceedings. As such it is the PTC to reflect victims' concerns in exercising its powers under art 61(7) of the Statute.

5.4.4 International Tribunals

The ad hoc international criminal tribunals offer no relevant experience as regards the participation of victims at the investigation stage of criminal proceedings as no comparable provisions exists in the statutes or RPE of the tribunals. By contrast, there is a burgeoning body of jurisprudence from international human rights tribunals relating to a number of aspects on victim participation, although these views generally lack in specificity and are not systematic. This is understandable since these bodies are not criminal tribunals thus their comments can only be general in character.

On the status and role of victims in criminal proceedings, PTC I cited with approval the European Court of Human Rights (European Court) decision affirming victims' 'independent voice and role' in *Berger v France*[144] which confirmed its earlier decisions that victims participating in criminal proceedings cannot be regarded as either the opponent or necessarily the ally of the prosecution, their roles and objectives being clearly different.[145] The European Court has interpreted Article 6(1) of the European Convention on the right to a fair hearing to include the right of victims to participate from the investigation stage of proceedings. In the European Court view, the right to participate from the investigation stage is of particular importance where the outcome of the criminal proceedings is crucial to obtaining reparations.[146]

The Inter-American Court has taken the same view in its interpretation of Article 8(1) of the American Convention.[147] It has held consistently after *Blake v*

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144 ECHR *Berger v France*, 'Judgment' 3 December 2002, Application No 48221/99, para. 38; European Court of Human Rights, Grand Chamber, *Perez v France*, "Judgment", 12 February 2004, Application No. 47287/99, para. 68.

145 *DRC Participation Decision* (n 72 above) para 51.

146 See ECHR decisions in *Moreira de Azevedo v Portugal*, 'Judgment', 23 October 1990, Series A No. 189; *Tomasi v France*, 'Judgment', 27 August 1992, Series A No.241-A; *Acquaviva v France*, 'Judgment', 21 November 1995, Series A No.333-A; *Selmouni v France*, 'Judgment', 28 July 1999, Application No.25803/94; *Calvelli and Ciglio v Italy*, 'Judgment', 17 January 2002,Application No. 32967/96; *Perez v France*, 'Judgment', 12February 2004, Application No. 47287/99; *Antunes Rocha v Portugal*, 'Judgment', 31 May 2005, Application No. 64330/01.

147 Provides that: Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

Guatemala[148] that victims of human rights violations or their relatives are entitled to take steps during criminal proceedings, from the investigation stage and prior to confirmation of the charges for a number of reasons, to have the facts clarified and the perpetrators prosecuted, and to request reparations for the harm suffered.[149]

5.4.5 National Experiences

One finds contrasting experiences in civil law and common law countries in general relating to the involvement by the victim at the investigation stage of criminal proceedings. In the contemporary common law tradition, the victim 'remains largely a bystander to the criminal justice system'.[150] Although relied upon as witnesses to prove the commission of the crime and its effects victims do not exert much influence on the course of investigation, prosecution, trial or sentence.[151] As outlined in chapter three of this thesis, national experience does not disclose a separate role for victims other than 'assisting with investigations' with little or with an insignificant in the actual direction of proceedings, unless they are mandated to conduct a private prosecution. It was noted in the last chapter that only a few common law countries allow for private prosecutions. It is precisely for these reasons that the victims' rights movement embraced restorative justice to give centrality to victims in their interactions with the offender. It emerged also that civil law countries have long recognised in varying degrees the right of victims to participate in criminal proceedings in general and to an extent in the investigations. In the case of partie civile procedure, victims have the right to initiate investigations by *constitution de partie civile* and to be informed of proceedings subject to the usual confidentiality requirements. Since the procedure in these systems is not as elaborate as that in the ICC, victims are accorded a lesser role at this stage, at which the investigating judge exercises overall control and is responsible for the general conduct of the investigation.

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148 *Blake v Guatemala* 'Judgment', 24 January 1998, Series C No 36 para 97.

149 See also *Villagrán Morales*, Case No. 63, Inter-Am. C.H.R., ser. C, P 227; R. Aldana-Pindell, 'An emerging universality of justiciable victims' rights in the criminal process to curtail impunity for state-sponsored crimes', (2004) 26:3 *Human Rights Q*. 605.

150 M Wolfgang, "Making the Criminal Justice System Accountable" (1972) *Crime and Delinquency*, January, 15 at 18; R Refshauge 'Victims rights and the role of the prosecutor' Criminal Reform Conference Paper, July 2006.

151 Ibid, 10.

5.5 TRIAL PHASE

5.5.1 Victims and the Trial: What Expectations?

The trial phase represents the most visible stage of participation for victims, not only in their traditional role as witnesses on both sides, but also as independent participants with special interests to articulate before the Court. Some may question what victims can expect or achieve through such participation in an adversarial environment where the Prosecutor seems to be the main player. In these circumstances – as is the case in criminal procedures in many national criminal justice systems where victims play no independent role - the prosecutor is ordinarily expected to represent and to protect the interests of third parties including victims. Such a claim fails to recognise, irrespective of duties imposed by Statute, that the Prosecutor's and victims' interests do not always converge and that the Prosecutor may often be driven by a singular objective in furtherance of his/her law enforcement function – establishing guilt (or lack of it) as efficiently as possible, a fact that may lead to ignoring issues central to victim's claims and concerns. The cathartic possibilities arising from a victim being heard aside, (for those who get the chance) an independent voice is necessary. The Prosecutor's opposition to what may turn out as benign effects on his work and to the rights of accused persons, and to what is in any case subject to strict judicial controls, attests to this necessity.[152]

5.5.2 Trial and Victims in National Systems

In national criminal justice systems, the scope of victim participatory rights at trial varies significantly from one jurisdiction to another but may be said to fall into four broad categories. In the first group of states, which are very few, participating victims exercise full prosecutorial rights.[153] While granting victims such a right gives them an

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[152] In the *DRC Situation Participation Decision* (n 72 above), the Court has, while asserting these rights, affirmed its intention to subject their exercise in specific cases to scrutiny and controls

[153] Art 101 Spanish Code of Criminal Procedure; See generally United Nations Office for Drug Control and Crime Prevention, Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (*UN*

opportunity to express their concerns and views throughout the proceedings, the need for professional prosecution has had the result that most prosecutorial work is left to trained prosecutors.[154] In the second group of states, part (subsidiary) prosecutorial powers are accorded to victims, enabling them to perform functions related to prosecutorial work such as submit evidence, suggest questions to be posed to witnesses and the defendant, and to comment on statements and evidence submitted in the proceedings.[155] In the third group of states, victims have an even lesser role. Participation by victims is limited to Victim Impact Statements or Victim statements of opinion, largely aimed at influencing sentencing.[156] The majority of jurisdictions are in the last group, where victims play no part beyond their role of witness.[157] It is clear that only a handful of states allow any meaningful role for victims in trial proceedings.

As was discussed at some length in a preceding chapter, this state of affairs may be explained by concerns that victim participation is disruptive, burdensome, and potentially prejudicial to defendants through delays occasioned by the increased number of actors. By granting victims rights to participate at trial, the Rome Statute seems to dispel these claims. However, safeguards in the Statute, in particular Article 68(3) and other relevant provisions, endorse the idea that the claims by those opposed to any extended role for victims of crime are not entirely without merit. Hence the close controls and active role for the Pre-Trial and Trial Chambers of the ICC discussed below.

5.5.3 Victims in the ICC Trial Framework

Participation by victims at the trial stage will certainly be the most public and most visible. Whether from a victim's standpoint their participation at this stage will have a

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Handbook on Victims) (1999) 39; C Stahn, Olasolo H and Gibson K 'Participation of victims in pre-trial proceedings' *J of International Criminal Justice* 4 (2006), 219-238 at 220.

154 *UN Handbook on Justice for Victims* 39.

155 See generally United Nations Office for Drug Control and Crime Prevention, Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (New York, 1999) 39; C Stahn et al (n 153 above) 220.

156 Victim impact statements are in use in the US, Canada, New Zealand, Israel and Australia.

157 See for instance ss 150 and 151 Criminal Procedure Act 51 1977 South Africa, which provides for roles for the prosecutor and accused only; Criminal Procedure Code (Chapter 75) Laws of Kenya; Criminal Procedure Code Act 30 of Ghana; Criminal Procedure (Scotland) Act 1995.

greater impact in asserting their rights than at the preliminary stage is a different issue altogether. We have previously considered how effective participation at the pre-trial stage not only sets the tone for the trial stage but also is imperative for the effective exercise of victims' rights in the entire ICC process. Whilst at the trial stage of the proceedings victims are granted an absolute right to participate by themselves or through their legal representatives, the drafters seem to have favoured participation through counsel. How this reality somewhat erodes an individual victim's right to participate but at the same time enhances the quality and effectiveness of input in the process has been canvassed above.

Broadly, the general participation framework applicable to the pre-trial stage is relevant at this stage of proceedings – Article 68(3) Rome Statute, Rule 89 ICC RPE and other relevant rules of procedure. Specific provisions of the Statute and rules relevant to particular modes of participation and other elements at the trial stage are outlined below. Before discussing specific modes of participation by victims at trial, proceedings when guilt is admitted are considered first.

5.5.4 Admission of Guilt and Plea Agreements

5.5.4.1 Plea Agreements at ICTR and ICTY

The debate on the right of victims to participate in criminal proceedings in general and at trial in particular touches another important practice – plea agreements. These are in use in many national systems and at the ad hoc criminal tribunals. Though practised for many years in some domestic criminal justice systems, plea agreements – which involve negotiations relating to crimes to be charged and possible sentences to be imposed – are of recent advent in international criminal justice. Plea agreements have entered the practice of the two international tribunals – ICTR and ICTY – in the last few years, necessitated by heavy case loads, the need to address complexity of crimes and dwindling resources.[158] The proportion of cases concluded through plea

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[158] See A Tieger & M Shin (n 66 above) 666-679. The first plea agreement in the history of the ICTY was the negotiated guilty plea in *Prosecutor v Erdemovic*, Case No : IT-96-22-T, (1997)

agreements to that of the total cases finalised by both tribunals suggest that this practice is now a permanent feature in the practice of both tribunals.[159]

As practised by the UN tribunals and national systems, plea agreements raise a number of concerns from a victim's perspective including: the right and opportunity of victims to be heard; the impact on the historical record; the dismissal of charges; and the reduction of sentences in the interests of increased efficiency.[160] The trial stage may be considered as the opportune moment for victims to be heard. Tieger and Shin opine that the absence of a trial may be seen as 'muting and disempowering victims.'[161] Since one objective of the tribunal is to establish truth and to create, to the extent possible, a full historical record, an abridged version of the trial proceedings certainly undercuts the related right of victims – that to truth. Greater involvement by the judges in the process may perhaps ensure a balance favourable to victims.

At the tribunals, prosecutors negotiate plea agreements without the involvement of victims or the judges, although sentencing is at the discretion of the Trial Chamber.[162] Following concerns that the practice of non-disclosure by the prosecutor of the contents of plea agreements had serious implications, a new rule was added to the ICTY's RPE providing that a Chamber shall not be bound by a plea agreement and that the Chamber 'shall require the disclosure of the agreement in open session or, on a showing of a good cause, in closed session'.[163] As noted, a good proportion of cases concluded at the tribunals have been achieved by negotiated guilty pleas.[164]

5.5.4.2 Plea Bargaining in National Jurisdictions

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159 Alan Tieger & Milbert Shin (n 66 above) 627.

160 Ibid 667.

161 Ibid 674 argue since trials 'are often viewed as the opportunity for the voice of the victims', the absence of the trial process may be perceived as muting and disempowering victims'.

162 Articles 22 and 23 of the Statute and Rule 101 ICTR ICC RPE.

163 Rule 62*ter* ICTY ICC RPE.

164 GR Watson 'The changing jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' 37:4 *New England R*. 882-883; M Bohlander, 'Plea bargaining before the ICTY' in Richard May et al. (eds) Essays on ICTY procedure and evidence in honour of Gabrielle Kirk McDonald (2001) 151; *Prosecutor v Jelisic*, Case No.: IT-95-10, Judgement, 5 July 2001; *Prosecutor v Todorovic*, Case No.: IT-95-9/1, Sentencing Judgment, 31 July 2001, paras. 7-17; *Prosecutor v Sikirica*, Case No.: IT-95-8, Sentencing Judgement, 13 Nov 2001, paras. 17-39; *Prosecutor v Simic*, Case No.: IT-95-9/2-S, Sentencing Judgement, 17 Oct. 2002, paras. 9-23.

Plea agreements have been widely used for years in most common law jurisdictions.[165] The practice is in general shunned in civil law countries, which adopt an approach focused on the establishment of truth. In civil law countries that have plea bargaining, the practice is of relatively recent advent in criminal procedure.[166] As is the case in most common law countries, the Prosecutor makes most critical decisions in the daily administration of justice including which laws to apply, what charges to proffer and punishments to be meted out.[167] Plea agreements have attracted a fair share of criticism from those who consider them trading justice for efficiency. Plea bargaining seems to be motivated by, and has been endorsed by the Courts in these countries on, largely economic grounds.[168] In the United Kingdom, commentators have criticised this practice, arguing that at the expense of victims, serious charges are dropped by the Crown Prosecution Service (CPS) to avoid the expense of a trial.[169] With seemingly all-powerful prosecutors, plea bargains raise serious rights concerns similar to those discussed in relation to the practice at the ad hoc tribunals both for defendants and victims.[170]

5.5.4.3 Plea Agreements in the ICC: A Possibility?

With respect to the ICC, an interesting situation is presented. In principle, most states did not want plea-bargaining to be introduced in the ICC.[171] In principle, one main consideration seems to have motivated this somewhat hard and even impractical stance taken by states – that due to the seriousness of ICC crimes, a full trial must always ensue once evidence supporting a chargeable crime is available.[172] Related to this, and given the emphasis on victims in the Rome Statute, it may be in the interest of victims to hold a full trial to, among others, establish a full historical record and provide a

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165 B Williams *Working with victims of crime: Policies, politics and practice*s (2000).

165 See generally Victim Support *The Rights* (2000) 108.

166 R Frase **'**Comparative criminal justice as a guide to American law reform: how do the French do it, how can we find out, and why should we care?' (1990) 78 *California LR* 539.

167 Yao Ma 'Prosecutorial discretion and plea bargaining in the United States, France Germany and Italy: A comparative perspective' International Criminal Justice Review 12 2002 22.

168 Ibid, 26.

169 See S Lees *Ruling passions: sexual violence, reputation and the law* (1997).

170 Yao (n 167 above) 26.

171 See F Guariglia, 824.

172 Ibid, 824.

broader basis for reparations claims. One may however argue that avoiding a full trial may indeed be good for victims who may be exposed to further suffering at trial.[173] We can assert with some conviction on the basis of international experience of the unlikely necessity for plea bargains in the ICC. This arises from the fact that the conditions that necessitated plea agreements in the UN tribunals – limited resources and heavy workloads – are unlikely to afflict the ICC. The fact that only four suspects are in the custody of the Court and that only one trial has commenced speaks for itself.

The commitment to the ideal of full trials in every ICC case charged and the fact that plea-bargains are unlikely to be necessary for resources reasons aside, the reality is likely to be different. The Prosecutor may still choose to urge defendants to plead guilty to obviate the need for long and costly trials where overwhelming evidence exits. This is unlikely to happen soon as the ICC is presently concerned with building reputation for itself and may be inclined to snap up any available case to its final conclusion.

However, Article 65(5), which falls under the general rubric 'proceedings on admission of guilt', seems to contradict these intentions:

> Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Irrespective of drafters' intention, this provision could be the basis for plea bargains in the ICC. It is interesting to note that this provision seems to reproduce, almost in its entirety, the amended rule relating to plea agreements at the ICTR and ICTY. Article 65(5) presupposes in our view that the Prosecutor could in practice enter negotiations with accused persons over admission of guilt, charges to be preferred and sentences to be imposed.[174] If by interpretation Article 65(5) will be held to support plea agreements, the formulation of Article 65(5) affirming that such agreements are not binding on the Court would allow the Court to exercise control and to reject such bargains. One reason for doing so could be that the agreement is not in the interests of justice, in this case, in the interest of the rights of victims to participate. Where the

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173 Guariglia, 824 suggests that this may have motivated delegations in Rome opposed to plea agreements.

174 Ibid, 831.

Prosecutor attempts to cut a deal that excludes civil liability arising from crimes charged for instance, the Court would reject on account of victims' right to reparations.

Unlike at the national level and at the ad hoc tribunals before the amendment to the rules, the Prosecutor does not seem to have much to offer to an accused other than to motivate leniency before the Court. There is no scheme of sentencing in the Statute or RPE and sentencing is a prerogative of the Trial Chamber.[175] Whatever approach is taken, the Trial Chamber is in a good position to ensure that victims' interests are factored into the pleas. The Statute and rules support the involvement of victims at all stages subject to established criteria.

5.5.5 Modes of Participation at the Trial Proper

Where guilt is not admitted and the case goes to full trial, victims are afforded possibilities to participate, through their legal representatives who can make oral presentations and interventions at the hearing, through written submissions, or both. It is evident from this that the victims' legal representative is not intended to be a silent observer during proceedings. Rule 89 ICC RPE secures victims' right to make opening and closing statements at trial. This rule, which governs applications for participation generally, which are made to the Registrar and transmitted to the Prosecutor and defence for comment, provides in the relevant part of sub-rule 1:

> […] Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

PTC I has ruled similarly in prior rulings.[176] A basic reading of this rule suggests that the drafters envisaged broad participation. Rule 89, and Rule 91 that governs aspects relating to the manner in which the victims' representative is to participate, are

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175 In terms of art 77 (Part 7) Rome Statute only life imprisonment is prescribed for in case of 'extreme gravity' of crime. Imprisonment terms may in other cases not exceed 30 years; Guariglia, 831.

176 *Situation in the Democratic Republic of the Congo* (*Prosecutor v Thomas Lubanga Dylo*) Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006 at 6 in which PTC confirmed that victims have a right to make opening and closing statements at proceedings in which they are allowed to participate.

underlain by the premise that it is for the Court to decide on the issues.[177] Rule 91(2) ICC RPE entitles victims' representatives to participate:

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

In terms of this rule, the right to take part in hearings, and thus make oral representations seems to be a discretionary one. However, there is a presumption that the victim's representative will always be present and participate in hearings unless the Chamber decides otherwise.[178] When the victim's representative participates in hearings, he or she may intervene by questioning a witness, an expert or the accused.[179] This right will be granted on prior written application to the Chamber, which is entitled to see the questions in advance and may convey them to the Prosecutor and defence if appropriate. The Trial Chamber will regulate the right to question in terms of Rule 91(3)(b) which requires that it take 'into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to Article 68, paragraph 3.' As discussed already, Article 68(3) of the Statute provides for general terms on which victims may participate – personal interests, appropriateness and defendant's rights.

The right of a legal representative to put questions to witnesses, experts, and accused is likely to be a very contentious one. The reason is that this may be damaging to strategies adopted both by the prosecutor and or the defence. Lee records that this fear preoccupied delegates at the Conference.[180] It is perhaps for this reason that despite the representative's right to participate in this way, it was necessary to put the Trial Chamber in close control. Where the Trial Chamber considers that questions prepared by the victims representative must be asked, but that it is inappropriate for the representative to do so, it may for this reason take up the role and 'put the victim's representative's question to the witness, expert or accused on behalf of the victim's

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177 Mekjian & Varughese (n 11 above) 25.
178 Lee (n 25 above) 466; Mekjian & Varughese 27.
179 Rule 91(3)(a) ICC RPE; Ibid, 26.
180 Lee, 467; Ibid, 28.

legal representative.[181] The need to balance interests of parties is nowhere clearer. While Rule 91 as read together with Article 68(3) embraces an extensive role for victims to ensure that their voice is heard, it embodies the recognition that the interests of the defence and prosecution have to be protected. For this reason, the central role of the Court in the realisation of the victims' right to participate could not be more crucial because of the delicate balance required.

Another mode of participation provided for under Rule 91(2) ICC RPE is through observations or submissions. While the difference is not evident, judging from how these terms have been used in the Statute and RPE, 'observations' means that counsel is allowed to comment, in this instance, in writing, on presentations or submissions made by either the Prosecutor or the defence. This could for instance be after a particular hearing or in response to an application by either party. 'Submissions' on the other hand refer in our view to, in this instance, written views of the victims' representative made in advance of accessing prosecutor's or defence's arguments on a specific issue(s) or applications.

Through written observations and submissions, victims' representatives who have participated in various proceedings so far have not limited their views to victim-specific concerns. They have acted as a sort of 'amicus curiae' and provided the Court with views on a range of issues under discussion.[182] The participation of victims' legal representatives is turning out not only to serve and advance victims' interests, but is also valuable to the Court in the sense that it is afforded an extra source of thought-out opinions on broad issues before it.

With regard to the all important enabling procedural right to access information and documents and to be notified of proceedings, the Court has ruled that Rule 131(2) of the ICC RPE affords participating victims the right to consult the record of the proceedings, including the index, subject to any restrictions concerning confidentiality and the protection of national security information. The Appeals Chamber has endorsed the position that Rule 92(5) ICC RPE which provides for a mandatory right for victims or their legal representatives to be notified in a timely fashion of all public proceedings and filings before the Court. In its view, victims will additionally be

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[181] Rule 91(3) (b) ICC RPE.

[182] For instance, see written submissions relating to *Lubanga Confirmation Hearing*.at <http://www.icc-cpi.int> .

afforded access to confidential material to the extent that such access does not breach other necessary protective measures if in the view of the Chamber a victim's personal interests are materially affected.[183]

5.5.5.1 Trial, Defendants' Rights and Role of Trial Chamber

Victims have proposed in a recent hearing that the extent and the form victim participation will take during the trial will largely depend on whether the Chamber decides to hold reparations hearings as part of trial or as a separate post-trial procedure. Victims have argued in the appeal proceedings following the confirmation hearing in *Lubanga* that if reparations are part of the trial, then victims should have appropriately broad rights to examine witnesses (under Regulation 56) and should be allowed to intervene whenever the evidence or the issues during a hearing relate to reparations.[184]

The defence has suggested that victims should be allowed to participate in specific stages of the trial only when their interests are affected and that it should not be a blanket permit covering the entire trial. They argued that if the Chamber grants the victims the opportunity to participate in the various ways requested by their legal representatives, this would essentially afford victims the same rights as the prosecution and the defence and could in consequence create an imbalance in the trial, thereby prejudicing the rights of the accused.[185] The defence urged the Court to consistently appoint common legal representatives for victims rather than allow individual victims to participate under Article 68(3), in order to promote promptness, efficiency and expeditiousness.[186]

Although the Appeals Chamber in its majority decision did not address this question directly, Judge Song's separate opinion attached to the Appeals Chamber's decision is relevant, insofar as it addresses the potential delays that may be occasioned

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183 *Prosecutor v Thomas Lubanga Dylo*, *Appeals Chamber Decision of 18 Jan 2008*, paras 106-107.

184 *Decision of the Appeals Chamber on the Joint Application of Victims* a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decisions of the Appeals Chamber" of 2 February 2007, 1CC-01/04-01/06-925 para 10-18.

185 Ibid, para 52.

186 Ibid, para 59.

by allowing victims to put questions to witnesses and experts when reparations issues arise during trial. Judge Song concluded that participation of victims per se is not contrary to a defendant's right to an expeditious trial, as '[u]nless special circumstances exist, this delay is not inconsistent with the rights of the accused, but merely a consequence of the fact that the Statute provides for the participation of victims in the proceedings before the Court.'[187] Once again, appropriate intervention and control by the Court is crucial in maintaining the right balance in proceedings.

