

**CRITICAL ANALYSIS OF VICTIMS' RIGHTS BEFORE  
INTERNATIONAL CRIMINAL JUSTICE**

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## DECLARATION

I, Maurice Kouadio N'dri, declare that the work presented in this dissertation is original. It has never been presented to any other University or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

Supervisor: Dr. Raymond Koen

Signature.....

Date.....

## **DEDICATION**

This paper is dedicated to my beloved mother, **Lalla DEMBELE** who untimely and suddenly passed away in BOUAKE (Cote d'Ivoire) in the morning of the 19 September 2006 while I was busy working tirelessly to give it the last framing. **May she rest in peace!**

**Que la terre te soit légère, Mère.**

'The world has become a smaller place for all of us. Today, the voices of millions of women, men and children from all over the globe whose basic human rights and freedom have been violated, even those in remote areas, travel fast over national boundaries, making their concerns our concerns also. No one is immune from serious human rights violations. Just as some innocent people are today's victims, we may be tomorrow's victims. Just as their basic universal human rights have been violated today, our same basic, universal human rights may be violated tomorrow.'

**Ilaria Bottigliero**

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Lastly to the lovely guys and ladies of the LLM class of 2006, for the unforgettable unique experience of a continent-wide family, and to the LLM family of the Western Cape.

## **LIST OF ABBREVIATIONS**

**ACHPR** African Charter on Human and Peoples' Rights

**AU** African Union

**CEDAW** Convention on the Elimination of Discrimination Against Women

**CERD** Convention on the Elimination of All Forms of Racial Discrimination

**CRC** Convention on the Rights of the Child

**ECC** Extraordinary Chambers in the Courts of Cambodia

**ICC** International Criminal Court

**ICCPR** International Covenant on Civil and Political Rights

**ICTR** International Criminal Tribunal for Rwanda

**ICTY** International Criminal Tribunal for the Former Yugoslavia

**NGOs** Non Governmental Organisations

**RPE** Rules of Procedure and Evidence

**SCSL** Special Court of Sierra Leone

**SPSC** Special Panels for Serious Crimes in East Timor

**UDHR** Universal Declaration of Human Rights

**UN** United Nations

**USA** United States of America

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# CHAPTER ONE

## INTRODUCTION

### 1.1 Background to the study

History is regrettably replete with wars (wars between nations and civil wars) and dictatorial regimes that claimed the lives of millions of people. Most of the time, the authors and planners were not held accountable for their misdeeds. The cases of Idi Amin Dada and Siad Barre in Africa and Pol Pot in Asia are examples of infamous tyrants who escaped justice.

Fortunately, recent years have witnessed a significant shift in ‘the unfortunate triumph of impunity over justice.’<sup>1</sup> In any event, the idea of people being prosecuted for mass atrocities was launched and debated.

The first triumph over impunity for widespread atrocities was the Nuremberg International Military Tribunal (IMT) followed by the Tokyo IMT. After the a long hiatus ascribed to Cold War, the last decade of the 20<sup>th</sup> century witnessed the rebirth of international criminal justice with the establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR). The problem with the *ad hoc* tribunals is that they do not leave room for victims of crimes to participate in the trials of offenders and to ask for compensation. This is clear from the wording of Resolution 827(1993), which establishes the ICTY and states that it was set up ‘for the sole purpose of prosecuting persons responsible for serious violations of international law.’

The establishment of the International Criminal Court (ICC) in Rome in 1998 is a milestone for humanity and a watershed in the life of victims of ongoing violations or wars.<sup>2</sup> The Preamble to the Rome Statute of the ICC acknowledges that ‘during this century [20<sup>th</sup> Century] millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.’

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<sup>1</sup> V Morris & M P Scharf, *The International Criminal Tribunal for Rwanda*, (1998) 5 *ILSA Journal of International and Comparative Law* 1.

<sup>2</sup> For UN Secretary General Kofi Annan, it is ‘a gift of hope for future generations.’

The dissertation explores the development and state of victims' rights in international criminal law.

## **1.2 Focus and objectives of the study**

Firstly, the study will first trace international law provisions dealing with victims' rights. Secondly, it will criticise the blindness of the *ad hoc* tribunals to victims' rights. In this regard, it will attempt to explore if the statutes of these tribunals can still be amended so as to include therein provisions safeguarding victims' rights. Finally, it will give a brief overview of the establishment of the ICC. It will analyse and address the provisions of the Rome Statute dealing with victims' rights.

## **1.3 Significance of the study**

The purpose of this study is to propose avenues for promoting respect for victims' rights. It will, accordingly, examine the rationale of the victims' reparation, its evolution, its denial and its rebirth. It will canvass victims' rights in domestic law especially in the civil law in comparison with international law. It will also propose means whereby the international community may better address the issue of victims' rights.

## **1.4 Hypothesis and research questions**

The study will aim to answer the following pertinent questions in respect of victims' rights by the international criminal justice:

Does the international criminal justice regime adequately deal with victims' rights?

Is the ICC really a hope for victims?

## **1.5 Literature survey**

Only few books were written on the subject of victim under international law. The most relevant for this study are the books of Ilaria Bottigliero<sup>3</sup>, Mikaela Heikkilä.<sup>4</sup>

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<sup>3</sup> I Bottigliero *Redress for victims for crimes under international law* (2004) 249.

<sup>4</sup> M Heikkilä *International criminal tribunals and victims of crime* (2004) 4.

Bottigliero's book focuses on the evolution of victims' rights throughout human history. She focuses on the collapse and the rebirth of these rights. She analyses the ICC reparation regime and tries to assess whether this court is truly a hope for victims of ongoing conflicts and violations.

Heikkilä's book is aimed at elaborating what the establishment of international criminal tribunals means for the victims of crime. Her study focuses on the ICTY, the ICTR and the SCSL, which have been established to prosecute crimes committed during specific armed conflicts and the permanent ICC. He aims at elucidating the role granted to victims and at identifying factors influencing this role.

A number of journal articles will also be useful for this study. There are, among others, the articles of Katzenstein<sup>5</sup>, Boyle<sup>6</sup>, and Bachrach<sup>7</sup>. All these articles focus on different aspects of victims' rights. They also give relevant information on the ECC and the SPSC, two instruments that are not well documented.

A number of UN instruments such as the statutes of ICTR, ICTY, Nuremberg Tribunal, ICC and the Special Court of Sierra Leone, the Extraordinary Chambers of Cambodia (ECC), the UN Declaration of Basic Principles for Victims of Crime and Abuse of Power (1985), the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of Humanitarian Law (1999) will be relied upon.

Websites such as those of the ICC,<sup>8</sup> the ICTY,<sup>9</sup> ICTR,<sup>10</sup> the Victims' Rights Working Group,<sup>11</sup> the Coalition for the ICC (CICC),<sup>12</sup> the London-based ONG Redress,<sup>13</sup> will be accessed for.

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<sup>5</sup> S Katzenstein 'Hybrid Tribunals: Searching for Justice in East Timor' (2003) 16 *Harvard Law Journal* 245-278.

<sup>6</sup> D Boyle 'The rights of victims: participation, representation, protection, reparation' (2006) 4 *Journal of international criminal justice* 307-313.

<sup>7</sup> M Bachrach the protection and rights of victims under international criminal law (2000) 34 *International Law* 7-20.

<sup>8</sup> [www.icc-cpi.int](http://www.icc-cpi.int).

<sup>9</sup> [www.un.org/icty](http://www.un.org/icty).

## 1.6 Methodology

The research will mainly be library based, with documented facts on this subject being explored. The study adopts both critical and active research methods.

## 1.7 Limitations of the study

This study is not a general comment of the statutes of all the international criminal tribunals and hybrid courts. Also, it does not intend to provide an in-depth analysis or detailed historical overview of victims' rights. It will devote more attention to the ICC because the establishment of this court is viewed as a major event in the history of humanity. A serious hurdle should be noted here: the scarcity or complete lack of documents on the SPSC's reparation regime.

## 1.8 Overview of chapters

The study consists of five chapters. Chapter one (this chapter) will provide the context in which the study is set. It outlines the basis and structure of the study. Chapter two endeavours to define some of the basic concepts central to the study: victim, witness, compensation, reparation, redress, restitution, etc. This chapter will give a brief overview of victims' rights in the domestic system. It will also analyse the right to an effective remedy in international law with specific focus on the UN human rights system and on regional systems. Chapter three will outline victims' rights before the *ad hoc* international criminal tribunals and hybrid courts. These tribunals and courts are the ICTY, ICTR, SCSL, ECC, and SPSC. Chapter four is devoted to the ICC. It will focus on its provisions dealing with victims' rights and assess whether this mechanism makes effective

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<sup>10</sup> [www.ictt.org](http://www.ictt.org).

<sup>11</sup> [www.vrwg.org](http://www.vrwg.org).

<sup>12</sup> [www.iccnw.org](http://www.iccnw.org).

<sup>13</sup> [www.redress.org](http://www.redress.org).

allowance for victims to be heard and compensated. Chapter five will consist of a summary of the entire presentation and the conclusions drawn from the study. It will make some recommendations for the adequate protection of victims' rights.

## CHAPTER TWO

### BASIC CONCEPTS AND BRIEF OVERVIEW OF THE RIGHT TO AN EFFECTIVE REMEDY

#### 2.1 Introduction

The goal of this chapter is threefold. It will first introduce key terms and concepts with a view to clarifying the scope and direction of this study. It will assess redress for victims in the domestic sphere. It will further discuss the provisions relating to redress and effective remedy in major human rights instruments.

#### 2.2 Definition of key concepts

##### 2.2.1 The concept of victim

The concept of victim is used in a great variety of senses, sometimes confusedly or abusively. It is not uncommon to notice that often the alleged perpetrator refers to himself as the victim. For the purpose of this study, it is therefore necessary to define this concept properly.

