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The international criminal court: justice for victims of international crimes?

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The International Criminal Court: Justice for Victims of International Crimes?

by Luke Moffett

Law (LLB), Queen’s University Belfast, and Masters in Human Rights Laws (LLM), Queen’s University Belfast.

A thesis submitted for the
Degree of Doctor of Philosophy
The School of Law,
Faculty of Arts, Humanities and Social Sciences,
Queen’s University Belfast

31 August 2012
Abstract

The International Criminal Court has been hailed as justice for victims on account of its Statute including a number of articles on victims such as participation, protection and reparations. These victim articles challenge the traditional trial proceedings of international criminal justice which previously excluded them. This thesis analyses the extent to which the International Criminal Court (ICC) can deliver justice to victims by evaluating its proceedings, outcomes and impact on the domestic situation in Uganda. The thesis begins by outlining a theory of justice for victims, relying on the jurisprudence of international law and human rights law as well as victimology, so as to guide later analysis. The decisions of previous international criminal tribunals are also assessed to provide a historical background to developments at the ICC. Examination of the proceedings and outcomes of the ICC is carried out through scrutinising the Court's legal basis and decisions on victims, as well as considering the travaux préparatoires of the Rome Statute and relevant academic commentaries. A case study of Uganda is used to demonstrate the role of the ICC in catalysing domestic mechanisms for victims' redress. The views of victims collected from field research in Uganda are used to provide a more contextual perspective on developments. The thesis concludes by finding that justice for victims at the ICC has not yet been achieved with victims having a largely symbolic role.
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This thesis would not have been realised without the support, love, motivation and advice of Sunneva Gilmore. Through numerous conversations on my arguments she made me think through my thesis and read over my drafts. This thesis is dedicated to her.
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<tr>
<td>ARLPI</td>
<td>Acholi Religious Leaders Peace Initiative</td>
</tr>
<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
</tr>
<tr>
<td>ECCC</td>
<td>Extraordinary Chambers in the Courts of Cambodia</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<tr>
<td>ICD</td>
<td>International Crimes Division</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
</tr>
<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for former Yugoslavia</td>
</tr>
<tr>
<td>IDP</td>
<td>Internal Displaced Person</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
</tr>
<tr>
<td>IMT</td>
<td>International Military Tribunal</td>
</tr>
<tr>
<td>IMTF</td>
<td>International Military Tribunal for the Far East</td>
</tr>
<tr>
<td>LRA</td>
<td>Lord’s Resistance Army</td>
</tr>
<tr>
<td>OPCV</td>
<td>Office of the Public Council for Victims</td>
</tr>
<tr>
<td>OTP</td>
<td>Office of the Prosecutor</td>
</tr>
<tr>
<td>RPE</td>
<td>Rules of Procedure and Evidence</td>
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<tr>
<td>PTC</td>
<td>Pre-Trial Chamber</td>
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<tr>
<td>RSIWA</td>
<td>Articles on Responsibility of States for Internationally Wrongful Acts</td>
</tr>
<tr>
<td>TC</td>
<td>Trial Chamber</td>
</tr>
<tr>
<td>TFV</td>
<td>Trust Fund for Victims</td>
</tr>
<tr>
<td>UNBPG</td>
<td>United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victim of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law</td>
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<tr>
<td>UPDF</td>
<td>Uganda Peoples’ Defense Force</td>
</tr>
<tr>
<td>UVF</td>
<td>Ugandan Victims Foundation</td>
</tr>
<tr>
<td>VLR</td>
<td>Victims’ Legal Representative</td>
</tr>
<tr>
<td>VPRS</td>
<td>Victim Participation and Reparation Section</td>
</tr>
<tr>
<td>VWS</td>
<td>Victims and Witnesses Section (ICTY)</td>
</tr>
<tr>
<td>VWU</td>
<td>Victims and Witnesses Unit</td>
</tr>
<tr>
<td>WIGJ</td>
<td>Women’s Initiatives for Gender Justice</td>
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<td>WVSS</td>
<td>Witnesses and Victims Support Section (ICTR)</td>
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Introduction

A. Opening

'Around 6pm in the evening when the sun was going to set, the rebels came ... We had just been from our village. My mother was peeling potatoes under the veranda; my wife was sitting beside her. I was out making bricks with the intention of making another hut. I heard a gunshot. People started running. We ran into the house. When the government soldiers ran away, my baby inside the house got wounded from the bullets. When I saw the injured leg of my son I shouted at my family members that we should run away. ... I opened the door so we could run together with the soldiers. My mum was getting stressed and said we should lie down and not run away. I took off and left them inside thinking they were going to follow me.

Unfortunately, my mum closed the door. When I took off at a distance I heard gunshots at my homestead. My mother was shot in the hand; my wife got wounded in the stomach, but did not die in that very moment. Even my daughter and infant son were burnt alive when they set fire to the huts. ... When I came back in the morning I found my mum was unconscious. Although she could speak, she was very weak and passed away in the government hospital. All my family were killed as a result of that attack.'

Testimony of James.1

Mass atrocities cause massive suffering and harm to individuals and groups. The horrendous damage noted above was part of a conflict which resulted in immense anguish to tens of thousands of other Northern Ugandans over decades in hundreds of attacks.2 Yet, how do we respond to such crimes? Usually, the reaction to international crimes has been to do nothing. Such apathy causes further suffering to victims by denying them the ability to hold those responsible to account, to remedy their harm, and prevent its recurrence. However, since the Second World War there has been an impetus to prosecute international crimes through international criminal justice mechanisms. International criminal tribunals and courts have often declared their purpose to deliver justice to victims. But to what extent does international criminal justice really achieve this?

Traditionally victims have been marginalised in international criminal justice mechanisms, due to their focus on prosecuting and punishing perpetrators of international crimes. However, the inclusion of several victim articles within the Rome Statute of the International Criminal Court (ICC), such as those regarding protection, participation and reparations,3 reflects a growing recognition of victims' interests in judicial mechanisms.4

1 Interviewed by the author in Northern Uganda, July 2011. Identifying details are removed and a pseudonym is used to protect the identity of this individual.
2 See Chapter 5.
3 Articles 68, 75 and 79, Rome Statute.
4
Some commentators envisage the victim provisions within the ICC as a shift in international criminal justice from a punitive approach to a more restorative 'victim-orientated justice.' But does the incorporation of these provisions provide justice to victims or a more 'victim-orientated justice'? In brief, this thesis seeks to explore whether or not the ICC can deliver justice to victims.

B. Original Contribution

This work contributes to the advancement of knowledge by adding new insight into victims in international criminal justice. This is evidenced in three areas: (1) the development of the theory of justice for victims; (2) a comprehensive approach to victims within the ICC; and (3) the use of qualitative research. First in developing a theory of justice for victims, research on victims of international crimes and their impressions of judicial mechanisms is an emerging field, particularly in light of the large amount of research conducted on domestic crimes. The most notable collection of research has been by Letschert et al who take an inter-disciplinary approach in examining victimisation as the result of international crimes; and Kiza et al who collate empirical data from a quantitative survey of 991 victims of international crimes in 11 different conflicts on their victimisation and perspectives of justice. There have also been compilations of research based on analysis of international humanitarian law and human rights law on specific issues, such as reparations. However, these studies and numerous articles on the ICC have alluded to, but have not been systematically defined what a theory of justice for victims is comprised of.

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4 Discussed further in Chapters 1 and 2. The ICC is referred to as 'the Court' throughout the rest of this thesis.
5 Sergey Vasiliev, Article 68(3) and personal interests of victims in the emerging practice of the ICC, in C. Stahn and G. Sluiter (eds.), The Emerging Practice of the International Criminal Court, (Brill 2009) 635-690, p677.
9 A.H. Guhr, Victim Participation During the Pre-Trial Stage at the International Criminal Court, International Criminal Law Review 8(1-2) (2008) 109-142; T. Markus Funk, Victims' Rights and Advocacy at the International Criminal Court (OUP 2010); Anne-Marie de Brouwer and Marc
This thesis elaborates a theory of justice for victims of international crimes, so as to enhance the understanding of the ICC and the role of victims therein.

Second, with regards to the International Criminal Court, the academic literature has focused on victim provisions in the Rome Statute and the Court’s interpretation of these. Some proponents view the provisions as improving victims’ access to justice and the legitimacy of the Court.10 These writers draw their arguments from developments in other fields such as human rights, victimology and transitional justice. These fields offer a greater inclusion of victims and a wider conception of justice that goes beyond punishment. Conversely, other commentators consider the Rome Statute’s victim provisions as a hindrance, preventing the Court from carrying out its primary task of prosecuting those most responsible or threatening to undermine the rights of the defendant.11 Thus the current academic debate represents a struggle between trying to find a role for victims while ensuring a fair trial and upholding the rights of the defendant. This debate demonstrates a lack of consensus on what justice means to victims and how this can be incorporated into international criminal justice.

Extensive research conducted by McGonigle, Dwertmann and McCarthy has studied specific aspects of the victim regime in the ICC.12 McGonigle examines whether victims can be afforded a role within the proceedings of the Court by analysing victim participation


through the theory of procedural justice. She also engages in a comparative analysis of other international and hybrid criminal tribunals, particularly the Extraordinary Chambers in the Courts of Cambodia. Dwertmann researches the reparation regime of the ICC drawing from national, international and human rights law to guide her interpretation of it. McCarthy similarly explores the Court’s reparations regime and its place within national and international mechanisms of redress.

This thesis, in contrast, takes a more comprehensive approach by examining victims within the proceedings of the ICC including their recognition, participation, and protection as well as reparations. Within these areas new interpretations of the Rome Statute are developed in light of a theory of justice for victims. These are supported by jurisprudence in international law and human rights law, as well as principles advanced by victimology. While this thesis supports the role of victims in proceedings of the Court, it also calls for the judges to reach a balance with other interests before it. Furthermore, it appraises the Ugandan situation before the ICC to provide an external examination of the Court’s work.

Third, qualitative research was conducted in Northern Uganda as part of this thesis. Numerous articles written on victims at the ICC are based on desktop research and second-hand information from NGO reports. McGonigle did use qualitative research by interviewing court personnel of international criminal justice mechanisms, but not victims. As this thesis is on victims it was crucial to meet with individuals and communities who had suffered from international crimes within the jurisdiction of the ICC, so as to understand their views on and concerns about the Court. Qualitative research outlined below involved interviews and focus groups with victims. This work also adds to the research in this area by taking a victim-orientated approach to the principle of complementarity, where the ICC and State Parties cooperate in the investigation and prosecution of international crimes, as well as

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14 McGonigle n 12, p29.
how this has operated in practice in Northern Uganda. Consequently, it is hoped that this thesis will contribute to informing and furthering the debate on victims in the ICC.

C. Methodology

The main research question of this thesis is: whether or not the ICC provides justice for victims. In order to develop the research questions, this thesis uses both desktop and qualitative research. Desktop research involved analysing relevant international human rights, and comparative and domestic legislation on victims. Additionally, jurisprudence of the International Court of Justice, European and Inter-American Courts of Human Rights, other international bodies and national practices was studied to identify principles and to provide guidance in interpreting the articles on victims within the Rome Statute. Reports published by governments and non-governmental organisations, as well as articles and books by commentators were also examined to add depth to the debates surrounding victims in the ICC.

Chapter 1 in developing a theory of justice for victims takes an inter-disciplinary approach by examining research in other fields such as victimology, criminology, transitional justice, psychology and political science, in order to provide a broader, well-balanced perspective on issues related to the protection of victims’ interests. In Chapter 2 a comparative study of previous international criminal tribunals is carried out by examining their drafting, decisions, judgments, and commentary. As this thesis concentrates on the ICC, Chapter 3 analyses the Court’s drafting, decisions, judgments, and transcripts, in order to assess its practice. With the beginning of the ICC on the 1st July 2002, this thesis examines the first ten years of the Court until July 2012. Chapter 4 explores the Court’s reparation provisions and as there were no reparations decisions at the time of writing in July 2012, reference is made to the travaux préparatoires, as well as jurisprudence on this area in international law and human rights law, due to their applicability under Article 21 of the Rome Statute on interpretation.
A case study of Uganda is undertaken in Chapter 5, as it was the first State referral to the ICC and the initial case before the Court. The case study comprises both desktop and qualitative research. The former involves examining appropriate Ugandan legislation, judgments, peace agreements, newspapers, NGO reports, academic articles and ICC decisions in order to outline the background of the conflict and legal developments. Qualitative research was conducted in Uganda with victims and other key stakeholders to gain first-hand information and to provide local insight into views on the ICC and domestic developments. While these views are not representative, they provide a general sentiment on the Court and national developments in Uganda. This research was conducted in June-July 2011 in Kampala and Northern Uganda. Ethical approval was gained beforehand. The methods used were interviews, focus groups, and informal conversations with key stakeholders. Respondents were informed of the researcher, the purpose of his research, and the use of interview material, with consent being obtained before beginning the interview or focus group discussion. To protect interviewees, all reference to them is anonymous due to the sensitive issues discussed.

Twenty-five key stakeholders were interviewed, including members of civil society, the United Nations, the ICC, the International Crimes Division, the Ugandan government, as well as lawyers, former LRA combatants, civil society, victims, and civilians. Five focus groups were also conducted involving forty-five victims in Northern Uganda, in an area which suffered some of the worst atrocities in the conflict, including crimes both pre- and post-2002. Where required, interviews were conducted in the local language using local translators who the interviewees were comfortable with and vetted by the author. To ensure representation of different social groups, the focus groups included at least one male, female, elder, religious/cultural/community leader and young person, and each focus group was from a different geographical area of a county. Over a dozen informal conversations were also carried out with other key stakeholders who wanted to speak off the record. A sample

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15 Including the government, civil society, LRA, and civilians, such as men, women, elders, young people, religious, cultural, and community leaders, and victims of abductions, massacres, pillaging, displacement, torture, and sexual violence.
questionnaire is attached in the annex. Additionally, the author attended the trial of LRA commander Thomas Kwoyelo, who was charged with a number of crimes including, murder, kidnap with intent to murder, and taking hostages. As already mentioned, qualitative research conducted in Uganda is not meant to be representative, but to provide different viewpoints. This is substantiated with reference to quantitative research conducted by other researchers using larger representative samples. This case study offers practical analysis of the ICC from Ugandan victims' perspective, with the lessons learnt being possibly applied to other situations before the ICC.

While this thesis is based on desktop and qualitative research there are some limitations. In order to assess more accurately the perceptions of a larger group of victims' on the responsiveness of ICC to their needs, a quantitative research of their expectations, views, and needs could be carried out, particularly among those who have applied and participated before the ICC. However, this was beyond the focus of this thesis. This thesis only evaluates the first ten years of the practice of the ICC with regards to victims, it is still a relatively new and emerging Court which in the future has the potential to evolve and improve. Additionally, this work just examines one case study of Uganda and is not representative of other situations before the Court.

D. Thesis Structure

The main thesis of whether or not the ICC can deliver justice to victims can be broken down into further research questions:

1. Who is a victim? What does justice for victims mean? How can this be achieved in international criminal justice?
2. What role did victims previously play in international criminal courts and tribunals? Why did victim provisions emerge in international criminal justice?
3. What motivated and influenced the drafters of the Rome Statute of the ICC in drafting the victim provisions in the Statute? How has the ICC developed the victim
provisions in its jurisprudence? Do the proceedings of the ICC respond to victims' needs?

4. What role do reparations have in international criminal law? Can they be effectively used to provide justice to victims?

5. What difference has the investigation of the ICC in Northern Uganda made? Has the intervention of the ICC delivered justice to Northern Ugandan victims? How has the Ugandan government complemented the work of the ICC?

6. Does the ICC provide justice to victims? What is the role of State Parties?

This thesis consists of six chapters, which address these corresponding research questions. Chapter 1 examines the theoretical issues involved in identifying what is meant by the terms 'victim', 'justice', 'justice for victims' and their interaction with international criminal justice. The Chapter begins by exploring the nature of international crimes and criminal justice theories which underlie international criminal justice, before discussing who is a victim in international criminal law. It then turns to considering what justice for victims involves, and whether the victim provisions of the International Criminal Court reflect this. The theory of justice for victims developed in Chapter 1 will be used in subsequent Chapters to evaluate the extent to which the ICC fulfils this theory in practice. Although there are other international criminal tribunals and courts, this thesis focuses on the ICC due to its prominence, wide jurisdiction and growing jurisprudence on victims.

Chapter 2 looks at the role of victims in previous international criminal courts and tribunals from the Second World War to the ad hoc tribunals of the 1990s. The account is sub-divided into three parts looking at the recognition of victims, procedural justice, and substantive outcomes. Victim recognition is considered by examining the definition of victims and crimes that were prosecuted. The proceedings of the Tribunals are evaluated as to whether they provided procedural justice to victims. This Chapter also considers the outcomes of these trials and the extent to which they satisfied victims' substantive rights. The information gathered from this Chapter highlights the challenges involved in
incorporating victims of international crimes into international criminal justice as well as the lessons that can be learnt for the ICC.

Chapter 3 assesses the role of victims in the proceedings of the ICC, paying particular attention to their recognition, participation and protection. It begins by discussing briefly the travaux préparatoires of the ICC and the drafters' intentions behind the victim provisions. The Chapter then analyses the ICC judges' interpretation of the provisions in recognition, participation and protection, and whether this is consistent with the theory of justice for victims set out in Chapter 1. The Chapter finds that victims' role in proceedings is limited by the rights and interests of other parties, with victims' interests not being fully considered in the determination of outcomes.

Chapter 4 appraises the Rome Statute's provisions on reparations. The inclusion of reparations at the ICC is an innovation, as it had never been utilised in previous tribunals and focuses on remedying victims' harm. Therefore reparations have the potential to satisfy a number of victims' needs and deliver them a broader sense of justice than just the punishment of the perpetrators. This Chapter outlines the jurisprudence concerning reparations in delivering victims an effective remedy established in international and human rights law. This jurisprudence is used to interpret the Rome Statute's provisions on reparations. Linked to providing justice for victims, this Chapter argues that there is a need to broaden reparations beyond individual convicted persons, by engaging the responsibility of State Parties as part of complementing the Court's regime.

Chapter 5 is a case study on Northern Uganda which evaluates the impact of the International Criminal Court on victims at the domestic level. The Rome Statute places a strong emphasis on victim provisions, but to what extent are States complementing the Court and fulfilling their obligations under the Rome Statute? This Chapter finds that victim-orientated complementarity is necessary to satisfy victims' needs for justice beyond the limits of the Court. The Chapter is split into three sections. The first section discusses the historical background to the conflict and the extent of victimisation. The second section examines the intervention of the ICC based on its investigation and the proceedings on
Northern Uganda, with a focus on victims. The third section assesses the incorporation of the Rome Statute and victim provisions into the Ugandan legal system and prosecutions before Ugandan courts.

Chapter Six concludes the thesis by drawing together the key themes in the previous Chapters to assess the overall success of the ICC in delivering justice to victims. The Chapter has three main findings: the Court does not realise victims’ substantive rights; redressing international crimes and ending impunity requires more than prosecuting individuals, due to State involvement in such crimes; and State Parties have a duty to complement the Court through investigations, prosecutions and reparations. In order to bridge the difference between the theory of justice for victims and the practice of the Court, this Chapter makes a number of recommendations on the future work of the ICC.
I. Conceiving Justice for Victims of International Crimes

A. Introduction

Justice for victims has often been claimed as a purpose of international criminal justice mechanisms. Yet, criticism has been levelled at these mechanisms for not doing enough for victims. A further difficulty lies in the scant understanding and examination of justice for victims within international criminal justice. In order to rectify this and to provide an analytical foundation for the rest of the thesis, this Chapter will outline a theory of justice for victims and how it can operate within the International Criminal Court.

Beginning with a discussion on international criminal justice, this Chapter distinguishes international crimes from domestic crimes, before moving on to examine how the prevailing criminal justice theories have influenced international criminal justice. The following section considers the theoretical basis of who is recognised as a victim. The third section develops a theory of justice for victims by drawing from victimological research of their needs and the development of their rights in national practices and human rights law. The final section incorporates this theory into international criminal justice by exploring the importance of victims, alternative justice theories, and the limitations of the ICC. The main conclusion reached in this Chapter is that justice for victims is an expansive concept which is broader than the capacity of single institution such as the ICC. Nevertheless, the Court can maximise the rights of victims in its proceedings and achieve justice for victims by catalysing domestic courts through complementarity to prosecute and punish those responsible for international crimes.


