Annex B

Public

Section 15

Victims in the Process before the ICC

Chapter 38

Victims' Rights and Interests in the International Criminal Court

Theo van Boven

Introduction

Having known Professor Igor Blishchenko for many years as a distinguished legal scholar, a good friend and a generous person who transgressed political and ideological boundaries, I feel honoured to contribute to this publication and to pay tribute to his memory. In this regard it must be recalled that the preamble of the Rome Statute of the International Criminal Court is mindful that during the twentieth century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.

The suffering and the plight of victims was undoubtedly one of the motivations of all those persons and institutions who advocated the establishment of an effective International Criminal Court (ICC) as a reaction against widespread patterns and practices of impunity for perpetrators of the most serious international crimes. It is against this background that the ICC Statute, while obviously having the prosecution and punishment of perpetrators as its major focus, also pays special attention to the rights and interests of victims. It is significant that the Statute goes well beyond treating the victim as an accessory tool in the criminal procedure and that it awards the victim a standing in her or his own right.

I will start to highlight the perspective of the victim, an aspect which is often underrated in national and international society. Then, for the sake of comparative background, I will review the position of the victim in the International Criminal Tribunal for the Former Yugoslavia (ICTY). Next, attention will be given to some developments in the process prior to the Rome Conference establishing the ICC, notably the views of the International Law Commission (ILC) which prepared the initial draft of the ICC Statute, to be followed by efforts pursued by non-governmental actors in support of victims' rights and interests which were also reflected in the draft Statute presented to the Rome Conference. This paper will further review the provisions relating to the position of victims in the Rome Statute. Thereafter, attention will be given to participation of victims in ICC proceedings and reparation through the Trust Fund as evidenced by recent developments.

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I. The Perspective of the Victim

In the activities of the United Nations to promote and protect human rights and to advance and enforce international humanitarian law, limited attention used to be paid to the rights and interests of victims. In cases where violations of human rights and humanitarian law were the subject of international scrutiny, the facts – and sometimes their root causes – were reported and analysed as a basis for pronouncements by UN policy organs such as the General Assembly, the Commission on Human Rights (replaced by the Human Rights Council) and occasionally the Security Council. Thus, series of country situations, often stricken by violence and armed conflict, appeared on the agenda of international bodies. Any resolution or motion of censure focussed on policies and practices and did not immediately target the persons responsible for these policies and practices. The criminal responsibility of perpetrators remained largely outside the official concerns of inter-governmental institutions and the plight of victims, if at all taken up, was more a concern for humanitarian assistance than the subject of redress and reparation.

However, in the area of crime prevention and criminal justice the plight of victims became a more consistent subject of concern and attention. In that area the United Nations prepared an important instrument and adopted in November 1985 the *Declaration of Basic Principles for Victims of Crime and Abuse of Power* (General Assembly resolution 40/34). The first paragraph described victims of crime as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative in Member States, including those laws proscribing criminal abuse of power".

While it would be an overstatement to say that the end of the Cold War inaugurated an era of compassion with victims, the new situation did open up potentials for international co-operation and revitalised visionary ideals which had been dormant for long in the minds of people. In this new political setting institutions and organisations examining gross and massive violations of human rights and humanitarian law, widely reported by the media, became more sensitive to the suffering of victims. Solidarity and pressure groups generated energetic efforts to provide help and relief as well as legal recourse to the survivors of rape in armed conflicts.

Human rights organisations together with important sectors of civil society and governmental opinion stood up in favour of a more effective enforcement of international criminal justice. The idea to set up an International Criminal Court with powers to mete out justice to perpetrators of serious international crimes and to afford some satisfaction to victims and survivors, responded to widespread hopes and aspirations. These trends were confirmed and re-enforced by the establishment of ad hoc international tribunals for the former Yugoslavia and Rwanda which progressively gained impact and by the growth of international petition procedures providing *locus standi* to persons claiming to be victims of violations of human rights under United Nations and regional international human rights instruments.

It fits in this pattern that the United Nations General Assembly adopted in December 2005, after a long period of discussions and preparations the *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*

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Humanitarian Law[1] containing a normative framework for rendering justice to victims and implementing their rights. In categorising the various forms of reparation, the basic principles and guidelines largely follow the catalogue drawn up by the International Law Commission in the Articles on State Responsibility: *restitution, compensation, rehabilitation, satisfaction* and *assurances and guarantees of non-repetition.*[2] The growing emphasis on the perspective of the victim is a visible expression of a gradual convergence of human rights law, international humanitarian law and the law pertaining to crime prevention and criminal justice.

II. The Victim in the International Criminal Tribunal for the Former Yugoslavia

A cursory review of the provisions of the ICTY Statute shows that the ad hoc tribunal for the former Yugoslavia[3] deals with victims principally in their role as witnesses,[4] for the sake of their protection (Articles 15, 20(1) and 22). The Tribunal's Rules of Evidence and Procedure further elaborate the protection principle. Thus, Rule 34 provides for the setting up, under the authority of the Registrar, of a Victims and Witnesses Unit with the task of recommending protective measures for victims and witnesses and providing counselling and support, in particular in cases of rape and sexual assault.

The ICTY described the principles for the unit's support work in the following terms: to respect, as much as possible, witnesses' freedom to make their own decisions (taking into account the need to ensure their safety and security); to provide material and psychological support throughout their stay in the Netherlands in connection with the Tribunal; to ensure that they are informed of the facilities available to protect them; to prepare them for trial by making them familiar with the place where they give evidence; to arrange for specialist and psychological care; and to provide support services for after-care in the home country[5].

Rules 69 and 75 set out in detail protective measures to be taken in exceptional circumstances requiring the non-disclosure of the identity of a victim and witness, taking also into account the rights of the accused. The ICTY dealt repeatedly with the intricacies of whose rights and interests prevail in conflictual situations as regards the disclosure or non-disclosure of the identity of a victim/witness[6].For present purposes it is also relevant to draw attention to two other ICTY Rules which put the position of the victim in a somewhat wider perspective.

Rule 105, in connection with Rule 88, provides for the possibility that, in case it

1 A/RES/60/147, dated 16 December 2005.

2 UN Doc.A/51/10, chapter III, articles 42-46.

3 It should be noted that the relevant provisions of the ad hoc tribunal for Rwanda are virtually identical.

4 See in more detail Roger S. Clark and David Tolbert, *Towards an International Criminal Court*, in The Universal Declaration of Human Rights: Fifty Years and Beyond (eds. Yael Danieli, Elsa Stamatopoulou, Clarence J. Dias), New York, 1998, pp. 99-112 (at pp. 104-107).

5 Third annual report of the ICTY, UN doc.A/51/292 – S/1996/665, para. 121.

6 Roger S. Clark and David Tolbert, note 4, at p. 105.

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is concluded by the Trial Chamber that unlawful taking of property was associated with the crime and a specific finding to that effect was made in the judgement, the Trial Chamber may order the restitution either of the property or the proceeds as appropriate. This provision representing the notion of restitutive justice on behalf of victims is followed by Rule 106 on the issue of compensation to victims. It orders the Registrar of the ICTY to transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim, whereupon a victim on the basis of relevant national legislation may bring an action in a national court or other competent body to obtain compensation.

It is undeniable that prosecution and punishment by the ICTY of persons criminally responsible for serious violations of international criminal law constitutes by itself a good degree of satisfaction to victims and survivors. At the same time, it is also true that the ICTY Statute and Rules place victims largely in an accessory role. As witnesses they serve the interests of criminal justice. Nevertheless, the Rules relating to restitution and compensation open up, albeit in a limited and embryonic fashion, a possibility for the Tribunal to assist the victims in obtaining reparation and justice for themselves. But it appears that these provisions were included in the Rules as a symbolic afterthought rather than that they were expected to produce concrete results.

III. The Victim's Position in Preparatory Stages of the ICC Statute

A. UN International Law Commission

The Draft ICC Statute elaborated by the International Law Commission did not attribute a place to the victim that went much beyond the terms of the ICTY Statute. The victim was mainly regarded as a witness in the proceedings and in need of protection (Article 43 ILC Draft). A timid resonance of a broader victim's perspective was, however, included in the article on applicable penalties (Article 47 ILC Draft) which stated that fines paid may be transferred by order of the Court to several purposes, including a State the nationals of which were the victims of the crime and a trust fund established by the UN Secretary-General for the benefit of victims of crime. In the commentary the limited nature of this provision was recognised since it was "not intended in any way to substitute for reparation or to prevent any action which victims may take to obtain reparation through other courts or on the international plane"[7].

In fact, from the very beginning the majority of the ILC members were very reluctant in granting victims a broader position under the authority of the proposed ICC. When the ILC held a general debate on the question of international criminal jurisdiction and on the tasks of the proposed ICC, the views of those prevailed who had strong reservations about the possibility of "intermingling strictly criminal proceedings against individuals and civil claims for damages"[8]. They raised the practical objection of the potentially large numbers of victims that could be involved

7 UN Doc. A/49/10, chapter II, Article 47, *Commentary*, para. 4.

8 UN Doc. A/47/10, para. 89.

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and they expressed doubt whether the granting of compensation for injuries suffered as a result of crimes referred to the ICC was within the scope of its mandate. By and large the ILC felt that victims' right to reparation, including the restitution of property, should best be left to national jurisdictions and to international judicial co-operation agreements.

B. NGO efforts

Strengthening the perspective of the victim, largely underexposed in the ILC Draft, became one of the target issues for many non-governmental actors, notably *Redress Trust, European Law Students Association, Women's Caucus for Gender Justice, Human Rights Watch* and many others.[9] They put forward a series of proposals with a view to promoting victims' rights and interests in the participation of ICC proceedings and in particular they sought to advance the idea that the ICC should receive authority to award or order reparations to victims. These NGO efforts found a sympathetic but not overwhelming response on the part of governmental delegations.

The London-based organisation *Redress*, set up to seek reparation for torture survivors, proposed on the basis of extensive consultations and a thorough study that the ICC in imposing sentences on a person convicted of crime may demand "without prejudice to the obligation on every State to provide reparation in respect of conduct engaging the responsibility of the State, other appropriate forms of reparation.[10] Acceptance of this proposal would give the ICC the power to award punitive damages to the victim(s). As regards determining an appropriate sentence, *Redress* recommended that not only the gravity of the crime and the individual circumstances of the convicted person be taken into account, as was proposed in the ILC Draft, but also the impact of the crime on the victims and that also attention be given to "the efforts made to afford reparation to victims". Finally, in order to take account of the need to implement awards made to the victim, *Redress* recommended that the article on recognition of judgements of the Court be made more precise so as to cover the obligation of States Parties "to carry out the judgements of the Court".

Similarly *Human Rights Watch* in its excellent study proposing recommendations for an independent and effective ICC, stressed that the making of reparations from perpetrator to victims can play a critical role in the healing process of victims and societies as a whole and that reparation is an essential element in the administration of international justice. In its recommendations Human Rights Watch supported the notion that the ICC should be empowered to make orders for reparations against the convicted person in favour of victims. It also recommended in the light of the then draft basic principles and guidelines on the right to reparation that reparation should be broadly defined to include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. It further recommended that the ICC

9 See Roger S. Clark and David Tolbert, note 4, at pp. 1001-101; see also David Donat-Cattin, *The Role of Victims in the ICC Proceedings*, in The International Criminal Court; Comments on the Draft Statute (ed. Flavia Lattanzi et al.), Napoli, 1998, pp. 251-272.

10 Redress, Promoting the right to reparation for survivors of tortue: What role for a permanent international criminal court?, London, 1997, Chapter VII Recommendations, pp. 42-44.

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Statute clarify that reparation orders against individuals, as judgements of the Court, should be binding on States Parties and directly enforced by them.[11]

C. The Draft ICC Statute presented to the Rome Conference

Large parts of the Draft ICC Statute presented to the Rome Conference in the final report of the Preparatory Committee[12] stood in brackets which meant that no agreement was reached on the bracketed passages or that such passages constituted one out of two or more proposed options. For present purposes it should be noted that in the draft Article 68 on the protection of victims and witnesses, the reference in the title of this article to *their participation in the proceedings* as well as the further elaboration of this notion in the text of the draft article itself, were in brackets.

It should further be noted that the whole of the text of the draft article 73 on *reparation to victims* and many separate elements of this draft article stood equally in brackets. It was nevertheless of crucial importance, that as a result of joint governmental and non-governmental efforts, a substantive draft article was before the Conference which was comprehensive enough to serve as a suitable basis for preserving the essentials. This is precisely what happened.

The most controversial element, ultimately deleted from the article on reparations, was the responsibility of the State to award reparations on the order or on the recommendation of the Court, in particular if the convicted person was acting on behalf of that State in an official capacity. It appears from the text adopted by the Rome Conference, that the Court can only make an explicit order for reparation against a convicted person (Article 75). In this way a nexus can be established between criminal responsibility of the perpetrator and civil responsibility entailing a punitive element on his part.

While the notion of State responsibility was expressly deleted for reasons which were also in the minds of members of the ILC (see above), and which were based on the intent that the ICC be a court to deal with individual criminal responsibility, this state of affairs will not prevent victims to pursue claims for reparations through the Trust Fund or outside the ICC as is also clearly expressed in Article 75(b) that nothing in the article shall be interpreted as prejudicing the rights of victims under national or international law.

D. The Victim in the Rome Statute

As was indicated in the introductory paragraph of this paper, it is one thing to regard the victim as a witness to serve the criminal justice system and it is another matter to grant the victim a standing in her or his own right in the criminal procedure. The ICC Statute makes room for the victim in both capacities and in that sense the Statute is innovative and combines elements of both the common law and the civil law criminal justice practice. The following provisions are pertinent:

– Article 43(6) relating to the setting up of a V*ictims and Witnesses Unit*, much

11 Human Rights Watch, *Justice in Balance*, New York – Washington – London – Brussels, 1998, pp. 122-126.

12 UN Doc.A/CONF.183/2/Add.1.

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along the same lines and following the experiences of the ICTY referred to above. It should be noted that the Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence;
- Article 54 (1(b)) in connection with duties and powers of the Prosecutor to conduct investigations, the Prosecutor shall *respect the interests and personal circumstances of victims and witnesses, including age, gender and health;*
- Article 64(6(e)) in relation with the functions and powers of the Trial Chamber which may, in performing its functions prior to trial or during the course of a trial, take measures to provide for the *protection* of witnesses and victims;
- Article 68 on *the protection of the victims and witnesses and their participation in the proceedings* which sets out the measures to be taken in order to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, taking into account such factors as age, gender and health. The same article also allows that for the protection of victims and witnesses proceedings be held *in camera* as an exception to the principle of public hearings. Such measures can in particular be taken in the case of a victim of sexual violence or a child who is a victim or witness.

The ICC Statute further substantiates and strengthens the position of the victim where it allows the victim to defend or represent his or her interests before the Court as a matter of his or her own right. In this connection the following provisions are of immediate interest:
- Article 15(3) allowing victims to make *representations to the Pre-Trial Chamber* (in accordance with the Rules of Procedure and Evidence) when the Prosecutor has requested the Trial Chamber for authorisation to proceed with an investigation;
- Article 19(3) dealing with questions of jurisdiction or admissibility entitles those who have referred the situation to the Court as well as victims to *submit their observations* to the Court when the admissibility of a case is challenged and a ruling is sought on this matter;
- Article 68 referred to above in relation to the protection of the victims and witnesses contains a special paragraph (3) on the *participation of victims in the proceedings* where the personal interests of the victims are affected. In such cases the Court shall permit that the *views and concerns of the victims* 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. Detailed provisions are contained in the finalised draft text of the Rules of Procedure and Evidence on application for participation of victims in the proceedings (Rule 89), legal representatives of victims (Rule 90) and participation of legal representatives in the proceedings (Rule 91);
- Article 75 concerning *reparation to victims* referred to above, provides that the Court shall establish principles relating to reparations to victims, including restitution, compensation and rehabilitation. On this basis the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to victims and will state the principles on which it is acting. While the notion of State responsibility for

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awarding reparations was not retained in the Statute, Article 75 does authorise the Court to make an order directly against a convicted person specifying appropriate reparations to victims, including restitution, compensation and rehabilitation. Where appropriate the Court may order that the award for reparation be made through the Trust Fund;

– Article 79 provides that a *Trust Fund* be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court and of their relatives.

The position of the victim in the ICC Statute, in particular the standing of the victim to pursue her or his own rights, claims and interests in relation to the international criminal justice procedure, constitutes a substantial advancement compared with the place attributed to the victim in the procedures of the international military tribunals established after World War II and of the *ad hoc* international tribunals more recently created by the Security Council.

The criminal law and procedural arrangements which characterise these "predecessors" of the ICC, were strongly influenced by the adversarial system prevalent in the United States of America and other common law countries, which in the search for the truth places victims in a quasi dependent position as witnesses. Without prejudice to the crucial role that witnesses play for the collection and corroboration of evidence, a more independent role for the victim/witness is advisable and as such recognised in many domestic criminal law systems, in particular where victims may claim damages as *partie civile* in connection with the criminal procedure. For various reasons such a course of action commends itself.

First, it makes the criminal offender more conscious of the fact that not only wrong was committed against public and moral order but that in addition serious injury and sufferings were inflicted on human beings. Second, it establishes a link between punitive measures and measures of reparation. Third, it tends to facilitate and expedite the procedural action to obtain civil damages.

The strengthening of the position of the victim in the ICC Statute is a happy illustration of the fact that in many ways the Statute is not the product of one predominant legal system and culture but the result of a healthy cross-fertilisation of several legal systems and cultures. As stated earlier, the ICC Statute permits the victim in several ways and at different stages to participate in the proceedings in order to represent and pursue her or his own interests. In particular the victim can make representations to the Pre-Trial Chamber in connection with the authorisation of an investigation (Article 15(3)), she or he can submit observations with regard to jurisdiction and admissibility questions (Article 19(3)), she or he can present views and concerns where her or his personal interests are affected at different stages of the proceedings (Article 68(3)), and above all she or he may request reparations, including restitution, compensation and rehabilitation (Article 75).

The latter provision on reparations is in itself a major advancement. The Rules of Procedure and Evidence contain in this respect important provisions on the publication of reparation proceedings (Rule 96), assessment of reparations (Rule 97) and the Trust Fund (Rule 98). Publicity of the reparations proceedings is intended to inform other victims, interested persons and interested States. Assessment of reparations shall take into account the scope and extent of any damage, loss or injury and may be

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determined on the basis of advice of appropriate experts appointed to assist in this matter. The rights of victims and the convicted person shall be duly respected.

The Trust Fund may be of considerable importance in cases where the number of the victims and the scope, forms and modalities of reparations make a collective award appropriate or where an award for reparations be made to an intergovernmental, international or national organization approved by the Trust Fund.

E. Participation of victims in proceedings and reparation

The Rome Statute was adopted on 17 July 1998 and entered into force on 1 July 2002 after the 60th instrument of ratification had been deposited. The Court became truly operational with the inauguration of the Judges, the Prosecutor and the Registrar in March, June and July 2003 respectively. Within the Registry of the Court the rights and interest of victims are particularly cared for by the Office of Public Counsel for Victims, offering necessary legal assistance, and by the Victims Participation and Reparation Section.[13]

In the Court's early years of existence some remarkable developments should be noted because of their potential impact on the rights and interests of victims in their future relationship with the Court. One such development pertains to the question of *participation of victims* in the proceedings of the Court, more in particular whether already during the investigation of a situation by the Prosecutor victims are entitled to present their views and concerns in accordance with Article 68(3) of the Statute. A request to this effect was made by the Fédération Internationale des Ligues des Droits de l'Homme on behalf of six victims of the situation of the Democratic Republic of the Congo (DRC), one of the situations referred to the Court and being the subject of investigation by the Prosecutor.

The Prosecutor, arguing that investigation of a situation does not fall under "stages of the proceedings" as meant in Article 68(3), objected to the right of victims to participate in the investigation stage since, in view of the massive scale of alleged criminality in the DCR, many thousands of individuals might claim such a right. According to the Prosecutor, a distinction has to be made between a class of "situation victims" and a victim who has been affected personally by a "case" and the accused of such a case.[14]

Pre-Trial Chamber I concluded, however, in a significant decision of 17 January 2006, that the six victims are entitled in the exercise of their procedural rights pursuant to Article 68(3) in relation to the ongoing investigation, to present their views and concerns, to submit relevant materials and to request the Pre-Trial Chamber to order specific measures. In its decision, Pre-Trial Chamber I analysed in detail Article 68(3), it also referred to the enhanced status of victims in human rights law and international humanitarian law and took into account in this respect the case law of the European and Inter-American Courts of Human Rights.

Pre-Trial Chamber I further analysed the criteria included in Rule 85(a) of the

13 See Report of the International Criminal Court for 2004, UN Doc. A/60/177, para. 45.

14 Situation in the Democratic Republic of the Congo, Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings, No.: ICC-01/04, dated 23 January 2006, para. 5.

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Rules of Procedure and Evidence on the definition of "victims", *viz.* natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. For purposes of the assessment of harm suffered, Pre-Trial Chamber I took into account the above-mentioned UN Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and the UN 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, both of which refer in their definition of "victims" to emotional suffering and economic loss as forms of harm suffered.[15]

The issue at stake in this procedure before Pre-Trial Chamber I involves the degree of access of victims to the International Criminal Court. The Pre-Trial Chamber's decision would allow a broad scope and a wide range of victims participation. The Prosecutor feared, however, that such approach would severely complicate the functions attributed to him by the Statue of the Court. The matter is not settled since the Prosecutor was granted leave to appeal the Pre-Trial Chamber's decision.

Another important development having an impact on the relationship of victims with the Court is the adoption by the Assembly of States Parties on 3 December 2005 of the *Regulations of the Trust Fund* for the benefit of victims of crimes within the jurisdiction of the Court.[16] As the Regulations determine, the Trust Fund shall be funded by (a) voluntary contributions; (b) money and other property collected through fines or forfeiture (Article 79(2) of the Rome Statute); (c) resources collected through awards for reparations ordered by the Court pursuant to Rule 98 of the Rules of Procedure and Evidence; (d) such resources as the Assembly of States Parties may allocate.

The Regulations contain among other matters detailed provisions for making Rule 98 operational with regard to resources collected through awards ordered by the Court, *viz.* individual awards to victims pursuant to Rule 98(2), collective awards to victims pursuant to Rule 98(3), and awards to an intergovernmental, international or national organization pursuant to Rule 98(4).

In the course of the drafting of the Regulations differences of opinion arose about the uses of resources, in particular voluntary contributions, collected independently from the Court orders pursuant to the provisions of Rule 98, and about the role of the Board of Trustees in this regard. One opinion supported by the Victims Rights Working Group favoured broad powers for the independent Board of Trustees. Another opinion sought to reduce the role of the Board of Trustees and wished that the Court should determine how the Trust Fund's resources are to be used and that only those persons should benefit from the Fund who had been victimized by crimes that were prosecuted by the Court. Consequently, following the latter opinion victims who are eligible for reparation orders would have to wait for many years for the accused perpetrator of the crime against them to be arrested and convicted before reparations orders could be made. After lengthy negotiations this restrictive view on the functioning of the Trust Fund and on the role of the Board of

15 Situation in the Democratic Republic of the Congo, Decision of Pre-Trial Chamber I on the Applications of Participation in the Proceedings, No.: ICC-01/04, dated 17 January 2006.

16 Resolution ICC-ASP/4/Res.3, dated 3 December 2005.

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Directors did not prevail.

The Regulations provide that, also in the absence of Court orders pursuant to Rule 98, the Trust Fund shall be seized with reparation arrangements when "the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families"(Regulations, para. 50 (a)(i)). However, as a compromise an elaborate conditional clause was linked to such activities of the Board prescribing that the Court be notified by the Board and allowing the Court to express the opinion that the envisaged activities of the Board would pre-determine any issue to be determined by the Court or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial (Regulations, para. 50 (a)(ii)).

The two developments referred to above and relating to participation of victims in proceedings and reparation raise a common intricate problem; how broad is the category of persons who as victims may have access to the Court and to its Trust Fund. There is no doubt that the situations referred to the Court for investigation, such as those pertaining to the Democratic Republic of the Congo, Uganda and Darfur, the Sudan, involve huge numbers of victims afflicted by crimes within the jurisdiction of the Court. Should they all have access to the Court in terms of participation and reparation? The more restrictive view would link the number of victims to cases of prosecution and conviction, the broader view would throw a wider net. The latter position has the perspective of the victim at its side but at the same time the question remains where to draw the line. The Court as well as the Board of Trustees of the Fund will have to go a long way to elaborate criteria for victims' participation and reparation.

Relevant in this respect is that both the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (para. 2) and the UN 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 (para. 9) determine that a person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

Summary of Main Features

- The perspective of the victim has been gradually strengthened in the elaboration of the Rome Statute on the Establishment of an International Criminal Court. It was thus recognised that victims of crimes not only have an interest in the prosecution of perpetrators but also an interest in restorative justice, whether in the form of compensation or restitution or otherwise.
- It must be understood that the authors of the Rome Statute were reluctant to include in a Statute which is aimed to establish individual criminal responsibility, the notion of State responsibility with a concomitant competence of the International Criminal Court to order States to award reparations to victims. However, the fact that victims can only pursue through the ICC claims for reparations against convicted persons, does not prevent victims to pursue claims for reparation through the Trust Fund or outside the ICC.

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- In addition to the issue of reparations, many other provisions of the Rome Statute allow victims to defend their rights and interests before the International Criminal Court, in particular through participation by themselves or their legal representatives in the proceedings and by the expression of their views and concerns. Thus, victims are not only perceived in their accessory role to serve the criminal justice system but also in the function of having their own standing in the criminal procedure.
- While it must be realised that in criminal proceedings the parties in the procedure are, as a matter of principle, the prosecutor and the accused, there is a growing tendency in domestic legal systems, now also reflected in the Statute of the ICC, to recognise and accept the victim as a civil party. Such development is welcome because it may make the criminal offender more conscious of the serious injury and sufferings inflicted on human beings, because it establishes a link between punitive measures and measures of reparation and it may open up perspectives of reconciliation.
- In determining the category and scope of victims' participation in ICC proceedings and victims' entitlement to reparation, it is advisable to seek guidance in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and in the UN 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 Human Rights Law. Both instruments determine that a person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

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CHAPTER 6

VICTIMS AND WITNESSES

I. INTRODUCTION

The Rome Statute, in an historic step forward, makes progress from the mere exercise of retributive justice to a new dimension of making reparations and allowing victims to participate in all phases of the proceedings. Victims are recognized as an aid to the administration of justice and have a right to express their views and to claim compensation. In this, the Rome Statute departs considerably both from the international criminal tribunals created after the Second World War and from the recent *ad hoc* Tribunals.

The Statute sets out the framework for the access of victims to the Court by establishing the basic principles for the protection of victims and their participation in the proceedings. These basic principles have been further extensively developed through the elaboration of Rules providing for a definition of victims (Section II); detailed measures to address specifically the issue of protection in the context of victims and witnesses giving testimony (Section III);[1] a coherent regime for their participation in the proceedings (Section IV);[2] and procedural provisions for claiming reparations (Section V).

II. DEFINITION OF VICTIMS AND GENERAL PRINCIPLE

Silvia A. Fernández de Gurmendi

A. Definition

Rule 85: Definition of Victims

For the purposes of the Statute and the Rules of Procedure and Evidence:

(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.

(b) 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.

1. Rules related to the Victims and Witnesses Unit, which are also of utmost importance for the protection of victims, are dealt with *supra* Chapter 2.

2. *See also supra* Chapter 3.

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The definition of victims in Rule 85 is the product of extensive negotiations in the Preparatory Commission and departs considerably from that contained in the Rules of the ICTY and ICTR which restrict the designation of a victim to "a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed."[3]

Who should be regarded as victims was not specifically discussed during the elaboration of the Rome Statute despite the major and distinctive role contemplated for them. Nevertheless, quite early in the process of negotiations, non-governmental organizations (NGOs), with the support of some delegations, expressed the view that victims had to be defined in the broadest possible way. Already at the Preparatory Committee,[4] attention was drawn to the Declaration on Basic Principles of Justice for Victims of Crimes and Abuse of Power (hereinafter referred to as the Victims Declaration), which had been developed in the area of crime prevention and criminal justice and adopted by the United Nations General Assembly on 29 November 1985.[5] The first paragraph of the Victims Declaration describes victims as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power." Paragraph 2 indicates that "[t]he term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization." The view was expressed that by virtue of its adoption by consensus at the General Assembly, this important document provided a widely accepted definition of victims in the field of criminal justice.

At the August session of the Preparatory Committee in 1996, the Secretariat distributed the Victims Declaration and relevant materials prepared by the Commission on Crime Prevention and Criminal Justice[6] pursuant to the request of the Economic and Social Council regarding the potential applicability to the ICC of the basic principles of justice for victims of crimes and abuse of power.[7] The matter was not considered in depth, but the Report of the Preparatory Committee included a proposal

3. Rule 2 A of the ICTY Rules and ICTR Rules, respectively.

4. 1996 Report of the Preparatory Committee, Vol. I, at 59.

5. Resolution 40/34 (29 November 1985).

6. Commission on Crime Prevention and Criminal Justice, Fifth Session, UN Standards and Norms in the Field of Crime Prevention and Criminal Justice, Report of the Secretary-General, E/CN.15/1996/16/Add.5 (26 February 1996).

7. In ECOSOC Res. 1996/14, para. 6, of 23 July 1996, the Council "requests the Secretary-General to bring to the attention of the Preparatory Committee for the Establishment of an International Criminal Court the potential applicability of the basic principles, contained in the Declaration."

that referred to ECOSOC Resolution 1996/14 and suggested the inclusion of provisions of the Victims Declaration in the ICC rules of procedure.[8]

A streamlined version of this proposal survived and was included in footnote form in the draft statute submitted to the Rome Conference.[9] But due to the lack of sufficient support, the proposal was left out of the Rome Statute. A footnote was nevertheless included in the Report of the Working Group on Procedural Matters to the Drafting Committee which stated that: "In the exercise of its powers under this article, the Court shall take into consideration the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power."[10]

Discussions of a definition of victims did not take place until the 1999 Paris Seminar. A definition which was based on that of the Victims Declaration was proposed in Workshop 1 of the Seminar. However, a footnote to the text indicated that conflicting views existed and some considered that the proposed definition might be too broad,[11] anticipating already the problems that would later arise in the Preparatory Commission.