As regards questioning of witnesses, the accused and experts, the Appeals Chamber has endorsed the approach suggested by the victims that questioning should not be limited to reparations issues, noting that the Court will allow questioning as long as the victims' interests are engaged. In the same vein, victims will be allowed to adduce evidence at trial if it contributes to discovery of the truth or if the Court requests it, presumably for this purpose.[188] The Appeals Chamber has rightly refused to lock out victims on the basis of abstract speculation that their participation as described prejudices defendants. It correctly endorses what seems to be the emerging case-by-case or participant-by-participant approach taken by both PTC I and PTC II in earlier decisions discussed.

A question that may arise is whether the roles described above for victims could result in 'double prosecution' of the accused. Would such fears be justified? As noted above, while the right of victims to participate at all stages is unequivocally entrenched, victims are not a 'true or genuine party' to proceedings since their role in any particular proceeding is subject to judicial approval. As such, while victims may be allowed to put questions to the accused, witnesses and experts, their status could never be elevated to that of a prosecutor. While intervention is largely to protect their interests, it is conceivable that submissions made by them or their representatives could strengthen the Prosecutor's case against the accused. Their role is however vital given that the Prosecutor's interests may not always converge with those of victims. As the evolving jurisprudence shows, the Prosecutor has for the most part allowed victims' representatives to make their own case as long as they do not jeopardise the OTP's strategy or conceivably prolong the process. Similarly, the defence has on

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187 *Prosecutor v Thomas Lubanga Dylo,* 1CC-01/04-01/06-925, Separate Opinion of Judge Song, para 27.

188 Ibid, para 108.

occasion endorsed victims' submissions by not challenging them.[189] However, while victims' representatives cannot do the Prosecutor's job, their input, to the extent that it helps the Prosecutor's case may mean that there is an imbalance in terms of resources. Nevertheless, one does not immediately see how this would result in prejudice to the defence, especially in view of the Court's control function.

With respect to the presumption of innocence, defence counsel suggested that reparations proceedings should be dealt with separately from the trial, since the issue of reparations only arises if there is a guilty verdict. In their view, although Regulation 56 permits the Trial Chamber to hear evidence for a decision on reparations and for purposes of trial at the same time, this should be the exception rather than the general rule as the latter approach would undermine the presumption of innocence.[190] The Appeals Chamber has rejected this suggestion,[191] endorsing the Prosecutor's proposal for a 'blended approach' providing that if both issues can reasonably be dealt with in the same proceeding, victims should be allowed to question witnesses on reparations.[192] The Court undertakes in terms of its mandate to carefully separate the relevant evidence relating to reparations from that tending to show the guilt of the accused at this stage.[193]

From the above discussion, the weighty nature of the Trial Chamber role is evident. The Trial Chamber is obliged to ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.[194] Trial Chamber is required to regulate the participation of victims and victims' counsel in the terms described. When doing so, it is obliged to ensure that a balance is maintained among the often contending interests – those of prosecutor, defendants and victims (and witnesses) as outlined above. It

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189 See for instance *Situation in the Democratic Republic of the Congo, Prosecutor v Thomas Lubanga Dyilo* Appeals Chamber's Judgment of 21 October 2008 on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the release of Thomas Lubanga Dyilo' ICC-01/04-01/06 OA 12 in which victims raised separate arguments than those of the Prosecutor but were not opposed or refuted by the latter. In the same case, the defence did not dispute or counter some or the submissions made by victims.

190 1CC-01/04-01/06-925, Separate Opinion of Judge Song, para 51.

191 Ibid, para 120.

192 Ibid, para 61; Prosecutor's submissions ICC-01/04-01/06-T-58-ENG, pages 14 to 16.

193 Ibid, para 120 – 121.

194 Art 64(2) Rome Statute; Rule 91(3) ICC RPE.

needs n general, Trial Chamber takes must assume the leading role with which it is entrusted in the conduct of proceedings.[195]

However, developments in the *Lubanga* case show that the manner in which the Trial Chamber exercises its powers in terms of article 68(3) of the Rome Statute, in particular in regulating the interactions between victims and the Court could prove problematic for defence rights. Just as the Prosecutor concluded his case, the Trial Chamber I issued a decision on 14 July 2009, relating to the possible 'legal recharacterisation' of the facts. Trial Chamber is of the view that the facts in case against Lubanga characterises five new crimes under the Rome Statute: three charges of sexual slavery (both as a war crime and a crime against humanity), one of inhuman treatment and one of cruel treatment).[196] This was in response to a request from victims' representatives, who had argued since Lubanga was first indicted that the Prosecutor should not have limited his case to recruitment and use of child soldiers, but should have included 'blood crimes'.[197]

The recharacterisation decision in *Lubanga* raises a number of complex legal questions. How does Regulation 55(2) (judge made rules)[198] relate to Article 61(9) of the Rome Statute relating to confirmation of charges? An integrated reading of article 61 seems to suggest that Trial Chamber's powers are limited to allowing the Prosecutor to withdraw charges after trial has commenced. How does one read Article 74(2) of the Rome Statute, which provides that 'the decision shall not exceed the facts and circumstances described in the charges [and that] the Court may base its decision only on evidence submitted and discussed before it at trial'. We do not delve into these questions here.[199] However, it suffices to conclude that the manner in which these

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195 Art 64(8) (b) Rome Statute.

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

197 See GM Musila, *Between rhetoric and action: The politics, processes and practice of the ICC's work in the DRC*, ISS Monograph (2009) 22.

198 Regulation 55(2) of the Regulations of the ICC provides that: 'If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change'.

199 See *Prosecutor v Thomas Lubanga Dylo* (n 196 above) where the Trial Chamber addresses these questions in some detail.

provisions are interpreted impinge on fair trial guarantees in a fundamental way. At a practical level, the most obvious result of this decision is that the trial may drag on for a few more years, with profound implications for the right to an expeditious trial. Although the matter is far from being concluded, the question is whether it is fair to spring new charges on the accused at this late hour, despite the Prosecutor having had opportunities in the past. However, including the new crimes perhaps reflects better the nature of crimes suffered by victims at all material times.[200] This said, the developments – although far from conclusion – illustrate how asserting victims' rights could prejudice in a serious manner the rights of the accused. Whether the facts that have already been adduced so far can support the charges as Trial Chamber suggests is another matter altogether.

5.5.5.2 Beyond the Trial: Appeals and Other Proceedings

The Appeals Chamber is vested with power to hear appeals on matters arising from the Pre-Trial and Trial Chambers. So far, the Appeals Chamber has only heard one appeal and rendered a decision relating to specific aspects of the participation of victims.[201] Since the Appeals Chamber applies the Statute, Rules and regulations of the Court, the same criteria relating to victim participation are applicable.[202] In its first decision, the Appeals Chamber dismissed the joint application of three victims to participate in the determination of the preliminary issue of the admissibility of the appeal against the decision on the confirmation of charges. The majority found that the applicant victims' personal interests were not affected by the issue, since the Appeals Chamber's determination would neither result in the termination of the prosecution nor preclude the victims from later seeking compensation, and the victims had not put forward any

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200 There are parallels between this decision and the proceedings in the *Akayesu* case at the ICTR where Judge Navanethem Pillay did, without any textual basis, request the Prosecutor of the ICTR to amend the charge sheet to include rape and sexual violence after it emerged from two prosecution witnesses that Hutu militia had systematically raped women and girls. This resulted in the historic decision that rape and sexual violence were constitutive acts of genocide. See R Copelon, 'Gender crimes as war crimes: integrating crimes against women into international law' (2000) *McGill LJ*, 223-228 describing the role of the judge and victim groups in the case.

201 Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decisions of the Appeals Chamber' of 2 February 2007, 1CC-01/04-01/06-925.

202 AC has endorsed this view. See *Prosecutor v Thomas Lubanga Dyilo*, 'Decision on Victims' Participation' of 16 May 2008 (ICC-01/04-01/06-1335).

other basis on which their personal interests were affected.[203] This ruling shows clearly that it is in the interest of victims of crime that suspects against whom there is evidence are prosecuted and that victims would be entitled to intervene in proceedings when there is a possibility of termination.

The view above – that victims would be allowed to participate at appeal if their interests were shown to be affected – was confirmed by the Appeals Chamber in *Lubanga*[204] following Trial Chamber I decision to dismiss charges against the accused over abuses incurred by the Prosecutor's non-disclosure of exculpatory materials covered by Article 54(3)(e) Rome Statute agreements. The Appeals Chamber agreed with victims and the Prosecutor that since the Appeals Chamber's ruling (over the Prosecutor's appeal of Trial Chamber I's release decision) could result in termination of the case against Lubanga, victims interests were affected since they could not participate in the trial and would be unable to request for reparations against the accused.[205]

In reparations proceedings, victims have the right to participate through legal representatives on two occasions. The first relates to proceedings when reparations are considered. In this regard, the Statute provides:

> Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.[206]

The second possibility arises when there is an appeal relating to reparations orders – brought either by the victim, convicted person or bona fide owner of the property in question. The Statute stipulates as follows:

> A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under Article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.[207]

The restrictions on questioning of accused, witnesses and experts applicable during trial do not apply during reparations proceedings:

> For a hearing limited to reparations under Article 75, the restrictions on questioning by the legal representative set forth in sub-rule 2 shall not apply. In that case, the legal representative

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203 *Prosecutor v Thomas Lubanga Dyilo* (n 196 above) para 26.

204 *Prosecutor V Thomas Lubanga Dyilo*, 'Decision on the participation of victims in the appeal' 6 August 2008, ICC-01/04-01/06 OA 13.

205 Ibid, para 9.

206 Art 75(3) Rome Statute.

207 Article 82 (4) Rome Statute.

> may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned.[208]

This means that should reparations issues not be dealt with at the trial stage, victims seem to have broader scope and more possibilities to participate at the post trial stage.[209] Suffice to say for purposes of this chapter that following the Appeals Chamber decision in Lubanga, it is unlikely that the Court will conduct a fully-fledged reparations proceeding within the trial itself. Although at the appeals stage, it will be necessary, should a matter come to appeal that combines both reparations and 'non-reparations' concerns, that the Chamber consider both in the same hearing. That said, should a matter come on an appeal that combines both reparations and non-reparations concerns, it will be necessary for the Chamber to consider both in the same hearing. Concerns relating to reparations are dealt with in some detail in the next chapter.

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208 Art 91(4) ICC RPE.

209 See Victims submissions to the Appeals Chamber in Appeals Chamber decision of 2 February 2007 (n 83 above) para 39 para 40.

CHAPTER SIX
OPERATIONALISING THE VICTIMS' REGIME II: REPARATIONS

6.1 Introduction: The ICC Reparations Framework

As noted in chapter one, the Rome Statute has been celebrated largely for providing for the right to reparations.[1] Previous chapters discussed how this issue has been dealt with in national and international tribunals. This chapter examines particular aspects of the right in the Rome Statute. In this regard, the chapter makes reference to the rather muted normative developments at the international level in the period preceding its adoption,[2] human rights jurisprudence as well as relevant mass reparations mechanisms deployed in varying contexts.

There are two 'focal points' for the victims' reparation function – the Court in terms of Article 75 and the Victims' Trust Fund (VTF) in terms of Article 79 of the Rome Statute.[3] Article 75 of the Statute establishes the right to reparations providing that 'the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.'[4] For its part, Article 79 creates the Victims Trust Fund (VTF) for the benefit of victims of crimes within the

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1 See for instance E Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?' in D McGoldrick, P Rowe & E Donnely, The Permanent International Criminal Court: Legal and Policy Issues (2004) 315-334; I Bantekas & S Nash *International Criminal Law* (2003) 395-396; Nainar 'Giving victims a voice in the international criminal Court', United Nations Chronicle (1999) at <http://www.iccwomen.org/sources/article.-unchronicle.htm > (acessed on 10 september 2005).

2 See the UNGA Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Final report by Theo van Boven to Sub-Commission on Prevention of Discrimination and Protection of Minorities 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms' UN Doc E/CN.4/Sub.2/1993/8 of 2 July 1993 (van Boven Report); Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law: Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms submitted pursuant to Commission on Human Rights resolution 1998/43 Un Doc E/CN.4/2000/62) (Bassiouni Report).

3 L Taylor 'Thoughts on victims' reparation and the role of the Office of the Prosecutor' (2003) Available at <http://www.icc-cpi.int/library/organs/otp/taylor.pdf > (accessed on 15 Jan 2008).

4 Art 75(1) Rome Statute; For a history of the provision, see D Donat-Cattin 'article 68' in Triffterer *Commentary on the Rome Statute of the International Criminal Court: observer's notes article by article* (1999) 965-1014.

jurisdiction of the Court, and for the families of such victims.[5] The Court is required to 'determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.'[6] Having so determined, the Court is empowered to make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims. In appropriate cases, the Court may order that such an award be made through the Trust Fund.[7] Rules 94 to 99 ICC RPE set out the procedures for reparations to victims.[8] In some instances, this procedure is linked to the participation regime.[9] As related to the VTF, the RPE cited as well as the Regulations of the Assembly of States Parties complete the legal framework.[10]

Neither the Statute nor the ICC RPE prescribes how these provisions will be implemented.[11] It falls to the Court to establish not only appropriate mechanisms and procedures for processing reparations but also the relevant principles as required by Article 75(1) Rome Statute. Wierda and de Greiff have observed with regard to the complexities involved in this regime that 'while the principles are beyond dispute, the modalities are far from resolved'. They rightly observe that 'the creation of a Trust Fund closely associated with a Court raises both practical and conceptual challenges that require careful deliberation'.[12]

This chapter suggests that any bid to implement the ICC reparations regime must address at least the following issues, which are discussed further below: 1)

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5 Art 79(1) Rome Statute.

6 Art 75(2) Rome Statute.

7 Art 75(2) Rome Statute.

8 Reparations may be granted by the Court upon request of victims or based on a motion of the Court itself.
The Court may invite to the reparations' hearings not only the victims and the convicted persons (with their respective attorneys), but also other interested persons or interested States whose properties could be affected by the rulings on reparations.
In terms of Rule 91(4), no restrictions in terms of 91(2) RPE applies to questioning of witnesses in reparations proceedings.

9 Art 75(2) Rome Statute; *Dylo Appeals Camber Decision*; Rule 91(2) ICC RPE

10 Assembly of States Parties Regulations of the Trust Fund for Victims.

11 See M Henzelin, V Heiskanen & G Mettraux 'Reparations to victims before the International Criminal Court: Lessons from international mass claims processes' (2006) 17 *Criminal Law Forum* 317-344 at 338 noting that the 'Statute and Rules do not provide … any predetermined mechanisms or procedures for processing reparations claims and the implementation of awards'.

12 M Wierda & P de Greiff 'Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims' International Center for Transitional Justice' (2005) 1; See M Henzelin et al (n 11 above) 319 writing of the challenges facing the ICC in this regard as 'momentous' and 'great'.

whether the trial and reparations ('civil liability') issues, can and should be combined in one proceeding; 2) whether Articles 75 and 79 establish two separate 'reparations frameworks' within the Court, and, if so, what are the links and how should they be implemented to complement each other in the Court's reparations mandate; 3) what are the reparations principles and rules related to actualization of the specific issues such as assessment of damage, loss or injury to or in respect of victims? ; 4) what is the link between the right to participate and the right to reparations – is the latter predicated on the former? – in view of the fact that: i) at least some reparations issues may be dealt with within the trial; ii) reparations proceedings must necessarily involve some participatory role for victims whether effected within the trial or in separate proceedings.[13]

This chapter attempts to answer these questions by reference to the Statute, the ICC RPE and ASP Regulations on the Trust Fund as well as to relevant practice and jurisprudence from international and domestic tribunals. Evidently, the nature of reparations issues are such that principles and practices may have to be sought beyond criminal law.[14] Additionally, in view of the novelty of reparations in international criminal tribunals, the practice of other international tribunals, in particular human rights tribunals, as well as domestic tribunals outlined in chapters three and four respectively is of particular relevance.

Before addressing these issues systematically, the justification for reparation in the ICC is considered.

6.2 Reparations as Restorative Justice: Why Reparations in the ICC?

In the introductory chapter, it was concluded that discourse in international criminal justice tends to inaccurately equate 'restorative justice' with 'reparations' to the

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13 de Greiff (n 12 above) at 1-2 identify two broad 'challenges' which are considered within the context of the issues outlined by this chapter: 1) the fact that Court and a 'fund' generally present two different approaches to reparations; and 2) conceptually, reparations is tied to issues of responsibility. See Henzelin et al.

14 See L Taylor (n 3 above) 4 that since 'the principles of compensation, restitution, rehabilitation and other forms of reparations are not rooted in the criminal law'… 'those who organize and manage the victims' reparation function will require expertise in fields such as personal injury and other wrongs, claims processing and management, remedies, victims' rights and banking and financial matters'.

exclusion of other constitutive elements of restorative justice. This finding, supported in subsequent chapters, strengthened the basic assumption of this study – that restorative justice is a wider concept underpinned by a number of values and principles. While this thesis agrees with the discredited position, at least to the extent that it recognizes 'restorative justice' as constitutive of reparations as a basic element, it is deemed important to briefly investigate the assertion that restorative justice is nothing more than reparations.

Further investigation of this seemingly 'given' position – that 'restorative justice' is 'reparations,' – serves, for the purposes of this thesis, at least two things. First, it responds to an important question: why reparations as a right in an essentially criminal process. Secondly, it lays foundation for addressing some of the more critical questions and challenges posed by what is viewed here as the 'transformation' of the criminal process by including the victims' rights regime in the ICC. In view of these two concerns, the question 'why a reparation right' in the ICC?' is therefore not a superfluous one. Nor does it generate artificial challenges for the Court.

Since the unprecedented trial of war criminals at Nuremberg and Tokyo, the idea that victims of human rights violations have a right to seek action against the responsible individuals or states is well established in numerous international human rights instruments both at global and regional level.[15] Although entrenchment of these principles in international instruments comes with a positive obligation requiring states to provide effective remedies at the national level, advancements in norm generation at the international level have not been matched by effective implementation on the domestic plane.

Increasingly therefore, although international mechanisms are meant to complement those at the domestic level, they are often the only available viable route

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[15] V Morris & MP Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995) 1-11; Art 8 Universal Declaration of Human Rights (UDHR); Arts 2(3)a, 14 International Covenant on Civil and Political Rights (ICCPR) G.A. Res. 217A (111), U.N. GAOR, 3rd Sess., arts. 8,10, at 71, U.N. Doc. A/810 (1948); art 14 the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (1984); 23 I.L.M. 1027, 24 I.L.M. 368; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power G.A. Res. 40/34, U.N. GAOR, 40th Sess., U.N. Doc. A/RES/40/34 (Dec. 11, 1985); art 6 International Convention on the Elimination of All Forms of Racial Discrimination; African Charter on Human and Peoples' rights; European Convention on Fundamental Rights; American Convention on Human Rights.

to justice for victims. When a state is unable to prosecute perpetrators for want of relevant institutions, it is needless to entertain the thought of the possibility that victims' concerns could be addressed in such a situation. On this account, it is opined that the international institutions established to punish perpetrators should be equally empowered to attend to specific victims concerns. This is in keeping with collective commitments in relation to victims. But while this explains the need for mechanisms that complement domestic efforts to incorporate victims' concerns and rights, it does not necessarily explain why an international body adjudicating criminal law should include a reparations component.

At the national level, commentators have explored the justifications for using restitution in substantive criminal proceedings to compensate victims of crime. Writing in the context of United States and Australia, both of which reformed their criminal justice systems to provide for victims in the last few decades, Kerch identifies two justifications: to restore the voice of victims in the system and to empower them and to build legitimacy of the criminal justice system by restoring public faith in its functions.[16] Oftentimes, there is failure to appreciate the centrality of crime victims to the success of the system. The author notes that legitimization is only achievable through the recognition of restitution as a valid substantive goal of criminal law beyond retribution, reformation, deterrence, and incapacitation.[17]

A third reason suggested here for the need to incorporate substantive issues of restitution and compensation in the criminal trial relates to the failure, for a range of reasons, of alternative avenues to proffer viable choices for victims.[18]

Critics of the distinction between criminal and civil law have rightly argued that abandoning victims of crime to their own devices and requiring that they pursue

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16 M Kerch 'The empowerment of the crime victim: a comparative study of victim compensation schemes in the United States and Australia (1994) 24 *California Western ILJ* 345.

17 Ibid, 347.

18 LN Henderson, 'The Wrongs of victims' rights' (1985) 37 *Stanford LR* 937-1021 at 1007 noting that: [i]f crime victims have 'rights,' the right to recover from the wrongdoer is the most tenable individually based right. Restoration of the victim to the *status quo ante* is what the tort system is supposed to accomplish, and its failure to do so in instances of criminal harm has led many commentators and politicians to advocate grafting tort principles onto the criminal law, typically at the sentencing stage'.

civil remedies in a different forum is 'unnecessarily burdensome and duplicative'.[19] In support of restitution within the trial, or as a complement to imprisonment, it can be argued convincingly that criminal law and civil law are mutually complementary and that they have overlapping goals of retribution, deterrence, compensation, and rehabilitation.[20]

For victims of international crimes, the argument that they can approach a relevant civil tribunal at the international level cannot be entertained in the absence of such tribunal. As discussed in chapter three, there are so far, two kinds of international tribunals/commissions that have adjudicated civil claims at this level - those in respect of claims between states; and special commissions in respect of property-related claims from individuals against states in the context of diplomatic protection. For reasons advanced in that chapter, the state responsibility framework in which these tribunals operate is unsuited to individual claims related to international crimes of genocide, war crimes and crimes against humanity. Proposals for such a specialized tribunal are yet to be effected.[21] It was demonstrated in chapter two that international criminal tribunals since Nuremberg have lacked competence to adjudicate beyond criminal sanction. It was noted that in that chapter that the failure to provide for victims beyond routine protection has been one of the shortcomings of these tribunals. Against this backdrop, the creation of an institution that incorporates both elements – punishment through criminal prosecution and reparations to victims of international crimes at the international level responds in similar fashion as certain national criminal justice systems discussed in chapter four did in the 80s. These instituted criminal justice reforms granting the right to reparation to victims and creating compensation funds.

The idea that an international criminal tribunal such as the ICC can and should dispense such form of justice is not new. The earliest proposal for a permanent international criminal Court recognised the need to incorporate a restitutive element in

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19 See for instance Editorial Notes Victim restitution in the criminal process: a procedural analysis' (1984) 97 *Harvard LR* 933 – 37; K King 'Criminal Restitution' (1988) 31 *Howard LJ* 423.

