

Reparations for Victims in International Criminal Law

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1. Introduction

The objective of this article is to chart the origins and the gradual development of reparations provisions in international criminal law and consider their contribution to the standing and rights of victims of armed conflict in international law.

Until the adoption of the Rome Statute of the International Criminal Court, the rights of victims in international criminal proceedings were largely marginalised. Reparations provisions in international criminal law have evolved at a slower pace than corresponding rights in human rights law. This development can partly be explained by the significant influence of municipal criminal law in the evolution of this sphere in international law. While it has been argued that international criminal law now can provide the bite that international human rights law has lacked,¹ one notes that from a victim's perspective, experiences seeking reparations to date have been more successful on the basis of human rights law. Expectations are high that the emerging practice of the International Criminal Court and its Trust Fund will provide a radical shift in favour of victims. However, it is submitted that responsibility for reparations should maintain an element of state responsibility as those considered to have carried the greatest responsibility for serious violations may have exercised functions of state authority. There are inherent dangers in shifting responsibility from states towards individuals as this may ultimately leave victims without redress. While the shift towards recognising victims and their right to reparations in international criminal law is welcome and positive, ideally this should operate alongside measures to establish potential state responsibility *vis-à-vis* victims.

Following a largely chronological order, the article will seek to identify the gradual incorporation of reparations provisions in international criminal law. In particular, the article studies the provisions and practice of the International Criminal Tribunals for Former Yugoslavia (ICTY) and Rwanda (ICTR) and the impetus which resulted in the groundbreaking provisions in the Rome Statute of the International Criminal Court. Albeit delayed, the right of victims to claim reparations has now been established in international criminal law. This recognition largely took place due to influences from international and regional human rights treaties and jurisprudence and furthermore sought inspiration from the development of 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 (2006).²

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¹ G. Simpson, *Law, War and Crime* (Polity Press, Cambridge, 2007) p. 57.

² 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, preamble, adopted by the UN Commission on Human Rights on 19 April 2005, UN doc. E/CN.4/RES/2005/35 and adopted in the General Assembly without a vote on 21 March 2006, UN doc. A/RES/60/147.

2. Origins of Reparations Provisions in International Criminal Law

Reparations provisions in international criminal law reflect a recent development. Their incorporation in part can be explained by growing attention to victims within national criminal justice systems and also as a reaction to criticism for the manner in which victims' concerns were considered by the ICTY and the ICTR.³

When seeking to trace victims' provisions in international criminal law it may be noted that the Nuremberg and Tokyo Charters did not even mention victims.⁴ The Convention on the Prevention and Punishment of the Crime of Genocide adopted in 1948 obliges states parties to provide effective penalties, but is silent with regard to victims. Nevertheless, it is significant that the *travaux préparatoires* of the Convention, notably the draft Convention on the Crime of Genocide, prepared by the Secretariat of the UN Secretary General in 1947, contemplated a specific provision for reparations.⁵

Draft Article XIII stated:

When genocide is committed in a country by the government in power and by sections of the population, and if the government fails to resist it successfully, the State shall grant to the survivors of the human group that is a victim of genocide redress of a nature and in an amount to be determined by the United Nations.

Furthermore, the Official Comments on the Draft Convention by the Secretariat of the UN stated: "If the country in which genocide was committed is not to be held responsible for reparations, who is?"⁶ The draft provision on reparations remained in early 1948; however, it was lost in the final political negotiation process.⁷ While the Genocide Convention as adopted in December 1948 failed to contain a provision on redress and reparations, it is nevertheless significant that the notion of state responsibility for reparations had significant international support already in the late 1940s.

3. Reparations and the Ad Hoc International Tribunals

Following the standstill in international criminal law during half a century, after the WWII International Military Tribunals, the creation of the Statutes of the International

³ L. Zegveld, "Victims' Reparations Claims and International Criminal Courts, Incompatible Values?", 8 *Journal of International Criminal Justice* (2010) pp. 79–111; E. Stover, *The Witnesses, War Crimes and the Promise of Justice in the Hague* (University of Pennsylvania Press, 2005)

⁴ S. Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press, 2003) p. 220

⁵ Draft Convention on the Crime of Genocide, UN. doc. E/447, prepared 26 June 1947 by the Secretary General upon request by the General Assembly, available at the UN Official Documentation System, <documents.un.org>. Among the states that supported the inclusion of a provision on reparations for victims were the United Kingdom, France, Belgium and Syria. The Official Comments on the Draft distinguished between criminal and civil state responsibility.

⁶ Official Comments by the Secretariat of the UN, contained in the Draft Convention on the Crime of Genocide, UN. doc. E/447, p. 48.

⁷ See the French version of the Draft Convention, reparations still figured in Article 7, presented 9 February 1948, UN doc. E/623/Add.1. The Genocide Convention as adopted in the General Assembly on 9 December 1948 contains no provision on reparations. W. Schabas, *Genocide in International Law, the Crime of Crimes* (Cambridge University Press, 2000) p. 400; H. Abtani and P. Webb, *The Genocide Convention, the Travaux Préparatoires*, vol. 1 (Martinus Nijhoff Publishers, 2008).

Criminal Tribunals for Former Yugoslavia in 1993 and Rwanda in 1994 failed to provide significant progress in the recognition of victims. Nevertheless, the experiences of victims in the ad hoc Tribunals have provided an impetus for advocacy towards recognition of victims' rights.