The debate on the role of victims—beyond their auxiliary function as witnesses—during the elaboration of the Statute, and again when the rules were crafted, was filled with many different concerns and conflicting views. Whatever the perspective and particular views, it was recognized by all that the access of victims to ICC proceedings would necessarily entail logistic constraints. Due to the nature of the crimes under its jurisdiction, very large numbers of victims might be expected and the Court could be overwhelmed by their full participation and request for reparation. It was considered absolutely necessary to devise a realistic system that would give satisfaction to those who had suffered harm without jeopardizing the ability of the Court to proceed against those who had committed the crimes.

For some, a realistic system could only mean a restrictive regime limiting the access of individuals to the Court through the restriction of the modalities of participation of victims in the different phases of the proceedings. Alternatively or in addi-

8. 1996 Report of the Preparatory Committee, Vol. II, at 204.

9. A/CONF.183/2/Add.1 (14 April 1998), at 116 (footnote 22).

10. A/CONF.183/C.1/WGPM/L.2/Add.8 (15 July 1998).

11. A definition of victims was proposed under Rule X with the following text:

    1. "Victims" means any person or group of persons who individually or collectively, directly or indirectly, suffered harm as a result of crimes within the jurisdiction of the Court.

    2. "Harm" includes physical or mental injury, emotional suffering, economic loss or substantial impairment of fundamental rights.

    3 "Victims," where appropriate, may also be organizations or institutions which have been directly harmed.

Report on the international seminar on victims' access to the International Criminal Court.

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tion to this, limiting the scope of those entitled to participate could also attain a similar result. For this reason, deciding what should be discussed first, the regime of participation or the definition of victims, became controversial in itself.

There was strong pressure from the NGO community to discuss the definition first in order to produce early in the process a broad definition based on the Victims Declaration. NGOs lobbied strongly in favour of that text which, in their view, constituted, in the absence of other authoritative definitions, the international law standard applicable also to victims of international crimes for the purposes of the Rome Statute.

However, it became gradually clearer that it would be very difficult to agree on a definition of victims, much less on a broad one, before reaching an agreement on a scheme of victim participation at the various stages of the proceedings. Therefore, debate on the definition was deliberately postponed and was resumed only at the March session of the Preparatory Commission in 2000.

When the matter was taken up again, the vast majority of delegations supported in principle a broad definition based on the Victims Declaration. A new proposal was therefore drafted during informal consultations, which followed the Declaration more closely than the text proposed in the Paris Seminar. It also contained an explicit reference to legal persons that could be considered victims, where appropriate, if they had been directly harmed. The proposal read as follows:

> For the purpose of the Statute and the rules of procedure and evidence:
>
> "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through conduct that constitutes a crime within the jurisdiction of the Court. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victims and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. The term "victim" also includes, where appropriate, organizations or institutions that have been directly harmed.[12]

This was only a working text which needed further discussion and which also left open other points of controversy. For instance, Cuba had suggested to incorporate in the definition an explicit clause on non-discrimination based on paragraph 3 of the definition in the Victims Declaration.[13] Other delegations objected, however, believing that the principle of non-discrimination was already covered in general by article 21, paragraph 3.

At the fifth session in June 2000, delegations faced again two basic questions. Was a definition necessary at all? If so, what should be its content? The vast majority of delegations felt that a definition was useful even if it was not strictly necessary.

12. This proposal was reproduced as Rule Q in the Mont Tremblant Document, at 74.

13. *Id.*, footnote 63. Paragraph 3 of the Victims Declaration reads as follows: "The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practice,

Regarding its content, most delegations favoured again a definition based on the Victims Declaration, which had been on the table of negotiations for years.

In seeking to achieve a compromise with the proponents of ample rights for the victims, the Spanish delegation introduced an alternative definition[14] and repeatedly cautioned delegations not to jeopardize the ability of the Court to administer justice by prescribing a victims regime that would be too ambitious. Its main concern related to the broad participation of victims in different phases of the proceedings. Pursuant to this proposal, a larger group of persons along the lines of the proposed broad definition referred to above would be regarded as victims for the purposes of protection and assistance,[15] as well as for claiming reparations. A much reduced group would be regarded as victims for the purposes of participation in the proceedings, being the "passive subjects" of the crimes (i.e., those persons against whom the crime had been committed.)[16] In other words, victim status would be recognized based on specific purposes.

This proposal, which was interpreted as providing several definitions of victims, did not obtain enough support from delegations. Furthermore, the regime for participation of victims in proceedings was almost agreed by then and seemed shaped by a different approach to the problem. That regime sought to respond to logistic problems arising from the possible numerous victims through modalities built in the system of participation, namely, the requirement of participation through legal representatives, and not by restricting the scope of those who would be entitled to participate.

Thus a majority of delegations continued to favour a single definition based on the Victims Declaration. However, this definition did not pass the test of the debates either. Several concepts equivalent to those contained in the proposed definition, such

14. The proposal was introduced informally, in Spanish only, and read as follows:

a) En relación con las medidas de protección y asistencia previstas en los arts. 43.6, 54.3 f), 57,3 c), 61.11 y 68.1, 2, 4 y 5 y en las reglas de procedimiento y prueba, tendrá la condicion de "víctima" la persona o grupo de personas que haya sufrido directa o indirectamente, individual o colectivamente, un daño como consecuencia de crímenes de la competencia de la Corte. A efectos de esta definición se entenderá por daño las lesiones fisicas o mentales, el sufrimiento emocional, los perjuicios económicos o la vulneración sustancial de derechos fundamentales. Las organizaciones o instituciones que hayan sufrido un daño directo tendrán tambien cuando corresponda, la condicion de "victima."

b) Tendrán la condición de víctima a efectos de su participacion en las actuaciones penales, conforme a los dispuesto en los art. 15.3. 19.3 y 68.3, quienes fueran sujetos pasivos de alguno de los crimenes de la competencia de la Corte. Aquellos que teniendo la condición de víctima conforme al partado a) no reunan la condición de sujetos pasivos del delito podrán participar, conforme al art. 75, en las actuaciones relativas a la reparación.

15. The Spanish proposal here referred to art. 43, para. 6; art. 54, para. 3(f); art. 57, para. 3(c); art. 61, para. 11; and art. 68, paras. 1, 2, 4, and 5.

16. This more stringent concept applied to those who wish to participate in the proceedings pur-

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as "family members," "dependents," "direct or indirect harm," had already been the subject of decisions by international human rights bodies, namely the European Commission of Human Rights and the Inter-American Court of Human Rights, for the purposes of claiming reparations.[17] Some delegations referred to that jurisprudence, but almost every word contained in the draft definition proved controversial for the ICC purposes, once a detailed analysis started.

Delegations objected to the inclusion or expressed the need to clarify the meaning of such terms used in the definition as "collectively" and "emotional suffering." Some considered the phrase "substantial impairment of their fundamental rights" to be too broad. Others objected the reference to "immediate family or dependents." Some wanted to restrict the beneficiary to direct victims or to immediate family or dependents or to those cases where the victim was deceased and the family was intervening on his or her behalf. Some delegations wanted to define "family." Some opposed broadening the definition to those "who have suffered harm in intervening to assist victims in distress or to prevent victimization." Above all, there was a major and fundamental division between those who wanted a definition of victims confined to natural persons and those who wanted to include legal entities as well.

In the light of all these difficulties, it was suggested that the option of no definition be considered again. Japan, in particular, proposed to have no definition at all or, alternatively, to have a very broad one that would give ample discretion to the Court itself, along these lines: "'Victim' means any person who suffered harm as a result of a crime under the jurisdiction of the Court."[18]

The restatement of positions around the same issues clearly demonstrated that the proposal based on the Victims Declaration raised too many difficulties and that it would not be conducive to producing an agreed text, or worse, that it would result in substantially amending the content of the widely recognized instrument. Delegations were invited to abandon the Declaration definition altogether and to try a different approach that would facilitate a compromise. A group of Arab States offered a proposal in this spirit. It eliminated all sources of conflict through a simple, straightforward definition, which read:

> For the purposes of the Statute and the Rules of Procedure and Evidence:
>
> (a) Victim shall mean any natural person or persons who suffer harm as a result of any crime within the jurisdiction of the Court.
>
> (b) The Court may, where necessary, regard as victim legal entities which suffer direct material damage.[19]

17. For an analysis of decisions of International Tribunals on who may claim reparations, see Dinah L. Shelton & Thordis Ingadottir, *The International Criminal Court. Reparations to Victims of Crimes (Article 75 of the Rome Statute and the Trust Fund (Article 79)*, prepared by the Center on International Cooperation, New York University for the 26 July – 13 August 1999 Meeting of the Preparatory Commission for the ICC, at 11–12.

18. Proposed by the representative of Japan during the Working Group Meeting of 26 March 2000.

Paragraph (a), which was similar to the Japanese proposal, swiftly became the basis of the current sub-rule (a) of Rule 85. A major controversy continued to divide delegations on the issue of legal entities, referred to in paragraph (b). The United Kingdom, in particular, was strongly opposed to the inclusion of legal persons, arguing that extending the definition to them could end up diverting the limited resources of the Court from individual victims to the benefit of powerful commercial corporations. Against this argument, others underlined the fact that very often victims of certain war crimes under article 8 of the Statute would be legal persons. Such crimes included intentionally directing attacks against historic monuments, hospitals or buildings dedicated to religion, art, or charitable purposes. Furthermore, attacks against religious and cultural property had become particularly significant during recent ethnic and religious conflicts. In the light of these experiences, it was clear that such crimes were likely to involve claimants from foundations, religious institutions, and museums. For these reasons, France and the Holy See, among others, argued strongly in favour of keeping legal persons in the definition of victims.

Taking into account both valid arguments, a compromise formulation was produced in sub-rule (b), pursuant to which victims "may" also include organizations or institutions[20] that have "sustained direct harm to any of their property" dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes. These are referred to in article 8, paragraph 2(b)(ix) and (e)(iv) of the Rome Statute. These organizations and institutions do not automatically qualify as victims; the definition only provides a guide to the Court, which remains the final arbiter.

B. General Principle

Rule 86: General Principle

> A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.

The Statute makes explicit reference to particularly vulnerable groups of victims and witnesses that may specially require protection for reason of their gender or age, or the sexual nature of the crime, e.g., sexual or gender violence or violence against children.[21] Protecting specially vulnerable victims was also a significant concern both of delegations and of the NGO community during the elaboration of the

Saudi Arabia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates, PCNICC/2000/WGRPE(2)/DP.4 (13 June 2000).

20. The term "legal entities" proposed in the Arab text was replaced by organizations and institutions, upon request of the delegation of France, supported by Spanish speaking delegations, which objected that the term "legal entities" did not have a precise meaning in French or Spanish.

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rules. Some important rules were developed in this connection, including Rule 88 "on special measures"[22] and Rule 86 containing a general principle.

This general principle originated in the Siracusa Seminar on protection of victims held in February 2000, at which a group of non-governmental organizations and delegations stressed the need of incorporating also in the rules specific provisions to protect children and other vulnerable groups, including a specific reference to persons with disabilities not explicitly covered by the statutory language. Some concrete proposals on this point were discussed and streamlined at the fourth session of the Preparatory Commission. As a result of these discussions, a short proposal was formally introduced by Italy in order to add a rule on directions for the conduct of the proceedings and testimony: "When issuing directions, the Presiding Judge should, in particular, take into account the needs of children and elderly and disabled persons."[23]

The text gained enough support and the scope was broadened to cover "all victims, in particular children, elderly persons and persons with disabilities."[24] The amended text was included as part of a specific rule on "General provisions" relating to "Evidence."

During the Mont Tremblant meeting, coordinators and sub-coordinators of the Rules suggested that all provisions related to victims be incorporated in a specific chapter. In view of this suggestion, the text was slightly amended to make it truly general and applicable to the Court in all circumstances and not only when making directions for the purpose of the Trial.[25]

The suggestions from Mont Tremblant were accepted by delegations at the fifth session of the Preparatory Commission and the text was then transferred to the section on victims and witnesses to follow the definition of victims. The principle was incorporated with the addition, consistent with the Statute, of a reference to victims of sexual or gender violence among the vulnerable groups to be particularly protected.

II. PROTECTIVE AND SPECIAL MEASURES FOR VICTIMS AND WITNESSES

Helen Brady

A. Introduction

Critical to the future success of the International Criminal Court will be its ability to encourage victims and witnesses to come forward and provide testimony. This will depend greatly upon the Court's ability to provide effective protection to victims

22. *See, in particular, infra* section II this chapter, description of Rule 88 on "special measures."

23. Rule 6.18(a) in PCNICC/2000/WGRPE(6)/DP 3 (13 March 2000). In the final text, directions for the conduct of the proceedings and testimony are dealt with in Rule 140.

24. Rule 6.1(a) in PCNICC/2000/L.1./Rev.1/Add./1 (10 April 2000).

25. Rule 6.1(a) in the Mont Tremblant Document, at 74.

and witnesses giving evidence before it. Those coming before the Court should not have to jeopardizes their security. They should be provided with the necessary protection and support to minimize serious risks to their security, avoid serious incursions of their privacy and dignity, and reduce trauma associated with giving testimony. This is not only a matter of pragmatics. International law demands it.[26]

The issue of protection of victims and witnesses was high on the Preparatory Commission's agenda of work for the Rules. Rules 87 ("protective measures") and 88 ("special measures"), in Section III ("victims and witnesses") of Chapter 4 ("provisions relating to various stages of the proceedings") of the Rules, are two fundamental rules within the ICC's protection regime. They derive principally from article 68, paragraphs 1 and 2 and article 69, paragraph 2 of the Rome Statute, and are specifically concerned with protection in the context of victims and witnesses giving testimony before the Court. They aim at protecting victims and witnesses by providing safeguards to facilitate and encourage their testimony before the ICC. They apply to all stages of the Court's proceedings and not merely to the trial stage. In addition to these two rules, the issue of protection for victims and witnesses is reflected in a number of other provisions throughout the Rules.[27]

Such rules are not new to international criminal tribunals. Both the ICTY and ICTR have similar—although not identical—provisions. Article 22 of the ICTY Statute and article 21 of the ICTR Statute mandated the Tribunals to adopt rules of procedure and evidence for the protection of victims and witnesses, including, but not limited to, the conduct of *in camera* proceedings and the protection of a victim's identity. Rules 69 ("protection of victims and witnesses"), 75 ("measures for the protection of victims and witnesses") and 79 ("closed sessions") of the ICTY and ICTR Rules elaborate on these measures. The Tribunals have considered the nature and scope of these rules in many cases.[28]

26. UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Resolution 40/34 (29 November 1985), article 6(d).

27. Two closely related rules are Rule 67 ("live testimony by means of audio or video-link technology") and Rule 68 ("prior recorded testimony"). These are also discussed in this chapter. In addition, a number of other rules concern issues of protection for victims and witnesses, including Rules 16–19; Rule 50, sub-rule 1; Rule 52, sub-rule 1; Rule 59, sub-rule 2; Rule 76, sub-rule 4; Rule 77; Rule 81; Rule 84; Rule 86; Rule 105, sub-rule 3; Rule 106, sub-rule 2; Rule 107, sub-rule 3; Rule 112, sub-rule 4; Rule 119, sub-rule 3; Rule 121, sub-rule 10; and Rule 131, sub-rule 2.

28. Although not an exhaustive list, see, for example, *Tadić*, Decision on the Prosecutor's motion requesting protective measures for victims and witnesses, 10 August 1995; *Delalić et al.*, Decision on the defense motion to compel the discovery of identity and location of witnesses, 18 March 1997; *Delalić et al.*, Decision on the Prosecution's motion for redaction of the public record, 5 June 1997; Blaskić, Decision of Trial Chamber I on the applications of the Prosecutor dated 24 June and 30 August 1996 in respect of the protection of witnesses, 2 October 1996; Blaskić, Decision on the application of the Prosecutor dated 17 October 1996 requesting protective measures for victims and witnesses, 5 November 1996; *Rutaganda*, Decision on the preliminary motion submitted by the Prosecutor for protective measures for witnesses, 26 September 1996; *Akayesu*, Decision on the preliminary motion submitted by the Prosecutor for protective

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In formulating these rules during the Preparatory Commission, several recurrent themes were borne in mind. The first was that the rules must underpin articles 68 and 69, paragraph 2 of the Rome Statute and remain true to the spirit of those articles and the Statute itself. The second was that while the rules should guide the Court when making orders for protective and special measures, they should not be overly prescriptive or exhaustive. They should allow the Court sufficient flexibility to respond to the particular interests, needs or personal circumstances of individuals in a particular case. The third and most crucial was that the rules—as a vital cog in the machinery of international justice—must strike an appropriate balance between protecting victims and witnesses and respecting the rights of an accused under the Statute and international law.

As finally adopted by the Preparatory Commission, the rules reflect a delicate balance between two fundamental and yet often competing interests in a criminal justice system—on the one hand, the Court's duty to take all reasonable steps to protect those before the Court as witnesses or victims or who are otherwise at risk from the Court's proceedings, and on the other hand, the Court's duty to ensure its proceedings are conducted in accordance with the highest standards of due process and with proper regard for the accused's fair trial rights.

B. A Brief Tour of the Negotiating History of These Rules

Rules 87 and 88 had their genesis in the Paris Seminar held in April 1999. By the end of that meeting, the Workshop dedicated to protection of witnesses and victims agreed upon text for two rules to govern protective and special measures.[29]

Most of the work on these rules were done during the second session of the Preparatory Commission in July – August 1999. At this session, Australia, drawing largely on the Paris Seminar proposals, put forward revised versions,[30] and the Italian and French delegations each put forward some additional proposals.

Negotiations resulted in two rules, one on protective measures and one on special measures, in the Revised Discussion Paper proposed by the Coordinator,[31] which were then incorporated into the Final Report on the Proceedings of the Preparatory Commission at its second session.[32]

measures for witnesses, 27 September 1996; *Akayesu*, Decision on a motion for the appearance and protection of witnesses called by the defense, 9 February 1998; *Akayesu*, Decision on the defense motion for the transfer, appearance and protection of 13 detained witnesses called by the defense, 9 March 1998; *Bagilishema*, Decision on the Prosecutor's motion for witness protection, 17 September 1999.

29. See Rules D and E of Workshop 3 in PCNICC/1999/WGRPE/INF/2/Add.1 (6 July 1999).

30. Proposal submitted by Australia, PCNICC/1999/WGRPE/DP.19 (26 July 1999).

31. Rules 6.28 and 6.29 in PCNICC/1999/WGRPE/RT.5/Rev.1 (11 August 1999).

32. PCNICC/1999/L.4/Rev.1 (18 August 1999). The rules were not discussed at the third session of the Preparatory Commission and they appeared unchanged in the Report of the Proceedings of the Preparatory Commission at its first, second and third sessions, Annex II

The rules made a brief appearance during the fourth session of the Preparatory Commission in March 2000, when an Italian proposal on a rule on anonymous witnesses prompted further discussion. However, no amendments were made to these two rules at the fourth session, and they were incorporated into the next draft of the Rules.[33]

The next evolution of these rules occurred at the Mont Tremblant meeting in April – May 2000. This resulted in the Mont Tremblant Document, which formed the basis for discussion at the fifth session.[34] Apart from some technical drafting amendments, the main change in the Mont Tremblant Document was that both rules were transported from the chapter on The Trial to a chapter on Victims and Witnesses, within a section devoted to "Protection of Victims and Witnesses."

The rules were next reviewed at the fifth session in June 2000. With some further refinements, the Working Group on Procedures approved the final text of Rules 87 and 88, which became part of the finalized draft text of the Rules adopted by consensus in the plenary on 30 June 2000.

C. The Source of the Rules

Several provisions of the Rome Statute relate to the protection of victims and witnesses in the course of an investigation or prosecution.[35] Some recognize the need to protect certain classes of particularly vulnerable victims and witnesses, namely victims of sexual or gender violence and children.[36] Others are phrased more generally.

Among these, article 68 ("protection of the victims and witnesses and their participation in the proceedings"), which applies throughout all stages of the proceedings, reigns supreme. It provides:

> (1) 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 . . . 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

33. Rules of Procedure and Evidence, Annex II, PCNICC/2000/L.1/Rev.1/Add.1 (10 April 2000).

34. PCNICC/2000/WGRPE/INF/1 (24 May 2000).

35. *See, for example*, art. 18, para. 1; art. 54, para. 1(b); art. 57, para. 3(c); art. 64, paras. 2 and 6(e), art. 68; and art. 69, para. 2.

36. This is in recognition of the special needs of such victims and witnesses. In *Tadić*, Decision on Prosecutor's motion for protective measures for victims and witnesses, 10 August 1995, the Tribunal held at para. 46:

> It has been noted that rape and sexual assault often have particularly devastating consequences which, in certain instances, may have a permanent detrimental impact on the victim. [. . .] It has been noted further that testifying about the event is often difficult, particularly in public, and can result in rejection by the victims' family and community. In addition, traditional court practices and procedures have been known to exacerbate the victim's ordeal during trial. Women who have been raped and sought justice in the legal system commonly compare this experience to being raped a second time."

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for the reduction of the numerous references to victims in various other rules. This explains the explicit reference to certain procedural rules, where specific references to victims' participation were included in earlier drafts. Rule 93 was not intended to limit a Chamber's rights to seek the views of any victim on any issue when the Chamber finds it appropriate.

F. Conclusions

The Statute acknowledges the importance of allowing a victim to participate in the proceedings in his or her own right. At the Rome Conference, one commentator expressed: "Punishing criminals is not enough. There will be no justice without justice for victims. And in order to do justice for victims, the ICC must be empowered to address their rights and needs."[121]

The principles set forth in the Statute have now been further strengthened and consolidated by provisions in the Rules, which allow participation in all stages of the proceedings in a fair and orderly way. This participation is not meant to undermine the prerogatives of the Prosecutor or the rights of the accused but to allow victims to present their views and legitimate concerns. The hope is that this will make a contribution to not only a punitive but also a restorative role of the Court.

IV. REPARATIONS TO VICTIMS

Peter Lewis and Håkan Friman

A. Introduction

The Statute is, in itself, an advancement of the rights and status of the victims of the serious crimes against international law that fall within the jurisdiction of the Court. In one of its most important aspects, the Statute provides victims with an opportunity to be awarded reparations by the Court that are enforceable by national jurisdictions. The question of the responsibility of States to provide reparations to victims has been addressed in a number of international instruments, and basic principles and guidelines on reparations to victims have been drawn up, especially within the auspices of the United Nations Commission on Human Rights.[122] However, before the Rome Statute, there was no international regime allowing victims to file claims against,

the views of victims are sought in accordance with Rule 93, the Chamber should arguably observe the procedural requirements set forth in Rule 103.

121. Statement by Fiona McKay, representing REDRESS, on behalf of *The Victims Rights Working Group* delivered to the Rome Conference on 17 June 1998.

122. In particular, see *Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law*, E/CN.4/1997/104 (16 January 1997) (prepared by Theo van Boven); *The Administration of Justice and the Human Rights of Detainees*, W/CN.4/Sub.2/1997/20/Rev.1 (2 October 1997) (prepared by Louis Joinet); and *Civil and Political Rights, Including the Question of Independence of the Judiciary, Administration of Justice, Impunity*, E/CN.4/1999/65 (8 February 1999) (prepared by M. Cherif Bassiouni). For a

and be awarded reparations by, an individual perpetrator of a crime.[123] Hence, the rights of victims enshrined in the Statute take a clear step forward in comparison with, *inter alia*, the ICTY and the ICTR.[124]

Besides the quest for providing justice to victims, one of the most compelling arguments for reparations is the potential importance for reconciliation in societies torn apart by conflict. The main concern in the context of the Court has been the Court's capacity—in a broad sense—to handle reparations to victims in an efficient and yet fair and purposeful way.

Article 75, which deals with reparations to victims, was developed relatively late in the negotiating process.[125] In the preparations of the Statute, the International Law Commission (ILC) introduced provisions on allocation of paid fines for the benefit of victims in its 1993 draft statute.[126] It was not a direct form of compensation to victims but instead a possible transfer of the fines to the State of nationality of the victims or to a trust fund established by the Secretary-General of the UN for the benefit of victims.[127] However, the ILC did not retain this proposal in the 1994 Draft Statute, which was the basis for the negotiations leading up to the Rome Statute. Although the issue of reparations to victims was raised earlier, the first concrete text proposal, submitted by France, appeared only at the December session of the

123. Before some human rights bodies, notably the European Court of Human Rights, individuals may initiate actions and be awarded compensation, but only by a State. Before the ICTY and ICTR, individuals may be awarded restitution, see *infra* note 124, but have no right to initiate an action for restitution themselves.

124. The Statutes of the ICTY (art. 24) and ICTR (art. 23) allow for restitution, as a penalty, of "any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners." In addition, their respective Rules Rrules 105 and 106) set forth a procedure, which, *inter alia*, allows for a special hearing for this matter, and acknowledge the victims' rights to bring an action in a national court or other competent body for compensation. However, the victim's position in bringing such a claim is strengthened by the fact that the "judgement of the Tribunal shall be final and binding as to the criminal responsibility for the convicted person for such injury" (Rule 106(B) in the respective Rules).

However, the issue of compensation to victims has recently been discussed within the ICTY, and it has been decided to recommend to the Security Council and the Secretary-General "that methods of compensating victims of crimes in the former Yugoslavia, be seriously considered by the appropriate organs of the United Nations." ICTY Press Release, 14 September 2000 (JL/P.I.S./528-e).

125. For a background to art. 75, see Christopher Muttukumaro, "Reparation to Victims," *in The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* 262–270 (Roy S. Lee ed., 1999); Theo van Boven, "The Position of the Victim in the Statute of the International Criminal Court," *in Reflections on the International Criminal Court—Essays in Honour of Adriaan Bos* 77–89 (Herman von Hebel et. al. eds., 1999); and the commentary on Article 75 by David Donat-Cattin, *supra* note 66, at 965–979.

126. *See* ILC Commentary to the Draft Articles, 1994, at 123–125.

127. The ILC explicitly made clear that this part of their proposal was "not intended in any way to substitute for reparations or to prevent any action which victims may take to obtain repa-

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Preparatory Committee in 1997. At the Committee's last session before the Rome Conference, in March 1998, a revised proposal jointly submitted by France and the United Kingdom resulted in a consolidated text, which thereafter was the basis for the negotiations on this question in Rome.

The late introduction of concrete text proposals, a general time constraint, and the very complex issues involved led to an article that sets forth some general principles but leaves many questions to be resolved elsewhere. Article 75 simply provides that the Court may award reparations to or in respect of victims. No definition of a "victim" is provided in the Statute; this issue was discussed and resolved in the Rules.[128] The debate on a definition was to a considerable extent focused on the issue of reparations.

Article 75, paragraph 1, states that reparations may include restitution, compensation and rehabilitation, which may be awarded by the Court at the request of a victim or, under exceptional circumstances, on the Court's own motion. A reparation order can be addressed against a person who has been convicted by the Court and, where appropriate, the Court may order that the award be made trough the Trust Fund provided for in the Statute (paragraph 2). The article also entails provisions on protective measures and enforcement. This is mainly done by way of reference to other articles, in particular to article 93, paragraph 1, on international cooperation and judicial assistance, and article 109 on enforcement. The issue of protective measures is also dealt with in article 57, paragraph 3(e) which mandates the Pre-Trial Chamber to seek the cooperation of States to take protective measures "for the purpose of forfeiture, in particular for the ultimate benefit of victims."

Both the substantive legal principles and the procedures for reparations are outlined only in very general terms in the Statute. In addition, article 75, paragraph 1, provides that "[t]he Court shall establish principles relating to reparations" and that the Court in its decision in an individual case may "determine the scope and extent of any damage, loss or injury to, or in respect of, victims and will state the principles on which it is acting." Although there is no explicit reference to further provisions in the Rules, a number of issues were raised in the Preparatory Commission for regulation in the latter instrument. In the subsequent debate, matters of substance as well as of a procedural nature were discussed. Moreover, a more general question arose, as to what extent further regulation should be provided in the Rules or, alternatively, matters should be left to the Court to decide in accordance with its mandate in article 75.

Draft rules for implementing article 75 were considered by the Preparatory Commission at its second, fourth and fifth sessions, for which the result of an expert meeting—the Paris Seminar—served as a point of departure. At the second session, a number of delegations, led by France, worked informally to develop a draft text that could serve as the basis for the coming discussions. This draft was presented as a Discussion paper proposed by the Coordinator.[129] At the fourth session of the

128. *See supra* section 1, this chapter.

Commission, further informal consultations resulted in an amended Discussion Paper.[130]

Throughout the discussions on reparations to victims, participating NGOs have been particularly helpful in assisting delegations with advice, proposals and background information.[131] In addition, academic institutions like the Center on International Cooperation at New York University[132] prepared recommendations for the Rules.

B. The Paris Seminar

The first inventory and discussions of questions relating to victims and witnesses that could or should be regulated in the Rules was made at the Paris Seminar. The participants were mainly drawn from the delegations to the Preparatory Commission, different international organizations and the NGO community. Workshop 4 focused exclusively on these questions and produced a set of draft provisions and comments that were conveyed to the Preparatory Commission at its second session in July–August 1999.[133] Proposals were made in respect of: presentation of claims, notifications, publication of proceedings, appointment of experts, assessment of reparations, the Trust Fund, evidence, and protective measures. Moreover, other issues were identified as necessary to address in the Rules, such as the *locus standi* of the Trust Fund to appear before the Court, provisions on urgent interim relief to victims, and enforcement of reparation orders. Some more general recommendations were also made. All these proposals and issues were later considered by the Preparatory Commission.