The Oxford Advanced Learner's dictionary defines the term victim as a 'person who has been attacked, injured or killed as the result of a crime, a disease, an accident.'<sup>14</sup> The concept of victim cannot properly be defined without reference to victimology, that is, the 'study of the victim, the offender and the society'<sup>15</sup> or study of why certain people are victims of crime and how lifestyles affect the chances that a certain person will fall victim to a crime.<sup>16</sup> In his article, 'victimology today: major issues in research and public policy', Viano defines victim as:

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<sup>14</sup> Oxford Advanced Learner's Dictionary International Student's Edition 7<sup>th</sup> edition 1640.

<sup>15</sup> Rika Snyman 'Overview of and concepts in victimology' in L Davis & R Synman (eds) *Victimology in South Africa* (2005) 7.

<sup>16</sup> <http://en.wikipedia.org/wiki/Victimology> (accessed on 12 August 2006).

An individual, or groups or bodies such as an organisation or social grouping of people, who is harmed or damaged by someone else and whose harm is acknowledged, and who shares the experience and looks for, and receives, help and redress from an agency.<sup>17</sup>

The concept victim is also defined in two UN instruments. Firstly, article 1 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines '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 within Member States, including those laws proscribing criminal abuse of power.<sup>18</sup>

The main criticism that can be made to this definition is its narrowness in that it excludes from the scope of victimhood the dependants of the direct victims. The drafters 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 have heeded this insufficiency and extended the scope of victims.<sup>19</sup> In this document victims mean:

Persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes 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 victimisation.

This definition, coined in the context of the UN, is broad in that it includes 'next-of-kin', descendents and ascendants, 'indirect victims' or 'potential victims' as well as juristic persons such non-governmental organisations.

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<sup>17</sup> EC Viano 'Victimology today: major issues in research and public policy' in PM Tobolowsky (ed) *Understanding victimology: Selected reading* (2000) 10.

<sup>18</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985).

<sup>19</sup> 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, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (19 April 2005).

Against this background, a victim may be defined as a person who has been wronged, injured or killed by another person as the result of a crime. The dependants of a direct victim (ascendants and descendents) shall be considered as indirect victims in some circumstances especially when the latter is deceased. Friends and other relatives may also be considered as victims if they prove that they have also been prejudiced by the wrongful act inflicted upon the direct victim.

## 2.2.2 The concept of witness

A witness may be defined as a person who provides or is due to provide testimony before a Trial Chamber as a result of being called by the parties, or summoned by the Chamber to give testimony by deposition or video-conference link.<sup>20</sup> The Council of the European Union defines the term 'witness' as any person, whatever his or her legal status, who possesses intelligence or information regarded by the competent authority as being material to the criminal proceedings.<sup>21</sup> The regulation establishing the Commission for Reception, Truth and Reconciliation in East Timor provides that a witness means a person who has knowledge of criminal acts or omissions or the effect of such acts or omissions and includes a person who appears before the commission to provide information or testimony.<sup>22</sup> Different categorisation of witnesses can be done depending on their relationship to the offence, offender and victim: eyewitnesses, victim witnesses, co-perpetrators etc.<sup>23</sup>

The Cambridge International Dictionary of English defines eyewitness as a 'person who saw something happen, for example, a crime or an accident.'<sup>24</sup> In other words, it is a person who was the direct spectator of a crime. A co-perpetrator is a witness who was involved in the perpetration of the crime. Most of the time, he becomes a witness for the prosecution as a result of a plea bargain or after pleading guilty and gives special

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<sup>20</sup> ICTY Doc. IT/200 Directive on allowance for witnesses and expert witnesses, Article 2.

<sup>21</sup> EU Doc OJ C 327, 7/12/1995.

<sup>22</sup> UN Doc. UNTAET/REG/2001/10, Section 1 (p).  
<http://www.un.org/peace/etimor/untaetR/Reg10e.pdf> (accessed on 19/08/2006).

<sup>23</sup> A Rydberg *The protection of the interests of witnesses: the ICTY in comparison to the future ICC* (1999) 456.

<sup>24</sup> Cambridge International Dictionary of English (1995) 490.

information pertaining to the offence and to his fellow offenders. A victim witness is a victim required or called upon to describe her or his victimisation especially in court proceedings. Only victim witnesses who are sometimes described as survivors will be covered by this study.

### **2.2.3 Victims' rights and related concepts**

The concept victims' rights should here be understood as encompassing all the entitlements a victim can claim. It has within its scope concepts as redress, remedy, compensation, restitution, recovery, rehabilitation and the like.

Black's Law Dictionary defines redress as 'satisfaction for an injury or damages sustained.... damages or equitable relief.'<sup>25</sup> The Oxford Advanced Learner's Dictionary defines it as 'payment etc...that you should get for something wrong that has happened to you or harm that you have suffered' and then mentions compensation as synonym.<sup>26</sup> Compensation, in turn, means 'something especially money that somebody gives you because they have hurt you, or damaged something that you own; the act of giving this to somebody.'<sup>27</sup>

### **2.3 Victims' rights in the domestic system**

There are many different legal families throughout the world. Heikkilä distinguishes four families: the common law tradition, the civil law tradition, the Islamic law tradition and the socialist law tradition.<sup>28</sup> However, only the common law and the civil law tradition will be discussed here.<sup>29</sup>

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<sup>25</sup> Black Law Dictionary, fifth edition (1979).

<sup>26</sup> Oxford Advanced Learner's Dictionary International Student's Edition 7<sup>th</sup> edition 1221.

<sup>27</sup> n 26 above 294.

<sup>28</sup> Heikkilä (n 4 above) 43.

<sup>29</sup> In fact, they are the ones that really inspire the drafters of the statutes of the international criminal tribunals.

### 2.3.1 Victims' rights in the common law system

Heikkilä asserts that the common law system<sup>30</sup> is viewed as less victim-friendly than the civil law tradition mainly because victims in common law system rarely participate in criminal proceedings.<sup>31</sup> In this system, as a rule, victims are only seen as witnesses, which means that it depends on the prosecutor and the defence whether a victim will appear before the court or not.<sup>32</sup> In fact, the legal process is between the defendant and the State.<sup>33</sup> It excludes the victim. Kelly points out that victims have no independent status, no standing in court, no right to choose counsel, no right to appeal, no control in the prosecution of their case or voice in its disposition.<sup>34</sup> In some common law jurisdictions such the US Courts, victims can ask for compensation.<sup>35</sup>

### 2.3.2 Victims' rights in the civil law system

Civil law<sup>36</sup> jurisdictions are sometimes viewed as being more victim-friendly than common law jurisdictions.<sup>37</sup> In fact, as Heikkilä points out, victims in many civil law jurisdictions have a recognised role in proceedings as victims. In the French system, they have the right to register as '*partie civile*' which implies that they can take a

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<sup>30</sup> The common law constitutes the basis of the legal systems of: England and Wales, the Republic of Ireland, federal law in the United States, federal law in Canada and the provinces' laws (except Quebec civil law), Australia, New Zealand, South Africa, India, Sri Lanka, Malaysia, Brunei, Pakistan, Singapore, Hong Kong, and many other generally English-speaking countries or Commonwealth countries. See Common law on [http://en.wikipedia.org/wiki/Common\\_law](http://en.wikipedia.org/wiki/Common_law) (accessed on 21 October 2006).

<sup>31</sup> Heikkilä (n 4 above) 46.

<sup>32</sup> Heikkilä (n 4 above) 46.

<sup>33</sup> See a few words on victims and their rights on [http://www.enm.justice.fr/Centre\\_de\\_ressources/dossiers\\_reflexions/oeuvre\\_justice/victims\\_rights1.htm](http://www.enm.justice.fr/Centre_de_ressources/dossiers_reflexions/oeuvre_justice/victims_rights1.htm) (accessed on 21 October 2006).

<sup>34</sup> [http://www.enm.justice.fr/Centre\\_de\\_ressources/dossiers\\_reflexions/oeuvre\\_justice/victims\\_rights1.htm](http://www.enm.justice.fr/Centre_de_ressources/dossiers_reflexions/oeuvre_justice/victims_rights1.htm) (n 33 above).

<sup>35</sup> Heikkilä (n 4 above) 50.

<sup>36</sup> Civil or civilian law is a legal tradition which is the base of the law in the majority of countries of the world, especially in continental Europe, but also in Quebec (Canada), Louisiana (USA), Puerto Rico (a U.S. territory), Japan, Latin America, and most former colonies of continental European countries. See civil law system on [http://en.wikipedia.org/wiki/Civil\\_law\\_\(legal\\_system\)](http://en.wikipedia.org/wiki/Civil_law_(legal_system))

<sup>37</sup> Heikkilä (n 4 above) 52.

significant part in the proceedings and ask for damages. The civil law reparation mechanism is the one that has inspired the drafters of the ICC Rome Statute.<sup>38</sup>

## **2.4 The right to an effective remedy in International Law**

The right to an effective remedy or the right for a victim to be granted the suitable redress for the injury or harm that he or she suffered is enshrined in the major international and regional human rights instruments. This right will be assessed in the UN system before evaluating it in various regional instruments.

### **2.4.1 The right to an effective remedy in the UDHR and the ICCPR**

According to article 8 of the UDHR, 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'

Although the UDHR is, as its name suggests, not a directly legally binding treaty, its importance should not be underestimated.<sup>39</sup> Most of its provisions constitute customary international law,<sup>40</sup> and it has paved the way for further developments in international human rights law.<sup>41</sup> In sum, the mother of most of the human rights instruments recognises that victims have the right to be compensated.

As with the UDHR, the ICCPR expressly provides for an individual right to a remedy in cases of violation of its provisions 'irrespective as to their magnitude or seriousness.' Under its article 2 (3), states parties undertake:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other

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<sup>38</sup> Bottigliero (n 3 above) 214.

<sup>39</sup> Office of the United Nations High Commissioner for Human Rights The UN Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies Fact sheet No 30 5.

<sup>40</sup> M Nowak *Introduction to the international human rights regime* (2003) 77.