20 See Editorial Notes, at 934-37.

21 See generally R Dixon, 'Rape as a crime under international humanitarian law: where to from here?' 13 *European JIL* 697 who argues for the establishment of an international victims' compensation/reparations tribunal (ICVT) for the victims of gender-based crimes of genocide, war crimes and crimes against humanity.

such a tribunal. This proposal, made in 1872 by Gustave Moynier, co-founder of the ICRC, suggested the creation of an international criminal Court to try people for breaches of the laws of war as then established.[22] More specifically, it proposed that persons convicted in such a Court for breaches of the Geneva Convention of 1864[23] should pay compensation to victims, the scope of which he did not specify.[24] In case of a convicted person being unable to pay, their governments would be responsible. The latter suggestion, which would imply state responsibility to pay compensation to victims of international crimes (at the time limited to the Convention of 1864), was the subject of intense and protracted debates during the negotiation of the Rome Statute of the ICC.[25]

In Rome, some states were opposed to the inclusion of the right to reparations in the ICC partly because they feared that such provision could undermine the individual criminal responsibility basis of the Court and that it would expose them [states] to undesired reparations claims.[26] Three further objections were raised by states to motivate their objections to the inclusion of reparations in the Statute. These concerns, which remain relevant today, are challenges that remain to be addressed as the ICC attempts to give effect to the reparations provisions.[27]

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22 See Draft convention for the establishment of an international judicial body suitable for the prevention and punishment of violations of the Geneva Convention by Gustave Moynier, Geneva, 1872 (art 1) (Draft Moynier Convention); Gustave Moynier 'Note sur la creation d'une institution judiciaire internationale proper a réprimer les infractions a la Convention de Genève *Bulletin international des Sociétés de secours aux militaires blesses,* Comite international, No. 11, avril 1872 at 122-227 (Cited in Amnesty International 'The International Criminal Court: ensuring an effective role for victims' at <http://www.vrwg.org/Publications/02/AIRoleforvictims99.pdf>(accessed on 12 January 2005) 3.

23 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 August 1864), which laid the foundation for contemporary international humanitarian law but was later replaced by the Geneva Conventions of 1906, 1929 and 1949 on the same subject.

24 Art 7 'Draft Moynier Convention'. See Christopher Keith hall, 'The first proposal for a Permanent International Court' *International Rev. Red Cross* No 322 at 57-74 at 73, also available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JP4M> (Accessed on 6th February 2006).

25 The idea of state responsibility to pay restitution was the subject of protracted debates at the Rome Conference. See C Muttukumaru 'Reparation to victims' in Roy S Lee (ed*) The International Criminal Court: The making of the Rome Statute: Issues, Negotiations, Results* (1999) 262-270 at 264; T Ingadottir 'The trust fund for victims' in T Ingadottir (n 25 above) (ed) *The International Criminal Court: Recommendations on policy and practice* (2003 111-141 128.

26 See Muttukumaru (n 25 above) 264 speaking of the feared potential of art 73 (later art 75) as a 'stalking-horse' for reparations claims against states.

27 See section 6.5 below.

First, states were concerned with the possibility that a reparations component would distract the Court's attention from what they considered its core purpose, envisioned as to 'prosecute, in fair and effective manner, those accused of the most serious crimes of international concern.'[28] The introductory chapter of this thesis has suggested that functions of the ICC as currently constituted are multifaceted. As such this first concern, which related to an ICC before the inclusion of the right to reparations, stands inaccurate today.

Opponents of the right to reparations advanced a second objection linked to the first one. They suggested that the inclusion of reparations raised the practical difficulties involved in asking a criminal Court to adjudicate on the form and extent of reparations not least because ICC judges would originate from different legal traditions.[29] It is notable, as outlined in greater detail in chapter three of this study, that although procedural aspects differ, some national criminal justice systems have long embraced such a right for victims. Others, predominantly of common law tradition, do not recognise this right. Concerns of a conceptual and practical nature generated by this dichotomy are addressed in the context of defendants' rights in this and the previous chapter (in view of the right to an expeditious trial and effectiveness of the Court process).

Thirdly, some states were concerned about the implications the award of reparations by a supranational criminal Court would have for domestic criminal justice systems that do not recognise the concept of reparations for victims of (serious) crime.[30] Chapter three of this study revealed the inconsistencies in national law on the subject. In the discussion of interactions between the ICC and national criminal justice systems as it relates to reparations, it is here suggested that these fears, while valid – in as far as they are a reaction from an untenable position that may arise where similarly placed victims are treated differently at the ICC and in national tribunals – fail to appreciate the fact that any disparities between the ICC reparations regime and national law do not prevent both systems from functioning as independent juridical

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28 Muttukumaru (n 25 above) 263; see discussion in chapter one above on objects of the ICC.
29 Muttukumaru (n 25 above) 264; Prep Com.
30 Muttukumaru (n 25 above) 264; Prep Com.

spaces, though complementary to each other.[31] The inclusion of the provision to the effect that victims' rights under the Rome Statute do not prejudice their rights under national and international law is recognition of varying protections under different legal regimes, although the highest standard is to be sought, whether under international law or national law.[32]

According to Muttukumaru, 'the real question' for states in Rome was whether, notwithstanding the objections, a right to reparations ought to prevail.[33] It is opined that overall responses to this question, the triumph of the proponents of Article 75 and its eventual inclusion in the final text of the Statute are relevant factors in appreciating the paradigm embodied in the ICC. Chapter one of this thesis outlined at length the factors on the basis of which it is argued that a restorative justice approach is intended in the ICC.[34]

During the negotiations for the ICC Statute, states unsupportive of reparations took the view that the very establishment of the Court constituted implicit recognition of victims' rights through its retributive and deterrent functions and that guarantees of non-repetition were assured in case of convictions.[35] However, Muttukumaru records that with the passage of time, delegations gradually took the view that 'a Court whose exclusive focus was purely retributive would lack a dimension needed to deliver justice in a wider sense' and that it was 'increasingly realised that victims not only had an interest in prosecution of offenders but also had an interest in restorative justice, whether in the form of compensation or restitution or some other form.'[36] The realisation that reparations could foster reconciliation and restoration of individuals and society in general convinced states to embrace what is evidently a broader concept of justice. As noted in the introductory chapter of this study, while commentaries on

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31 M Delmas-Marty, 'Interactions between national and international criminal law in the preliminary phase of trial at the ICC' (2006) 4 *J of International Criminal Justice* 2-11 at 2 refers to the international and national spheres as separate *espaces juridiques*.

32 Art 75(6) Rome Statute; Donat-Cattin, 976-77.

33 Muttukumaru (n 25 above) 264.

34 These factors, motivated in Chapter one are: 1) the objects of the ICC; 2) the victims' participatory and reparative regime and related mechanisms themselves; 3) various other mechanisms and concepts in the Statute and Rules such as 'interests of justice', a new reading of 'fair trial' unlimited to defendants and 'fairness' and; 4) a proper reading of the application and interpretative clause (article 21) as not only supportive but also demanding of a restorative justice approach in interpretation.

35 Muttukumaru (n 25 above) 264.

36 Ibid.

the ICC do not elaborate their claim, they seem to be united in the fact that the ICC embodies 'a broader concept of justice'.[37]

As outlined in some detail in chapter one, it is argued that the inclusion of reparations in the ICC firmly grounds restorative justice in the Court and its processes. It is suggested that together with the participatory regime discussed in the previous chapter, the right to reparations grounds victims' concerns in the Court in such a manner that first, they must temper the interpretation of prosecutorial functions and defence rights, and secondly they must affect fundamentally the overall functions of the ICC and the kind of justice it dispenses.

6.3 Reparations: Definitions and Forms

While the right to reparations as formulated in Article 75 of the Rome Statute is new, there is already sound legal basis for such a right elsewhere and various accounts of what it entails. In chapter three, the jurisprudence from international tribunals operating in a state responsibility framework was discussed in general fashion. The focus here is to apply relevant principles and models elaborated in national and international Courts and commissions to the ICC framework, which entails individual 'civil responsibility'. Before considering various models in the next section, the various forms of reparations are briefly outlined.

The question of terminology in the context of remedies is an area riddled with uncertainty and confusion.[38] Even at national level, commentators lament this apparent lack of clarity.[39] While the Rome Statute may provide some guidance as to what forms of remedies are applicable, what is meant by particular remedies and the operational principles remain to be clarified. Article 75 makes reference to reparations, restitution

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37 Muttukumaru (n 25 above) 264; see Pablo de Greiff 'Introduction: Repairing the past: compensation for victims of human rights violations' in de Greiff (ed) *The Handbook of Reparations* (2006) 1-18 2 noting that reparations may occupy a special place in a transition out of conflict or towards democracy. See Final TRC Report, Volume 5, Chapter Five noting at para 21 that 'without adequate reparation and rehabilitation measures, there can be no healing and reconciliation, either at an individual or a community level.'

38 See D Shelton, *Remedies in International Human Rights Law* (1999) 1 lamenting the lack of precise theory and terminology of remedies in international law.

39 See for instance A Kull 'Rationalising restitution' (1995) 83 *California LR* 1191-1242 at 1191 decrying the 'linguistic confusion that bedevils the law of restitution'.

and compensation all in the same breath, but seems to suggest that restitution, compensation and rehabilitation are 'types' of reparations.[40]

It is thus useful to appreciate the broader language of remedies in international and municipal law. In general, there is a tendency by legislators, Courts and scholars alike to use these terms eclectically, more often than not attributing similar meanings to different terms.[41] One of the most crucial questions posed at the Rome Conference during deliberations for the adoption of the Rome Statute was whether a possible right to reparations would be limited to compensation, or would extend to other forms of reparations.[42] The final formulation of Article 75 suggests an open-ended approach, in the sense that the Court may extend its appreciation of 'reparations' and attendant principles beyond the enumerated 'types'.

'Reparations' has a basis both in tort (delict) law and the law of state responsibility.[43] In human rights, it is a generic term representing 'all types of redress, material and non-material, for victims of human rights violations'.[44] As such, restitution, compensation and rehabilitation cover particular aspects of reparation.[45] Reparation, which is 'generally framed as repair for past damage, putting the victim back where he or she would have been had the wrong not occurred',[46] usually denotes a monetary consideration (compensation) or 'other valuable resources'. However, it is not limited to this.[47]

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40 Art 75 Rome Statute provides in part: 'The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

41 AT Harland 'Monetary remedies for victims of crime: Assessing the role of the criminal Courts' (1982) *Univ of California LR* 52 60-64 describing this confusion within the context of US debates.

42 Muttukumaru (n 25 above) 263.

43 N Roht-Arriaza 'Reparations decisions and dilemmas' (2004) 27 *Hastings International and Comparative LR*157-219 at 129.Various human rights treaties provide for the right to an 'effective remedy' and exhort states to ensure such in case of violation of protected rights; *Chorzow Factory Case*; Articles of State Responsibility; D Shelton 'Righting Wrongs: Reparations in the articles of State Responsibility' 96 *American J of International Law* (2002) 833-856.

44 Theo van Boven 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms' UN Doc E/CN.4/Sub.2/1993/8 of 2 July 1993, para 13.

45 Theo van Boven (n 44 above); B Saul 'Compensation for unlawful death in international law: a focus on the Inter-American Court of Human Rights' (2004) 19 *American Univ ILR* 523-584 at 541.

46 Roht-Arriaza (n 43 above) 1160.

47 Roht-Arriaza (n 43 above) 159; KO Gorgone 'Between vengeance and forgiveness: facing history after genocide and mass violence' (2000) 24 *Suffolk Transnational LR* 211-232 218.

The UN's Basic Principles on the Right to a Remedy and Reparation lists five basic categories of reparations: (i) restitution or *restitutio in integrum*, which is aimed at restoring the victim to the *status quo ante* or 'original situation' before the violation occurred; (ii) compensation, in terms of which every quantifiable harm - material and non-material - is compensated; (iii) rehabilitation, which could include all relevant medical, psychological, social and legal support services; (iv) satisfaction, which is fairly broad and would include such varied measures as public apologies, truth-finding processes, sanctioning perpetrators; and (v) guarantees of non-repetition, including institutional and legal reform, and promoting mechanisms to prevent and monitor future social conflict.[48]

Satisfaction or moral reparations takes various non-material forms including official acknowledgement of wrong, apology, disclosure of the details of the offence, service to the victim or a cause chosen by them.[49] Satisfaction may be fulfilled by more elaborate ways of 'telling the story' including an undertaking to memorialisation.[50]

The actual scope and meaning of restitution is not uncontroversial. Restitution may be defined as the 'action of restoring or giving back something to its proper owner or making good or giving an equivalent for any loss, damage or injury previously inflicted'.[51] This definition conflates two issues: giving back something to its proper owner; and 'making good for loss, damage or injury.' Kull has argued convincingly that restitution refers to the body of substantive law, and the set of remedies associated with this body of law, in which liability is not founded on tort or contract but depends

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48 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res., UNGAOR, 60th Sess., UN Doc. A/Res/60/147 (16 December 2005) paras. 19-23. See also, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni: The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. UNESCOR, 56th Sess. UN Doc. E/CN.4/2000/62, (January 18, 2000) which provides a comprehensive outline of reparations.

49 J Coben & P Harley 'International conversatins about restorative justice, mediation and the practice of law' (2004) 25 *Hamline J. Pub L & Policy* 235-234 239 241; Roht-Arriaza (n 43 above) 158-160.

50 The Inter American Court on Human Rights has on numerous occasions required governments to construct monuments in remembrance of victims of gross human rights violations. See generally B Saul (n 45 above) 157.

51 See *Black Law Dictionary* (5th Ed 1979) 118; D Laycock 'The scope and significance of restitution' (1989) 67 *Texas LR* 1277 at 1279-80; Terminological and conceptual problems bedevil restitution see Kull (n 39 above) 'Rationalizing restitution' (1995) 83 *California LR* 1191 1192-93.

on unjust enrichment.[52] This definition seems to limit itself to restitution in the first respect. In this case, remedies usually entail the return or restoration of something to its rightful owner or status. For instance, if someone assaults another and robs them of something in the process, returning the stolen 'thing' is the proper scope of restitution so conceived.

In the criminal justice system, restitution seems to be used, at least in domestic law, in the second sense, that is, making good or giving an equivalent for any loss, damage or injury previously inflicted. In this regard, Dawson suggests that restitution is said to entail 'compensation for loss, especially full or partial paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or a condition for probation'.[53] It is clear that in this sense 'restitution' seems to mean the same thing as, or overlaps considerably with, 'compensation'.[54] It is suggested that it is perhaps due to similar instances of lack of clarity and obfuscation in the area of remedies that many consider it a problem area not only in national law[55] but also in international law generally.[56] However, it is not thought that these reasons should prevent the ICC in adopting a clear policy and principles on reparations as required by Article 75 of the Statute.

As used in this thesis, it is suggested that the ICC adopts a definition of restitution that encompasses the two aspects outlined: restoration of property stolen or looted in the course of an act that amounts to an ICC crime and compensation ordered as part of a criminal sentence for injury or loss sustained by an individual arising from the commission of an ICC crime. While restitution as understood in the first sense has

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52 Kull (n 39 above) 1191 argues that the proper scope of 'restitution' is limited to civil liability for unjust enrichment and that it does not extent to the other areas to which it is erroneously attributed.

53 J Dawson 'Restitution without enrichment' (1981) 61 *Boston Univ LR* 563 577; Kull (n 39 above) 1191.

54 In the UN's Basic Principles on the Right to a Remedy and Reparation, compensation is considered one of the categories of reparations, 'in terms of which every quantifiable harm is compensated'; Kull (n 39 above) 1191 (considers that restitution so understood is 'a form of compensation'); Laycock (n 51 above) 1282-83 (referring to the 'third' sense in which 'restitution' is used – restoring the value of what the plaintiff or requiring criminal to pay victims… is simply compensatory damages'.

55 See Kull (n 39 above) 1191 lamenting that 'linguistic problems … bedevil the law of restitution'; Laycock (n 51 above) 1277.

56 Shelton (n 38 above) 1.

been the subject of concern of ICL since Nuremberg,[57] it is new as used in the sense of 'compensation for damage, loss or injury.' It is suggested that this is thus one of the main aspects of reparations on which the ICC's interpretative efforts should be concentrated. Issues to be elaborated include what kind of damage or loss can be compensated; what principles underlie such determination; what standards of proof are applicable, standards of causation and the like. These are considered at some length in the following sections of this chapter. Since the ICC assumes an important place in the framework of international criminal law, it is suggested that it should seize the opportunity to bring clarity to relevant aspects of remedies in as far as they relate to its work and ICL in general.

6.4 Implementing Reparations: Issues, Concerns and Challenges

6.4.1 Criminal and 'Civil Liability' Proceedings: To Separate or Not?

The first issue the ICC has to address is whether reparations concerns will be dealt with entirely within the main criminal trial or whether a separate post trial procedure will be favoured or whether aspects of reparations will be a dealt with within the trial and the rest reserved for a more elaborate post trial procedure. In responding to this question, a further concern to be addressed later – how the criminal Court dispensing reparations issues will relate to the Victim Trust Fund and how reparations functions should be allocated between them – is raised. This is a relevant question in the context of burden sharing between institutions with overlapping mandates as it relates to victims and the fact that there are numerous victims.

There is no provision, either in the Statute, the Rules or the ICC's regulations that provides definitively whether reparations should be held separately to the main trial. What exists is a permissive rule that opens the possibility for a combined hearing. Regulation 56 of the Court's Regulations provides that 'the Trial Chamber may hear

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[57] Art 28 of the Nuremberg Charter provided that 'in addition to any punishment imposed by it, the tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany'. The Tokyo Charter did not have a similar provision. Arts 23(2) ICTR and art 24 ICTY Statute provide for restitution of property or proceeds acquired by criminal conduct. It is notable however that these identical provisions are included under 'penalties' rather than as a free standing right to restitution for victims. For a longer discussion of Nuremberg, Tokyo and the ad hoc tribunals, see chapter two of this study.

the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with Article 75, paragraph 2, at the same time as for the purposes of trial.' Although in its decision of January 2008[58] the Trial Chamber I interrogated at some length the applicability of Regulation 56, it abstained from pronouncing definitively on the question under consideration here.

Although Trial Chamber I did not rule out the possibility that reparations issues may be determined conclusively during the trial, it seems to favour separation in as far as each process leads to a conclusive end – a conviction or acquittal on the one hand, and an award of reparations on the other. Concurring with victims' submissions on the extent of participation in Trial proceedings, TC stated that:

> 'the extent of participation by victims during trial will, to a significant degree depend on the Chamber's decision as to whether or not *evidence concerning reparations will, at least in part,* be considered during the trial or as a separate procedure after the trial.[59]

One notes that the formulation used by Trial Chamber I refers to considering 'evidence concerning reparations' rather than 'deciding reparations' for instance, which would be a more definitive consideration of reparations including the award itself. To support this view, the Trial Chamber considers Regulation 56 as a provision meant to enhance the Court's efficiency, rather than a requirement that it choose to deal with reparations at a particular stage of proceedings.[60] Trial Chamber I took the view that Regulation 56 does not, contrary to defence submissions, undermine the presumption of innocence. In its view, the application of this provision would allow it increase efficiency by expediting proceedings and to avoid unnecessary hardship or unfairness to the witnesses by removing, where appropriate, the necessity of giving evidence twice.[61]

As discussed in chapter four, it seems that the procedure adopted in many jurisdictions where the right to reparations in some form or another exists is such that

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58 *Situation in the DRC in the case of Prosecutor v Thomas Lubanga Dylo*, Decision on victims' participation No ICC-01/04-01/06 (Jan 18 2008) [Hereinafter *DRC Jan 18 2008 Trial Chamber I Decision*]. This Decision is intended to provide the parties and participants with general guidelines on all matters related to the participation of victims throughout the proceedings in the Dylo case.

59 *DRC Jan 18 2008 Trial Chamber I Decision* paras, 40 and 119 (emphasis mine).

60 Ibid, para 120.

61 Ibid. TC I seemed to endorse submissions by the Office of Public Counsel for Victims noting at para 76 that holding a joint (trial-reparations) hearing would have the objective of expediting the proceedings and limiting unnecessary further trauma to the victims.

the criminal trial is separated from the civil claim for compensation.[62] Proponents of this view have argued that combining trial and restitution proceedings would burden and further complicate a process with potential prejudice to the accused person.[63] To the contrary, some have however argued that the successful 'integration' between criminal and civil law in most continental European systems has shown that fears enhanced roles for victims in these proceedings need not have disruptive results.[64]

While the continental European approach has its benefits – cost effectiveness, efficiency – the fear of overburdening the criminal process, with the possible infringement of due process rights of accused persons, is a real one. It is clear that the ICC Trial Chamber I seems prepared to address at least some reparations issues during trial on account of the two reasons advanced – efficiency and concerns for victims. It is posited that in the context of mass atrocities – and the possibility that there may be tens, or hundreds of victims who may successfully motivate the requisite links to a case before the ICC for purposes of reparations - it may be absolutely necessary that the trial, and 'civil liability' issues, are separated. The process could be drawn out on that account alone. Logistical complications that arise from its location away from the actual theatre of crime add to this dilemma. Therefore, it is suggested that if the proceedings are not separated, its impact on the defendants' right to a fair and expeditious trial must be considered.[65] Even when the Court considers it appropriate to take evidence on reparations within the trial, these issues should not delay the determination of guilt at the earliest possible time.[66] In view of the above factors, one

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62 This applies generally to Common Law countries. See in relevant parts M Brienen & E Hoegen *Victims of crime in 22 European criminal justice systems* (2000) 285; P Rock *Constructing victims' rights* (2005) 263-330 discussing compensation and reparation in the UK.

63 J Dolliver 'Victims' rights constitutional amendment: a bad idea whose time should not come' (1987) 34 *Wayne LR* 87; AM Cellini 'The proposed victims' rights amendment to the Constitution of the United States: Opening the door of the criminal justice system to the victim' (1997) *14 Arizona J. Int'l & Comp. L.* 839 856.

64 AM Cellini (n 64 above) 867 noting that 'inclusion of victims in the criminal proceedings of civil code systems and some surviving instances of the 'private prosecutor' concept in common law criminal proceedings, reveal that victim participation can be achieved without disruptive results or compromise of the goals of the criminal justice system; RS Frase, 'Comparative criminal justice as a guide to American law reform: how do the French do it, how can we find out, and why should we care?' (1990) 78 *California LR* 539 669; Guinchard & Buisson, *Procedure Penal* (2005) 703-704 discussing *partie civile* procedure.

65 Henzelin et al (n 11 above) 343; *DRC Jan 18 2008 Trial Chamber I Decision* para 61. While endorsing joint proceeding, the prosecutor has advocated for a cautious approach proposing that TC 'must carefully separate any submissions or material relating exclusively to reparations from the evidence relating to guilt or innocence, as submitted by the parties.'

66 Henzelin et al (n 11 above) 326; dissenting Opinion of Judge Blattman in

can foresee that in the vast majority of cases, especially those that involve many victims, the Court will opt for a separate post trial procedure whether conducted by itself or entrusted to a panel of experts or the VTF.[67]

6.4.2 The Court and/or the Fund: Independence or Interdependence?

Although both established by the Statute, the Court and Fund are structurally separate entities each with particular reparations mandates.[68] The ICC framework thus establishes two focal points for reparations – the Court's binding orders and the VTF.[69] In terms of the Statute, Rules and VTF Regulations, a number of scenarios are possible in the relationship between the Court and VTF.[70] First, both the Court and VTF seem to have the option to make an order for reparations or implement an agenda for victims directly without recourse to each other. In this regard, once the Court convicts a defendant, it may order reparations against a perpetrator,[71] which may be raised from forfeited money or property.[72] This is perhaps the most straightforward case, which completely bypasses the VTF. It is suggested that this will typically be the case where the Court takes the view that the defendant can afford to pay. Even where the defendant is not indigent, it is not far-fetched to argue that there is certainly a limit to the number of victims who may benefit from such an order. Other possibilities through the Fund must be explored.

For its part, Rule 98(5) ICC RPE seems to confer powers on the VTF to implement reparations programmes in respect of victims without having to deal with the Court. It provides that 'other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of Article 79'. Should the VTF implement its own initiatives, the only possible link with the Court is that the Court may have deposited some of the money in the Fund pursuant to a forfeiture order.[73] As was suggested earlier, this route (VTF) offers more flexibility in terms of procedure and

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67 See *infra* 6.4.2 and; Henzelin et al (n 11 above) 335.