C. Statutory Provisions or Principles Established by the Court?

As already stated, article 75 does not establish the exact scope or content of reparations that can be awarded to, or in respect of, victims. This lack of specificity relates to both the concept of "reparations" and to the scope of "victims." Conflicting opinions were raised when these matters were discussed in Rome, the main controversy being to what extent the Court should engage in individual cases of damage, loss or injury in relation to a crime. In the report of the Working Group on Procedural Matters

130. PCNICC/2000/WGRPE(6)/RT.2 (27 March 2000) and RT.2/Corr.1 (30 March 2000).

131. *For example, see* Amnesty International, *The International Criminal Court: Ensuring an Effective Role for Victims*, July 1999 (IOR 40/10/99), Human Rights Watch, *Commentary to the Preparatory Commission on the International Criminal Court: Elements of Crimes and Rules of Evidence and Procedure* (July 1999), Women's Caucus for Gender Justice, *Recommendations for Reparations—Submitted to the Preparatory Commission for the International Criminal Court, 27 July – 13 August 1999*, and REDRESS, *Rules of Procedure and Evidence for the International Criminal Court: Recommendations to the Preparatory Commission Regarding Reparation and Other Issues Relating to Victims* (March 2000).

132. *See Shelton & Ingadottir, supra* note 17.

133. See Workshop 4 in the Report of the Paris Seminar, PCNICC/1999/WGRPE/INF/2 (6 July

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of the Rome Conference, two footnotes were inserted to reflect different views.[134]

In respect of the principles that the Court shall establish, it was noted that:[135]

> Such a provision refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as the victims' families and successors. For the purposes of interpretation of the terms "victims" and "reparations," definitions are contained in the text of article 44, paragraph 4 of the Statute, article 68, paragraph 1, and its accompanying footnote, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985, annex) and the examples in paragraphs 12 to 15 of the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law (E/CN.4/Sub.2/1996/17).

However, regarding article 75, paragraph 1, as such, some delegations expressed the view that:[136]

> This provision intends that where there are only a few victims the Trial Chamber may make findings about their damage, loss or injury. Where there are more than a few victims, however, the Trial Chamber will not attempt to take evidence from or enter orders identifying separate victims or concerning their individual claims for reparations. Instead, the Trial Chamber may make findings as to whether reparations are due because of the crimes and will not undertake to consider and decide claims of individual victims.
>
> In similar fashion, where there are more than a few victims, this provision will not authorize their separate appeals to the Appeals Chamber. It is anticipated that the Rules will limit the number of victims who can appeal and will require that if there are large numbers of victims, their appeals will be jointly presented by a single representative.
>
> It was understood that the Rules of Procedure and Evidence would have to address such issues.

While the second footnote only reflected the opinion of some delegations at the Rome Conference, it was expected that proposals would be submitted for the Rules to establish the pre-conditions for reparations in more detail. However, it was determined at the Paris Seminar that the Court itself should establish the principles for reparations. Thus, no provisions were drafted and the Seminar recommended only that the Court should be guided by certain international documents in establishing those principles.

The Preparatory Commission acknowledged the mandate given to the Court to establish principles and no proposal for rules to further define the scope and extent

134. Footnotes 5 and 6 to article 73 on reparations to victims in A/CONF.183/C.1/WGPM/L.2/Add.7 (13 July 1998).

135. *Id.*, footnote 5. At that stage, art. 44, para. 4, contained the text that finally became art. 43, para. 6 (the Victims and Witnesses Unit). The revised draft basic principles and guidelines referred to *in fine* (prepared by Theo van Boven) are also attached to a Note by the Secretary-General to the Commission on Human Rights, Doc. E/CN.4/1997/104, *supra* note 122.

of reparations was submitted.[137] Thus, a repetition of the long and sometimes contentious debate on these issues in Rome was avoided, and it will be up to the Court to determine, within its mandate, the principles for reparations. Nevertheless, there was some disagreement as to the exact division between issues that should be addressed in the Court's own principles and matters that should be regulated in the Rules.

D. Procedure for Reparations

1. *Procedure when a Victim Requests Reparations*

Rule 94: Procedure upon request

1. A victim's request for reparations under article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars:

(a) The identity and address of the claimant;

(b) A description of the injury, loss or harm;

(c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm;

(d) Where restitution of assets, property or other tangible items is sought, a description of them;

(e) Claims for compensation;

(f) Claims for rehabilitation and other forms of remedy;

(g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.

2. At commencement of the trial and subject to any protective measures, the Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges and, to the extent possible, to any interested persons or any interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3.

Rule 94 deals with basic procedures to be applied when a victim claims reparations from the Court. It has its origin in the draft rules from the Paris Seminar.[138]

Sub-rule 1 provides a list of those items that should be included in any claim for reparations. Two of the items proved controversial.

Sub-rule 1(c) as initially formulated would have required the claimant to identify the person or persons responsible for the injury, loss or harm (without such an identification the Court might have found it difficult to link a claim with an accused being prosecuted before the Court). It quickly became apparent however that many victims would be unable to identify the perpetrator of the attack, let alone a specific defendant before the Court. For this reason sub-rule 1(c) includes the important pro-

137. Colombia raised the issue of providing further clarification of the terms "compensation, restitution and rehabilitation" but did not propose any rule. *See* PCNICC/1999/WGRPE/DP.37 (10 August 1999).

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viso that the claimant should identify the person or persons responsible "to the extent possible."

Sub-rule 1(g) proved unexpectedly contentious. To many of the delegates the requirement to provide any supporting documentation which would help validate the claim seemed perfectly reasonable. To other delegates the requirement for documentation would prevent those without documentation making claims for reparations, and it was recognised that many refugees may lose all means of formal identification. So that there would be no doubt about the matter the provision was added that documentation would be provided but only "to the extent possible."

Sub-rule 1 requires the request to be made "in writing," which departs from the original draft which also foresaw requests being made "in electronic form."[139] However, the alternative forms for making a request did not get lost in the debate but are instead covered by the general provisions in Rule 102 which, under certain conditions, allows that different forms of communications to the Court be made in audio, video or other electronic form.

Sub-rule 2 appears to be a simple provision about notification. Notification of the claim is in fact a very important guide as to how the whole scheme of reparations will operate.

There was some debate as to when the Court could receive claims for reparations. Some argued that the Court should only encourage claims where there was a known defendant against whom reparations could (potentially) be claimed. Others argued that the Court should encourage victims to put forward their claims at the earliest opportunity. The onus would then be put upon the Court to determine if the claim could subsequently be linked to an identified person or persons prosecuted before the Court. This argument prevailed, and the rule has been drafted to encourage early claims. The question then arose as to when the Court had a duty to notify an accused person of the fact that a claim had been made, which is one of the responsibilities of the Court under article 75 paragraph 3.[140] Some delegates argued that as soon as an accused has been arrested and brought before a court he or she should be told whether there are any claims for compensation. Others argued that until charges had been confirmed it would be unclear whether a person would face any claims. Because of these uncertainties it was decided that the appropriate point for notifying an accused was at the start of the trial; at that stage the accused would know that the charges had been confirmed and that there were claims for reparations associated with that charge.

139. *Id.* Rule A, sub-rule 2. *See also* Italian proposal, aimed at assisting young and disabled victims, to prescribe that the request could alternatively be made "in audio [or] in video," PCNICC/2000/WGRPE(6)/DP.3 (13 March 2000).

140. Art. 75, para. 3, reads: "Before making an order under this article the Court may invite, and shall take account, representations from or on behalf of the convicted person, victims, other inter-

2. Procedure when the Court Raises the Issue of Reparations

Rule 95: Procedure on the motion of the Court

1. In cases where the Court intends to proceed on its own motion pursuant to article 75, paragraph 1, it shall ask the Registrar to provide notification of its intention to the person or persons against whom the Court is considering making a determination, and, to the extent possible, to victims, interested persons and interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3.

2. If, as a result of notification under sub-rule 1:

(a) A victim makes a request for reparations, that request will be determined as if it had been brought under rule 94;

(b) A victim requests that the Court does not make an order for reparations, the Court shall not proceed to make an individual order in respect of that victim.

Article 75, paragraph 1, allows the Court to determine the scope and extent of reparations on its own motion. Article 75 does however contain the proviso that the Court should only act on its own motion in exceptional circumstances.[141] It was identified at the Paris Seminar that a procedure initiated by the Court would require provisions in the Rules on notifications and submission of representations.[142]

Although the majority of delegations found Rule 95 to be a simple and straightforward rule which provides for notifications to be made to all interested persons in the event of the Court acting on its own motion, there was some opposition. Some delegates felt that some victims, as a matter of conscience, would not wish reparations to be made since they would not wish to be seen as benefiting from "blood money." Conversely, other delegations thought that the Court should not be intervening in what was essentially a civil procedure: if victims chose not to exercise this right then the Court should not intervene to pursue a civil claim against a convicted defendant. Finally, there was a third group who were concerned that the procedure for the Court to act on its own motion should not act to the prejudice of a victim making a late application for reparations.

All of these conflicting views are dealt with in sub-rule 2. Under sub-rule 2(a) a victim who becomes aware that the Court is acting on its own motion and then submits a claim for reparations, will not be treated differently from a victim making a claim in the usual way. Under sub-rule 2(b), the Court will not proceed to make an individual order if the victim so requests. Those delegates who were concerned about the Court intervening in a civil matter were persuaded that sub-rule 2(b) effectively dealt with their concerns.

141. Art. 75, para. 1, reads: "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion, in exceptional circumstances, 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."

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E. Notification of the Proceedings

Rule 96: Publication of reparation proceedings

1. Without prejudice to any other rules on notification of proceedings, the Registrar shall, insofar as practicable, notify the victims or their legal representatives and the person or persons concerned. The Registrar shall also, having regard to any information provided by the Prosecutor, take all the necessary measures to give adequate publicity of the reparations proceedings before the Court, to the extent possible, to other victims, interested persons and interested States.

2. In taking the measures described in sub-rule 1, the Court may seek in accordance with Part 9 the cooperation of relevant States Parties, and seek the assistance of inter-governmental organizations in order to give publicity, as widely as possible and by all possible means, to the reparation proceedings before the Court.

The general subject of notification of proceedings proved problematic throughout the discussions in the Preparatory Commission. As has been referred to elsewhere[143] there was considerable debate about the cost, practicality and wisdom of widespread notification. There was, however, a general recognition that special considerations apply to reparations and that the general rule on notifications needs to be augmented by a special rule on the publication of reparation proceedings.[144] The general concern was to ensure that victims are encouraged to make application for reparations and this is only possible if they are aware of the proceedings.

It was recognised that the Court itself may not be able to provide the notifications envisaged by this rule. In particular, it was acknowledged that in the conditions that may exist following the commission of grave crimes the only effective means of communicating with shattered communities may be through humanitarian agencies working in the country concerned. There was some debate about the correct way of drafting the provision to identify the role of such agencies. Some favoured a loose drafting which would have included non-governmental organisations. This however proved contentious, as some delegates were wary of implying that non-governmental organisations could have a role to play in intervening in a state's domestic affairs. For this reason the safer formula was adopted of referring to inter-governmental organisations.

F. Assessment of Reparations

Rule 97: Assessment of reparations

1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.

2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may 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. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.

3. In all cases, the Court shall respect the rights of victims and the convicted person.

143. *See infra* Chapter 7.

Although this rule, which originates from the Paris Seminar,[145] is entitled "Assessment of reparations," the real debate concerned whether it was appropriate to make collective awards.

Some delegations saw reparations as a method for victims to enforce their civil claims through the Court. Their concern was to ensure, as far as possible, that the procedures were similar to those that would operate to enforce civil liabilities and debts. These delegations found it difficult to understand the concept of collective awards. Firstly, a victim pursuing a civil claim through the Court would wish to have their individual position restored by the Court and a collective award would not satisfy them. Secondly, there were problems in ensuring that the defendant did not face more than one claim for the same loss. If the convicted person was viewed as a respondent in civil litigation they would find the greatest difficulty in defending a civil claim before domestic courts if they could not be certain that the individual claim had been included in a reparations order made by the International Criminal Court. This view of reparations as a form of civil remedy to satisfy civil claims had a profound effect on the negotiations of the rules on reparations.

Other delegations took a different view of the process. For them reparations were another form of sanction imposed by the Court, specifically tailored to the needs of victims, and were not a means of satisfying civil debts. In any event it was recognised by these delegations that in many cases a convicted defendant would have relatively little resources to compensate victims. Reparations would largely be a symbolic gesture and building a hospital, school or memorial which would allow small sums of money to benefit the whole population were much more likely than the satisfaction of individual claims.

Yet a third view was that whereas the Court should have the flexibility to make individual or collective awards, reparations were very much a matter of trying to address the needs of victims and for this reason victims should have a say in how any resources were used. As an example, if the Court could identify a sum of money to be paid in reparations to a particular village, the villagers ought to have some say in whether each family should receive a specific share or whether the resources would be used on a collective basis for the benefit of the whole village, e.g., to build a school or something similar.

There were lengthy discussions to try and resolve these difficulties. Eventually Rule 97 emerged as a generally accepted text. Sub-rule 1 emphasises that reparations should normally be on an individualised basis unless the Court considers it appropriate to make the award on a collective basis or both.[146]

145. *Id.* Rules D and E.

146. The idea of combining the two forms of reparations

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Sub-rule 2 allows the Court to receive expert help in making awards. This may involve everything from assessing the harm caused to individual victims, to suggesting schemes that may benefit a whole community. Allowing room for experts assisting the Court with such preparatory tasks, which will often be difficult and time-consuming, may prove very important in order to enhance the Court's capacity to deal with reparations in an appropriate way.[147]

Sub-rule 3 was specifically added to ensure that the Court would respect the rights of victims. This was particularly important to those delegations that wanted to ensure that the Court would not award reparations against the wishes of victims. However, to meet the concerns of those who wanted to ensure that reparations would remain a fair hearing for the defendant, an amendment was included to ensure that the Court would also respect the rights of the convicted person.

G. Rules on Evidence?

Questions on evidence for the purpose of reparations were extensively discussed, first at the Paris Seminar and thereafter in the Preparatory Commission. One main issue related to the acceptance of evidence and the Court's findings in the criminal part of the proceedings as well as introduction of additional evidence in the proceedings on reparations. Another issue was whether to set forth a standard of proof for reparations.

The participants of Workshop 4 in the Paris Seminar suggested the introduction of a standard of proof for reparations, defined as "on the balance of probabilities."[148] One principal aim was to underline that this standard should be lower than the standard of proof for a criminal conviction, i.e., that "the Court must be convinced of the guilt of the accused beyond reasonable doubt" (article 66, paragraph 3). However, the experts fully realized that the regulation of a standard of proof would also require thorough considerations regarding other difficult matters such as the requirement of "causation" between the crime and the damage, loss or injury for which reparations could be awarded. Hence, the question of establishing a standard of proof was raised but no proposal was put forward.

When this question was debated in the Preparatory Commission, various opinions were raised. Some delegations, among them France, pointed to the need to explicitly provide for a standard of proof for reparations that would be lower than that for a conviction. Because reparations can only be awarded upon a conviction, and the Statute only provides a standard of proof for the latter, these delegations feared that the Court might consider itself obliged to apply the same standard also for reparations. If so, the victims' rights to reparations might be severely affected due to difficulties in gathering evidence.

147. For example, see comments made by Colombia in PCNICC/1999/WGRPE/DP.37 (10 August 1999) and PCNICC/1999/WGRPE/DP.42 (12 November 1999).

In this vein of thought, Canada proposed linking the standard of proof with findings in the criminal proceedings, which the Court may rely upon also in its determination of reparations. The informally circulated proposal by Canada read:

> After conviction, any damage, loss or injury resulting from the crime, including the nature or amount thereof, need only be proved on a balance of probabilities for the purpose of a reparation order. Where damage, loss or injury has been proven as part of the definition of the crime for which the person was convicted the Court may rely on that finding in determining reparations.

Nevertheless, a number of delegations, including some who were in favour of prescribing a separate standard of proof for reparations, were uncomfortable with the "balance of probabilities" formula. While this concept is known in some national jurisdictions, it was considered very unclear by others.

While some delegations were concerned about a too burdensome standard of proof for reparations, the main concern of others was to provide for a minimum standard. In an attempt to address, *inter alia*, the different concerns regarding the standard of proof, the United States put forward an informal draft proposal. Like the Canadian proposal, this draft also stated that the Court might rely on its findings in relation to the conviction. However, the US proposal was framed differently and dealt only with individualized reparations. It read:

> 1. Where damages, loss or injury to a particular victim is necessarily part of the crime for which the person has been convicted or has otherwise been proven at the trial, the Court may rely on that finding of guilt or the evidence at the trial in determining that the convicted person should pay [make] reparations to the victim.
>
> 2. Where damages, loss or injury to a particular victim as a result of the crime has not been proved at trial, the Court must find that the victim suffered actual damages, loss or injury as a result of the convicted person's criminal action before it may order reparations to that victim. The Court need not require proof beyond reasonable doubt, but may order reparations if the proof shows that it is more likely than not that the convicted person caused the victim's damages, loss or injury. The accused shall be allowed to contest the proof offered to establish entitlement to reparations.

Nonetheless, some delegations still had problems with the formulation of the evidentiary standard for reparations. Trying to capture the different concerns that had been raised, the French delegate, who was coordinating the informal talks, circulated a short text for considerations:

> Where damage, loss or injury has been proven as part of the crime for which the person was convicted the Court may rely on that finding in determining reparations. After conviction, the Court shall not require, for the purpose of a reparation order, the standard of proof set forth in article 66, paragraph 3.

In spite of the efforts, some delegations remained unconvinced that it was feasible, appropriate or necessary to provide for a standard of proof for reparations. It was clear that it would be very difficult to establish a common understanding among delegations regarding causation and other substantive issues concerning reparations.[149]

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It was, moreover, queried whether such issues were to be dealt with in the Rules at all due to the explicit mandate to the Court in article 75 to "establish principles." As to the necessity, many argued that it was sufficiently clear that the standard of proof in article 66, paragraph 3, only applies to the question of conviction. Hence, the Discussion Paper that was proposed by the Coordinator at the end of the second session of the Commission included a "place holder" for a rule on evidence and a note referring to the need for further discussion.[150]

In the informal consultations at the fourth session of the Preparatory Commission, a non-paper was circulated for discussion:

> (a) Where a particular damage, loss or injury was proved at trial in the course of establishing the commission of a crime, the Court need not require any further proof of such damage, loss or injury in respect of the making of an order for reparations.
>
> (b) Where a particular damage, loss or injury was not proved at trial in the course of establishing the commission of a crime, the Court, before making an order for reparations, shall be satisfied that it is more probable than not that such damage, loss or injury was caused.

This proposal received some support. It was pointed out that there might well be situations where it was not possible or necessary for the Prosecutor, for example, to identify dead victims individually for the purpose of a conviction. Regarding reparations, however, this would be necessary and sub-rule (b) would allow further evidence to be submitted. Nevertheless, there were still concerns that no causation was established in regard to different types of responsibility for committing a crime and that the draft text did not seem to cover aggravation of damage that occurs later. Hence, the discussion returned to the basic question whether the standard of proof should instead be regulated in the principles to be established by the Court. This view prevailed and the Preparatory Commission did not include any provision on evidence in the Rules.

Part of the difficulty in resolving the question of standard of proof was that delegations had very different views on what "proof" meant. To some participants, facts could only be proved with documents and other pieces of evidence in a written form whereas to others "proof" simply meant giving any kind of evidence that the Court believed. While there was consensus regarding what the standard of proof should *not* be, attempts at elaborating the standard failed since they were all based on the concept of "the balance of probabilities," which was a concept unknown to too many of the delegations. However, a footnote was inserted in the revised Discussion Paper in order to reflect the common understanding that the standard of proof set forth in article 66 shall not be required for reparations.[151] While no footnotes were retained in the final Rules, the Court will most probably take this understanding into account when establishing the principles for reparations.

150. Rule F and footnote 2, *supra* note 129.

H. The Trust Fund

Rule 98: Trust Fund

> 1. Individual awards for reparations shall be made directly against a convicted person.
>
> 2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.
>
> 3. 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.
>
> 4. Following consultations with interested States and the Trust Fund, the Court 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.
>
> 5. Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.

Many of the arguments concerning collective awards that beset the negotiations on Rule 97 were also carried through to Rule 98 principally because the Trust Fund is the obvious body to administer collective awards.[152] During the lengthy discussions a number of principles emerged which were incorporated in Rule 98. Firstly, the Trust Fund need not be involved in straightforward awards to an individual. Secondly, there would be cases where due to the youth or mental incapacity of an individual victim it would not be possible to make the award directly, and in such cases the Trust Fund is a convenient body to hold awards until the young person becomes an adult or until a patient recovers from any mental incapacity. Thirdly, the Trust Fund is a convenient body to administer collective awards. Fourthly, the Trust Fund may not be in the best position to distribute monies or organise, for example, the building of a school or hospital. For this reason, it was felt appropriate to allow the Trust Fund to call on intergovernmental, international or national organisations approved by the Trust Fund to carry out tasks on its behalf.

The use by the Trust Fund of agencies proved unexpectedly controversial. Many delegates felt that such involvement could not work without the involvement and co-operation of the State concerned. Other delegations were worried about the implied infringement of sovereignty if it was suggested that these organisations could simply intervene in the internal affairs of a country. Because of these concerns sub-rule 4 was drafted to ensure that the Court would only order that an award be dealt with by these organisations after consultations with the interested States and the Trust Fund itself.

Some delegations wanted a specific rule to allow the Court to order the Trust Fund to make funds available for specific reparations. It was pointed out however that

152. *See* proposal submitted by Japan, with an extensive explanatory note, in PCNICC/2000/

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the Court did not have complete control or authority over the Trust Fund. To begin with, monies may be given to the Trust Fund for specific purposes (e.g., in respect of a specific war crime or a specific set of victims), and the Court would not be able to use those funds for other purposes. But more fundamentally, the operation of the Trust Fund is a matter for the Assembly of States Parties and not for the Preparatory Commission dealing with the Rules. Nevertheless, many delegations thought that it was important to have some reference in the rules that the Trust Fund may be a source of additional money for compensation. For this reason sub-rule 5 was drafted to make it clear that the resources of the Trust Fund *may* be used for the benefit of victims.

It was suggested at an early stage that monies from the Trust Fund could be used to fund legal representation for victims (for example, to help victims make claims for reparations).[153] Although this was superficially attractive, many delegations were concerned that the limited resources of the Trust Fund could be dissipated in expensive lawyer fees, and the reference to the funds being used for legal representation was deleted.

I. Interim Relief

A more difficult issue concerned the subject of interim relief, an issue first raised at the Paris Seminar.[154] Victims seeking reparations may find themselves in a desperate situation—they may have lost their homes, their livelihoods, and the most basic means of sustenance and support. Some may also be in an urgent need of medical attention. Thus, it would be desirable that the Court should be in a position to provide some interim relief pending the outcome of what may be a long trial. Some delegations argued therefore that the Court should have the ability to award interim relief.[155] Although reparations were seen as a way of providing redress for victims, it was clear to many delegations that they were nevertheless a part of the sanction of the Court to be ordered against a convicted defendant, and that making an interim award before a trial, it was concluded, may be an indication that the Court had already determined the guilt of the person. After much soul-searching, and with all delegates acknowledging the terrible plight of some victims, it was decided that reparations were not an appropriate place to deal with interim relief.

153. Workshop 4, Rule F, *supra* note 133.

154. Although the issue of provisions for urgent interim relief, such as medical attention, was highlighted, no concrete proposal was made. *Id.* at 8.

155. For example, see proposal by Costa Rica, *supra* note 146. A provision on interim relief was inserted in the Report of the Preparatory Commission's third session, with a footnote attached on the need for further discussion, Rule E(c) in Doc. PCNICC/1999/L.5/Rev.1/Add.1 (22 December 1999), at 67. The footnote (97) highlighted the need to clarify the circumstances under which the Court should provide interim relief, to avoid conflicts between the Trust Fund and the Victims and Witnesses Unit, and to assess the consequences of interim relief in cases where the Court ultimately makes no finding of guilt and consequently is unable to order reparations, and whether receiving this kind of relief could create the appearance of bias on the part of a potential witness.

J. Cooperation and Protective Measures

Rule 99: Cooperation and protective measures for the purpose of forfeiture under articles 57, paragraph 3 (e), and 75, paragraph 4

1. The Pre-Trial Chamber, pursuant to article 57, paragraph 3 (e), or the Trial Chamber, pursuant to article 75, paragraph 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be requested.

2. Notice is not required unless the Court determines, in the particular circumstances of the case, that notification could not jeopardize the effectiveness of the measures requested. In the latter case, the Registrar shall provide notification of the proceedings to the person against whom a request is made and so far as is possible to any interested persons or interested States.

3. If an order is made without prior notification, the relevant Chamber shall request the Registrar, as soon as is consistent with the effectiveness of the measures requested, to notify those against whom a request is made and, to the extent possible, to any interested persons or any interested States and invite them to make observations as to whether the order should be revoked or otherwise modified.

4. The Court may make orders as to the timing and conduct of any proceedings necessary to determine these issues.

The debate on provisions relating to protective measures, which were first developed at the Paris Seminar,[156] was closely linked to the question when the Court could receive claims for reparations and, thus, the provisions on notifications (see under A *supra*). The relevant provisions of the Statute that are applicable in respect of protective measures are article 57, paragraph 3 (e), and article 75, paragraph 4, which in turn refers to the general provisions on cooperation of States Parties in article 93, paragraph 1.

Sub-rule 1 may superficially appear to be a statement of the obvious. The key to understanding the provision is the reference to "victims who have given a written undertaking to make a request for reparations." It was recognised that the whole scheme for awarding reparations would be ineffective if there was not a means to secure the assets of a suspected criminal. The ability of the Court to act quickly would be essential. For this reason the Court can take action in respect of a victim who may be preparing a request for representation but before the formal application is lodged under Rule 97. However, there was some concern that serious decisions concerning the defendant's property would be made on such an informal basis. For this reason the protection was added that where a full claim has not yet been submitted there should nevertheless be some formal indication by the victim that they intend to make a request.

Sub-rules 2 and 3 address the question of notification regarding proceedings for protective measures. The proposal from the Paris Seminar included a requirement of notification, except in the case of urgent circumstances.[157] In case an order was made

156. Workshop 4, Rule H, *supra* note 133.

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without prior notice, an *inter partes* hearing was prescribed to enable the person against whom the protective measures had been directed and others to address the Court on the issue. However, in the Preparatory Commission the concern was raised that the proposed scheme would make it possible for the suspect to hide assets before formal procedures were implemented. The outcome was a reversed provision on notification so that sub-rule 2 now states that notice is not required unless the Court determines that this would not jeopardize the effectiveness of the requested measures. On the other hand, it was acknowledged that serious steps could be taken against the person's property without even the basic protection of a notice, so that the person concerned could make representations to the Court about the appropriateness of the order. Because of these concerns sub-rule 3 was added to ensure that if notice is not given before the order is made the Registrar will be asked to ensure that notice is given after the event. Again, the subsequent notice will only be given when it is prudent to do so.

Sub-rule 4 is a very straightforward and simple rule which may again appear to state the obvious. This is an example however of a more mature drafting technique that emerged towards the end of the Preparatory Commission. In the early stages of negotiations of the Rules it was felt necessary to describe in some detail the procedures and time limits necessary for particular actions, but towards the end of the negotiations and with the benefit of experience, this short form of drafting emerged which simply empowers the Court without seeking to regulate every aspect of the procedure.

K. Enforcement of Reparation Orders

It is of course imperative to an effective regime for reparations that orders can be enforced and, accordingly, the Statute addresses the question of enforcement of the Court's reparation orders. Article 75, paragraph 5, provides that a State Party shall "give effect to" such an order in accordance with the provisions in article 109 on enforcement of fines and forfeiture measures. How to ensure that the effectiveness of the scheme for reparations would not be seriously hampered at the enforcement stage—where the Court must rely upon national authorities—was extensively discussed at the Paris Seminar, where a few recommendations were made but no concrete proposals.[158] In the Preparatory Commission the question of enforcement of reparation orders was addressed together with other enforcement issues in the rules relating to Part 10 of the Statute, particularly in Rules 217–222.[159]

L. Final Remarks

Due to the history of the negotiations, article 75 only provides the most fundamental directions for reparations. In addition, the article mandates the Court itself to establish principles relating to reparations to, or in respect of, victims, i.e., the substantive law regarding reparations that the Court will apply. Thus, the rules in this

158. *Id.* at 8.

section have a limited scope and focus mainly on procedural matters. One achievement is the further clarification of the scope of the reparations in that a definition of "victim" is given in the Rules. Furthermore, some principles regarding individualised and collective reparations have been underlined and the procedures for the reparations proceedings have been developed. For example, it is now clear that the Court shall encourage victims and their representatives to put forward requests for reparations as early as possible, ensuring, by this and other provisions, that fair procedures will follow. Besides, the boundaries between the Court and the Trust Fund, for which the management criteria are to be established by the Assembly of States Parties, have been pointed out. All in all, the negotiations on the Rules have led to a greater understanding as to how the reparations regime is to work, and developed provisions that assist and guide the Court and the parties in conducting such proceedings.

ROUTLEDGE RESEARCH IN INTERNATIONAL LAW

Justice for Victims before the International Criminal Court

Luke Moffett

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Luke Moffett

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3 Victims in the proceedings of the International Criminal Court

A Introduction

The Rome Statute affords a greater procedural role to victims through recognition, participation, protection, and support measures, in contrast to previous tribunals. These provisions have been declared as a 'high-water mark'[1] by placing victims at the 'heart of international criminal justice'.[2] This supposedly indicates that the ICC is not just concerned with prosecuting and punishing perpetrators of international crimes, but to also deliver justice to victims. As Fiona McKay, on behalf of the Victims' Rights Working Group at the Rome Conference of the ICC, declared, 'punishing criminals is not enough. There will be no justice without justice for victims. And in order to do justice for victims, the ICC must be empowered to address their rights and needs.'[3] In light of the theoretical discussion in Chapter 1 on the internal element of justice for victims within the framework of the ICC, this chapter examines victims' role in the proceedings of the Court. In order to analyse whether the ICC fulfils victim-orientated justice this chapter will consider victim recognition, as well as procedural and substantive justice for victims. Victim-orientated justice involves the Court responding to victims' interests while fairly balancing them against the interests of others. Procedural justice is meant to ensure victims' input into proceedings and to protect them from secondary victimisation. Substantive justice is the determination of truth and justice, with reparations considered in the following chapter.

1 Christine Chung, Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise? *Northwestern Journal of International Human Rights* 6(3) (Spring 2008) 459–545, p. 516.