<sup>41</sup> Bottigliero (n 3 as above) 113.

competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

The Human Rights Committee's (HRC) views on individual complaints for the breaches of the ICCP provisions such as torture and disappearances, have substantially contributed to the gradual expansion and better definition of the victims' rights to redress under international law.<sup>42</sup>

Bottiglierio mentions three pillars of the rights to redress for victims of serious human rights violations. The first pillar is the duty to investigate that was decided in the landmark decision *Rodriguez v Uruguay*. In this communication, the HRC held that 'the responsibility to investigate falls under the state's party obligation to grant an effective remedy.'<sup>43</sup> The second pillar is the duty to prosecute and punish those responsible. This obligation was expressed by the HRC in the case *Bautista v Colombia* relating to the disappearance of a Colombian citizen and activist. The HRC argued that the duty of Colombia was to

Investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations.<sup>44</sup>

The third pillar is the incompatibility between amnesty laws and the right to a remedy. In the case *Rodriguez v Uruguay*, the HRC objected to amnesty laws that it viewed as opposing the duty of states to provide victims with a remedy under article 2(3) of the ICCPR. These views were actually broadly expressed in General Comment No 20 referred to in the concluding observations relating to this communication, as follows

Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not

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<sup>42</sup> The Human Rights Committee is the UN treaty-based body whose task is to supervise and monitor the implementation of the ICCPR. It has main functions: issuing General Comments, receiving and examining states reports and receiving and considering individual complaints and state complaints.

<sup>43</sup> *Rodriguez v Uruguay* (Communication 322/1988 para 12.3.

<sup>44</sup> *Bautista v. Colombia* (Communication 563/93) para 8.

occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.<sup>45</sup>

In sum, the HRC has contributed enormously to the development of the development of the right to a remedy for victims of serious violations of human rights.<sup>46</sup>

## 2.4.2 UN specialised treaties

Torture being one of the most common human rights abuses,<sup>47</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) could not remain silent on the issue of victims' compensation. Article 14, its most significant provision in respect of victims' redress, reads as follows:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Interestingly, the CAT extends reparation to the dependants of the victim of torture in the event of the death of the latter. The CAT committee has, in its views, called upon states not to leave victims of torture uncompensated and to create mechanisms for compensation.<sup>48</sup>

Unlike the CAT, the International Covenant on Economic Social and Cultural Rights (ICESCR) has no clear provision related to victims' redress. Article 2 merely obligates state parties to:

undertake to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

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<sup>45</sup> General Comment 20 (HRC) concerning art 7 ICCPR para 15.

<sup>46</sup> Bottigliero (n 3 above) 123.

<sup>47</sup> Bottigliero (n 3 above) 123.

<sup>48</sup> *OR, MM, and MS v Argentina*, Communications Nos 1, 2, and 3/1988

General Comment No 3 on the implementation of this article goes further and specifies that appropriate means include ‘judicial remedies.’ In this vein, the ICESCR-Committee held that:

Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies.<sup>49</sup>

For its part, the Convention on Elimination of All Forms of Racial Discrimination (CERD) requires states to provide ‘effective protection and remedies’ to victims of racial discrimination which violate their human rights, as well as ‘just and adequate reparation’ for damage suffered. Article 6 specifies that:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

In the case of migrant workers, the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families provides for the rights to ‘fair and adequate compensation for migrant workers or members of their families who have been arbitrarily deprived of property, even by expropriation, or who have been victims of unlawful arrest or detention, or miscarriage of justice.’<sup>50</sup> Moreover, article 71 (2) adds that:

As regards compensation matters relating to the death of a migrant worker or a member of his or her family, States Parties shall, as appropriate, provide assistance to the persons concerned with a view to the prompt settlement of such matters.

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<sup>49</sup> General Comment No 3 on the nature of the states parties obligations (article 2 para 1) para 5.

<sup>50</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly resolution 45/158 of 18 December 1990, articles 15, 16 and 18 (6).

### 2.4.3 UN reports and studies

Various studies and reports on the rights of victims of atrocities have been issued by Special Rapporteurs and independent experts of the UN Commission on Human rights. The most significant of them are the 1993 and 1997 Draft Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law elaborated by Professor Theo van Boven, and its revised version prepared by Mr Cherif Bassiouni, and the Joinet report.

The UN Basic Principles on victims outline important aspects of victims' rights including the requirement that the state 'shall ensure that adequate legal or other appropriate remedies are available to nay person claiming that his or her rights have been violated.'<sup>51</sup>

Mr Joinet's study on the question of impunity for perpetrators of human rights violations contributed immensely to the development and clarification of the right to redress for victims of human rights violations.<sup>52</sup> For him, victims' legal rights encompass the right to know, the right to justice and the right to reparation.<sup>53</sup>

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<sup>51</sup> Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Violations of International Human Rights and Humanitarian Law E/CN.4/Sub.2/1993/8 (Bassiouni Report)

<sup>52</sup> Commission on Human Rights (now Human Rights Council), Sub-Commission on Prevention of Discrimination and Protection of Minorities, Revised Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), E/CN.4/Sub.2/1997/20/Rev.1, UN ESCOR, 49th Sess. (1997) Annex, Agenda Item 11(d) (Joinet Report) [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.sub.2.1997.20.Rev.1.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.sub.2.1997.20.Rev.1.En) (accessed on 3 September 2006).

<sup>53</sup> n 52 as above.

#### 2.4.4 The right to an effective remedy in the African system

The African Charter on Human and Peoples' Rights does not expressly address the victims' rights to redress. Article 21 (2) provides only that people dispossessed of their wealth and natural resources shall have the right to the lawful recovery of their property as well as to an adequate compensation. Article 7 simply indicates that everyone shall have the right to have his cause heard including 'the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force.' Despite this relative disregard of victims, the African Commission, drawing inspiration from international law<sup>54</sup> has recognised that the main objective of individual complaints is to redress the abuse suffered by the victim.<sup>55</sup> It stated in the landmark case of *SERAC v Nigeria*,<sup>56</sup> that article 1 of the Charter requires, that apart from providing for the Charter standards in its law, the state must among other things, protect its citizens from encroachments upon of their rights by private persons and to provide effective remedies in case of infringement.<sup>57</sup> In communications against Mauritania, the Commission recommended for the state complained against:

To arrange for the commencement of an independent enquiry in order to clarify the fate of persons considered as disappeared, identify and bring to book the authors of the violations perpetrated at the time of the facts arraigned.

To take diligent measures to replace the national identity documents of those Mauritanian citizens, which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania as well as the restitution of the belongings looted from them

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<sup>54</sup> According to article 60 of the Charter, The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

<sup>55</sup> *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interfricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire* Comm. No. 25/89, 47/90, 56/91, 100/93.

<sup>56</sup> *The Social and Economic Rights Action Centre for Economic and Social Rights (SERAC) v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 Communication 155/96.

<sup>57</sup> *SERAC* (n 56 above) para 47. See further chapter 4.

at the time of the said expulsion; and to take the necessary steps for the reparation of the deprivations of the victims of the above-cited events.

To take appropriate measures to ensure payment of a compensatory benefit to the widows and beneficiaries of the victims of the above-cited violations.<sup>58</sup>

Moreover, one of the most significant requirements for a communication to be admissible by the Commission is the exhaustion of local remedies.<sup>59</sup> The same requirements apply to the future African Court on Human and Peoples' rights.<sup>60</sup> In the above-mentioned case against Zaire, the Commission admitted that 'the requirement of local remedies is founded on the principle that a government should have notice of a human right violation in order to remedy such violation before being called before an international body.'<sup>61</sup> But, this requirement is unsatisfied when local remedies are unduly prolonged, unavailable or ineffective. According to the Commission, 'a remedy is available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success; and it is found sufficient if it is capable of redressing the harm alleged.'<sup>62</sup>

It should be borne in mind that unlike the African Charter, the Protocol establishing the African Court contains specific provisions pertaining to victims' redress drafted after those of the Inter-American Court of Human Rights.

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<sup>58</sup> Malawi African Association, Amnesty International, Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit, Association Mauritanienne des Droits de l'Homme v Mauritania, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000).

<sup>59</sup> Article 56(5) of the African Charter.

<sup>60</sup> According to article 6 (2) of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, 'the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter.'

<sup>61</sup> Free Legal Assistance Group and others v. Zaire

<sup>62</sup> *Dawda Jawara v the Gambia* comm. Nos. 147/95 and 149/96 (2000) 31-32.

#### 2.4.5 The right to an effective remedy in the American system

Unlike the African Charter, the American Convention does contain provisions relating to effective remedy. Article 25 establishes the 'right of everyone to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention.' In the same vein, article 63 (1) states that:

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

In a number of communications, the Court made application of article 63 (1) and in the landmark case of *Velásquez Rodríguez v Honduras*, it issued one of the fundamental principles of general international law, namely that when a wrongful act is committed and is imputable to a state, this state assumes the international responsibility for the violation and has a duty to make reparation.<sup>63</sup> In this regard, the Court held that:

It is a principle of international law, which jurisprudence has considered 'even a general concept of law,' that every violation of an international obligation which results in harm creates a duty to make adequate reparation. Compensation, on the other hand, is the most usual way of doing so.<sup>64</sup>

#### 2.4.6 The right to effective remedy in the European system

The European Convention for the Protection of Human Rights and Fundamental Freedoms also contains a redress provision. According to article 13:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

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<sup>63</sup> *Velásquez Rodríguez v Honduras*, Compensatory Damages, Judgment of 21 July 1989, Inter-Am. Ct H.R.

<sup>64</sup> *Velásquez Rodríguez case*, as n above para 25.

As in many other human rights instruments, the manner in which the Convention's redress provisions are implemented, including the choice of remedies and related procedures, is left to the national authorities of states parties.<sup>65</sup>

## **2.5 Conclusion**

All the major human rights instruments recognise victims' right to an effective remedy. In those where this right is not expressly provided for, some provisions have been interpreted extensively so as to include this right. It should be borne in mind that the right to redress as recognised and detailed in these instruments is supposed to be exercised before the domestic courts. The rule of exhaustion of local remedies is therefore one of the basic requirements of the HRC and the other regional jurisdictions. These international institutions are called upon to redress the wrongful act when the domestic courts fail to address it adequately or when local remedies are unavailable or ineffective.