2 See Chapter 2.

3 Reference to justice for victims in the sources cited in n 1 is involves the punishment of perpetrators, without considering victims other needs outlined below.
B. International Criminal Justice

International criminal justice is mainly concerned with the prosecution and punishment of individuals responsible for international crimes within an international court. International crimes transcend the suffering of individual victims and the jurisdiction of the State as they violate fundamental interests of the international community, such as international peace and security or widespread violations against human beings. These fundamental interests also fall under 'jus cogens' (compelling law) norms, which are 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' Such norms include the prevention of genocide, torture, and international humanitarian law. A violation of a jus cogens norm is deemed 'objectively illegal' or 'intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.' Holding individuals criminally responsible for international crimes serves to uphold these fundamental interests of the international community. Under international law States also have a duty to investigate, prosecute and punish individuals

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responsible for international crimes.\textsuperscript{10} Where States are unable or unwilling to do this, recourse can be made to international criminal justice so as to vindicate international law.

In comparison to domestic crimes, international crimes have a more serious nature, owing to four general characteristics: mass victimisation; large-scale organised participation; ideologically driven perpetration; and State involvement.\textsuperscript{11} First, international crimes are not normally a single crime against one individual, but numerous crimes committed against multiple individuals and groups.\textsuperscript{12} In international criminal law, core international crimes include genocide, crimes against humanity, and war crimes.\textsuperscript{13} Genocide is committed against a ‘group’ of victims, crimes against humanity involve a ‘widespread or systematic attack’ directed against a civilian ‘population’, and war crimes entail ‘a plan or policy’ or a ‘large-scale commission’.\textsuperscript{14} Second, international crimes can, but does not have to, involve highly organised mass participation of individuals and groups, rather than a sole perpetrator acting alone. The clearest example of this would be the genocide in Rwanda which killed up to a million civilians, but also involved the organised mass participation of over a million perpetrators through the government, military, local leaders, and the media.\textsuperscript{15}

\textsuperscript{10} Article 1, Genocide Convention; Article 49, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Article 50, Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Article 129, Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949; Article 146, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949; and Articles 6 and 7, UNCAT.

\textsuperscript{11} See Marc S. Groenhuijsen and Antony Pemberton, Genocide, Crimes Against Humanity and War Crimes: A Victimological Perspective on International Criminal Justice, in R. Letschert, R. Haveman, A.M. de Brouwer, and A. Pemberton (eds.), \textit{Victimological Approaches to International Crimes: Africa}, (Intersentia 2011). International criminal law stipulates more specific elements, such as a special intent for genocide.

\textsuperscript{12} Groenhuijsen and Pemberton ibid, p12.

\textsuperscript{13} Cassese n 4, p148; and Article 5, 1998 Rome Statute, UN Doc. A/CONF.183/9, which also includes the crime of aggression.

\textsuperscript{14} Ibid. Articles 6-8, Rome Statute.

\textsuperscript{15} Alison Des Forges, Leave None to Tell the Story: Genocide in Rwanda, Human Rights Watch (1999).
Third, the perpetration of international crimes can also be ideologically driven. Victims are often dehumanised so as to legitimise violence against individuals and groups or to glorify the perpetrators, such as the Nazis in the Holocaust depicting Jews as ‘rats’, or in the Rwandan genocide Tutsis being called ‘cockroaches’. Fourth, international crimes usually occur on a widespread or organised scale due to actions or inactions of a State. State involvement in international crimes can either be through direct perpetration through its forces, or collaboration or acquiescence where crimes are committed by non-state actors. Often the infrastructure, organisation and resources of the State are necessary to carry out crimes on a widespread and systematic scale. As international criminal justice focuses on the responsibility of the individual rather than the State, it reflects the theoretical aspects of domestic criminal justice.

1. Criminal justice theories

Since the 1800s the State has been the primary adjudicator on crime, with the criminal court used as main institution for arbitrating on justice and meting out punishment. Before the State, justice was carried out by a victim. The victim, their family, or kin either retaliated against the offender or sought compensation from them. In order to protect society from crime and prevent victims’ vengeance from turning into socially destructive blood feuds, the State gradually took over responsibility of impartially judging crimes. The resulting criminal court determined the individual criminal responsibility of a perpetrator and

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17 Groenhuijsen and Pemberton n 11, p13.
19 Cassese n 4, p7.
punished them accordingly. Criminal justice balances the interests of society against the rights of the defendant based on the punishment theories of retribution and utilitarianism.23

Historically, retribution comes from ‘lex talionis’, i.e. the law of revenge, intended to distribute proportional measures of punishments, i.e. ‘just desserts’, to offender for causing harms which are considered morally wrongful.24 Retribution is the application of deontological ethics, in that to ‘enjoy and assert’ natural and legal rights there is a corresponding ‘duty’ to respect the rights of others, or else face punishment for violating another individual’s rights.25 Punishment serves to ‘right the wrong’ of the offender’s actions and vindicate the law.26 A criminal court judge is an impartial arbiter of punishment, with due process rights afforded to the defendant to ensure that only those who are responsible for crimes are punished.27

Retribution is thus backward-looking as it considers the past actions of the offender to determine whether they deserve punishment.28 Kant believed that punishment was necessary in order to restore ‘equality’ between the parties by removing the dominance of the offender over the victim created by the harm of the crime.29

The other prominent theory in criminal justice is utilitarianism, a form of distributive justice that seeks to allocate goods in society to ensure the maximum happiness or benefit of the majority. Utilitarianism follows the maxim of the ‘greatest good to the greatest number’ in order to increase social utility.30 Jeremy Bentham, the founding

23 Karmen n 20, p147.
28 Heikkilä ibid, p25.
father of utilitarianism, deemed social utility as any object which produced ‘benefit, advantage, pleasure, good, or happiness’ for the majority and not just for the individual. Bentham considered that punishment in itself was ‘evil’, but necessary in order to result in good outcomes. Utilitarianism is thus forward-looking or consequentialist as it justifies punishment based on its foreseeable consequences. Utilitarianism uses punishment, not to ‘torment’ the offender or to undo the crime, but to achieve its aims of deterrence, incapacitation, and rehabilitation so as to enhance social utility, thereby fulfilling society’s interests by preventing future crimes.

2. Criminal justice theories in international criminal justice

These two theories of retribution and utilitarianism have been reflected in international criminal justice. Traditionally, international criminal justice had a retributive focus. Punishing individual perpetrators for the wrongfulness of international crimes served to ensure they receive their ‘just desserts’ and to uphold international criminal law. In the same vein, international criminal justice mechanisms assert that the purpose of punishment is to reinstate the rule of law by ending impunity for international crimes. Procedurally, international criminal justice incorporates criminal justice principles of impartiality and due process so as to ensure that only those responsible are punished. Retribution is also evident in sentencing in international criminal justice mechanisms, by weighing up aggravating and mitigating circumstances of the perpetrator’s crime to achieve a proportional punishment.

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32 Ibid.
33 Heikkinen 27, p29.
35 McGonigle 27, p60.
37 Article 21 ICTY Statute; Article 20 ICTR Statute; and Article 67, Rome Statute.
Yet, due to the ‘radical evil’ of international crimes it is almost impossible to find a proportional punishment that could equate with the mass suffering caused. As in some domestic criminal courts, international criminal justice mechanisms also allow plea bargaining, where the perpetrator can accept responsibility for certain crimes in order to obtain a reduced prison sentence. This further undermines retribution, and indicates the prevalence of other priorities at work, such as expediency. Moreover, international criminal justice mechanisms can only prosecute a small number of perpetrators of international crimes because of their limited resources. Senior leaders are prosecuted and punished so as to deter them and others from committing future crimes. Attention to the responsibility of senior leaders is due to their role in designing and implementing such crimes, as well as their authority and control over subordinates. Low level perpetrators can also be punished before international criminal justice mechanisms because of their important role in heinous atrocities. Prosecutorial selection of crimes and perpetrators can have more to do with the chance of securing a conviction, or availability of resources, rather than seeking to ensure the ‘just desserts’ of those most responsible.

International criminal justice mechanisms also pursue a number of utilitarian goals. International criminal justice is supposed to deter and prevent future crimes. However,

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43 Nino n 39, p68.
46 Drumbl n 41 p151.
deterrence is only effective where there is a chance of ‘getting caught’.

The experience of international criminal justice indicates that this has not been achieved. Since the first international criminal justice mechanism at the Nuremberg Tribunal in 1945, numerous other international crimes have been committed and continue to be. Other factors, such as ideological justifications or survival, may dominate perpetrators’ motivations in committing international crimes without considering the risk of prosecution. Besides deterrence, international criminal justice mechanisms also avow other purposes, such as contributing to the restoration and maintenance of peace and reconciliation. Removing a Head of State or other perpetrators of international crimes can encourage the realisation of these goals, but they are difficult to discern in isolation from other transitional justice developments, such as peace agreements and domestic reconciliation measures. International criminal justice mechanisms can offer apologies which could promote reconciliation, such as in the case of Plavšić, but these are generally rare. As Drumbl points out with international criminal justice mechanisms, the pursuit of reconciliation is mostly ‘rhetorical’ without any real effort expended in realising it in practice. Accordingly, international criminal justice pursues a mixture of retributive and utilitarian punishment objectives.

3. Victims in the criminal justice theories of international criminal justice

International criminal justice mechanisms have often declared that their purpose is to deliver justice to victims, consistent with retributive or utilitarian goals. Punishing perpetrators condemns and stigmatises them, thereby denying their legitimacy and

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47 Drumbl n 38, p590-591.
48 Drumbl n 41, p170
50 UN Security Council Resolutions creating the ICTY S/RES/827 (1993), 25 May 1993; and the ICTR S/RES/955 (1994), 8 November 1994. These purposes could also suggest a transitional justice role for the ad-hoc tribunals, examination of this issue is beyond the scope of this thesis.
53 Drumbl n 41, p150.
54 McGonigle n 27, p61.
recognising victims’ suffering.\textsuperscript{56} While these mechanisms do hold senior perpetrators to account, punishment does not always ensure justice for victims.\textsuperscript{57} In retributive justice, victims are considered as objects used to justify punishment, as their harm is considered aggravating factor in sentencing.\textsuperscript{58} Furthermore, it punishes the offender without remedying the harm suffered by the victim.\textsuperscript{59} In criminal justice proceedings, victims are often prevented from participating in the determination of decisions, so as to protect the impartiality of the trial and the procedural rights of the defendant. This is due to fears they would undermine the equality of arms between the prosecution and the defence.\textsuperscript{60}

Utilitarianism also marginalises victims’ needs and interests by focusing on maximising the collective interests of society. This can involve deciding to prosecute the most senior perpetrators of international crimes so as to deter others. However, victims may identify the low level perpetrator who physically committed the crime against them as the most responsible and deserving punishment, rather than those who orchestrated such crimes.\textsuperscript{61} Accordingly, criminal justice systems which are based on these theories do not consider victims’ needs or interests in the determination of justice.\textsuperscript{62} It is only with the ICC that justice has been more broadly interpreted beyond these criminal justice theories to include victims, owing to a greater understanding of them through victimological research and developments in human rights law. It is worth identifying who victims of international crimes are before considering what justice means to them.

\textbf{C. The Concept of a Victim}

The use of the word ‘victim’ is commonly used to refer to certain persons and groups who are seen to suffer, and considered not responsible for their harm.\textsuperscript{63}

\begin{itemize}
\item \textsuperscript{56} Schabas, n 52, p347.
\item \textsuperscript{57} See section D and Chapter 2.
\item \textsuperscript{58} See Chapters 2 and 3.
\item \textsuperscript{61} Combs n 40, p47.
\item \textsuperscript{62} Heikkilä n 27, p33; and McGonigle n 27, p44.
\item \textsuperscript{63} Eric Stover, \textit{The Witnesses}, (University of Pennsylvania Press 2005) p5.
\end{itemize}
Suffering can encompass those who are subjected to accidents, medical difficulties, crimes, and natural disasters. Victims of crime are distinguishable as crimes entail the intention or recklessness of the perpetrator in committing a harmful act against the injured party, and therefore deemed more morally objectionable and serious. Determining which individuals and groups are victims is important in delineating who can access international criminal justice.

The discipline of victimology has over the last few decades developed the understanding and recognition of victims of crimes. Victimology is the study of victimisation, examining how the harm caused by crimes impacts individuals and wider society, as well as assessing its causes, extent, and consequences. Victimisation is the way in which individuals or groups suffer harm, 'a violation of rights, or significant disruption of their well being' as the result of a crime. The 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, (UN Victims’ Declaration) construes harm in a broad sense including physical, mental, or emotional harm, economic loss, or substantial impairment of their fundamental rights.

Originally victimology was concerned with analysing individuals who were defined as victims in criminal law, so-called positive victimology. However, this approach excluded the recognition of those who suffered harm which were not considered criminal, such as child abuse and domestic violence before the 1970s-1980s. Positive victimology also examined the victim’s responsibility or proneness in a crime. Yet, this approach

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66 Ibid.
68 Principle 1.
neglected the impact of social structures upon victimisation, such as race, class, age, and gender, and resulted in ‘victim blaming’.  

In reaction to the narrow focus of positive victimology on victims, radical, and critical victimology theorists have helped to broaden the recognition of victims. Theorists coming from a Marxist perspective consider how class structures impact on as well as looking beyond criminal victimisation to consider State violence. Feminist victimology adds an important gender dimension by drawing attention to the disproportionate harm that crime can have on women, and the lack of State protection to prevent gender-based crimes, such as domestic violence and marital rape. Critical victimology challenges the definitions and perceptions of victims to include a wider understanding and recognition of victimisation. The use of the words “victim” and “victimisation” can be shaped by historical and cultural contexts, as well as being manipulated for political goals. Critical victimology attempts to uncover victimisation which remains hidden or unrecognised, due to prevailing social factors or lack of interest in certain individuals or vulnerable groups, such as children or the elderly. Accordingly, victimology has shifted from a positive theory based on the objective standard of the law, to a more subjective examination of those who suffer harm. In application to international crimes, a critical victimological approach is more appropriate to the theory of justice for victims, as outlined below, to ensure recognition and redress for those who suffer as a result of such crimes.

Victimology has also documented that victimisation can be distinguished by the degree in which it affects certain individuals and groups. The direct or primary

74 See Mawby and Walklate n 70.
victim is the person who is originally injured by the crime, such as an individual who is murdered. A crime can cause harm to victims in different ways, and can be made more severe due to the characteristics of the individual, such as age where crimes can cause greater harm to children. However, a crime can affect more than the direct victim. For instance, the relatives of a murder victim can suffer emotional trauma such as shock, depression and guilt as well as economic hardship as a result of the crime, thus causing significant disruption to their ‘well-being’. Victimisation can also impact on local communities and wider society. An arson attack on an individual’s house may be committed with the intent of sending a sectarian or racial motivated message to a community, causing fear to their members and forcing some to move. Recognition of harm caused to the members of a family, community, and society is referred to as ‘indirect victimisation’, or alternatively, ‘secondary’ and ‘tertiary’ victims. ‘Secondary victims’ are persons who are victimised by their connection to the direct victim, such as relatives, people who have witnessed a crime and are left emotionally traumatised, or individuals who try to prevent victimisation and are harmed as a result. ‘Tertiary victims’ are members of communities who are affected by the consequences of the harm or crime, due to the primary or direct victim being a member of such a group, such as in cases of hate crimes or genocide. Secondary victims are likely to suffer more harm than tertiary victims, due to their closer proximity to the direct victim.

This ‘multi-victim perspective’ of victimisation is especially relevant for international crimes such as genocide, where victims are not only individuals but also communities or groups. Furthermore, victims of international crimes generally do not suffer from a single crime, but multiple crimes committed against them on numerous

77 Mawby and Walklate n 70, p48-51.
79 Edna Erez and Tikva Meroz-Aharoni, Primary and Secondary Victims and Victimization during Protracted Conflict, in Letschert et al. n 11, 117-140, p120-121.
80 See Spalek n 78.; and Hoyle and Zedner n 71, p470.
occasions, both direct and indirect. A victim could be disabled through torture, witness the murder of a neighbour, a family member could be raped, their home destroyed, property stolen, and they could be forced to live in a displaced persons camp. This chronic suffering can compound the harm upon victims. Additionally, international crimes are often committed against certain groups or minorities, meaning that the harm caused can break down social and community bonds, which would normally help victims cope with their suffering. Consequently, international crimes can cause extensive harm to victims in different ways and at various levels. The inclusion of indirect victims provides a more accurate recognition of victimisation caused by international crimes so as to facilitate a more effective response to those harmed. For the purpose of this thesis, victims are those individuals and groups who suffer harm both directly and indirectly as a result of an international crime.

D. Justice for Victims of International Crimes

Justice is a fundamental part of human society as it helps to regulate social interaction between individuals and institutions. Justice is more than giving a person what they are due, yet it can be synonymous with 'fairness'. It can also be understood in the negative as unfairness or injustice. Injustice is normally defined as the opposite of justice, but it can be better distinguished as the situations which justice seeks to correct. Victims can represent the faces of injustice by the fact that they suffer. The victim can believe the crime to be an injustice, as they have been wrongly harmed by another and the State failed to protect them. A theoretical

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83 Wemmers and Brouwer n 64, p286.
86 Wemmers and Brouwer n 64, p287.
87 See the victimisation caused in the Northern Ugandan conflict, discussed in Chapter 5; and Kiza et al n 84.
understanding of justice can help to determine its meaning for victims of international crimes discussed in the following sub-sections.

Aristotle theorised that there were two types of justice: complete and special. Complete justice represents the justness of law which regulates individual’s relations with each other. Where the law fails to reflect justice or where institutions are unjust then there is a need of recourse to special justice. Special justice is the way in which complete justice can be attained in the face of injustice and inequality. Aristotle further subdivided special justice into rectificatory and distributive justice. Rectificatory or corrective justice regulates transactions (such as contracts) or clandestine affairs (crimes) between individuals. Rectificatory justice corrects the harm or injustice suffered by the injured party through trying to return them to the position they were in initially. Restitution of stolen property or compensation for loss are apt examples, and have been used in reparations orders by human rights courts to correct the harm suffered by victims. To Aristotle, rectificatory or corrective justice was about achieving equality between the parties, more of a mathematical formula rather than about fairness or restoration. Rectificatory justice though is limited to resolving injustices between individuals rather than addressing inequalities in society, which is the role of distributive justice.

Distributive justice seeks to determine the allocation of goods in society, such as wealth, class, honour, or abilities. Different theorists have postulated that such distribution should be based on various ideals such as egalitarianism, utilitarianism, or fairness. Egalitarianism seeks to equally distribute goods amongst members of society. However, equal distribution of goods may impact individuals and groups differently due to dissimilar needs. This is due to egalitarianism not considering the uniqueness of each person and the diversity of society, so that equality of distribution may cause inequality. Utilitarianism

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90 Aristotle, *Nicomechean Ethics*, Book V.
91 Ibid.
92 Ibid.
93 See Chapter 4.
94 Raphael n 88, p43.
96 Ibid p165-184.
allocates goods to maximise the total happiness of the majority to the possible detriment of the minority.97

Rawls instead asserted that fairness should be the determining criterion in distributing goods justly in society.98 According to Rawls, fairness could be established in the hypothetical situation of the original position, where individuals behind a veil of ignorance are devoid of their personal characteristics, knowledge of themselves and self-interests. With such a veil of ignorance individuals would agree to the fundamental principles of justice. The two principles that emerged from Rawls’s original position are that everyone should have an ‘equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others’, and that ‘social and economic inequalities are arranged so they are both (a) reasonably expected to be to everybody’s advantage, and (b) attached to positions and offices open to all.’99 These two principles enable individuals the freedom and opportunity to determine fair proceedings based on their needs so as to ensure fair outcomes.100

Criminal justice does incorporate elements of corrective and distributive justice. Corrective justice is manifest in retribution, by trying to equate the punishment of the perpetrator with the suffering of the victim. It also evidences distributive justice by seeking to maximise society’s interests of deterring crimes. Nonetheless, victims’ liberty to participate in determining justice in criminal courts is neglected in favour of procedural and evidential rules, with outcomes limited to acquitting or punishing the defendant. Justice for victims, discussed below, aims to shift this balance by recognising the value and needs of victims in the determination of justice in criminal courts so as to ensure fair proceedings and outcomes for them.