2 Paolina Massidda and Sarah Pellet, Role and Practice of the Office of Public Counsel for Victims, in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009) 691–706, p. 692.

3 Speech by Fiona McKay, Redress, on behalf of the Victims Rights Working Group, 16 June 1998.

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This chapter begins by discussing the recognition of victims by the International Criminal Court and the challenges associated with it. The second section explores victim participation in depth. Considerable space is devoted to this subject, due to its innovative nature in international criminal justice and importance in allowing victims to realise their procedural and substantive rights. The third section examines the provisions on protection and treatment under the Rome Statute for victims. The chapter concludes that despite the number of provisions for victims, the ICC does not satisfy victim-orientated justice.

B The drafting of the victim provisions within the Rome Statute

At the opening of the Rome Conference, UN Secretary-General Kofi Annan stressed to delegates that the 'overriding interests must be that of the victims and the international community as a whole', and the Court represented 'an opportunity to bequeath to the next century a powerful instrument of justice … [and] succeeding generations [a] gift of hope'.[4] In the subsequent drafting of the Rules of Procedure and Evidence (RPE), French Minister of Justice Elisabeth Guigou stated that the purpose of the ICC was 'to put the individual back at the heart of the international criminal justice system, by giving it the means to accord the victims their rightful place … [as they] are both the reason for and objective of international criminal justice'.[5] A number of articles on victims were created in the Rome Statute and RPE reflecting their integral part in Court and international criminal justice. These articles came about due to three main reasons: the involvement of numerous states and NGOs in the drafting of the Rome Statute; the criticisms of the ad hoc tribunals; and to bring international criminal justice in line with international standards on victims in criminal proceedings and human rights law.

First of all, the Rome Statute was created on a treaty basis involving 160 states and hundreds of NGOs, which encouraged a more pluralistic development of international criminal justice.[6] This inclusive approach is in comparison to the four nations who created Nuremberg, 13 at Tokyo, and the 15 members of the Security Council for the ad hoc tribunals. The participation of so many different states and NGOs provided a diversity of perspectives on the nature and function of the ICC. As a result, NGOs along with some states were able to campaign for the inclusion of victim

4 UN Secretary-General Declares Overriding Interest of International Criminal Court Conference must be that of Victims and World Community as a Whole, Press Release L/ROM/6.r, 15 June 1998.

5 Cited in Haslam Ch. 1 Note 182, p. 316.

6 See ibid., p. 325.

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provisions, which had previously been neglected in the International Law Commission's drafts.[7] Furthermore, the diversity of those involved in the drafting drew upon their own different criminal justice proceedings, such as in the civil and Islamic law jurisdictions, which include victim participation and claiming compensation in criminal proceedings.[8] Yet such mass participation from states and civil society was a double-edged sword, with disparate views on victim provisions from different legal traditions, resulting in compromises.[9] While many delegations supported provisions for victims, others were wary that they would undermine the rights of the defendant and the fairness of the trial. Consequently, a number of the victim articles were left open for the judges to determine. It was only during the drafting of RPE that victim provisions on recognition, participation, protection, and reparations were more adequately defined, but maintained some flexibility for the Court's judges in interpreting and applying these provisions.[10]

Second, the motivation to incorporate victim participation and reparations came from the failures of the ad hoc tribunals to be responsive to victims' needs and deliver them justice.[11] As discussed in Chapter 2, the neglect of victims at previous tribunals was because of their primary purpose of prosecuting and punishing individuals responsible for international crimes. The ad hoc tribunals appreciated the importance of protecting victims, but this was more of a functional role to guarantee their testimony. The exclusion of participation and reparation at the previous

7 Such as the European Law Students' Association, Redress, the Women's Caucus for Gender Justice, and Amnesty International, Human Rights Watch, along with states such as France, UK, and New Zealand. David Donat-Cattin, Article 68, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Nomos 1999), pp. 869–888; Theo Van Boven, Victims' Rights and Interests in the International Criminal Justice, in J. Doria, H.-P. Gasser, and M. Cherif Bassiouni (eds), *The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko* (Brill 2009) 898–906, pp. 899–900; William Schabas, Article 68: Protection of the Victims and Witnesses and their Participation in the Proceedings, 821–835, Ch. 1 Note 19; see Report of the International Law Commission on the work of its 44th session, 4 May to 24 July 1992, Official Records of the General Assembly, 47th session, Supplement No. 10.

8 Discussed below under participation and Chapter 4.

9 Marian Pena, Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead, *ILSA Journal of International and Comparative Law* 16(2) (2009–2010) 497–516, p. 499; Sam Garkawe, The Victim-related Provisions of the Statute of the International Criminal Court: A Victimological Analysis, *International Review of Victimology* 8 (2001) 269–289.

10 See Silvia A. Fernández de Gurmendi, Definition of Victims and General Principle, in R.S. Lee (ed.), *International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 427–434; Report on the International Seminar on Victims' Access to the International Criminal Court, PCNICC/1999/WGRPE/INF.2.

11 Sam Garkawe, Victims and the International Criminal Court: Three Major Issues, *International Criminal Law Review* 3 (2003) 345–367; Vasiliev Intro. Note 4, p. 676.

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tribunals was also due to the adversarial model of criminal proceedings. Instead in the drafting of the Rome Statute, delegates wanted to prosecute perpetrators of international crimes as well as to offer justice to victims.[12]

Third, delegates advocated for victim provisions within the Rome Statute in order to bring it into line with standards established in international law, victimology, and human rights law.[13] The UN Victims' Declaration informed the drafters on victims' procedural rights to participation, protection, support, and reparations.[14] Additionally, developments before the regional human rights courts and articles within international conventions provided guidance on victims' substantive rights to truth, justice, and reparations, including the then draft UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victim of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNBPG).[15] The resulting Rome Statute and RPE reflect these standards by including victim provisions on recognition, participation, protection, treatment, support, reparations, and a Trust Fund for Victims.

Funk and Guhr suggest that restorative justice encouraged the shift towards incorporating victims within the ICC.[16] The inclusion of participation, reparations, and a Trust Fund indicates that the Court does not strictly follow a retributive justice approach, but seeks to restore victims. However, the proceedings of the ICC are 'lawyer dominated', and retain a retributive focus, limiting victims' interests as participants in deference to the two parties of the prosecution and the defence.[17] Instead the drafting of the Rome Statute and the jurisprudence of the ICC have been more influenced by UN Victims' Declaration and human rights law than restorative justice.[18] As Vasiliev asserts, rather than making the Court a restorative

12 Muttukumaru Ch. 1 Note 282, p. 264.

13 Yael Danieli, Report of the Victims' Rights Working Group, Rome Conference, 15 June to 17 July 1998, p. 3.

14 See Principles Guaranteeing the Rights and Interests of Victims in the Proceedings of the Proposed International Criminal Court, E/CN.15/1996/16/Add.5, 26 February 1996, cited in Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, A/51/22 (1998) p. 2; Decisions taken by the Preparatory Committee at its Session held from 4–15 August 1997, A/AC.249/1997/L.8/Rev.1 pp. 36–37; Reports of the Working Group on Procedural Matters, A/CONF.183/C.1/WGPM/L.2/Add.7 and A/CONF.183/C.1/WGPM/L.2/Add.8, 13 and 15 July 1998.

15 A/RES/60/147; see Report on the International Seminar on Victims' Access to the International Criminal Court, PCNICC/1999/WGRPE/INF.2.

16 Funk Ch. 1 Note 283, p. 4; A.H. Guhr, Victim Participation during the Pre-Trial Stage at the International Criminal Court, *International Criminal Law Review* 8(1–2) (2008) 109–142, p. 110.

17 Doak Ch. 1 Note 194, p. 221.

18 See Carsten Stahn, Hector Olásolo, and Kate Gibson, Participating of Victims in Pre-trial Proceedings of the ICC, *Journal of International Criminal Justice* 4(2) (2006) 219–238, pp. 220–221; Schabas Ch. 1 Note 55, p. 327.

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justice forum where victims can interact with the perpetrator and collectively resolve their differences, the Court is more victim-orientated justice without replacing the core goals of prosecuting and punishing perpetrators of international crimes.[19] As outlined in Chapter 1, this chapter argues that the Court can be more responsive to victims' interests and the human rights approach of balancing rights. This can be seen in relation to the recognition of victims.

C Victim recognition

As discussed in Chapter 1, a critical approach to victim recognition requires acknowledgement of the suffering of individuals and groups who are directly and indirectly harmed by international crimes. At the ICC victims are recognised on the basis of the definition in Rule 85 of the RPE:

> (a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
> (b) 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.

On the face of Rule 85 it appears to reflect the harm international crimes cause to victims.[20] Part (a) on 'natural persons' has been interpreted by the Court to include individuals and groups, replicating the individual and collective nature of their harm.[21] Part (b) covers certain legal persons, i.e. organisations or institutions, due to their protected status under international humanitarian law and the Rome Statute, and the harm they suffer as a result of international crimes.[22]

19 Vasiliev Intro. Note 4, p. 677.

20 See Chapter 1.

21 *Prosecutor v Lubanga*, Decision on Victims' Participation, ICC-01/04-01/06-1119, 18 January 2008, para. 92; see also draft Rule 85, PCNICC/1999/WGRPE/INF.2.

22 Articles 8(2)(b)(ix) and e(ix), 8(2)(b)(iii) and (e)(iii), as well as 8(2)(b)(xxiv) and (e)(ii). For instance, school headmasters: a/0188/06 (*Situation in the DRC*, ICC-01/04-423-Corr, paras 142–143); a/0071/08 (*Katanga and Chui*, Public Redacted Version of the 'Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case', ICC-01/04-01/07-579, 10 June 2008, paras 133–135); a/0270/07 (*Lubanga*, Decision on the Applications by Victims to Participate in the Proceedings, ICC-01/04-01/06-1556, 15 December 2008, paras 107–111). Articles 9 and 52–54, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. See Eva Dwertmann, *The Reparation System of the International Criminal Court* (Brill 2009), p. 96.

4 Reparations and responsibility under the Rome Statute

A Introduction

The inclusion of reparations in the Rome Statute is an important advance in international criminal justice, in comparison to past tribunals.[1] With the numerous developments in national, international, and human rights law, reparations for international crimes based on state responsibility have become a fundamental component of redressing such serious crimes. However, unlike its international and national counterparts, the Court's regime is based on individual criminal responsibility. Accordingly, the reparations regime of the ICC is *sui generis*. Moreover, the Pre-Trial Chamber I has declared that reparations are 'not only one of the Statute's unique features. It is also a key feature … the success of the Court is, to some extent, linked to the success of its reparation system.'[2]

This chapter builds on the theoretical discussion in Chapter 1 by examining whether the Rome Statute's provisions on reparations can deliver victim-centred justice. This can be contrasted to victim-orientated justice discussed in the previous chapter on the criminal proceedings of the ICC, which has to be balanced with other interests in order to determine justice. This chapter submits that even though the reparation regime of the ICC was established to provide justice to victims, its structural limitations of being connected with the criminal trial will restrict its effectiveness in remedying victims' harm. Accordingly, the Court cannot by itself sufficiently redress the harm suffered by victims with reparations. Instead, the ICC requires the support of the Trust Fund and State Parties to assist its reparations regime.

This chapter begins by considering the theoretical and normative basis of reparations, before outlining the drafting of reparation provisions and then the Court's reparation regime under the Rome Statute. The subsequent section examines the interpretation of the reparation regime by

1 Justice for Victims: The ICC's Reparation Mandate, Redress, May 2011.

2 *Prosecutor v Lubanga*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-01/06-8-US-Corr, 24 February 2006, para. 136.

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the ICC, and practical difficulties in light of international and human rights jurisprudence. The final parts of this chapter assess whether solutions can be found to these challenges through the work of the Trust Fund and state responsibility. The chapter concludes by finding that reparations at the ICC will only be successful through complementarity with State Parties.

B The theoretical and normative basis of reparations

Reparations are measures which are meant to repair the harm caused to an injured party.[3] As established in the *Chorzow Factory* case, they are to 'as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[4] The 2005 UN 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 (UNBPG) states that reparations are intended to 'promote justice by redress'.[5] For this book, reparations are victim-centred justice as they concentrate on remedying victims' harm.

Drawing from civil law principles in equity and tort in many national jurisdictions, reparations seek to return the victim to the *status quo ante* (original position) through *restitutio in integrum* (returning to the victim all they have lost).[6] Therefore, they can be the instruments of corrective justice.[7] However as discussed in Chapter 1, corrective justice is more of a mathematical formula of ensuring equality. Rombouts and Paramentier contend that returning victims to their original position may restore them to a position of inequality, such as discriminated minority, or it may be impossible to return them as they may be severely injured or dead.[8] In light of this issue human rights law has found that reparations are not meant to enrich or impoverish victims or their heirs, but to repair their harm.[9] Instead of being backward looking, reparations can be prospective as a right that can provide victims with the agency and means to build a

3 See A Sourcebook for Victims of Torture and other Violations of Human Rights and International Humanitarian Law, Redress, 2003.

4 *Chorzow Factory*, 1928, para. 125.

5 Principle 15, A/RES/60/147.

6 *Velásquez Rodríguez*, paras 25–26; *Plan de Sánchez Massacre*, para. 52; *Blake v Guatemala*, Reparations, Series C No. 48 (IACtHR, 22 January 1999), para. 31; *Papamichalopoulos and Others v Greece*, para. 34; Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2005), pp. 9 and 65.

7 See *Loayza-Tamayo v Peru*, Reparations, Series C No. 43 (IACtHR, 27 November 1998), para. 151.

8 Rombouts and Parmentier Ch. 1 Note 148.

9 *Garrido and Baigorria v Argentina*, Judgment, Series C No. 39 (IACtHR, 27 August 1998), para. 43.

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new life.[10] Reparations can also involve distributive justice by redressing inequalities in society through the redistribution of goods to prevent recurrence of violations in the future, such as the representation of different ethnic groups in government. Therefore remedies can be more broadly construed as reparative in nature, rather than simply corrective.[11]

It has been suggested that reparations can be understood as measures of deterrence to dissuade individuals or states from committing wrongful acts. An economic theory of reparations asserts that it 'ought to deter possible wrongdoers from causing (greater) social costs in the future'[12] by equating 'the value of damages with the value of harm'.[13] However, certain harms cannot be quantified in monetary terms. Moreover, deterrence focuses on punishing the perpetrator and their future acts, rather than redressing the suffering of the victim. In international law and human rights law reparations are non-punitive so as to focus on remedying the harm of the victim.[14] For the purpose of this book, reparations are predominately reparative in nature to remedy the harm suffered by victims, but responsibility still plays an important part in determining who should provide them.

To clarify reparations it is perhaps useful to reduce it down to three core elements: (1) acknowledgement of victims' suffering; (2) appropriate types of reparations to remedy their harm; and (3) made by those responsible. Acknowledgement serves to publicly accept the suffering of victims and to recognise them as 'victims', discussed as recognition in Chapter 1. The second element pertains to ensuring that appropriate measures are taken to effective remedy victims' harm, this is discussed further below in the types of reparations. Together acknowledgement and effective remedy of victims' harm can affirm their dignity and discontinuity of suffering in the past by 'correction in the old and the creation of the new'.[15]

1 Effective remedy

Reparations in international law and human rights law fall under the heading of an effective remedy for victims. Remedies are means to redress a harm or violation through procedural mechanisms such as courts, and

10 The 'proyecto de vida' (life project) established for a time by the IACtHR in *Loayza Tamayo*, paras 147–148.
11 Separate Opinion of Judge Cançado Trindade, the *Street Children* case, para. 42.
12 Rombouts and Paramentier Ch. 1 Note 148, p. 159.
13 Shelton Note 6, p. 18.
14 *Velásquez Rodríguez*, para. 38; ILC Commentaries on Articles of State Responsibility, pp. 99 and 107; Principle 15, UNBPG.
15 *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16, para. 21; Teitel Ch. 1 Note 260, p. 147.

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substantive outcomes, i.e. convictions and reparation orders.[16] International humanitarian law (IHL) has for a long time recognised that, at least in international armed conflicts, states are responsible to remedy the harm caused from any violation of IHL through compensation.[17] In human rights law, remedies have long been established as essential for individuals to seek redress against the state for violating their rights.[18] According to the UNBPG, victims' right to remedies includes 'equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms'.[19]

As discussed in Chapter 1, remedies can be synonymous with justice for victims or victim-centred justice, and reflect both procedural and substantive elements.[20] Reparations also contain these elements. Procedural justice for reparations involves victims to be informed, to participate, to be able to claim reparations, and to appeal decisions. Substantively, reparations redress victims' harm through appropriate measures. Reparations can also encompass complex identities of victim-perpetrators, whereby their victimisation can be acknowledged, but the amount or types of reparations available may be reduced or barred to reflect their responsibility and remedy the harm they caused to other individuals. The discussion of an effective remedy throughout this chapter in relation to the ICC can therefore be understood as ensuring victims' procedural and substantive rights to reparations.

2 Responsibility

Responsibility is tied to accountability, which is concerned with ensuring that those who are culpable for causing the violation are appropriately sanctioned.[21] For victims such accountability is evinced by identifying those parties responsible, holding them to account for their actions, issuing a

16 Shelton Note 6, p. 7.

17 Article 3 of The Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), and Article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

18 See for instance Article 8 of the Universal Declaration of Human Rights, and Article 2 of the International Covenant on Civil and Political Rights.

19 Principle 11, UNBPG.

20 The distinction between justice for victims and victim-centred justice is that the former is from victims' perspective of what justice means to them based on their needs, whereas the latter is the determination of justice by the Court being responsive to victims' needs. Victim-orientated justice is the Court balancing victims' interests with other parties' rights to decide justice, as discussed in Chapter 1.

21 Kleffner Ch. 1 Note 15, p. 240.

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judgment on their liability, and requiring them to provide reparations.[22] Attaching responsibility for reparations to perpetrators, whether individual, state, or organisational, can provide an important psychological function for victims in appropriately directing blame at those who committed the atrocity against them and to relieve their guilt.[23] Reparations made by the responsible perpetrator can also help to symbolise their commitment to remedying the past and to be held to account for their actions. Thus responsibility for reparations distinguishes such measures from charity or humanitarian assistance by achieving some form of accountability.[24]

Responsibility for reparations stems from a wrongful act by a person or entity, which contravenes the rights of an injured party. As Shelton points out, it is the, 'rights-infringing nature of the wrongful conduct that is the source of the claim. Otherwise a person's losses due to a falling tree would be legally equivalent to an injury resulting from torture.'[25] There are three levels of responsibility for reparations generally recognised in international law for international crimes: (1) individual; (2) state; and (3) international. A fourth will also be suggested below for organisations. Together these different types of responsibility reflect the diversity of legally culpable actors in international crimes, which can overlap.[26]

First, individual responsibility arises from the autonomy and capacity of individuals to make their own free and informed decisions, with them being held to account for their consequences.[27] In domestic law, individuals can be responsible for their wrongful acts in both civil and criminal proceedings depending on whether the act is defined as criminal by violating public interests or just giving rise to damages between private parties.[28] Obliging a responsible individual to make reparations re-establishes the legal order through holding them accountable and remedying the harm they have caused. The ad hoc tribunals permitted compensation and restitution to be based on the individual criminal

22 *Prosecutor v Thomas Lubanga*, Decision Establishing the Principles and Procedures to be applied to Reparations, ICC-01/04-01/06-2904, 7 August 2012, para. 179.

23 Brandon Hamber, Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition, in P. de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press 2006) 560–588, p. 566.

24 Carla Ferstman and Mariana Goetz, Reparations before the International Criminal Court: The Early Jurisprudence, in C. Ferstman, M. Goetz, and A. Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Brill 2009) 313–350, p. 341.

25 Ibid., p. 12.

26 Bystanders may be morally culpable for international crimes, but not legally.

27 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press 2009, 6th edn).

28 Shelton Note 6, p. 25.

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responsibility of perpetrators convicted before them, though no orders were ever made.[29]

Second, state responsibility occurs when a state violates an international obligation, such as under an international treaty.[30] A breach of primary rules by a state committing a wrongful act, e.g. violating an obligation under a treaty, creates a new relationship between two or more states, requiring the responsible one under secondary rules, i.e. on responsibility, to cease the breach and provide reparations to the injured state.[31] As stated in the *Chorzow Factory* case '[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form'.[32] State responsibility allows for a remedy to be made to an injured party, while also functioning as a condemnation of the state's breach and the 'restoration of the international legality, [and] respect for international law'.[33] The International Court of Justice has recognised that although most reparation orders in international law are inter-state, in certain cases a state can be ordered to provide reparations to individuals.[34] This is the position in human rights law, where individuals and groups are right-holders who can directly claim reparations against states for violating their rights.[35]

State responsibility can also emanate from *jus cogens* (non-derogable) norms, which impose strict liability on states for committing international crimes such as genocide, war crimes, and crimes against humanity, as well as gross violations of human rights. Breaches of *jus cogens* norms are deemed 'objectively illegal' or wrongful as they violate the fundamental interests of the international community.[36] A state cannot be held criminally responsible for international crimes, as established at Nuremberg – '[c]rimes against international law are committed by men, not by abstract

29 Articles 24(3) and 23(3) of the ICTY and ICTR Statutes respectively as well as common Rule 106, RPE.

30 Article 2, RSIWA.

31 *United Kingdom v Albania*, the *Corfu Channel* case, Judgment of 9 April 1949, ICJ Reports 1949, pp. 4–169, p. 23; ILC Articles 1–2 and commentaries; Eric David, Primary and Secondary Rules, in J. Crawford, A. Pellet, and S. Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2011) 27–33.

32 *Chorzow Factory*, p. 21; see also Article 31, RSIWA.

33 Alain Pellet, The Definition of Responsibility in International Law, in Crawford *et al.* Note 31 4–15, p. 15.

34 See the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136, paras 151–153; see Liesbeth Zegveld, Victims' Reparations Claims and International Criminal Courts: Incompatible Values? *Journal of International Criminal Justice* 8 (2010) 79–111; cf. Article 33(2), ILC Responsibility of States for Internationally Wrongful Acts (RSIWA), *Yearbook of the International Law Commission* (2001), vol. II (Part 2).

35 *Velásquez Rodríguez*, para. 134.

36 Article 53, Vienna Convention; Orakhelashvili Ch. 1 Note 6, p. 242; *Prosecutor v Kupreškić et al.* (IT-95-16) Judgment, 14 January 2000, para. 520; Article 40, RSIWA.

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entities'.[37] Instead when *jus cogens* norms are breached, the responsible state is under an obligation to prosecute the perpetrators and provide reparations to the victims, in order to cease and alleviate the harm, thereby reasserting their non-derogable status.[38] Where a state fails to comply with their obligations arising from breaching a *jus cogens* norm, *obligatio erga omnes* (obligations flowing to all) occur, whereby the collective interests of other states affected by the breach can seek to invoke the responsibility of the responsible state.[39]

Third, international responsibility is reflected in *erga omnes* obligations, which require every state to ensure the enforcement of binding international law. Under the Article 48 of the Articles on State Responsibility (RSIWA), which sets down principles on state responsibility, a non-injured state can invoke the responsibility of another state where the obligation breached is owed to a group of states and protects a collective interest, such as in multilateral treaties, i.e. 'obligations *erga omnes partes*', or it is owed to the international community as a whole.[40] It is due to the 'importance of the rights involved' that non-injured states have a 'legal interest' in ensuring their protection and the maintenance of international law.[41] The commission of international crimes is the 'concern of all States' as they 'threaten the peace and security of humankind and … shock the conscience of humanity'.[42] A non-injured state which invokes the responsibility of another is entitled to claim from the responsible state cessation of the wrongful act, guarantees of non-repetition, and fulfilment of reparation to an injured state or the beneficiaries of the obligation breached.[43] Furthermore, for serious breach of *jus cogens* obligations, all states are required to take lawful action to bring such a breach to an end and to refuse to recognise the situation as lawful.[44]

Fourth, organisational responsibility relates to the mass, organised violence carried out by non-state armed groups, which holds the organisation responsible collectively through its members. Drumbl points out that individual criminal responsibility has limited utility when such crimes are committed on a collective basis with individual participation deeply conformist.[45] Instead he distinguishes collective responsibility from

37 Judgment of the International Military Tribunal, IMT Official Documents, Vol. 1 (1947) p. 223.
38 Article 40, RSIWA; Orakhelashvili Ch. 1 Note 6, p. 243.
39 Bassiouni Ch. 1 Note 4, p. 72.
40 See ILC Commentaries RSIWA Note 21, p. 126.
41 *Barcelona Traction, Light and Power Company, Limited*, Judgment [1970] ICJ Reports 3, para. 33.
42 Ibid., paras 33–34; Bassiouni Ch. 1 Note 4, p. 69; Article 48, RSIWA.
43 Article 48(2).
44 Articles 40 and 41, RSIWA.
45 Drumbl Ch. 1 Note 47, p. 24.

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'collective punishment' due to its non-criminal sanctions, thereby avoiding liberal concerns of collectively punishing such individuals.[46] Kelly further supports the responsibility of individuals as members of a group as a basis for responsibility of reparations, owing to complicity with the action of the group.[47] Members of an armed group agree with the group's principles, purpose, or aims, and by themselves in a normal society would not agree to such actions, but for the group.[48] Moreover, as members of an armed group expressing approval of the organisation's action and benefit from membership of the group, they should be collectively responsible for the acts of the group and the 'cost' of reparation.[49] The collective behaviour of members in an organisation reflects the collective pressure, organisation, and culture through discipline and orders which conditions individuals to collectively act as an armed group, thus lending itself to organisational responsibility and collectively seeking reparations from members of a group, rather than just individuals.[50]

In relation to reparations such groups may be more able to provide reparations than just individuals, as they may have more resources or control over land, and can prevent reoccurrence of violations through training of members, or continue to maintain authority over a region that enables them to facilitate measures, such as the construction of memorials or recovery of the bodies of those disappeared.[51] Organisational responsibility reflects the collective nature of these crimes, which are distinct from state and individual responsibility, as they are not legal entities and do not attach criminal responsibility.[52] However, where these groups are unable to provide reparations the state should provide them to victims on the principle of subsidiary in that the state is ultimately responsible for providing a remedy to victims of international crimes.[53] The state can compel the compliance of these armed groups with such reparation measures through administrative and judicial mechanisms, or to indemnify the government for reparations paid to victims.[54] Accordingly organisational responsibility would hold all members collectively responsible for reparations and together with other types of responsibility better reflect the pluralistic culpability of international crimes.

46 Ibid., p. 25.
47 Erin Kelly, Reparative Justice, in T. Isaacs and R. Vernon (eds), *Accountability for Collective Wrongdoing* (Cambridge University Press 2011) 193–209, p. 201.
48 Ibid., p. 202; Drumbl Ch. 1 Note 47, p. 29.
49 Kelly ibid., p. 207.
50 Kleffner Ch. 1 Note 15, p. 244.
51 Ron Dudai, Closing the Gap: Symbolic Reparations and Armed Groups, *International Review of the Red Cross* 93(883) (September 2011) 783–808.
52 See Jann K. Kleffner, The Applicability of International Humanitarian Law to Organized Armed Groups, *International Review of the Red Cross* 93(882) (June 2011) 443–461, p. 450.
53 Principle 16, UNBPG.
54 Principles 15 and 17, UNBPG.

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C The International Criminal Court's reparation regime

Reparations have been notably absent from international criminal law. With the introduction of reparation provisions in the Rome Statute of the ICC this shortcoming has been addressed on paper, though it remains to be seen whether it will be an effective remedy for victims in practice. This section begins by considering the drafting of the reparations provisions within the Rome Statute, before outlining the Court's reparation regime.

1 Drafting of reparation provisions

As mentioned in the previous chapter, the inclusion of victim provisions within the Rome Statute was the result of: the participation of numerous states and NGOs in drafting; the criticisms of the ad hoc tribunals of neglecting victims' interests; and developments in victimology, international law, and human rights law. Although previous tribunals offered the possibility of compensation and restitution, as noted in Chapter 2, a reparation order was never made. The ad hoc tribunals were confounded by the challenge of determining who should receive reparations, weak statutory provisions, and the lack of funding for reparation orders. Reports by judges in both the ad hoc tribunals rejected compensation provisions on the grounds that it would be time-consuming, delay their work, and undermine the rights of the defendant to an expeditious trial. These same issues face the ICC. Nevertheless, the inclusion of reparations within the Rome Statute demonstrates the indivisibility of accountability and reparations in effectively remedying the harm caused to victims by international crimes.

In the early drafts of the Statute of the ICC, the International Law Commission (ILC) specified that compensation was to be determined by the Court and enforced through national courts as with the provisions at the ad hoc tribunals.[55] However, many delegates were worried that reparations, considered a civil matter, would be inappropriate for a criminal court owing to their complexity and the large numbers of victims involved in international crimes.[56] As a compromise, the ILC draft Statute (1993) included a trust fund under the UN Secretary-General for the 'benefit of victims of crime' collected from fines or confiscated property.[57]

55 Fiona McKay, Are Reparations Appropriately Addressed in the ICC Statute? In D. Shelton (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Transnational Publishers 2000) 163–174, p. 167.

56 Report of the International Law Commission on the Work of its 44th Session, 4 May to 24 July 1992, Official Records of the General Assembly, 47th session, Supplement No. 10, paras 88–92.