The objectives of the ad hoc Tribunals are not expressly stated in the Security Council resolutions creating their Statutes.⁸ However, the resolutions give some orientation of their purposes; in the case of the ICTY the resolution no. 827 of 1993⁹ states that the Tribunal was established for “the sole purpose of prosecuting persons responsible for serious violations” yet also to “contribute to ensuring that violations are halted and effectively redressed”. The Security Council resolution no. 955 establishing the ICTR of 1994¹⁰ echoes the above but also states that among the aims of the prosecutions is “contribution to the process of national reconciliation”. The judgements of the ICTY and the ICTR contain ample references to the purposes of sentencing. Curiously each judgement contains a separate analysis of applicable principles and purposes of punishment. The majority of sentences indicate that the primary objectives of the Tribunals are deterrence and retribution, for example in the cases of *Prosecutor v. Tadic* and *Prosecutor v. Akayesu*.¹¹ Certain judgements of the Tribunals also state that one of the aims of sentencing is reconciliation, for example in the case of *Prosecutor v. Furundzija*.¹²

Victims are generally given scant recognition in the exploration of purposes of punishment; however, in some judgements retribution is described as “the expression of condemnation of grave violations of fundamental human rights [...] it is also recognition of the harm and suffering caused to the victims”.¹³ The lack of consistency in the formulation of principles relating to the objectives of punishment is unfortunate.¹⁴ Undeniably, all the cases brought before the ad hoc Tribunals involve victims of serious violations and it would have been important to provide equal recognition of justice for victims in a standard formulation on the objectives of the Tribunals.

A closer review of the Statutes of the ICTY and the ICTR reveals that references to victims are scarce. Generally, references to victims in the Statutes of the ad hoc Tribunals primarily refer to their relevance as witnesses and as passive contributors to the proceedings. Article 15 of the Statute of the ICTY (mirrored by Article 14 of the ICTR) mentions that the protection of victims and witnesses should be taken into account in the adoption of Rules of Procedure. Article 20(1) of the Statute of the ICTY (corresponds to Article 20(1) of the ICTR Statute) established that trials be conducted with “full respect for the rights of the accused and due regard for the

⁸ Security Council resolution no. 827 adopted on 25 May 1993 and Security Council resolution no. 955 adopted on 8 November 1994, available at the official webpage of the ICTY <www.un.org/icty/> and the official webpage of the ICTR <www.icttr.org> (last visited 20 February 2010).

⁹ Security Council resolution no. 827, preamble, S/RES/827 (1993).

¹⁰ Security Council resolution no. 955, preamble, S/RES/955 (1994).

¹¹ *Prosecutor v. Tadic*, Case No. IT-96-21-Y, Judgement 16 November 1998, para. 21; *Prosecutor v. Kayishema and Ruzindana*, Case No.: ICTR-95-1-T, Sentence, 21 May 1999, para. 2; *Prosecutor v. Akayesu*, Case No.: ICTR-96-4-T, Sentence, 2 October 1998, para. 19. See further discussion in W. Schabas, *An Introduction to the International Criminal Court*, 2nd edition (Cambridge University Press, 2004) p. 164 and also in R. Dixon and K. Khan, *Archbold: International Criminal Courts, Practice, Procedure and Evidence* (Sweet & Maxwell Limited, London, 2005) p. 484.

¹² *Prosecutor v. Furundzija*, Case No.: IT-95-17/1-T, Judgement, 10 December 1998, para. 288.

¹³ *Prosecutor v. Nikolić*, Case No. IT-02-60/1, Judgement, 2 December 2003, para. 86.

¹⁴ R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007) pp. 395–396, contains further discussion on inconsistencies in the current purposes of sentencing.

protection of victims and witnesses”. It appears as if the rights of the accused are given priority as they must be “fully respected”, whereas for victims the proceedings are merely required to show “due regard”. The difficult balancing of rights of the accused versus witnesses has caused significant controversy in the Tribunals and protective measures in favour of witnesses, especially victims of sexual violence, have been challenged by the defence and criticised by human rights lawyers for their inadequacy.¹⁵ As recognised by the former President Jorda of the ICTY, victims have largely been considered as “object-matter or an instrument” in the proceedings of the ad hoc Tribunals.¹⁶

There is no direct reference to reparations in the Statutes other than restitution. The Tribunals have no faculty to award compensation but may decide on cases relating to restitution. Article 24(3) of the Statute of the ICTY (mirrored by Article 23(3) of the Statute of the ICTR) reads: “[I]n addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owner.” The use of the term restitution, however, does not indicate state responsibility. According to the Statutes, states are only responsible in so far as they should enforce orders between individuals. As described in the Rules of Procedure and Evidence (RPE), Rule 105 which is common to both Tribunals, the request for restitution cannot be initiated by the victim but must be presented by the Prosecutor or the Chamber. Disappointingly, the Tribunals have been unwilling to use their authority to order restitution, including in cases where it was clearly established that property was illegally taken from victims.¹⁷

In the drafting process of the RPE of the Tribunals, some attempt was made to address the issue of compensation. However, as noted by Cassese, this possibility was compromised due to the absence of a corresponding provision in the Statutes.¹⁸ Rule 106 of the RPE provides that the Registrar of the Court shall transmit judgements detailing convictions to relevant national authorities and that the judgement shall be considered final and binding as to the criminal responsibility of the convicted perpetrator. The same Rule further states that it is up to the victims themselves to claim compensation before national courts “pursuant to the relevant national legislation”.