The UN Victims’ Declaration identifies justice for victims as the ‘responsiveness of

98 Ibid.
99 Ibid. p53.
100 Ibid. p74-78.
judicial and administrative processes to the needs of victims'. In order to redress injustice an understanding of victims’ needs require consideration.

1. The needs of victims of international crimes

Victims respond differently to crime and harm due to their own personal idiosyncrasies and social factors. Their needs can be diverse and change over time. Victimological research of victims of domestic crimes has found that they commonly have informational, emotional, and practical needs. In relation to informational needs, victims want to know if the offender has been apprehended, charged, or released; more specifically who committed the crime against them, why it happened and most importantly, ‘why me?’ Emotional distress by the crime can cause the victim to suffer further from shock, anxiety, confusion, helplessness, depression, denial, fear, or other trauma. One of the most documented conditions of victimisation is Post-Traumatic Stress Disorder (PTSD), which symptoms can be those mentioned, as well as the victim re-experiencing the event, nightmares, avoidance, and changes in their behaviour or routine that can be long-term. Accordingly, victims may need emotional support or counselling, so as to help them to cope with their victimisation, and to heal emotionally and psychologically.

The practical needs of victims can be quite diverse depending on the consequences of the crime. Some victims may have suffered from physical harm and need medical treatment; or economic loss, and require compensation for the resulting costs or loss of earnings. A victim may need the crime to be stopped and prevented from recurring, such as in domestic violence. They can require official recognition as a victim, as well as acknowledgement and condemnation of their harm. Victims may also want the person who

103 Sarah Walklate, Victimology: The victim and the criminal justice process, (Unwin Hyman 1989) p133-136; Maguire n 73, p545-551 and Victim Support, Criminal Neglect: No justice beyond criminal justice, (2002). It has been more extensive due to the emerging nature of the study of victimology for international crimes. See Letschert et al n 11; and Kiza et al n 84.
104 Spalek n 78, p73.
harm them to be held responsible and punished in order to give them a sense of
security that the victimisation will not happen again. Confronting the offender and
voicing their victimisation through testifying could provide them with catharsis and
healing.\textsuperscript{107} Victims may wish to see the offender sincerely apologise and to remedy
the harm that have caused.\textsuperscript{108} Others may be too traumatised or fearful to testify
requiring protection, privacy, and safety measures to prevent further victimisation.
Victims may have some or all of these needs.

Victims of international crimes can have similar informational and practical
needs to those of domestic crimes, such as identification of the perpetrators,
confronting the offender, recognition of their harm, participation in judicial
processes, and protection measures.\textsuperscript{109} However, victims of international crimes can
have more extensive needs than those of domestic crimes. This is due to the more
serious and widespread nature of international crimes outlined above. The emotional
impact of international crimes can leave victims more vulnerable than domestic
crimes, due to the involvement of their own government, which can be unable or
unwilling to investigate or prosecute such crimes.\textsuperscript{110} This can cause further harm to
victims by labelling them as unworthy of recognition.\textsuperscript{111} The psychological harm
caused by international crimes is so invasive that it can transfer to subsequent
generations.\textsuperscript{112} Victims may consider the provision of food, clean water, shelter,
medical supplies, security, returning to their homes or accessing their land as more
pressing practical needs, owing to the destruction caused by international crimes.\textsuperscript{113}

\textsuperscript{110} O'Connell ibid, p303.
\textsuperscript{111} Ibid; Cristian Correa, Reparations for Victims of Massive Crimes: Making Concrete a Message of Inclusion, in Letschert et al. n 11, 185-234, p189-190.
\textsuperscript{112} Danieli n 85 p46-49.
\textsuperscript{113} See Patrick Vinck, Phuong Pham, Suliman Baldo, and Rachel Shigekane, Living with Fear, A population-based survey on attitudes about peace, justice and social reconstruction in eastern Democratic Republic of Congo, August 2008; and Kiza et al n 84.
They may also require the cessation of crimes so that they can begin to locate their family members. Additionally, reconciliation measures can enable victims to re-integrate into their communities.114

With international crimes involving numerous victims, different individuals and groups may have diverse and possibly conflicting needs.115 For example, some may prefer peace over justice or resolution of land issues over monetary compensation.116 This may require a compromise between these divergent views. This thesis will examine in subsequent Chapters the responsiveness of the ICC to the needs of victims in determining whether or not it provides justice for them and the challenges involved in doing so.

2. Justice for victims

Justice for victims involves both corrective and distributive justice. Corrective justice ensures that those harmed are returned to the original situation before the international crimes. However, returning victims to their original position may restore them to a situation of inequality which caused their victimisation, or it may not be possible as they may be severely harmed or dead.117 Therefore justice for victims can be considered more as reparative or remedial justice, rather than just corrective, by repairing victims’ harm where it cannot be completely undone.118 It also incorporates distributive justice by trying to tackle the causes of victimisation through the redistribution of goods in society, such as reform of State institutions through the inclusion of minorities in government, who were previously victims of international crimes, due to their vulnerability in society.

With regards to State involvement in international crimes, justice for victims should also address impunity. Impunity is the failure by a State to investigate and prosecute those

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responsible for international crimes, and to recognise and remedy the suffering of victims. 119 As such, impunity is considered the 'opposite of justice' as it serves to refute victims' suffering and access to redress. 120 By denying them recognition and their ability to seek a remedy, it can send the message that such individuals, groups and communities deserved to be harmed. 121 Justice for victims therefore serves to counter impunity by reaffirming victims' dignity, holding those responsible to account, and remedying their harm.

Justice for victims is virtually synonymous with ensuring their right to an effective remedy in human rights law. 122 Shelton distinguishes remedies as including two concepts – procedural and substantive. 123 Procedural remedies refer to the ‘processes by which arguable claims ... are heard and decided, whether by courts, administrative agencies, or other competent bodies.’ 124 Substantive remedies mean ‘the outcome of the proceedings, the relief afforded.’ 125 These procedural and substantive aspects of justice have been interpreted as rights for victims. These rights are legal entitlements which are to ensure the responsiveness of judicial mechanisms to their needs. 126 Mawby and Walklate stipulate that translating victims’ needs as rights is necessary to avoid discretionary responses. 127 Furthermore, Mawby on a justice-based approach states that victims have rights irrespective of their need, due to the harm caused to them. 128 While victims’ needs inform the contents of justice, rights help to demarcate what justice for victims should be. Such an approach is useful in delineating procedural and substantive justice for victims.

120 Danieli n 85, p45; and O’Connell n 109, p310.
121 Correa n 111, p189-190.
122 The distinction between the two is that justice for victims draws from victimological research, rather than just human rights law.
124 Ibid.
125 Ibid.
127 Mawby and Walklate n 70, p178.
a) Procedural justice

A starting point for procedural justice is that victims can access a justice mechanism to seek redress. Procedural justice entails fairness in processes and outcomes. With regards to victims this involves their participation in proceedings, impact on decisions, and ability to shape outcomes. Procedural justice also involves the impartiality of judges and courts in their decisions and judgments. Victims can often suffer ‘secondary victimisation’ from the way they are treated by official institutions and individuals, such as the denial of their human rights, inappropriate attitudes or conduct by police or judicial officers, or by deciding not to prosecute a perpetrator. This often occurs where the criminal justice process or its officials do not consider the needs or interests of victims. Therefore procedural justice is an important part of satisfying victims’ needs while preventing secondary victimisation.

Some studies have suggested that procedural justice can be more important than substantive outcomes. Danieli identifies the significance of victims’ procedural role in each step of the justice process as, ‘an opportunity for redress and healing’. Treating victims with respect can improve their satisfaction with criminal proceedings. Participation in proceedings can also provide them with some ownership of the process, replacing their feelings of helplessness with worth and control. It can connote respect by acknowledging the importance of their voices. Although allowing victims to express their needs and interests is important, it does not require their views to dominate judges’ decisions, just that they are considered and taken into account in determining justice.

129 Ibid. p8.
130 Edgar A. Lind and T.R. Tyler, The social psychology of procedural justice, (Springer 1988); and Jo-Anne Wemmers, Victims in the Criminal Justice System, (Kugler 1996).
131 Wemmers ibid.
134 See Lind and Tyler n 130; and Wemmers n 130.
135 Yael Danieli, Massive Trauma and the Healing Role of Reparative Justice, in Letschert et al n 11, 235-261.
136 McGonigle n 27, p48.
137 Danieli n 85, p47.
138 Rombouts n 102, p221.
139 Wemmers n 130, p146-147.
The UN Victims’ Declaration and other international documents, influenced by human rights developments and victimological research on domestic criminal law practices, establish that victims do have certain procedural rights in relation to judicial and administrative proceedings as a result of a crime or violation of a human right.\textsuperscript{140} Their procedural rights include: respect and recognition; to receive information; to provide information; to legal advice or representation; protection of privacy and physical safety; to claim reparations; and to receive assistance.\textsuperscript{141} The official recognition of an individual as a victim is important in acknowledging their suffering.\textsuperscript{142} Recognising and treating victims with respect can fulfil their psychological needs by affirming their dignity.\textsuperscript{143} Providing information to victims allows them to understand the criminal process and be informed of the progress of the case, so that they can more effectively perform their other legal rights.\textsuperscript{144} Additionally, supplying information can enable victims to report a crime and the opportunity to testify as a witness, thereby countering denial of their harm by publicly ‘telling the world’ what happened to them.\textsuperscript{145} As victims suffered from a crime they are primary sources to explain their harm, help a judicial mechanism to determine the truth, and to ensure their harm is effectively redressed through reparations.\textsuperscript{146}


\textsuperscript{142} Ibid, p153. Danieli n 85.

\textsuperscript{143} Danieli ibid. p47.


Victim participation in proceedings can improve the responsiveness of a justice mechanism to victims' needs by enabling their interests to be presented and considered.147 Access to legal assistance or representation can enable lawyers to more efficiently advocate victims' interests and needs in legal processes. Prosecutors can often overlook victims' interests as they also have to represent the State's interests.148 The right to protection aims to avoid any further victimisation or trauma by protecting their safety and privacy.149 Without such protection victims could be prevented from performing their other rights. Assistance is meant to support their practical, informational, and emotional needs through assistance with filling in forms, counselling, and information on the criminal process.150 As some victims may be more vulnerable than others due to their age, gender, ethnicity, etc. they may require additional protection or assistance measures.151 Together these rights not only seek to provide for victims' procedural needs, but ensure the outcome of such process can effectively redress their harm.152

b) Substantive justice

Substantive justice refers to the outcomes of judicial mechanisms. For victims this involves redressing their harm and the causes of victimisation.153 Human rights law has established the need to ensure an effective remedy of the victims' suffering so as to wipe out the consequence of the harm caused by the crime.154 This branch of law has established that

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147 Principle 6(b), UN Victims' Declaration.
149 Principle 6(d), UN Victims' Declaration.
150 Victim Support n. p7-8; Walklate n 103, p133-136.; and Principle 6(c), UN Victims' Declaration.
153 Wemmers n 130, p148.
international crimes involve gross violations of individual and group rights, giving rise for victims to have three main rights in relation to outcomes: truth; justice; and reparations.\textsuperscript{155} The right to truth entails the determination of what occurred in the past involving international crimes, including the circumstances and reasons, as well as the fate of those who died and their whereabouts.\textsuperscript{156} This right reflects victims’ need to know ‘what happened, why the crime was committed, and who committed the crime.’\textsuperscript{157} Ascertaining the truth can alleviate their suffering by offering an accurate historical narrative of the conflict and vindicating their memory or status as a victim.\textsuperscript{158} The establishment of the truth can present lessons to be learnt for the State concerned so as to reform its institutions and prevent such crimes from recurring.\textsuperscript{159}

The right to justice involves the State prosecuting, trying, and punishing those responsible for crimes.\textsuperscript{160} This is retributive justice by punishing perpetrators for committing international crimes.\textsuperscript{161} Victimological research suggests that victims pursue a number of goals beyond retribution as part of their right to justice including: official recognition as a victim; condemnation of their harm; determination of those responsible; imprisonment of the perpetrator to ensure their

\textsuperscript{155} Based on the right to an effective remedy under Article 8 Universal Declaration of Human Rights (UDHR), 217 A (III), 10 December 1948; Article 13 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), CETS No.5; Article 2(3) International Convention of Civil and Political Rights, UN Treaty Series Vol.999, p171, 16 December 1966; Article 25 American Convention of Human Rights, 22 November 1969; and ICPPED. See also General Comment 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Human Rights Committee, CCPR/C/21/Rev.1/Add. 13, 24 May 2004, paras.15-20; Velásquez Rodríguez v Honduras, Judgement, Series C No.7 (IACtHR, 29 July 1988), paras.174-175; Aksoy v. Turkey, App no 21987/93 (ECHR, 18 December 1996), para.98. These rights are supported by victimological research of conflict situations, see Kiza et al, n 84.

\textsuperscript{156} Tibi v Ecuador, Merits, Reparations and Costs, Series C No 114 (IACtHR, 7 September 2004),para.257; 19 Tradesmen v Colombia, Merits, Reparations and Costs, Series C No 109 (IACtHR, 5 July 2004), para.261; Mapiripán Massacre v Colombia, Merits, Reparations and Costs, Series C No 134 (IACtHR, 15 September 2005), para.216; Article 24(2), ICPPED; Principles 2-4, Impunity Principles; and Principle 24, UNBPG.

\textsuperscript{157} Aldana-Pindell n 152, p1439; and Jonathan Doak, Victims’ rights, human rights and criminal justice: Reconceiving the role of third parties, (Hart 2008), p180.

\textsuperscript{158} Aldana-Pindell ibid, p1439; and Hayner n 145, p145-151.

\textsuperscript{159} Bámaca Velásquez v Guatemala, Judgement, Series C No 70 (IACtHR, 25 November 2000), para.77; and 19 Tradesmen v Colombia n 156, para.259.

\textsuperscript{160} Principle 19, Impunity Principles; and Principle 4, UNBPG.

\textsuperscript{161} Aldana-Pindell n 152, p1445-1451.
security; and deterrence of future crimes.\textsuperscript{162} Thus the right to justice can satisfy a number of victims’ practical and emotional needs.\textsuperscript{163}

The right to reparations requires States to provide remedial measures to victims so as to alleviate or heal their harm.\textsuperscript{164} Reparations are meant to, as far as possible, wipe out the consequences of the wrongful act.\textsuperscript{165} Reparations made by a responsible party to victims can connote acknowledgement and vindication of their harm.\textsuperscript{166} They include restitution, compensation, rehabilitation, measures of satisfaction, and guarantees of non-repetition.\textsuperscript{167} Restitution is the return of property or position to victims. Compensation is monetary reimbursement for a victim’s loss. Rehabilitation is physical and mental care, as well as social services to re-instate a victim’s health and social functioning. Measures of satisfaction are meant to remedy victims’ public harm, such as memorials. Guarantees of non-repetition are measures to reform State institutions, such as civilian control of the military. For victims these different types of reparations are required to fully redress their extensive harm, and to address the causes of victimisation.\textsuperscript{168}

Both procedural and substantive rights are complementary parts required together in order to ensure justice for victims. For victims of international crimes, justice is both a means (procedural) and an end (substantive) to remedy their harm. As international criminal justice is a growing mechanism for responding to international crimes it is worth considering the extent to which, in theory, it is responsive to victims’ needs, both in its proceedings and how they benefit from its outcomes.

\begin{footnotes}
\item[163] O’Connell ibid.
\item[164] See 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, A/RES/60/147, 16 December 2005, (hereafter: UNBPG); and Article 14, UN CAT.
\item[166] Danieli n 85, p59.
\item[167] Principles 15-23 UNBPG; and Principles 31-38, Impunity Principles.
\item[168] See Chapter 4.
\end{footnotes}
E. The Role of Victims in International Criminal Justice Mechanisms

As outlined above, the determination of justice in international criminal justice is traditionally based on retributive and utilitarian theories, which has been insufficient in providing justice to victims. In contrast, the International Criminal Court (ICC)\(^{169}\) endeavours to deliver justice to victims beyond these traditional theories. Although this is not explicitly stated as the mandate of the ICC in the Preamble of the Rome Statute, the Statute does include several articles on victim protection, participation, and reparations.\(^{170}\) These articles enable victims to realise some of their procedural and substantive rights.\(^{171}\) In interpreting these articles reference can be made to the Statute’s preparatory works, where the drafters intended to do ‘justice for victims’.\(^{172}\) Similarly during the drafting of the Court’s Rule of Procedure and Evidence the French Justice Minister Elisabeth Guigou stated:

‘The *raison d’être* of our fight are the victims, those who have suffered and are still suffering, those who are waiting for us to find and punish their tormentors, to listen to them and acknowledge their pain and try to mitigate its consequences through fair reparations. Indeed, the victims are, and must remain at the heart of our preoccupations. The recognition of their rights and reparation for any damage, loss or injury to, or in respect of them, are both the reason for and objective of international criminal justice. If we were tempted to forget that requirement, the extremely tragic current events would remind us of it.’\(^{173}\)

Additional interpretative guidance can be found in the Preamble of the Rome Statute. As an integral component of a treaty, which usually comprises of ‘a statement of the motives or objects of the parties in making the treaty, the Preamble ... is a useful guide and aid in interpreting the operative provisions.'\(^{174}\) In the Rome Statute it touches upon the suffering of victims – that during the twentieth century ‘millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity’.\(^{175}\)

\(^{169}\) ICC and ‘the Court’ are used interchangeably throughout this thesis.

\(^{170}\) Articles 68, 75 and 79, Rome Statute. Discussed further in Chapters 3 and 4.

\(^{171}\) See Chapters 3 and 4.


\(^{173}\) Opening Speech, at the International Meeting on ‘Access of Victims to the International Criminal Court’ Paris 27\(^{th}\) April 1999, quoted in Haslam n 148, p325.


\(^{175}\) Paragraph 2, Preamble of the Rome Statute.
Moreover, it declares that State Parties are determined to end impunity for such crimes so as to contribute to their prevention.\textsuperscript{176} This is important to mention with regards to addressing the effects of impunity on victims under human rights law, discussed further below. Based on the interpretation of treaties in the Vienna Convention, these sources together acknowledge implicitly that the object and purpose of the ICC is to deliver justice to victims.\textsuperscript{177} The rest of this section outlines the significance and limitations in delivering justice within international criminal justice, before turning to ascertain what can be achieved within the ICC.

1. **Why should international criminal justice be concerned with delivering justice to victims?**

At first glance the protection of victims’ interests seems unnecessary in international criminal justice, whose primary goal is prosecution and punishment of perpetrators of international crimes. Nevertheless, its inclusion is important for a number of reasons. First, victims have an integral role in the success of international criminal justice mechanisms. They are essential in proving the occurrence of such crimes by testifying and giving evidence to assist investigations and prosecutions. In order to achieve this, providing sufficient protection of their rights is justified to build a sense of trust between the victims and the international criminal justice mechanisms so as to facilitate their pro-active cooperation.

Second, the protection of victims’ rights in criminal justice has a theoretical basis. As criminal courts are concerned with adjudicating on crimes, it is considered unjust that victims, as those most affected by crimes, can have their needs and interests ignored in the determination of justice.\textsuperscript{178} Victims’ rights are meant to ensure justice mechanisms are responsive to their needs and consider their input into proceedings so as to remedy their harm. This resonates well with the theory of corrective justice as discussed above, as well as

\textsuperscript{176} Paragraphs 2 and 5, ibid.
\textsuperscript{177} Articles 31 and 32, Vienna Convention on the Law of Treaties.
\textsuperscript{178} Tallack n 59; and Fry n 59.
procedural justice which emphasises fair treatment of interested parties. Yet, as some commentators argue, international criminal justice suffers from ambiguity of who from it. The international community certainly gains from the prosecution of international crimes as it vindicates international law and their fundamental interests. However, victims are more important beneficiaries owing to their suffering as a result of such crimes. In order to ensure the effectiveness of international criminal justice, those most affected by the crimes should have input into the determination of justice.

Third, incorporating victims reflects the growing development of international standards and domestic practices in criminal proceedings. A number of regional and international standards endorse the role of victims in criminal courts. In many domestic criminal justice systems there have been a number of advances in transforming criminal courts to be more responsive to victims’ needs, such as protection, support and compensation measures, with victim participation to ensure that their interests are presented and taken into consideration in determining justice. The attention to victims as key stakeholders in domestic criminal justice is based on a growing appreciation of their suffering and needs. By way of example, in the United Kingdom victims have access to protection measures during proceedings, support, and compensation, as well as being able to bring private prosecutions and to make personal impact statements during sentencing. Yet, until the ICC, victims in international criminal justice mechanisms remained the objects of justice without any rights to present their needs and interests. The inclusion of justice for victims into the Court is meant to reflect these developments by bringing it in line with

181 See Brienen and Hoegen n 144; and UN Victims’ Declaration.
contemporary practices. The importance of delivering justice to victims has been evident in alternative justice theories.