68 T Ingadottir (n 25 above) 115.

69 Taylor (n 3 above) 4; Henzelin et al (n 11 above) 335; Wierda & de Greiff (n 12 above) 2-3.

70 For a brief outline of possible scenarios, see Wierda & de Greiff (n 12 above) 4.

71 See Rule 98(1) ICC RPE which provides that 'Individual awards for reparations shall be made directly against a convicted person.'

72 See also arts 75(4), 57(3)(e) and 93(1)(k) Rome Statute.

73 See art 79(2) Rome Statute.

broader possibilities regarding the nature of reparations that may be ordered. This may include 'communal reparations' under the category of rehabilitation.[74]

As part of the VTF-initiated reparations measures under Rule 98(5) ICC RPE, the Board of Directors of the Fund may 'decide to provide physical or psychological rehabilitation or material support for the benefit of victims and their families.'[75] A reading of the relevant Regulation suggests that these proceedings need not be linked to a particular investigation or a case already under consideration by the ICC, which would include 'victims of the situation', a category elaborated by PTC I.[76] In spite of this possibility, one does not imagine that the VTF will go out, say to the DRC (a situation before the ICC) 'trawling' for victims and their families to rehabilitate and provide with material support. It is suggested that for practical purposes, these will have to be victims who have had some contact with the Court (Office of the Prosecutor or Victims and Witnesses Unit), even though they may not be linked to any particular proceedings.[77]

It is suggested that the VTF-initiated activity or project for victims may be envisaged as 'interim relief', in the sense that they are measures undertaken in favour of victims who may at a later stage receive reparations that are more substantial.[78] Emphasizing the need for the Court-VTF collaboration - and acknowledging the fact that ordering reparations even before investigations are commenced by the Prosecutor

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74 On definition of 'rehabilitation', see J de Hemptinne & F Rindi 'ICC Pre-Trial Chamber allows victims to participate in the investigation stage of proceedings' *J of International Criminal Justice* 4 (2006) 342-350 332; *UN Handbook on Justice for Victims on the Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* UN Doc. E/CN.15/1998/CRP4/Add.1.

75 Regulation 50(a) (i) VTF Regulations.

76 Regulation 50(a) (ii) VTF Regulations.

77 This would be consistent with the Court's approach as relates to this category of victims in respect of whom the Prosecutor has an obligation to inform when he takes a decision to investigate and commence proceedings before the PTC. See Rule 50 (1) ICC RPE; *Uganda Participation Decision* (n 53 above) para 91. In late 2008, the VTF launched a global appeal for 10 million euros to finance its projects in Uganda, Central African Republic and the DRC. See VTF 'Donor appeal: rehabilitating and supporting survivors of sexual violence' <http://www.icc-cpi.int/library/vtf/TFV_Donor_Appeal_Eng.pdf> (Accessed on 30 September 2008). Between 1 July 2008 and 30 June 2009, the Fund supported 30 projects - 13 projects in the eastern DRC (covering the provinces of North and South Kivu and the District of Ituri in Orientale Province) and 17 projects in northern Uganda (covering the Lango, Teso, and Acholi subregions and Adjumani District) through which rehabilitation and material support is provided to the most vulnerable victims. See Assembly of States Parties, 'Report of the Court on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2008 to 30 June 2009' 29 July 2009, ICC-ASP/8/1, paras 8-12.

78 See Ingadottir (n 25 above) 131 referring to recommendations contained in the Report on the International Criminal Court UN Doc. PCNICC/1999/WGRPE/INF/2, at 8.

raises serious concerns – Regulation 50(a)(ii) requires the Fund to inform the Court when it decides to take this action. Regulation 50(a)(ii) specifies issues that may be implicated in this action. In general, the Court must satisfy itself within specified time frames that measures proposed by the Fund in respect of victims do not predetermine issues of jurisdiction[79] or admissibility;[80] violate the presumption of innocence;[81] or be prejudicial to the rights of the accused to a fair and impartial trial.[82] It is suggested that in view of the fact that reparations orders – when made against an accused - must be preceded by a guilty verdict, these factors must also inform decisions relating to interim measures of reparations, whether initiated by the Court or the VTF.

The third set of circumstances in the Court-Fund relationship relates to when the Fund acts as a 'trustee' or 'safe deposit' of a reparations award made by the Court against a convicted person but which is impossible or impracticable to immediately implement to benefit a victim(s).[83] It is evident that in this case, the Fund will have little role in the process, other than to distribute the award at an opportune time in terms of the Court's reparations order. However, this presupposes that the order is specific in nature, in terms of not only the form of reparations but also the beneficiaries.[84]

The fourth possibility affords the VTF an opportunity not only to participate in fashioning the reparations order, but also in implementing it. In terms of Rule 98(3) ICC RPE, the Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate. It is posited that the role of the VTF in fashioning collective reparations awards may be its defining role if well implemented. This is in view of the limitations imposed on the Court as a judicial body. It is suggested that the Fund may enjoy greater flexibilities in terms of procedure and permissive standards of proof that may allow it to process large numbers of victims who need not be linked to a case before the Court in order to obtain reparations.

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79 Art 19 Rome Statute.

80 Arts 17 and 18 Rome Statute.

81 Art 66 Rome Statute.

82 Regulation 50(a) (i) and (iii) VTF Regulations. The Fund may only proceed if the Court does not express itself within 45 days.

83 Rule 98(2) ICC RPE.

84 Wierda & de Greiff (n 12 above) 4.

It is suggested that this fourth scenario raises at least three possibilities. The first and unlikely option is for the Court, while making the award destined to go to many victims through the Fund, to fashion specific orders with identified victims and leave the VTF the sole role of giving effect to that order. The second and perhaps most likely option is for the Court to draw on expertise assembled by the VTF by consulting when designing the order.[85]

It is suggested that in view of reasons cited elsewhere, including that the lengthy and cumbersome reparations proceedings may detract the Court from its trial functions, (apart from posing real dangers for fair trial guarantees and efficiency of the Court), it may be necessary for the Court to rely entirely on a third option. This option would apportion to the Court only the role of developing 'principles' or general guidelines and reserve the discretion for the VTF to design a fitting approach to the nature of claims, number of victims and other relevant factors. The Court then would assume only a supervisory role.[86] Such an approach was successfully adopted in Holocaust-related restitution programmes discussed further below.[87]

It is suggested further that this is perhaps the best approach for the Court to adopt, save in straightforward cases where reparations awards are easy to make against convicted defendants who are financially able. Even in this case, the VTF may be best suited to operationalise a reparations award in favour of several victims. The experience of the Inter-American Court discussed in chapter three,[88] and the specific case studies discussed below support this assertion.

6.4.3 Links Between Two Rights: Participation and Reparations

It is suggested that one question is of pertinence here - whether participation is a prerequisite for obtaining reparations. It would appear that in view of the two focal points for reparations – the Court and the Trust Fund - the answer to this question depends on whether one is speaking to the ICC or the VTF. Either way, it is difficult to

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85 Wierda & de Greiff, 4.

86 Wierda & de Greiff, 4.

87 Section 6.6.1 this study.

88 In *Aloeboetoe et al v Suriname* (Reparations, 1993. *Aloeboetoe Case*, which involved numerous victims for a particular tribe, the Court for the first time ordered, among others, the establishment of a fund to manage compensation claims in favour of members of that tribe.

imagine a successful reparations programme without some form of participation from victims – lodging claims forms, giving evidence to support claims, participating in outreach programmes, appeals etc.

Participation as it relates to the right to reparations is not used in the same sense as participation under Article 68(3) discussed in the previous chapter – it is suggested that it must be considered as participation in proceedings *other than* Article 68(3) proceedings. Otherwise, it would produce undesirable results. If the fairly strict triple test under Article 68(3) of the Statute is applied as general criteria for participation in *all* proceedings, including reparations proceedings, then it must be applied less restrictively to reparations proceedings. The implication is that *any* victim who has a 'plausible' claim on the papers filed should be allowed to make representation in support of their claim at an appropriate time. In any case, in terms of the triple test, once one meets the requirement of 'victim', it is opined that it is no longer necessary to inquire whether 'participation' would prejudice a defendant, who would already have been convicted (in case reparations are considered as part of a post trial procedure). The case is clearly different if reparations, or part of reparations issues, are dealt with in the trial, in which case the Court has to be careful to weigh other factors such as the presumption of innocence and other rights of accused persons.[89] The third factor – that 'personal interests are affected' is of little importance either way. The Court seems to take the view so far that whenever a victim has reason to claim reparations, it must be considered that their personal interests are affected.[90]

As to the fundamental question whether the right to reparations is predicated on the right to participate under Article 68, in the sense that only victims who are granted the right to participate in proceedings can eventually claim reparations later on, the answer is a resounding no. No links based on right to participate are apparent in Articles 68, 75 and 79 in this regard. The basic requirement – and the obvious link – is

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89 See section 6.4.1 above.

90 *DRC Situation Participation Decision July 2006,* para 63. The Court noted with respect to participation at the investigation stage that 'The personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators and to solicit reparations'. See also Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decisions of the Appeals Chamber" of 2 February 2007, 1CC-01/04-01/06-925. Separate Opinion of Judge Song, para 10 noting that victims have at least two interest - to obtain reparations and to receive justice.

that one has to be a victim (as defined under Rule 85) to participate based on Article 68 criteria as well as to benefit from reparations under Articles 75 and 79 of the Statute. Further, as seen already, it is possible for victims to obtain reparations from projects initiated by the Trust Fund, which are unlinked to the Court process.[91] While the right to reparations is not dependent on participation, it is already noted that the extent and forms victim participation will take at the trial is dependent on whether reparations hearings will be held as part of the trial.[92]

6.4.4 Assessing Reparations: Some Specific Issues

6.4.4.1 The Concept of Harm: Damage, Loss, or Injury

The right of victims to obtain reparations is premised on their ability to prove some form of harm.[93] Neither the Statute nor Rules 85 defines these terms. Neither do they set the 'minimum threshold of harm', if at all, for a victim to obtain reparations. Article 75 (1) requires the Court to 'determine the scope and extent of any damage, loss and injury to, or in respect of, victims and […] state the principles on which it is acting.' Presumably, pursuant to this mandate, the Court has referred, without clarification, to the Basic Principles and Guidelines on the Right to a Remedy (Basic Principles).[94] The Court noted that in terms of Principle 8 of the Basic Principles, a victim may suffer, either individually or collectively, from harm in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights.[95] Without saying more, the ICC Appeals Chamber stated that Principle 8 provides appropriate guidance.[96] It is opined that the normative status of the Basic Principles notwithstanding, principle 8 does not begin to address the range of issues implicated in the concept of harm. The

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91 See Rule 98(5) ICC RPE; Regulation 50 VTF Regulations; section 6.4.2.

92 *Situation in the DRC in the case of Prosecutor v Thomas Lubanga Dylo*, Decision on victims' participation No. ICC-01/04-01/06 (Jan 18 2008) [Hereinafter *DRC Jan 18 2008 Trial Chamber I Decision*], para 40.

93 Rule 85 ICC RPE defines victims as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'. See art 75 Rome Statute.

94 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

95 *DRC Jan 18 2008 Trial Chamber I Decision*, para 92.

96 Ibid.

matter should not be regarded as either settled or uncontroversial.[97] The Court will have to return to this question at some stage. An attempt is made here to highlight some issues relevant to the concept.

For a start, the ICC has placed victims into two categories – 'victims of situation' and 'victims of a case'.[98] However, it is suggested that this categorization is only for administrative purposes, and serves only to distinguish between victims granted permission by the Court to participate in proceedings including trial at a particular time (in terms of Article 68) and those who do not. The distinction does not mean that victims who participate have any greater claim to reparations than those who do not. In any case, as argued already, the right to reparations is not tied to participation in proceedings.[99]

However, this distinction does not shed any light on the determination of harm - what damage, loss or injury is compensable and what principles should underlie this determination. As relates to the kind of harm that is compensable, Henzelin et al observe that the use of the terms 'damage, loss or injury' is intended to cover various types of physical damage, as well as personal injury, financial and other losses.[100] This seems to be in keeping with the practice of the human rights tribunals discussed in chapter 3.[101] One can assume that one aspect of reparations in respect of which the Court may have wide discretion because of the 'silences' in the relevant instruments is the concept of harm. The elaboration of the kinds of compensable damage, loss or injury falls entirely on the Court. It is suggested that context – nature of crimes, kinds

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97 See dissenting opinion of Justice Rene Blattman in *DRC Jan 18 2008 Trial Chamber I Decision* para 4-5 cautioning against regarding the Basic Principles as 'a strongly persuasive or decisive authority which the Chamber should be using in its legal determination of victims and in particular the definition of victims and participation.' See Donat-Cattin n 4 above) 969 (noting that Principle 8 definition was considered and included as a footnote in the Draft Statute but was eventually left out).

98 See *Situation in the DRC in the case of Prosecutor v Thomas Lubanga Dylo*, Decision on victims' participation *DRC Situation Participation Decision July 2006,* PTC I, paras 65-6.

99 If this view were taken, it would produce undesirable results. Faced with the clamour from tens, possibly hundreds of victims vying to participate in proceedings, the Court would lose the ability to run a speedy and efficient trial to the detriment of defendants. See Rule 98(5) ICC RPE; Regulation 50 VTF Regulations.

100 Henzelin et al (n 11 above) 324.

101 Some relevant cases decided the Inter-American Court include *Aloeboetoe et al v Suriname* (Reparations, 1993) para 46; *Velásquez Rodríguez Case*, (Merits, 1988) Series C No. 4, para. 189; *Godínez Cruz Case*, (1989) Series C No. 5, para.199; *Castillo Páez* (Reparations) para 49; *Velásquez Rodríguez* (Compensatory Damages) paras 27, 30 & 54.

of victims, availability of resources are some of the factors that will affect the eventual position to be taken by the Court.

As relates to gross human rights violations, human rights tribunals, as discussed in chapter three, have adopted a 'liberal' approach. For the Inter-American Court of Human Rights (Inter-American Court), which, of all human rights tribunals has developed the most relevant jurisprudence in this regard, fair compensation for injury as used in Article 63(1) of the Convention includes material and moral damages, but excludes 'punitive damages'. It rightly takes the view that the latter concept does not exist in international law.[102] Material (pecuniary) damages, as used in its case law, cover a range of issues: loss of income, medical expenses, costs incurred in searching for the victim (where the state engages in a cover-up or fails to investigate), and other expenses of a pecuniary character resulting from the violation.[103] Moral damages, which in the Inter-American Court's view may result from 'the psychological impact' suffered by the victim or survivors due to the violations,[104] or as in the case of *Aloeboetoe*, the assault on the dignity and self worth of victims, family and tribal members,[105] have been ordered as part of the package of reparative measures.

The experience of the United Nations Compensation Commission, which adopted language similar to Article 75 of the Rome Statute – 'damage, loss or injury' seems to support this view.[106] The UNCC had a wide range of 'particulars' for compensation dictated by circumstances.[107] The fact that UNCC operated under the state responsibility framework may limit its relevance to the ICC.[108]

Secondly, it is noticeable that neither the Statute nor Rules prescribe a minimum threshold of harm that is compensable. One may take the view that ICC crimes are the most serious, and that any harm arising from there occasioned to victims

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102 *Velásquez Rodríguez* (Reparations) para 39.

103 JM Pasqualucci *The Practice and procedure of the Inter-American Court of Human Rights* (2003) 255; *Trujillo Oroza v Bolivia* (Reparations, 2002) para 74 (a).

104 *Velásquez Rodríguez*, para 50.

105 In *Aloeboetoe* (Reparations) moral damages were based on the death of loved ones, denial of information about victims and their inability to obtain and bury their bodies.

106 See UN SC Res 687 (1991); Hemptinne et all (n 74 above) 324.

107 The United Nations Compensation Commission established to process claims against Iraq took the view that 'damage, loss or injury' covered a wide range of various types of 'harm' including departure costs, illegal detention, torture and witnessing of traumatic events, personal injury and death, personal property, bank accounts and securities, loss of income, real property, and various types of business losses and public service expenditures, including evacuation costs incurred by Governments.

108 See section 6.6.4 below.

must be repaired. However, this position may be untenable in view of various factors. Victims of these crimes are affected in different ways. Secondly, in view of the large number of victims, the undesirable yet necessary reality is that many victims will be left out. It makes sense for the Court to establish a 'minimum threshold' of compensable harm for individuals. It may be necessary that this threshold be applied through fairly strict criteria to achieve this necessary end.[109] Communal reparations can then be applied to the benefit of a greater pool of victims on the basis of less restrictive criteria. However, communal reparations may be criticized on grounds that they ignore particular ways in which individual victims are affected by crime. If a reparations order is to be made against an accused, it is already noted that this is dependent on a guilty verdict. But what indications relating to compensable harm can be gleaned, if at all, from the sentence imposed? Writing with respect to sentencing generally in international criminal law, Danner notes that 'sentencing…overtly or unconsciously encodes judgments about *harm* and culpability … [it] provides signals about norms underlying the criminal law it serves'[110]

The question one may ask here is: does a long custodial sentence, as opposed to a short one, presuppose a greater or 'larger' responsibility for harm caused to victims affected by relevant crimes? It is tempting to take this view, but one has to consider that in terms of the principle of proportionality proposed below, quantum of reparations should as far as possible relate to the actual harm suffered. In national jurisdictions where restitution proceedings are part of a post trial procedure usually linked to sentencing, short custodial sentences may indicate the commitment of the convict to pay restitution to the victim or family. The length of sentence alone cannot therefore be a definitive marker of actual harm.[111]

One is not entirely sure whether any guidance on how to decide on harm from the sentence imposed on the perpetrator can be sought from the jurisprudence of international criminal tribunals, which since Nuremberg, have failed to meaningfully

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109 See Henzelin et al (n 11 above) 325-26.

110 AM Danner 'Constructing a hierarchy of crimes in international criminal law sentencing' (2001) 87 *Virginia LR* 415 417 (emphasis mine).

111 See Randy Barnet 'Restitution: a new paradigm of criminal justice' (1977) Vol 86 Issue 4 *Ethics* at 279-301 at 284 notes that there is never a simple rational connection between a term of imprisonment and and harm caused to the victim; Heikkila, 27.

address victims' concerns relating to reparations.[112] Danner does not discuss whether actual harm to victims has had any bearing on the perceived 'hierarchy' of crimes on the basis of sentences. The closest the sentencing principles of the ad hoc tribunals come to considering victims is on the question of 'gravity of crimes'.[113] However, while the nature of crimes - and their gravity in terms of persons killed or affected - has informed sentences, these factors have mostly been referred to *en passant*. It is opined that the experience of the tribunals and their sentencing practice offers little help in determining either 'kinds' of reparable damage, loss or injury. The Rome Statute, in keeping with these previous international criminal tribunals provides but a skeletal framework on sentencing.[114] It suggested however that in view of the victims' right to reparations, the ICC should reorient sentencing jurisprudence to reflect the new restorative justice paradigm. The substantive basis for such action exists in the Statute.[115]

6.4.4.2 Assessing Harm: Proposed Principles

It is suggested that at least the following principles should inform the determination of harm and the award of reparations to victims or categories of victims. Firstly, it is opined that non- discrimination as a norm of customary international law must inform all reparations activities and projects undertaken either by the Court or VTF. While the Statute and the Rules do not contain a prohibition on discrimination, the VTF Regulations are underpinned by this criterion. The Fund is obliged not to accept earmarked donations from non-state entities whose application as prescribed by the

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112 See Chapter two of this study. Commenting on offender's mental state and impact on victims as determinants of punishment meted out, Heikkila, 26 argues that for [international crimes] which infer numerous victims, offenders mental state has been afforded greater significance since it is impossible to fashion punishment that would fit the suffering of victims.

113 On sentencing principles, see art 23 ICTR Statute; Art 24 ICTY Statute; Danner (n 110 above) 428.

114 Arts 77 and 78 Rome Statute; Danner, (n 110 above) 442-43 comparing the ad hoc tribunal and ICC.

115 Art 76 (1) provides that 'n the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.' It is suggested that 'appropriate sentence' should be informed by any obligations held in respect of victims right to reparations.

donor would result in discrimination on listed grounds.[116] Although this provision relates to 'contributions', it is suggested that non-discrimination equally applies to how funds are allocated to particular groups as well as awards to specific victims. One clearly sees that in all cases, the Regulations intend that victims should as much as possible be treated fairly. A reading of relevant regulations suggests that non-discrimination aims at fair treatment rather than equality between victims. This interpretation of 'non-discrimination' finds support in the endorsement in the VTF Regulations of preferential treatment for certain 'kinds' of victims – those with special status in international law.[117]

The second principle proposed – proportionality – should be fairly straightforward in its application. Proportionality, a general principle of international law, has been applied by the ad hoc tribunals in the area of sentencing[118] and is endorsed by national practice largely based on retributive theories of punishment.[119] What is suggested with regard to reparations is that reparations awarded to victims should be proportional to harm suffered. In view of a number of factors foreseen here – limited resources, difficulties in establishing damage, loss or injury with exactitude – it is suggested that *proportionality*, should not, while desirable, be understood to always infer *restitutio in integrum*. For the reasons cited, including the vast number of victims in a particular category, it is not entirely presumptuous for one to conclude that in most cases, reparations will be symbolic. The case studies discussed shortly – Holocaust reparations, the South African TRC and Rwanda's post genocide experiences support this view. It is suggested that while proportionality best applies in

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116 Regulation 27(b) VTF Regulations mentions race, colour, sex, language, religion, political or other opinion, national, ethnic or other origin, property, birth or other status.

117 Art 27(b) has a proviso to the effect that: 'provided that contributions aimed at assisting those enjoying specific protection under international law should not be considered to be discriminatory'.

118 See V Morris and MP Scharf *An insider's guide to the International criminal Tribunal for the former Yugoslavia* (1995) 21 noting that the general principle of proportionality is the main, if not the only principle of determining the standard for appropriate penalty for crimes under international law. See also Danner, 447 referring to the jurisprudence of the ad hoc tribunals who consistently invoke retribution as a purpose of sentencing. See for instance trial chamber decision in *Prosecutor v Kambanda* Case No ICTR 97-23-S reprinted in 37 ILM 1411 at 1424 noting that 'a sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender'.

119 See Danner (n 110 above) 449-51; also C Kelk et al 'Sentencing Practice and Discretion' in Phil Fennell et al. (eds) *Criminal Justice in Europe* (1995) 319 at 323 cited in Danner, 450 referring to this as greater movement'; D Dolinko 'The future of punishment' (1999) 46 *UCLA LR* 1719 at 1720.

circumstances described, it will be imperative for the Court (or VTF) to consider in this 'scheme of proportionality' the 'burdens' imposed by a reparations order on the perpetrator.

Thirdly, although this does not pass as a 'principle', the Court or VTF has to consider the question of alternative avenues of recourse for victims. It is clear that recourse to the ICC by victims seeking reparations does not prejudice their rights under national or international law.[120] It is perfectly possible that victims who approach the ICC may have already received, or may receive at a later stage, some form or other of reparations nationally or in an international tribunal. In assessing harm and thus reparations at the ICC, it is suggested that prior reparations measures received by a victim have to be considered in the scheme of awards. Whether the ICC is constrained or not in terms of resources, it is advisable that as a matter of principle, double reparations be avoided.