Morris and Scharf examined the *travaux préparatoires* of the ICTY and the considerations presented during the negotiations of the provisions relating to restitution and compensation.¹⁹ Among the arguments used to justify the exclusion of reparation provisions was the wording of the Security Council resolution establishing

¹⁵ For contrasting views regarding measures undertaken for witness protection *refer* to F. Mumba, ‘Ensuring a Fair Trial Whilst Protecting Victims and Witnesses-Balancing of Interests’, in R. May (ed.), *Essays on ICTY Procedure and Evidence* (Kluwer Law International, 2001) pp. 359–371, and also C. Chinkin, ‘The Protection of Victims and Witnesses’, in Kirk-McDonald and Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law* (Kluwer Law International, 2000) and G. Sluiter, ‘The ICTR and the Protection of Witnesses’, No. 3 *Journal of International Criminal Justice* (2005) pp. 962–976 and D. Tolbert and F. Swinnen, ‘The Protection of, and Assistance to, Witnesses at the ICTY’, in H. Abtahi and G. Boas (eds.), *The Dynamics of International Criminal Justice* (Martin Nijhoff Publishers, 2006) pp. 193–229.

¹⁶ C. Jorda and J. Hemptinne, ‘The Status and Role of the Victim’, in A. Cassese, P. Gaete and J. Jones (eds.), *The Rome Statute of The International Criminal Court* (Oxford University Press, 2002) pp. 1387–1419.

¹⁷ S. Malmström, ‘Restitution of Property and Compensation to Victims’, in R. May (eds), *Essays on ICTY Procedure and Evidence* (Kluwer Law International, 2001) pp. 373–384.

¹⁸ A. Cassese, *International Criminal Law* (Oxford University Press, 2003) p. 429.

¹⁹ V. Morris and M. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers, 1995) in particular pp. 283–289.

the Tribunal for the *sole* purpose of prosecution. It was feared that dealing with cases involving restitution and compensation would distract the Tribunal by forcing it to operate as a claims commission and thereby “divert” its limited resources. The Security Council resolution no. 827 which created the ICTY, however, notes that the work of the Tribunal “shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law”. The resolution gives no indication of what the term “through appropriate means” refers to, but it is worthwhile noting that at the time it was considered a possibility that the Security Council establish another body for restitution claims.²⁰ Morris and Scharf affirm that “the prosecution and punishment of individuals responsible for war crimes does not relieve the State of its responsibility for the violations of international law and its obligation to provide compensation”.²¹

The mandates and proceedings of the ad hoc Tribunals reveal numerous deficiencies. Importantly, the lack of recognition of the rights of victims stands out in disharmony with developments in international law, both in general international law and human rights law. Proceedings of the ad hoc Tribunals cite richly from human rights law concerning the right to a fair trial and in relation to the rights of the accused, however, they omit the application of human rights law in the area of victims’ rights. Leaving victims at the mercy of their domestic legal systems renders them dependent on whether the national legislation foresees the possibility of compensation claims. Domestic legislation and political policy thus determine whether victims have access to present their claims. As a consequence, redress may be available to some victims but not others. To date, there are few, if any, reports of domestic claims being successful as they depend on the national legal and institutional framework, whether resources can actually be extracted from the perpetrator of the violations as well as the political goodwill of the specific state to assume responsibility.²² Stateless victims are left entirely without any recourse.

The approach of the Tribunals thus results in indirect discriminatory treatment of victims depending on their nationality and origins. Most disconcertingly, the provisions of the Tribunals recognise the rights to restitution for victims of property theft but in contrast provide no right to remedies for victims of serious human rights violations who have survived genocide and torture.²³

There were attempts to modify the mandates of the ad hoc Tribunals. These initiatives were largely undertaken in view of the credibility challenge facing the Tribunals due to their restricted ability to recognise victims’ rights, criticism raised by victims’ groups and the successful incorporation of provisions regarding victims’ rights in the Rome Statute of the International Criminal Court. In November 2000, the Prosecutor strongly advocated for the creation of a Claims Commission to compensate victims in an address in the Security Council affirming that

it is regrettable that the Tribunals’ statutes [...] make only a minimum of provision for compensation and restitution to people whose lives have been destroyed...my office is having considerable success in tracing and freezing large amounts of money in the personal accounts of the accused. Money that could very properly be applied by the courts to the compensation of the citizens who deserve it [...] I would therefore respectfully suggest to the Council that the present system falls short of delivering justice to the people of Rwanda and the former

²⁰ *Ibid.*, p. 288

²¹ *Ibid.*

²² Malmström, *supra* note 17.

²³ I. Bottiglieri, *Redress for Victims of Crimes under International Law* (Martinus Nijhoff Publishers, Leiden, 2004) p. 202.

Yugoslavia, and I would invite you to give serious and urgent consideration to any change that would remove this lacuna.²⁴

In a parallel move, also in November 2000, the judges of the ICTY presented a report to the Security Council through the Secretary General of the United Nations.²⁵ The report specifically expressed concern over the Tribunal's lack of authority to deal with compensation for victims. In the report the judges affirmed that "in order to bring about reconciliation in the former Yugoslavia and to ensure the restoration of peace, it is fundamental that persons who were the victims of crimes that fall within the jurisdiction of the Tribunal receive compensation for their injuries". The report noted the general trend towards recognising a right to compensation in international law, not only to states but also to individuals based on state responsibility. The report reached the conclusion that victims of the crimes over which the Tribunal has jurisdiction are entitled to benefit from a right to compensation.

The report advised against amending the Tribunal's Statute and Rules and Procedure in order to incorporate a compensation mechanism as this would imply several practical difficulties, which would affect the length of the trials. However, the judges of the ICTY advocated for the creation by the Security Council of another body which could operate as an international compensation commission. An official reply from the Security Council was not received; no such measure was adopted; and it now appears unlikely to be undertaken given that the Tribunals are phasing out their work.