57 Article 53(4), Report of the International Law Commission on the Work of its 45th Session, UN Doc. A/48/10, 1993.

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Nonetheless, the Preparatory Committee, established to draft the Statute for the Rome Conference, included such a reparation provision. This differed considerably from the final Article 75, as it originally included state responsibility for reparations. Under Article 73(b) of the draft Statute, the Court could make a reparation order against a state if the convicted person is unable to do so and 'in committing the offence, was acting on behalf of the State in an official capacity, and within the course and scope of his/her authority'.[58] Article 73(c) also provided that where crimes were committed by non-state actors, the Court may recommend the state to 'grant an appropriate form of reparations to victims'.[59] Therefore Article 73 reflected the position of international and human rights law that reparations should be the responsibility of the state if the perpetrator is indigent.[60]

At the beginning of the Rome Conference, reparations were undetermined and included a number of proposals, which provided for both state responsibility and direct orders by the Court against individuals. Many states wanted to avoid reparation orders being made against them; some saw that reparations would detract from the purpose of the Court to punish perpetrators, while others wanted to ensure effective reparations for victims through state paid orders.[61] Motivated by NGOs, delegations modified a joint proposal made by France and the United Kingdom during the Preparatory Committee to arrive at the final draft of Article 75.[62] The delegates realised that retributive justice through punishment of the defendant was not enough to satisfy victims' needs for justice and to ensure them an effective remedy.[63] Therefore the inclusion of reparation at the ICC under Article 75 was an attempt by the drafters to deliver 'justice for victims'[64] or 'justice in a wider sense' reflecting norms in human rights law.[65] The Trust Fund for Victims under Article 79 was also adopted to act as a repository for fines and to provide legal assistance to victims.[66]

58 Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, pp. 116–118.
59 Ibid.
60 Principle 16, UNBPG.
61 McKay Note 55; Muttukumaru Ch. 1 Note 282; Boven Ch. 3 Note 7, p. 900.
62 Proposal by France and the United Kingdom of Great Britain, A/AC.249/1998/WG.4/DP.19, 10 February 1998.
63 Muttukumaru Ch. 1 Note 282, p. 264.
64 McKay Note 55, p. 166.
65 Muttukumaru Ch. 1 Note 282, p. 264.
66 International Seminar on victims' access to the International Criminal Court, PCNICC/1999/WGRPE/INF.2. Rule F; see also Thordis Ingadottir, The International Criminal Court: The Trust Fund for Victims (Article 79 of the Rome Statute), A Discussion Paper (PICT February 2001), p. 27.

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Although reparations were accepted as part of the ICC framework, the drafters intended that the Court should focus on individual criminal responsibility.[67] Muttukumaru suggests that if state responsibility had been included in Article 75 it would have resulted in the rejection of the whole article, thereby preventing victims from accessing reparations through the Court.[68] However, as the rest of this chapter will argue, individual criminal responsibility for reparations at the ICC will be insufficient to provide victims with an effective remedy, and instead requires a reparative complementarity approach based on State Parties' obligations under the Rome Statute.

2 Outline of the reparation regime of the ICC

Turning to the provisions of the Rome Statute, the reparations regime of the ICC is made up of Court-ordered reparations under Article 75 and a Trust Fund for Victims under Article 79. Article 75 titled 'Reparation to victims' states:

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, 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.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
3. 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.
4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

67 Muttukumaru Ch. 1 Note 282, p. 268.
68 Ibid., p. 268.

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There are a number of lacunae in Article 75 including the principles of the reparation regime, the role of victims, the appropriate types of reparations, and the cooperation of State Parties. These lacunae provide judges with the flexibility to determine the scope and extent of reparations. The judges can order reparations directly against the convicted person or through the Trust Fund for Victims.[69] The Court has the power to order State Parties to seize a defendant's assets derived from international crimes to be used for reparations or fines.[70] Victims and other interested parties can make representations to the Court on the substance of the reparation orders.[71] Additionally, State Parties have a role to play in cooperating with the Court and enforcing reparation orders.[72] The Rome Statute also protects victims' rights to claim reparation before other international or national bodies.[73]

There are a number of advantages in an international criminal justice mechanism adjudicating on reparations. The ICC offers victims an avenue to claim reparations. As international crimes can invariably involve the actions or inactions of a state, it may be unwilling to allow victims to claim reparations through local courts. Moreover, collective violence or conflict may have destroyed a country's judicial infrastructure and/or killed judicial personnel making victims' domestic claims difficult, if not impossible. In addition, reparation orders by the Court could have the added value of being independent and impartial, as they are determined by an external international body, which may promote perceptions of fairness. This could be important in establishing reparations as a norm for domestic institutions to follow. By including reparations in the mandate of the ICC it can acknowledge and redress the suffering of victims, as well as determining the guilt of the perpetrator.

Reparations at the ICC represent the broadening of international criminal justice beyond retributive justice. Under the Rome Statute reparations are not punitive, as they do not appear under Article 77 on applicable penalties, which include separate punitive orders such as fines and forfeitures.[74] Furthermore, the title 'Reparations to victims' indicates that reparations at the ICC are directed at remedying victims' harm. This is consistent with human rights law which affirms the victim-centred nature of reparations by focusing on remedying harm.[75] However, reparations at the ICC are not completely distinct from the retributive function of the

69 Article 75(2).
70 Articles 75(2) and 75(4), 57(3)(e), 93(1)(k), and Rules 99, 146–148.
71 Article 75(3).
72 Article 75(4) and (5).
73 Article 75(6).
74 See Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press 2012).
75 *Velásquez Rodriguez*, para. 38; Principle 15, UNBPG.

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Court, as reparations are based on the conviction of a defendant and the crimes they are convicted of.

The second part of the reparation regime of the ICC under Article 79 is the Trust Fund for Victims (TFV), established by the Assembly of State Parties in 2002.[76] Article 79 states:

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

The TFV has a dual mandate of supporting reparation orders made by the Court and assisting victims. Its first mandate under Articles 79(2) and 75(2) is to transfer money or property collected by fines or forfeitures from the defendant or convicted person through an order of the Court.[77] Additionally, the TFV can supplement funds already deposited with it to be used for reparations orders where the convicted person is indigent and there are insufficient resources for victims.[78]

The second mandate of the TFV is to provide 'physical or psychological rehabilitation or material support for the benefit of victims and their families' who have suffered from crimes within the jurisdiction of the Court under Rule 85.[79] This covers a wider category of beneficiaries than those who are likely to receive reparations ordered by the Court against a convicted person.[80] In this role the TFV is similar to the UN Trust Funds established for Torture, Slavery, and to End Violence against Women.[81] The flexible mandate of the TFV means it can fund assistance to victims without having to wait for the conviction of the defendant;[82] this adheres to the principle in human rights law that a victim should receive support without the perpetrator having to be identified, apprehended, prosecuted,

76 Resolution ICC-ASP/1/Res.6, adopted at the 3rd plenary meeting, 9 September 2002.
77 ICC-01/04-439, para. 10; ICC-02/04-114, para. 10; ICC-01/05-29, para. 7.
78 TFV Regulation 56.
79 On the definition of victims; Article 79(1); TFV Regulations 42 and 50(a)(i).
80 Ingadottir Note 66, p. 27.
81 A/48/520; ibid., p. 28; Shelton Note 6, p. 236; The Role of the United Nations Development Fund for Women in Eliminating Violence Against Women, A/RES/50/166, 16 February 1996.
82 Ingadottir Note 66, p. 27; Marieke Wierda and Pablo de Greiff, Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims, International Centre for Transitional Justice, 2004.

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or convicted.[83] As of 2013, the TFV funded projects in Uganda, the Democratic Republic of Congo (DRC), and the Central African Republic (CAR).[84] Beneficiaries of the TFV are selected on the basis of demographic data, targeted outreach, and consultation with victims to identify those with the most need.[85] For instance, in the Ugandan situation, the TFV identified victims of mutilations as a group who received little or no donor or government support, and so funded a surgical initiative to provide physical rehabilitation through plastic surgery to those affected.[86] In order to maximise the benefits of the Trust Fund to the greatest number of victims, the TFV collectivises them into groups which will receive communal assistance rather than individual support, so as to provide more efficient disbursement and to reduce infrastructure costs.[87]

In 2013 alone the Trust Fund supported programmes for over 110,000 victims, such as reconstructive surgery, village saving schemes, counselling, and community reconciliation.[88] Funding for the TFV comes from a number of sources, including fines or forfeitures and awards for reparations collected by the Court, as well as voluntary donations and contributions from the Assembly of State Parties (ASP).[89] Between 2004 and 2013 the TFV collected €13.02 million from 33 countries, with €5.9 million (2007–2013) spent on projects in Northern Uganda and the DRC.[90] For many victims the projects supported by the TFV have transformed their lives by helping them to heal and integrate into society.[91] By way of example, in 2003 Santa, a 35 year old Northern Uganda woman, was burnt inside her home as part of a Lord's Resistance Army's attack on her village. The burns disfigured her face and neck, and as a result she became immobile and stigmatised in her community. In 2008 she received surgery through AVSI[92] and Interplast funded by the TFV. Before the surgical operation, Santa says,

83 Principle 2, UN Victims' Declaration; Principle 9, UNBPG; adopted by the TFV see ICC-02/04-114 para. 30; ICC-01/04-439, para. 30.
84 TFV Summer Progress Report 2013; activities in CAR were brought to a halt in early 2013 after Séléka rebels overthrew the Bozizé government.
85 TFV Regulations 60–61.
86 See TFV Summer 2011 Progress Report, July 2011, p. 21.
87 ICC-02/04-114, para. 34; ICC-01/04-439, para. 34.
88 See the TFV Winter 2012 Progress Report.
89 Ibid., para. 2; Article 79(2) and Rule 98 of the RPE; see also Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3, 2005, Regulations 20–41.
90 TFV Programme Progress Report Fall 2010; TFV Programme Progress Report Summer 2013.
91 TFV Summer 2011 Progress Report.
92 Association of Volunteers in International Service Foundation.

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> ...my eyes would not see, my lips were twisted, and coupled with a stiff neck, I was unable to cook or dig ... but now I can happily cook, and dig and my eyes are just fine.[93]

Schabas suggests that the TFV is an expensive development agency and states should instead give their money to Oxfam, or for the Court to wait until the Prosecutor gets a wealthy perpetrator for reparations, so that the Trust Fund can just facilitate the transfer of assets to victims.[94] However, the assistance mandate of the TFV is important as it specifically targets victims of international crimes, in comparison to humanitarian assistance which provides support to the general population. In the CAR, for instance, the TFV funded support to victims of sexual violence who were not being assisted by governmental or non-governmental agencies, attesting to its importance in helping vulnerable victims.[95]

The assistance mandate of the Trust Fund for Victims is a novelty of the Rome Statute, both in the sense of making a meaningful impact in the lives of victims and assisting them without the need to determine the identity or responsibility of the perpetrator. Thus it is a victim-focused initiative. This is in sharp contrast to the retributive justice of the Court's criminal trial or reparation orders, which focus on the defendant or the convicted person. The success of the reparation regime of the ICC to be responsive to victims' needs will depend on the way in which it is interpreted. In August 2012 Trial Chamber I in the *Lubanga* case issued its first reparation decision which provides some insight into the future interpretation of the Court's reparation regime.

D Interpreting the International Criminal Court's reparation regime

For its part, the language of Article 75 is left open-ended, enabling the judges to draw from a number of sources to determine the principles and scope of reparations.[96] Article 21 stipulates that the Court shall apply the Rome Statute and Rules of Procedure and Evidence first, and then 'where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'.[97] The Appeals Chamber of the ICC found that judges can only apply international law to lacunae when interpreting the Rome

93 Ibid., p. 23.
94 Schabas, Ch. 3 Note 244, p. 501.
95 TFV Summer 2011 Progress Report, p. 15.
96 Article 75(1); David Donat-Cattin, Article 75: Reparations to Victims, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Hart 2008) 1399–1412, p. 1402.
97 Article 21(1)(a)–(b).

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Statute.[98] As a number of these exist in Article 75 the principles established in international law on reparations provides guidance to the Court's judges in interpreting reparations at the ICC.

The purpose of reparations outlined in international law of 'wiping out the consequences of an illegal act', noted at the start of this chapter, offers an important guiding principle for the Court's reparation regime.[99] In order for reparations to be an effective remedy, further principles may be used, such as appropriateness, by responding to the harm with the most suitable type of reparation; and proportionality, by going no further or no less than fully remedying the victims' harm.[100] In the first reparations decision in the *Lubanga* case, Trial Chamber I also recognised the need to ensure victims are treated fairly with respect to their dignity, non-discrimination, and non-stigmatisation, particularly with regards to gender.[101] Importantly, the Chamber found that reparations should also 'secure, whenever possible, reconciliation between the convicted person, the victims of the crimes and the affected communities'.[102] The judges' motivation for this was to overcome the limited charges, which resulted in a narrow scope of victims who could benefit from a reparations order. Additionally, victims of the charges only came from one side of the conflict in Ituri, which could cause further resentment and re-stigmatisation of child soldiers.[103] As discussed further below, this approach may indicate the Court trying to offer reparations which are more directed at reconciliation than remedying the harm of those who suffered from the crimes. Nevertheless, the judges acknowledged that even though international criminal justice is punitive, the inclusion of reparations recognises the 'need to provide effective remedies for victims'.[104]

Article 21(3) obliges judges to interpret the Rome Statute consistently with 'internationally recognized human rights'. The Appeal Chamber has held, 'Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted

98 ICC-01/04-168, paras 33–42; see Elizabeth Odio Benito, The Development and Interpretation of Principles of Reparation: The Case Law of the IACHR and its Possible Contribution to the Jurisprudence of the ICC, in C. Eboe-Osuji (ed.), *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay* (Martinus Nijhoff 2010) 571–594, p. 592.

99 *Chorzow Factory*, para. 125.

100 See Article 31, RSIWA and ILC Commentaries, p. 94; also recognised in human rights law, Principles 2, 3, and 15 of the UNBPG; see *Velásquez Rodríguez*, para. 66; *Hugh Jordan*, para. 159; *Bozize v Central African Republic*, Communication no. 449/1990, UN Doc. CCPR/C/50/D/428/1990, 26 April 1994.

101 *Lubanga*, Decision Establishing the Principles and Procedures to be Applied to Reparations, ICC-01/04-01/06-2904, 7 August 2012, paras 187–192 and 202.

102 Ibid., para. 193.

103 Ibid., fn. 383.

104 Ibid., para. 177.

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and more importantly applied in accordance with internationally recognized human rights.'[105] Therefore the ICC must interpret and apply reparations in line with internationally recognised human rights, which could have wide reaching implications on the scope and content of reparations at the Court.[106] Trial Chamber I in the reparations decision in the *Lubanga* case drew heavily from the jurisprudence of human rights law.[107] However, the ICC is not a human rights court, and there is likely to be a number of differences between the two fora in their conceptions of reparations, particularly with regard to individual and state responsibility. The Inter-American Court of Human Rights has distinguished the two:

> The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.[108]

Including reparations in a criminal court which focuses on the responsibility of individuals blurs the distinction between the two. Bearing in mind the limited resources of the ICC, this issue raises a number of difficulties on (1) the number of victims that could be eligible, (2) their role in determining reparations, and (3) the types of reparations that can be ordered against convicted persons. The drafters of the Rome Statute left most of these issues unsettled so as to be determined through judicial interpretation. Therefore, this section examines these concerns before moving on to consider in the final section of this chapter whether they could be resolved by the Trust Fund for Victims, or through state responsibility.

1 Eligibility of victims

Article 75(1) requires the Trial Chamber to determine 'the scope and extent of any damage, loss and injury to, or in respect of, victims'. A definition of damage, loss, or injury is absent from the statutory or procedural framework of the Court. Nonetheless, following the UN Victims' Declaration harm can include physical and psychological damage or injury,

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

106 See Dinah Shelton, Reparations for Victims of International Crimes, in D. Shelton Note 55 137–161.

107 *Lubanga*, ICC-01/04-01/06-2904.

108 *Velásquez Rodríquez*, para. 134; *Pueblo Bello Massacre v Colombia*, Merits, Reparations and Costs, Series C No. 140 (IACtHR, 31 January 2006), paras 91, 112, and 122.

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economic loss, and substantial impairment of fundamental rights.[109] This abides by the interpretation of the Court of harm for victim participation, discussed in the previous chapter.[110] This approach was adopted by Trial Chamber I in the *Lubanga* reparation decision, and not only ensures consistency between the trial and reparations stage, but also links the recognition of harm to a remedy.[111]

Although the English version of Article 75(1) and (2) only refers to reparations being made 'to, or in respect of, victims', the French version identifies reparations being made to 'aux victimes ou à leurs ayants droit' (the victims or their dependants/family members).[112] The exclusion of the word 'family' from the final English text of Article 75 was due to disagreements on its definition.[113] In line with the Court's jurisprudence on participation and norms established in international human rights law, which include victims of indirect harm, the English version's language of 'in respect of' must include indirect victims.[114] Furthermore, in relation to Article 33 of the 1969 Vienna Convention on the Law of Treaties, the language which follows the object and purpose of the treaty should prevail.[115] In this case the French text is preferred, due to it following more closely the object and purpose of the Rome Statute, as the drafters intended to do justice to victims, both direct and indirect, and to reflect the impact of the harm caused by international crimes in reality.[116] Accordingly, Trial Chamber I in the *Lubanga* case recognised that both direct and indirect victims will be able to claim reparations before the ICC.[117] In addition, other types of victims may be able to claim reparations. In light of Rule 85(b) certain legal persons could benefit from reparations, such as a school or hospital harmed by international crimes.[118]

The language of Article 75(2) stipulates that reparations are to be made against a convicted person, meaning that only victims of the crimes the

109 Principles 1 and 2; Principle 8, UNBPG.
110 *Situation in DRC*, para. 115.
111 *Lubanga*, ICC-01/04-01/06-2904, paras 228–229.
112 *Statut de Rome de la Cour pénale internationale*, A/CONF.183/9, Article 75(1) and (2); Gilbert Bitti and Gabriela Gonzalez Rivas, The Reparations Provisions for Victims under the Rome Statute of the International Criminal Court, in International Court of Arbitration (ed.), *Redressing Injustice through Mass Claims Processes: Innovative Responses to Unique Challenges* (Oxford University Press 2006) 299–322, p. 311.
113 Dwertmann Ch. 3 Note 22, p. 86; Schabas Ch. 1 Note 19, p. 911.
114 See Principle 2, UN Victims' Declaration, and Principle 8, UNBPG; see *X v Federal Republic of Germany*, App. no. 4185/69 (ECtHR, 13 July 1970); *Aloeboetoe et al. v Suriname*, Reparations and Costs, Series C No. 15 (IACtHR, 10 September 1993), para. 54.
115 UNTS vol. 1155, p. 331.
116 Muttukumaru Ch. 1 Note 282, p. 264.
117 *Lubanga*, ICC-01/04-01/06-2904, paras 194–201.
118 For example, a/0188/06 (*Situation in DRC*, 'Corrigendum à la "Décision sur les demandes de participation"'), ICC-01/04-423-Corr, 31 January 2008, paras 142–143; followed in *Lubanga*, ICC-01/04-01/06-2904, para. 197.

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defendant is convicted of will be able to claim reparations. The Court can only prosecute a select number of persons and crimes, due to its limited resources. Moreover, as discussed in Chapter 3, victims do not have any input into the prosecutorial selection of perpetrators and crimes, thereby denying them their procedural right to have autonomous standing to bring a reparation claim to the Court. Consequently, in practice it is likely that very few victims will be eligible for reparations before the Court.[119] This distinguishes the ICC from human rights law, which permits victims to have standing to claim reparations if they have suffered a violation of their rights, thereby being victim-focused rather than the convict-focused nature of the ICC.

As a result, the reparation regime of the ICC creates a reparation gap. As discussed in Chapter 1, providing reparations to certain victims may label them as more worthy than others, causing further victimisation to those excluded. Moreover, distribution of a convicted person's assets to victims at the ICC could deny others a resource to claim reparations, such as in the *Lubanga* case which only recognised child soldiers as victims.[120] The labelling of victims deserving of recognition is brought into sharper focus in the *Lubanga* case due to the ethnicity of the conflict in Ituri, which involved fighting between the Hema and Lendu. In *Lubanga* the victims, who are all child soldiers, belong to the Hema group, whereas victims of Lubanga's other suspected crimes, which he is not charged with at the ICC, are Lendu. Furthermore, in the *Katanga and Chui* case which also deals with Ituri conflict, a few of the victims are Lendu former child soldiers, but the majority before the Court are Hema. This risks creating a hierarchy of suffering and causing further victimisation to victims in the Lendu community through denying their recognition and access to reparations, despite suffering from massacres and other crimes committed by Lubanga's militia.[121] This is the result of unrepresentative prosecutorial selection during investigation. Therefore there is a need for domestic reparation bodies to complement the Court to bridge this gap, as discussed in the final section.

In order to address this disparity, the prosecution in its submission to the Court on reparations in the *Lubanga* case asserted that reparations should not be limited to those victims connected to the charges, but should *inter alios* (among other people) include 'civilians of any ethnic group who suffered at the hands of [Lubanga's militia (the UPC)] without restriction to the period of the charges'.[122] This was based on the prosecution

119 Ferstman and Goetz Note 24, p. 318.
120 *Lubanga*, ICC-01/04-01/06-1813.
121 See HRW Ch. 3 Note 195.
122 Prosecution's Submissions on the Principles and Procedures to be applied in Reparations, ICC-01/04-01/06-2867, 18 April 2012, para. 20.

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recognising the limited nature of the charges against Mr Lubanga and their own narrow prosecution.[123] There is nothing in Article 75 of the Rome Statute which restricts reparations to the charges the accused is convicted of in trial proceedings; though to order reparations against any crime committed by the convicted person would require further investigation and proceedings to ensure sufficient connection and evidence of the harm caused by the convicted person's crimes to the victim.

The judges acknowledged the shortcomings of the charges for the purpose of reparations and in their reparation decision in the *Lubanga* case, as will be discussed further below. The judges tried to overcome it by directing reparations to be based on a more collective or community based approach. However, the Chamber did not go as far as the prosecution, and limited the beneficiaries of reparations to those who had suffered personal harm as result of the crimes Mr Lubanga was found guilty of.[124] Ultimately, eligibility is an important part of access to justice for victims and acknowledgement of their harm, but is problematic to achieve given the limited capacity of the ICC.

2 Reparation proceedings

Under Article 75, reparations are to be made against a convicted person, indicating that reparation proceedings will commence after a defendant has been found guilty.[125] Reparation proceedings are an important way for victims to avail of their procedural rights. By presenting their interests it can help the Court determine reparations that can more effectively remedy their harm. Progressing to the Court's reparation stage is not automatic, but requires a victim to request reparations proceedings or the Court to initiate on its own motion.[126] Additionally, under Article 75(2) the use of the word 'may' indicates that there is no obligation on the Court to order reparations against a convicted person, and thus no explicit right for victims to reparations. However, the ICC has recognised the importance of reparations for victims and to the 'success' of the Court,[127] indicating that such proceedings will usually follow a conviction.

Article 75(3) is the key provision for victims to inform the Court of their views on reparations.[128] In making submissions to the ICC, victims can request the type of reparations and describe their damage, loss, or

123 Ibid., para. 18.
124 *Lubanga*, ICC-01/04-01/06-2904, para. 194.
125 See also Article 76(3).
126 Rules 94–95.
127 *Prosecutor v Lubanga*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-01/06-8-US-Corr, 24 February 2006, para. 136.
128 See also Article 82(4), and Rule 97(2); Rules 94(2), 95(1), 96, and 218(4) also provide notification to victims on reparations consistent with Principle 24, UNBPG.

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injury.[129] Human rights courts have found it important to hear victims' views on the content, implementation, and operation of reparations, such as the location of a clinic, services offered, and time-frame, in order to remedy effectively their harm.[130] Yet, the language of Article 75(3) – that the Court 'may invite' representations – signifies a discretionary element in permitting victims' representations. The French and Spanish versions of Article 75(3) require that the 'Court shall take account' of representations omitting the phrase 'may invite'.[131] Read in light of Article 33 of the Vienna Convention of Treaties, the French and Spanish versions reflect a meaning which follows the object and purpose of the Rome Statute. Additionally, the French delegation, which proposed the draft of Article 75 with the United Kingdom,[132] suggested that victim representations were important to ensuring the Court had the complete information before it.[133] Together these sources suggest that victim representations to the Court should be considered in determining reparations; this is consistent with procedural justice for victims by permitting their input into decisions which affect their interests.

Zegveld compares the participation of victims under Article 75 to the practice in civil law countries of *partie civile*, where victims join the prosecution's criminal case so as to make a compensation claim upon the defendant's conviction.[134] Article 75 may share some of the procedural aspects of *partie civile*, such as leading evidence, participation in the criminal trial, and a right to appeal. Furthermore, the focus on the individual responsibility of a convicted person indicates a more civil claim. However, Article 75 is titled 'Reparations to Victims' in the Rome Statute suggesting a more substantive right to reparations, than civil law damages or compensation. This is due to the usage of the word 'reparations' in international and human rights law, of which compensation is only one type. Furthermore, the Court has also distinguished victims' role in criminal proceedings to ensure their substantive rights to truth, justice, and reparations.[135]

The role of victims in reparations proceedings may be more participatory than just providing representations. Judge Kirsch suggests that in comparison

129 Rule 94(1).

130 *Moiwana Community*, paras 213 and 217; *Saramaka People v Suriname*, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs Series C No. 185 (IACtHR, 12 August 2008), para. 17; Carlton Waterhouse, The Good, the Bad and the Ugly: Moral Agency and the Role of Victims in Reparations Programs, *University of Pennsylvania Journal of International Law* 31(1) (2009) 257–294, p. 258; Impunity Principles Report, E/CN.4/2005/102, para. 59.

131 Donat-Cattin Note 96, p. 1407.

132 Proposal by France and the United Kingdom of Great Britain, A/AC.249/1998/WG.4/DP.19, 10 February 1998.

133 *Réparations dues aux victimes: Intervention de la France*, 17 March 1998, p. 4.

134 See Zegveld Note 34.

135 See Chapter 3.

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to participation in the trial under Article 68(3), victims in reparation proceedings will play a more leading role, such as submitting evidence and calling witnesses.[136] Victim participation under Article 75(3) does not face the same limitations as in the criminal trial with Article 68(3), where it has to be in victims' personal interests and balanced against rights of the defendant and a fair and impartial trial. Victims can also appeal a reparation order if they are 'adversely affected' by it, giving them a procedural remedy which they do not have in the criminal trial proceedings before the Court.[137] Staker suggests that victims could make an appeal on this ground if the Court refused to order reparations on their behalf.[138] However, the discretionary language of Article 75 suggests that victims have no right to reparations before the ICC, i.e. no legal entitlement procedurally or substantively to reparations. Thus as with the criminal trial, victims at the ICC have a subsidiary role, with no guarantees that their interests or needs will be addressed by the Court. Of course such a stance is understandable for the ICC, given the challenges the Court faces in practice.

The ability of thousands of victims to participate and communicate with the Court will be tempered by its limited resources. The drafters of Article 75 felt that where there are a few victims, the Trial Chamber could hear evidence from each victim on his/her views and individual damage, loss, or injury.[139] The boards of the Assembly of State Parties (ASP) have suggested that where a defendant is indigent reparations proceedings should be brief so as to conserve resources for reparation orders, rather than spent on legal aid and other court costs associated with victim participation.[140] In light of the above discussion on Article 75(3), the Court is obliged to receive victims' representations, though the provision does not distinguish whether their representations are in written or oral form. As a compromise in cases of mass victimisation it is likely that victim participation could be reduced to written representations, rather than being excluded entirely or limited to a few victims.

There are a number of solutions within the legal framework of the Court which allow mass representation and participation of victims in proceedings. The Court could use a small number of victims' legal representatives (VLRs) to participate on the victims' behalf in proceedings while

136 Partly Dissenting Opinion of Judge Philippe Kirsch, ICC-01/04-01/06-1432-Anx, 23 July 2008, para. 22; see Rule 94 RPE.

137 Article 82(4).

138 Christopher Staker, Article 82: Appeal against Other Decisions, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Nomos 1999) 1029–1032, p. 1032.

139 Draft Article 73 fn. 6, UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.7, 3 July 1998.

140 Establishing effective reparation procedures and principles for the International Criminal Court, September 2011, VRWG, fn. 3, citing the Report of the Committee on Budget and Finance, 17th Session, para. 36.

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allowing written representations to be made by individuals, as the Court has done in relation to their participation in the trial. Additionally, consulting victims possibly through the organs of the Registry could document their views on reparations.[141] Alternatively, under Rule 97, victims, their legal representatives, and the convicted person could request, or the Court of its own motion could appoint, experts to 'assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims'.[142] Experts have been used in other reparation mechanisms to consult victims and develop reparation programmes which were acceptable to all the parties involved.[143] They can also provide additional information on the suffering of victims that may have been excluded from the trial, as well as expertise on victimisation from different professional perspectives, such as psychology, criminology, and medical.[144] Therefore experts could overcome some of the criticism of the ad hoc tribunals (being time-consuming and unfamiliar) by injecting their knowledge into the ICC so as to expedite the Court's reparation proceedings. Together these measures could help the Court to balance its restricted resources against being overwhelmed by mass victim participation.

In the *Lubanga* case, under Article 75(3) Trial Chamber I issued an invitation to any interested individuals or parties to make submissions on the principles and procedures related to reparations.[145] In all, five NGOs responded to the invitation.[146] Their reports included details on reparation jurisprudence in human rights law and national practices, as well as views in Ituri on reparations.[147] The Court accepted these reports on the basis that,

> these organisations are in a position to supply information and assistance that will be of direct relevance to issues related to reparations that otherwise will not be available to the Court, or would be costly and time consuming to secure.[148]

141 See *Situation in the Republic of Kenya*, ICC-01/09-24.

142 Rule 97(2).

143 See the role of a Special Master in Swiss banks litigation in the US, Ferstman and Goetz Note 24, p. 343; see also the appointment of experts in *Aloeboetoe*, para. 39.

144 See *19 Tradesmen*, expert witness testimony, pp. 36–39; Redress Note 1, p. 51.

145 *Lubanga*, Scheduling Order concerning Timetable for Sentencing and Reparations, ICC-01/04-01/06-2844, 14 March 2012.

146 Women's Initiatives for Gender Justice; International Center for Transitional Justice; United Nations Children's Fund (UNICEF); the Fondation Congolaise pour la Promotion des Droits humains et la Paix, and Avocats san frontières which made representations with four Congolese organisations – Justice Plus, Terre des Enfants, Centre Pelican – Training for Peace and Justice, Journalistes en action pour la Paix, and Fédération des Jeunes pour la Paix Mondiale.

147 See *Lubanga*, ICC-01/04-01/06-2904.

148 *Lubanga*, Decision Granting Leave to make Representations in the Reparations Proceedings, ICC-01/04-01/06-2870, 20 April 2012, para. 19.