6.4.4.3 Causation, Standard of Proof and Related Issues

Once harm is determined, the focus turns on establishing causation. This standard - the relationship that must exist between the harm suffered and the criminal conduct of the accused that forms the basis of the charges provided for – is not specified either in the Statute or in the Rules.[121] However, as noted in the previous chapter, both Pre-Trial Chambers I and II have stated that for a victim to be eligible to participate in particular proceedings, one the victim must establish a causal link between the harm a victim applicant has suffered and the crimes that the accused has been charged with.[122] This link serves as motivation for the applicant's claim that his/her interests are affected – if the link is established, they can claim reparations at a later stage.

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120 Art 75(6) Rome Statute.

121 Hemptinne et al (n 74 above) 325.

122 See Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 *in the Case the Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-172, page 6 and 7; Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the *Prosecutor v Thomas Lubanga Dyilo* and of the investigation in the Democratic Republic of the Congo, ICC-01/04-01/06-228, pages 9-10; *Decision on the Arrangements for Participation of Victims* a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, ICC-01/04-01/06-462, page 5; and Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05-252, paragraph 12 noting that the Judge will consider whether harm alleged 'appears to have arisen 'as a result ' of the event constituting a crime within the jurisdiction of the Court.

One can see that the issue of the causal link has concerned the Court as one of the criteria on the basis of which victims are granted rights to participate in proceedings related to a particular situation or case. However, it is clear that the Court's preoccupation with this aspect signals its importance in the apportionment of responsibility and eventual claim for reparations.[123]

The actual standard aside, there are fundamental problems in establishing with exactitude causation with a view to apportioning 'civil' responsibility for harm suffered. It is suggested that the problems are in large part likely to be founded in the form of responsibility the ICC embodies – individual responsibility rather than state responsibility – and dynamics related to perpetrators – the fact that ICC will try only persons who bear the largest responsibility[124] and that in case of joint perpetration, only some may actually be before Court.

The following scenario may illustrate some of these difficulties. A bomb destroys a church during an armed conflict.[125] Five senior people in the army and government are indicted, but only two are hauled to the Court for trial. Two of the officers are indicted and charged for, among others, war crimes relating to this attack. If the ICC dealt with state responsibility, it may suffice to convict the officials and hold the state responsible to pay reparations to victims, having established their links to the state in terms of international rules of attribution.[126] However, state responsibility does not apply, so one must grapple with the difficult issues of causation in this scenario.

Issues of command responsibility will loom large. Depending on seniority, the indicted individuals are unlikely to have participated in the crimes themselves, in the sense of 'pulling the trigger'. Yet, unless they can be linked concretely to this crime and convicted, they cannot be expected to pay any form of reparations. If for

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123 *DRC Jan 18 2008 Appeals Chamber Decision*, para 99 established the required standard of causation for one to be allowed to participate as '*prima facie*, credible grounds for suggesting that the applicant has suffered harm as a result of a crime committed within the jurisdiction of the Court.' AC motivated this standard noting that it would be untenable for the Chamber to engage in a substantive assessment of the credibility or the reliability of a victim's application before the commencement of the trial.

124 Art 1 Rome Statute.

125 Rule 85 (2) ICC RPE provides that victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

126 See ILM Articles on State Responsibility and chapter three of this thesis.

argument's sake the bomb were to trigger a landslide in the neighbouring village resulting in deaths and further destruction, issues of causation become even more complicated. However, even when the alleged perpetrators are convicted, issues of indigence may still dog reparations efforts. What level of 'civil' responsibility should be apportioned to them in view of the fact that the other perpetrators are not in Court, and may never be brought to Court? Yet claimants must demonstrate that damage, loss or injury suffered is a result of, or is closely related to, the acts of the convicted person.[127]

In case of indigent perpetrators, the Court may be constrained to order reparations to be made through the Trust Fund (as discussed above) but in view of limited funds, prioritization becomes the next concern.[128] Would the Court rather make an order for funds to reconstruct a church, rather than construct a village clinic or pay hospital expenses for specific victims or school fees for surviving children? All said, there are conceptual problems associated with holding the two officers before the Court in the example 'civilly liable' for what are essentially state-instigated crimes – genocide, crimes against humanity, war crimes and more so, aggression.

This section is not meant to discuss in detail issues related to causation. It is merely an illustration of the complex issues in respect of which the Court has to develop guidelines, which in view of the variety of cases, it is suggested, must embody both a general and case-by-case approach. The question is whether the standard alluded to above, that of 'prima facie, credible grounds for suggesting', applicable as part of eligibility criteria for grant of the right to participate in proceedings generally, will be the same as that required to obtain actual reparations. The Court's decisions have been less revealing in this regard. What seems clear from these decisions is that the claimant has to establish a nexus between harm suffered and crimes charged.

Once the Court has pronounced itself on this, it will become clear whether the applicable standard of causation is one of directness, proximate cause, foreseeability or

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127 Henzelin et al (n 11 above) 328; see participation criteria (art 68(3) Rome Statute) discussed in the last chapter, which support this interpretation.

128 Lack of funds is the main problem faced by the Victim Trust Fund, and may ultimately determine whether the VTF will contribute meaningfully to the work of the ICC in providing justice to victims. Since it began its functions, the operational costs of the fund far exceed its income. The result has been that the Fund does not have sufficient staff to enable to perform at optimal level. For the financial report of the VTF as at July 2009, see Assembly of States Parties (n 77 above) pars 28-32.

some other standard. The lack of uniformity in this regard is such that general international law offers no clue as to the eventual direction the Court will take on the question.[129] The jurisprudence of the International Court of Justice as well as that of international human rights tribunals is irrelevant in this regard for the simple reason that their focus is on state responsibility under which causation issues do not arise. As noted in chapter three, in case of conduct of private persons, it suffices to link these individuals to the state under the rules of attribution, or by the failure by the state to fulfil some obligation under international law in order to establish the relevant state's responsibility to pay reparations.[130]

6.5 Design and Implementation of Mass Reparations Mechanisms

The ICC is confronted with mass atrocities. In whatever case that comes before the Court, there will be tens, hundreds or thousands of victims eligible to claim reparations. Yet, the Court can only deal with a few of these in its trial processes. To deal with this reality, it will have to use effective means possible under the instruments, which may only lie in approaches that respond appropriately to the nature or crimes and large number of victims they generate. The design of reparations mechanism(s) must consider this fact. In this part, historical mass reparations mechanisms are explored with a view to providing lessons in design as well as principles that may be applied by the ICC.

As a preliminary observation, it appears that while in general victims' claims (to compensation schemes) are often couched and pursued as individual entitlements, models have been adopted allowing for mass tort claims under special legislation. To the extent that claims for reparations under the ICC may be made by numerous victims relating to the same set of facts or circumstances, domestic systems proffer some lessons as shown on how to deal with mass claims. It emerges that one common approach in these circumstances has been resort to the 'fund model', which offers a

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129 For a discussion on the practice of international claims commissions see various in RB Lillich (ed) *The United Nations Compensation Commission* (1995); N Wuhler, 'Causation and Directness of Loss as Elements of Compensability before the United Nations Compensation Commission', in RB Lillich (ed) *The United Nations Compensation Commission* (1995); V Heiskanen, *The United Nations Compensation Commission*, 296 *Recueil des cours de L'Academie de La Haye* 259, 334–339 (2003) cited in Hemptinne et all (n 74 above) 325.

130 See Chapter three and ILM Articles on State Responsibility.

no-fault liability approach to mass tort litigation.[131] This has been a favoured alternative to mass tort litigation because it is a less complicated, non-adversarial way of compensating identified victims.[132]

An important aspect of mass reparations mechanisms – the fund model – is exclusivity. Victims who choose to participate waive their right to sue in the Courts or pursue other recourse against the same parties. To the contrary, ICC victims do not relinquish potential claims available to them in domestic and international law merely by obtaining some form of remedy from the ICC or the VTF.[133]

Another approach which may be of greater relevance to the nature of crimes dealt with by the ICC has been deployed in more specific circumstances, as transitional justice mechanisms to address the question of accountability for mass atrocities. While Truth and Reconciliation Commissions fit generally in the complementarity framework, they may also serve as reference points for the ICC, in particular with respect to victims. The South African TRC, celebrated by commentators as a possible model for post conflict societies grappling with accountability issues, may inform how the ICC deals with some reparations issues.[134] It also emerges from the discussion that follows that some international mechanisms such as claims commission carry useful lessons for the ICC in fashioning a mechanism to process reparations.

6.5.1 Holocaust Reparations Programmes

No movement has been as successful as that associated with the Holocaust in pursuing reparations claims against various entities.[135] The Holocaust gave rise to a range of

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131 See generally LS Mullenix & KB Stewart (2002) 'The September 11th victim compensation fund: fund approaches to resolving mass tort litigation' *Connecticut Insurance Law J* 121-152 who outline the September 11th Compensation Fund as well as other similar mass tort models in recent US history.

132 Ibid.

133 Art 75(6) Rome Statute.

134 Aldana-Pindell, 'In vindication of justiciable victims' right to truth and justice for state-sponsored crimes' rights in the criminal process to curtail impunity for state-sponsored crimes' 35 *Vanderbilt J Transnat'l Law* 1399-1501.

135 See MJ Bazyler 'The Holocaust restitution movement in comparative perspective' 2002 20 *Berkeley J Intl Law*; Redress 'Reparations for victims of genocide, crimes against humanity and war crimes: systems in place and systems in the making' Report of proceedings (2007) 7. See also R Howard-Hassman 'Getting to reparations: Japanese Americans and African

approaches and mechanisms aimed at restitution to victims or their families. The restitution claims resulted in a number of significant settlements including the Swiss Banks settlement;[136] Austrian Banks settlement[137] and the German Banks Settlement.[138]

For its historical importance and richness in potential lessons for latter-day reparations programmes, the Swiss banks settlement is discussed at length here. The matter began with class actions brought in several US federal Courts under the Alien Torts Claims Act (ATCA) against a number of Swiss banks and other entities. The claimants alleged that these financial institutions collaborated with and aided the Nazi Regime by knowingly retaining and concealing assets of Holocaust victims, and by accepting and laundering illegally obtained Nazi loot and profits of slave labour.[139] All the cases were consolidated before the United States District Court for the Eastern District of New York (New York District Court).[140] In the course of the litigation, the Swiss banks opted to settle out of Court. A settlement of USD 1.25 billion[141] (Global Settlement) agreed upon was to be distributed to four categories of claims: forced labour claims; looted property claims; deposited assets claims and insurance policies claims.[142]

Americans' (2004-5) 83:2 *Social Forces* 823-840 who comparatively examines two other social movements and discusses why the former was far much more successful and J Greenberg 'Reparations: politically inconceivable' 29 (2006-7) *T. Jefferson LR* 157 discussing the African American reparations claims in context.

136 *Swiss Banks Settlement: In re Holocaust Victim Assets Litigation* United States District Court for the Eastern District of New York at <http://www.swissbankclaims.com/> ion to 3,858 former refugees. See generally Bazyler, (n 135 above); P van der Auwereart 'Holocaust reparation claims fifty years after' 2002 71 *Nordic J Intl L* 557.

137 On the Austrian banks settlements, see M Bazyler, 'Nuremberg in America: Litigating the holocaust in United States Courts' (2000) 1 *Univ Richmond LR* 239 (which explains the general history of recent Holocaust litigation).

138 In December 1999, the U.S and German governments announced a $5.2 billion settlement to compensate Nazi-era slave and forced laborers. Over 200,000 survivors have received awards between 2001 and 2004 in the US and Eastern Europe. The $5.2 billion fund included approximately $4 billion for non-Jewish survivors. See Bazyler (n 136 above) 239.

139 On the five law suits, see Auwereat (n 136 above) 567-570.

140 See *In re* Holocaust Victim Assets Litigation, No. CV-96-4849, 2000 US Dist. LEXIS 20817 (E.D.N.Y); and generally Holocaust Victims Assets Litigation at <http://www.swissbankclaims.com/Overview.aspx> (Accessed on 13 April 2008).

141 See the Class Action Settlement Agreement of 1999, para 5.1 Accessible at <http://www.crt-ii.org/Court_docs/Settleme.pdf> [as amended in 2000 to provide for an Insurance Claims Process for claims concerning WWII-era insurance policies issued to Victims or Targets of Nazi Persecution by certain Swiss insurance companies released under the Global Settlement.].

142 Bazyler (n 136 above) 16; Auwereart (n 136 above) 572-2.

6.5.1.1 Structures and Mandates

Several institutions were central to the implementation of the Swiss banks settlement - the New York District Court; the Independent Committee of Eminent Persons ('ICEP or Volker Committee); the Independent Commission of Experts Switzerland (Bergier Commission); the Joint Distribution Committee;[143] and the Claims Resolution Tribunal. The Volker Committee[144] and Bergier Commission established by the Swiss Parliament were established independently around the time settlement negotiations were ongoing between claimants and Swiss institutions to explore Switzerland's role during the Holocaust era. Their findings – on the dormant accounts of victims of Nazi persecution by the Volker Committee[145] and those on wartime dealings in gold between Germany and Swiss institutions and on Switzerland's treatment of refugees of Nazi persecution in Switzerland[146] - became instructive to the settlement and distribution recommendations.

The Claims Resolution Tribunal (CRT) was established by the Volker Commission as an international tribunal in Switzerland in furtherance of the goals set in the ICEP's memorandum as part of the comprehensive claims resolution process arising from its investigation.[147] The independence of the CRT from the class action in New York ended in 1998 when an arrangement was reached for the two processes to be merged as part of the Global Settlement of USD 1.25 billion.[148] Of this, USD 800 million was earmarked by the New York District Court for the main restitution class – the Deposited Assets Class rendered by the CRT. The District Court, assumed a

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143 Responsible for distribution of awards to victims in the US, Former Soviet Union and Central and Eastern Europe.

144 Established by Memorandum of Understanding between the Swiss Bankers Association, the World Jewish Restitution Organization and the World Jewish Congress on May 2, 1996. Memorandum rprinted in Volker Report Apendix A, A-1. On Volker Committee generally see Michael Bradfield 'The role of the Independent Committee of Eminent Persons' 1998 14 *American Univ Intl Rev* 231.

145 See Volker Committee Report *Report on dormant accounts of victims in Swiss banks* available at <http://www.crt-ii.org/icep_report.phtm> (accessed on 10 Jan 2008).

146 Final Report of the Independent Commission of Experts Switzerland – Second World War (Final Bergier Report) <http://www.swissbankclaims.com/Documents/DOC_15_Bergier_Refugee.pdf> (accessed on 10 Jan 2008).

147 RP Alford 'The Claims Resolution Tribunal and Holocaust Claims Against Swiss banks' (2002) 20 *Berkeley Intl LJ* 250 at 259;

148 Ibid, 260.

supervisory role over CRT activities. The CTR's guidelines and criteria to resolve the claims, as well as individual awards, were subject to the Court's approval.[149]

For a mass restitution tribunal, the CRT adopted a unique approach, opting to resolve claims by 'a judicial case-by-case manner rather than through an administrative procedure using predetermined criteria.'[150] As shown in subsequent examples in this chapter, mass restitution programmes generally adopt an administrative procedure in most cases ending in undifferentiated awards.[151] It is argued that this approach may have been informed by the fact that in most cases, the quantum of the claims could be established with ease where dormant accounts existed, or where evidence of the amounts deposited was available. Further, it is opined that the approach adopted is not informed only by the availability of evidence to establish a claim with a measure of exactitude. The nature of claims and the availability of funds in reparation programmes for thousands of claimants are additional factors that may dictate approaches chosen. In cases of mass atrocities for instance, victims sustain different injuries or damage and are affected in different ways. A case by case approach in such instance may be unworkable considering the obvious need for variety of experts and the necessity for extensive administrative structures that many countries emerging from conflict may not be able to marshal. Limited funds committed to such programmes, or lack of it may force, as was the case of the South African TRC's reparations programme, for relevant entities to shun a case by case approach that infers *restitutio in integrum*.[152]

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149 Deposited Assets Class was implemented in phase two of CRT (CRT II). Stage one (CRT I) operated as an independent arbitral tribunal under the Volker Commission. See Auwereart, at 574; Rules of the Claims Resolution Tribunal (CRT Rules) arts 8 and 16; the Final Order and Judgment of the [District] Court approving the Settlement Agreement, dated July 26, 2000 (as corrected on August 2, 2000); Press release 'ICEP Claims Process Underway in $ 1.25 Billion Swiss Bank Settlement' April 17 2001 available at <http://www.swissbankclaims.com/pdfs_eng/pressreleasefinal.pdf >. See also Alford (n 146 above0 260 and 265.

150 RP Alford & Peter HF Bekker 'International Courts and tribunals' (1999) 33 *International Law* 537 at 548 quoted in Alford (n 146 above) 260.

151 See the exception of the UN Compensation Commission where certain types of claims were adjudicated on a case -by -case basis. See Alford & Bekker (n 150 above) 548.

152 See section on TRC. Although in a different context, Wierda & de Greiff (n 12 above) 5 give the example of Peruvian reparations program to argue that *restitutio in integrum* is not always a desirable principle to apply. In that case, lump-sum settlements were paid out to victims. Had this principle, applied by the Inter-American Court in its practice been adopted, the unaffordable amount of USD 150, 000 would have been payable to victims.

In what became typical of later mass claims processes, the CRT adopted flexible rules of procedure and a low threshold of proof.[153] For a claimant to prove entitlement s/he had to satisfy the CRT on a 'standard of plausibility' which required that 'each claimant must demonstrate that it is plausible, in light of all the circumstances that s/he is entitled to the claimed account.'[154] The Sole Arbitrators or Claims Panels were required to 'bear in mind the difficulties of proving a claim after the destruction of the Second World War and Holocaust and long time that [had] lapsed since the opening of [the] dormant accounts.'[155] According to Alford, this low standard of 'plausibility' proved difficult to apply in some cases, in particular those relating to competing claimants.[156]

6.5.1.2 Principles, Trends and Lessons

Restitution measures associated with the holocaust have become relevant for national and international reparations processes. First, holocaust restitution programmes illustrate how inappropriate a judicial forum operating under normal rules and procedures is for processing mass claims. Although as noted at the beginning some of the holocaust claims were commenced by judicial action, these claims processes generally avoided the Courtroom. In these cases, targeted organizations have moved swiftly to settle through negotiations.[157] Litigation or the threat of it, where this option exists, while unsuited for actual processing of claims can be crucial as a 'trigger' of action from persons targeted by reparations claims.[158] It is clear the banks targeted by these claims moved to negotiate and settle the claims out of Court for fear of, among others, harmful publicity.[159] .

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153 On the procedure and practice of the CRT see Alford (n 147 above) 260-.

154 Art 17 (1) CRT Rules. See also art 22 CRT Rules on the criteria for making awards which required fairly speculative links to the account claimed taking into consideration factors as similar, or substantially similar names, street address of account holder and the like.

155 Rules of the Claims Resolution Tribunal (CRT Rules) art 17(2); Alford (n 146 above) 262.

156 Ibid 267.

157 The Swiss Bank Settlements were attributed to pressure from victims' groups.

158 Later settlements seemed to follow the same pattern. See Bazyler, (n 136 above) 17.

159 Bazyler (n 136 above) 17 citing political pressure, in particular from Sen. D'Amato's banking committee and the threat of sanctions against relevant banks as one main reason to settle. See also Auwereart (n 136 above) 569; generally HE P Moser 'Restitution negotiations-the role of diplomacy' (2002) 20 *Berkeley Intl LJ* on the important role of diplomatic pressure in the settlements.

While the matter was eventually settled through negotiation, this did not entirely exclude the District Court in New York, which exercised a supervisory role then and throughout the distribution process, as discussed. This offers a second valuable indication of the role Courts can play in mass claims programmes such as this. It has been argued that the ICC is unlikely to deal extensively with reparations concerns within the trial and may have to appoint a panel of experts – either independently or through the Trust Fund - to deal with these questions.[160]

Thirdly, holocaust restitution programmes demonstrate the crucial role played by organizations and groups within in survivor communities not only in rallying support for political action, but also in the implementation of restitution programmes themselves. If reparations programmes in the ICC are to succeed, there is need to work with states, intergovernmental organisations, civil society in general, in particular, victim groups. The ICC Rules permit such possibility. The ICC may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.[161] In this regard, the holocaust programmes once again are illustrative of the need for an effective network of organizations, not only in lobbying and raising funds but also in the disbursement of awards and implementation of broader goals of reparations such as rehabilitation.

Fourthly, these programmes have contributed to the evolution of procedure related to mass claims processes. While for the most part case - by - case determination of claims was undertaken in most of the programmes, the identification of special beneficiary categories and the award of both individualized and collective awards may be their most important procedural innovation.[162] In view of claims lodged, the programme had to respond appropriately to fashion fitting measures to address the varied broad categories of claimants. These options are pertinent to the ICC, which confronts mass atrocities that affect victims differently. There will be cases where individual reparations are more fitting and others – in view of limited

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160 See section 6.5.2 above. Rule 97(2) ICC RPE permits the Court to appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. See Henzelin et al (n 11 above), at 337-38.

161 Rule 98(4) ICC RPE.

162 Redress (n 135 above) 7.

resources and the need to address the effects of crimes at the broader societal level – where collective reparations will be more appropriate.

Another important contribution in terms of mechanisms and procedure relates to not only the flexible use of administrative and judicial mechanisms but also of flexible evidentiary standards and engagement of civil society groups and governments.[163] Fewer possibilities for adapting rules – substantive and procedural - to new situations exist for the ICC and VTF than those that availed those charged with implementing Holocaust reparations mechanisms. The latter could amend with ease even rules pertaining to the most fundamental institutional issues.[164] The ICC is a criminal Court established by treaty, with attendant institutional strictures and limitations. However, what the ICC will do in this regard – achieving procedural flexibility – may depend on the extent to which reparations proceedings are tied to the trial. As noted already, the less 'judicial' VTF, or independent experts appointed by the Court are perhaps the best avenues to deal in detailed fashion with reparations claims.

The need to have an efficient, well organized secretariat to carry out complicated administrative work is glaringly illustrated by these programmes, which dealt with fifty year-old restitution matters of varying degrees of complexity. Further, as is the case for holocaust restitution claims, the fact that crimes in respect of which reparations claims will be made in the ICC require thorough investigations speaks to the need for specialized entities, but also extensive groundwork investigations. In the case of the Swiss Banks Claims, the centrality of the Volker and Bergier investigative reports to establishment of claims challenges the possibility that a Court such as the ICC may be suited for broad based reparations programmes. As the South African TRC case demonstrates, the success of reparations programmes in cases of mass atrocities where a broad range of issues must be established, including the identity of

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163 Ibid.

164 For instance, after encountering difficulties that slowed distribution of assets among claimants, the Claims Redistribution Tribunal (CRT) eliminated the concept of 'applicable law' in an earlier version of its rules with a view to achieving 'the result that is most fair and equitable under the circumstances', which offered greater discretion. See Alford (n 147 above) 266 and 269.

victims, nature of crimes, injury/loss/damage sustained, often hinges on investigative processes.[165]

Because of the difficulties involved in quantification of damage and payments, varied modes of assessments were used – restitution in integrum, sometimes lump-sum payments and long-term benefit (pension funds), common trust funds among others. In case of dissimilarly placed survivors and in case of difficulty of ascertaining exact loss, strict legality was not adhered to. In these circumstances, restitution in integrum is impossible to effect. With respect to the looted property for instance, it was determined that neither case-by-case adjudication nor a pro rata distribution was acceptable due to at least three factors: the large size of the class of claimants; the difficulty for claimants to prove that property was indeed stolen from them and the impossibility of determining whether specific property was transacted through a Swiss entity as required by the Class Settlement Agreement.[166] The distribution Plan therefore favoured a cy-près remedy consisting in an approximate assessment of loss.[167]

For the first cy-près remedy, the Special Master in charge of this class decided to adopt measures beneficial to the entire group. He created a Victim Lists Foundation to compile and publicize a list of all victim targets of Nazi persecution as defined in the Settlement[168] which he believed would 'honour the memory of the victims, tangibly benefit all their heirs and serve as a powerful testimony to the horrors of the Holocaust.'[169] The second cy-près remedy consisted in the establishment of various forms of humanitarian assistance programmes for the elderly and neediest survivors of the Holocaust.[170]

More broadly, the Holocaust experience is said to have influenced a range of mass claims processes deployed in the post-Holocaust era to address a multiplicity of

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165 See TRC and Community based Organisations.