Despite the obstacles outlined above, it is noteworthy that both ad hoc Tribunals have a Victims and Witness Support Unit, established by Rule 34 of the RPEs. The Units, which are based in the Registry on the basis of its neutrality, largely provide advice, assistance and protection arrangements during the trial period but operate with scarce resources²⁶ and have little means of ensuring follow-up and long-term safety of witnesses upon completion of prosecution.²⁷ While the RPEs of the two ad hoc Tribunals coincide in the majority of their text, it should be noted that Rule 34 provides an exception. In the case of the ICTR, the Rule was amended in 1998 to extend the mandate of the Victims and Witness Support Unit to: "Ensure that they receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault; and to develop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family."

In the case of the ICTY, Rule 34 merely refers to the mandate to provide counselling and support, and there is no mention of physical and psychological rehabilitation and the duty to develop long term plans for protection of victims. ICTR has thus to be noted for its attempt to address certain urgent and practical needs of victims, in particular in relation to victims of sexual violence and their access to rehabilitation measures. Such measures were undertaken in response to the outcry from victims and witnesses, in particular those who found themselves HIV positive with no access to medical attention, whilst such was provided for defendants.

²⁴ Address by the Prosecutor of the ICTY/ICTR, Carla del Ponte, to the Security Council on 21 November 2000, ICTY Press Release JL/P.I.S./542-e, <www.un.org/icty/pressreal/p542-e.htm> (last visited November 2007).

²⁵ Report UN. doc. S/2000/1063, 3 November 2000.

²⁶ T. Ingadottir, F. Ngendahayo and P. Sellers, 'The Victims and Witnesses Unit', in T. Ingadottir (ed.), *The International Criminal Court: Recommendations on Policy and Practice* (Transnational Publishers, 2003) p. 5; Stover, *supra* note 3, p. 129.

²⁷ Tolbert and Swinnen, *supra* note 15.

However, as documented by De Brouwer,²⁸ the ICTR made some progress in providing medical assistance, including antiretroviral treatment, for victims who have appeared as witnesses. Certain efforts were also made to sustain assistance after the trial period. While the initiative taken to afford rehabilitation measures for victims of sexual violence is commendable, its weakness lays in its limited application as only victims who have provided testimony qualify for assistance.²⁹ Also, it is worth noting that the medical assistance programme for victims and witnesses was only established several years after the ICTR became operational and following considerable critique of the discrepancies in relation to medical assistance for the accused *vis-à-vis* their victims.

Only limited research has documented the experiences of victims and witnesses in international criminal proceedings. Stover, following extensive interviews in the former Yugoslavia with witnesses who had previously testified in the ICTY, concluded that a majority of them “resisted a definition of justice that focused solely on the punishment of suspected war criminals [...] [J]ustice had to include an array of social and economic rights for the persecuted, including the right to move about freely and without fear, the right to have the bodies of loved ones returned for proper burial and the right to receive adequate treatment for the psychological trauma as a result of witnessing wartime atrocities.”³⁰ The findings of the study indicated that while a majority of witnesses described their experiences at the ICTY as positive, nevertheless, “by and large, war crimes trials are generally ill-suited for the sort of expansive and nuanced story-telling so many witnesses yearn to engage in”.³¹

Further reflections on the results of the Tribunals recognise their shortcomings and the need for accountability mechanisms which take victims’ concerns into account. Zacklin states:

Criminal Courts exist for the purpose of establishing individual accountability, not to uncover the fates and remains of loved ones. Nor is it their purpose to provide an official history. To the extent that a historical record is integral to individual trials it might be said that this is incidental to the work of the ICTY but it is not its primary purpose. Even less so is the awarding of compensation for victims... The hope was that the establishment of the ICTY would promote reconciliation. There is little evidence to date that this is the case. Clearly, the Tribunal itself is not sufficient to promote reconciliation. Additional mechanisms, such as functioning national courts and truth commissions are needed.³²

In conclusion, the overall attention given to victims’ rights in proceedings of the ad hoc Tribunals has been inadequate and mainly focused on urgent protection measures for witnesses, rather than more long term considerations such as the right to reparations. Lack of adequate outreach programmes and sustained protection measures both in the ICTY and the ICTR has left victims in doubt of the value of international criminal justice. In the debate on the compatibility of measures taken to protect witnesses with the rights of the accused, considerable attention has been dedicated to the applicable minimum human rights standards guaranteeing a fair trial.³³ In this context, it is remarkable that the corresponding rights of victims of

²⁸ A. De Brouwer, ‘Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and the Trust Fund for Victims and Their Families’, 20 *Leiden Journal of International Law* (2007) pp. 207–237.

²⁹ Ingadottir, Ngendahayo and Sellers, *supra* note 26.

³⁰ Stover, *supra* note 3, pp. 119–120.

³¹ *Ibid.*, pp. 129, 134.

³² R. Zacklin, ‘The Failings of Ad Hoc International Tribunals’, No. 2 *Journal of International Criminal Justice* (2004) pp. 541–545.

³³ Mumba, *supra* note 15; Chinkin, *supra* note 15.

serious human rights violations have not been equally invoked. Given the significant developments in human rights law regarding the right of victims to seek redress, it is regrettable that such provisions were not reflected in the Statutes and Rules of Procedure of the ad hoc Tribunals. Although the establishment of responsibility by the Tribunals relates to that of individuals rather than states, clearly the violations and the suffering of the victims in cases under international criminal law is equal to that of victims who present cases of serious violations to human rights mechanisms. Progress made in one branch of international law, in particular in the realm of human rights, should have been transferred into international criminal law.