Apart from the American and European systems, victims' rights to redress are not adequately or effectively addressed in the UN and African systems because of the lack of enforcement mechanisms. States may actually disregard decisions condemning them. This observation leads to a consideration of victims' rights before the *ad hoc* tribunals.

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<sup>65</sup> Bottigliero (n 3 above) 147.

## CHAPTER 3

### AN OVERVIEW OF VICTIMS' RIGHTS BEFORE THE *AD HOC* CRIMINAL TRIBUNALS AND HYBRID COURTS

The 20<sup>th</sup> century was, regrettably, replete with conflicts and tyrannical regimes that have claimed millions of lives. There were the two world wars, the Cambodian and Yugoslav tragedies, the Rwandan genocide and the brutal killings of East Timorese. To deal with the aftermath of these 'dark days', the international community created *ad hoc* criminal tribunals and hybrid courts to try those who bear the greatest responsibility in the killings and other serious and massive violations of human rights.

#### 3.1 Nuremberg and Tokyo Tribunals and victims' rights

The Nuremberg and Tokyo tribunals were the first international criminal tribunals and were established for 'the just and prompt trial and punishment of the major war criminals' of the European Axis and in Japan.<sup>66</sup> Unfortunately, neither addressed the rights of the millions of victims of World War II.<sup>67</sup> The founding statute of Nuremberg International Military Tribunal made no mention of the word 'victim', nor did it indicate that victims or witnesses might have rights to protection and support.<sup>68</sup> In fact, the prosecutors did not call any of the victims of the extreme acts of persecution by the Nazi regime to testify. Their cases were based mainly on the voluminous and detailed documentary evidence that the Nazis themselves had compiled.<sup>69</sup> These tribunals paved the way for a persistent blindness to victims' rights under international criminal justice.<sup>70</sup>

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<sup>66</sup> H A M von Hebel 'An International Criminal Court-a historical perspective' in H A M von Hebel et al (eds) *Reflections on the ICC* (1999) 19 & 21.

<sup>67</sup> M Bachrach (n 7 above) 12.

<sup>68</sup> S Garkawe 'Victims and the International Criminal Court: three major issues' (2003) *International Criminal Law Review* 3 345.

<sup>69</sup> Garkawe (n 67 above) 345.

<sup>70</sup> The establishment of these tribunals is viewed as the first victory of humanity on impunity. They were supposed to render justice to millions of victims of World War II. They did nothing to heal the wounds of victims in the name of whom justice was rendered.

## 3.2 Victims' rights to redress under the ICTY and the ICTR

These tribunals were created by UN Security Council resolutions.<sup>71</sup> Their primary mandate is to try those who bear the greatest responsibility in the Yugoslav<sup>72</sup> and Rwandan<sup>73</sup> tragedies. As a result, they do not provide for any direct mechanism for the monetary compensation of victims of crime in their respective jurisdictions. They do, however, provide for restitution and indirect compensation.

### 3.2.1 The scheme of reparation

The ICTY and ICTR have the same scheme of reparation enshrined in their statute and Rules of Procedure and Evidence (RPE).<sup>74</sup> There are, on the one hand, restitution of property unlawfully obtained and, on the other hand, referral of the matter to domestic courts for compensation of victims.

#### *Restitution of property unlawfully obtained*

Restitution is provided for by articles 24 (1) and 23 (1) of the ICTY and ICTR statutes respectively. According to the common terms of these articles, in addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.'

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<sup>71</sup> The ICTY was set up by UN resolution 827 (1993) S/RES/827) of 25 May 1993, the ICTR by UN resolution 955 (1994) (S/RES/955) of 8 November 1994.

<sup>72</sup> The Yugoslav War was a series of violent conflicts in the territory of the former Socialist Federal Republic of Yugoslavia that took place between 1991 and 2001. The only that led to the setting up of the ICTY are the Croatian war of independence (1991-1995) and the Bosnian war (1992-1995). See Yugoslav wars on [http://en.wikipedia.org/wiki/Yugoslav\\_wars](http://en.wikipedia.org/wiki/Yugoslav_wars) (accessed on 24 October 2006).

<sup>73</sup> The Rwandan Genocide was the massacre of an estimated 800,000 to 1,071,000 Tutsis and moderate Hutus in Rwanda, mostly carried out by two extremist Hutu militia groups, the Interahamwe and the Impuzamugambi, during a period of 100 days from April 6th through mid-July 1994. See <http://www.answers.com/topic/rwandan-genocide> (accessed on 24 October 2006) or the *Prosecutor v Jean-Paul Akayesu Case No. ICTR-96-4-T* Para 78-129.

<sup>74</sup> The ICTY's and the ICTR's statutes have the same rules in regard of redress provisions.

The principle of restitution has been further developed in the RPE.<sup>75</sup> However, the Trial Chamber can order restitution only if it is proven that the unlawful taking of property is associated with a crime under the statute and it must be the object of a specific finding in the Trial Chamber. According to Rule 105 common to the two statutes, the Trial Chamber shall, at the request of the prosecutor, or may, *proprio motu*, after a judgment of conviction containing a specific finding, 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. The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty.<sup>76</sup>

If the Trial Chamber is able to determine the rightful owner, it shall order the restitution of the property or make an order such as may be appropriate.<sup>77</sup> If it is unable to determine ownership, it shall notify the national authorities and request them to determine ownership.<sup>78</sup> In this context, it must wait for the decision of the requested authorities before ordering the restitution of property or proceeds.<sup>79</sup>

### *The indirect scheme of compensation*

The UN Security Council resolution adopting the Statute of the ICTY states that:

‘the work of the international 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.’<sup>80</sup>

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<sup>75</sup> Rule 98 *ter* (B) (Judgment) of Section 3 of the ICTY on ‘Rules of evidence’ and Rule 88 (B) (Judgment) of the ICTR on ‘case presentation’ state that: ‘if the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that the unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgment. The Trial Chamber may order restitution as provided in Rule 105.’

<sup>76</sup> Rule 105 (C) of ICTY’s & ICTR’s Statutes.

<sup>77</sup> Rule 105 (D) of ICTY’s & ICTR’s Statutes.

<sup>78</sup> Rule 105 (E) of ICTY’s & ICTR’s Statutes.

<sup>79</sup> Rule 105 (F) of ICTY’s & ICTR’s Statutes.

<sup>80</sup> Article 7 of resolution 827 (1993) of 25 May 1993.

The idea of victims seeking compensation from other sources has been clarified in the rules of the tribunals. This indirect approach to compensation was adopted because of the states fearing that the tribunals would have been overwhelmed by a high number of compensation claims.<sup>81</sup> This fear, albeit well-founded, led the drafters of the statutes of these tribunals to sacrifice victims' rights so that these institutions could function without delay or obstacles.

The RPE nevertheless envisage that the Registrar shall transmit to the relevant national authorities the judgment finding the accused guilty of a crime that has caused injury to a victim.<sup>82</sup> It is then up to the victim to claim compensation before the competent national court.<sup>83</sup> For this purpose, 'the judgment of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.'<sup>84</sup>

### 3.2.2 Implementation of the redress provisions

As noted above, the statutes of both the ICTR and ICTY contain redress provisions: restitution of property and indirect compensation after referral to domestic courts. However, hitherto, these tribunals have not issued a single order of restitution nor made any referral to domestic courts.<sup>85</sup> It means that these tribunals focus exclusively on their primary mandate, that is, the sole prosecution of those bearing the greatest responsibilities in the atrocities. In the case *Prosecutor v Akayesu*, for instance, the ICTR wrote:

Many of the eye-witnesses who testified before the Chamber in this case have seen atrocities committed against their family members or close friends, and/or have themselves been the victims of such atrocities. The possible traumatism of these witnesses caused by their painful experience of violence during the conflict in Rwanda is

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<sup>81</sup> Bottigliero ( n 3 above) 201.

<sup>82</sup> Rule 106 of ICTY & ICTR RPE, see also The victims before the International Criminal Tribunal for the Former Yugoslavia and for Rwanda <http://www.trial-ch.org/en/international/the-victims-role/the-victims-before-icty-and-icttr.html> (accessed on 15 October 2006).

<sup>83</sup> Rule 106) of ICTY's & ICTR's Statutes.

<sup>84</sup> Rule 106 (c).

<sup>85</sup> Bottigliero (n 3 above) 202-203 and Heikkilä (n 4 above) 176, 178-179.

a matter of particular concern to the Chamber. The recounting of this traumatic experience is likely to evoke memories of the fear and the pain once inflicted on the witness and thereby affect his or her ability fully or adequately to recount the sequence of events in a judicial context. The Chamber has considered the testimony of those witnesses in this light.<sup>86</sup>

The Trial Chamber eloquently described the trauma of victims and witnesses but unfortunately did nothing to promote or protect their rights.

### 3.2.3 The prosecution and victims' rights

The lack of direct compensation provisions for victims in the statutes of these *ad hoc* tribunals is regrettable. Moreover, the extant redress provisions have never been applied and both tribunals prefer to use only words to console victims. In this context, we must support the initiative of the then prosecutor of both courts who asked for a more efficient system of victims' compensation.<sup>87</sup> In an address to the UN Security Council, she argues as follows:

It is regrettable that the Tribunal's statute makes no provision for victim participation during the trial, and makes only a minimum of provision for compensation and restitution to people whose lives have been destroyed...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 Yugoslavia, and I would invite you to give serious and urgent consideration to any change that would remove this lacuna in our process.<sup>88</sup>

This strong and unambiguous call of the prosecutor in favour of victims' redress will likely not receive the desired response.

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<sup>86</sup> *The Prosecutor v Jean-Paul Akayesu* Case No. ICTR-96-4-T para 144.