166 Class Settlement Agreement (n 136 above); Auwereart (n 136 above) 575.

167 In common law jurisdictions the cy-près doctrine a legal doctrine of Courts of equity. The term can be translated (from French to English) as "as near as possible" or "as near as may be. See Black's Law Dictionary p. 349 (5th ed. 1979).

168 See s 1 Class Settlement Agreement.

169 See *Special Master's Proposed* Distribution *Plan for Allocation Plan and Distribution of Settlement Proceeds,* adopted by the Court on November 22 2000 and upheld by the United States Courts of Appeal for the Second Circuit on July 21 2001 (hereinafter Distribution Plan), Vol I at 115; Auwereart (n 135 above) 575.

170 This included Jews in America and Russia as well as Jehovah Witness, homosexuals, disabled and Roma. See Auwereart (n 136 above) 575-576; Distribution Plan Vol I at 118.

situations and objectives. For instance, some objectives have been judicial in character involving the evaluation of liability, while other objectives have been more political in nature, including fact-finding functions.[171] Some of these processes of relevance to this study are discussed below.

6.5.2 South African TRC Model

Many aspects of the South African Truth and Reconciliation Commission have generated much academic comment.[172] Here, the focus is on those aspects that relate directly to the rights of victims of crimes under apartheid. Not much is made of the fact that apartheid was declared a crime against humanity[173] as confirmed by the Rome Statute.[174] It is opined that the relevance of the status of apartheid as such and its endorsement by the Rome Statute is that it affords national initiatives established to deal with such breaches and to redress related victims significance within the Rome Statute and its framework on victims' rights.[175]

To start with, one can take a preliminary view – by a cursory reference to the restorative justice framework outlined in chapter one of this thesis – that the South African approach to redress gross violations associated with apartheid was strongly

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171 Redress (n 134 above) 7 mentioning some of these developments. See also generally John Torpey 'Reparations in the twenty-first century' (2000-2003) *Third World Legal Studies* 43 on the influence of the Holocaust reparation programs on the politics of later initiatives.

172 P Hayner 'Fifteen truth commissions from 1974-1994: a comparative study' (1994) *16 Hum Rghts. Q*; Tama Koss 'South Africa's Truth and Reconciliation Commission: a model for the future' 14 *Florida J of International Law* (2001) 517; A Boraine 'Truth and Reconciliation in South Africa: the third way' in RI Rotberg and Dennis Thompson (eds) (2000) 141; J Klaaren 'A second bite at the amnesty cherry: constitutional and policy issues around legislation for a second amnesty' (2002) 117 *South African Law J* 572 593; C Jenkins 'A truth and reconciliation commission for East Timor: lessons from South Africa?' 7 *J on Conflict and Security* (2002) 234; J Dugard 'Reconciliation and justice: the South African experience (1998 8 *Transnational Law and Contemp. Probs*) 277; J Sarkin 'Trials and tribulations of the South Africa's Truth and Reconciliation Commission' (1996) 12 *South African J on Human Rights* 617.

173 International Convention on the Suppression and Punishment of the Crime of Apartheid Crime of Apartheid (30 November 1973), reprinted in (1974), 13 ILM; G.A. Res. 3068, 28 U.N. GAOR (No. 50), U.N. Doc.A/9233/Add.1 (1973).

174 Arts 7(1)j and 7(2)h Rome Statute.

175 Chapter 1 of the TRC Act limited the list of breaches of concern to the TRC to gross human rights violations namely killings, torture, severe ill treatment, abduction and related acts - attempts, incitement, conspiracy, instigation, command or procurement to commit the listed (main) acts. See Vol Six TRC Report, at 98.

restorative in character.[176] Restorative justice approaches including reparations were central to the process entrusted to the Truth and Reconciliation Commission established by the Promotion of National Unity and Reconciliation Act (TRC Act).[177] The general tenor of the TRC's objectives was 'to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past.'[178] This core objective was to be pursued by the TRC 'establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights' committed during the period commencing 1 March 1960 to the 'cut-off date'.[179] The TRC had the power to grant amnesty[180] 'to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective',[181]. It was also required to establish and make known 'the fate or whereabouts of victims' and of 'restoring the human and civil dignity of such victims' by enabling them to relate their accounts of the violations and by recommending 'reparation measures' in respect of such violations.[182]

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176 See chapter one of this thesis. However, see S Wilson 'The myth of restorative justice: Truth, reconciliation and the ethics of amnesty' (2001) 17 *South African J of Human Rights* 531 who argues that restorative justice 'should be seen as a political myth to which some commissioners [of the South Africa TRC] mistakenly appealed while grasping for a moral justification for amnesty'…and that 'restorative justice, as conceived by the TRC – failed to take full account of the value of retribution and the meanings of forgiveness and reconciliation'. See also S Garkawe 'The South African Truth and Reconciliation Commission: a suitable model to enhance the role and rights of the victims of gross violations of human rights?' (2003) 27 *Melbourne Univ LR*, 344 suggesting that the TRC did not formulate RJ as a model of justice.

177 The Promotion of National Unity and Reconciliation Act 34 of 1995; See summary in the Preamble of the Act the general discussion under this section.

178 Section 3 TRC Act.

179 Described in the epilogue to the Constitution as a date after 8 October 1990 and before 6 December 1993.

180 Although we do not delve into this here, the grant of amnesty had implications for victims rights, in the sense that it had the effect of extinguishing the rights of individual victims from seeking redress outside the TRC process in the South African legal framework. *Azanian Peoples Org v The President of the Republic of South Africa* 1996 (4) SALR 637 (CC). A distinct feature of the TRC's mandate which raises serious questions of South Africa's responsibility under international law is that its inquiry did not extent to acts which constituted international crimes, for reasons that they were not crimes under South African Law at the time. Although the TRC acknowledged that Apartheid was an international crime, its approach, and recommendations did not reflect this principled position. See J Dugard, 'Is the Truth and Reconciliation Process Compatible with International Law? An unanswered Question' (1997) 13 (2) *South African J Human Rights* 260.

181 S 3(1) (b) TRC Act.

182 S 3(1) (c) TRC Act.

6.5.2.1 Structures and Mandates

The TRC Act established three committees, each with a set of duties that contributed to the global objective of the TRC. These were the Committee on Human Rights Violations,[183] Committee on Reparations and Rehabilitation (RRC)[184] and the Committee on Amnesty.[185] The TRC could, as it did, recommend prosecutions where a grant of amnesty had been refused.[186] The broad mandate of the Reparations and Rehabilitation Committee (RRC) was to 'affirm, acknowledge and consider the impact and consequences of gross violations of human rights of victims, and to make relevant recommendations.[187] Under the TRC Act, one of the objectives of the TRC was to provide for the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity, of victims of violations of human rights.[188]

More specifically, the TRC Act required the TRC to make recommendations to the President with regard to policy and measures to be taken to grant reparation to victims, including urgent interim reparations or with respect to 'other measures aimed at rehabilitating and restoring the human and civil dignity of victims.'[189] This provision was buttressed by Section 25(b)(i) of the TRC Act, which granted the RRC discretionary powers to 'make recommendations which may include urgent interim measures as contemplated in Section 4(f)(ii), as to appropriate measures of reparation to victims.' In its final report, the TRC made such recommendations, referred to below. The TRC Act created 'a President's Fund' from which all money payable to victims would be disbursed.[190]

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183 S 3(3)(a) Chapter 3 of the TRC Act.

184 S 3(30(c); Chapter 5 of the TRC Act. See L Atkins & WP Pagan 'Conflict resolution and Democratic Transformation: Confronting a shameful past- Prescribing a human future' 119 *South African Law J* (2002) 174-191 at 194.

185 S 3(3)(b); Chapter 4 of the TRC Act.

186 D Ntsebeza 'The Legacy of the TRC' in Charles Villa-Vicencio and E Doxtader (eds.) *The Provocations of Amnesty: Memory, Justice and Impunity* (2003) 237 Doxtader at 23. See also George Bizos 'Why prosecutions are necessary' in Charles Villa-Vicencio and Doxtader, E (eds.) *The Provocations of Amnesty: Memory, Justice and Impunity* (2003) 5.

187 See Final Truth and Reconciliation Commission Report (1998) Vol Six [Vol Six TRC Report], S TWO, Chapter Two at 98.

188 Preamble to the TRC Act.

189 S 4(f) TRC Act.

190 S 42 TRC Act.

6.5.2.2 Principles, Trends and Approaches

The TRC experience offers valuable lessons for the ICC. First, like the Holocaust reparations programmes, it illustrates the need for special entities – committees, task forces or experts tasked with specific functions relating to reparations, which implicates a range of issues.[191] At the grand structural level, the Commission itself was divided into the three committees introduced above, with the RRC tasked specifically with considering reparations. The Commission was empowered to establish subcommittees to perform specific duties and functions assigned by the Commission.[192]

Additionally, the Act created an Investigation Unit[193] charged with among others, the duty to conduct any investigation or hold any necessary hearing,[194] to gather information and receive evidence and to establish the identity of victims and the nature and extent of harm suffered.[195] To collect and record statements of violations from victims, the TRC at one point used special 'statement takers' and later governmental and community-based organizations in this task.[196] The ability to establish specialized entities such as these afforded the Commission sufficient flexibility in its functions. In the discussion on Holocaust restitution programmes, doubt was expressed regarding the Court's ability to process mass reparations claims. The same argument advanced there – that the Court should use the facility available to it (appoint experts and/or delegate to the Fund) as the best approach to the issue –applies here.

In the context of this multiplicity of bodies, there is need for coordination and sharing of information between various committees, subcommittees and other commission structures. The Act also provided for the possibility of referral of relevant issues to the RRC by the other Committees of the Commission[197] and from the RRC to

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191 For a critical discussion of various entities in the TRC seen P Pigou 'False promises and wasted opportunities? Inside South Africa's Truth and Reconciliation Commission' in Deborah Posel and Graeme Simpson (eds) *Commissioning the past: Understanding South Africa's Truth and Reconciliation Commission* (2002) 37.

192 Ss 5(b) TRC Act.

193 S 3(3)(3)d TRC Act.

194 S 5 (d) TRC Act.

195 S 4(b) TRC Act.

196 S Garkawe (n 175 above) 367.

197 S 15(1) TRC Act with respect to the Committee on Human Rights violations; S 22 TRC Act with respect to the Amnesty Committee both of which were required to furnish the RRC with

the Committee on Human Rights Violations.[198] All these required an effective administrative unit to co-ordinate the work of various units. In the case of the ICC, administrative functions, coordination and supervision functions have to be streamlined. Henzelin et al have suggested that should the ICC appoint experts, it should retain overall control - with enough powers ceded to the relevant experts to develop effective reparations mechanisms.[199]

While the TRC was not fully a judicial body and could operate flexibly, there was still need to establish a special investigation unit with the functions described above. This quasi-judicial character is not true of the ICC, which is a criminal tribunal with limits on what it can do. Yet, it is required in terms of its reparations mandate 'either upon request or on its own motion in exceptional circumstances, to determine the scope and extent of any damage, loss and injury to, or in respect of, victims and to state the principles on which it is acting.'[200] Evidently, such a task may require resources usually not available to a Court, especially one that operates more or less along adversarial lines. Additionally, this may be a lengthy process, which may offend against the requirement of an expeditious trial of accused. In earlier discussion, it was noted that defendants in the *Katanga* case advanced this argument with some approval from the Court in the context of debates relating to whether reparations issues should be dealt with at the trial stage.[201] The views relating to how the ICC should proceed have already been expressed.[202] Suffice it to say that, the complicated process of identifying victims and perpetrators, and quantifying loss and damage, will need investigation and processing mechanisms free of the strictures of Courts.

The ICC may find some useful reference in the TRC experience in the interpretation of Article 75 of the Rome Statute on 'principles relating to reparations to, or in respect of, victims'. On the forms of reparations, the TRC regarded 'reparations' as encompassing a range of measures. On the types of reparations, the TRC elaborated a wide range of measures showing a great deal of innovation and

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the names of individuals they encountered during their work whom they considered to have been a victim of a gross human rights violation.

198 S 26(2) b TRC Act for a finding whther a particular violation alleged met the criterion of 'gross violation'.

199 Henzelin et al (n 11 above), 337.

200 Art 75 Rome Statute.

201 See *DRC Jan 18 2008 Trial Chamber I Decision*,

202 Section 6.5.2 above.

variety of reparations to fit the circumstances - variety of violations, number of victims, and availability of resources among others. The TRC Act defined reparation to include 'any form of compensation, ex gratia payment, restitution, rehabilitation or recognition.'[203] Commenting on the Interim Constitution of 1993 under which the TRC Act operated, the Constitutional Court endorsed the TRC and a broad conception of reparation.[204] The Court gave some examples of reparations: bursaries and scholarships for the youth; occupational training and rehabilitation; surgical intervention and medical assistance; housing subsidies, and tombstones and memorials.[205]

The following five modes of reparation were eventually recommended by the TRC: interim reparation in monetary terms,[206] individual reparation grants both in monetary terms;[207] and in the form of symbolic reparation[208] including a range of legal and administrative measures,[209] Community rehabilitation programmes;[210] and institutional reform.[211]

For the ICC, in view of the large number of victims, the ICC will have to explore the possibilities available in deploying communal reparations. However, the fact that ICC deals with individual responsibility – and not state responsibility - raises

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203 S 1 TRC Act.

204 Justice Mohammed stated in *AZAPO v President of South Africa* CC at para 45 that: 'The election made by the makers of the Constitution was to permit Parliament to favour 'the reconstruction of society' involving in the process a *wider concept of 'reparation'* which would allow the state to take into account the competing claims on its resources, but at the same time, to have regard to the 'untold sufferings' of individuals and families whose fundamental human rights had been invaded during the conflict of the past.' (emphasis added).

205 AZAPO, ibid. See also See Final TRC Report, Volume Five, Chapter Five, para 44.

206 Ibid, para 25. This was conceived by the Commission as assistance for people in urgent need, to provide them with access to appropriate services and facilities. The TRC recommended that limited financial resources be made available to facilitate this access.

207 Ibid, paras 26 and paras 40-45. The Commission envisaged an individual financial grant scheme through which each victim would receive a financial grant, according to various criteria, paid over a period of six years. Citing lack of resources, the government eventually paid out a one time lump-sum of R 6000, down from the R 23,000 recommended. The insufficiency of individual grants has been central critiques of the TRC process.

208 Ibid, para 27-28. According to the TRC, symbolic reparation would encompass 'measures to facilitate the communal process of remembering and commemorating the pain and victories of the past' and would include including designation of a national day of remembrance and reconciliation, erection of memorials and monuments, and the development of museums.

209 These included measures to assist individuals to obtain death certificates, expedite outstanding legal matters and expunge criminal records. See Ibid, para 29.

210 This involved the establishment of community-based services and activities by various ministries aimed at promoting the healing and recovery of individuals and affected communities. Ibid, para s30-31.

211 Ibid, para 32. These proposals include legal, administrative and institutional measures designed to prevent the recurrence of human rights abuses.

conceptual as well as practical concerns. A state, with its deeper purse, is best suited and able to institute measures requiring expenditure towards construction of monuments, museums, health facilities and the like. Unless the accused at the ICC are heads of states or government – this is not the case at the moment – one cannot expect the government to take on such a responsibility in respect of which the ICC lacks powers to order. Since an order against an accused is dependent on a guilty verdict,[212] and since a reparations order can only be made against an individual with respect to specific victims, the only other avenue – unless the defendant is rich enough – is to operationalise communal reparations through the ICC's Trust Fund. But, this confronts yet another obstacle – lack of funds. The trust fund, as stated, relies on voluntary contributions. It is unlikely that meaningful programmes will be instituted in all the four countries in respect of which the ICC is seized of 'situations' at the moment.

The TRC outlined a number of principles relating to reparations said to be drawn from internationally acceptable approaches, which the Commission couched as 'reparations policy'. The specific modes of reparations outlined above were to be considered and implemented within this policy. These principles are:1) *redress*, constituting the right to fair and adequate compensation; 2) *restitution,* which means the right to the re-establishment, as far as possible, of the situation that existed prior to the violation; 3) *rehabilitation*, which entails the right to receive medical and psychological care and fulfilment of significant personal and community needs; 4) *restoration of dignity,* entailing the right of the individual/community to a sense of worth and; 5) *guarantees of non-repetition*, which covers a wide range issues and the strategies for the creation of legislative and administrative measures that contribute to the maintenance of a stable society and the prevention of the re-occurrence of human rights violations.[213]

As discussed, the Rome Statute contains provisions on restitution, rehabilitation and compensation but not on guarantees of non-repetition. In the discussion on the ICC reparations framework, it was noted that states unsupportive of reparations in the ICC took the view that the establishment of the Court constituted implicit recognition of victims' rights through its retributive and deterrent functions

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212 *DRC Jan 18 2008 Trial Chamber I Decision*, paras 51, 61 and 76.

213 Final TRC Report (n 205 above) para 37; Also Final TRC Report Volume Six, Section Two, Chapter Two.

and that guarantees of non-repetition was assured in case of convictions.[214] It is opined that this view only partially comprehends what guarantees to non-repetition means. It seems to suggest that non-repetition is achieved merely through the incapacitation of a particular perpetrator. It was noted above that guarantees of non-repetition is a much broader idea which infers not only incapacitating a particular perpetrator but also institutional and legal reform, and promoting mechanisms to prevent and monitor future social conflict.[215] Once again, the fact that the ICC deals with individual responsibility rather than state responsibility raises practical problems for the ICC in giving effect to this form of reparation. Yet, this may be the one of the most effective measure for post conflict societies more broadly. The ICC cannot make an order against an individual concerning legal reform. In this regard, the ICC may have to work through relevant national organisations – beyond its particular mandate – to promote a legal reform agenda in countries it has dealings with.

However, it is possible that the ICC can partly contribute to the achievement of guarantees of non-repetition through the implementation, within the limits of resources, of broad communal reparations in relevant communities, rather than individualised measures. Uplifting economically relevant victims groups and their communities may be the best way of addressing at least some of victims' concerns. More often than not, individuals are victimised in conflicts that are rooted in economic marginalisation, and other forms of exclusion. It makes more sense in these cases to deploy mechanisms that target communities more rather than exclusively individual victims. The work of other intergovernmental, international and national organisations in this regard can be crucial.

At a practical level, the TRC experience provides more lessons. In general, the RRC, and the TRC in general adopted flexible procedures and low standards of proof. All that was needed was for one to prove that one was a victim of a gross violation. For these reasons, the TRC and RRC in particular provided for wide and unrestricted

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214 Muttukumaru (n 25 above) 264.

215 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res., UNGAOR, 60th Sess., UN Doc. A/Res/60/147 (16 December 2005) paras. 19-23. See also, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni: The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. UNESCOR, 56th Sess. UN Doc. E/CN.4/2000/62, (January 18, 2000) which provides a comprehensive outline of reparations.

participatory rights unlike in the case of the ICC where the potentially prohibitive Article 68 criteria – operates to limit the number of eligible victims who can participate directly in proceedings. Even in the TRC's amnesty committee – which for the reason that the rights of suspected perpetrators were at issue adopted a fairly adversarial procedure – once the committee had identified a victim, they would without restrictions or preconditions refer to the RRC for action.[216]

In line with the TRC's open policy on reparations,[217] the ability to obtain remedies was not pegged on participation in TRC proceedings such as those relating to amnesty. Even non-participating victims who made application for reparations received reparations.[218] It is not expected that the ICC will limit beneficiaries of reparations to victims who participate, even when the orders are made against the defendant. The facility for legal representation provides a viable avenue for large numbers of victims to participate and to motivate a case for reparations during the trial or in a post trial procedure as the case may be.

In terms of awards, the RRC recommended a lump-sum award spread over 6 years. In so doing, it dispensed with potentially complex and time-consuming processes of quantifying loss, injury and damages. The ICC could choose this approach, but it is not without problems. It ignores the fact that victims are not similarly placed in not only injuries or losses sustained but also economically and that responses to each must vary. Why treat similarly, differently placed victims? The fact that the South African government eventually cut the final award recommended for each victim by the TRC demonstrates the limits of individualized reparations especially where victims are many.

Equally, one can take the view that the TRC process – with its wide participation and the RRC's reparations policy - seems better suited to deal with broader issues of reconciliation than a traditional criminal Court. The broad participation by victims and the public, the amnesty and reparations among others contributed to the general view that TRC approach was restorative in character. One can argue that the TRC inferred a relatively more accessible process not tethered to the procedural and formalistic requirements of an essentially adversarial process such as

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216 S 22 TRC Act.
217 Art 26 TRC Act and Final TRC Report, Chapter Five, part Five.
218 Ibid.

the ICC. In the end, there are limits to what the ICC can do both in facilitating access and in achieving goals beyond prosecution of perpetrators. That is why the reparations function should be ceded to the fund with only a limited supervisory role reserved for the Court. Since the Rules allow the Court to collaborate with intergovernmental, non-governmental, international and national organizations and others,[219] the Court should, stimulate and work with these 'partner' organizations at the national level in matters relating to victims once the ICC becomes seized of a matter.

6.5.3 Rwanda and Gacaca Reparations Model

6.5.3.1 Structures and Mandates

After the genocide 1994, Rwanda faced a huge challenge of justice – millions of devastated survivors and tens of thousands of alleged perpetrators in its collapsing penitentiary facilities. In spite of the government's firm desire to prosecute all alleged perpetrators without exception, represented in its rejection of a Truth and Reconciliation Commission,[220] there was no enabling law for the punishment of genocide and crimes against humanity.[221] In the face of a collapsed judiciary and the absence of enabling legislation to try genocide and crimes against humanity, difficult problems bedevilled efforts to prosecute perpetrators and to bring justice to victims.[222] A new law was passed on August 30 1996 to enable national Courts to try individuals accused of participation in the two crimes.[223] The law defined four categories of offenders, beginning with category I, consisting of the most serious ones whose

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219 Rule 18(e) relating to the Witnesses and Victims Unit; and Rule 98(4) on making of reparations order by the Court.

220 J Sarkin 'Promoting justice, truth and reconciliation in transitional societies: evaluating Rwanda's approach in the new millennium of using community based Gacaca tribunals to deal with the past' (2000) 2 *International LF* 112-121 117; E Daly, 367.

221 Rwanda rejected calls to institute a Truth and Reconciliation Commission opting for Nuremberg style trials under difficult circumstances.

222 CM Carrol 'An assessment of the role and effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan national criminal justice system in dealing with the mass atrocities of 1994' (2003) 18 *Boston Univ International LJ* 163-200 164.