Despite the deficient attention to victims' rights in the Statutes and Rules of Procedure of the ad hoc Tribunals, the experiences drawn from their operation nevertheless present important precedents valuable to the creation of the International Criminal Court. The challenges faced by the Tribunals due to their restrictions regarding victim participation and redress have provided important impetus in order to construct a concept of justice for serious violations which recognises of victims' rights. As concluded by Jorda, the former President of the ICTY, reparations for those who have suffered such harm is a "*sine qua non* for the establishment of a deep-rooted and lasting peace".³⁴

4. Reparations and the Rome Statute of the International Criminal Court

The provisions of the Rome Statute of the International Criminal Court represent a significant landmark for the affirmation of the rights of victims of serious violations in international law. The preamble of the Statute gives recognition that "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity".³⁵ For the first time, victims were acknowledged as stakeholders in international criminal proceedings and numerous articles in the Statute relating to victim participation and protection, as well as their right to reparations, bears evidence to this effect.

Importantly, for the first time an international Court was provided with the authority, at its own discretion, to award reparations in favour of victims. Article 75 of its Statute states that:

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation [...]
2. The Court may make an order directly against a convicted person specifying reparations [...] Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

It should, however, be noted that the original draft of the Statute presented in 1994 by the International Law Commission (ILC)³⁶ did not contain specific references to reparations, apart from a vague reference to the possibility of creating a trust fund for victims. Rather, the inclusion of reparations provisions occurred during the preparatory negotiation meetings, "PrepComs", due to the pressure from non-governmental organisations (NGOs), who were particularly anxious not to see the weaknesses from the ad hoc Tribunals repeated and fixed in international law. NGOs

³⁴ Jorda and Hemptinne, *supra* note 16, p. 1398.

³⁵ Available at the official webpage of the ICC <www.icc-cpi.int/> (last visited 20 February 2010).

³⁶ See further details of the *travaux préparatoires* of the ILC in relation to the Statute of the ICC, <www.un.org/law/ilc/>, and full text of the Draft Statute as adopted by the ILC in 1994, <untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf> (last visited December 2007).

formed a specific coalition working group on victims' rights and strongly advocated for the incorporation of principles of human rights law and restorative justice. Yet, in the draft Statute, upon which the Rome negotiations initiated, the article relating to reparations was still in square brackets due to the lack of consensus and support among States.³⁷ Certain states opposed the inclusion of a mandate to order reparations by arguing that, similarly as was done in conjunction with the creation of the ad hoc Tribunals, such a provision would distract from the main purpose of the Court, *i.e.* to prosecute.

Originally, the term that figured in the draft text was *compensation*, echoing the language of the RPE of the ad hoc Tribunals. However, NGOs advocated for the inclusion of the more comprehensive term *reparations* which eventually prevailed, as did specific references to *restitution, compensation and rehabilitation*. Ultimately, the inclusion of the final text in the article on reparations was possible thanks to the political will displayed during the negotiations by certain states, notably the United Kingdom and France.³⁸

Major debates took place regarding whether reparations would be considered as part of the penalty and whether reparation orders from the Court could be aimed not only at convicted individuals but also at States. However, in both cases there was an overall lack of support for the endorsement of such provisions.³⁹ States were wary of the potential inclusion of state responsibility in the context of reparations and the exclusion of such references was a compromise to ensure the approval of Article 75. Nevertheless, Article 25(4) of the Statute affirms that “no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law”. As noted by Muttukumaru, the Statute “does not diminish any responsibilities assumed by States under other treaties and will not – self-evidently – prevent the Court from making its attitude known through its judgements in respect of State complicity in a crime”.⁴⁰ In this context, it is pertinent to recall the wording of the ILC in its Articles on State Responsibility, specifically in Article 5, which affirms that the conduct of a person who has status as an organ of state or of a person “empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law”.⁴¹ Given the likely coincidence between state and individual responsibility for the crimes within the jurisdiction of the Court, which is “limited to the most serious crimes of concern to the international community”, it is inevitable that the debate on state responsibility in relation to the Court will continue.⁴²

The mention in Article 75(1) of the establishment of “principles relating to reparations” was intended as an indirect reference to the UN Basic Principles of

³⁷ C. Muttukumaru, ‘Reparations to Victims’, in S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law International, 1999) pp. 262–270.

³⁸ D. Donnat-Cattin, ‘Article 75’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court- Observers’ Notes, Article by Article* (Nomos Verlag, Baden Baden, 1999) pp. 965–978.

³⁹ F. 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, NY, 2000) pp. 163–178.

⁴⁰ Muttukumaru, *supra* note 37, p. 268.

⁴¹ Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001 by the International Law Commission.

⁴² For example discussion by A. Nollkaemper, ‘Concurrence between Individual Responsibility and State Responsibility in International Law’, 2:3 *International and Comparative Law Quarterly* (2003) pp. 615–630.

Justice for Victims of Crime and Abuse of Power and the then draft UN Basic Principles on the Right to Reparation for Victims.⁴³ Yet, as the latter were still under negotiation in the former Commission on Human Rights, the reference was deliberately vague with a view to their future adoption. The language was used to defer to the definitions contained in the UN Principles regarding the concepts of victims and reparations. It is worthwhile noting that the Rules of Evidence and Procedure and the Regulations of the Court do not establish or expand on specific “principles relating to reparations”. This appears to confirm the acceptance of the UN principles as the standard to be applied by the Court. Their practical elaboration will be developed over time through jurisprudence. In November 2009, the Court adopted its official overall strategy in relation to victims; it specifically affirms that it draws on the two UN Basic Principles of Justice for Victims and the Right to Reparation for Victims.⁴⁴

While the Statute does not provide a definition of who is a victim, Article 75 nevertheless speaks of “reparations to, or in respect of, victims”. This is considered to signal recognition of family members and successors of victims⁴⁵ and is consistent with jurisprudence of human rights mechanisms as explored in the previous chapter. Rule 85 of the Rules of Procedure and Evidence define victims as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”.⁴⁶ Furthermore, organisations or institutions dedicated to religion, art, science, charitable or humanitarian purposes as well as historic monuments and hospitals can also be considered as victims.