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Representations on reparations were also made by the parties and participants in the *Lubanga* case including the prosecution, defence, victims' legal representatives, the TFV, the Registrar, and the OPCV. Additionally, as part of the adoption of the five point plan by the TFV, outlined below, and the Registry's proposal, the Court also found that a team of experts should be retained to assist the judges in the assessment of harm of victims, the effect of the crimes on the direct victims of the crimes (child soldiers), to identify the most appropriate type of reparations, who should be awarded reparations, and how to access the funds for these purposes.[149] Trial Chamber I then delegated the appointment and overseeing of the experts work to the TFV.[150]

However, the Chamber went further by recognising the TFV is 'well placed' due to its operation in the DRC to 'determine appropriate forms of reparations and to implement them'.[151] This was part of the five step plan advocated by the TFV, which was supposed to ensure transparency and procedural justice by allowing victims to be involved in the decision making process.[152] The five step plan was summarised by Trial Chamber I as:

> First, the TFV, the Registry, the OPCV and the experts, should establish which localities ought to be involved in the reparations process in the present case (focusing particularly on the places referred to in the Judgment and especially where the crimes are committed). Although the Chamber referred in the Article 74 Decision to several particular localities, the reparations programme is not limited to those that were mentioned. Second, there should be a process of consultation in the localities that are identified. Third, an assessment of harm should be carried out during this consultation phase by the team of experts. Fourth, public debates should be held in each locality in order to explain the reparations principles and procedures, and to address the victims' expectations. The final step is the collection of proposals for collective reparations that are to be developed in each locality, which are then to be presented to the Chamber for its approval.[153]

In their reparation decision the judges outlined their view that reparations should ensure effective participation.[154] Yet, adopting the five step plan of the TFV assigned the procedural and substantive aspect of the reparations

149 *Lubanga*, ICC-01/04-01/06-2904, para. 263.
150 Ibid., para. 265.
151 Ibid., para. 266.
152 *Lubanga*, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, ICC-01/04-01/06-2872, 25 April 2012, para. 188.
153 *Lubanga*, ICC-01/04-01/06-2904, para. 282.
154 *Lubanga*, ICC-01/04-01/06-2904, paras 177 and 203.

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regime to the Trust Fund, with a newly constituted chamber only having oversight and monitoring functions. Subsequently, the legal representatives for the victims appealed the decision on a number of grounds including the Trial Chamber delegating 'its own responsibilities for matters of reparations to two non-judicial entities'.[155] Victims' legal team two argued that such transfer of powers to the TFV enabled it to have an 'unfettered discretion',[156] with victims' legal team one believed it constituted a 'violation' of Article 75(2), as reparations are only to be made against a convicted person and ordered 'through' the Trust Fund even if the person is indigent.[157] These applications by the victims raised questions as to whether or not the TFV will ensure procedural justice to victims by considering their interests, and the extent to which victims can challenge the Trust Fund's decisions through the new constituted trial chamber. The decision also has important implications for the types of reparations that will be ordered for victims.

3 Types of reparations

Article 75(1) and (2) of the Rome Statute specify that the Court can order reparations 'including restitution, compensation and rehabilitation'. Neither the Rome Statute nor the Rules of Procedure and Evidence (RPE) define the contents of these reparations, leaving it to judicial discretion. However, international law and human rights law recognise that reparations include: restitution, compensation, rehabilitation, measures of satisfaction, and guarantees of non-repetition.[158] These various types of reparations seek to remedy an individual or a group's harm in different ways, each having their own benefits and drawbacks.[159] The Inter-American

155 *Lubanga*, Observations of the Vo2 Team of Legal Representatives of Victims in Accordance with Directions, ICC 01/04 01/06-2923, ICC-01/04-01/06-2931-Corr-tENG, 19 October 2012, paras 19–22.

156 Ibid., para. 18.

157 *Lubanga*, Appeal against Trial Chamber I's Decision Establishing the Principles and Procedures to be applied to Reparation of 7 August 2012, ICC-01/04-01/06-2914-tENG, 18 September 2012, para. 19; see further submissions by the VLRs against the appeal by the defence on the reparation decision in the *Lubanga* case – Réponse au Mémoire de la Défense relatif à l'appel contre la 'Decision establishing the principles and procedures to be applied to reparations' du 7 août 2012, ICC-01/04-01/06-3007, 7 April 2013; Joint Response to the 'Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la "Decision establishing the principles and procedures to be applied to reparations"', ICC-01/04-01/06-3010, 8 April 2013.

158 Ibid.; Principles 19–23, UNBPG; Articles 30 and 35–37, RSIWA, but does not include rehabilitation; *Loayza Tamayo*, para. 85; International Humanitarian Law only refers to compensation – Article 3 of The Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), and Article 91 of the Protocol Additional I, 8 June 1977.

159 *Garrido and Baigorria*, para. 41; *Blake*, para. 34; *19 Tradesmen v Colombia*, para. 223.

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Court of Human Rights has emphasised that a combination of measures is necessary to redress the differing harms victims of serious violations suffer.[160] The ICC is bound by international human rights law under Article 21(3) and can apply international law principles under Article 21(2). Thus the Court is in a position to draw from this jurisprudence established on these different types of reparations to ensure its orders effectively remedy victims' suffering.

a Restitution

Restitution seeks to 're-establish the situation that existed before [a] violation occurred'.[161] It can include the return of property or to one's place of residence, as well as restitution in kind, i.e. the provision of something similar, such as a new house.[162] In the Inter-American Court case of *Loayza Tamayo v Peru*, a Peruvian Professor was arrested, detained incommunicado, subjected to torture, inhumane, and degrading treatment, and forced to leave the country. The Court ordered the restoration of her liberty, former employment benefits, including her pension, her job, and salary until she was able to rejoin teaching again.[163] Restitution can return the victim to their original position in certain respects. However, in *Blake v Guatemala*, involving the execution and disappearance of two US citizens by military forces, the Inter-American Court found the murder of the two victims made *restitutio in integrum* to the *status quo ante* 'impossible, insufficient, and inadequate'. As such, the Inter-American Court awarded $151,000 in compensation to their next of kin for their 'suffering, intense anguish, frustration in the face of Guatemala's failure to investigate and the cover up of what occurred'.[164]

b Compensation

Compensation seeks to provide monetary or economic awards to victims for the harm or loss they have suffered.[165] In many legal systems, victims of crime or their next of kin, especially in homicide, are provided with

160 See *Plan de Sánchez Massacre*, para. 93; *Pueblo Bello Massacre; Moiwana Community; Ituango Massacres v Colombia*, Preliminary Objection, Merits, Reparations and Costs, Series C No. 148 (IACtHR, 1 July 2006); the *Las Dos Erres Massacre*.

161 Shelton Note 6, p. 272; see Principles 8–11, UN Victims' Declaration, and Principle 19, UNBPG.

162 Ibid., Shelton; Principle 19, UNBPG; *Papamichalopoulos and others v Greece*, para. 38; *Chorzow Factory*, para. 125.

163 See *Loayza-Tamayo*.

164 *Blake*, paras 42, 50, and 57.

165 See The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners' Guide, International Commission of Jurists, 2006, p. 123; see Principles 12–13, UN Victims' Declaration; Principle 20, UNBPG.

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compensation for their injury and loss.[166] In international law compensation is a substitute where restitution is impossible.[167] Compensation can enable victims the 'freedom of choice' to spend the money as they see fit to redress their suffering.[168] According to the *Lusitania* case, it 'is measured by pecuniary standards, because, says Grotius, "money is the common measure of valuable things" '.[169] Compensation can cover:

(a) Physical or mental harm;
(b) Lost opportunities, including employment, education and social benefits;
(c) Material damages and loss of earnings, including loss of earning potential;
(d) Moral damage;
(e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.[170]

It therefore encompasses both pecuniary and non-pecuniary losses. Traditionally, the regional human rights courts only ordered compensation to cover quantifiable damages, such as economic loss or medical treatment expenses. However, with the recognition that certain harms can cause more intangible damage, such as a person's reputation, the courts began to award compensation for non-pecuniary or moral damages. Non-pecuniary or moral damages provide awards for harm to an individual's dignity which cannot be monetarily quantified, and so is based on the principles of equity.[171] The Inter-American Court has expanded the use of compensation further to cover past and present suffering, as well as the loss of the victim's future potential earnings which would have been made if had they not suffered from the crime.[172]

To put this into context, in the *Caracoza v Venezuela* case, 276 civilians, including a number of children, were killed by government forces in response to public protests during a state of emergency.[173] The

166 In the UK, Criminal Injuries Compensation Authority; in France Articles 85–91, 371–375, and 418–426 of the Code of Criminal Procedure; and *diyya* in Islamic law, see Muhammad Abdel Haleem, Compensation for Homicide in Islamic Shari'a, in M. Abdel Haleem, I. Edge, and O. Adel Sharif (eds), *Criminal Justice in Islam: Judicial Procedure in the Shari'ah* (Tauris 2003) 97–108.

167 *Chorzow Factory*, para. 125; Article 36, RSIWA.

168 Truth and Reconciliation Commission of South Africa Report (1998) Vol. 5, p. 179.

169 Opinion in the Lusitania Cases, 1 November 1923, Recueil de sentences arbitrales, Vol. VII, p. 32, at 35.

170 Principle 20, UNBPG.

171 *B.J. v Denmark*, Views of 10 May 2000, CERD/C/56/D/17/1999, para. 7; *Velásquez Rodríguez*, para. 48; see Shelton Note 6, p. 37.

172 *Loayza-Tamayo*, paras 117, 147–150.

173 Reparations and Costs, Series C No. 95 (IACtHR, 29 August 2002).

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Inter-American Court awarded the 37 victims killed, their 44 next of kin, and three survivors $31,000–63,000 for pecuniary damages as the result of funeral and medical costs, as well as loss of earnings. An additional $2,000–53,000 was ordered for non-pecuniary damages due to the 'various types of physical and psychological ailments, grief, anguish, intense fear, and frustration' they all suffered as a result.[174] Compensation can therefore be used to indemnify a wide range of harm that victims can suffer from.

In cases of mass victimisation involving hundreds or thousands of victims, compensation can be an efficient way to disburse funds to victims without having to work out the modalities of returning property or establishing long-term support programmes.[175] For instance, the UN Claims Commission established after the Gulf War awarded $52.4 billion of compensation to 1.55 million victims who suffered harm as a result of Iraq's invasion of Kuwait.[176] However, such a large fund is generally rare in post-conflict situations, due to the damage caused to the local economy and infrastructure, and so fully remedying the harm through compensation may be unviable. Instead more creative options, such as annual pensions, tax breaks, or university scholarships, could be awarded to victims to make compensation more economically viable to countries emerging from conflict or gross violations of human rights.

Although the utility of compensation is apparent, quantifying the suffering of victims into monetary amounts can denigrate the value of human life and dignity by placing a price on a person or loved one's suffering or life. In the *Street Children* case before the Inter-American Court involving the abduction, torture, and murder of three children and two young adults by the Guatemalan police, Judge Cançado Trindade decried the use of compensation as reducing humans into economic values or 'homo oeconomicus',[177] thereby rejecting an economic analysis of reparations. He continued:

> one ought to focus the whole theme of the reparations for violations of human rights as from the integrality of the personality of the victims, discarding any attempt of mercantilization – and the resulting trivialization – of such reparations. It is not a question of denying importance to the indemnizations, but rather of warning for the risks of reducing the wide range of reparations to simple indemnizations. It is not by mere chance that contemporary legal doctrine has been

174 Ibid., para. 100.
175 Waterhouse Note 130, p. 261; *Moiwana Community v Suriname*, paras 213–215.
176 UN War Crimes Commission webpage: www.uncc.ch (accessed 10 December 2012).
177 The *Street Children* case, Separate Opinion of Judge Cançado Trindade, para. 34, citing *Loayza Tamayo*, Joint Separate Opinion of Judges A.A. Cançado Trindade and A. Abreu Burelli, para. 9.

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> attempting to devise distinct forms of reparation – inter alia, *restitutio in integrum*, satisfaction, indemnizations, guarantees of non-repetition of the wrongful acts – from the perspective of the victims, so as to fulfil their needs and claims, and to seek their full rehabilitation.[178]

Therefore compensation is useful, but is only one component of remedying victims' harm. As encapsulated by Shelton, monetary compensation is,

> incapable of restoring or replacing the rights that have been violated and, as a substitute remedy, are sometimes inadequate to redress fully the harm … [it can however] supply the means for whatever part of the former life and projects remain possible and may allow for new ones.[179]

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c Rehabilitation

Rehabilitation, the third type of reparation mentioned in Article 75, can be a type of restitution as it is the process of trying to reinstate an 'individual's full health and reputation after the trauma of a serious attack on one's physical and mental integrity … [so as to] restore what has been lost'.[180] However, it can be distinguished from restitution as rehabilitation involves healing the personal integrity of the individual rather than returning goods or benefits to them. The World Health Organisation defines rehabilitation as, 'the combined and co-ordinated use of medical, social, education and vocational measures for training or retraining the individual to the highest possible level of functional ability'.[181] The UN Victims' Declaration also calls for 'necessary material, medical, psychological and social assistance' to victims.[182] Rehabilitation may need to go beyond individual assistance to remedy familial, communal, or social bonds damaged as a result of the crime or violation, such as reconciliation measures between communities or education programmes to sensitise communities to victims' suffering.[183]

The European Court of Human Rights has limited rehabilitation for physical and psychological harm to compensation for the cost of medical

178 The *Street Children* case ibid., para. 28.
179 Shelton Note 6, p. 291; Waterhouse Note 130, pp. 260–261.
180 Shelton ibid., p. 275; see Principle 21, UNBPG.
181 World Health Organisation, Expert Committee on Medical Rehabilitation, Second Report, Technical Report Series 419 (1968), p. 6, cited from Clara Sandoval, Rehabilitation as a Form of Reparation under International Law, Redress, December 2009, p. 8.
182 Principle 14.
183 See the TRC Report Vol. 5, p. 175.

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treatment.[184] The Inter-American Court followed the same approach until the *19 Tradesmen v Colombia* case in 2004 where it ordered compensation together with rehabilitation measures.[185] In this case, involving the execution and disappearance by paramilitary and military forces of 19 merchants, an expert witness testified that the victims' next of kin suffered psychological harm as a result, and excessively consummed drugs and alcohol in order to cope with the harm caused.[186] The Inter-American Court ordered the state to provide specialised healthcare without charge to the next of kin on an individual, familial, or collective level and to deal with any substance abuse.[187]

In the *Plan de Sánchez Massacre* case, the Guatemalan army attacked an indigenous Mayan village killing 268 civilians. Mostly women and the elderly were massacred, girls were raped, and homes destroyed causing the displacement of the civilian population. Building on the *19 Tradesmen* case, the Inter-American Court ordered rehabilitation expanding it beyond healthcare to include: a housing and development programme; a healthcare centre; Mayan education; and infrastructure (a road, sewage, and potage water system) for the remaining 317 survivors.[188] These forms of rehabilitation not only redressed the suffering at the individual level, but allowed the community as a whole to rebuild and continue its cultural activities. Rehabilitation has therefore developed from just remedying the victim's physical or psychological harm, to providing measures to repair a wide scope of damage that affects families and communities.

d Other forms of reparation

Although Article 75 only mentions three types of reparation, the Court may use other forms recognised in international and human rights law of satisfaction and guarantees of non-repetition. Mégret suggests that one of the reasons why more property or monetary based reparations of restitution, compensation, and rehabilitation only appear in the Rome Statute is due to the other types requiring the action and responsibility by the state rather than individuals.[189] This is in line with Muttukumaru's observations

184 See Sandoval Note 181, pp. 45–50; *Predică v Romania*, App. no. 42344/07 (ECtHR, 7 June 2011), para. 85.

185 *19 Tradesmen*, para. 278.

186 Carlos Martín Beristain, doctor, specialist on the care of victims of torture, human rights violations, and other forms of violence, ibid., pp. 32–36; cited by the Court at paras 276–278.

187 Ibid., para. 278.

188 *Plan de Sánchez Massacre*, paras 105 and 110.

189 Frédéric Mégret, The International Criminal Court Statute and the Failure to Mention Symbolic Reparations, *International Review of Victimology* 6 (2009) 127–147.

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of the drafters wanting to avoid state responsibility.[190] However, the omission of satisfaction and guarantees of non-repetition does not mean that they are redundant. The use of the term 'including' in Article 75(1) and (2) suggests that the three types of reparations mentioned are illustrative rather than conclusive, thereby permitting the addition of other types of reparations.[191] This is further supported by Rule 94(1)(f) of the Rules of Procedure and Evidence (RPE) which mentions 'other forms of remedy' that a victim can request.[192] The *Lubanga* decision on reparations acknowledged this point stating that the list in Article 75 is 'not exclusive', and can include other types of reparations such as those with a 'symbolic, preventative or transformative value'.[193]

1 MEASURES OF SATISFACTION

Measures of satisfaction repair the moral damage suffered by victims, in that they are supposed to reaffirm the victim's dignity and acknowledge their suffering.[194] They can also 'awaken [...] public awareness to avoid repetition', and 'maintain remembrance of the victim'.[195] This can help to counter the ideological element of international crimes and impunity, outlined in Chapter 1 that such victims deserved to be harmed as they are labelled sub-human or political enemies, by publicly and officially recognising victims' harm and reaffirming their trust in the state and society.[196] In international law, satisfaction involves a variety of measures that endeavour to repair the moral damage of a state, i.e. the 'honour, dignity and prestige' caused by a violation or crime that cannot be redressed by restitution or compensation, due to its intangible and unquantifiable nature.[197] Measures of satisfaction are therefore symbolic and include 'an acknowledgement of the breach, an expression of regret, [or] a formal apology'.[198] A judgment by a court against a state or individual for a crime

190 Muttukumaru Ch. 1 Note 282, p. 268.
191 Mégret Note 189, p. 136.
192 See also the original victim application form for reparations, part F(1) which refers to 'other form of reparations'.
193 *Lubanga*, ICC-01/04-01/06-2904, para. 222.
194 *Plan de Sánchez Massacre*, para. 93; Shelton Note 6, p. 78.
195 Principle 22, UNBPG; *19 Tradesmen*, paras 272–273; *Myrna Mack-Chang*, para. 286.
196 Correa Ch. 1 Note 140.
197 Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded 9 July 1986 between the two states and which related to the problems arising from the *Rainbow Warrior* affair, 30 April 1990, UNRIAA, vol. XX, 215–284, pp. 267–273; *Corfu Channel* case; see ILC Commentary on RSIWA (A/56/10), 2001, p. 105; Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) [2002] ICJ Reports 3, para. 75.
198 Article 37(2), RSIWA.

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or violation can also be a measure of satisfaction as it attributes and determines their responsibility.[199]

In human rights law, satisfaction is more broadly conceived as fulfilling victims' needs for non-monetary outcomes such as justice, recognition of their suffering, the truth, and reaffirming their dignity.[200] As such, satisfaction is generally considered a residual form of reparation that is required to remedy fully victims' harm.[201] This broader interpretation of satisfaction may be more applicable to the ICC, due to human rights law focusing on victims as individuals and groups of atrocities akin to crimes against humanity, such as massacres. The Inter-American Court has ordered satisfaction measures including: prosecution of those responsible;[202] cessation of the violation;[203] plaques and memorials;[204] renaming a well-known street, square, or school in the name of the victim(s);[205] the search, identification, and burial of victims or massacred or were disappeared;[206] and scholarships for victims.[207] These can promote reconciliation within society and prevent future violations by establishing the facts of what occurred, who was responsible, and who the victims were.[208]

Satisfaction can also allow community reintegration. Memorials, scholarships, and other official acknowledgements help to memorialise publicly what happened, reconcile differences, and emphasise that they cannot be repeated in the future.[209] By way of example, in the *Mapiripán Massacre v Colombia* case, over 100 paramilitaries attacked the town of Mapiripán and detained, tortured, and executed at least 49 civilians, destroyed their bodies, and threw them into a river, causing the survivors to abandon the town and seek refuge elsewhere. The Inter-American Court ordered the state to construct a memorial; provide rehabilitation to survivors and families; identify, recover, and return the remains of victims

199 See the *Corfu Channel* case, p. 35; *Rainbow Warrior* affair, pp. 272–273.

200 *Velásquez Rodríguez*, para. 36; *El Amparo v Venezuela*, Reparations and Costs, Series C No. 28 (IACtHR, 14 September 1996), para. 35; *Loayza Tamayo*, para. 153; *Moiwana Community*, para. 216; see Principle 22(b, d, f, and h), UNBPG; Mégret Note 189, p. 129.

201 McCarthy Note 74, p. 170.

202 *Velásquez-Rodriquez*, paras 34–35; *Plan de Sánchez Massacre*, paras 98–99; Principle 22(f), UNBPG.

203 Principle 22(a), UNBPG.

204 *Myrna Mack-Chang*, para. 284; *Moiwana Community*, para. 218; *Pueblo Bello Massacre*, para. 278; Principle 22(g), UNBPG.

205 *Myrna Mack-Chang*, para. 286; *Street Children*, para. 103; *Contreras et al. v El Salvador*, Merits, Reparations and Costs, Series C No. 232 (IACtHR, 31 August 2011), paras 207–208; Principle 22(g), UNBPG.

206 *Pueblo Bello Massacre*, paras 270–273; Principle 22(c), UNBPG; Article 15, International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).

207 *Myrna Mack-Chang*, para. 285.

208 *19 Tradesmen*, paras 258–259; *Plan de Sánchez Massacre*, para. 93; see also Principle 22, UNBPG.

209 *Moiwana Community*, para. 218.

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to their next of kin; and to guarantee the safe return of the survivors to Mapiripán, allowing them to reintegrate into the community and the possibility of future reconciliation.[210] This reconciliation element of satisfaction measures strongly perpetuated the *Lubanga* reparation decision with the judges finding that reparations at the Court are to be more symbolic in nature.[211] In this decision, Trial Chamber I recognised the judgment against Mr Lubanga could serve to raise awareness of child soldiers and deter their perpetration in the future, and that the reparations ordered should follow suit so as to ensure effective reintegration of child soldiers into society.[212]

2 GUARANTEES OF NON-REPETITION

The second form of alternative reparations is the guarantee of non-repetition. These are legislative amendments and institutional reforms made by states to prevent the repetition of violations and atrocities.[213] Mégret defines guarantees of non-repetition as 'a commitment made by the State to never engage again in the practices that led to violations, backed by a number of reforms and restructuring initiatives to make good on that promise'.[214] Guarantees of non-repetition can include ensuring effective civilian control over military forces, strengthening judicial independence, and promoting human rights standards.[215] For instance, in the *Ituango Massacre v Colombia* case before the Inter-American Court, 19 civilians were murdered by paramilitary forces, who also looted property, detained, tortured, and displaced the civilian population. Although the massacre was carried out by non-state actors, it had occurred due to Colombia's failure to protect its citizens and to properly investigate, prosecute, and punish those responsible. The Court ordered Colombia to carry out human rights education programmes for its armed forces and security agencies because of their collaboration, tolerance, and acquiescence of the violations.[216] The Inter-American Court also uses guarantees of non-repetition to raise public awareness, to improve 'collective memory', and to move beyond just the removal of laws by creating new

210 *Mapiripán Massacre*, paras 305–315.
211 *Lubanga*, ICC-01/04-01/06-2904, paras 238–244.
212 Ibid.
213 Principle 23, UNBPG; Article 30, RSIWA; Article 24(5), ICPPED; see also *Garrido and Baigorria*, para. 41; *Plan de Sánchez Massacre*, para. 54; *Moiwana Community* case, para. 216.
214 See Mégret Note 189, p. 130.
215 See Principle 23, UNBPG. Strictly speaking guarantees of non-repetition are forward looking remedies not concerned with redressing the harm caused to individuals claiming reparations. Instead guarantees of non-repetition try to provide wider political and society benefits, and to prevent future victimisation.
216 *Ituango Massacre*, para. 409.

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state support mechanisms to prevent recurrence of violations in the future.[217] Accordingly, they can redress the causes of the conflict, such as abusive armed forces, so as to avoid future victimisation.

In all, the jurisprudence on reparations affirms that different types are available to victims of mass atrocities. The Inter-American Court has developed a corpus of jurisprudence on reparations which aims to be sensitive to victims' needs and is insightful for the ICC in achieving victim-centred justice. Yet, it is unclear whether the ICC has the jurisdiction or the will to order measures of satisfaction or guarantees of non-repetition, which are normally used against states to carry out programmes and reforms, instead of individuals.[218] This has divided commentators. Mégret points out that the ICC could potentially order measures of satisfaction and guarantees of non-repetition, especially for groups where individual compensation to numerous victims would be insufficient. He places them in the wider purpose of the Court in delivering reparations, which are more than just *restitutio in integrum*, but transformative justice as they seek to transform the situation of the victims and society through various remedies and reforms, making the ICC an 'actor of transitional justice' rather than just an international criminal court.[219] However, Mégret does not deal with the issue of state responsibility, instead preferring other forms of reparation to be carried out by the Court through the Trust Fund, which in itself raises certain problems on capacity and responsibility.

Donat-Cattin takes a similar approach to Mégret. Although Donat-Cattin states that the ICC does not have the jurisdiction to order reparations against states, measures of satisfaction and guarantees of non-repetition could be ordered by the Court, without suggesting whether the individual or the Trust Fund should be responsible for carrying these types of reparations out.[220] Keller excludes other forms of reparation on account of the Court's lack of jurisdiction over states.[221] Henzelin, Heiskanen, and Mettraux also neglect satisfaction and guarantees of non-repetition owing to their absence from Article 75.[222] However, to remedy effectively the harm suffered by victims and to be compliant with human rights jurisprudence, all five types of reparations are necessary due to the extent of harm international crimes cause and to achieve victim-centred justice. The Court may need to call upon a state to provide reparations to

217 *Plan de Sánchez Massacre*, para. 104.
218 Muttukumaru Ch. 1 Note 282, p. 264.
219 Mégret Note 189.
220 Donat-Cattin Note 96, p. 1411.
221 Linda M. Keller, Seeking Justice at the International Criminal Court: Victims' Reparations, *Thomas Jefferson Law Review* 29(2) (2007) 189–217, p. 195.
222 Marc Henzelin, Veijo Heiskanen, and Guenael Mettraux, Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes, *Criminal Law Forum* 17(3/4) (2006) 317–344; Zegveld Note 34.

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victims in order to ensure an effective remedy; this point is returned to in the final section of this chapter. The ICC ordering all these types of reparations raises a number of difficulties in relation to individual responsibility.

4 Difficulties in ordering reparations before the ICC

There are a number of difficulties in ordering certain reparations against defendants before the Court, of which three are identified here. First, reparation awards will be inadequate as convicted persons before the Court are likely to be indigent or have hidden their assets. The Court can request State Parties to freeze bank accounts and seize any assets of the accused to be used for reparations.[223] However as Jorda and Hemptinne point out, many defendants before the ad hoc tribunals were unable to afford the cost of their own defence, making it rare for defendants before the ICC to afford a reparation scheme for thousands of victims, as in the *Lubanga* case.[224]

The Court can use the reserves of the Trust Fund for Victims (TFV) to supplement reparations orders against the convicted person.[225] In 2013 the TFV had €1.8 million in reserve for the Court to use for reparations in its first two cases against *Lubanga* and *Katanga*.[226] Yet, this funding is likely to be insufficient to support the needs of the victims in these two cases, who already number in their hundreds with further applications pending.[227] Victims in the *Bemba* case may have a better chance of claiming reparations based on the defendant's resources, as €5.2 million of his assets were seized by the Court.[228] Yet, even in this case there are 4,898 victims, and 478 applications for reparation.[229] If Bemba is convicted and the numbers of victims remain at this amount for the reparation stage,

223 Articles 57(3)(e), 77(2), 93(1)(k), and 109; and Rule 218; see *Prosecutor v Thomas Lubanga*, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06-8-US-Corr, 24 February 2006, paras 136–141.

224 Jorda and de Hemptinne Ch. 1 Note 226, p. 1415; Wierda and Greiff Note 82, p. 10; see *Lubanga*, ICC-01/04-01/06-2904, para. 269.

225 Article 75(2) and Rule 98.

226 TFV Board of Directors Raises Reparations Reserve to 1.8 Million Euros Thu, ICC Press Release, 21 March 2013.

227 517, 151 in Lubanga and 366 in *Katanga*, as of December 2013.

228 *Prosecutor v Bemba, Decision et demande en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs adressées a la republique Portugaise*, ICC-01/05-01/08-8-US-Exp, 27 May 2008; Portugal Seizes Booty of Suspected Congolese War Criminal: Report, AFP, 22 July 2008.

229 *Bemba*, ICC-01/05-01/08-2401; Notification to the Defence and Legal Representatives of the Applicants of Applications for Reparation Pursuant to Rule 94(2) of the Rules of Procedure and Evidence, 25 October 2013, ICC-01/05-01/08-2847.

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they would receive less than €1,000 each. This would be far less than the tens to hundreds of thousands of euros ordered by the regional human rights courts to each victim, plus rehabilitation and measures of satisfaction to remedy effectively their harm.[230] For instance, the *Abuyeva and others v Russia* case before the European Court involved the killing of 24 civilians by Russian aerial bombardment of a refugee 'safe zone' in Chechnya. The Court ordered between €30,000 and €120,000 to the victims for death of a relative or injuries suffered.[231] In the *Mapiripán Massacre v Colombia* case the Inter-American Court awarded between $50,000 and $350,000 for the torture, dismemberment, murder, and disposal of at least 49 civilians in a nearby river, along with other types of reparations.[232]

Although these amounts were awarded against states, they were decided on an equitable basis to remedy victims' harm. Both these regional human rights courts came to these amounts due to the seriousness of the violations against these individuals to the extent that they were compared to crimes against humanity. These cases therefore provide a good comparison to the crimes before the ICC and the appropriate amount required to compensate their harm. Despite the crimes before the ICC being the most serious and grave, the reparations based on the resources of the convicted person or the TFV are likely to be grossly insufficient to remedy the suffering of victims. This is in contrast to reparation orders by human rights courts against states, which are more likely to have the resources and capacity to provide mass-claim reparation programmes. Consequently, the reliance on individual responsibility by the Court impedes the amount of reparations victims can receive from the ICC.