<sup>87</sup> Carla Del Ponte, a Swiss citizen, was appointed prosecutor for both tribunals from August 2003. In 2003, she was removed from her position of prosecutor for the ICTR on 15 September 2003 as a result of persistent criticisms from Rwandan authorities. She is currently prosecutor for the ICTY.

<sup>88</sup> Address to the UN Security Council by Carla Del Ponte, 21 September 2000. ICTY Doc. JL/P.I.S./542-e of 24 November 2000, see also Bottiglieri (n 3 above) 205.

### 3.2.4 The tribunals' response to the prosecutor's request

The reaction of the judges of ICTY and ICTR was similar. Although they agreed with the prosecution on the right of victims to seek compensation, they strongly opposed an amendment of the statutes to create direct compensation mechanisms. The judges of the ICTY expressed a negative view on the incorporation of compensation procedure in the statute arguing that the additional workload resulting from such a change would have a 'significant impact on the conduct of the proceedings and the length of preventive detention, which is a fundamental right of the accused, by shortening trials.'<sup>89</sup>

As for the ICTR, its then president expressed her tribunal's disagreement as follows:

The calendar of the Tribunal is full of foreseeable future. All the three Trial Chambers are fully committed and will remain so for the life of the tribunal. ...If the Tribunal adds to its responsibilities a whole new area of law relating to compensation, then the Tribunal will not only have to develop a new jurisprudence; it will also have to expand its staffing considerably and establish new rules and procedures for assessing claims.<sup>90</sup>

The reasons why the Tribunal is opposed to the amendment of rules so as to include compensation provisions are further given as follows:

Victim satisfaction with compensation programmes appears to be quite low. Victims usually express considerable frustration with the complexity of compensation documentation procedures. It seems likely that if the Tribunal embarks upon the processing of claims for compensation, then, in addition to any dissatisfaction with its present progress, it can expect to add to this the frustration and disappointment of those attempting to establish claims.

The reasons presented to justify the tribunals' unwillingness to incorporate redress provisions are very weak in comparison to what the victims lose. In any event, as far as the question of a busy calendar is concerned, it must be objected that the life of the tribunal can be extended if the allocated time is insufficient due to an additional workload.

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<sup>89</sup> Victims Compensation and Participation : Judges' Report of 13 September 2000 on <http://www.un.org/icty/pressreal/tolb-e.htm> (accessed on 24 October 2006).

<sup>90</sup> Letter of the president of the ICTR to the UN Secretary-General, annex to a letter of 14 December 2000 by the UN Secretary-General, Kofi Annan to the UN Security Council, UN Doc. S/2000/1198 of 15 December 2000.

### 3.2.5 Criticisms

The international *ad hoc* tribunals, created to render justice to the countless victims of atrocities have proved to be unable adequately to fulfil this expectation.<sup>91</sup> Not only are their statutes and RPE deficient on the important issue of redress, but also it is regrettable that the few statutory provisions granting some unsatisfactory forms of redress have never been implemented. The lack of substantive provisions on the right to reparation caused a lot of frustration amongst victims, because it was clear that there was no way to get reparation from domestic courts.<sup>92</sup>

Furthermore, it was the prosecution traditionally more interested in the conviction and punishment of perpetrators that proposed an amendment of the statutes so as to include redress provisions. Unfortunately, the prosecutorial calls were rejected by the judges who are more concerned about the limited time allocated for the resolution establishing the tribunals or the additional workload. Campaigning for victims' rights before these tribunals seems to be a lost cause. The ICTR will close its doors in 2008 leaving, victims uncompensated.

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<sup>91</sup> One of the objectives of these tribunals, beside prosecution of persons allegedly responsible for serious violations of international humanitarian law, is to render justice to victims. See <http://www.un.org/icty/glance-e/index.htm> (accessed on 15 October 2006).

<sup>92</sup> Articulation between the International Criminal Court and the Khmer Rouge Tribunal: The Place of Victims (Phnom Penh, March 2-3, 2005) <http://www.vrwg.org/Publications/02/FIDHcambodge420ang.pdf> (accessed on 10 October 2006).

### 3.3 Brief overview of redress provisions in hybrid tribunals

The conflicts in Cambodia, East Timor and Sierra Leone have led to brutal violations of human rights. After the creation of the ICTY and ICTR, these countries concluded agreements with the UN for the setting up of a tribunal to try those responsible for these crimes. Tribunals set up in these countries are considered hybrid because they 'share judicial accountability jointly between the state in which [they] function and the United Nations.'<sup>93</sup> They endeavour to combine the strengths of the *ad hoc* tribunals with the benefits of local prosecutions.<sup>94</sup>

#### 3.3.1 The Extraordinary Chambers in Cambodia

The Extraordinary Chambers of Cambodia (ECC) are a product of two instruments, namely, the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea (EC Statute), and the agreement between the UN and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (UN-RGC Agreement).<sup>95</sup>

Trials before the ECC will be conducted in accordance with the Cambodian law. One of the results of establishing the ECC within this civil law system is that the victims of the Khmer Rouge have the right to participate actively in the proceedings.<sup>96</sup> In this regard, under article 12 (1) of the 2003 agreement between the UN and Cambodia, the ECC are only authorised to seek guidance in procedural rules established at the international level where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the inconsistency of such a rule with international standards.'

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<sup>93</sup> Katzenstein (n 5 above) 245.

<sup>94</sup> Katzenstein (n 5 above) 245.

<sup>95</sup> <http://www.cambodiangenocide.org/chambers.htm> (accessed on 6 October 2006).

<sup>96</sup> Boyle (n 6 above) 306.

Interestingly enough, while some aspects of Cambodian criminal procedure may be ambiguous, or fall below international standards, this is certainly not the case in regard to victims, who have the right to file charges and intervene as '*partie civile*' in ongoing criminal proceedings.<sup>97</sup> Accordingly, victims' rights under domestic law may only be denied before the ECC if there is some uncertainty as to their application in this context, or if their exercise would be 'inconsistent with international standards.' Here, it must be borne in mind that the ECC law implicitly confirms the status of victims as full parties before the ECC, since it recognises their right to appeal decisions of the Trial Chambers.<sup>98</sup> In fact, under Cambodian law, only parties to criminal proceedings may appeal the decisions of the trial court. If Cambodian law is applied, apart from their being called as witnesses, certain victims may intervene as 'civil parties' in ongoing criminal investigations and ask for reparation.

Nevertheless, an issue raised by Boyle should not be left unconsidered.<sup>99</sup> Concern is often expressed that the participation of too many civil parties could reduce the effectiveness of the ECC. However justified this concern may be, it should not prevent full respect for the rights of all victims before the ECC. It would appear illogical to exclude the victims of the most serious mass crimes simply because there are too many of them.

Another hurdle will be to find the available funds to satisfy the large number of individual claims for reparation. Most of the perpetrators of the violations have died and it would be difficult for the few surviving to compensate victims.<sup>100</sup> In these circumstances, the establishment of an independent victims' trust fund for the purpose of organising more collective forms of reparation, such the construction of hospitals, schools, should be considered.

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<sup>97</sup> Boyle (n 6 above) 306.

<sup>98</sup> Article 36 of the Law on the establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea states that 'the extraordinary chamber of the appeals court shall decide the appeals from the accused persons, the victims, or by the co-prosecutors ...'

<sup>99</sup> Boyle (n 6 above) 306.

<sup>100</sup> The crimes in Cambodia were committed between 1975 and 1979. See [http://en.wikipedia.org/wiki/Khmer\\_Rouge](http://en.wikipedia.org/wiki/Khmer_Rouge) (accessed on 7 October 2006).

### **3.3.2 The Special Court for Sierra Leone**

Established by an Agreement between the United Nations and the Government of Sierra Leone, the SCSL has the power prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment and implementation of the peace process in Sierra Leone.<sup>101</sup>

The statute of the SCSL has no specific provisions dealing with victims' rights. Its article 17 deals only with the rights of the accused. Rule 34 of its RPE is devoted to witnesses and victims but does not mention redress. It merely obligates the registry to set up a witnesses and victims section that will perform the following functions:

- Recommend to the Special Court the adoption of protective and security measures for them;
- Provide them with adequate protective measures and security arrangements and develop long- and short-term plans for their protection and support;
- Ensure that they receive relevant support, counselling and other appropriate assistance, including medical assistance, physical and psychological rehabilitation, especially in cases of rape, sexual assault and crimes against children.

The reasons to this lack of interest in victims' rights may be twofold. Firstly, Sierra Leone is a common law country and common law countries are not familiar with the victims being civil parties in criminal proceedings. The second reason is the influence of the ICTY and the ICTR. As a matter of fact, victims' situation before the ICTY and ICTR seems better than under the SCSL in that the SCSL cannot order restitution or refer the matter to the Sierra Leonean domestic courts for indirect compensation.

### **3.3.3 The Special Panels for Serious Crimes of East Timor (SPSC)**

The functioning and works of the SPSC are not well documented. Our study of redress mechanisms will therefore be limited to the provisions of the UN Regulation No 2000/30 on transitional rules of criminal procedure. According to section 12.1, 'a victim shall be accorded those rights provided in the present regulation, in addition to any other rights

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<sup>101</sup> Article 1 of the Statute of SCSL.

provided by law or other UNTAET regulations.<sup>102</sup> The regulation on transitional rules of criminal procedure does not mention redress. As to the rights provided by law, East Timor, being a former Portuguese colony, we must suppose that it applies the civil law system. From this supposition, we may conclude that the SPSC's provisions for victims' rights are similar to those of the ECC.

### **3.4 Conclusion**

This chapter has shown that the two well-established *ad hoc* tribunals deny victims' rights to effective redress. Moreover, the agreed-upon mechanisms of reparation, namely restitution of unlawfully obtained property and referral of the matter to domestic courts for compensation, have never been utilised. As alluded to earlier, nothing is likely to be done to amend the existing victim-unfriendly frameworks. As for the hybrid tribunals, if the redress provisions of the ECC and the SPSC are still unclear, it is regrettably noticed that the SCSL will probably follow in the footsteps of the ICTY and ICTR and disregard victims' rights. Ideally, the SCSL should copy the model of the ICC.