2. The inclusion of victims within alternative justice theories

A number of alternative justice theories have arisen in reaction to the shortcomings of criminal justice for victims. These theories have tried to include some measure of justice for victims and so can provide some insight into integrating victims as key stakeholders in the determination of justice.

a) Restorative justice

Alongside the advances in victimology and human rights in the past few decades, there has also been an emphasis on restorative justice in delivering justice to victims of domestic crimes. Marshall defines it as ‘a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.’184 Restorative justice processes include family group conferencing and victim-offender mediation. Restorative justice arose as a reaction to the legalism and perceived lack of legitimacy of criminal justice in the 1970s, due to increasing levels of crime and incarceration rates, as well as the unfair treatment of victims.185 Criticisms against criminal justice was directed at its lawyer-dominated process, which was seen to have ‘stolen’ the ‘conflict’ between the offender and victim by failing to protect their interests and ability to determine justice.186 Thus restorative justice is supposed to be a return to more traditional and informal justice by bringing the offender and victim together to discuss how justice can be attained for both parties.

Theoretically, restorative justice could offer a greater appreciation of justice for victims beyond that of criminal justice, as it focuses on the harm caused by the crime, rather than the wrongfullness against society. The offender is shamed by being made to acknowledge what happened, face the consequences of the harm he/she has caused,

186 Christie ibid p4.
empathise with the victim, offer a sincere apology, and make restitution or pay compensation to help the victim to heal. 187 Such outcomes could satisfy victims’ right to reparations by offering material and symbolic measures of redress which may be more important to them than punishment. 188 Additionally, restorative justice could offer victims the truth by establishing what occurred through discussions with the defendant. They are also “able to tell the ‘whole truth’ as they see it”, without evidential rules and procedures that limit them to narrating the facts relevant to a criminal court. 189 Therefore restorative justice could enable victims to realise some of their procedural and substantive rights.

Nonetheless, restorative justice does not always satisfy justice for victims. For some victims, particularly those of serious or violent crimes, facing the offender could be highly traumatic. Without proper safeguards and emotional support restorative justice processes can cause further suffering. 190 Additionally, the importance of healing and restoration over punishment could deny victims’ right to justice. The participation of society or community members can also dominate proceedings and outcomes, such as diverting cases into restorative programmes in order to avoid burdening the criminal courts or to minimise prison populations. 191 As a result, victims can be dissatisfied with restorative justice on account of it not always determining justice based on their needs. 192

b) Human rights law

Klug defines human rights law as ‘victim centred justice’ as it focuses on the responsibility of the State to protect and ensure individuals’ and groups’ fundamental rights and freedoms, as well as to provide an effective remedy when these are violated. 193 Human rights law has also elaborated victims’ procedural and substantive rights. It has found that

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187 See Strang n 108; and John Braithwaite, Crime, Shame, and Reintegration, (CUP 1999).
188 Doak n 157, p263.
189 Doak ibid, p264; and Martha Wright, Justice for Victims and Offenders: A Restorative Response to Crime, (Waterside 1996), p138.
190 Mawby and Walklate n 70, p68.
victim participation in investigations and prosecutions is ‘necessary to safeguard their legitimate interests’. The Inter-American Court has connected this procedural right to victims’ right to truth by keeping them ‘informed about the relevant facts and the responsible parties’. Additionally, human rights law has recognised the need to protect victims in criminal proceedings so as to avoid violation of their right to a private life. With regards to their substantive rights, it has also acknowledged the right to justice should be used in conjunction with reparations to fully remedy victims’ harm. Both procedural and substantive rights are complementary. This can be seen by human rights courts discussing victims’ procedural rights to participation, information, and protection, in order to ensure the effectiveness of their right to justice, i.e. those responsible are identified and punished, and to ensure a transparent process.

Human rights law has also addressed international crimes as gross violations of individuals’ and groups’ rights. Human rights law requires the investigation, identification, prosecution and punishment of those responsible, as well as appropriate reparations so as to effectively remedy the harm caused to victims of gross violations of human rights. Reparations are also necessary alongside the prosecution and punishment of perpetrators so as to counter impunity and its effects. The Inter-American Court of Human Rights has found that impunity ‘fosters chronic recidivism ... and total defencelessness of

194 Shanaghan v the United Kingdom, App no 37715/97 (ECtHR, 4 May 2001) para.92; McKerr v the United Kingdom, App no 28883/95, (ECtHR, 4 May 2001), para.115; and Mapiripán Massacre n 156, para.219.
195 Moiwana Community v Suriname, Preliminary Objections, Merits, Reparations and Costs, Series C No 124 (IACtHR, 15 June 2005), para.147.
196 Doorson v the Netherlands, App no 20524/92 (ECtHR, 26 March 1992), para.70. See also Baegen v Netherlands, App No 16696/90, (Commission Decision, 20 October 1994), para.77.
197 These are explored more in Chapters 3 and 4.
198 Öğur v Turkey App no 21594/93 (ECtHR 20 May 1999), para.92-93; Kaya v Turkey, App no. 22535/93 (ECtHR 28 March 2000), para.124; Caracazo v Venezuela, Reparations, Series C No 95 (IACtHR, 29 August 2002), para.118; and Villagrán Morales et al. Case (The “Street Children” Case) v. Guatemala, Reparations, Series C No 63 (IACtHR, 19 November 1999), para.227. Principle 19, Impunity Principles; and Principles 12-14 UNBPG.
199 See for instance Plan de Sánchez Massacre Ch.1 n 154; Case of the “Las Dos Erres” Massacre v Guatemala Preliminary Objection, Merits, Reparations and Costs, Series C No 211 (IACtHR, November 2009); and Abuyeva and others v Russia, App no.27065/05, (ECtHR, 2 December 2010).
200 See Chapter 4.
victims and their relatives’, prevents the next of kin from ‘knowing the truth’ and hinders their access to justice. Impunity is considered a distinct harm from the criminal act or original violation that needs to be remedied due to its seriousness. Accordingly, ending impunity requires the prevention of future crimes as well as the remedying of the harm caused by it and international crimes through the realisation of victims’ procedural and substantive rights.

While human rights law is victim-centred, the application of human rights law in criminal trials cannot be the sole determination of justice. States also have to protect the rights of the defendant and public interests in a fair and impartial trial. Victims’ rights have been criticised for undermining the rights of the defendant. Nevertheless, the European Court of Human Rights has recognised victims’ distinct interests in criminal proceedings, as they ‘cannot be regarded as either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different.’

The European Court has also found that in order to ensure a fair and impartial trial the rights of the defendant have to be balanced against those of the victims. However, balancing rights is not a zero-sum game, where the benefit gained by one results in the loss of the other, as their interests do not always conflict but may agree, such as in an efficient and speedy trial. Some of victims’ procedural rights, such as information, do not affect the defendant’s rights at all. Even where their rights do conflict, it does not render victims’ rights invalid, as the defendant’s right to fair trial is not an absolute, allowing judges some

201 The “White Van” (Paniagua Morales et al. case) v Guatemala, Series C No 37 (IACtHR, 8 March 1998), para.173.
202 Gomes-Lund et al. (Guerrilha do Araguaia) v Brazil, Merits, Reparations and Costs, Series C No 219, (IACtHR, 24 November 2010), para.173.
203 Case of Anzualdo Castro v Peru, Preliminary Objection, Merits, Reparations and Costs, Series C No 202 (IACtHR, 22 September 2009), para.125.
204 19 Tradesmen n 156, paras.260-263; Plan de Sánchez Ch.1 n 154, paras.95-99; and Moiwana Community n 195, paras.203-205. See the Impunity Principles.
207 Doorson v the Netherlands n 196, para.70.
208 Doak n 157, p246-249.
209 Ibid.
discretion to consider the interests of all the parties in determining justice. For instance, where victims need complete protection from the accused during criminal proceedings, such as anonymity, the European Court has found that it can sometimes be necessary to withhold evidence from the defendant in order to protect them. Conversely, victims’ procedural rights are not absolute, but are malleable to the defendant’s rights and public interests. This interpretative balance better reflects fairness for all parties before a criminal court, rather than focusing exclusively on the defendant. By balancing rights human rights law makes criminal justice more victim-orientated justice.

c) Transitional justice

Transitional justice seeks to remedy the causes and consequences of a conflict so as to create a more peaceful and stable society. In redressing international crimes, transitional justice mechanisms can include truth commissions, national prosecutions, security sector reform, demobilisation and disarming of combatants, reparation bodies, and the use of indigenous or traditional justice mechanisms. Certain transitional justice mechanisms, such as truth and reconciliation commissions, can pay greater attention to victims’ needs, as they are not limited by strict procedural and evidential rules of criminal trials, enabling them to narrate in their own words their experience and needs.

Transitional justice shares some similarities with restorative justice. Procedurally, transitional justice involves more local and informal processes, which encourage the participation of perpetrators, victims, and the community to decide how to respond to international crimes. Substantively, transitional justice can promote reconciliation between perpetrators and victims through apologies, as well as determine truth, justice and reparations in truth commissions, prosecutions, traditional ceremonies, and reparation

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210 Ibid. See Prosecutor v Duško Tadić, IT-94-1, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para.33.
211 Kostovski v the Netherlands App no 11454/85 (ECtHR, 20 November 1982), para.43-44; Doorson v the Netherlands n 196, para.69-72; and Rowe and Davis v the United Kingdom App no 28901/95 (ECtHR, 16 February 2000).
213 Ibid.
214 Hayner n 145, p22.
bodies.\textsuperscript{215} Transitional justice has been termed ‘justice from below’, compared to international criminal justice’s approach of ‘justice from above’\textsuperscript{216} as it can seen as imposing justice on a society by an outside body. Instead, transitional justice is seen to be more organic as it comes from the society itself. It has been suggested that, based on the experience of transitional justice in a number of countries, any long lasting solution must come from within the State itself.\textsuperscript{217}

However, as in restorative justice mechanisms, transitional justice can fail to protect victims’ rights, as other interests can dominate.\textsuperscript{218} For example, in Latin America the use of amnesties for the military juntas denied recognition and justice to victims.\textsuperscript{219} Transitional justice processes, due to their lack of resources, can also involve compromises being made, such as the South African Truth and Reconciliation Commission concentrating only on victims of kidnapping, torture and murder, while ignoring others who suffered harm during apartheid.\textsuperscript{220} Therefore, while transitional justice facilitates a local approach in determining responses to international crimes and enables victims to participate in the processes, it does not always guarantee their rights.

d) Influence on the International Criminal Court

These alternative theories have to a certain extent inspired the Court’s approach in dealing with victims. The drafters of the Rome Statute recognised that having a court which focused solely on retributive justice would be unable to ‘deliver justice in a wider sense ...

\textsuperscript{215} Aldana-Pindell n 152, p1438.
\textsuperscript{216} See Kieran McEvoy and Lorman McGregor, Transitionnal justice from below: grassroots activism and the struggle for change, (Hart 2008).
\textsuperscript{217} Question of the impunity of perpetrators of human rights violations (civil and political), Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, (Joinet Report), E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, para.28.
[including] restorative justice. Muttukumaru and Funk believe that the participation of victims afforded under Article 68(3) of the Rome Statute and reparations under Article 75 supposedly evidences the influence of restorative justice on the ICC. However, the ICC is not a restorative justice mechanism as it follows criminal rules of evidence and procedure which inhibits perpetrators and victims from determining the process and outcome themselves. As such, the ICC remains a retributive institution by using sanctions against perpetrators, such as imprisonment and fines.

The inclusion of victim participation and reparations also exhibit developments in human rights law and transitional justice. The inclusion of reparations in the Rome Statute can be seen as more reparative justice by directly remedying the harm victims have suffered beyond the punishment of the defendant. Additionally, the stipulation of Article 21(3) of the Rome Statute allowing the judges to interpret the Statute in light of internationally recognised human rights requires examining how far the Court, by carrying out the functions of a State by prosecuting perpetrators, will ensure an effective remedy for victims through reparations? Moreover, a human rights approach is also likely to be utilised to achieve an effective balance between the rights of the defendant and victims under Articles 67 and 68 respectively, such as the right of the accused to a public trial under Article 67(1) against permitting closed trials to protect victims under Article 68(2). Victims could also be important in assisting the ICC in fulfilling its purpose of ending impunity. Allowing victims to avail of their procedural and substantiative rights before the Court could help it to counter impunity more effectively. With transitional justice, victim participation at the ICC could also offer local input into the determination of justice at the international level, thereby

223 Article 77. Doak n 157, p221.
224 See Chapter 4.
225 See Chapter 3.
countering some criticisms of international criminal justice of being imposed from above.\footnote{226}{See Prosecutor v Katanga and Chui, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/04-01/07-474, para.163.}

Furthermore, the ICC could have a more integrated role with local justice developments under the principle of complementarity.

e) Complementarity

Article 1 and the Preamble of the Rome Statute state that the Court ‘shall be complementary to national criminal jurisdictions’, with the Preamble further declaring that in ending impunity, ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’.\footnote{227}{Preamble of the Rome Statute, para.6, see also paras. 4 and 10.} The principle of complementarity is further substantiated in Article 17, which permits a case to be admissible to the Court’s jurisdiction only where a State Party is unable or unwilling to investigate or prosecute those responsible. Read together the Preamble, Articles 1 and 17 establish that under the Statute State Parties are obliged to investigate and prosecute all international crimes.\footnote{228}{Kleffner n 174, p251.} Complementarity therefore protects the sovereignty of States by recognising their primary responsibility to prosecute perpetrators of international crimes, due to their obligations under the Rome Statute and international law.\footnote{229}{See the Preamble of the Rome Statute; and William A. Schabas, Complementarity in practice: some uncomplimentary thoughts, \textit{Criminal Law Forum} 19(1) (2008) 5-33, p5. See n.8.} The ICC enables domestic accountability in the first instance. Where a State is unable or unwilling to prosecute and punish those responsible, the Court can intervene and avoid the continuation of impunity, so called ‘negative complementarity’.\footnote{230}{John T. Holmes, The Principle of Complementarity, in R.S. Lee (ed.), n 221, 41-78; and Informal Expert Paper: The principle of complementarity in practice, OTP (2003) p3.} Thus the ICC is a ‘court of last resort’.\footnote{231}{Nicholas Waddell and Phil Clark, \textit{Courting Conflict? Justice, Peace and the ICC in Africa}, (Royal African Society 2008), p8.}

The Office of the Prosecutor (OTP) has also developed positive complementarity as ‘a pro-active policy of co-operation aimed at promoting national proceedings’.\footnote{232}{As well as ‘the Office will encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office}
based on the articles in the Rome Statute on the powers of the Prosecutor and State co-operation.\textsuperscript{233} Under positive complementarity the role of the ICC is to encourage national prosecution so as to ensure accountability and build domestic judicial capacity, so as to enable States to fulfil their obligations.\textsuperscript{234} Therefore the ICC is to act as a ‘catalyst’ for national prosecutions, rather than prosecutorial and judicial workhorse.\textsuperscript{235} This may encourage a longer lasting resolution to impunity by State Parties developing their own solutions as part of transitional justice in light of the Rome Statute. The ‘Rome Statute System’\textsuperscript{236} involving prosecution by both the ICC and State Parties represents a ‘consensual division of labour’ in pursuit of the Rome Statute’s mandate to end impunity.\textsuperscript{237} Where a State does not have the resources to implement mechanisms other State Parties can cooperate to build its capacity.\textsuperscript{238} A challenge remains where a State is unwilling to hold those responsible to account.

The significance of victims in the determination of justice has also been recognised in positive complementarity. The OTP has stated that victim participation in domestic accountability mechanisms is of ‘central importance’ as it “helps ensure that policies for combating impunity effectively respond to victims’ actual needs and, in itself, ‘can help reconstitute the full civic membership of those who were denied the protection of the law in the past’”.\textsuperscript{239} This incorporates developments in international human rights law by equating directly in capacity building or financial or technical assistance.’ Prosecutorial Strategy 2009-2012, OTP (2010) p5.

\textsuperscript{233} Articles 54(3), 59, 86, 88, 89, and 93, Rome Statute.
\textsuperscript{235} Complementarity: Taking stock of the principle of complementarity: bridging the impunity gap, Report of the Bureau of Stocktaking, ASP eight session 22-25\textsuperscript{th} March 2010, para.8.
\textsuperscript{237} OTP ibid p5; and Informal Expert Paper p4.
victims' rights with ending impunity. Ending impunity is seen as a key objective of the Rome Statute and complementarity through investigations and prosecutions of those individuals responsible for international crimes, and as Chapter 4 will discuss the possibility of also including reparations for victims in order to remedy their harm. Nevertheless, there are a number of limitations of international criminal justice in providing justice to victims of international crimes.

3. The limitations of international criminal justice in delivering justice to victims

Justice for victims of international crimes is an expansive concept. The ability of international criminal justice mechanisms to dispense justice to victims of international crimes faces numerous challenges in practice. Four general limitations can be identified. First, international crimes usually involve mass victimisation and perpetration. For each perpetrator to be prosecuted there could be hundreds or thousands of victims. International criminal justice mechanisms are unable to prosecute and punish every perpetrator, because investigations and prosecutions are time consuming, they could have insufficient evidence, and such mechanisms have limited resources. As the ICC is a single institution it is difficult to see how it can prosecute all those responsible, and to provide all victims their procedural and substantive rights.

Second, there are other interests involved in the prosecution and punishment of international crimes besides victims. State parties and the international community have an interest in holding those most responsible to account and ensuring a fair and impartial trial for defendants. They may identify those leaders and military commanders as most responsible for the crimes requiring prosecution before an international criminal justice mechanism, whereas victims may want a low-level individual perpetrator who committed the crime against them prosecuted.

240 19 Tradesmen n 156, paras.260-263; Plan de Sánchez Ch.1 n 154, paras.95-99; Moiwana Community n 195, paras.203-205; and the Impunity Principles.
242 See Chapters 3 and 4.
The prosecution of senior officials and commanders follows the retributive and utilitarian goals of international criminal justice outlined above. As May states, 'victims are not owed convictions; rather it is the larger society, if anyone, that has the right to pursue convictions.' The individual rights of victims are not thus determinative of justice traditionally in international criminal justice mechanisms.

Third, international criminal justice mechanisms can obscure the responsibility of the State and other actors in the victims' suffering through the principle of individual criminal responsibility. This is counter-intuitive to the nature of international crimes, which are often carried out on a mass scale and usually involve the State. Prosecuting all those responsible for international crimes may not be enough to end impunity, especially where State institutions are used to commit atrocities or the State allows a cause of victimisation to remain in place, as was the case in South Africa under apartheid.

Fourth, the use of a criminal court as a response to international crimes enforces a Western conception of justice. Other theories of justice, such as restorative and transitional justice outlined above, may be favoured more by victims and local communities. Informal or indigenous justice forums, such as traditional healing ceremonies, truth telling, reconciliation and reparations, may be considered to be in conflict with international criminal justice mechanisms as they do not determine criminal responsibility. Additionally, accountability and truth in a criminal trial is necessarily linked to the charges and perpetrators brought before it, and its procedural and evidential rules. Consequently, international criminal justice can only offer partial truth and justice to the few victims who are lucky to appear before them.

With regards to the ICC, complementarity may be incompatible with other transitional justice mechanisms. Article 17(1)(a) of the Rome Statute on admissibility of

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244 See Articles 1 and 25, Rome Statute.
246 See Chapter 3.
247 Groenhuijsen and Pemberton n 11, p17. As discussed in Chapter 4 reparations before the ICC are also likely to be limited.
cases before the ICC, states that ‘the Court shall determine that a case is inadmissible where ... [it] is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.’ Based on this article Ryngaert suggests that all international crimes are admissible before the ICC if the State does not utilise criminal justice, but in so doing complementarity precludes the use of other transitional justice mechanisms. Consequently alternative mechanisms to prosecutions and punishments may be contrary to complementarity. However, the exclusion of alternative justice mechanisms to prosecution may not satisfy victims’ needs. For instance, the use of amnesties and traditional ceremonies for perpetrators of international crimes in the situation in Northern Uganda was seen as in conflict with arrest warrants issued by the ICC. This suggests that international criminal justice mechanisms can impose on a society a notion of justice without being responsive to their local needs. Additionally, as an examination of the Uganda situation demonstrates in Chapter 5, international criminal justice can simplify the complexity of international crimes by punishing perpetrators, when such individuals may also be victims as in the case of child soldiers.