A number of commentators have suggested that reparations should be made on a collective or symbolic basis, due to lack of available resources, the potential thousands or tens of thousands of victims requesting reparations, and the time required to analyse each claim at the ICC.[233] The Court could order collective reparations to be paid by the convicted person or the TFV in order to maximise their limited resources.[234] Individual reparations are measures aimed at remedying the individual person's harm, such as restitution or compensation for looted property. Collective reparations are awarded to a group to remedy their communal harm, such as a memorial for victims of a massacre, but they can also benefit society as a whole, e.g. human rights education of military forces. For instance in the

230 See Pablo de Greiff, Reparations and Justice, in J. Miller and R. Kumar (eds), *Reparations: Interdisciplinary Inquiries* (Oxford University Press 2007) 153–175, pp. 158–159; Sandoval-Villalba Ch. 1 Note 179.

231 App. no. 27065/05 (ECtHR, 2 December 2010).

232 Merits, Reparations and Costs, Series C No. 134 (IACtHR, 15 September 2005).

233 Keller Note 221; Mégret Note 189; Ferstman and Goetz Note 24; Wierda and Greiff Note 82; Rombouts Ch. 1 Note 130, p. 200.

234 Rule 97(1).

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Saramaka People v Suriname, the Inter-American Court ordered collective reparations to protect the Saramakas' communal rights to land and compensation to be paid into a development fund for them.[235] Symbolic reparations can be both individual and collective as they recognise the victim's or group's harm or 'moral status'[236] by offering a small monetary sum or constructing a memorial to acknowledge their suffering.[237]

There are a number of benefits to collective and symbolic reparations. Collective reparations can be cheaper to implement than mass compensation or restitution claims, such as constructing a memorial for the massacre of dozens of victims, instead of awarding them individual monetary amounts. They apply equally to a group of victims thereby avoiding a hierarchy of suffering sometimes associated with compensation awards, which address each individual's particular suffering that can lead to varying levels between victims.[238] Collective reparations can also potentially benefit other victims who are not part of a case before the ICC, such as the construction of a health centre in an area.

However, collective reparations risk compromising individual victims' right to a remedy by being utilitarian and responding to the needs of the group. Collective reparations can marginalise certain vulnerable groups, such as women, children, the elderly, or minority groups, who may have additional or different needs. Furthermore, the community or group to which collective reparations are directed at may not identify themselves as a collective entity with shared interests or needs. Reparations are instead supposed to remedy appropriately all victims' harm, both individual and collective.[239] The Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC) only allow collective awards and explicitly preclude individual monetary payments.[240] Excluding individual restitution or compensation could allow the harm of international crimes to remain, such as poverty as a result of the death of the breadwinner in a family, destruction of an individual's possessions or home, or a severe physical or psychological disability preventing them from earning a living. Additionally, the UN Human Rights Committee has ruled that 'symbolic' or less than full compensation is inadequate and ineffective as a remedy.[241]

235 *Saramaka People v Suriname*, paras 194–202.

236 Conor McCarthy, Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory, *International Journal of Transitional Justice* 3(2) (2009) 250–271, p. 271.

237 See *Albert Wilson v the Philippines*, Communication No. 868/1999, UN Doc. CCPR/C/79/D/868/1999 (2003).

238 Wierda and Greiff Note 82, p. 6.

239 Rianne Letschert and Theo Van Boven, Providing Reparations in Situations of Mass Victimisation, in Letschert *et al.* Ch. 1 Note 10 153–184, p. 170.

240 Rule 23(1)(b) and 23 *quinquies*(1).

241 *Albert Wilson*, para. 5.14.

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Individual and collective reparations are not mutually exclusive, but complement each other in remedying the different aspects of victims' harm, particularly in light of the suffering that international crimes cause to individuals and groups, as explored in Chapter 1.[242] This could preclude the sole reliance on symbolic reparations to redress victims' harm. The use of both individual and collective reparations is supported by the jurisprudence of the Inter-American Court and the UNBPG;[243] the Court should follow such an approach in order to provide victim-centred justice.

The ICC Rules of Procedure and Evidence (RPE) permit judges to award individual and/or collective reparations.[244] The Court could order the construction of a memorial or a health centre to provide rehabilitation, using the confiscated assets of the convicted person to fund these programmes. Alternatively, the convicted person could voluntarily apologise, such as in the *Duch* case before the Extraordinary Chambers in the Cambodian Courts;[245] offer knowledge on the whereabouts of victims' bodies, as occurred in the *Nikolić* case before the ICTY;[246] make a full, public disclosure of what happened to allow the victims to find out the truth, such as Jean Kambanda at the ICTR;[247] or order their armed forces to stop committing atrocities. In the *Lubanga* reparation decision Trial Chamber I mooted that the convicted person could contribute to 'non-monetary' or 'symbolic' reparations, such as 'a public or private apology to the victims', which would be 'only appropriate with his agreement', but this would not form part of the Court's order.[248] So far Mr Lubanga has not apologised, or made any other form of symbolic reparation.

Trial Chamber I in *Lubanga* reparation decision recognised that individual and collective reparations could be ordered concurrently.[249] Significantly, it dismissed victims' individual applications for reparation, and instead favoured collective reparations directed at helping child soldiers and their communities.[250] This was on the basis that community based reparations would be 'more beneficial and have greater utility than individual awards, given the limited funds available and the fact that this approach does not require costly and resource intensive verification

242 Principle 8, UNBPG.
243 See for instance *19 Tradesmen*, para. 222; *Plan de Sanchez Massacre*, paras 54 and 93; Principles 8, 19–23, UNBPG.
244 Rule 97(1).
245 *Prosecutor v Guek Eav Kaing alias 'Duch'*, ECCC, Judgment, 001/18-07-2007/ECCC/TC, 26 July 2010.
246 *Prosecutor v Dragan Nikolić*, IT-94-2-S, Transcript, 3 November 2003 pp. 239–258; Combs, Ch. 1 Note 48, pp. 194–195.
247 *Prosecutor v Jean Kambanda*, ICTR 97-23-S, 4 September 1998, para. 50.
248 *Lubanga*, ICC-01/04-01/06-2904, para. 269.
249 Ibid., para. 220.
250 Ibid., para. 274.

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procedures'.[251] Additionally, the Court was more inclined to make reparations on a community basis in order to ensure that reparations to certain individuals would not cause them further victimisation within Ituri, as other victims from other communities were excluded from reparations.[252]

However, this was contrary to the wishes of the victims who advocated for both individual and collective reparations.[253] It is important to note that victims argued against community reparations on the grounds that the community 'accepted this behaviour [the recruitment and use of child soldiers in the conflict] for the most part and supported the leaders who engaged in it. Many even collaborated.'[254] Accordingly, reparations ordered on a community basis do not directly remedy the harm suffered by victims, could cause secondary victimisation, and portrays the Court's reparation regime as symbolic. This may be the result of the judges in the *Lubanga* case interpreting the ICC reparations regime as serving a more reconciliation purpose than a remedial one, owing to the defendant being indigent, difficulties in ordering individual reparations to child soldiers of one community in Ituri, and having to rely on the TFV. The judges may also be trying to overcome the shortcomings of the criminal trial and its limited charges by maximising the scope of beneficiaries of reparations to the community rather than a specific group of individuals. Nonetheless, such an approach reduces the meaningfulness and effectiveness of reparations by failing to clearly and publicly acknowledge those individuals who suffered harm and responding to the needs of those most affected by these crimes.

This decision to pursue more collective reparations for victims of international crimes before the ICC has impacted other victims' perceptions of the Court in meaningfully addressing their needs. This is apparent in the Kenyan case of *Ruto and Sang*, whereby at least 47 victims have pulled out of participating at the Court. One of the predominant issues the victim cited for pulling out was that reparations would be ordered collectively, such as the construction of a hospital, meaning that perpetrators who continue to live near victims would be able to benefit from the harm they

251 Ibid.

252 Ibid., paras 240 and 244.

253 *Lubanga*, Observations on the Sentence and Reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, and a/1622/10, ICC-01/04-01/06-2864-tENG, 18 April 2012; Observations du groupe de victimes VO2 concernant la fixation de la peine et des réparations, ICC-01/04-01/06-2869, 18 April 2012.

254 Ibid., ICC-01/04-01/06-2864-tENG, para. 16.

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caused.[255] The victims' submission cited other concerns with the selection of perpetrators, engagement with the peace process, and compensation claims before the Kenyan High Court, but the predominate concern remained the potential use of collective reparations at the end of the ICC. The victims would instead prefer compensation, even if it was a very little amount. Otherwise the victims felt disillusioned and justice could not be achieved before the Court. Such a position, while representing only some of the victims in the case, supports the importance of respecting victims' views in such important decision making, and goes back to one of the elements of reparations in acknowledging victims' specific harm, rather than benefiting the community. However, the legal representative of these victims did raise his concerns that such a submission by the victims reflected intimidation by the members of the community to pull out of ICC proceedings.[256]

A second problem is that individuals cannot carry out certain types of reparation, such as rehabilitation, satisfaction, and guarantees of non-repetition. An apology by a convicted person could lack sincerity as it may only be due to criminal and appeal proceedings being complete, or to obtain a reduced sentence.[257] Moreover, a convicted person lacks the capacity to perform other reparations which can only be facilitated by the state, such as physical recovery of victims' bodies and reform of institutions which caused victimisation. Therefore reparations based on individual responsibility of a convicted person are likely to be limited to monetary or proprietary based reparations. It may be more feasible to consider organisational responsibility for non-state actors such as Lubanga's militia, the UPC, to be responsible for reparations in order to collectively hold all the perpetrators responsible for the crimes, as together they may have more capacity and resources to provide reparations to victims. In such instances the role of the state to facilitate reparations or to provide them if the non-state armed group is unable to, would better ensure victims are able to receive reparations for their harm.

Third, by only concentrating on the responsibility of a convicted person ICC reparation orders may exclude the responsibility of the state in victims' harm. International crimes can involve both individuals, such as a

255 *Prosecutor v Ruto and Sang*, Common Legal Representative for Victims' Comprehensive Report on the Withdrawal of Victims from the Turbo area by Letter dated 5 June 2013, ICC-01/09-01/11-896-Corr-Red, 5 September 2013, para. 12. The letter was based on the wishes of 93 victims – 47 of whom had their participation status confirmed in the case, with 13 whose status is unclear, and 33 outside the scope of the case. There were some 628 victims participating as of December 2013.

256 Ibid., para. 16.

257 Mégret Note 189.

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Head of State, as well as state institutions.[258] For example, Omar al-Bashir, President of Sudan, has been indicted by the ICC for international crimes committed in Darfur, which were carried out by state institutions, such as the Sudanese army, and other actors, e.g. the Janjaweed.[259] As such, a number of perpetrators, groups, and institutions may be responsible for victims' harm. The state can necessarily be involved in international crimes, due to their widespread and systematic nature as explored in Chapter 1.[260] Prosecuting only an individual perpetrator, such as a Head of State, allows the victimising structures and other perpetrators to enjoy impunity leaving victims 'defenceless' and 'fosters chronic recidivism'.[261] Therefore, such partial responsibility undermines the Rome Statute's objective of ending impunity and delivering justice to victims. The Trust Fund for Victims is supposed to supplement the shortcomings of reparations against convicted persons before the ICC.

E Reparations through the Trust Fund for Victims

As discussed above, the TFV has two mandates: to be a repository of fines and forfeitures of assets so as to provide a reserve for ICC reparation orders; and to fund assistance to victims within the Court's jurisdiction. The TFV could provide a solution to the specific challenges outlined above: the convicted person being indigent, and their inability to carry out the reparation programmes themselves.

For the first issue, a number of scholars have suggested that problems of the convicted person being indigent can be overcome by the TFV.[262] Fischer goes as far to declare that the TFV, 'is the mechanism through which the international community can "right the wrongs" of international ... crimes'.[263] This is unrealistic given the limited resources of the Trust Fund and the multitude of victims within the Court's jurisdiction. These challenges may mean that awards through the TFV would be small, inadequate, and symbolic by being unable to fully remedy victims' harm.

258 André Nollkaemper, Concurrence between Individual Responsibility and State Responsibility in International Law, *International and Comparative Law Quarterly* 52(3) (2003) 615–640.

259 See *Prosecutor v Al Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1, 4 March 2009; *Prosecutor v Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-95, 12 July 2010.

260 See A.A. Cançado-Trindade, *The Access of Individuals to International Justice* (Oxford University Press 2011).

261 *'White Van'* case, para. 173.

262 Keller Note 221; Mégret Note 189; Jorda and Hemptinne Ch. 1 Note 226.

263 Peter Fischer, The Victims Trust Fund of the International Criminal Court: Formation of a Functional Reparations Scheme, *Emory International Law Review* 17(1) (2003) 187–240, p. 240.

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As the cases before the Court increase, it is also questionable whether reliance on the Trust Fund's resources is sustainable in the future.

On the second issue, with regard to the inability or lack of capacity of the convicted person to carry out reparative programmes, the ICC could use the TFV as it has funded the operation of a number of assistance programmes in the DRC and Northern Uganda. These programmes could be extended to cover victims in a reparation order by the Court. The Trust Fund could also facilitate the construction of memorials, commemoration days, or scholarships for victims. The TFV has no physical presence itself in these situations, but funds programmes which are carried out by intermediaries, such as intergovernmental, international, or national NGOs. The five-step plan of the TFV in the *Lubanga* case indicates the Court's willingness to delegate the adjudication of reparations to this assistance body.

Nevertheless, using the TFV to address these two concerns raises the conceptual problem of attributing responsibility. First, if reparations and assistance are both funded by the resources of the Trust Fund and carried out by NGOs, it makes it difficult to distinguish reparations ordered by the Court from charity or humanitarian aid, which target individuals because of their vulnerability or need rather than rights.[264] Perhaps some victims will just want assistance, but by placing responsibility for reparations with the TFV, it has the effect of transforming such a right into a discretionary service which lacks transparency and prevents victims from holding it to account by challenging its decisions. Designating reparations to be provided through the TFV as assistance to victims equates it with charity connoting pity and disempowering them as helpless, vulnerable objects of moral concern, rather than a rights discourse where victims are subjects 'empowering' them to seek remedy against those responsible, reinforcing their legal entitlement and agency.

Second, the conceptual coherence of reparations is further undermined by the responsible party not being held liable for reparations. This is because the funds used by the TFV do not come from convicted persons, but are voluntary contributions made by State Parties of the Rome Statute. Jorda and de Hemptinne suggest the use of the reparations through the TFV demonstrates State Parties wanting to ensure their collective interests of remedying victims' harm, such as under *erga omnes partes*.[265] However, *erga omnes partes* only gives rise to other State Parties invoking the responsibility of the state which has committed the breach, rather than them undertaking the responsibility to provide reparations.[266] This issue goes back to the theoretical basis of reparations mentioned at the start of this

264 Ferstman and Goetz Note 24, p. 341.
265 Jorda and de Hemptinne Ch. 1 Note 226, p. 1416.
266 Article 48, RSIWA.

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chapter, where responsibility arises on the basis of a wrongful act by an individual, organisation, and/or state. A responsible individual or state is obliged to make reparations to remedy the harm they have caused so as to hold them accountable and to vindicate the law. For victims, the origin of reparations can be important as the culpable person is made to acknowledge and remedy their suffering.[267] To exclude such an aspect neglects the corrective and reparative justice elements of reparations. The focus of the ICC on the convicted person thus creates conceptual difficulties in the locus of responsibility. As the Court has not committed a wrongful act, granting reparations through the Trust Fund does not infer that the ICC is responsible by fulfilling the obligations of a state, nor does this give rise to victims' right to make such claims against the ICC.

Focusing on one institution to provide justice and reparations to millions of victims is clearly unrealistic. However, as the Rome Statute was established to provide justice to victims and to end impunity, the mandate of the Statute needs be reconciled with the practice of the Court. The solution to this lies in the notion of complementarity and state responsibility, in that State Parties have the primary responsibility to fulfil the Rome Statute's mandate, with the ICC only being a last resort. Reparations through the ICC do not negate a state's responsibility to provide reparations to victims.[268] Thus the reparation regime of the Rome Statute includes the Court and State Parties working together to provide justice to victims through accountability and reparations in order to end impunity.

F State responsibility for reparations

As outlined above, state responsibility for reparations only arises when a state commits a wrongful act. A state is not responsible for all conduct within its jurisdiction, such as that committed by non-state actors, unless a rebel movement becomes the new government.[269] It is only responsible when its actions or inactions are considered wrongful in themselves, separate from the violations committed by the non-state actors.[270] A state's responsibility for its inactions arises where: it does not protect its citizens from non-state actors committing international crimes;[271] or it fails to investigate, prosecute, and punish those who commit international crimes.[272] This second part is consistent with State Parties' obligation

267 Walleyn Ch. 3 Note 323, p. 362.
268 Article 75(6).
269 Article 10(1), RSIWA; Principle 12, UN Victims' Declaration; Principle 16, UNBPG.
270 *Pueblo Bello Massacre*, para. 123.
271 *Velásquez Rodríguez*, paras 175–176; *Loayza-Tamayo*, para. 168; General Comment No. 31, para. 8.
272 Article 146, Geneva Convention (IV), 75 UNTS 287; *Velásquez Rodriguez*, para. 32; *Osman v United Kingdom*, App. no. 23452/94 (ECtHR, 28 October 1998), para. 115.

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under the Rome Statute to investigate and prosecute those responsible for international crimes. The failure of a state to do so acknowledges the existence of impunity.

As discussed in Chapter 1, international crimes generally involve the actions or inactions of a state owing to their widespread and systematic scale. International criminal justice only holds those individuals most responsible to account, but is meant to be complemented by states who have the primary obligation to provide reparations to victims of international crimes. The Court by focusing only on the responsibility of individuals for international crimes displaces responsibility from the state and obscures the reality of international crimes, which are committed by both. International law and human rights law recognise the 'duality'[273] of responsibility at the individual and state level for international crimes, which 'co-exist … for the eradication of impunity'.[274] The individual perpetrator is criminally punished and the state is responsible for investigating, prosecuting, and punishing those responsible and providing reparations to victims.[275] Holding all individuals accountable for international crimes may not be enough to end impunity, especially where state institutions committed atrocities or allowed a cause of victimisation to continue, such as abusive or discriminative policies of the armed forces, as in South Africa under apartheid. In practice, due to the limitations of evidence or criminal court capacity it is unlikely that all or even most perpetrators will be held to account, but states can ensure that all or most victims can receive redress through reparations. In addition, a state cannot be held criminally responsible as it is a legal entity; therefore reparations remain the primary means for holding it accountable.[276] Reparations are necessary to fill the gap between retributive justice and remedying victims' harm, including the causes of victimisation. As the purposes of the Rome Statute and the International Criminal Court are to end impunity and deliver justice for victims, this section will examine how state responsibility for reparations can be used to complement the Court's orders.

273 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment [2007] ICJ Reports 43, para. 173; *Anzualdo Castro v Peru*, Preliminary Objection, Merits, Reparations and Costs, Series C No. 202 (IACtHR, 22 September 2009), para. 125; Article 58, RSIWA.

274 Separate Opinion of Judge Cançado Trindade, *Plan de Sánchez Massacre*, para. 39.

275 *Velásquez Rodríquez*, para. 134; *Pueblo Bello Massacre*, paras 91, 112, and 122; Principle 16, UNBPG.

276 Judgment of the International Military Tribunal, IMT Official Documents, Vol. 1 (1947), p. 223.

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1 State responsibility and the Rome Statute: reparative complementarity

The ICC only has jurisdiction over individuals who commit international crimes and not states.[277] As mentioned above on the drafting of the reparation provisions in the Rome Statute, the drafters excluded state responsibility for the purposes of reparations.[278] Conversely, the Rome Statute does not transfer responsibility for reparations to the ICC. Rather the Rome Statute maintains state responsibility for reparations, as can be seen in Article 25(4) which stipulates '[n]o provision ... relating to individual criminal responsibility shall affect the responsibility of States under international law'.[279] This is supported by Article 75 which touches upon state cooperation and enforcement of the Court's reparation orders.[280] The drafters intended that these references to the state would recognise that it is in the best position to remedy as far as possible the consequences committed by international crimes.[281]

Accordingly, the ICC would establish reparation principles and leave them for national authorities to implement.[282] This evidences a reparative complementarity approach, whereby the state is primarily responsible for reparations, with the ICC only ordering reparations in the cases before it. Such an approach is connected to the external element of justice for victims at the ICC, discussed in Chapter 1, by maximising the impact of the Court through catalysing states to fulfil their obligations. Reparative complementarity would not require State Parties to follow the decisions of the ICC on reparations, but it would require them to develop domestic mechanisms based on the UNBPG that would enable victims to claim reparations against perpetrators, culpable organisations, or the state. Importantly for the reparation regime of the ICC, reparative complementarity could overcome its shortcomings through the support of reparation mechanisms in State Parties.

As the ICC has no jurisdiction over states it cannot hold them responsible when they do not provide reparations to victims. However, other State Parties can invoke the responsibility of a state which has committed a breach based on obligations *erga omnes partes*, i.e. as part of a multilateral treaty, which affects a collective interest.[283] With regards to the Rome Statute, the obligation to investigate and prosecute those responsible is

277 Article 1, Rome Statute.
278 Muttukumaru Ch. 1 Note 282, p. 264; see also Resolution ICC-ASP/10/Res.3, 20 December 2011, para. 2.
279 Article 25(4), Rome Statute.
280 Article 75(4) and (5) discussed below.
281 *Réparations dues aux victimes: Intervention de la France*, Rome Conference, 17 March 1998, p. 3.
282 Ibid., p. 2; see also Draft Article 43(3)(c), Proposal Submitted by Egypt for Article 43, A/AC.249/WP.11, 19 August 1996.
283 Article 48, RSIWA.

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breached when a state is unwilling or unable to do so, and therefore it affects State Parties' collective interest in ending impunity, as discussed in Chapter 1.[284] The Inter-American Court has also recognised that the failure to eliminate impunity violates victims' right of access to justice, requiring the other states to collectively adopt all measures to ensure it does not continue.[285] With regards to reparations, in invoking the responsibility of a state which has breached its obligations, other State Parties can require it to cease the breach and make guarantees of non-repetition, as well as performance of reparations to beneficiaries of the obligation breached.[286] One way to do this outside the Rome Statute is to bring a claim before the International Court of Justice (ICJ).[287] This could be an important enforcement mechanism to ensure the compliance of states with the Court's reparation orders. Without such enforcement, the ICC would become powerless, abstract, and an ineffective remedy for victims.

There are specific provisions within the Rome Statute for the Court to involve State Parties in reparations orders. The ICC could call upon a responsible state to complement the Court's reparation orders based on Articles 75(4) and (5). Article 75(4) enables the ICC to request certain types of reparations from a state. Under the provision the Court, 'may … determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under Article 93, paragraph 1'. Under Part 9 of the Rome Statute on 'International Co-operation and Judicial Assistance', Article 93(1) on 'co-operation' stipulates that State Parties 'shall' comply with any requests made by the Court under this article. In relation to reparations, Articles 93(1)(g), (k), and (l) are noteworthy. Starting with Article 93(1)(k), the most relevant provision to reparations, enables the Court to request State Parties to identify, trace, freeze, and seize any property or assets belonging to the convicted person to support reparation orders. This could provide an important avenue for victims to seek restitution of their property and fund reparation orders.

Article 93(1)(g) on 'the exhumation and examination of grave sites' could also be useful for measures of satisfaction ordered by the ICC in identifying and returning the bodies of victims to their next of kin. Of course, use of the word 'may' in the article implies there is no obligation

284 Article 48(1)(a), RSIWA; moreover, this also may breach *jus cogens* obligations which are owed to the international community as a whole allowing other State Parties to invoke responsibility under Article 48(1)(b), as well as 40 and 41, RSIWA.

285 *Goiburú et al. v Paraguay*, Merits, Reparations and Costs, Series C No. 153 (IACtHR, 22 September 2006), para. 131; *Anzualdo Castro v Peru*, para. 125.

286 Article 48(2)(b), RSIWA.

287 Article 36, Statute of the International Court of Justice, 18 April 1946; a similar obligation under Articles 6 and 7 of the 1984 UN Convention Against Torture was invoked before the ICJ in the case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, 20 July 2012.

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on judges to order measures under Article 93(1). Such requests under Article 93(1)(g) or (k) would be consistent with the jurisprudence established by the regional human rights courts and international human rights conventions, which obligate a state to restore property and the bodies of deceased victims.[288] Clearly in most cases these measures will not be a full and effective remedy. Article 93(1)(l) permits the Court to request cooperation from a state to provide 'any other type of assistance' to give effect to a reparations order. This could be a broader basis to request a state to complement the Court's reparation regime.

Unlike Article 75(4), Article 75(5) is not limited to the measures outlined in Article 93(1), so it may provide a wider avenue for the ICC call upon a state to carry out other reparation measures. Under this Article '[a] State Party shall give effect to a decision under this article as if the provisions of Article 109 were applicable to this article'. Article 109(1) on 'enforcement' stipulates that State Parties 'shall give effect' to the enforcement of fines and forfeitures ordered by the ICC. This requires State Parties to enforce the reparation orders at the national level. Turning again to the Vienna Convention on the Law of Treaties, the ICC judges could rely on the preparatory work of Article 75 in interpreting its application.[289] In earlier drafts of Article 75, the Court could determine the scope and extent of victimisation as well as the principles for reparation so that victims could rely on it to pursue remedies in domestic proceedings.[290] Rule 219 of the RPE affirms this by requiring states not to modify 'the reparations specified by the Court, the scope or the extent of any damage, loss or injury determined by the Court or the principles stated in the order, and shall facilitate the enforcement of such order'. Furthermore, Article 88 of the Rome Statute obliges each State Party to ensure that there are procedures available in their national law for cooperation with the Court. Therefore under Article 75(5) the Court could make a reparations judgment and outline principles and the extent of victimisation to be enforced through domestic courts.

Under the Rome Statute a state would be responsible for complementing reparations at the ICC in two situations. In the first situation we can term 'basic reparative complementarity', the Court could call upon a responsible State Party to supplement reparation orders made by the ICC against a convicted person under Article 75. In this situation, there are three levels where the Court could call upon a responsible state. To begin with, where the convicted person has the assets to fund reparations for all victims, the Court could request a state to provide certain reparations

288 Article 15, ICPPED, UN Doc. A/RES/61/177 (2006); *Papamichalopoulos and others v Greece*, para. 38; *Pueblo Bello Massacre*, paras 270–273.

289 Article 32(1).

290 Preparatory Committee Report Vol. I, para. 282.

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which are impossible for the incarcerated person to carry out, such as rehabilitation, measures of satisfaction, and guarantees of non-repetition.

In the second instance, where the convicted person is indigent, the Court after determining the extent of victimisation and appropriate reparations could call upon a state to provide reparations to victims, with the TFV only used to provide interim rehabilitation, consistent with its current assistance mandate, so as to avoid any conceptual difficulties with reparations and to minimise the continuing effects of the crimes on victims. This would be coherent with the responsibility of a state under international law and human rights law for its actions or inactions in international crimes and impunity, and the principle of subsidarity.[291] The state could pursue the resources of members of an armed group, which the convicted person is also a member, to indemnify the state, or seek out other responsible actors such as corporations which facilitated such crimes. In the third instance, where the convicted person is indigent and a responsible state is unwilling to provide reparations to victims, the Court could refer the matter to the ASP or Security Council, for its failure to comply with a request of the Court, thereby engaging international responsibility.[292]

The second situation of 'comprehensive reparative complementarity', responsible states would have a general obligation to provide a dedicated national reparation mechanism and process for all victims of international crimes, including those outside the reparation decisions of the ICC, in order to end the effects of impunity and to provide an effective remedy.[293] This would remove the reparations gap between those few victims before the ICC and the majority who had suffered from international crimes. This approach adheres to the principle in human rights law that reparations are based on the victims' harm without the need for the perpetrator to be identified, apprehended, prosecuted, or convicted, i.e. victim-centred.[294] It would also require the state to provide reparations even where the individual perpetrator is identified and convicted, but indigent, so that state provision of reparations in a subsidiary role to individual responsibility would ensure that all victims, regardless of the perpetrator's affiliation, would be able to receive reparations.[295]

The motivation for states to create such mechanisms and processes would be to avoid costly and lengthy civil litigation against the state, which

291 Article 40, RSIWA; *Velásquez Rodríguez*, paras 175–177; *Blake*, para. 64; *19 Tradesmen*, para. 175; Principles 15–16, UNBPG.

292 Article 87(7).

293 See Report of the International Commission of Inquiry on Darfur to the Secretary-General, S/2005/60, 1 February 2005, paras 591–600.

294 See Principle 2, UN Victims' Declaration; Principle 9, UNBPG.

295 Principle 16, UNBPG.

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can be a political liability in terms of human rights compliance.[296] This mechanism/policy approach, rather than court based, would remove the burden from victims bringing civil claims and provide sufficient evidence against perpetrators to obtain redress, or to exhaust all domestic remedies before being able to bring a case against the state at a regional human rights court. This principle of subsidiary would require states to provide full reparations for victims, due to the serious and harmful nature of international crimes.[297] Accordingly State Parties would provide streamlined reparation mechanisms to all victims of collective violence.

As the Court only has jurisdiction over convicted persons for the purposes of reparations, the Statute does not provide proceedings to adjudicate on this second situation. Therefore it would be incumbent on the state to carry out reparations consistent with principles and the UNBPG. Failure of a responsible state to provide reparations could be enforced by State Parties through the ICJ on the basis of international responsibility, or victims could claim violation of their rights at regional human rights courts on the grounds of state responsibility.

In the *Lubanga* decision Trial Chamber I tentatively indicated that a reparative complementarity approach is possible by finding that State Parties and the international community are 'entitled to institute other forms of reparation'.[298] The Chamber stated that such reparations could include,

> establishing or assisting campaigns that are designed to improve the position of victims; by issuing certificates that acknowledge the harm particular individuals experienced; setting up outreach and promotional programmes that inform victims as to the outcome of the trial; and educational campaigns that aim at reducing the stigmatisation and marginalisation of the victims of the present crimes. These steps can contribute to society's awareness of the crimes committed by Mr Lubanga and the need to foster improved attitudes towards events of this kind, and ensure that children play an active role within their communities.[299]

Although the decision does not recognise State Parties' obligations for reparations under the Rome Statute and includes mostly symbolic,

296 IOM report Ch. 2 Note 195, p. 19.

297 In comparison to many national compensation schemes whereby the state only provides damages and costs to victims of crime; see Rianne Letschert and Karin Ammerlaan, Compensation and Reparation for Victims of Terrorism, in R. Letschert, I. Staiger, and A. Pemberton (eds), *Assisting Victims of Terrorism: Towards a European Standard of Justice* (Springer 2010) 215–266, p. 231.