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<sup>102</sup> On October 25, the UN Security Council passed Resolution 1272, establishing the UN Transitional Administration in East Timor (UNTAET), see Katzenstein (n 5 above) 249.

## CHAPTER FOUR

### THE INTERNATIONAL CRIMINAL COURT (ICC) AND VICTIMS' RIGHTS

#### 4.1 Introduction

Whereas victims were effectively disregarded by the drafters of the statutes of the ICTY and ICTR, the creation of the ICC was seen by many as a major step towards the recognition and the enhancement of victims' rights.

The Rome Statute of the ICC was adopted on 17 July 1998 and came into force on 1 July 2002 after the 60<sup>th</sup> ratification.<sup>103</sup> Its adoption was viewed as a milestone in the history of mankind and as the culmination of a series of international efforts to replace a culture of impunity with a culture of accountability.<sup>104</sup> The ICC was created as a deterrent to impunity, as a means towards eliminating the world's most horrendous crimes and as an instrumentality to redress the victims of genocide, war, crimes and crimes against humanity.<sup>105</sup> One of the great innovations of the Rome Statute and of its RPE is the series of rights granted to victims.<sup>106</sup> For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and observations before the Court.

The aim of this chapter is to analyse whether the provisions of the Rome Statute of the ICC will allow victims to vindicate their rights adequately.

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<sup>103</sup> <http://www.icc-cpi.int/about/ataglance/establishment.html> (accessed on 15 October 2006).

<sup>104</sup> P Kirsch 'The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes against Humanity, War Crimes, and Aggression' (1999) 32 *Cornell International Law Journal* 437-442.

<sup>105</sup> C Bassiouni, 'From Versailles to Rwanda in seventy-five years: the need to establish a permanent ICC' (1997) 10 *Harvard Human Rights Journal* 11.

<sup>106</sup> <http://www.icc-cpi.int/victimissues.html> (accessed on 15 October 2006).

## 4.2 Jurisdiction of the ICC

According article 5 (1) of the Rome Statute, 'the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.' These crimes are specified as being the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Hence, only victims of these crimes can be heard and possibly compensated by the ICC. Victims of offences which are not considered to be international crimes are therefore excluded.

## 4.3 Reference to victims in the Rome Statute

The Preamble to the Rome Statute recognises that during the 20<sup>th</sup> century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity. Van Boven argues in this regard that:

the suffering and the plight of victims undoubtedly contributed to the motivation of all the persons and institutions who advocated the establishment of an effective ICC as a reaction against widespread patterns and practices of impunity for the perpetrators of the most serious international crimes.<sup>107</sup>

As a result of this concern, the Rome Statute goes significantly further than previous statutes of the *ad hoc* tribunals by expressly authorising the Court, in article 75, to provide for a range of measures of reparations, 'including restitution, compensation and rehabilitation.'

Many articles in the Rome statute refer to victims. The most relevant are the following:

Article 15 (3) allows victims to make representations to the Pre-trial Chamber when the prosecutor has requested the latter for authorization to proceed with an investigation.

Article 19 (3) entitles 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 43 (6) provides for the establishment of a Victims and Witnesses Unit (VWU). This unit will include staff with expertise in trauma, including trauma related to crimes of

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<sup>107</sup> Theo van Boven 'the position of the victim in the statute of the International Criminal Court' in H A M von Hebel et al (eds) *Reflections on the International Criminal Court* (1999) 77.

sexual violence.<sup>108</sup> Article 54 (1) (b), which is related to the duties and powers of the prosecution in regard to conducting investigations, states that the prosecutor shall respect the interests and personal circumstances of victims and witnesses including age, gender and health. Article 64 (6) (e) states that in performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary, provide for the protection of the accused, witnesses and victims.

Article 68 sets out rules in connection with the protection of victims and their participation in the proceedings. For the purpose of this dissertation, article 75 seems to be the most important in that it deals with reparation. It sets up rules that will be analysed later in this study.

Besides these provisions, victims' interests are also indirectly referred to in some contexts. For example, article 36 (8) (b), that deals with the qualifications, nomination and election of judges stresses that States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children. According to Bachrach, this 'reference to women and children emphasises the growing understanding of various types of sensibilities that must be addressed when examining victimisation.'<sup>109</sup>

#### **4.4 The rights granted to victims**

Victims have the right to protection, the right to participation and, most importantly, the right to reparation.

##### **4.4.1 Right to protection**

To help victims and witnesses face the judicial process -- without being (re)traumatised by it -- the ICC will have a Victims and Witnesses Unit (VWU), placed in the registry, to provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses and victims, victims who appear before the Court

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<sup>108</sup> Theo van Boven (n above) 86.

<sup>109</sup> Bachrach (n 7 above) 17.

and others who are at risk on account of testimony.<sup>110</sup> The VWU is considered more fully in section 4.3.3 below.

All organs of the Court must take appropriate measures to protect the privacy, dignity, physical and psychological well-being, and the security of victims and witnesses, especially when the crimes involve sexual or gender violence, while fully respecting the rights of the accused. This general principle is affirmed in article 68 of the Statute and specified in rules 87 and 88 of the Rules of Procedure and Evidence.

#### **4.4.2 Right to participation**

The Rome Statute allows victims to participate in the court proceedings in several ways and at different stages in order to represent and pursue their own interests.<sup>111</sup> Victims have the right to apply to the Registrar of the Court to be admitted as participants in a given process. The relevant Chamber dealing with the case will allow their participation namely, if:

- (1) There is a personal interest for the victim to intervene in the proceedings,
- (2) There is no threat to the rights of the accused and to a fair and impartial trial.<sup>112</sup>

Victims are free to choose to be assisted in the proceedings by legal representatives who can pursue their best interests.<sup>113</sup> Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives.<sup>114</sup>

When the victims are unable to follow this recommendation, the Registry may provide assistance, *inter alia*, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.<sup>115</sup> This procedure

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<sup>110</sup> <http://www.vrwg.org/victimrights.html> (accessed on 17 October 2006).

<sup>111</sup> Theo van Boven 88.

<sup>112</sup> Article 68 (3).

<sup>113</sup> Rule 90 (1).

<sup>114</sup> Rule 90 (2).

<sup>115</sup> Rule 90 (2).

reflects the practice of several national jurisdictions in which victims are entitled to participate in criminal proceedings.<sup>116</sup> Rule 92 specifies that victims and their legal representatives must be duly notified of the most important procedural developments in their case.

Victims' legal representatives are entitled to participate in Court hearings under the supervision and control of the judges of the relevant Chamber. Rules 91 and 93 establish procedures to fulfil their right to make timely interventions on behalf of the victims, including the possibility of making opening and closing statements and posing questions to witnesses.<sup>117</sup>

The possibility afforded to victims to contribute to fact-finding and truth-telling in the judicial process before the ICC may contribute to their healing after victimization and trauma.<sup>118</sup> Their participation may also empower them to seek the preservation of the assets of the accused that could be used for reparations if the accused is found guilty at the end of the process.<sup>119</sup>

#### **4.4.3 Right to reparation**

Reparation is the most important of the rights granted to victims in the ICC scheme. It is also derived from two preceding rights. In this regard, it will be farcical to allow victims to participate actively in the court proceedings and not to grant them the right to ask for reparation. Bottigliero accordingly notes that the ICC reparation regime has three pillars:

The active participation of the victims and their families at various stages of the proceedings;

The establishment of implementation procedures for the victims' right to reparation, including the creation of a Trust Fund and

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<sup>116</sup> See victims' rights on <http://www.vrwg.org/victimrights.html> (accessed on 22 October 2006).

<sup>117</sup> <http://www.vrwg.org/victimrights.html> (n 116 above).

<sup>118</sup> <http://www.vrwg.org/victimrights.html> (n 116 above).

<sup>119</sup> <http://www.vrwg.org/victimrights.html> (n 116 above).

The institution of a Victim and Witnesses Unit with broad competence over victims-related issues.<sup>120</sup>

The Trust Fund and the Victims and Witnesses Unit will be considered below.

#### 4.5 The Trust Fund

As one of the main tools for the implementation of victims' rights to redress,<sup>121</sup> the Trust Fund was established by the Assembly of States Parties and is administered by the Registry and supervised by an independent Board of Directors.<sup>122</sup> According to article 79 (1) of the Rome Statute, the Trust Fund is '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.'<sup>123</sup>

Article 75 (2) states that

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.

This means that reparation through the Trust Fund will be ordered when the Court deems it appropriate.

The sources of income of the Trust Fund are manifold. Article 75 (2) mentions that the Court may order reparation awards against a convicted person to be made through the Trust Fund. Article 79 (2) mentions money or other property collected through fines or forfeiture under article 77. But these sources are unreliable. As Schabas<sup>124</sup> states:

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<sup>120</sup> Bottigliero (n 3 above) 215.

<sup>121</sup> Bottigliero (n 3 above) 225.

<sup>122</sup> <http://www.icc-cpi.int/vtf.html> (accessed on 15 October 2006).

<sup>123</sup> The Assembly of States Parties (ASP) is the Court's governing body and is comprised of the states that have ratified the Rome Statute. The Assembly meets at least once a year to discuss and decide on issues that are central to the Court, such as the election of judges and prosecutors, the adoption of the ICC's budget and cooperation between states and the Court. See about the Court on <http://www.iccnw.org/?mod=court&PHPSESSID=14552adc562397c3933af30eafe58f25> (accessed on 24 October 2006).

<sup>124</sup> W A Schabas *An Introduction to the International Criminal Court second edition* (2004) 175.

Experience of the ad hoc tribunals suggests that by and large most defendants succeed in claiming indigence. For example, they are almost invariably represented by tribunal-funded counsel after making perfunctory demonstrations that they are without means to pay for their own defence. The irony is that these are the very people who are widely believed to have looted the countries where they once ruled. It may simply be unrealistic to expect the new Court to be able to locate and seize substantial assets of its prisoners.<sup>125</sup>

It is therefore foreseeable that the ICC may not be able to trace, freeze and seize assets of its accused since it is known that these people can easily hide their belongings.