According to Rule 97(1) of the Rules of Procedure, awards can be determined on “an individualized basis or, where it deems it appropriate, on a collective basis or both”; thus the Court has considerable discretion and flexibility to decide how it chooses to approach the matter of reparations. The Court should “apply applicable treaties and the principles and rules of international law, interpretation of law” and “must be consistent with internationally recognized human rights” according to Article 21 of the Statute. The reference to human rights in the Statute is an important recognition of victims’ rights as jurisprudence on redress in international and regional human rights systems, as explored in the previous chapter, has significantly contributed to developing the concept of reparations.⁴⁷ Furthermore, Rule 86 of the Rules of Procedure establish as a general principle that “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 (protection), in particular, children, elderly persons, persons with disabilities and victims of

⁴³ UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, UN. doc. A/Res/40/34; 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, 21 March 2006, UN doc. A/RES/60/147; further discussion in McKay, *supra* note 39, p. 174.

⁴⁴ International Criminal Court, *Report of the Court on the strategy in relation to victims*, 10 November 2009, ICC-ASP/8/45, para. 6. See discussion in Redress, *Victims central role in fulfilling the ICC’s mandate*, Paper for the 8th Assembly of States Parties, The Hague, 18–26 November 2009 available at <www.redress.org> (last visited April 2010).

⁴⁵ Donnat-Cattin, *supra* note 38, p. 969.

⁴⁶ ICC Rules of Procedure and Evidence, Adopted by the Assembly of States Parties, New York, 3–10 September 2002, Official Records ICC-ASP/1/3.

⁴⁷ G. Bitti and G. Gonzalez Rivas, ‘The Reparations Provisions for Victims under the Rome Statute of the International Criminal Court’, in Permanent Court of Arbitration (ed.), *Redressing Injustices through Mass Claims Processes, Innovative Responses to Unique Challenges*, pp. 299–322, at p. 312.

sexual or gender violence". This principle underlines the importance that the Court should give to particularly vulnerable groups in their proceedings.

Article 43(6) of the Statute provides for a Victims and Witnesses Unit within the Registry of the Court which is responsible for protection and counselling and should have staff with expertise in trauma, including sexual violence. Thus the Unit was created as a statutory body, unlike the Victims and Witnesses Units of the ad hoc Tribunals which were established as an afterthought by the Rules of Procedure and Evidence.⁴⁸ Additionally, in 2005 the Court established the Office of Public Counsel for Victims to specifically provide support and assistance to victims and their legal representatives in obtaining reparations.⁴⁹

Among the most controversial provisions of the Rome Statute is Article 68(3), which states that "where the personal interests of 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". The Court has already drawn on human rights standards and jurisprudence in its various decisions on victim participation.⁵⁰ The introduction of the right to victim participation in international criminal law was a novelty which continues to be contested and the practical implications of which has raised considerable concern both inside and outside the Court. As could be expected given the situations under investigation, large numbers of victims have filed requests to participate in various stages of the proceedings; by the end of 2009 some 1,800 individual applications had been submitted. Approximately 450 victims had by late 2009 participated in the investigation into the situation in the Democratic Republic of the Congo (*Prosecutor v. Lubanga* and *Prosecutor v. Katanga and Chui*).⁵¹ Questions regarding at which stage and how victims may participate continues to be debated, and while there is recognition of the importance of victim participation, there are legitimate fears that it may delay proceedings.⁵² It is likely that some victims file to participate in the early stages of the proceedings out of concern that they may otherwise not be considered at the reparations stage.

A relevant observation is that the victim is defined as a person who has suffered harm due to "a crime within the Court's jurisdiction", *i.e.* the definition does not hinge on the crime already being under investigation or decided by the Court. Commentators have noted that this could be interpreted as affecting the presumption of innocence of the accused.⁵³ However, victims' ability to recur to reparations provisions is anyway subjected to considerable restrictions. Although the victim does not have to refer to a specific investigation in his or her reparation claim,⁵⁴ nevertheless the request for reparations must ultimately be linked to criminal proceedings against the person responsible for the harm. Reparation orders can only

⁴⁸ Ingadottir, Ngendahayo and Sellers, *supra* note 26, pp. 1–33.

⁴⁹ Report of the International Criminal Court to the General Assembly of the United Nations, 2006, A/61/217.

⁵⁰ Zegveld, *supra* note 3, p. 101.

⁵¹ Report of the International Criminal Court to the General Assembly of the United Nations, 2007/2008, A/63/323; Report of the International Criminal Court to the General Assembly of the United Nations, 2008/2009, A/64/356; Redress, *supra* note 44; *Prosecutor v. Lubanga*, ICC-01/04-01/06; *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07.

⁵² H. Friman, 'The International Criminal Court and the Participation of Victims: A Third Party to the Proceedings?', 22 *Leiden Journal of International Law* (2009) pp. 485–500; *Judgment on victim participation in the investigation stage of the proceedings by Appeals Chamber*, ICC-01/04-556, 19 December 2008; conversation with staff member of the ICC Office of the Prosecutor, 8 December 2009.

⁵³ Jorda and Hemptinne, *supra* note 16, p. 1403.