298 *Lubanga*, ICC-01/04-01/06-2904, para. 239.

299 Ibid.

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informational, and reconciliatory measures, it does suggest that the reparation orders by the ICC are insufficient in themselves. As such, this requires the cooperation of State Parties and the international community to complement the work of the Court in order to remedy victims' harm. The Assembly of State Parties has recently passed a resolution that liability for reparations within the framework with the Rome Statute is limited to individuals, not State Parties.[300] However, to guarantee the success of reparative complementarity, binding State Parties through obligations would be better in securing effective remedies for victims.

2 Reparative complementarity: a solution?[301]

Effectively, the inclusion of reparative complementarity follows the drafters' intentions on reparations by recognising that the state is in the best position to carry them out. It is also in harmony with states' obligations under international law and human rights law. This approach is still interpretatively and legally possible due to the ambiguous language of Article 75, the *jus cogens* nature of international crimes, and the obligation to provide reparations.[302] In applying reparative complementarity to the problems facing the Court's reparation regime – limited reparations, inadequate resources, and the issue of responsibility – state responsibility could be a solution to these inadequacies.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) in its reparations decision in the *Duch* case came to a similar finding.[303] The Cambodian Chamber found that victims' reparation requests for rehabilitation and memorials should be carried out by the Cambodian government or non-governmental organisations. The Chamber refused to order measures of satisfaction or rehabilitation to be carried out by the Cambodian Court on the grounds that such measures interfered with the national government's prerogatives to provide reparations. A distinction must be drawn between the reparations regimes of the ECCC and the ICC. The ECCC is based on a *partie civile* system in Cambodian law, which allows victims to attach their civil claims to a criminal prosecution. Additionally, the ECCC Internal Rules stipulate a restricted scope of only collective and

300 Victims and Affected Communities, Reparations and Trust Fund for Victims, ICC-ASP/12/Res.5, para. 9.

301 See Luke Moffett, Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the International Criminal Court, *International Journal of Human Rights* 17(3) (2013) 368–390.

302 Separate Opinion of Judge A.A. Cançado-Trindade, *Street Children*, para. 36; *'White Van'* case, para. 173; *Ituango Massacres*, paras 128–129.

303 *Duch*, 001/18-07-2007/ECCC/TC, Judgment, para. 66.

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moral reparations, and do not include a trust fund for victims.[304] In contrast, at the ICC reparations under Article 75 are likely to be based on international and human rights law, which permit different types. Moreover, Article 75(4) and (5) specify state cooperation and enforcement of reparations with the ICC. Nevertheless, the *Duch* decision is still relevant as it indicates an important point: that the state is primarily responsible for reparations. The difficulty with the *Duch* decision is that the ECCC refused to call upon the Cambodian government to fulfil its international obligations to provide reparations for all the victims of the Khmer Rouge.

At the ICC calling upon a State Party to provide extensive reparation programmes could consume a post-conflict country's GDP and may be disproportionate, or it may not have the 'independence, credibility or capacity' to create effective reparation programmes by itself.[305] Instead, impoverished states could provide reparations over a number of years such as an annual pension, rather than a lump sum, with reparations justified on the basis of a country's priorities in contrast to its defence budget.[306] In such instances, there may be a role for other State Parties, as members of the ASP, to provide support through capacity building, such as sending experts, as they currently do in building states' prosecutorial competence.[307] Moreover, as Van Der Wilt points outs, there is a margin of appreciation for State Parties in fulfilling their obligations under the Rome Statute, in that they do not have to follow the exact procedure established for the Court, but can adapt it to their own domestic procedures provided they follow substantive law of the ICC, such as the crimes and requests by the Court.[308] However, there are certain procedural provisions states would have to adopt for domestic mechanisms to remedy victims' harm, including their protection and participation in proceedings to ensure effective reparations.

Reparation decisions at the ICC should thus place victims at the centre by determining their harm and appropriate types to remedy it effectively, then to decide where the resources should come from, instead of being dictated by the convicted person's assets. Otherwise, reparations are centred on the successful conviction of the perpetrator, resulting in

304 Rule 23 of the ECCC Internal Rules (Rev. 8); these rules were amended after the *Duch* judgment to include a fund for victims; see Redress Note 1, pp. 22–23.

305 Articles 35 and 37, RSIWA; Cecily Rose, An Emerging Norm: The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors, *Hastings International and Comparative Law Review* 33(2) (2010) 307–343, p. 309.

306 See Correa Ch. 1 Note 140, 185–234.

307 In Uganda, see Justice for Serious Crimes before National Courts: Uganda's International Crimes Division, HRW, 2011.

308 Harmen van der Wilt, Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court, *International Criminal Law Review* 8 (2008) 229–272.

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symbolic reparations for victims. The difficulty of reparations in international criminal justice is compounded by its asymmetrical nature, which concentrates on the responsibility of single perpetrators despite international crimes involving thousands of victims. This is not to remove reparations from the ICC, but to seek solutions which allow the Court to move from a solely retributive justice institution to a more reparative justice one and achieve victim-centred justice. Key to the success of the reparation regime of the ICC is the support of other State Parties through reparative complementarity.

G Conclusion

Reparations provide the opportunity for the ICC to push the boundaries of international criminal justice beyond defendant-focused criminal justice, by delivering justice directly to victims of international crimes. Thus international criminal justice moves from retributive justice to a more remedial one. However, a narrow reading of the Rome Statute, which sees the convicted person as the only source of reparation, will be inadequate to remedy victims' suffering and may be a source of secondary victimisation. Although the TFV can fund some assistance, it is not reparation. The *Lubanga* decision which has delegated the decision making process to the TFV and Registry has already been decried by victims as neglecting their interests and unlikely to provide an effective remedy to their harm. In order to offer justice to victims under the Rome Statute, State Parties need to remedy impunity by prosecuting those responsible and awarding reparations to victims. As this chapter has argued, the ICC does not absolve State Parties from their obligations to provide reparations to victims of international crimes, rather it affirms it.

Perhaps the dissatisfaction with the asymmetrical individualised responsibility of the ICC reparation regime rests in the failure of the Court to reflect the reality of how international crimes occur, wherein perpetration and responsibility is not individualised, but is orchestrated collective violence through multiple actors and institutions. Accordingly pinning the blame on one individual, such as Thomas Lubanga, is grossly unsatisfactory given the reality of the context to which crimes arise, such as the conflict in the DRC involving numerous states and non-state actors, and resulting in millions of deaths with continued violence and insecurity. Furthermore the impact of a certain group of victims receiving reparations only serves to distinguish them as more deserving than others, as they have by chance had their case successfully heard and resolved by the ICC. This in itself only reinforces a hierarchy of victims and notions of more deserving victims, which in itself is likely to cause secondary victimisation and lead to further insecurity when co-opted by community and ethnic narratives of the conflict. Conceivably a more sustainable and fair approach to reparations would include all victims and be based at the state level.

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Of course states, such as the DRC, may have other pressing public priorities in spending its revenue, which requires international organisations such as the ICC to ensure states place victims at the centre of any reconstruction or transition from the past.

Reparative complementarity under the Rome Statute seems to offer a solution to the problems faced by the reparation regime of the ICC, as well as to complement other responsibility regimes in international law and human rights law. The growing international and human rights jurisprudence establishes that reparations are victim-centred measures of redress. Additionally, this jurisprudence has recognised that prosecutions and reparations are necessary and inter-connected parts in remedying international crimes. This is due to the serious and widespread harm these crimes cause to victims. The development of international criminal justice through the inclusion of reparations within the Rome Statute demonstrates that prosecution on its own is no longer recognised as sufficient by itself to remedy the harm caused to victims of international crimes. The next chapter examines how the external element of the Court in catalysing justice for victims in domestic jurisdictions through complementarity has worked in practice in the situation of Northern Uganda at the ICC.

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CHAPTER 14

ARE REPARATIONS APPROPRIATELY ADDRESSED IN THE ICC STATUTE?

Fiona McKay

The Rome Statute of the International Criminal Court (ICC) made history in several ways, one of which was the adoption of provisions aimed at providing reparation for the victims of crimes within the ICC's jurisdiction. Article 75 of the Statute and related articles set out the framework for the reparations regime. The two core elements of this regime are as follows:

1. The Court *shall* establish principles relating to reparation and in so doing *may* determine the scope and extent of any damage, loss and injury; and
2. The Court *may* make a reparation order directly against a convicted person.[1]

In addition, Article 75 sets out certain principles aimed at making this regime workable. It provides for:

1. Representations to be made by the convicted person, victims, other interested parties or interested states;
2. Protective measures to be taken under Article 93, including the identification, tracing and freezing or seizure of assets;
3. Enforcement pursuant to Article 109, according to which States Parties shall give effect to orders of the court, without prejudice to the rights of *bona fide* third parties and in accordance with the procedure of their national law.

Finally, Article 79 provides that the Assembly of State Parties will establish and set criteria for a Trust Fund "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims." The Court may order fines and forfeitures imposed as penalties to be paid into this Trust Fund.

This was the first real attempt to develop a reparation regime in the context of international criminal justice and thus its content had to be built largely from

[1] Art. 75.1 and .2 (emphasis added).

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first principles. While national practice provided some assistance, the reparation regime which was created was, as with the Statute as a whole, *sui generis* and not a reproduction of any national system.

The provisions concerning reparations in the ICC Statute can be regarded as a recognition by the states involved in the drafting process that individual criminal responsibility in international law carries with it the responsibility to repair so far as is possible the damage caused by the international crime. The International Criminal Court will be dealing only with cases in which domestic criminal justice systems have proved unwilling or unable to prosecute. In such situations, it is likely that reparation also will not be available domestically. Just as national systems have often failed to prosecute and punish perpetrators, so have they failed to adequately ensure reparation for victims.

The inclusion in the ICC Statute of powers relating to reparation also represents a major step forward in making international criminal justice more responsive to the rights and interests of victims, reflecting a trend which can be discerned in national practice and in current initiatives to develop international standards.

A. RELEVANT INTERNATIONAL STANDARDS

Recent years have seen a growing concern in the international community for the need to more effectively do justice for victims, and a growing recognition that this includes ensuring that appropriate reparation is provided. Such an evolution has been reflected in initiatives taken in two U.N. spheres of interest: criminal justice and human rights. In 1985, the U.N. General Assembly adopted a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[2] developed by the U.N. Commission on Crime Prevention and Criminal Justice. This agency later developed a guidebook for policy makers and a handbook on the application of the Declaration.[3] One of the principles set out in the Declaration is that victims should receive restitution, compensation and assistance.

A second initiative was taken by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities which in 1989 requested a Special Rapporteur, Professor Theodoor van Boven, to undertake a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.[4] In 1993, Professor van Boven submitted his final report, together with a draft set of U.N. Basic Principles and Guidelines on the right to reparation for victims of violations of human rights and international humanitarian law (these will be referred to as the draft Principles

[2] Adopted by the U.N. General Assembly on Nov. 29, 1985, Resolution 40/34.

[3] U.N. Docs. E/CN.15/1998/CRP.4 (Apr. 17, 1998) and E/CN.15/1998/CRP.4/Add.1 (Apr. 17, 1998).

[4] Resolution 1989/13, Forty-First Session.

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and Guidelines).[5] This was subsequently revised in light of views and comments by states and others, and a later version[6] was presented to the U.N. Commission on Human Rights.

The draft Principles and Guidelines attempt to set out the scope and form of the right to reparation and to define state responsibilities in this regard. Based on the International Law Commission's Draft Articles on state Responsibility,[7] five main forms of reparation are identified, although it is emphasized that the list is not exhaustive. The five forms of reparation are:

1. restitution, including restoration of liberty, family life, citizenship, return to one's place of residence, and restoration of employment or property;
2. compensation for any economically assessable damage such as physical or mental harm, including pain, suffering and emotional distress, lost opportunities, material damages and loss of earnings, harm to reputation or dignity, legal and medical costs;
3. rehabilitation, including medical and psychological care as well as legal and social services;
4. satisfaction, including cessation of continuing violations, verification of the facts and disclosure of the truth, apology, and commemorations;
5. guarantees of non-repetition, including measures to prevent the recurrence of violations.

The approach is an important recognition of the fact that the starting point for reparation should be the needs and desires of victims, and that the form of reparation which will satisfy a victim will vary considerably from one case to another. In many instances, monetary compensation will not be sufficient or even desirable: an offer of payment to a bereaved family of a disappeared person can be viewed as insulting. Moral forms of reparation, such as disclosure of the truth and acknowledgment of responsibility, are often perceived as most important in the context of violations of human rights, a position that has been reiterated time and time again by groups representing families of the disappeared and other victims.

Although drafted primarily in the context of state responsibility, the framework set out in the draft Principles and Guidelines was considered by the states negotiating the ICC Statute to constitute an appropriate basis for defining reparation in the context of individual responsibility for international crimes. A wide and victim-centered approach to reparation also can be seen in some decisions of

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[5] U.N. Doc E/CN.4/Sub.2/1993/8 (July 2, 1993).

[6] U.N. Doc E/CN.4/1997/104.

[7] U.N. Doc A/51/10, 1996, arts. 42–46.

international and regional human rights bodies, such as the Inter-American Court of Human Rights and the U.N. Committee against Torture.

B. REPARATION IN INTERNATIONAL CRIMINAL JUSTICE

Previous international criminal tribunals have not attempted to deal fully with the question of reparation. The Statutes for the two ad hoc international criminal tribunals for former Yugoslavia and Rwanda do not give these tribunals the power to award reparation to victims, although the Rules of Procedure and Evidence have developed a limited capacity for the tribunals in this area. The Rules for the Tribunal for former Yugoslavia provide for restitution of property (Rule 105) and compensation to victims (Rule 106).[8] Rule 105(A) states:

> After a judgement of conviction containing a specific finding as provided in Sub-rule 98 ter (B), the Trial Chamber shall, at the request of the Prosecutor, or may, proprio motu, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.

This Rule further allows the Tribunal to seek assistance from the competent national authorities in determining ownership.

Rule 106 states that the Registrar shall transmit a judgment finding a person guilty to the competent national authorities, and that a victim may bring an action in a national court or other competent body to obtain reparation, pursuant to relevant national legislation. For this purpose, the Tribunal's judgment shall be considered binding as to the criminal responsibility of the convicted person. For their part, the Rules of Procedure and Evidence of the Tribunal for Rwanda, in their 1998 revised version, include among the functions of the Victims and Witnesses Support Unit the function of ensuring that victims and witnesses "receive relevant support, including physical and psychological rehabilitation, especially counseling in cases of rape and sexual assault."[9]

When it came to negotiating a treaty for the establishment of an international criminal court, there was therefore little precedent to draw upon, but a strong sense that a primary purpose of the ICC was to do justice for victims. U.N. Secretary-General Kofi Annan, in his opening address to the Diplomatic Conference in Rome on June 15, 1998, said that the overriding interest must be that of the victims. This sentiment is reflected in the Preamble to the Rome Statute, in which parties express that they are "mindful that during this century

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[8] Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, as amended Mar. 11, 1999.

[9] Rule 34(A)(ii).

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millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."

C. REPARATION IN THE DRAFTING HISTORY OF THE ICC STATUTE

The original draft Statute for an international criminal court submitted by the International Law Commission to the U.N. in 1994 contained no provision directly bearing on reparation.[10] The working group of the ILC discussed the issue of reparation and restitution, but deleted a draft article on restitution because of concern that determining the ownership of stolen property would require separate proceedings and was more appropriate for a civil than a criminal case. It was suggested that allowing the Court to consider such matters would be inconsistent with its primary function and contrary to its fundamental purpose, which was to prosecute and punish, without delay, perpetrators of the crimes in the Statute.[11] Nevertheless some members of the working group expressed the view that the Court should have power to provide reparation to victims. The draft that was eventually submitted to the General Assembly contained only an indirect reference to reparation: Article 47, which dealt with applicable penalties, authorised the Court to impose a fine as well as imprisonment on a convicted person, and provided that fines could be transferred to, *inter alia*, "a trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime."

The Preparatory Committee on the Establishment of an International Criminal Court ("PrepCom") was charged by the U.N. General Assembly in 1995 with further discussing the ILC's draft statute, and drafting the text for a Diplomatic Conference.[12] The PrepCom met in New York in up to three sessions a year until the Diplomatic Conference in Rome in June–July 1998.

A compilation of states' proposals for consideration by the PrepCom published in 1996 included two proposals on reparation. First, a proposal entitled "Compensation for the Victims" echoed Rule 106 of the Rules of Procedure and Evidence of the Tribunal for former Yugoslavia. It required the Registrar to transmit judgments of the Court to the competent national authorities of the states concerned, stated that victims may institute proceedings in a national court, and provided that the judgment of the Court shall be binding on national jurisdictions as regards the criminal liability of the convicted person and the principles relating to compensation and restitution.[13] Second, a French proposal went further and gave the Court itself some direct role in reparation. It provided that in its judg-

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[10] Draft Statute for a Permanent International Criminal Court, U.N.G.A. Doc. A/49/355 (Sept. 1, 1994).

[11] [1993] II Y.B. INT'L L. COMM'N 125, Part Two.

[12] U.N. GAOR 50/46 (Dec. 11, 1995).

[13] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, Compilation of Proposals, U.N. Doc. A/51/22, at 224.

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ment the Court "may, where necessary, establish principles relating to compensation for damage caused to the victims and to restitution of property unlawfully acquired by the persons convicted."[14]

Proposals put forward by non-governmental organizations urged the PrepCom to give greater recognition to the needs and rights of victims. REDRESS, for example, proposed in June 1997, that in sentencing convicted persons, the Court may impose "other appropriate forms of reparation" as one of the possible sentences, "without prejudice to the obligation on every state to provide reparation in respect of conduct engaging the responsibility of the state."[15] REDRESS and other non-governmental organizations, supported by an increasing number of states, urged the PrepCom to adopt the term "reparation" rather than the narrower term "compensation" in line with developing international standards, and to give the Court power to make awards of various forms of reparation.

Initially, the idea of the Court playing a role in providing reparation to victims raised concern among some states about the danger of overwhelming the Court with claims. They also argued that their own legal systems did not allow reparation to be dealt with by a criminal court. In the draft text that went to Rome, the entire article was in square brackets, indicating the lack of agreement that reparation should be dealt with in the Statute at all. Nevertheless, in the debates in the Working Groups very few states spoke against the principle of the Court dealing with reparation. A willingness to look for a workable role for the Court in ensuring reparation for victims developed. This was due in no small measure to the willingness of common law countries, which had less of a tradition of victims obtaining reparation through criminal proceedings, and in particular the United Kingdom, to work hard to reach agreement with countries, such as France, which did have this tradition.

Nevertheless a number of states did raise specific concerns and there were very lengthy discussions held during the PrepComs relating to reparation. Some of the fiercest debates concerned whether or not the Court should have the power to make reparation orders against states as well as against convicted persons. Another area of concern was how to avoid turning the Court into a social service agency. The PrepCom initially discussed proposals relating to reparation in two Working Groups, that on penalties and that on procedures. The Working Group on Penalties included "appropriate forms of reparation . . . such as restitution, compensation and rehabilitation"—albeit in square brackets—as one of the lists of penalties that could be imposed on convicted persons by the Court.[16] While

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[14] *Id.* at 223.

[15] *Promoting the Right to Reparation for Survivors of Torture: What Role for a Permanent International Criminal Court?*, REDRESS 43 (London, June 1997).

[16] *See* rolling text of the Working Group on Penalties, U.N. Doc. A/AC.249/1997/WG.6/CRP.1 (Dec. 2, 1997).

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there was overwhelming support among states' delegates who spoke in the debates for the principle that the Court should be able to address issues of reparation, a significant number of states expressed unease with the inclusion of awards of reparation as a form of penalty rather than as a distinct power of the Court. Others believed that it was best to consolidate all matters relating to reparation in one place in the Statute, and that since reparation was dealt with elsewhere, it was not necessary to include it also as a penalty.[17] This view eventually prevailed. Although the text forwarded to the Rome conference still included the option of having reparation among the list of applicable penalties, this was only at the insistence of a few states, and even fewer states spoke in favour of its inclusion during the Rome conference.

Consensus was reached on one further important matter for the rights of victims at the December 1997 PrepCom, namely that victims would be listed as the primary beneficiaries of fines and confiscated assets. Previously, the relevant article had provided that such funds could go to meet the costs of the trial, to a state the nationals of which were victims of the crime, or to a trust fund for the benefit of victims. The new text made it clear that funds collected by way of fines or confiscated assets would go as a matter of priority to the trust fund.[18]

Meanwhile, the Working Group on procedures of the PrepComs continued to develop and discuss a free-standing article which would give the Court power to make determinations relating to reparation. Like the Working Group on Penalties, this Working Group was now using the term "reparation" rather than the term "compensation." The draft text discussed during the PrepCom of December 1997 still did not provide that the Court itself would become involved in actually making reparation orders against convicted persons. Instead it was envisaged that the burden would fall primarily on national courts to make and enforce such orders. The Court itself might determine the scope and extent of victimization, and determine that reparation should be made.[19]

Before, during, and after the last PrepCom, which took place in March and April 1998, the draft text improved significantly from the point of view of access to reparation for victims, so that the text forwarded to the Rome conference was considerably stronger than its predecessors. The draft article on reparation now explicitly provided for the Court itself to make an order regarding reparation directly against a convicted person. There was even language in the draft containing the possibility of the Court ordering that an appropriate form

[17] There is no formal record of these debates, and these comments are based on informal notes taken by REDRESS of sessions of the PrepCom where issues relevant to reparation were discussed.

[18] *See* U.N. Doc. A/AC.249/1997/WG.6/CRP.12 (Dec. 11, 1997).

[19] *See* Proposal of France of Dec. 5, 1997, U.N. Doc. A/AC.249/1997/WG.4/DP.3; and Proposal of the United Kingdom of December 10, 1997, U.N. Doc. A/AC.249/1997/WG.4/DP.13.

of reparation be made by a state. While this proposal had support from a number of states, a significant number were strongly opposed, and this provision did not survive the Rome conference.

The draft Statute before the negotiators at the Diplomatic Conference held in Rome in the summer of 1998 therefore contained the ingredients for a strong reparation regime for the Court. Deep disagreements remained between states regarding specific language, and the entire reparation article remained in square brackets, but early on the one state which had openly opposed the inclusion of a reparation regime for the Court dropped its objection. The issue thus became how strong a reparation article there would be, not whether there would be one at all. Outstanding issues included: whether the Court would consider making orders regarding reparation only at the request of victims, or whether it could do so on its own motion; whether the Court should be able to order reparation to be paid into the Trust Fund; and whether protective measures such as the tracing and freezing of assets could be made prior to or only following conviction.

The debate continued in informal sessions and in late night sessions of the Working Group on Procedures. Only in the last week of the Diplomatic Conference were all outstanding issues resolved and the article on reparation was finally adopted.

D. ANALYSIS OF THE REPARATIONS PROVISIONS OF THE STATUTE

Article 75.1— Establishing principles

> The Court *shall* establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court *may*, either upon request or on its own motion in exceptional circumstances, 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.

One of the most significant developments brought about by the Court's reparation provision is the adoption of definitions for "reparation" and "victim" which are broadly in line with developing international standards. The use of the language "reparation . . . including restitution, compensation and rehabilitation," replacing the narrower term "compensation," was specifically intended to reflect the draft U.N. Basic Principles and Guidelines on the Right to Reparation for Victims of Violations of Human Rights and International Humanitarian Law (the "van Boven principles"). This intention was reflected in a footnote to (then) draft Article 73, which stated that for the purposes of interpreting the terms "victims" and "reparations," reference should be made to the definitions contained in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and in the draft Principles and Guidelines on the Right to Reparation.[20] The

[20] U.N. Doc. A/CONF.183/C.1/WGPM/L.2/Add.7, of July 13, 1998, n. 5.

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same footnote stated that those entitled to reparation would include not only direct victims but also others such as victims' families and successors.

One element of reparation is "rehabilitation." During the negotiations some states expressed concern at how the Court could be expected to deal with this issue and avoid becoming a social service agency. However, it became clear that allowing the Court to establish principles and make orders relating to rehabilitation did not mean that the Court itself would necessarily be involved in actually providing medical and other services to victims.

In order to resolve a dispute over how far the Court should go in assessing and determining individual claims, a footnote was inserted to reflect the views of some delegations that Article 75.1 was intended to allow the Trial Chamber to make determinations regarding the damage, loss, and injury of individual victims when there are only a few victims.[21] Where there are more than a few victims, however, the Trial Chamber may make findings as to whether reparations are due but not consider and decide individual claims.

Article 75.2—Orders against convicted persons

> The Court *may* make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79.

> Article 79: The Assembly of State Parties will establish and set criteria for a Trust Fund "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims." The Court may order fines and forfeitures imposed as penalties to be paid into this Trust Fund.

The possibility for reparation to be paid through the Trust Fund will be important particularly where the defendant has insufficient assets or where there are multiple victims. It is expected that the Trust Fund will be augmented by contributions from states and others.

Article 75.3—Hearing representations

> 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.

Such a provision protects due process rights, and gives due recognition to the involvement of victims in the process.

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[21] *Id.* at n. 6.

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> Article 75.4—Protective measures regarding assets
>
> In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
>
> Article 93.1: "States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: . . . (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties."

While Article 75 itself only provides for provisional measures after conviction, Article 57.3(e) provides for protective measures pursuant to Article 93.1 where a warrant for arrest or summons has been issued, "and having due regard to the strength of the evidence and the rights of the parties concerned." This gives the Court an all important power to make such orders early in the process, in order to preempt so far as possible any steps by an accused person aimed at placing assets beyond reach of the victims.

> Article 75.5—Enforcement
>
> A State Party shall give effect to a decision under this article as if the provisions of Article 109 were applicable to this article.
>
> Article 109: "States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law." If unable to do so, "it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited." Furthermore, property or its proceeds which are obtained by a state through enforcement of a judgment of the Court shall be transferred to the Court.

It is crucial to the effectiveness of a reparations regime that available enforcement procedures be as strong as possible. It is to be expected that in many instances it will not be possible to enforce reparation orders without the active cooperation of national authorities. The requirement for states to give effect to the Court's reparation orders is therefore important.

Finally, Article 75.6 states that "Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law."

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The Statute, then, goes a long way toward recognizing the need for a wide and sensitive response to victims of violations of the type that will come before the Court.

E. NEGATIVE OR UNCERTAIN ASPECTS OF THE REPARATIONS PROVISIONS IN THE STATUTE

Despite the many positive elements of the reparations provisions in the Statute, they do not include everything victims rights advocates would have wished. Some were disappointed that the Court will not have power to order states to provide reparation, or even to recommend them to do so. Such a suggestion was contained in bracketed language in the draft article which came to Rome, but it was deleted. Many states took the view that the question of state responsibility was not for the ICC, which was being established for the purpose of prosecuting individuals only. This result made the enforcement provisions relating to the reparation regime all the more important.

The experience of human rights litigation, for example in the Inter-American human rights system and in United States courts, has demonstrated that obtaining a reparation judgment is one thing, enforcing it is quite another. Much will depend on the extent of state cooperation in the tracing and freezing of assets under Articles 57.3 and 93.1, and the effectiveness of the enforcement provisions. In relation to both protective measures and enforcement, victims may be forced to rely on national states where law and order may have broken down and judicial institutions may not be functioning effectively.

The draft Statute submitted to the Rome conference contained bracketed language which would have added reparation to the list of possible penalties which could have been imposed on convicted persons in addition to imprisonment or fines. Many groups campaigning for victims rights believed that this would constitute an important acknowledgement of the rights of victims in the criminal process in line with principles of restorative justice, particularly since some forms of reparation—such as the obligation to leave public office—are by their nature a form of penalty. In reality, however, the exclusion of reparation as a penalty was a symbolic rather than a substantive defeat.

F. CONCLUSION

The positive aspects of the reparations regime for the Court, as set out in the Rome Statute, definitely outweigh the negative aspects. The Court has been given the flexibility and capacity to take a holistic view of what reparation is needed in any particular case, and make appropriate orders. The power both to establish principles—including determining the scope and extent of damage—and to make orders against individuals, in combination with the possibility to draw from a Trust Fund, should combine to equip the Court with sufficient tools to examine what is needed to do justice to victims, even in situations involving large numbers of victims.

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It should not be forgotten that the bringing of criminal proceedings itself and the empowerment of victims to participate in the proceedings as more than mere bystanders[22] are also important elements of reparation for victims. But the Statute goes much further than that. The evolution of the far-reaching Article 75 from an original proposal that victims could take a judgment back to a national court to help them obtain "compensation" against a convicted person is a remarkable achievement.

The reparation provisions in the Statute mark an important stage in the evolution of accepted international standards governing the right to reparation for violations of human rights and humanitarian law, as elaborated in the draft U.N. Principles and Guidelines. It is hoped that the reliance placed on the draft Principles and Guidelines in arriving at a definition of reparation in the Statute will itself contribute to the early adoption of the Principles and Guidelines by the U.N. General Assembly. Article 75 is also a landmark in the increasing recognition of the rights of victims in the criminal justice process. In addition to the right to reparation, victims have gained a role in triggering investigations and prosecutions by the Court, and will be able to participate in the proceedings at appropriate stages.

The process by which the reparation provisions in the Statute were developed, with very little by way of precedent, is also a good example of effective cooperation and consultation between states, non-governmental organizations and experts. It is hoped that this experience could serve as a useful model for work in other areas.

The challenge ahead is to translate the principles set out in the Statute into Rules of Procedure in a way that does not weaken them, and which will prove to be workable and effective. At the same time, it will be important that states, in adopting legislation enabling them to implement the provisions of the Statute, include measures to ensure that they are able to cooperate fully with any orders of the Court relating to reparation, and to give effect to such orders. Finally, the real test of the effectiveness of the reparation provisions will come when the Court is established and dealing with its first case.

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[22] *See* art. 68.3 ("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.")