223 The Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since October 1 1990, Organic Law No.8/96.

responsibility overlapped considerably with ICTR-type cases, to less serious crimes against property in category IV.[224]

No sooner had it come into operation than the government became sceptical of the conventional Courts' ability to deal with the complicated question of post conflict justice in Rwanda in view of the problems cited.[225] It became imperative for new institutions to be created to deal with massive numbers of perpetrators and victims. The answer seemed to lie in *Gacaca*, an ancient conflict resolution mechanism that was formally adopted and constituted to try offenders in their communities by their peers. A law was promulgated in 2001 giving legal sanction to these traditional or 'village' Courts.[226] *Gacaca* tribunals have jurisdiction over intentional and unintentional homicides, crimes against property and assault,[227] but excludes category I crimes in terms of the Organic Law of 1996.

The concept of Gacaca inferred a broad based participatory process presided over by elders – *inyangamgayo* – and open to public participation by whoever could lend assistance to the process. *Gacaca* was firmly rooted in restorative justice as understood today in many national jurisdictions. Rather than mete out retributive justice, these Courts were intended to reconcile the wrongdoer with those affected by their acts. Together with institutionalized apology, open participation by victims, perpetrators and the entire community enhanced the ability of the tribunals to reconcile victims with perpetrators and the entire community.

The vesting of powers in such rudimentary Courts, generally unequipped to try serious international crimes especially in the face of serious deprivations of due process rights raises serious questions beyond this study.[228] The lack of legal

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224 For a discussion of the Organic Law No 8/96 and the categorization of crimes, see generally Idi Gaparayi 'Justice and Social reconstruction in the aftermath of the genocide in Rwanda: an evaluation of the possible role of Gacaca tribunals' 1 (2000) *African HRLJ* 78-106; E Bradley 'In search for justice: a truth and reconciliation commission for Rwanda' (1998) 7 *J of International Law and Practice* 129-190 135; M Morris 'Rwandan justice and the International Criminal Court' 1998 *ILSA J of International & Contemp. Law* 351-361 at 351 (citing political problems and factionalisation for the problems encountered in the implementation of the Organic Law).

225 E Daly 'Between Punitive and reconstructive justice: the Gacaca Courts in Rwanda' (2001) 34 *New York Univ J of International L and Politics* 355.

226 Legal Notice No 8 of 2001.

227 E Daly (n 226 above) 371.

228 For commentaries on this see J Sarkin 'Tension between justice and reconciliation in Rwanda: politics, human rights, due process and the role of *Gacaca* in dealing with the genocide' 45, 2(2001) *J of African Law* 143-172 146; generally I Gaparayi (n 225 above).

representation and fair trial guarantees in *Gacaca* procedure has been one of the main points of attack on these tribunals, sometimes derided as 'mob justice' and a disguised avenue for revenge.[229] Others have been more lenient in their criticism. For instance, Human Rights Watch has noted the flaws in the *Gacaca* system but acknowledged that it may be the only hope for dealing with the large number of suspects at the time held in overflowing Rwandan jails and centers of detention.[230]

6.5.3.2 Principles, Trends and Lessons

Like the South African TRC, *Gacaca's* main mandate was to promote reconciliation. Zorbas has observed in this regard that *Gacaca's* 'overarching goal was to promote healing and reconciliation by providing a platform for victims to express themselves, encouraging acknowledgements and apologies, and facilitating the coming together of both victims and perpetrators.'[231]

In terms of the Organic Law, reparations were ordered against persons found guilty of property offence - destruction, stealing, burning. This did not extend to those who had to serve prison terms, in particular, those charged with the most serious crimes. The nature of reparations measures ordered – rebuilding of houses, minimal monetary recompense and community service to construct communal facilities - accommodated the indigence of the accused in practical ways. Commentators take issue with how the indigence of defendants at the ICC affects the possibility of meaningful restitution orders. While Rwanda offers interesting and innovative approaches to restitution, it is unlikely, because of the fact that the ICC is removed from the theatre of conflicts that could make such orders, that a defendant will be ordered to reconstruct a house that was destroyed.

Lack of fair trial guarantees, while perhaps justifiable under the circumstances of post-1994 Rwanda, somewhat eroded the gains and legitimacy of the *Gacaca* as a viable alternative to formal justice. The fact that *Gacaca* is in direct contact with

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229 Amnesty International Report, Rwanda, Unfair Trials: Justice Denied -AFR 47/08/97, (8 April 1997) Para. 1.

230 See 'Justice in Rwanda' *BBC News* Tuesday, 18 June 2002, accessible at <http://news.bbc.co.uk/1/hi/world/africa> (accessed on 13 May 2004).

231 E Zorbas 'Reconciliation in post genocide Rwanda' 1 (2004-05) *African J of Legal Studies* 29-52 at 36.

communities – as opposed to tribunals such as the ICC – lends legitimacy to the process.[232] The remote location of 'theatres of crime' from the ICC's seat in The Hague limits its contact with conflict communities. This is not mitigated by the fact that the ICC may from time to time hold sessions away from its permanent seat.[233] Even when it relocates, the formal rules limit who may appear or participate meaningfully in the process.

6.5.4 UN Compensation Commission: The Case of Iraq-Kuwait

Unlike international criminal tribunals, such as the ICC, UN Claims Commissions are established within the framework of state responsibility and usually provide compensation only to injured states, not individuals. The UN Compensation Commission (UNCC) established after the Gulf War had the mandate to enforce Iraq's international responsibility to pay reparations to individuals and corporations in respect of obligations arising from the unlawful invasion and occupation of Kuwait.[234] As such, the UNCC broke new ground in the law of state responsibility by requiring a state to provide direct compensation to both individual victims and corporate entities.[235] The procedure afforded individual victims a primary role in the process of compensation, in contrast to the established practice, which made the state the focal point for similar claims.[236] The UNCC, which concluded its work in 2005 was created

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232 D Hafner & E King 'Beyond traditional notions of transitional justice: how trials, truth commissions and other tools of accountability can and should work together' 30 (2007) *British Columbia & Contemp LR*. 91- 110 at 103; E Daly (n 226 above) 374 (noting that a majority of Rwandans support *Gacaca*).

233 Art 3(3) Rome Statute provides that the Court may seat elsewhere whenever it considers desirable.

234 On the UN Claims Commission, see RB Lillich (ed) *The United Nations Compensation Commission* (1995); N Wuhler, 'Causation and Directness of Loss as Elements of Compensability before the United Nations Compensation Commission', in RB Lillich (ed) *The United Nations Compensation Commission* (1995); V. Heiskanen, *The United Nations Compensation Commission*, 296 *Recueil des cours de L'Academie de La Haye* 259, 334–339 (2003).

235 MC Bassiouni 'International recognition of victims rights' (2006) 6:2 *Human Rights LR* 6 (2006), 203-279 at 240. Individual victims and corporations presented their claims through their respective governments or international organisations on behalf of those individual victims who are not in a position to have their claims filed by a government.

236 See S Rosenne 'Reflections on the position of the individual in inter-state litigation in the International Court of Justice' in P Sanders (ed) *International arbitration Liber amicorum for Martin Domke* (1967) 240-251 241 who has wondered why the individual in the context of cases where states articulate claims on behalf of nationals before the ICJ, although the

by Security Council resolution under Chapter VII – another first in international law.[237] The resolution established a Compensation Fund and the UNCC to administer and process compensation claims, of which 1.5 million were concluded by 2005.[238] Conceived as a 'claims resolution facility' rather than a tribunal or Court, the UNCC has dealt with property compensation issues arising from unlawful activities and violations of international human rights and humanitarian law violations – including murder, torture and illegal detention.[239]

The experience of the UNCC is instructive in respect of potential models of processing mass claims for victims. First, it demonstrates, just as is the case for the mass claims processes discussed above, that a successful, well-run reparations process must be free from the fetters of litigation.[240] A flexible procedure with low thresholds of proof may be necessary to enable processing of thousands – probably millions of claims. Secondly, the importance of specialized expertise and evaluation in processing mass claims –which the judges such as those of the ICC lack – is equally demonstrated here. While, there is room for the ICC to use experts in the evaluation of loss, damage and injury to, and in respect of, victims in processing reparations applications, it has already been argued that there is a limit to what can be done within the main trial in view of a number of countervailing interests - fair trial guarantees and efficiency. In the end, it is suggested that the focus for reparations should be on the Trust Fund, and or a separate post trial procedure managed by experts.

Thirdly, the UNCC sounds a caution, in the context of the ICC, to the 'dangers' of an open process that is likely to attract enormous claims, in view of limited resources – time and money. While the ICC is undertaking a vital step towards meeting its mandate by sending out forms and inviting victims to identify themselves, it risks raising expectations of millions of victims only to disappoint by failing to provide reparations. It is advisable for the Court to properly manage expectations of

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individual is the object of proceedings, he is not 'granted any opportunity to make known to the Court, in his own way, his own views on the questions of fact and questions of law involved'.

237 See SC Res. 692, 20 May 1991, S/RES/692 (1991; MCBassiouni (n 236 above) 240.

238 See SC Res. 692, 20 May 1991, S/RES/692 (1991); Bassiouni (n 236 above) 240. See also JR Crook, 'Current Development: the United Nations Compensation Commission - A New Structure to Enforce State Responsibility', (1993) 87 *American JIL* 144.

239 Bassiouni (n 236 above) 240.

240 The UNCC was not conceived as a Court or tribunal, but as a compensation facility. Bassiouni (n 236 above) 240; Crook (n 238 above) 145.

victims and not to 'fish' for victims in the absence of sufficient funds.[241] Fifthly, the fact that the UNCC was able to process more than 1.5 million claims totalling in excess of USD 50 billion demonstrates the success a well endowed fund can achieve – and the limits of the VTF based on voluntary contributions.[242].

Fourthly, the UNCC may proffer limited lessons for the ICC reparations framework on assessment of damage, loss and injury as appears in Article 75 of the Rome Statute. Conceptually, a comparison between the two, in particular attempts to draw 'hand-in-glove' solutions would be problematic in view of the fact that the ICC and UNCC, as noted already operate within different frameworks of responsibility – individual and state responsibility respectively. Curiously, UN Res 671 that created UNCC uses similar language to that used in Article 75 Rome Statute – 'damage, loss or injury'. Noting this similarity, Hemptinne *et al* rightly highlight the fact that UNCC was charged with establishing responsibility on the basis of general international law (which in their view may have resulted in a broader scope of liability), while the ICC deals with responsibility arising largely in international humanitarian law.[243] They note that the Court must consider this.

Finally, it is noteworthy that unlike the UNCC, the definition of victim in Rule 85 ICC RPE is limited to natural persons. It is argued that this is a vital factor that must inform the considerations relating to the nature and forms of reparations – and perhaps scope of liability before the ICC.

6.5.5 United States' Alien Torts Claims Act (ATCA)

The ATCA is considered here - not because it is a reparations model (in the sense of a mass reparations programme) but rather, as an important institution that offers victims

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241 A Di Giovanni 'The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?' (2006) 2 *J of International Law & International Relations* 25 noting at 27 that with respect to publicizing reparations that '… the Court would risk sending the message to the victim population that they will indeed be compensated, in some form or other, for wrongs committed against them. These are expectations which might be more easily created than dispelled.'

242 Bassiouni (n 236 above) 241 records that more than USD 20 billion of this has been availed to states and international organisations for distribution to successful claimants. The Compensation Fund drew funds collected from 25% of oil proceeds managed through the UN Oil for Food Programme.

243 Hemptinne et al (n 92 above) 353.

of ICC-type crimes from around the world to obtain reparations against individual or corporate perpetrators in United States federal Courts. As noted already, the ATCA has links to most of the Holocaust reparations programmes in the sense that proceedings that eventually led to out of Court settlements between victims and various entities were commenced under the ATCA, and were, as in the case of the Swiss Banks Settlement discussed in detail above, supervised by the same Court.

In the post Holocaust era, the United States has been a forum of choice for many victims of gross human rights violations from many parts of the world because of the ATCA. The purpose of the abridged discussion[244] here is to draw important lessons arising from litigation under this law as it relates to the design of reparations mechanisms as well as principles that it proffers. It is considered that the ATCA is worth discussing at two levels. It has so far been the only national law under which victims of gross human rights violations have successfully claimed for reparations. Equally, it is relevant in demonstrating the limits of such statutory judicial process as a mechanism of addressing mass atrocities.

The ATCA provides an avenue for victims of certain human rights abuses, including those committed outside the United States, but where the perpetrator has territorial ties to the US – usually where he now lives in or, in the case of corporations, is based in the United States, to obtain damages in US federal Courts.[245] The ATCA, adopted in 1789 as part of the original Judiciary Act, grants Federal Courts jurisdiction over cases involving violations of the 'law of nations', which has proved an important

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244 The ATCA has evoked considerable academic commentary. On this subject generally, see JL Garwood-Cutler 'Enforcing ICL Violations with Civil Remedies' in Bassiouni, MC Vol III (Enforcement) 343-390. See also AR Amar, 'The two-tiered structure of the Judiciary Act of 1789 (1990) 138 *Univ. of Pennsylvania LR* 1499; J Jarvis 'A new paradigm for the Alien Tort Statute under extraterritoriality and the universality principle' (2003) 30 *Pepperdine LR* 671; ST Kim, 'Adjudicating violations of international law: defining the scope of jurisdiction under the Alien Tort Statute - *Trajano v Marcos*' (1994) 27 *Cornell Int'l LJ* 387.

245 Corporations that may be called to account include those that did business, paid taxes or complied with the laws of a foreign country in which it is alleged that an atrocity occurred. However, none of the cases brought against corporate entities have been successful yet, although the Court in *Karadzic* and Unocal-Burma case (*Doe v Unocal*), Corp., 395 F.3d 932 (*9th* Cir. *2002*) have made statements to the effect that 'any private person' (unlinked to governments) can be held to account under the ATCA. See RG Steinhardt 'The Alien Tort Claims Act: Theoretical and historical foundations of the Alien Tort Claims Act and its discontents: a reality check' (2003) 16 *St. Thomas LR* 585 at 602-05. See also AF Enslen 'Filartiga's offspring: the Second Circuit significantly expands the scope of the Alien Tort Claims Act with its decision in *Kadic v Karadzic*' (1996) 48(2) *Alabama LR* 695.

criterion strictly enforced by the Courts.[246] Although on the face of it the ATCA does not provide for a cause of action required for one to obtain redress, US Courts have taken a progressive approach on this point. Since the landmark judgment in the celebrated case *Filartiga v Pena Irala*[247] that revived the 200-year-old statute, they have consistently held that the Act provides for both jurisdiction and a cause of action for acts that violate international law.[248]

The somewhat ambiguous position after *Filartiga* as to what acts the ATCA deals with, this most important criterion of a twin test applied by federal Courts under ATCA has been clarified. In a recent case *Sosa v Alvarez-Machain*, the Supreme Court took the view that ATCA provides only a limited ability for individuals to bring private causes of action based on international law.[249] ATCA applies only to claims involving violations of international norms that are specific, universal, and obligatory.[250] The Court stated categorically that the ATCA does not apply to claims of arbitrary arrest and detention at issue in the case. While the Court did not elaborate further, the additional categories that may meet this test, it is opined that genocide, war crimes and crimes against humanity are easy inclusions in the list of acts against 'the law of nations'. Accordingly, a victim of any of these crimes can – if able to furnish the second requirement regarding jurisdiction – obtain a civil remedy before relevant US Courts.

The requirement that the relevant US Court must have personal jurisdiction over defendants is equally important. For the individual defendant, there must be some physical presence in the U.S. With regard to corporate entities, this rule enacts that the

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246 S 28 U.S.C. §1350, Judiciary Act 1789 provides that **'**U.S. district Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'

247 630 F.2d at 876 (2d Cir. 1980).

248 Since the decision of the Second Circuit Court of Appeals in the *Filartiga* case in 1980, U.S. Courts have consistently held that the ATCA permits victims, or their relatives, to seek damages for acts committed outside the US and that violate international law. Over $10 million were awarded to the family of a Paraguayan human rights activist who had been subjected to torture by a Paraguayan police inspector in Paraguay, but who had subsequently immigrated to the US.

249 *Sosa v Alvarez Machain* 542 US 692 (2004) 732; A Farelly 'Foreign policy in the Courts – ATCA and the *in re* South African Apartheid Litigation: What *Sosa* makes Courts do' (2005) 30 *Seton Hall Legis J* 437 439.

250 See *Filartiga* (n 250 above); J Jarvis 'A new paradigm for the Alien Tort Statute under extraterritoriality and the universality principle' (2003) 30 *Pepperdine LR* 671 672.

corporation must either be based, or have certain other contacts in the US. The onus of establishing the link in both cases falls upon the victim.[251]

To date, various perpetrators have been sued successfully under the ATCA. This suggests that the ATCA is indeed a useful tool for establishing accountability that can, as it has albeit in a limited number of cases, enable deserving parties to obtain a measure of justice,[252] even though sometimes this may only be symbolic given the poor record of enforcement of ATCA judgments.[253]

While the ATCA can be a useful tool for victims, and indeed has been, in delivering judgments against powerful foreign defendants in cases where such is impossible in their home countries, it has been influenced by questions of politics and US relations with other governments. While this is not reflected overtly in US Courts' rulings, together with the twin test described, courts have deployed the customary principle of sovereign immunity[254] and the 'political question' doctrine effectively to refuse jurisdiction in cases that have foreign policy implications.[255] This stance appears to have been influenced by fears that ATCA suits would compromise US relations with other states.[256] President Bush expressed related fears in 1991[257] regarding the

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251 AA Reed 'The two-tiered structure of the Judiciary Act of 1789 (1990) 138 *Univ. of Pennsylvania LR* 1499; generally J Jarvis (n 251 above).

252 As the result of increasing international concern with human rights issues, however, litigants have recently begun to seek redress more frequently under the ATCA. Some of the recent cases include for instance *Abebe-Jira v Negewo*, 72 F.3d 844 (11th Cir.1996) (alleging torture of Ethiopian prisoners); *Kadic v Karadzic*, 70 F.3d 232 (2d Cir.1995) (alleging torture, rape, and other abuses against Karadzic, a military leader committed during the Balkan war); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir.1994) (alleging torture and other abuses by former President of Philippines); *Tel-Oren v Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir.1984) (alleging violations against Libya based on armed attack upon civilian bus in Israel); *Xuncax v Gramajo*, 886 F.Supp. 162 (D.Mass.1995) (alleging abuses by Guatemalan military forces). For a discussion of these and other ATCA cases, see generally Garwood-Cutler (n 246 above). See also L Londis 'The corporate face of the Alien Torts Act: how an old statute mandates a new understanding of global interdependence' (2005) 57 *Maine LR* 141.

253 See Garwood-Cutler (n 245 above) 383 noting that apart from a small payout in a the case brought against Marcos (Philippines) from the sale of seized assets in Hawaii, no plaintiffs have been able to enforce any portion of the amounts awarded.

254 See Garwood-Cutler (n 245 above) 367; generally Farelly 'Foreign policy in the Courts – ATCA and the *in re* South African Apartheid Litigation: What *Sosa* makes Courts do' (2005) 30 *Seton hall Legis. J* 437 439.

255 US Courts have refused to adjudicate certain ATCA cases on the grounds that that they only disclosed a nonjusticiable political problem and therefore lie 'beyond judicial cognizance'. See Garwood-Cutler (n 246 above) 366-367.

256 B Fein, 'Ruinous Spanner in Foreign Policy? *The Washington Post* 3rd Oct 1995 at A14 quoted in Garwood-Cutler (n 246 above) 373 echoing President Bush's statements four years earlier when signing the TVPA.

257 Bush stated that '[t]here is … a danger that US Courts may become embroiled in difficult and sensitive disputes in other countries, and possibly ill-founded or politically motivated suits,

Torture Victim Protection Act (TVPA), which, like the ATCA permits aliens to sue in US Courts for torture[258] committed abroad, but unlike the ATCA extends this possibility to US citizens.[259]

6.5.5.1 Available But Inappropriate: The Limits of Litigation

The ATCA discussion illustrates a number of things. First, it illustrates the lack of appropriate avenues through which victims of serious violations and ICC type crimes in most countries around the world. Victims who have brought claims under the ATCA are drawn to the US federal Courts for a range of reasons, including the fact that a real possibility of obtaining remedies exists.

Secondly, as shown in the discussion, the application by US Courts of a number of devices – sovereign immunity, political question doctrine – to refuse jurisdiction in 'sensitive' cases illustrates in part the limits of litigation to pursue reparations claims in foreign Courts, even though this may be the only avenue. One must underscore here however that as an international Court, these considerations are unlikely to inform the ICC's actions on the question of remedies. It is suggested that while some form of these considerations may inform prosecutorial policy at the ICC – whether to indict certain individuals – once this happens, reparations claims will be determined on the basis of Article 75 criteria.

Thirdly, it was indicated that in some successful cases under the ATCA, favourable judgments obtained have been largely symbolic. Victims have been unable to enforce judgments obtained.[260] This shows that favourable judgments alone may not helpful to victims, although even judgements may be regarded as a victory for victims insofar as their pain and suffering is acknowledged, illegality of impugned conduct

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which have nothing to do with the United States and which offer little prospect of successful recovery. Such potential abuse of this statute undoubtedly would give rise to serious frictions in the international relations…' Statement on Signing the Torture Victim Protection Act of 1991, 28 Weekly Comp. Pres. Doc. 465, Public Papers of the Presidents, Mar 12 1992 cited in Garwood-Cutler 366. See Fein (n 257 above) A14 quoted in Garwood-Cutler (n 246 above) 373.

258 The TVPA meets US obligations under article 14 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment GA Res 39/46, 39 UN GAOR Supp. No 51, at 197, UN Doc. A/RES/39/708 (1984) reprinted in 23 ILM 1027 (1984).

259 Torture Victim Protection Act of 1991, Pub. L No 102-256, 106 Stat. 73 (1992); 1992 USCCAN (106 Stat.) 1991.

260 Garwood-Cutler (n 246 above) 343 citing the 'Marcos exception'.

condemned and guilty entities identified. The ability of persons against whom judgments are obtained to pay is but one of relevant factors.

Fourthly, related to the third, the success of Holocaust claims that were initiated but not completed under the federal legislative framework (ATCA) once again illustrate the limits of Courts as an avenue for obtaining reparations, especially where high stakes political issues are concerned. In this regard, it is noteworthy that all Holocaust-related cases brought before the Swiss banks claims were unsuccessful before US Courts. Claims subsequent to the Swiss claims, were all concluded by negotiated agreements, with strong 'encouragement' of parties involved by the US government.[261]

Lastly, perhaps of greater relevance to the ICC's victims' framework is that even where reparations have been obtained by some involvement of Courts, such as the Swiss banks Holocaust claims, a separate, usually non-judicial mechanism has been established to handle actual processing and distribution of awards to actual claimants. The Court is thus reduced to a supervisory role of appointing claims administrators, certifying agreements and confirming awards. It is suggested that this is a powerful illustration of the unsuitability of an institution that operates on strict judicial rules and procedure in matters such as these and must inform the ICC approach to this question. Further, it is posited that accordingly, this strengthens the case for a greater role for the Victims Trust Fund in the Court-Fund dichotomy on the question of reparations in the ICC.

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[261] See Bazyler (n 136 above) 16; Garwood-Cutler (n 246) 345.

CHAPTER SEVEN
CONCLUSIONS

The retributive model of justice applied by international tribunals has tended to focus on the interests of two parties – the international community (as represented by the prosecutor) and perpetrators. For this reason, this model does not address the specific concerns of victims of international crimes, which go beyond mere participation as witnesses when called by either party. A review of the practice of the international criminal tribunals since the Nuremberg through to the recent ad hoc tribunals – ICTR, ICTY and SCSL – amply demonstrate the fringe position occupied by victims and the failure by these tribunals to address their specific concerns.