⁵⁴ Bitti and Gonzalez Rivas, *supra* note 47, pp. 312–314.

be issued once a case is decided. Should the defendant be acquitted there may be no reparations for the victims.⁵⁵ Given the experiences of international tribunals so far it appears unlikely that the reparations provisions, although groundbreaking, will live up to expectations among victims and NGOs. The complexity of the cases before the Court result in proceedings that last several years and eventual reparation orders depend on whether there is a conviction.

An additional challenge for the Court relates to the implementation of the reparation orders as these are made against individuals. Experiences from international tribunals indicate that the defendants often claim indigence.⁵⁶ As state responsibility is not reflected in the Rome Statute, it was deemed necessary to provide the Court with alternative means to ensure reparations for victims, who otherwise would be dependent on the financial solvency of the perpetrator.⁵⁷ In this context, Article 79 of the Statute foresaw the creation of a Trust Fund by the Assembly of States parties for the benefit of victims and their families. The Trust Fund for Victims was formally created in 2002, when the Rome Statute entered into force; it is independent from the Court and managed by the Assembly of States Parties. The Statute does not detail how it will be financed except from stating that the Court may order money and other property collected through fines and forfeiture (Article 109) to be transferred to the Trust Fund. The Assembly of States Parties has subsequently defined that the Trust Fund may receive voluntary contributions from governments, international organisations, individuals, corporations and other entities.⁵⁸

As defined in Rule 98 of the Rules of Evidence and Procedure, the Court may depend on the Trust Fund in several ways. It can order that an award against a convicted person be deposited through the Fund, which in turn shall forward it to the individual victim. The Court may also resort to the Trust Fund when the “number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate”. Furthermore, the Court can, in consultation with the Trust Fund, order an award for reparations to an intergovernmental, international or national organisation approved by the Fund. The Court has discretion to decide whether to order awards for victims, and it should also be noted that the Court may act on its own initiative, without a specific request from a victim. This is of note, in particular in situations where it is clear that many victims cannot approach the Court for practical reasons, such as the remote geographic location of the communities affected. The official webpage of the Fund states that “unless ordered by the Court to award reparations to individuals, the Trust Fund favours reparations activities which are directed at groups, based on similarities in their claims or situations”.⁵⁹ The Trust Fund can only act in situations where the International Criminal Court has jurisdiction. It is foreseen that projects will be linked to some stage of investigations. However, it is important to note that the Fund is formally independent from the Court and may assist victims even in the absence of ongoing investigations.⁶⁰

The Regulations of the Trust Fund were adopted in 2005, a Board of Directors (*pro bono*) appointed; and in early 2007 the Trust Fund became operational. The activities of the Trust Fund have to date been undertaken in the framework of Article

⁵⁵ *Ibid.*

⁵⁶ Schabas, *supra* note 11, p. 175

⁵⁷ Jorda and Hemptinne, *supra* note 16, p. 1408.

⁵⁸ Bitti and Gonzalez Rivas, *supra* note 17, pp. 315–316.

⁵⁹ Information about the Trust Fund at the website of the International Criminal Court including, Resolution ICC-ASP/4/Res. 3, Regulations of the Trust Fund for Victims, adopted 3 December 2005, <www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Victims/> (last visited 15 April 2010).

⁶⁰ Resolution ICC-ASP/4/Res. 3, Articles 48, 50.

50(a)(i) of the Regulations of the Trust Fund which enables it undertake such measures on its own accord “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.” Such measures are based on voluntary contributions to the Fund rather than on seized assets from the accused. In January 2008, the Trust Fund notified the Trial-Trial Chambers of its intention to carry out activities in the Democratic Republic of the Congo and Uganda, these were in turn approved by the Chambers once deemed that they would not “pre-determine any issue to be determined by the Court”.⁶¹ By the end of 2009, some 34 projects were being implemented in partnership with local non-governmental organisations, grass-roots organisations and women’s associations. The majority of the projects provided rehabilitation assistance and counselling for victims and also contributed to creating livelihood opportunities, such as micro-credit projects, for survivors. Many of the projects specifically targeted women and children in their interventions. The Trust Fund for Victims estimated that in late 2009, some 42,300 persons were benefiting directly from such assistance and that some 182,000 family members benefit indirectly through improved well-being and reduced stigma.⁶² The Fund expected to be able to reach some 380,000 direct and indirect victims through their current projects, which in 2008 carried a budget of EUR 1,650,000. This leads to the remarkable conclusion that the cost per victim beneficiary would be less than EUR 5.

As noted by Redress, local victims’ organisations report on positive reactions to the projects, and, “for many, the work of the Trust Fund in providing assistance to victims under its “other mandate” might be the most tangible impact they might experience from the ICC.”⁶³ The activities carried out by the Trust Fund in this regards are considered as a form of humanitarian assistance rather than reparations measures, which from a legal point of view have to be formally awarded by the Court.⁶⁴ Nevertheless, this distinction is likely to be of limited relevance to victims whose urgency is grave and whose lives simply cannot be resumed without immediate assistance. While not negating that compensation will remain an important element of reparations for victims, the direct impact of assistance focused on rehabilitation and access to basic health, education and livelihood opportunities enables victims to overcome stigma in their communities and equips them, in a gender and child sensitive manner, with tools to look to the future. Such results cannot be achieved by financial compensation alone.

Concerns have been raised regarding the financial means available to the Trust Fund of the International Criminal Court.⁶⁵ As the International Criminal Court and the Trust Fund are not part of the United Nations, they are not guaranteed a regular budget from the United Nations Secretariat. In 2007, when the Fund became operational, it had received voluntary contributions of EUR 1,450,000. A future

⁶¹ Report of the International Criminal Court to the General Assembly of the United Nations, 2007/2008, A/63/323, paras. 18 and 27.