4. Justice for victims within the International Criminal Court

In order to reconcile justice for victims with the limitations of international criminal justice mechanisms, it is worth outlining how justice for victims can be maximised with the framework of the ICC, so as to provide a benchmark to analyse the practice of the Court in subsequent Chapters. This thesis proposes that the Rome Statute represents the pursuit of justice for victims of international crimes by both the ICC and State Parties. Correspondingly, justice for victims can be divided between an internal and external element. The internal element involves the Court’s proceedings and outcomes to provide procedural and substantive justice to victims,

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248 Ryngaert n 234, p164.
249 See Allen n 116; and Chapter 5.
although owing to competing interests of other parties, the Court cannot deliver victim-centred justice. Instead the Court offers victim-orientated justice by being responsive, as far as possible, to victims' needs without fundamentally violating the rights of the defendant and other interests. As Vasiliev asserts the ICC is a compromise between victims' rights and criminal justice. The extent to which the Court dispenses victim-orientated justice will be expanded upon and examined in Chapters 3 and 4.

The external element refers to delivering justice beyond the ICC through positive complementarity. A victim-orientated approach to complementarity involves recognising victims' suffering and rights so as to remedy their harm and the causes of victimisation at the local or national level. The intervention of the Court in a country could demonstrate exemplary fair trial practices to domestic criminal justice systems. Additionally, positive complementarity could encourage the establishment of domestic transitional justice mechanisms alongside criminal courts so as to realise victims' substantive rights, such as truth commissions and reparation bodies. Thus through positive complementarity the ICC could catalyse domestic mechanisms so as to ensure access to justice for victims outside the jurisdiction of the Court. The ICC is not only a last resort for victims, but also a vehicle for developing local access to justice for them. As discussed in Chapter 4, placing responsibility on State Parties to deliver justice to victims is consistent with their obligations under international law. This external element will be evaluated in Chapter 5 with regards to the situation in Uganda before the ICC.

F. Conclusion

The attention to victims within the ICC suggests the insufficiency of previous international criminal justice mechanisms to respond to their needs in redressing international crimes. Understanding how justice can be attained for victims within the ICC and with State Parties is imperative in ensuring an effective remedy for the harm victims have suffered as a result of international crimes. Justice for victims is not an exclusive goal

250 Vasiliev n 5, p677.
of the ICC, but integral to ending impunity and doing justice for international crimes. Nonetheless, the extent to which this purpose is achieved requires an analysis of the practice of the Court. The following Chapter assesses the historical context of international criminal justice mechanisms and their attention to victims’ needs. The examination of past tribunals serves to contrast the practice of the ICC in Chapters 3 and 4 in delivering justice to victims.
II. The Development of Victims in International Criminal Justice

A. Introduction

While the prosecution of crimes in domestic jurisdictions has been practised for centuries, it has only been established at the international level since the end of the Second World War.¹ Victims, as those most affected by international crimes, have often been neglected in international criminal tribunals. This is due to the retributive focus of international criminal justice in prosecuting and punishing perpetra tors of international crimes. This Chapter analyses the role of victims in international criminal tribunals after the Second World War and the ad hoc tribunals established in the 1990s prior to the ICC so as to assess whether or not they provided justice for victims. This can provide a historical background to the development of victim provisions at the ICC and the construction of victim-orientated justice.

As discussed in Chapter One, victim-orientated justice concerns courts being responsive to victims’ needs, both procedurally and substantively, and reaching a fair balance with other interested parties. This can be examined in three areas: recognition, procedural and substantive justice for victims. Recognition is distinguished from procedural justice due to its importance in determining who is a victim before an international criminal tribunal, and therefore victims’ access to provisions. Procedural justice is supposed to respect victims’ input into the decision-making process and prevent them from suffering any secondary victimisation. Substantive justice is the realisation of their rights to truth, justice and reparations. Based on these three areas, this Chapter begins by considering the international criminal tribunals of the Second World War in Nuremberg and Tokyo, before a more extensive discussion of the ad hoc tribunals, arising out of their more developed legal frameworks for victims. In concluding, this Chapter finds that international criminal justice mechanisms have been important in holding senior perpetrators to account, but have not

¹ Although there are certain exceptions, such as the trial of Peter von Hagenbach in Breisach in 1474. Schabas Ch.1 n 52, p1-2.
engendered justice for victims. As the ad hoc tribunals have recognised, achieving this goal is challenging because of the scale of harm caused by international crimes.

B. The Second World War Tribunals

The Second World War resulted in the greatest loss of human life in history, with some fifty to seventy million people killed and tens of millions left physically and emotionally scarred. In its aftermath international criminal justice was established at Nuremberg and Tokyo. During the war, the Allies (America, Britain, France, and the Soviet Union) were determined that those responsible for such atrocities would be held to account.2

On the 18th October 1945 the Nuremberg Tribunal (IMT) was founded by the Allies to prosecute Nazi crimes in the European theatre.3 This was followed on the 5th May 1946 with the establishment of the Tokyo Tribunal (IMTFE) to prosecute Japanese forces for crimes committed in the Pacific and Asia.4

This is in contrast to the experience of the First World War where the international community was divided in its response to international crimes.5 In the aftermath of the First World War there was an impetus to prosecute Germany and the Ottoman Empire for atrocities committed during the conflict so as to address the suffering of victims and their 'cries for justice.'6 The subsequent national trials in Germany and Turkey recognised the crimes committed by German and Ottoman forces, including the organised massacres of the Armenians.7 These trials also provided victims with the right to participate as parties.8 Yet,

4 Created by the Charter for the International Military Tribunal for the Far East, Tokyo, 19 January 1946, (Tokyo Charter).
owing to a lack of concerted international pressure these trials only prosecuted a handful of low-ranking subordinates excluding those most responsible for international crimes, such as Kaiser Wilhelm II (in exile in the Netherlands) and members of the Turkish government.9

Since these trials, the Tribunals of the Second World War experienced a procedural shift from civil to common law owing to America’s influence on their design. By instituting a common law adversarial trial approach to proceedings, the Americans wanted to ensure that the defendant received a fair trial through contesting evidence with the Prosecutor. However, adversarial trials limit victims’ procedural rights to testifying as victim-witnesses and only recognise their suffering if the defendant is convicted.10 Until the conviction, they remain ‘alleged victims’. The incorporation of the adversarial trial also evidences retributive justice by focusing on punishing the wrongfulness of the perpetrators’ actions whilst ensuring their rights to due process. Consequently, the adoption of adversarial trial proceedings at Nuremberg and Tokyo diminished the role of victims in international criminal justice for sixty years until the formation of the ICC.

Throughout the negotiations and proceedings of the Second World War Tribunals victims’ suffering was often invoked to justify the punishment of individuals before an international court. The Allied Prosecutors’ speeches were replete with statements beseeching the judges to ensure the defendants were punished on behalf of the victims. At Nuremberg the French Prosecutor De Ribes in his closing statement implored the judges ‘to heed the voice of innocent blood crying for justice.’11 The American Chief Prosecutor, Robert Jackson, called upon the Tribunal to find the defendants guilty so that ‘justice may be done to these individuals as to their countless victims.’12 For victims of atrocities, the trials

8 Due to the civil law system in Germany and the civil and Islamic law mixed system in the Ottoman Empire. In Germany see Reichs-Gesetzblatt No.247, p2125-2126 (1919) Section 6, available from: http://alex.onb.ac.at. For Turkey see John A. Strachey Bucknill and Haig Apisoghom S. Utidjian, The Imperial Ottoman Penal Code, (OUP 1913).
10 Doak Ch.1 n 157, p34-36.
11 IMT Transcripts Vol. XIX p569.
were intended to provide a 'symbolic' sense of justice and vindication' by punishing the Nazi and Japanese leadership. As the discussion on victim recognition and provisions will reveal, justice for victims was simply construed as retribution by punishing the wrongful acts of the defendants.

1. Victim recognition

The London and the Tokyo Charters, which establish the Nuremberg and Tokyo Tribunals respectfully, made no reference to victims. Only in the Potsdam Declaration, which paved the way for the Tokyo Tribunal, were mistreated Allied prisoners of war referred to as victims. Victim recognition was instead associated with the stipulation of the three crimes under the jurisdiction of the Tribunals: crimes against peace, war crimes, and crimes against humanity. The Tribunals acknowledged the various forms of victimisation. The Nuremberg Tribunal documented the commission of crimes against civilians and minorities by the Nazis. The Tokyo Tribunal recognised rape as an international crime, as well as prosecuting numerous other crimes. While these crimes recognised individual victims' suffering in the war, the Tribunals focused on the crimes against peace, due to American dominance. The Americans deemed crimes against peace or waging an aggressive war as the principal crimes committed by the Nazis and the Japanese, with war crimes and crimes against humanity as only manifestations of aggression. This focus on aggression takes an international law approach, rather than a criminal one, by recognising States as the primary injured parties rather than individuals as victims.

15 Potsdam Declaration, para.10.
16 Article 6 of the IMT Charter; and Article 5 IMTFE Charter.
17 See IMTFE Vol. XX p49604-49640.
18 Article 6(a). Donald Bloxham, Genocide on Trial: Law and Collective Memory, in Reginbogin et al. n 14, 72-85, p72.
19 See Britain’s Chief Prosecutor Sir Hartley Shawcross presentation on aggression, IMT Vol.III.
The Tribunals did introduce crimes against humanity into international criminal law. However, it had a subsidiary position to crimes against peace and war crimes, as they had to be committed “in execution of or in connection with any crime within the jurisdiction of the Tribunal.” Moreover, the Nuremberg Tribunal in its final judgment excluded crimes against humanity committed before the war, such as the persecution of the Jewish community in Germany pre-1939, as it found that ‘revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime.’ The Tribunal thus denied the recognition of numerous German victims due to the limits of the Charter.

Additionally, the Tribunals did not representatively recognise all victims of atrocities committed during the war. Crimes committed by the Allies, such as the Soviet Union’s massacre of Polish officers in Katyn, the mass rape of German women, and the United States’ use of atomic bombs on Hiroshima and Nagasaki, were not investigated or prosecuted emphasising the role of the Tribunals as manifestations of victor’s justice. Additionally, at the Tokyo Tribunal the focus on Allied prisoners and a select group of Asian victims excluded other crimes, such as the sexual slavery of the ‘comfort women’, making the Tribunal appear as a ‘white man’s Tribunal.’ As such, the Tribunals provided very selective recognition of victims’ suffering, which obscured certain truths and historical narratives of the conflict.

2. Procedural justice for victims

The Nuremberg and Tokyo Charters made no reference to any provisions for victims on participation, protection and support. At Nuremberg, efforts by the Institute for Jewish Affairs to participate in the trial as a party through *amicus curiae* (friend of the court) were

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20 Article 6(c) IMT Charter; and Article 5(c) IMTFE Charter.
21 IMT Vol. XXII p498.
22 Albin Elser, The International Military Tribunal at Nuremberg from a German Perspective, in Reginbogin et al. n.11, 53-59, p59.
rejected. The Tribunal considered that the participation of victims, who could potentially number in their millions, would threaten to render the trial unworkable and unfair. Therefore, victims only participated as witnesses before both Tribunals. At the Nuremberg Tribunal fourteen victim-witnesses testified, and twenty-seven at the Tokyo Tribunal. Victim-witnesses testified on their own personal suffering, their identification of the defendants at the scenes of atrocities, and on the suffering of others. The small number of victims called before the Tribunals was due to the Prosecutors’ reliance on documentary evidence to make the trial more impartial and credible. However, owing to less documentary evidence at the Tokyo Tribunal, the Prosecutors had to depend more on witnesses and affidavits.

The Tribunals offered victims little in the way of protection and support. At the Nuremberg Tribunal victims were housed in a witness house, but often came into contact with high ranking Nazi and SS officers, putting them at risk of suffering further trauma. With regards to treatment, victims were at times blamed or their credibility questioned in an intimidating way. Moreover, victims were not able to tell their story in narrative form. Instead, they were often interrupted, questioned, and directed not to focus on irrelevant points which they felt were important. Accordingly, the proceedings of the Nuremberg and Tokyo Tribunals based on an adversarial trial were focused on prosecuting perpetrators of international crimes and neglected the procedural needs of victims.

3. Substantive justice for victims

In their final judgments, the Nuremberg and Tokyo Tribunals found nineteen senior Nazi and twenty-five senior Japanese leaders guilty of international crimes. The Tribunals

26 Ibid.
31 For instance: IMT Vol.VI, 28 January 1946p304.
for the first time prosecuted international crimes at the international level offering recognition to certain victims and condemnation of the harm they suffered. However, the Tribunals fell short of offering justice to victims by failing to respond to their needs and to representatively recognise those who suffered. In relation to reparations, under Article 28 of the Nuremberg Charter, the Tribunal could make restitution for stolen property. However, restitution was to be made to the Allied Control Council rather than to specific victims, though the Tribunal never issued any restitution orders.32 The Tokyo Charter made no reference to reparations. Only in the Potsdam Declaration, a preparatory document of the Tokyo Tribunal, was a reference made to the ‘exaction of just reparations in kind’,33 but the matter was not raised before the Tribunal. The disregard for reparations further demonstrated the indifference by the Allies towards victims.34 While it would have been impossible for the Tribunals to provide reparations to the tens of millions of victims, they could have called for it in their judgment to be enforced by States.

Consequently, Danieli, a psychologist specialising on victims of the Holocaust, contends that the failure of the Tribunals to recognise victims’ suffering caused many to face denial, be blamed for their own suffering, and forced into a ‘conspiracy of silence’, as no one understood their harm.35 This psychological impact hindered victims’ healing and had a detrimental impact upon their health.36 For decades victims sought justice through other courts and tribunals, such as in the Barbie and Papon trials in France, the Eichmann trial in Israel, and the Women Tribunal on Japanese Military Sexual Slavery, which all provided them with the ability to participate and in certain cases claim reparations.37

32 Garkawe, n 14, p86.
33 Potsdam Declaration, para.11.
36 Ibid.
Accordingly, the Second World War Tribunals were unresponsive to the needs of victims. Instead they were used to rationalise and legitimise the punishment of defendants. As one Auschwitz survivor stated, 'justice was a far-away concept. It certainly was not available on a personal or local level. The Nuremberg trials were a distant happening, important for the abstract concept of international law, but did not touch us personally then.'

The subsequent manifestations of international criminal justice have made a greater effort to tailor justice to victims’ needs and interests.

C. The Ad hoc Tribunals

1. Introduction

It was not until the end of the Cold War that international criminal justice arose again as the answer to international crimes. In response to widespread violence against civilians in the former Yugoslavia, in 1993 the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY). The Tribunal’s purpose was the ‘prosecution of persons responsible for serious violations of international humanitarian law’ in the hope of bringing them to justice in order to contribute to reconciliation and the restoration of peace in the region. In the following year, the genocide in Rwanda again prompted the UN Security Council to create the International Criminal Tribunal (ICTR) to investigate and prosecute those responsible for the international crimes being committed in Rwanda. The purpose of the ICTR was to end the ‘cycle of impunity’ by prosecuting those responsible with the hope that it would promote reconciliation, and the restoration and maintenance of peace.

This section begins by discussing the development of victims’ rights and procedural role since the Second World War before considering the influence of such advances on the drafting of the ad hoc tribunals. The second sub-section analyses the recognition of victims.

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38 Frederick Tena, quoted in Danieli n 35, p1642-1643.
40 UN Resolutions 808 and 827.
42 Ibid, Preamble.
by the ICTY and ICTR. The third sub-section examines whether the Tribunals provided procedural and substantive justice to victims within their legal frameworks and practices, in order to determine how responsive they were to victims’ needs.

2. The development of the role of victims and their influence on the drafting of the ad hoc tribunals

In the interim between the Second World War and the ad hoc tribunals in the 1990s, there had been greater recognition of victims and their role in criminal proceedings through the evolution of victimology, international law and human rights law. Victimology has developed from the categorisation of victimisation to the understanding that victims need to be able to participate, as well as seek protection and support within criminal justice systems. Since the 1970s victim groups in numerous States have advocated for criminal justice systems to be more ‘victim-friendly’ through the introduction of new procedures, standards, and rights. The culmination of this advocacy was the adoption of the UN Victims’ Declaration that recognised victims’ needs in justice. The Victims’ Declaration defines victims as persons who individually or collectively suffer harm as a result of crimes, and includes indirect victims, such as family members. Principle 6 of the Declaration stipulates that judicial mechanisms should be responsive to victims’ needs and interests.

International law and human rights law have also advanced the protection of individual and group rights through numerous conventions, such as the 1948 UN Convention on Genocide, the 1948 Universal Declaration of Human Rights, the four Geneva Conventions of 1949 and the 1977 Additional Protocols I and II to the Geneva

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43 See Bassiouni Ch.1 n 154.
45 See Doak Ch.1 n 157; and Bassiouni Ch.1 n 154.
47 Principles 1 and 2.
49 General Assembly Res. 217 A (III), 10 December 1948.

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Conventions, the 1950 European Convention of Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1969 American Convention on Human Rights, the 1981 African Charter on Human and Peoples’ Rights, the 1984 UN Convention against Torture, and the 1989 UN Convention on the Rights of the Child. Human rights law established after the Second World War has also recognised each individual’s inherent human dignity, autonomy, freedoms, and rights that impose obligations on States to ensure a remedy to victims’ harm.

These developments encouraged a number of States to support the inclusion of victim articles during drafting of the ICTY Statute. The Islamic delegation strongly advocated victims’ rights based on their domestic practices and international human rights law. The delegation suggested that victims should have access to protection measures, which were in part incorporated under Article 22 of the Statute. Furthermore, they recognised that they should be compensated by governments. However, this was excluded from the final draft of the Statute. The French delegation also supported victims’ rights on the basis of human rights law, as well as recognising their importance in ensuring the long term effectiveness and credibility of the ICTY, so as to avoid the Tribunal being purely


51 CETs No.005, 4 November 1950.


55 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Res. 39/46, 10 December 1984.


57 See Doak n 157, p31-33.

58 Letter dated 31 March 1993 from the representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey to the United Nations addressed to the Secretary-General, S/25512, 5 April 1993; Part III(2).

59 Ibid. Part III(1-3) and Part V(1).

60 Ibid. Part III(4-5). See Chapter 4.
symbolic.\textsuperscript{61} The delegation proposed closed hearings to protect victims,\textsuperscript{62} although they were opposed to reparations on the grounds that they would make the Tribunal ineffective by flooding it with claims, finding that it should instead be provided through national courts.\textsuperscript{63} It was this proposal on reparations that was incorporated into the ICTY Rules of Procedure and Evidence.\textsuperscript{64} While the drafting of the Statute included a number of States, from common, civil, and Islamic law jurisdictions, it was mainly influenced by the proposals of the United States due its position on the Security Council.\textsuperscript{65} Its proposal only provided protection measures to testifying victims.\textsuperscript{66}

Nonetheless, the resulting ICTY Statute included a number of articles for victims incorporating some procedural rights, such as protection and support under Article 22, and restitution in Article 24(3). As the Statute of the ICTR was a ‘boilerplate’ copy of the ICTY, many of the articles are nearly identical in both Tribunals.\textsuperscript{67} For the first time in international criminal justice, victims are mentioned throughout the governing Statute and in the Rules of Procedure and Evidence (RPE).\textsuperscript{68} The ad hoc tribunals also established a Victims and Witnesses Section to provide support and protection to victims.\textsuperscript{69} The ICTY and ICTR Statutes therefore signified the incorporation of victims in international criminal justice, but not necessarily justice for victims, as can been seen from the degree to which they were granted formal recognition.