The Rome Statute provides for the rights of victims to participate in proceedings in their capacity as victims and the right to reparations. The study proposes that in order to give full effect to the new victims' rights regime in the Rome Statute, a restorative justice approach – which, as argued has a basis in the texts – has to be adopted by the Court. The thesis argues that the new victim rights regime in the ICC, in particular the right to participation and to reparations as read together with other relevant provisions in the Rome Statute and its Rules of Procedure and Evidence (ICC RPE), provide a normative framework for a restorative justice paradigm. This framework is a mechanism through which victims of international crimes can be entrenched as a party – albeit a party *sui generis* – with specific interests to be protected. However, it further argues that in implementation, the scope of these rights will depend on various factors including the role of the Court. It was further argued that in view of the novelty of these victims' rights in international criminal law (ICL), the Court has to rely, in its interpretation, on sources beyond ICL, in which victims have held but a fringe position. To test the assumptions made above, the study attempted to respond to a number of key questions while conducting a systematic analysis and review of relevant texts and jurisprudence.

The following key questions were posed at the beginning: Does the new victims' rights regime presuppose a restorative justice paradigm? If so, what is the scope of this concept in view of both normative and institutional limitations since the ICC is primarily a criminal court? In view of the well recognised defence right to fair

trial and the prosecutor's law enforcement functions, how should the rights of victims, in particular the right to participate be read? In view of the interests of these two parties that are traditionally protected in the criminal process, does the new victims' rights regime proffer a real change for victims, or will it in effect end up as merely superficial recognition? What is the role of the Court in developing content of victims' rights and giving effect to them amid these competing interests? In view of the novelty of the ICC victims' rights regime, what is the relevance of jurisprudence on related matters from national, human rights and other international bodies?

This final chapter summarises and integrates the main findings in relation to the two rights of victims of international crimes discussed – participation and reparation.

The normative framework and sources of law

The study departed from the position that ICL based on a retributive paradigm of justice has previously marginalised victims of crime and has largely relegated them to the role of witness. In providing for the right to participate in proceedings and the right to reparations, the Rome Statute has normatively changed this. However, since the framework of justice within which the relevant provisions are to be interpreted and given effect is important, the ICC has to adopt an appropriate model of justice.

As argued in chapter one, the inclusion of the new victims' rights regime in the Rome Statute read together with several other concepts in the ICC framework contemplates, and indeed requires the adoption of restorative justice paradigm in order to give full effect to victims' rights to participation and reparation. A restorative justice paradigm offers the best way of understanding how the provisions of the Rome Statute fit together. But, what is restorative justice? To what extent do institutional arrangements (the ICC being a criminal court) place constraints on the elaboration of a restorative justice approach?

Typically, restorative justice, which is generally used in contradistinction to 'retributive justice', is associated with principles and values that underpin appropriate reaction to the commission of a crime such as making amends, reconciliation, guarantees against repetition of crime(s), participation and restoration but also with various 'methods' or 'practices' such as mediation, group conferencing and circles,

especially at the national level. Although restorative justice principles are rooted in international law, in particular the law of state responsibility, the potential links between restorative justice and human rights violations has not been well explored. The term 'restorative justice' has been somewhat stigmatized in ICL. Although judges and commentators today make fleeting reference to it, or sometimes choosing formulations such as 'victim-oriented', 'victim-centred' justice, restorative justice has remained ill defined and vague. Discourse around the role of victims in the process of the ad hoc international criminal tribunals has tended to inaccurately equate 'restorative justice' to reparations or compensation.

Various provisions in the Rome Statute relating to victims, the rights of defendants and the role of states parties as discussed in chapters 5 and 6 embody the principles or restorative justice. These principles require the balancing of the interests of victims, offenders and the public, facilitation of access to justice for victims and defendants as well as participation and full restoration of victims of crime. In view of the normative and institutional constraints imposed on the ICC as a criminal court, the concept of restorative justice that includes the listed 'practices' and 'methods' sometimes associated with it is not fitting for the ICC framework. The conception of restorative justice adopted here – as limited to certain principles and values – is informed by institutional constraints applicable to the formal criminal justice system in general and the ICC in particular.

In proposing a restorative justice approach by the ICC, it has been demonstrated in chapter one that the Rome Statute contemplates such an approach. In this regard, it was argued that restorative justice provides the best basis of understanding how all the provisions coherently fit together. First, the objects and overall mandate of the ICC consists not only in prosecuting perpetrators but also in providing justice for victims.[1] Secondly, the victims' participatory and reparative regime itself and related mechanisms institutionalise this new, more just approach in ICL. Thirdly, various other mechanisms in the texts such as 'interests of justice', and 'fairness' are supplementary frameworks of analysis which also advance this approach. It has been argued that the participation of victims in the process of the ICC renders

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1 *Situation in the DRC in the case of Prosecutor v Thomas Lubanga Dylo*, Decision on victims' participation No ICC-01/04-01/06 (Jan 18 2008) [Hereinafter *DRC Jan 18 2008 Trial Chamber I Decision*].

the process more fair and complete. Further, although not given much emphasis in ICL until now, reparation as an obligation in general international law is not only of similar normative standing as that requiring punishment of perpetrators, but is also about fairness – the idea that harm suffered by victims should, to the extent possible, and by all appropriate means be repaired to the fullest extent possible.

Fourthly, the Rome Statute requires that the application and interpretation of law pursuant to Article 21 – the interpretative clause –, 'must be consistent with internationally recognized human rights.'[2] A proper reading of Article 21 of the Rome Statute, in its requirement that interpretation of the Statute must conform to recognised human rights, provides an entry point for the Court to apply restorative justice principles that have been embraced by international human rights tribunals, which jurisprudence is relevant to the elaboration of victims' rights in the Rome Statute itself. It appears that while various Chambers of the ICC have so far referred to human rights and cited human rights jurisprudence in their interpretation of specific aspects of victims' right to participate and to reparations, the 'cherry-pick approach,' so far adopted is problematic. While this approach is presumably informed by considerations of relevance of human rights jurisprudence to the issues under consideration, it is unsystematic and not always rationalised. This thesis suggests that for coherence, the Court should deploy restorative justice paradigm within Article 21 as an interpretative framework.

The right to participate in proceedings

In terms of Article 68(3) of the Rome Statute, victims have a general right to participate at all stages of the proceedings from the initiation of proceedings and investigations to the conclusion of appeals. The decisions rendered by various chambers of the ICC so far reiterate this. However, a further reading of the Statute and its Rules of Procedure and Evidence (ICC RPE) disclosed that this is not an automatic right for every victim to participate in every proceeding and that various factors are relevant in understanding the scope of the right to participate. These are; whether proceedings relate to a 'situation' or a 'case'; the fact that there is criteria for

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[2] Art 21 (3) Rome Statute

participation; the role of the Court (Pre-Trial Chamber, Trial Chamber or Appeals Chamber); the role of legal representation among others. In various circumstances, the Statute and ICC RPE provide a right to participate as either mandatory or facultative. Thus victims have: an absolute right to attend trial proceedings; a discretionary right to participate in specific circumstances – put questions to the accused, witness or experts; the possibility to make representations before the Court even in Pre-Trial procedure; the right to be heard before decisions on reparation; and the right to intervene in appeals concerning reparation orders. Before looking at these circumstances in turn, it is important to clarify some general elements relate to the right to participate.

On the question whether victims are established victims as a third party to proceedings – in addition to the prosecutor and defence – chapter one concluded that the Statute bestows on victims a presumptive status of party, not an automatic, full party status as is the case for the Prosecutor and defence. To the extent that victims' role in particular proceedings is subject to judicial determination and that because their participation is not in the strictest sense essential to the conduct of a criminal trial, victims are but a 'potential' and 'not genuine'.[3] However, whether an essential party or not, the Statute affords victims the right to participate at every stage and to assert certain rights as such, albeit subject to judicial approval.

Commentators acknowledge that the possibility of a trial without victims does not mean that they do not have a right to participate or interests to protect in the process. Further, it was noted that their potential contribution to the accomplishment of the Court's main objective – truth searching – renders them indispensable. The chapter concluded that victims are a party *sui generis* and that full prosecutorial functions rest with the prosecutor.

While the discursive principles embodied in restorative justice would require an open process in which the majority of victims participate directly to resolve particular conflict, it emerged that participation by victims at the ICC will be largely through legal representatives. The large number of victims, the fairly complex procedures, the rights of defendants to a speedy trial and the need for an efficient

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[3] Donat-Cattin 'article 68' in Triffterer 873; Roy S Lee 'XI' in Roy S Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001)

process makes it necessary for the Court to 'bundle' victims together for purposes of participation subject to special interests and any conflict of interests between victims.

The factors enumerated above render the criteria established under Article 68(3) of the Rome Statute for the participation of victims crucial. Article 68(3) is crucial, not only to ensure the efficiency of the Court process, the achievement of the law enforcement function and protection of fair trial guarantees, but also in ensuring that the rights of victims to participate do not fall victim to those aims. Article 68(3) requires that the right of a victim to participate in any proceeding be subjected to three tests: 1) that the personal interests of the victims are affected; 2) that it is appropriate, as determined by the Court for a victim(s) to participate in particular proceedings; and 3) the manner of their participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The application of these criteria in essence determines the scope of victims' right to participate in particular phases of the proceedings.

On reviewing existing jurisprudence, the test of appropriateness, was determined to be whether the participation of victims raises the appearance of integrity of the process (for instance the investigation or trial) and whether such participation is inconsistent with basic considerations of efficiency and security, in particular that of victims themselves.[4] The study takes the view therefore that there is a presumption in favour of broad participation of victims at all stages. The view taken by the Court with respect to the investigation stage applies to the rest of the proceedings. To the Court, the *extent* of a victim's participation and not their participation *per se* is the core consideration in determining the adverse impact on the investigation, or by extension the trial or appeal proceedings.[5]

With respect to the requirement that a victim's interests have to be affected in order for him or her to participate in proceedings, it is noted that this requirement will be perhaps the most challenging to apply and may determine how effective victim participation in the ICC general will be. While the interests of victims at issue may differ with the stage of proceedings, in general, the interest(s) that a victim(s) seek to

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4 *DRC Situation Participation Decision*, para 57

5 *DRC Situation Participation decision*, para 58

protect must be one that is capable of judicial recognition. [6] However, there is no clarity yet on the meaning of 'interests'. The Pre-Trial Chamber I of the ICC has so far identified two examples of interests that may determine admission of victims to participate – obtaining reparations and punishment of perpetrators.[7]

On analysis of the ICC's jurisprudence, the study suggests in chapter five that the decision of the Appeals Chamber in the *Lubanga Case*, in particular the dissenting opinion by Justice Song in that case represents the best approach of assessing when victims' interests are affected. The Appeals Chamber endorsed the victims' view that their interests in participating in proceedings are diverse, and include obtaining reparations, expressing their views and concerns, verifying facts, protecting their dignity during the hearings and securing recognition as victims.[8] The study agrees with the Appeals Chamber's view that victims have multiple interests to protect, but that these must be linked to evidence brought to substantiate specific charges against the accused.[9]

Other than reparations, Judge Song's view that victims participate with an interest 'to receive justice' is accurate.[10] This formulation aggregates the diverse interests victims may seek to protect within the ICC proceedings and could furnish the Court with a flexible test to deploy in determining when the interests of victims are affected. The Appeals Chamber endorsed PTC I's view that victims have multiple interests to protect, but that these must be linked to evidence brought to substantiate specific charges against the accused.[11] While this requirement of causal connection between crimes charged in a particular case and harm suffered by a victim(s) in respect of which claims are made – is necessary to protect defendants' rights to a speedy trial and for the Court to operate an efficient process – it may reduce considerably the number of victims who may participate in particular proceedings.

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6 See E Haslam 'Victim participation at the International Criminal Court: A triumph of hope over experience?' in D MacGoldrick, P Row & E Donnely (eds) *The Permanent International Criminal Court: Legal and Policy Issues*'315-334 326'

7 See initial opinion of PTC I in *DRC Situation Participation Decision*, para 63

8 Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decisions of the Appeals Chamber" of 2 February 2007, 1CC-01/04-01/06-925, para 39

9 Ibid, para 97

10 Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decisions of the Appeals Chamber" of 2 February 2007, 1CC-01/04-01/06-925. Separate Opinion of Judge Song, para 10

11 Ibid, para 97

In view of the fact that cases to be tried at the ICC will arise from situations of mass atrocities, there is a danger that hundreds of victims may apply to participate in proceedings with the possibility of such proceedings being drawn-out, with injustice being occasioned to accused persons. For his or her part, the Prosecutor, considering victims as a 'burden' may seek to exclude or limit to a minimum the role of victims in their capacity as such. It becomes imperative for the Court to apply judiciously its control role.

Thus, the study concludes that the exercise by victims of the right to participate is closely related to the power of the Court vis-à-vis those of the prosecutor, in particular during the investigations.[12] While accepting in principle that victims are afforded this right, the attitude of the prosecutor gleaned from decisions so far reflects a desire to limit to a minimum the number of victims participating in the process who are considered as an encumbrance on prosecutorial powers. It may take time for the Prosecutor to be entirely at ease with the fact that the right of victims to participate is not necessarily inimical to prosecutorial function and that victims' role may in the end enhance the impact of the Court. Other than qualified legal representatives, the Court has to consistently, as it has done so far, assert the fact that victims' right to participate is embedded in the ICC framework. Defendants against whom rights of victims to participate have to be balanced have not viewed this development entirely in positive light and have raised the possibility of their right to an expeditious trial being prejudiced. So far, the Court recognises the necessity to entrench participatory rights of victims and to assert their influence and voice in the ICC's process but is equally alive to the challenges this portend.

Legal representatives of victims will play an important role in the realisation of the right to participate at various stages of proceedings. A question was posed at to whether requiring legal representation of victims does not negate the essence of the right to participate in proceedings. A proper response may require that one determine what victims want and what victims aim to achieve by participating in the proceedings at the ICC. For want of appropriate tools, the study restricted itself to the last two issues. One of Article 68(3) of the Rome Statute criteria alludes to why victims

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[12] See with respect to investigations J de Hemptinne & F Rindi 'ICC Pre-Trial Chamber allows victims to participate in the investigation stage of proceedings' *J of International Criminal Justice* 4 (2006) 342-350 349

participate – to protect their personal interests, which as noted, cover a wide range of issues. While the potential cathartic benefits of participating personally in a trial have been raised and debated, effective participation and articulation of one's interests required informed representation in view of the complex procedures at the ICC. Practically, 'bundling' of victims in terms of broad interests for purposes of representation is inevitable in the face of numerous victims. The complexity of procedures and other practical considerations thus limit direct participation in proceedings, in particular at trial where victims can put questions to the accused, witnesses and experts.

The right to reparations

In chapter six, the study identified and discussed some of the issues it suggests the ICC must address with respect to the right to reparations. These include: firstly, whether the trial and reparations ('civil liability') issues, can and should be combined in one proceeding. Secondly, whether Article 75 (substantive right to reparations) and Article 79 that creates the victims trust fund (VTF) establish two separate 'reparations frameworks' within the Court, and, if so, what are the links and how should they be implemented to complement each other. Thirdly, what are the reparations principles and rules related to actualization of the specific issues such as assessment of damage, loss or injury to or in respect of victims? Furthermore, what is the link between the right to participate and the right to reparations – is the latter predicated on the former? - In view of the fact that: i) at least some reparations issues will be dealt with within the trial; ii) reparations proceedings must necessarily involve some participatory role for victims whether effected within the trial or in separate proceedings.

As a start, the objections to the inclusion of reparations in the ICC had to be examined. Responding to the concerns that a reparation component in the ICC could distract the Court's attention from its 'core purpose' of prosecuting perpetrators, the study emphasises that with the inclusion of victims' rights, the retributive model of justice – with its emphasis on punishment – is no longer appropriate if the tripartite interests now recognized in the Rome Statute are to be properly protected. The objective of giving victims a voice in the Court's process would not be achieved.

Drawing from the experience of national criminal justice systems discussed in chapter four, the chapter on reparations acknowledged the practical difficulties involved in vesting a criminal court with a reparation function. The right of a defendant to a speedy trial and the need to conduct an efficient proceeding poses particular challenges. Having reviewed the texts and relevant jurisprudence, the conclusion is that the ICC framework is equipped to deal with these concerns. Various mechanisms in these regard, including various permissive rules and the creation of the VTF closely associated with the Court make it possible to confront difficulties associated with the right to reparations in the ICC.

The Court, in terms of Article 75(2) and VTF in terms of Article 79 are the two 'focal points' of the victims' reparation function.[13] These two 'centers of reparation' are closely linked operationally. Chapter 6 took the view that while a reading of the relevant provisions establishes the possibility of the Court and VTF instituting independent reparations schemes, it is imperative that the two collaborate in order to give full effect to that function. Despite being structurally separate entities, the texts intended interdependence between the Court and the VTF, especially given that the latter may be required to participate in fashioning or reparations orders made by the Court and to give effect to the Court's reparation order. Further, the VTF is required to consult with the Court when it implements independent reparations projects.

With respect to reparations linked to the trial, the study examined in chapter six the possibility of incorporating reparation proceedings within the main trial taking into consideration the rights of defendants to a speedy trial and the presumption of innocence. While Regulation 56 of the Court's Regulations provides for the possibility of considering reparations issues during the main trial,[14] the experience from national tribunals leads one to conclude that it is best if criminal proceedings and reparation proceedings are held separately. The fact that a reparation order against an accused is dependent on finding of guilt of the accused, it necessarily means that a definitive finding on reparation has to come after that. Further, in the context of mass atrocities and the possibility that numerous victims may prove the requisite links to a case to obtain reparations, holding joint proceedings would complicate and burden the trial.

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13 L Taylor 'Thoughts on victims' reparation and the role of the Office of the Prosecutor' (2003) Available at <http://www.icc-cpi.int/library/organs/otp/taylor.pdf > (accessed on 15 Jan 2008)

14 Regulation 56 of the Court Regulations

However, the chapter endorsed the initial view of the Court that evidence concerning reparations could, at least in part – where appropriate, and in the interest of efficiency and victims –be considered during the trial.[15]

In view of the limits of what the Court can achieve in relation to reparations, the large number of victim claimants and the rights of defendants, it is suggested that the VTF should be allowed a more prominent role in the processing of reparations. A survey of various mass reparation schemes – Holocaust reparations, South African TRC, the Rwandan *Gacaca* model and the United Nations Compensation Commission (UNCC), as well as the Alien Tort Claims Act (ATCA), a particular mass tort litigation mechanism – offer some useful lessons on a range of reparation related questions.

First, the very existence of these mechanisms is a testament to the limits of a criminal Court to deal with reparation issues especially in cases of mass victimisation. With the exception of the ATCA, all the mechanisms were meant to operate outside the strictures of a courtroom situation. It was noted that even for the ATCA, all the successful claims under that Act were settled outside court, with the latter assuming a mere supervisory role. For this reason alone, it is suggested that the VTF, rather than the Court presents the better option for addressing reparations issues.

Secondly, as exemplified by the *Gacaca* in Rwanda and the Truth and Reconciliation Commissions, in South African and Sierra Leone, the permissive rules and special procedures operated by these mechanisms not only allowed for a greater role for victims, but also made it possible for the often complex reparations issues to be determined in a less restrictive framework. As is the case for mass reparations schemes discussed in chapter six, flexibility in procedure with low thresholds of proof may be necessary to enable processing of numerous claims. The VTF, rather than the Court is best placed to institute such mechanisms.

Thirdly, these mechanisms demonstrate that reparation scheme that is dependent on the guilt of the perpetrator creates enormous challenges. The ICC prosecutes only a handful of perpetrators, most of who are likely to be indigent, yet the number of victims will run into hundreds, thousands or more. This limits the scope and

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[15] *Situation in the DRC in the case of Prosecutor v Thomas Lubanga Dylo*, Decision on victims' participation No ICC-01/04-01/06 (Jan 18 2008)

impact of Court-based reparations. A liability-free scheme, in which determination of beneficiaries is not subject to the challenges mentioned is best suited for a multiplicity of victims and could allow for the adoption of interim measures in favour of victims before the criminal trial is concluded. Despite all the problems likely to be raised by a liability-free scheme (where only the injury to the victim matters), the VTF is the best forum to deal with reparations. However, as was observed in chapter six, while the sources of funds for the VTF may be wider, reliance on voluntary contributions is a problem.

Fourthly, in determining the quantum of reparations, chapter six examined practice at international and national levels and identified proportionality as a key principle to be applied by the Court and VTF in this regard. In view of several factors identified: numerous victims; limited resources; possible indigence of perpetrators; and difficulties in establishing with exactitude the damage, loss or injury suffered by a particular victim, it is suggested that while desirable, proportionality should not be understood to always infer *restitutio in integrum*, which requires specific 'itemisation' of every aspect of harm suffered. The case studies examined reveal that in reality, individual awards in mass reparations schemes are only likely to be symbolic. These cases further showed that innovative ways of bundling victims – collective or communal reparations – have to be a necessary component of reparations schemes at the ICC. However, while it may be easier to group victims together for purposes of exercising their right to participation, bundling victims who have suffered in specific ways for purposes of implementing collective forms of reparations would rightly attract the critique of not only being arbitrary (insofar as it departs from *the proportionality* principle) and of ignoring particular concerns individual victims.

In terms of which victims should benefit, the VTF offers flexibility (unlike the Court-based individualised reparations). This is however subject to availability of funds and clearance from the Court to the effect that defence rights are unlikely to be affected by the institution of any independent reparations or support projects. It would be in line with the VTF's mandate should it choose to focus on a particular class of victims; for instance children or women who have suffered the brunt of sexual crimes. However, the VTF depends on voluntary contributions, rather than the Court's budget will limit what it can do in this regard. The Court, and in particular the VTF is caught between two groups of victims. The first is a huge group of victims (hundreds of

thousands of victims of a situation who are not yet linked, and may never get a chance to participate in any case). The second is a smaller group of victims (victims of a case who have a chance to make a case for reparations before conclusion of the trial by virtue of participating in proceedings). There is a chance that victims in the latter group may unfairly receive preferential treatment, which the Court and the Fund have to consider.

For the above reasons, those who look to the VTF or the Court in general as a panacea to all victims' problems are likely to be disappointed. While one must urge member states to increase contributions to the VTF and for the Fund and the Court to seek ways, as suggested in this study, of implementing reparations, situation countries – those states under investigation by the ICC and from which victims are drawn – cannot abandon their primary responsibility of providing appropriate remedies for victims. Mere referral of a situation to the ICC should not be the last act undertaken by the state in response to mass atrocities. Just like the ICC can only prosecute those who bear the greatest responsibility, it cannot be expected to bear the burden of providing reparations and other appropriate remedies to all victims. Even when the ICC orders reparations in respect of victims or the VTF institutes projects, the site of implementation – where relevant mechanisms should be established – is at the national level. It is discouraging for victims that in all the four situation countries – Uganda, Democratic Republic of the Congo, Central African Republic and the Sudan – no domestic reparations schemes have been instituted.

The Rome Statute promises a lot for victims of international crimes. As argued, the Court has a crucial role to play in ensuring that the rights guaranteed – to participate at all stages of the proceedings, and to reparations – are given effect. In view of the limits of retributive justice, the paradigm of justice to be adopted by the Court is crucial. The thesis motivated and argued for a restorative justice model of justice as one that best accommodates the tripartite interests of law enforcement, defendants and victims rights. It suggested that apart from giving a voice to victims, as an interpretative framework, restorative justice constitutes the best way of understanding how the provisions in the Rome Statute – at least the key ones that go to the objectives of the Court – fit together.

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