In any event, to overcome what seems to be a hurdle, a resolution of the Assembly of States Parties<sup>126</sup> establishes two additional funding sources and foresees the Trust Fund playing a depository role in these cases: (1) voluntary contributions from governments, international organisations, individuals, corporations and other entities and (2) such resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate to the Trust Fund.<sup>127</sup> This idea is specified in article 116 of the Rome Statute when states that ‘the Court may receive and utilise, as additional funds, voluntary contributions from governments, international organisations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.’ These criteria are still undetermined. But, they will surely depend on the wealth and level of development of states parties. In this regard, if the United States and Japan, the two greatest contributors of the UN are not party to the

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<sup>125</sup> The experience of ad hoc tribunals is here relevant. To identify possible assets of some accused, the ICTY established a Financial Tracing Unit. It is however the Registrar’s Office of Legal Aid and Detention Matters that makes inquiries into the financial status of accused persons claiming to be indigent. See UN doc A/56/495/Add.1, para 2 & 79. In respect of the ICTR, it has an Intelligence and Tracing Team whose function is ‘to locate the assets of accused ...and to make conservatory measures to ensure that the assets are available for possible restitution to victims under Rule 105’ see UN doc. A/56/495/Add.1. In the same vein, the then Prosecutor of the *ad hoc* argued in a address before the UN Security Council that ‘her office is having considerable success in tracing and freezing large amounts of money in the personal accounts of the accused.’ See Bottiglierio (n 3 above) 204 & Heikkilä (n 4 above) 184.

<sup>126</sup> ICC Doc. Resolution ICC-ASP/1/Res. 6.

<sup>127</sup> Heikkilä (n 4 above) 185.

ICC, it is to be welcome that other wealthy states such as the United Kingdom, Germany, France and Canada have ratified the Rome Statute.<sup>128</sup> The states' contributions to the Trust Fund must be compulsory so as to avoid its being underfunded. Resolutions of the Assembly of the States Parties must call upon states that will have overdue contributions to respect their obligations.

The question of who will be the beneficiaries of the Trust Fund is pertinent here. Article 79 (1) states that the Trust Fund is established for victims of crimes within the jurisdiction of the Court. However, article 79 is ambiguous in its wording. It does not specify whether or not victims must be involved in the proceedings to become beneficiaries. As result of this lack of clarity, many delegations have interpreted article 79 restrictively, to apply only to victims or family members of victims of a particular crime being prosecuted by the Court.<sup>129</sup> However, many other delegations interpret this article more broadly, to mean that the Trust Fund can be used to benefit victims of the crimes within the jurisdiction of the Court, even if a case is not before the Court.<sup>130</sup> This interpretation would include victims who are not taking part in the proceedings even when the crime which has victimised them is before the Court.

The best solution to the problem is that all the victims should be considered by the Court irrespective of whether or not their case is under consideration in the Court's proceedings. This argument is justified by the existence of the VWU.<sup>131</sup> The VWU is to be established for the exclusive assistance of victims who appear before the Court, whereas the Trust Fund is created for the benefit of victims without specific reference to their participation in the proceedings.<sup>132</sup>

The exclusion of victims not taking part in the proceedings can amount to unfair discrimination on the ground of indigence. The headquarters of the ICC are located in The Hague. Proceedings will be held in this city. The victims in Northern Uganda and of

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<sup>128</sup> <http://www.icc-cpi.int/statesparties.html> (accessed on 16 October 2006).

<sup>129</sup> See Amnesty International, ICC: ensuring an effective Trust Fund for victims, IOR 40/05/2001 of 1 September 2001 at 3.

<sup>130</sup> Amnesty International (n 129 as above).

<sup>131</sup> Bottigliero (n 3 above) 231

<sup>132</sup> Bottigliero (n 3 above) 231.

Thomas Lubanga Dyilo in the DRC need to travel to The Hague if they desire fruitfully to take part in the proceedings. In this process, they may face the obstacle of meagre resources. Moreover, many may not be informed that their alleged tormentor is being investigated or tried in The Hague. To allow all the victims to ask for compensation, the Trust Fund must not stay in its ivory tower in The Hague. It must establish some form of representation in countries where investigations are ongoing, such as Sudan, the Democratic Republic of Congo or Northern Uganda.

#### **4.6 The Victims and Witnesses Unit**

The Victims and Witnesses Unit (VWU) is, alongside the Trust Fund, the second structure dealing with victims' interests and rights. It is created by article 43 (6), which states that:

'This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.'

The VWU is established to provide the aforementioned services to witnesses appearing before the Court. Its activities do not extend to those not involved in the proceedings.

The closeness between the VWU and the prosecution foreseen by the Rome Statute may present a danger. Bottigliero accordingly stresses that the VWU will have to exercise great care not to favour prosecution witnesses to the detriment of defence witnesses.<sup>133</sup> Furthermore, witnesses should not be advantaged over victims who may not testify. The VWU must overcome these pitfalls and function as a neutral body, motivated only by the interests of victims and witnesses (whatever their side).

Another issue that deserves to be raised is the extent of protection granted to victims and witnesses. Will they still enjoy protection after the proceedings, after the conviction of the accused against whom they testified? This question is of paramount importance since it is known that some of the witnesses before the ICTR were killed sometimes

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<sup>133</sup> Bottigliero (n 4 above) 233.

before testifying.<sup>134</sup> In order to avoid victims and witnesses before the ICC meeting the same fate, it would be preferable to protect them after their testimony also.<sup>135</sup>

## 4.7 Some problematic aspects of the Rome Statute

Despite its victim-friendly framework, the Rome Statute contains certain problematic aspects. There are, inter *alia*, the unsatisfactory definition of victim, the assessment of reparations, and the possible clashes between the rights of victims and those of the accused.

### 4.7.1 The unsatisfactory definition of victim

Rule 85 defines victim as ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.’ This definition seems to exclude the dependants of the victims, the next of kin in case of the direct victim being killed. This problem seems to have been resolved by the establishment of the Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.<sup>136</sup> In any event, to avoid interpretations damaging to some indirect victims, it is urged that the definition by rule 85 be extended to the dependants of the victims. It is preferable to adopt the approach 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, which defines victims as:

Persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or

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<sup>134</sup> Bachrach (n 7 above) 19.

<sup>135</sup> A case in the South African context unlinked to victims’ rights but a good illustration here is *S v Zuma*, in which the accused is the former Deputy President. In this case, the complainant was granted protection during the proceedings. To avoid possible revenge or persecution from discontented supporters of the accused, the trial judge held that the ‘name and photograph of the complainant may not be published without her and the Director for Public Prosecutions.’ The case illustrates the fact that victims need protection even after their testimony. See *S v Zuma* 2006 (7) BLCR 790 (W).

<sup>136</sup> Article 79 (1) of the Rome Statute.

serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes 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 victimisation.<sup>137</sup>

#### **4.7.2 The assessment of reparation claims**

The ICC may be the first international tribunal to address the compensation of victims for the harm suffered. However, its Rome Statute and RPE do not give very detailed rules on the question of assessment of reparations.<sup>138</sup> Article 75 (1) states that:

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.

Rule 97 (2) states that:

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.

In the face of this lack of clarity, the ICC will have to draw inspiration from domestic courts in assessing reparations amounts because there is no international precedent. In this regard, the Assembly of States Parties must develop coherent and comprehensible rules pertaining to reparation by keeping in mind fairness and non-discrimination between victims.

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<sup>137</sup> 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, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/ L.10/Add.11 (19 April 2005).

<sup>138</sup> Bottiglierio (n 3 above) 240.

### **4.7.3 Victims' rights and the rights of the accused persons**

One of the arguments raised by the ICTY<sup>139</sup> and ICTR for their unwillingness to amend the statutes was that the heeding of victims' rights could prejudice the rights of the accused person who has the right to be tried without undue delay.<sup>140</sup> Article 68 (3) of the Rome Statute addresses this problem. It provides that:

where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

The feared clash between the rights of the accused and those of victims appears to have been resolved, at least in theory.

## **4.8 Some practical hurdles for the ICC**

There are, among others, the anti-ICC policy of the USA and the blanket amnesty promised to the Lord's Resistance Army in Uganda and its impact on victims' rights.

### **4.8.1 The anti-ICC policy of the USA and its impact on victims' rights**

Pessimists may argue that an organisation deprived of the membership of the USA will be insufficient or will perish prematurely.<sup>141</sup> The US was one of the last signatories of the Rome Statute. Former US President Bill Clinton signed it on 31 December 2000, the last day that it was open for signature.<sup>142</sup> Shortly after entering office and just before its entry

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<sup>139</sup> In their report on 'Victims Compensation and Participation' of 13 September 2000, the judges of the ICTY argue that 'these procedures would increase the Chambers' workload and further exacerbate the length of its proceedings, thus undermining its efforts to provide accused with fair and expeditious trials.'

See <http://www.un.org/icty/pressreal/tolb-e.htm> (accessed on 23 October 2006).

<sup>140</sup> Article 21 (4) (c) of the ICTY Statute, 67 (1) (c) of the Rome Statute.

<sup>141</sup> The League of Nations created after World War I was insufficient and collapsed mainly because the US refused to be member.

<sup>142</sup> <http://www.iccnw.org/?mod=usaicc&PHPSESSID=154609feae66f36f4199905c40ec40bc> (accessed on 18 October 2006).

into force, US President George W. Bush 'unsigned' the Rome Statute, thereby withdrawing from the treaty. Since 2002, the United States has launched a full-scale, multi-pronged campaign against the International Criminal Court, claiming that it may initiate politically-motivated prosecutions against US nationals. The US crusade against the ICC has resulted in the signing of Bilateral Immunity Agreements (BIAs), purportedly based on article 98 of the Rome Statute, excluding its citizens and military personnel from the jurisdiction of the Court.<sup>143</sup> These agreements prohibit the surrender to the ICC of a broad scope of persons, including current or former government officials, military personnel, and US employees (including contractors) and nationals. These agreements, which in some cases are reciprocal, do not include an obligation by the US to subject those persons to investigation and/or prosecution.<sup>144</sup>

These agreements seriously undermine the jurisdiction of the ICC and are also victim-unfriendly. If crimes falling within the ambit of the ICC are committed by US nationals on the territory of a state party, which has a BIA with the US, the case will not be referred to the ICC. Victims of such wrongdoings will accordingly be not compensated. These BIAs signed by states which are, paradoxically, party to the Rome Statute are a serious breach of victims' rights enshrined in this instrument.