⁶² The Trust Fund webpage <trustfundforvictims.org/projects> (last visited 15 April 2010).

⁶³ Redress, *Report on the Impact of the Rome Statute System on Victims and Affected Communities*, 22 March 2010, p. 15.

⁶⁴ E. Kristjansdottir, ‘International Mass Claims Processes and the ICC Trust Fund for Victims’, in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making* (Martinus Nijhoff Publishers, Leiden, 2009) p. 175.

⁶⁵ T. Ingadottir, ‘The Trust Fund of the ICC’, in D. Shelton (ed.), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (Transnational Publishers, NY, 2000) pp. 149–161; S. Garkawe, ‘Victims and the International Criminal Court: Three Major Issues’, No. 3 *International Criminal Law Review* (2003) pp. 345–367.

challenge faced by the Fund will be its ability to sustain funding, especially once the Court starts to issue orders for reparations as these are likely to be in favour of large numbers of victims and involve considerable sums. To date, the majority of the voluntary funding for the Trust Fund has come from governments. By the end of 2009, although the Trust Fund had only been operational for two years, contributions had already been received from 24 states.

Among the numerous difficult issues which remain to be resolved, the Court must clarify how it intends to assess reparations claims, to what degree these will be done on an individual or collective basis and which standards of proof will be applied.⁶⁶ The latter aspect has considerable practical implications as certain victims will have had limited access to formal education, which even with the aid of legal representation, will impact on their ability to present their claims. Furthermore, many of victims come from areas where civil registries and birth registration are lacking, as are medical facilities in order to document sexual violence; this in turn has a deleterious effect on victims' possibilities to present relevant documentation and supporting evidence.

It is important to acknowledge the novelty of the creation of a Trust Fund linked to international criminal proceedings. However, as outlined above, the reactions of victims and their organisations with regard to the reparations regime of the International Criminal Court are likely to be marked with disappointment due to their high expectations. Among the challenging issues relating to reparations that the Court will be faced with are: delays in concluding prosecutions, inability to ensure enforcement of reparations against individual perpetrators, restrictions due to the limited jurisdiction, inadequate funding of the Trust Fund and lack of outreach and information access for the victims most in need.⁶⁷ The Court will also have to define how to address the situation of numerous victims who carry the dual identity of perpetrators, such as children who have been recruited and used in hostilities.

Nevertheless, the Court, in particular through the Trust Fund, can play a vital role in reaching out to victims and putting true meaning into the justice and reconciliation for victims by providing them with the practical means of resuming their lives as they were before being disrupted by armed conflict. Through the independent Trust Fund projects can be carried out in a collective manner and reach victims who are unable or reluctant to approach the Court personally.⁶⁸ Furthermore, assistance can be delivered as interim measures pending the outcome of investigations and be tailored in consultation with affected communities to correspond to their needs. These activities, many of which focus on rehabilitation, will be an important complement to formal reparation orders, which are more likely to focus on financial compensation. The Court and the Trust Fund have the opportunity to further develop the complementing concepts mentioned in the Rome Statute of "restitution, compensation and rehabilitation" as the practical implementation of reparations will require a creative approach towards developing measures which are deemed important by the victims

⁶⁶ C. Ferstman and M. Goetz, 'Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making* (Martinus Nijhoff Publishers, Leiden, 2009) pp. 313–350.

⁶⁷ G. Greco, 'Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis', No. 7 *International Criminal Law Review* (2007) pp. 531–547; Redress, *Report on the Impact of the Rome Statute System on Victims and Affected Communities* (The Redress Trust, London, 22 March 2010).

⁶⁸ D. Shelton, *Remedies in International Human Rights Law*, 2nd edition (Oxford University Press, Oxford, 2005) p. 236.

themselves. Furthermore, the jurisprudence of the Court will probably prompt impetus at the national level to establish reparations programmes. Such programmes will be essential to avoid discrimination among victims and ensure that as many as possible can benefit from reparations, while they at the same time provide an important recognition of State responsibility *vis-à-vis* the victims.

5. Conclusions

The perceived injustices and blatant discrepancies in the treatment of defendants compared to victims and witnesses by the ad hoc Tribunals have provided fundamental lessons on the importance of not ignoring the tragic reality of the victims. Although faced with high expectations, the reparations regime of the International Criminal Court can provide a turning point in international criminal law by vindicating its credibility among those most concerned – the victims themselves.

The innovative creation of the Trust Fund of the International Criminal Court, which acts independently of investigations and the stage of proceedings of the Court, illustrates how concrete measures can be undertaken in order to reach victims. Although reparations cannot be formally awarded until the Court issues a conviction, nevertheless the Trust Fund has provided assistance for victims in the form of rehabilitation and livelihood opportunities. Such reparation measures are likely to have a considerable positive impact on changing the situation for victims, rather than rendering them entirely dependent on protracted international criminal proceedings. From a victims' perspective, being able to present evidence against a specific individual, attend international trial proceeding and await the outcome of proceedings is something few victims of serious violations will ever be able to undertake. Without disregard for the importance of judicial accountability, many victims perceive the concept of justice alien unless accompanied with reparations. In societies where armed conflict has largely affected poor and vulnerable groups of society, reparations are an indispensable element of post-conflict justice in order for victims to be able to re-establish their dignity, resume their lives and participate on equal footing in society.

While important progress has been made with regard to victims' rights and reparations in international criminal justice, significant challenges remain in order to prove that victims are no longer an afterthought and to ensure that their rights are effectively enjoyed not only in law, but also in practice.