3. **Victim recognition**

Victims are defined under common Rule 2(A) of both Tribunals as a ‘person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.’\(^70\) The use of the word ‘allegedly’ reinforces an adversarial trial position, as individuals are only recognised as victims once the accused has been successfully convicted. This is contrary to the UN Victims’ Declaration, where a victim is recognised regardless if their perpetrator is ‘identified, apprehended, prosecuted or convicted’.\(^71\) Additionally, the ad hoc tribunals’ definition of a victim only recognises direct and individual victims by use of the language of ‘committed against’ and ‘person’. As discussed in Chapter One, this definition narrowly recognises the suffering caused by international crimes, which also causes indirect and collective harm.\(^72\)

Owing to legal developments in the interim the ad hoc tribunals have a wider jurisdiction over crimes than Nuremberg and Tokyo.\(^73\) This provides a greater recognition of victims' suffering. Most notably they have developed the scope of crimes against humanity by not requiring them to be connected to an internal or international armed conflict, thereby going beyond the Second World War Tribunals.\(^74\) In the *Akayesu* case, the ICTR recognised Tutsis as victims of genocide, even though they did not fall under a distinct ethnic group under the Genocide Convention, due to their common language and culture with Hutus. However, the Tribunal interpreted this in light of the travaux préparatoires of the Genocide Convention, which was meant to protect ‘any stable and permanent group’.\(^75\) The Tribunal in *Akayesu* also found that because genocide is carried out against groups, both the group and the individual are victims, acknowledging the harm that occurs to each.\(^76\) Additionally, the

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\(^70\) RPE of the ICTY and ICTR.

\(^71\) Principle 2.

\(^72\) See UN Victims’ Declaration, Principle 2.

\(^73\) Articles 2-5 ICTY Statute, and Articles 2-4 ICTR Statute.

\(^74\) See *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

\(^75\) Ibid, paras. 516, and 701-702.

ICTR expanded the other forms of genocide to include rape and ‘slow death’ conditions.\textsuperscript{77} Rape was determined to be an act of ‘physical invasion of a sexual nature, committed on a person under circumstances which are coercive.’\textsuperscript{78} The use of the word ‘invasion’ defines the crime from the perspective of the victim rather than from the perpetrator who ‘penetrates’, and ‘coercive’ excludes the issue of consent.\textsuperscript{79} The ICTY amongst other jurisprudential developments recognised sexual slavery as a crime.\textsuperscript{80} In the Tadić case, the Tribunal found ill-treatment, torture, sexual violence and murder had occurred in Omarska, Keraterm and Trnopolje concentration camps against Muslims and Croats by Bosnian Serbs.\textsuperscript{81} In the Krstić case, the ICTY found genocide had taken place with the massacre of 7,000 to 8,000 Bosnian Muslim males in and around Srebrenica in 1995.\textsuperscript{82} Nevertheless, the narrow jurisdiction of the ICTR limited victim recognition and prevented the contextualisation of the violence of other massacres committed before, during, and after the 1994 Rwandan genocide, such as Burundian genocide in 1993 and the conflicts in the Democratic Republic of Congo 1996-2002.\textsuperscript{83} In contrast, the ICTY had an open-ended temporal jurisdiction beginning on the 1\textsuperscript{st} January 1991 and territorial jurisdiction over the whole of the former Yugoslavia.\textsuperscript{84} This enabled the Tribunal to assert its jurisdiction over crimes committed in Kosovo in 1999, as well as prosecuting all the local parties in the conflict.\textsuperscript{85}

\textsuperscript{77} Prosecutor v Akayesu, Judgement, ICTR-96-4-T, 2 September 1998, paras.505-508.
\textsuperscript{78} Ibid para.598.
\textsuperscript{80} The Prosecutor v Kunarac, Kovac and Vukovic, IT-96-23-T and IT-96-23/1-T 22 February 2001.
\textsuperscript{81} The Prosecutor v Tadić, Judgement, IT-94-1-T, 7 May 1997.
\textsuperscript{82} The Prosecutor v Krstić, Trial Judgement, IT-98-33-T 2 August 2001.
\textsuperscript{84} Article 8 ICTY Statute.
The selection of perpetrators and charges are also important in recognising victims. A victim-orientated approach, which is consistent with the critical victimology of recognising those who suffer as a result of a crime discussed in the previous Chapter, would provide a representative picture of their suffering in the perpetrators and crimes charges. The ICTY Prosecutors have taken different approaches. In the Milošević case, the Prosecutor believed that despite the length of the case she had a ‘duty to the victims’ to ensure that they are representatively recognised by the charges brought against the defendant. The prosecution tried to ensure a representative picture of victimisation caused by Milošević was evidenced in the charges by including victims in Bosnia, Croatia, and Kosovo, so-called ‘just representation’. However, the defendant died after four years of proceedings and without a judgment. The death of Milošević left his victims with ‘little justice’, by preventing them from being recognised, and the defendant being held responsible for his crimes. Conversely, in some cases regarding sexual crimes, the prosecution neglected its ‘duty’ to represent victims, with charges being reduced in order to expedite the trial. For instance, in the case of Milan and Sredoje Lukić, charges of rape and sexual violence were dropped from the indictments so as to speed up the trial to the anger of many victims. Additionally, in certain cases charges of genocide were discontinued due to a plea bargain, or not appealed owing to the discretion of the Prosecutor, despite the facts indicating that the defendants were involved in committing or aiding genocide.

With regards to the ICTR, the Tribunal has not adequately recognised the suffering of all victims. The Akayesu case can be seen as an ‘anomaly’ in the prosecution and the

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86 Prosecutor v Milošević, 29th November 2005, transcript p46654.
87 See Prosecutor v Slobodan Milošević, IT-02-54-T, Second Amended Indictment, 28 July 2004.
development of the jurisprudence of the ICTR on sexual crimes. Although Akayesu recognised rape as an endemic part of the genocide with 250,000 to 500,000 victims, there have been very few prosecutions before the ICTR. Furthermore, the crime of sexual slavery has also been neglected by the ICTR, despite 84,000-166,000 women being enslaved for gang rape. Many of the cases before the Tribunal have resulted in rape acquittals, charges dropped, or rape evidence disregarded. In the Cyangugu case, no sexual charges were included in the indictment, even though widespread rape was documented in the area under the defendants’ control. Additionally, there was prolonged engagement by victims’ groups to tell their experience of rape to ICTR investigators, and an amicus curiae submission on their behalf to the ICTR to include rape in the charges. The ICTR also refused to prosecute members of the Tutsi Rwandan Patriotic Front which overthrew the genocidal government in 1994, despite the crimes it committed during the genocide in Rwanda and after in the Congo. As a result, some Rwandan Hutus consider the Tribunal as the TPIH – le Tribunal Penal International pour les Hutus. This ‘one-dimensional’ approach and claims of 'victor’s justice’ for the RPF at the ICTR are significant in undermining the Tribunal’s mandate, particularly in ending impunity.

Representative recognition of victims is difficult to achieve in international criminal justice mechanisms, and is dependent on prosecutorial discretion. There is no obligation on

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92 Nowrojee ibid, p114.
93 De Brouwer n 79, p54-55.
94 Askin n 91, p1008; and Nowrojee n 91, p109 and 116. See Prosecutor v Muvunya, ICTR-2000-55A, Decision on the Prosecutor Motion to Drop Rape Charges against Muvunya, 23 February 2005.
96 See Prunier n 83; and Mapping report n 83.
the Prosecutor to prosecute certain crimes or to take into account the wishes of victims. As outlined in the previous Chapter, while international criminal justice is necessarily selective, the lack of recognition of certain groups and crimes can cause secondary victimisation. Other factors, such as ensuring an expeditious trial and convictions, can have a greater influence on the Prosecutor’s discretion to prosecute certain defendants and crimes over others, than considering victims’ interests. The Milošević case shows the difficulty in trying to recognise representatively victims of international crimes. Thus representation of victims’ suffering needs to be tempered with expediency. Selective prosecutions at the ICTR undermined the whole impartiality and purpose of the Tribunal by ensuring impunity and denying justice for victims, indicating the need for some judicial oversight of Prosecutor’s discretion in order to ensure their perceived fairness. Nonetheless, the ICTY and ICTR did provide a number of provisions to victims who were recognised before them.

4. Procedural justice for victims

The ad hoc tribunals Statutes and Rules outline victim provisions on participation, treatment, protection and support. As such, the Tribunals recognise some of victims’ procedural rights. However, their practice has not been victim-orientated as victims have not been treated with respect nor have their interests been fairly balanced with those of other parties.

a) Victim participation

There are four ways victims can participate before the ICTY and the ICTR: *amicus curiae*; writing a letter to the Prosecutor; victim impact statements; and testifying as witnesses. With regards to the first of these participation measures, under Rule 74 of the Rules of Procedure and Evidence (RPE) of both Tribunals, any State, organisation, or person can make an *amicus curiae* application to the Chamber to aid in the ‘proper determination of the case.’ A Chamber decides which submissions are relevant, leaving some victims with no

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100 Heikkilä Ch.1 n 27, p135.
right to participate. As victims are unlikely to have the resources, expertise, and information required to submit an application, only a few amics were submitted on their behalf by NGOs and academics.\textsuperscript{101} The Tribunals dismissed \textit{amicus curiae} that tried to allow victims to participate in proceedings. For instance, in the \textit{Bagasora} case before the ICTR, there were three separate \textit{amicus curiae} applications on behalf of victims by the Belgian and Rwandan governments as well as African Concern.\textsuperscript{102} These \textit{amicis} were rejected by the Trial Chamber on the grounds that presentation of evidence and witnesses was best suited for the prosecution and the defence.\textsuperscript{103} The Tribunal’s approach was to protect the two-party adversarial trial proceedings, which would have been upset by introducing victims as participants through \textit{amicus curiae}.\textsuperscript{104} However, this neglected victims’ input into proceedings which consequently affects their interests, and denied them procedural justice.

Victims can also contact the Prosecutor directly through correspondence, yet like \textit{amicus curiae} they require the resources, expertise, and information to advocate effectively their interests. NGOs, especially the Coalition for Women’s Human Rights in Conflict Situations, played a vital role in filling this gap.\textsuperscript{105} However, the impact of victims’ correspondences on the Prosecutor’s discretion is questionable.\textsuperscript{106} For instance, in the \textit{Muvunyi} case the Coalition submitted a letter to the Prosecutor to investigate sexual violence and to continue to prosecute rape, but at the trial he presented no evidence on these crimes.\textsuperscript{107} The third way victims can participate is through submitting written impact statements on

\textsuperscript{102} \textit{Prosecutor v Théoneste Bagasora}, Amicus Curiae: Letter from Geert Muyelle to Mr Agwu Ukiwe Okali, ICTR-96-7-T, 10 February 1998; Demande introduite par African Concern aux fins d’autorisation de déposer un mémoire en qualité d’amicus curiae dans l’affaire Le Procureur c. Theoneste Bagosora, 4 December 1998; and Request by the Government of Rwanda for Leave to Appear as Amicus Curiae, 18 June 1999.
\textsuperscript{103} \textit{Prosecutor v Bagasora} case, Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium, ICTR-96-7-T, 6 June 1998, p4; Decision on the Amicus Curiae Application by African Concern, ICTR-96-7-T, 23 March 2004; and Decision on the Amicus Curiae Application by the Government of Rwanda, 13 October 2004.
\textsuperscript{104} McGonigle Ch.1 n27, p142.
\textsuperscript{105} \textit{De Brouwer} n 79, p300-301.
\textsuperscript{106} Ibid. See Coalition’s Letter to Prosecutor Jallow, Regarding the Need to Step-up Sexual Violence Investigations in the Case of Former Commander Muvunyi, and Not to Drop Rape Charges, 8 February 2005.
how the crime affected them to a Chamber when it is determining the defendant’s sentence.\textsuperscript{108} Victim impact statements are derived from the practice of common law countries, which permit victims to express their views and influence the severity of sentencing.\textsuperscript{109} These statements are under the discretion of the Chamber to consider such information, leaving victims without any guaranteed access to have their voices heard by the Tribunal.

In light of the limitations of the preceding participation modalities, victims mostly appear before the ad hoc tribunals as witnesses. Unlike Nuremberg’s vast documentary evidence, the ICTY and ICTR rely heavily on witnesses, especially victim-witnesses, to testify on crimes. As of July 2012, over 4,300 witnesses have testified at the ICTY,\textsuperscript{110} and over 3,000 at the ICTR.\textsuperscript{111} This is in comparison to 94 witnesses at Nuremberg and 419 at Tokyo.\textsuperscript{112} For many witnesses, testifying at the Tribunals is a positive experience and most would testify again.\textsuperscript{113} Many of them considered testifying as their ‘moral duty’, by speaking on behalf of those who died, which provided them with some closure and satisfaction.\textsuperscript{114} The ICTY claimed that it had given a voice to the victims by enabling them to be heard and to speak about their suffering through testifying.\textsuperscript{115}

However, for some victims and witnesses, testifying before the Tribunal can be discouraging due to narrow focus of proceedings. As in domestic criminal proceedings, the Tribunals confine victim-witnesses’ testimony to issues that are relevant to the case and charges at hand, rather than permitting them to ‘tell their story’ in narrative form.\textsuperscript{116} The Tribunals had limited resources and time, and therefore could not allow victims to testify at length. Victims became frustrated when they were interrupted during their testimony and

\textsuperscript{108} Rule 92bis (A)(i)(d) RPE.
\textsuperscript{109} See Doak Ch.1 n 157, p150-151.
\textsuperscript{111} See ICTR Annual Reports 1996-2011 to the UN General Assembly and Security Council.
\textsuperscript{112} Though the Nuremberg Tribunal only lasted less than a year and the Tokyo Tribunal two and half years, the ICTY and ICTR adjudicated for over twenty years.
\textsuperscript{113} Stover n 63, p103.
\textsuperscript{114} See ibid.
\textsuperscript{116} McGonigle Ch.1 n27, p141.
asked to focus on certain facts, rather than to testify on what they saw as important.\textsuperscript{117} A more responsive approach to victims' needs in testifying would have been to allow them to testify in their own words, and then to question them. This would incorporate procedural justice by respecting their input and worth by listening to what they want to say.

Both Tribunals have created outreach programmes to inform victims and affected communities of proceedings and developments of the ICTY and ICTR. These programmes involve training seminars and workshops for legal practitioners and students, community meetings, and films on the Tribunals' work.\textsuperscript{118} Outreach is also supposed to provide local communities ownership of the Tribunals' work.\textsuperscript{119} However, due to limited funds and not being established from the outset, the outreach programmes have failed to fully inform victims. A 2002 survey of 2,091 Rwandans found that 87\% were not well informed or not informed at all about the work of the Tribunal.\textsuperscript{120} Without timely notification victims were prevented from presenting their interests on the selection of perpetrators and charges, procedural matters, protection, and reparations, thereby denying them a sense of ownership.

A number of victims have also had a negative and traumatising experience in testifying before the Tribunals due to inadequate protection and treatment measures.

\textit{b) Treatment and protection of victims}

Under Article 20 of the ICTY Statute and Article 19 of the ICTR Statute, trial proceedings are to be conducted with 'due regard for the protection of victims and witnesses.' Additionally, the Tribunals 'shall provide' measures for the protection of victims and witnesses, including, but not limited to, in camera proceedings and protecting their

\textsuperscript{117} Marie-Bénédicte Dembour and Emily Haslam, Silencing Hearings? Victim-Witnesses at War Crimes Trials, \textit{European Journal of International Law} 15(1) 151-177, p158.


identity. The Rules of Procedure and Evidence for both Tribunals also enumerate further victim provisions. Rule 34 outlines the Victims and Witnesses Section (VWS) at the ICTY and the Witnesses and Victims Support Section (WVSS) at the ICTR. Rule 69 governs the protection of victims and witnesses in proceedings, and Rule 75 details the measures for the protection of victims and witnesses, such as name redaction, non-disclosure, image and/or voice distortion, pseudonyms, CCTV, and relocation. Victims of rape and sexual assault are also provided special provisions under Rule 96, which require no corroboration of victim’s accusation, a limited defence of consent, and exclusion of the victim’s prior sexual conduct. These protective measures try to minimise the risk to victims of traumatising and demeaning cross-examination, allowing them to testify. These provisions at ad hoc tribunals were the greatest improvement for victims’ procedural rights in comparison to the Nuremberg and Tokyo Tribunals. Even so, victims and witnesses do not have a right to protective measures as they are at the Chamber’s discretion.

Victims and witnesses do have access to each Tribunal’s Support Section. The Support Sections (VWS/WVSS) were established by the Tribunals to encourage victims and witnesses to come forward to testify, alleviating their fears of reprisals through the provision of a safe and dignified environment, so as to avoid causing them trauma in proceedings. The ICTY Support Section also provides victims with information on proceedings, 24 hour support for their psycho-social and practical needs while in the Hague as well as coordination with its office in Sarajevo. The ICTR Support Section includes physical and psychological rehabilitation as well as a gender sensitive approach to witnesses and victims. The majority of victims and witnesses who come before the Tribunals are

121 Articles 22 and 21 of the ICTY and ICTR respectfully.
122 Rule 75(B).
124 See Tadić, IT-94-1, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, paras.46-50; Askin n 91, p304-305.
127 Since the 8 June 1998, Rule 34(A)(ii), and (B).
satisfied by the professionalism, support and fair treatment they receive from the Support Sections. With regards to protective measures, the ICTY in its first decision in the Tadić case provided a progressive interpretation in guaranteeing victims’ interests. In Tadić, the Trial Chamber recognised that a defendant’s right to fair and public trial are not absolute, but need to be balanced with the protection of victims and witnesses. The majority found that the language of Article 21(4), of the defendant’s right to fair and public trial, is ‘subject to Article 22 on the protection of safety and privacy of victims and witness.’ The Trial Chamber distinguished two types of protection measures – confidentiality and anonymity. Confidentiality measures allow victims and witnesses to remain unidentified to the public and media, but not to the judges, the defendant, or the prosecution. In the Tadić case, the majority recognised that the right to a public trial is important in ensuring transparency so that the public can see justice done, but has to be balanced with the duty upon the Tribunal to protect victims and witnesses. Therefore the defendant’s right to a public trial is not absolute. However, the majority recognised that the use of confidentiality is only permitted if ‘special considerations’ exist where the witness is vulnerable, such as in cases of sexual assault. In light of the ongoing conflict in the former Yugoslavia at the time and the risk of intimidation to those who come before the Tribunal, it is likely they would fall under the ‘special considerations’ exception. Accordingly, the Chamber concluded that a closed session may be required in some cases to protect the victim’s or witness’s identity from the public and media without substantially infringing on the defendant’s right to cross-examination.

128 Stover Ch.1 n.63, p134. 129 Prosecutor v Tadić, IT-94-1, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995. 130 Ibid para 34. 131 Ibid paras.28 and 33; and Rule 79. 132 Ibid paras.39-42. 133 Ibid para.42. 134 Ibid para.42. 135 Ibid para.51.
With regards to anonymity, where the identity of the victim or witness is not disclosed to the defendant, the Chamber took a more stringent approach. The Chamber considered that the use of anonymity went to the heart of balancing the rights of the defendant to a fair trial.\textsuperscript{136} The majority kept in mind that using anonymous witness could prevent the defendant from determining their reliability and credibility through cross-examination.\textsuperscript{137} In order to reach an effective balance the majority outlined five criteria:

1. There must be real fear for the safety of the witness or her or his family. Fear is to be judged by the Chamber on both subjective and objective grounds;
2. The testimony of the particular witness must be important to the Prosecutor's case;
3. The Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy;
4. The ineffectiveness or non-existence of a witness protection programme. The Tribunal does not have a police force, trust fund, or long-term protection programme for witnesses;
5. Any measures taken should be strictly necessary. The International Tribunal must be satisfied that the accused suffers no undue avoidable prejudice, although some is inevitable.\textsuperscript{138}

The majority noted that while Article 21(4)(e) guarantees the defendant the right 'to examine, or have examined, the witnesses against him', the '[a]nonymity of a witness does not necessarily violate this right, as long as the defence is given ample opportunity to question the anonymous witness.'\textsuperscript{139} They also stipulated four additional requirements:

"Firstly, the Judges must be able to observe the demeanour of the witness, in order to assess the reliability of the testimony. Secondly, the Judges must be aware of the identity of the witness, in order to test the reliability of the witness. Thirdly, the defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts. ... Finally, the identity of the witness must be released when there are no longer reasons to fear for the security of the witness."\textsuperscript{140}

Additionally, judges in a trial chamber could strike out an anonymous witness's testimony from the record if it was overly prejudicial against the accused.\textsuperscript{141} These safeguards protect the rights of the defendant whilst ensuring the protection of the victim with judges to act as

\textsuperscript{136} Ibid para.55.
\textsuperscript{137} Ibid. para. 54 citing European Court of Human Rights case of \textit{Kostovski v the Netherlands}, App no 11454/85, (ECtHR 23 May 1989).
\textsuperscript{138} Ibid, paraphrased paras.62-66.
\textsuperscript{139} Ibid. para. 67.
\textsuperscript{140} Ibid. para.71.
\textsuperscript{141} Ibid. para. 84.
informed arbiters. This achieves a fair balance between the defendant and victims’ rights consistent with human rights law and victim-orientated justice.142

However, Judge Stephen dissented from the majority in the Tadić decision finding that allowing anonymous witness testimony would undermine the defendant’s right to a fair trial.143 He believed the protection of victims and witnesses was secondary to the rights of the defendant, which have to be fully respected. While the majority decision on using confidentiality measures has been adopted by both Tribunals, Judge Stephen’s exclusion of anonymity was followed in Blaškić and subsequent cases, with no further anonymity measures ordered.144 As the Trial Chamber in Milošević stated, ‘the rights of the accused are given primary consideration, with the need to protect victims and witnesses being an important but secondary one.’145 The Brdanin decision found that non-disclosure to the defence under Rule 69 was a more effective way to balance the rights of the defendant and the protection of victims and witnesses, provided their identities were disclosed thirty days before the trial began.146 The Brdanin decision places trust on the defendant to maintain the protection of the victim or witness’s identity, showing that the balance between victims and the rights of the defendant weighs in favour of the latter due to their primary importance to the Tribunal. In doing so, it neglects victims’ right to protection and a fair balance which respects their interests.