#### **4.8.2 The blanket amnesty promised to the LRA leadership in Uganda and its impact on victims' rights**

In December 2003 the President Yoweri Museveni took the decision to refer the situation concerning the Lord's Resistance Army (LRA) to the Prosecutor of the ICC.<sup>145</sup> The Prosecutor determined that there was a sufficient basis to start planning for the first investigation of the ICC.<sup>146</sup> The LRA is alleged to have (from the 1st day of July 2002):

directed its attacks against both the Uganda People's Defence Force and local defence units and against civilian populations; that, in pursuing its goals, the LRA has engaged in

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<sup>143</sup> Hitherto, 45 ICC state parties have signed a BIA with the US. Some of those that have refused lost US aid in fiscal year 2005. See the fact sheet of the Coalition for the ICC (CICC)

[http://www.iccnw.org/documents/CICCFBS\\_BIAstatus\\_current.pdf](http://www.iccnw.org/documents/CICCFBS_BIAstatus_current.pdf) (accessed on 18 October 2006).

<sup>144</sup> [http://www.iccnw.org/documents/CICCFBS\\_BIAstatus\\_current.pdf](http://www.iccnw.org/documents/CICCFBS_BIAstatus_current.pdf) (n 143 above).

<sup>145</sup> [http://www.icc-cpi.int/pressrelease\\_details&id=16&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html) (accessed on 18 October 2006).

<sup>146</sup> [http://www.icc-cpi.int/pressrelease\\_details&id=33&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=33&l=en.html) (accessed on 18 October 2006).

a cycle of violence and established a pattern of 'brutalization of civilians' by acts including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements; that abducted civilians, including children, are said to have been forcibly 'recruited' as fighters, porters and sex slaves to serve the LRA and to contribute to attacks against the Ugandan army and civilian communities.<sup>147</sup>

Despite the referral of the case to the ICC, the Ugandan government has commenced peace talks with the LRA leadership and has made the offer of a blanket amnesty if these peace talks are successful.<sup>148</sup> The problem with amnesty is that it involves abolition or forgetting of offences, rendering a perpetrator unaccountable for crimes committed.<sup>149</sup> It means that if peace talks are successfully conducted, the LRA leadership will not be answerable for the harm caused to thousands, and the ICC must drop its indictment and warrants of arrest. In the process, the countless victims of the LRA, some of whom have been atrociously abused, disabled or deprived of their limbs, may be left uncompensated. A victim-friendly approach in this matter will suggest that if the waiver of the warrants of arrests is requested, the ICC must disregard this call and continue the task with which it was charged.

## 4.7 Conclusion

The establishment of the ICC is a historic milestone in that victims' concerns, interests and rights are now heeded. The victim-oriented provisions of the Rome Statute, albeit that most of them are still unclear, are supposed to grant victims longed-for relief. However, as Bottiglierio writes, 'in practice, only time will tell whether the ICC will provide effective redress for victims.'<sup>150</sup> It is to be hoped that time will indeed see the ICC fulfil its obligations to victims.

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<sup>147</sup> See warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005 [http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53_English.pdf) (accessed on 18 October 2006).

<sup>148</sup> See Africa's mixed amnesty precedents on <http://news.bbc.co.uk/1/hi/world/africa/5148226.stm> (accessed on 18 October 2006).

<sup>149</sup> Unpublished: M Godfrey Whistling past the graveyard: amnesty and the right to an effective remedy under the African Charter: the case of South Africa and Mozambique, unpublished LLM 2004 18.

<sup>150</sup> Bottiglierio (n 3 above) 242.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

A satisfactory sentiment arises from this study: the international community has irreversibly launched the war against impunity for the most serious crimes. The world will no longer be a safe place for dictators and other violators of human rights. Victims will no longer be left alone to heal their wounds; they shall be rendered justice. This mission is today carried out by the international criminal tribunals and the ICC. They signify the end of what Morris and Scharf have identified as ‘the unfortunate triumph of impunity over justice.’<sup>151</sup>

Their unified campaign against impunity notwithstanding, the *ad hoc* international tribunals and the ICC approach the issue of victims’ redress differently. The *ad hoc* tribunals do not award reparations to victims. Moreover, although their statutes allow them to order restitution of property unlawfully taken in the course of the wrongdoings or to refer the matter to domestic for an indirect form of reparation, these options have not been used either by the ICTY or by the ICTR. Efforts have been made to justify this lack of interest for victims’ rights. It has, for instance, been strongly argued that reparation proceedings would be time-consuming (for overworked and short-lived tribunals) and that there exist quicker and simpler avenues for reparation.<sup>152</sup> Heikkilä has revealed that some lawyers with a common law background have warned that criminal proceedings in which victims have participatory rights threaten the accused person’s right to fair trial by disturbing the delicate balance between the prosecution and the defence.<sup>153</sup> And the ICTY and ICTR judges have strongly opposed the prosecutorial proposal to amend the statutes of the *ad hoc* tribunals so as to incorporate effective redress provisions.

By contrast, the ICC will be able to grant reparation to victims. The ICC redress provisions grant victims three kinds of rights: participation, protection and reparation. The Rome Statute also establishes two structures dealing with victims’ rights and

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<sup>151</sup> V Morris & M P Scharf, *The International Criminal Tribunal for Rwanda*, (1998) 5 *ILSA Journal of International and Comparative Law* 1.

<sup>152</sup> Heikkilä (n 4 above) 188.

<sup>153</sup> Heikkilä (n 4 above) 188.

concerns: the Trust Fund and the VWU. However, despite these historic achievements, there are some gaps in the ICC's victim-friendly regime. The beneficiaries of the Trust Fund and the assessment of reparation claims are for the moment unspecified. Furthermore, the ICC has not started functioning yet, so as it is very difficult to predict its shortcomings or to assess its ability to implement its numerous victim-oriented provisions.

Thus far, four cases have been referred to the Prosecutor of the ICC, all of them relating to conflicts in Africa.<sup>154</sup> This workload may seem insubstantial. However, it is too early to be pessimistic in respect of the future of the ICC and its ability to curb worldwide impunity.<sup>155</sup> Arguably, the mere presence of the ICC will have a deterrent effect on future dictators and their collaborators.<sup>156</sup>

It should also be highlighted that the existence of the ICC has already positively influenced domestic standards on human rights and justice administration.<sup>157</sup> In any event, each state wishing to be part of the ICC has to amend its domestic legislation to make it consistent with the ICC standards. As for victims' redress, many countries have incorporated in their domestic legislation provisions to implement victims' rights to reparation as expressed in the Rome Statute, and to ensure proper cooperation with the ICC.<sup>158</sup>

It remains to offer some few recommendations which, if implemented, may help make the ICC an institution upon which victims of atrocities can rely for redress.<sup>159</sup>

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<sup>154</sup> Three cases were referred to by governments: Uganda, the Democratic Republic of Congo and the Central African Republic. One was referred to by the UN Security Council as regards the situation in Darfur (Sudan). See situations and cases on <http://www.icc-cpi.int/cases.html> (accessed on 24 October 2006).

<sup>155</sup> See A Bos 'The International Criminal Court: a perspective' in Lee, RS (ed) *The International Criminal Court: the making of the Rome Statute: Issues, Negotiations, Results* (1999) 463-470.

<sup>156</sup> Human Rights Watch (HRW) 'Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute' on [http://www.hrw.org/campaigns/icc/docs/handbook\\_e.pdf](http://www.hrw.org/campaigns/icc/docs/handbook_e.pdf) (accessed on 24 October 2006).

<sup>157</sup> Bottiglierio (n 3 above) 242.

<sup>158</sup> Bottiglierio (n 3 above) 243.

<sup>159</sup> For the reasons enumerated in Chapter 3, it is clear that recommendations towards the ICTY and ICTR are unnecessary as the likelihood for them to fall in deaf ears is high.

Its first cases are from developing countries where poverty and misinformation reign. The ICC needs to recognise that these may be obstacles for victims to vindicate their rights. The interests of victims unable to participate in the proceedings should also be taken into account. In this respect, the ICC must create avenues to these victims by opening branches or agencies in countries where investigations are ongoing.

In respect of assessment of claims, the ICC must adopt clear, impartial and unbiased rules. In some domestic courts where compensation is granted to victims, the lack of meaningful rules leads to compensation on an unclear and arbitrary basis. The ICC must at all costs avoid duplicating this unacceptable situation.

As a deterrent against gross violations of human rights, the ICC must, alongside human rights NGOs, conduct campaigns to raise awareness about the promotion and protection of human rights. The involvement of the ICC in such activities will undoubtedly be of paramount importance. In this respect, a collaboration between the ICC and the UN Human Rights Council would be highly desirable.

Some NGOs, such as the Coalition for the ICC have launched a campaign for the worldwide ratification of the Rome Statute.<sup>160</sup> It is hoped that this campaign succeeds and that non-state parties ratify and implement the Rome Statute. Only widespread ratification and domestication of the Rome Statute will allow the ICC to achieve its goals.

Finally, states parties are urged to make generous financial contributions so as to allow the ICC and its Trust Fund to provide meaningful damages to victims of the most heinous crimes.

**Word count:** 15 375 (including footnotes)

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<sup>160</sup> See Ratification and Implementation on <http://www.iccnw.org/?mod=ratimp&PHPSESSID=7f84dc35983988cda146f3e6991a0591> (accessed on 24 October 2004).

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