The ICTR jurisprudence on protective measures replicates the ICTY.147 Though the ICTR never went as far Tadić in ordering complete witness anonymity, it did extensively use confidentiality protective measures in the majority of cases, as high as 95% compared to

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142 Kostovski v the Netherlands n 137, para.43-44; and Doorson v the Netherlands Ch.1 n 196, para.70.
144 See the Prosecutor v Tihofil Blaškić, Decision on the Application of the Prosecutor dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, IT-95-14-T, 5 November 1996, para. 34-35; and Prosecutor v Radoslav Brdanin and Momir Talic, Decision on motion by prosecution for protective measures, 3 July 2000.
145 Prosecutor v Slobodan Milošević, Decision granting Protective Measures for Individual Witnesses, IT-02-54, 19 February 2002, para. 23; and Brdanin ibid, para. 20.
146 Brdanin ibid, para. 26-34; affirmed in Milošević ibid, para. 26.
147 See the Prosecutor v Georges Anderson Nderubumwe Rutaganda, Decision on the Preliminary Motion Submitted by the Prosecutor for Protective Measures for Witnesses, ICTR-96-3-T 26 September 1996.
38% at the ICTY.\textsuperscript{148} The justification for this approach was that both prosecution and defence witnesses were at risk from suffering intimidation or violence by publicly testifying before the ICTR, due to instability or 'regional volatility' in the Great Lakes region.\textsuperscript{149} Additionally, confidentiality measures were more acceptable as they did not fundamentally compromise a defendant’s right to a fair trial or the interests of justice.\textsuperscript{150}

In practice, victims have suffered secondary victimisation at the ad hoc tribunals. On numerous occasions victim-witnesses’ identities have been leaked either accidentally or intentionally. In the \textit{Milo\v{s}evi\v{c}} trial at the ICTY, the defendant who was representing himself often purposively leaked the names of protected witnesses, and even one of the judges accidentally mentioned the name of a witness.\textsuperscript{151} In the \textit{Haradinaj et al.} case, at least nine witnesses were killed and another had an attempt on his life.\textsuperscript{152} As one witness who was later charged with contempt for refusing to testify commented, “I don’t want protective measures because such measures do not exist in reality; they only exist within the boundaries of this courtroom, not outside it.”\textsuperscript{153} The Appeal Chamber found that witness intimidation had ‘permeated the trial’ and the Trial Chamber’s focus on expedition had ‘helped to ensure that witness intimidation succeeded in denying the Prosecution an opportunity to present potentially crucial evidence in support of its case ... result[ing] in a miscarriage of justice.’\textsuperscript{154} The \textit{Haradinaj} case indicates that the ICTY failed to achieve an equitable balance between


\textsuperscript{150} Sluiter n147, p969. See \textit{Prosecutor v Obed Ruzindana}, ICTR-95-1-T and ICTR-96-10-T, Decision on the Motion Filed by the Prosecutor on the Protection of Victims and Witnesses, 4 March 1997; and \textit{Prosecutor v Renzaho}, ICTR-97-31-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 17 August 2005, para. 13.

\textsuperscript{151} See Mirko Klarin, Protected Witnesses Endangered, IWPR, 22 February 2005.

\textsuperscript{152} According to Serbia's War Crime Prosecutor Vladimir Vukcevic, in Merdijana Sadović and Aleksandar Roknic, Serbian Anger at Haradinaj Acquittal, IWPR, 14 April 2008.


\textsuperscript{154} Ibid. paras. 48-49.
the defendant and victims in this case, and as result caused secondary victimisation to victims. Similar problems have faced the ICTR.155

As the Haradinaj case reveals, protective measures by the Tribunals can be ineffective outside of the courtroom. A person who disappears for a few weeks to testify at the Tribunals is likely to be noticed, due to close-knit communities in the former Yugoslavia and Rwanda.156 The majority of witnesses at the ICTY found that protective measures had failed to protect their identity when they returned home leaving them open to recriminations.157 Although there were not widespread reprisals against witnesses who testified at the ICTY, they were still stigmatised and ostracised on their return home by the loss of friends, houses, or jobs.158 However, in Rwanda the consequences were more acute with victims and their families being harassed, violently attacked, and even murdered.159 Furthermore, support measures only applied to those victims and witnesses who appeared before the Tribunals to testify. This is the result of insufficient resources of the Support Sections and domestic authorities' unwillingness to make support and protection measures effective.160 As such, both Tribunals' witness protection programme are examples of international criminal justice being 'a giant without arms and legs'.161

With regard to the treatment of victims before the Tribunals, there have been a number of instances at the ICTY and ICTR where some judges have been insensitive and disrespectful towards victims causing them 'secondary victimisation'.162 The imbalance between the rights of defendants and the duty to protect victims is also demonstrated in the

155 See Prosecutor v Setako, ICTR-04-81-1, Decision on Prosecution Motion for Protective Measures, 18 September 2007, para. 5; Renzaho, para. 11; and Prosecutor v Ntawukulilyayo, ICTR-05-82, 6 February 2009, para. 5.
156 Heikkilä Ch.1 n 27, p137; and Nowrojee n 91, p128.
157 Stover Ch.1 n 63, p98.
158 See Stover ibid.
159 Mahony reports some 99 were killed before the WVSS could be established in 1996, n 149, p59. Dozens of other witnesses have been killed including victims before and after their testimony at the ICTR, More Can Be Done to Protect ICTR Witnesses, Hirondelle News Agency, 17 December 2004.
160 Ibid. p81.
162 Ibid p132; and Dembou and Haslam n 117, p171-177. See also De Brouwer n 79, p122; Kunarac IT-96-23, Transcript, 25 April 2000, p2235-2236.
way in which defendants are allowed to represent themselves in proceedings.\textsuperscript{163} Former Serbian President Slobodan Milošević called one victim-witness a "murderer and robber".\textsuperscript{164} At times in the Milošević case the judges silenced the defendant’s microphone when he disrespected or attacked witnesses.\textsuperscript{165} In the Karadžić case, the defendant decried the protective measures in place for a victim-witness as unnecessary as the witness was ‘not a victim’, despite surviving the Srebrenica genocide and being shot alongside his brother.\textsuperscript{166} Although the judges did apologise after the victim-witness had complained to the VWS, they blamed him for reacting so strongly, because he did not understand that the defendant could represent himself.\textsuperscript{167} A victim-orientated approach to the situation would have been the judges being more empathetic to the victim-witness’s needs by apologising to him and refuting the defendant’s statement, as his status had already been confirmed in previous judgments.

The proceedings of the ICTR have also been a source of secondary victimisation for victims. In some cases, judges failed to prevent harassment of victim-witnesses by defence lawyers or harmed them through their own actions. In the Butare case, a rape victim was asked 1,194 questions by the defence without intervention by the Chamber.\textsuperscript{168} In one of the worst instances, three judges laughed during the testimony of a rape victim.\textsuperscript{169} Although the judges were laughing at the inept questioning by the defence lawyer and not the victim, the situation was not explained to them, she was not apologised to, and the judges were not admonished for their disrespect.\textsuperscript{170} For the victim-witness, the incident left her feeling ‘angry and nervous’. Upon returning home everyone knew she had testified, she was threatened, her house was attacked, and her fiancée left her after finding out she was raped.\textsuperscript{171} As African

\textsuperscript{163} See Patricia Wald, \textit{Tyrants on Trial}, (Open Society Justice Initiative 2009); and Stover Ch.1 n 63, p99.
\textsuperscript{164} Stover ibid.
\textsuperscript{165} Ibid, p99.
\textsuperscript{166} Prosecutor v Radovan Karadžić, IT-95-5/18-1, Transcript, 21 April 2010, p1330.
\textsuperscript{167} Karadžić, IT-95-5/18-1, Transcript, 22 April 2010, p1397-1398.
\textsuperscript{168} Nowrojee n 91, p130.
\textsuperscript{169} Ibid.
\textsuperscript{171} Nowrojee n 91, p130.
Rights aptly states, it is ‘a bitter irony that the institution which has increased international recognition of the heinous nature of rape, has also been the forum for the humiliation of rape victims.’ 172 Despite the innovative provisions for victim protection and support at both Tribunals, in practice victims can on occasion cause secondary victimisation. This is the result of the practitioners in the proceedings of the ICTY and ICTR being unresponsive to victims’ needs.

5. **Substantive justice for victims**

As of July 2012, the ICTY has indicted 161 suspects, tried 126 with 35 trials ongoing, and convicted 64 defendants.173 The ICTR has indicted 92 suspects, tried 72 cases with 20 trials ongoing, and convicted 45 defendants.174 The ICTY has declared that these prosecutions have delivered justice to victims.175 Some consider the work of the ICTR as rendering ‘human dignity back to the survivors of the genocide’ by prosecuting those responsible for the Rwandan genocide in 1994.176 Without these Tribunals, those responsible would still be at large, and therefore they have established a certain amount of accountability as well as clarifying the facts as to what occurred.177 This has realised some of victims’ rights to truth and justice. However, the recognition of only certain crimes and perpetrators made justice and truth more selective.

In relation to victims’ right to justice, the ICTY has been willing to take into account the harm suffered by victims as an aggravating circumstance in determining the sentence of a defendant.178 The Tribunal has considered the ‘special vulnerability of victims’ in 31 cases, the ‘extreme suffering or harm inflicted on victims’ in 25 cases, the ‘large number of

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173 Additionally, 12 defendants were acquitted and 36 indictment withdrawn or indictee deceased. [http://www.icty.org/sections/TheCases/KeyFigures](http://www.icty.org/sections/TheCases/KeyFigures), Accessed on 31/07/2012.
177 Mose Ch.1 n 1, p932.
178 *See Prosecutor v Tadić*, Sentencing Judgement, IT-94-1-T, 14 July 1997, paras.4 and 56.
victims’ in 15 cases and the ‘cruelty of the attack’ in 14 cases.\textsuperscript{179} In the \textit{Krnojelac} sentencing judgment, for instance, based on victim impact statements the Chamber considered, ‘the extent of the long-term physical, psychological and emotional suffering of the immediate victims’.\textsuperscript{180} The Appeal Chamber in \textit{Mrkić} expanded this scope by judging the impact and consequences of the crime (torture) including, ‘the vulnerability of the victims and the consequences, effect or impact of the crime upon the victims and their relatives.’\textsuperscript{181} In \textit{Krstić}, the Chamber believed that victim impact statements helped to ‘give a voice’ to the suffering of the victims’ in the determination of sentencing.\textsuperscript{182} This reflects the impact of victim participation in the determination of substantive outcomes consistent with victim-orientated justice discussed in Chapter One. The ICTR did not consider victims’ harm in their determination of aggravating circumstances in sentencing, instead finding that the defendant’s position of influence, authority and public trust more important.\textsuperscript{183}

At the ICTY, victim impact statements in certain cases enabled victims to realise their rights to truth. In the \textit{Nikolić} case, the prosecution called three victims to provide oral impact statements.\textsuperscript{184} One of the victims during their testimony asked the defendant about the location of her sons who were disappeared. The defendant responded that although he was not involved in the killings of her sons, he knew the location of where they were killed.\textsuperscript{185} This instance enabled the victim to access directly the truth and redress by finding out where the bodies of her sons were located. Nevertheless, it was an exception. In contrast to the \textit{Nikolić} case, the ICTY has not encouraged defendants to fully reveal the facts of their crimes or to provide information to the victims on the location of relatives’ bodies in plea agreements. For instance, in the \textit{Mrda} case, the defendant received a reduced sentence of 17 years for his role in executing 178 male civilians because of a plea agreement, yet he did not

\textsuperscript{181} \textit{Prosecutor v Mrkić and Sljivančanin}, Judgement, IT-95-13/1-A, 5 May 2009, para.400 and 413.
\textsuperscript{182} \textit{Krstić}, Judgement, IT-98-33-T, 2 August 2001, para.703.
\textsuperscript{183} For instance see \textit{Prosecutor v Callixte Kalimazira}, Judgement, ICTR-05-88-T, 22 June 2009, paras.750-751.
\textsuperscript{184} \textit{Prosecutor v Nikolić}, Sentencing Judgement, IT-94-2-S, 18 December 2003, para.41.
\textsuperscript{185} Nikolić, Transcript, 3 November 2003, p240-258.
reveal the location of the victims' bodies. By withholding this information, the defendant created a barrier for family members having some closure. Accordingly, the ad hoc tribunals have not been responsive to victims' substantive needs to truth and justice. Instead they have been used by the Tribunals in their purpose of prosecuting and punishing perpetrators through testifying and increasing their punishment. This reflects a narrow, retributive understanding of justice for victims.

This is further demonstrated in the lack of reparations available before the ad hoc tribunals. Neither the ICTY nor the ICTR offer victims the right to claim reparations before their Chambers. Resolution 827(1993) establishing 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.' This indicates that reparations are not part of the Tribunal’s work. Restitution is mentioned in Articles 24(3) and 23(3) of the Statute of the ICTY and ICTR respectively. Additionally, common Rule 106 titled ‘Compensation to Victims’, permits victims to claim compensation before domestic courts in the former Yugoslavia and Rwanda against those defendants who are convicted before the Tribunals. Victims do not have standing before the Tribunal to bring restitution claims themselves, but instead rely on the Prosecutor to bring claims on their behalf. Only one claim was made before a Bosnian court. However, any perpetrators before the Tribunals are unlikely to have the funds to compensate victims. Furthermore, the Tribunals do not fully reflect

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190 See Maja Bjelajac, Bosnia War Compensation Dispute, IWPR, 10 January 2011. Case involves 1,400 claimants following the ICTY judgement in the Galić case (IT-98-29) on siege of Sarajevo for €470 million.
191 Ibid. p383.
victims’ right to reparations which includes rehabilitation, measures of satisfaction, and guarantees of non-repetition in order to remedy their harm effectively.

In light of these shortcomings in 2000 the judges of the ICTY and the ICTR sent letters to the Security Council on their findings on compensation and participation of victims at the Tribunals.192 The letters acknowledged victims’ legal right to compensation for their injuries,193 but found that such proceedings would be time consuming, likely to increase the workload of the Tribunal, and would be contrary to the defendant’s right to an expeditious trial. Instead, the judges suggested that a separate claims commission established by the UN Security Council would be a more suitable alternative.194 The Security Council did not establish any form of reparations programme for victims in the former Yugoslavia or Rwanda. Subsequently, the ICTY has recognised that the Security Council’s neglect of reparations has hindered the wider goals of the Tribunal in delivering justice to victims:

‘The failure to properly address this issue constitutes a serious failing in the administration of justice to the victims of the former Yugoslavia. The Tribunal cannot, through the rendering of its judgements alone, bring peace and reconciliation to the region: other remedies should complement the criminal trials if lasting peace is to be achieved, and one such remedy should be adequate reparations to the victims for their suffering.’195

The judges’ standpoint appreciates the importance of reparations to victims of international crimes, but found the Tribunals were unable to perform such a function due to a lack of legal basis in their respective Statutes. As Malmstrom points out, the mandate of the Tribunals was to prosecute those responsible rather than provide a wider conception of justice to victims.196

D. Conclusion

The establishment of international criminal tribunals where victims can see some justice done is an important achievement. They have prosecuted some of the most heinous

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193 In light of the developments of the ICC and the principles of the UN Victims’ Declaration.
194 Such as the UN Claims Commission set up after the Gulf War.
196 Malmstrom n 189, p384.
crimes and perpetrators. Additionally, they have officially acknowledged the occurrence of international crimes, who was responsible, who was victimised, and clarified the truth, such as in the Akayesu case on the 1994 genocide in Rwanda. The ad hoc tribunals also expanded the scope of international crimes. Although the ad hoc tribunals did make an effort to keep victims informed, protected, and provide some support, it was at times inadequate and limited to those who came before them to testify. This suggests that victims’ procedural rights were only important to facilitate the Tribunals’ mandate in prosecuting those most responsible, rather than to meet their specific needs and interests. Additionally, the structural limitations of a criminal court, especially using the adversarial trial, favoured the rights of the defendant and unfettered prosecutorial discretion over victims’ needs. With regards to procedural justice, the lack of representative recognition of victims by the Tribunals cast some doubts on their impartiality. While the Tribunals did prosecute some of the most senior perpetrators in the conflicts, it excluded a number of others resulting in selective justice and truth, and therefore created inequality between victims and impunity. Accordingly, victims’ substantive rights to truth and justice were only realised where they coincided with the interests of the tribunals in representing the interests of the international community, and excluded their right to reparation.

Despite the developments in international law, victimology, and human rights law did not cause substantial changes in international criminal tribunals to deliver justice to victims. International criminal justice is supposed to be the last resort to justice for victims of mass atrocities who cannot access justice locally. Instead, justice for victims has been rhetoric used by the Tribunals to justify punishment and legitimise their existence, without meeting victims’ needs. As such, victims in international criminal tribunals are considered as objects, in the sense that justice is done on the basis of their suffering, without recognising them as subjects having needs and interests in determining the substantive outcomes.

Nonetheless, the challenges of the ad hoc tribunals did provide the drafters on the Rome

197 Prosecutor v Akayesu (ICTR-96-4-T), Judgement, 2 September 1998, paras.111-128, cited by Schabas, Ch.1 n 52, p347.

198 Jorda and Hemptinne Ch.1 n183, p1389; and Schabas, Ch.1 n 18, p42.
Statute an incentive to be more responsive to victims' needs and interests at the International Criminal Court. The development of the role of victims between the Second World War and the ad hoc tribunals demonstrate the difficulty in incorporating their needs and interests into a mechanism, which is primarily concentrated on prosecuting and punishing perpetrators of international crimes. This is a challenge which the ICC has been grappling with and is explored further in the following chapters.
III. Victims in the Proceedings of the International Criminal Court

A. Introduction

In contrast to previous tribunals, the Rome Statute affords a procedural role to victims through recognition, participation, protection and support measures. These provisions have been declared as a ‘high-water mark’ by placing victims at the ‘heart of international criminal justice’. This supposedly indicates that the ICC is not just concerned with prosecuting and punishing perpetrators of international crimes, but to also deliver justice to victims. As Fiona McKay, on behalf of the Victims’ Rights Working Group at the Rome Conference of the ICC, declared,

‘punishing criminals is not enough. There will be no justice without justice for victims. And in order to do justice for victims, the ICC must be empowered to address their rights and needs.’

In light of the theoretical discussion in Chapter 1 on the internal element of justice for victims within the framework of the ICC, this Chapter examines victims’ role in the proceedings of the Court. In order to analyse whether the ICC fulfils victim-orientated justice this Chapter will consider victim recognition, as well as procedural and substantive justice for victims. Victim-orientated justice involves the Court responding to victims’ needs while fairly balancing them against the interests of others. Procedural justice is meant to ensure victims’ input into proceedings and to protect them from secondary victimisation. Substantive justice is the realisation of their rights to truth and justice, with reparations considered in the following Chapter.

This Chapter begins by discussing the recognition of victims through their definition under the International Criminal Court. Section two explores victim participation in depth. Considerable space is devoted to this subject, due to its innovative nature in international criminal justice and importance in allowing victims to realise their procedural and

1 Christine Chung, Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise? Northwestern Journal of International Human Rights 6(3) (Spring 2008) 459-545, p516.


3 Speech by Fiona McKay, Redress, on behalf of the Victims Rights Working Group, 16 June 1998.
substantive rights. Section three examines the provisions on protection and treatment under the Rome Statute for victims. The Chapter concludes that despite the number of articles for victims, the ICC does not satisfy victim-orientated justice.

B. The Drafting of the Victim Provisions within the Rome Statute

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

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

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4 UN Secretary-General declares overriding interest of international criminal court conference must be that of victims and world community as a whole, Press Release L/ROM/6.r, 15 June 1998.
5 Cited in Haslam Ch.1 n148, p316.
6 See ibid, p325.
States were able to campaign for the inclusion of victim provisions, which had previously been neglected in the International Law Commission’s drafts. Yet such mass participation from States and civil society was a double-edged sword with disparate views on victim provisions from different legal traditions, resulting in compromises. While many delegations supported provisions for victims, others were wary that they would undermine the rights of the defendant and the fairness of the trial. Consequently, a number of the victim articles were left open for the judges to determine. It was only during the drafting of Rules of Procedure and Evidence that victim provisions on recognition, participation, protection and reparations were more adequately defined, but also enabled the Court’s judges some flexibility in their interpretation and application.

Second, the motivation to incorporate victim participation and reparations came from the failures of the ad hoc tribunals to be responsive to victims’ needs and deliver them justice. As discussed in Chapter 2, the neglect of victims at previous tribunals was because of their primary purpose of prosecuting and punishing individuals responsible for international crimes. The ad hoc tribunals did recognise the importance of protecting victims, but this was more to guarantee their testimony. The exclusion of participation and reparation at the previous tribunals was also due to the adversarial model of criminal proceedings. Instead,

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11 Jorda and de Hemptinne Ch.1 n 183, p1389-1391.

12 Ibid p1391.
in the drafting of the Rome Statute, delegates wanted to prosecute perpetrators of international crimes as well as to offer justice to victims.\textsuperscript{13} Furthermore, the diversity of those involved in the drafting drew upon their own different criminal justice proceedings, such as in the civil and Islamic law jurisdictions, which include victim participation and claiming compensation in criminal proceedings.\textsuperscript{14}

Third, delegates advocated for victim provisions within the Rome Statute in order to bring it into line with standards established in international law, victimology, and human rights law.\textsuperscript{15} The UN Victims’ Declaration informed the drafters on victims’ procedural rights to participation, protection, support, and reparations.\textsuperscript{16} Additionally, developments before the regional human rights courts and articles within international conventions provided guidance on victims’ substantive rights to truth, justice and reparations, including the then draft UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victim of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNBPG).\textsuperscript{17} The resulting Rome Statute and RPE reflect these standards by including victim provisions on recognition, participation, protection, treatment, support, reparations and a Trust Fund for Victims.

Funk and Guhr suggest that restorative justice encouraged the shift towards incorporating victims within the ICC.\textsuperscript{18} The inclusion of participation, reparations and a Trust Fund indicates that the Court does not strictly follow a retributive justice approach, but seeks to restore victims. However, the proceedings of the ICC are ‘lawyer dominated’, and retain a retributive focus, limiting victims’ interests as participants in deference to the two

\textsuperscript{13} Muttukumaru Ch.1 n 221, p264.
\textsuperscript{14} Discussed below under participation and Chapter 4.
\textsuperscript{17} A/RES/60/147. See Report on the international seminar on victims’ access to the International Criminal Court, PCNICC/1999/WGPE/INF.2.
\textsuperscript{18} Funk Ch.1 n222, p4; and A.H. Guhr, Victim Participation During the Pre-Trial Stage at the International Criminal Court, \textit{International Criminal Law Review} 8(1-2) (2008) 109-142, p110.
parties of the prosecution and the defence. Instead the drafting of the Rome Statute and the jurisprudence of the ICC have been more influenced by UN Victims’ Declaration and human rights law than restorative justice. As Vasiliev asserts, rather than making the Court a restorative justice forum where victims can interact with the perpetrator and collectively resolve their differences, the Court is more victim-orientated justice without replacing the core goals of prosecuting and punishing perpetrators of international crimes. As outlined in Chapter 1, this Chapter argues that the Court can be more responsive to victims’ needs. This can be seen in relation to the recognition of victims.

C. Victim Recognition

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

(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

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

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19 Doak Ch.1 n 157, p221.
21 Vasiliev Ch.1 n5, p677.
22 See Chapter 1.
23 *Prosecutor v Lubanga*, Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008, para.92. See also draft Rule 85, PCNICC/1999/WGRPE/INF.2.
24 Articles 8(2)(b) (ix) and c(ix), 8(2)(b)(iii) and c(iii), as well as 8(2)(b)(xxiv) and c(ii). For instance, school headmasters: a/0188/06 (*Situation in the DRC*, ICC-01/04-423-Corr para.142-143);
The Court's definition contains two further noteworthy elements in recognising victims: harm; and crimes within the jurisdiction of the Court. Firstly, harm is not defined in the Rome Statute or the RPE. Instead judges interpret it on a 'case-by-case basis' relying on human rights law, the UN Victims' Declaration, and the UNBPG. The ICC Appeals Chamber has found that harm in its 'ordinary meaning denotes hurt, injury or damage.' The Court has broadly construed it to include physical, emotional, psychological, mental, economic loss, and the substantial impairment of fundamental rights. The Court has accepted a single instance of harm as sufficient to recognise a victim.

During drafting of the victim definition the delegates disagreed as to the inclusion of indirect harm, owing to differing views on the word 'family'. However, the Court established that harm can be both direct and indirect to a victim. This is due to the language in Rule 85(a) containing no limitations on direct or indirect harm for natural persons, in comparison to Rule 85(b) which only mentions direct harm to legal persons. The Court has also adopted the position of the UN Victims’ Declaration that indirect victims can suffer harm either as close family members or dependants of the direct victim, or having suffered whilst intervening to help direct victims of the case or to prevent the latter from becoming

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26 Ibid ICC-01/04-01/06-1432, para.31.

27 See *Situation in DRC*, ICC-01/04-101, para.81; *Situation in Uganda*, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, 11 August 2007; *Prosecutor v Bemba*, Fourth Decision on Victims' Participation, ICC-01/05-01/08-320, 12 December 2008, para.51; *Prosecutor v Abu Garda*, Public Redacted Version of "Decision on the 52 Applications the Pre-Trial Stage of the Case" for Participation at the Pre-Trial Stage of the Case", ICC-02/05-02/09-147, 9 October 2009; and Redacted version of "Decision on 'indirect victims', ICC-01/04-01/06-1813, 8 April 2009, para.50.

28 *Situation in DRC*, ICC-01/04-101, para.81; and *Situation in DRC*, ICC-01/04-423, para.3


30 *Lubanga*, ICC-01/04-01/06-1119, para.90; affirmed in *Lubanga*, ICC-01/04-01/06-1432, para.30.
victims because of the commission of these crimes.\textsuperscript{31} The Appeals Chamber has observed that the personal nature of the harm is sufficient in recognising victims, rather than the degree of suffering.\textsuperscript{32} This is in contrast to the ad hoc tribunals which only recognised direct individual victims, as discussed in Chapter 2. The inclusive approach of the ICC by recognising a broader scope of victims is more in line with critical victimology, which identifies victims as those who suffer as a result of a crime, as well as human rights law and national practices.\textsuperscript{33}

Secondly, Rule 85(a) requires victims’ harm to be the result of a crime within the Court’s jurisdiction. The jurisdiction of the ICC has three areas: temporal, territorial, and the crimes.\textsuperscript{34} The Court’s temporal jurisdiction commences from the 1\textsuperscript{st} July 2002 when the Rome Statute was ratified by the required sixty State Parties.\textsuperscript{35} The Court’s territorial jurisdiction is based on Article 12 for crimes occurring on the territory of any State Party of the Rome Statute or involving any national of a State Party. Finally, the crimes within the Court’s jurisdiction outlined in Article 5 of the Rome Statute are genocide, crimes against humanity, war crimes, and the crime of aggression.\textsuperscript{36}

The jurisdiction of the ICC is more extensive than any previous international criminal tribunal covering some 121 State Parties, as well as having a temporal jurisdiction with no end date.\textsuperscript{37} However, the commencement of the temporal jurisdiction on the 1\textsuperscript{st} July 2002 is problematic, as many of the conflicts under investigation and being prosecuted by the ICC began decades before 2002, such as Democratic Republic of Congo and Uganda. This restricted temporal scope limits the number of victims in a conflict who can be recognised and seek justice at the ICC. This could possibly create a justice gap between

\textsuperscript{31} Prosecutor v Lubanga, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo,ICC-01/04-01/06-172-TE, 29 June 2006, p7-8; Katanga and Chui, ICC-01/04-01/07-579, 10 June 2008, para66; and Lubanga, ICC-01/04-01/06-1813 para.49-51. Adopting Principle 2, UN Victims’ Declaration.

\textsuperscript{32} Lubanga, ICC-01/04-01/06-1432, paras.34-35 and 39.

\textsuperscript{33} See Chapter 1; Principle 2 UN Victims’ Declaration; and Mina Rauschenbach and Damien Scalia, Victims and international criminal justice: a vexed question? International Review of the Red Cross 90(870) (2008) 441-459, p454.

\textsuperscript{34} Articles 5-8, 11-12, Rome Statute. Lubanga, ICC-01/04-01/06-1119, para.94.

\textsuperscript{35} Article 11, Rome Statute.

\textsuperscript{36} Article 5(1). The crimes are further detailed under Articles 6-8 and the Elements of Crime.

\textsuperscript{37} As of July 2012.
those victims recognised before the Court and those who are not. Where there are gaps in the Court’s jurisdiction State Parties are obliged to complement the ICC through domestic processes.

The Rome Statute does expand international criminal law to include other types of suffering experienced by victims, such as conscription and enlistment of children into an armed conflict; sexual violence including sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization; enforced disappearances; and the crime of apartheid.\(^{38}\) The addition of these crimes offers a greater recognition of the suffering of vulnerable groups during conflicts. In the Court’s first judgment in *Lubanga* case, it extended the recognition of children conscripted, enlisted, and used in hostilities to include both those who actively participated and those in indirect support roles, such as being used as human shields or to carry loads, due to the risk and harm they faced.\(^ {39}\)

The recognition of victims at the ICC has also been distinguished between a situation and a case.\(^ {40}\) A situation is defined as the temporal and territorial boundaries, such as the situation in the territory of the Democratic Republic of Congo since the 1\(^{st}\) July 2002,\(^ {41}\) whereas a case arises in a situation and involves crimes committed by a suspect within the jurisdiction of the Court, such as the *Lubanga* case within the situation of the Democratic Republic of Congo.\(^ {42}\) In a situation before the ICC victims have only to evidence their harm was as a result of any crime within the Court’s jurisdiction, without having to identify a specific perpetrator.\(^ {43}\) Thus victims in a situation can be recognised without the perpetrator being ‘identified, apprehended, prosecuted or convicted.’\(^ {44}\) This is consistent with human rights law and procedural justice by officially recognising victims in a situation on the basis of their harm, rather than the conviction of the perpetrator. However, victims recognised in a situation have fewer opportunities to participate compared to those in a case, but can avail of

\(^{38}\) Articles 7 and 8, Rome Statute.

\(^{39}\) *Prosecutor v Lubanga*, Judgement, ICC-01/04-01/06-2842, 14 March 2012, paras.624-628.

\(^ {40}\) *Situation in DRC*, ICC-01/04-101, para.65.

\(^ {41}\) Ibid.

\(^ {42}\) Ibid.

\(^ {43}\) Ibid para.100.

\(^ {44}\) Principle 2, UN Victims’ Declaration; and Principle 9, UNBPG.
protection measures. Furthermore, as reparations before the ICC can only be made on the conviction of a perpetrator under Article 75(2), therefore victims in a situation cannot claim reparations. Official recognition in a situation could be important to some victims, but it is insufficient to deliver justice to them as delineated in Chapter 1.

Victim recognition in a case is dependent on the selection of charges and perpetrators by the Prosecutor, as victims have to evidence they suffered harm as a result of the crimes committed by the accused. By way of example in the Lubanga case, the Prosecutor only prosecuted the use of child soldiers, but not other crimes committed by Lubanga and his militia, such as sexual violence and massacres. In comparison to the ad hoc tribunals, the Court’s definition of victims is far more comprehensive by including direct and indirect victims, certain legal persons, and a greater coverage of crimes. The definition of victims is also more in line with the UN Victims’ Declaration by removing the ‘alleged’ requirement and recognising them without being dependent on the perpetrator. Yet, to participate fully and claim reparations victims need to fall within the charges and perpetrators being prosecuted before the Court. This reflects the unavoidable limits of a criminal court in recognising victims and their rights. Thus it is necessary for the crimes and perpetrators prosecuted before the Court to be a representative of the suffering caused within a conflict, as far as possible, to ensure victims’ access to justice. Consequently, while victim recognition at the ICC is victim-orientated, retribution remains a priority of the Court meaning it cannot offer victim-centred justice and recognition all victims of a conflict, which may be more appropriate in transitional justice mechanisms such as truth commissions. This is also evident with victim participation.

45 Articles 15(3), 19(3), and 68(1).
46 See Chapter 4.
47 Letschert et al Ch.1 n 11, p646.
48 This is discussed further in the next section.
D. Victim Participation before the International Criminal Court

One of the most innovative provisions of the Rome Statute is the ability of victims to participate in proceedings before the ICC. Victim participation at the ICC reflects a growing trend in national jurisdictions and international declarations that victims have a legal standing in criminal trials in order to protect their interests.\(^5\) In civil law countries victims have a wide range of participatory rights in criminal proceedings, such as *partie civile* and *Nebenklage*. The *partie civile* procedure in French-speaking countries enables victims to initiate prosecutions, participate as a party in proceedings, and bring ancillary claims for damages on the prosecution’s case.\(^5\) In the German-speaking countries the *Nebenklage* procedure permits victims to appoint their own counsel to act as a private accessory prosecutor, who can inspect files, present their case in a trial, question witnesses, object to judges’ orders and questions, apply for evidence to be taken and make statements.\(^5\) Additionally, victims in Islamic law countries have the right to prosecute privately an offender and to claim compensation.\(^5\) In some common law countries, victims can also bring private prosecutions and make impact statements during sentencing.\(^5\)

As the ICC adjudicates on international crimes, which involve numerous victims, participation before it requires a unique ‘bespoke approach’ in comparison to domestic crimes.\(^5\) Therefore the Court does not adopt a specific domestic criminal practice, but contains comparable elements related to victims such as legal representatives, presenting evidence, and making statements in sentencing. Victim participation has also been

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\(^5\) See the UN Victims’ Declaration; Council of Europe Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, Official Journal L82, 22 March 2001; UNBPG; and Brienen and Hoegen Ch.1 n 144.


\(^5\) In the United Kingdom, Section 6 of the Prosecution of Offences Act 1985 governs private prosecutions; for UK and USA see Doak Ch.1 n 157, p125-126.

incorporated into the international criminal hybrid tribunals in Cambodia and Lebanon.\textsuperscript{56} The Extraordinary Chambers in the Courts of Cambodia (ECCC) follows a more civil law approach by allowing victims to participate as civil parties and to initiate investigations, question witnesses, appeal decisions, and to bring ancillary claims for reparations.\textsuperscript{57} Article 17 of the Statute of the Special Tribunal for Lebanon adopts a similar victim participation provision to the Rome Statute’s Article 68(3).\textsuperscript{58} The inclusion of victim participation within these different international and hybrid criminal tribunals indicates its emerging normative nature in international criminal justice.

Victim participation was incorporated into the Rome Statute to ensure that victims’ interests were heard before the Court, and to expand justice beyond retribution.\textsuperscript{59} During the drafting of the Statute some delegates were worried that victims would duplicate the role of the Prosecutor and undermine the rights of the defendant, or with such large numbers of them would end up just being symbolic.\textsuperscript{60} Nonetheless, NGOs had a strong influence on the addition of participation in the Statute. Amnesty International believed victim participation was essential in fulfilling the Court’s core function of effectively determining responsibility, appropriate sentence, and reparations.\textsuperscript{61} The Women’s Caucus for Gender Justice considered it was ‘indicative of a broader and more evolved concept of justice’ which would be vital in the Court’s wider impact in establishing the rule of law, peace and security, and

\begin{thebibliography}{99}
\bibitem{57} Rules 23\textit{bis}, 55(10), 74(4), 80(2), of the ECCC Internal Rules. McGonigle ibid.
\bibitem{58} See also Rules 86-87 in the STL Rules of Procedure and Evidence, 8 February 2012, STL/BD/2009/01/Rev. 4.
\bibitem{61} Amnesty International, The International Criminal Court: Ensuring an Effective Role of Victims – Memorandum for the Paris Seminar, IOR 40/06/99, April 1999, cited in Haslam Ch.1 n148, p325.
\end{thebibliography}
reconciliation. In light of Chapter 1, victim participation is important in facilitating procedural justice for victims by enabling them to present their interests and have an input into the clarification of facts and the determination of those responsible, i.e. their substantive rights to truth and justice.

1. The legal framework of victim participation

Victim participation at the ICC is drawn from the Rome Statute, the Rules of Procedure and Evidence, and the Regulations of the Court. As in previous international criminal tribunals, victims continue to play a crucial role in providing information to the Prosecutor on crimes and testifying as witnesses at the ICC. The Court also allows victims to present their interests as participants in proceedings, discussed further below. Additionally, there are a number of support organs within the ICC Registry crucial in the functioning of victim participation before the Court, namely the Victims Participation and Reparation Section (VPRS), the Victims and Witnesses Unit (VWU), and the Office of Public Counsel for Victims (OPCV). The VPRS transmits victims’ applications to participate and seek reparations to the Court and copies to the parties. The VWU is mainly tasked with ensuring protection and support measures for victims participating before the Court. The OPCV provides legal research and advice to participating victims, and represents victims at the Court’s appointment. The Rome Statute delineates three distinct instances where victims have ‘specific rights’ to participate before the Court under Articles 15(3), 19(3), and 75(3), as well as a general right to participate in proceedings under Article 68(3).

a) Specific victim participation

First of these specific rights is Article 15(3), which permits victims to make ‘representations’ to the Pre-Trial Chamber where the Prosecutor initiates an investigation

63 Articles 15(3), 19(3), 68(3), and 75(3); Rules 89-92, RPE; and Regulations 86-88, ICC Regulations.
64 ICC Regulation 86(9). See Regulations 97-111, Registry Regulations.
65 Rules 16-19, RPE.
66 Regulations 80 and 81, ICC Regulations.
67 ICC-01/04-101, para.62.
68 Under Rule 93 the Court can seek the views of victims on any issue.
proprio motu (by his own authority). As of July 2012, the Prosecutor has used his proprio motu power twice to initiate an investigation into the situations in Kenya and Côte d'Ivoire. Under this Article, the Pre-Trial Chamber II in the Kenyan situation ordered the Victims Participation and Reparation Section (VPRS) to contact known victims. The resulting VPRS report expressed strong support for an ICC investigation by those victims it had contacted. This information was used alongside other victim representations to help the Court understand the situation in Kenya and the harm suffered by victims, so as to authorise an investigation. Similarly, in the Côte d'Ivoire situation, victims' representations were used extensively by the Chamber to support the evidence presented by the Prosecutor and to commence an investigation.

Second, under Article 19(3) victims can submit their observations to the ICC for decisions relating to the Court's jurisdiction or the admissibility of a case. In the Ugandan case of *Kony et al.* the participation of victims under Article 19(3) provided an important opportunity for their views to be heard and documented. Third, under Article 75(3) in relation to reparation proceedings, the Court can 'invite' and 'shall take account of representations' from victims with a right to appeal any reparation decision under Article 69 See also Rule 50 RPE.

70 *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, ICC-01/09-3, 26 November 2009; and *Situation in Republic of Côte d'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-14, 3 October 2011.


72 Ibid ICC-01/09-17-Corr-Red.


74 *Situation in Republic of Côte d'Ivoire*, ICC-02/11-14.

75 See Rule 59; and the *Situation in Uganda in the Case of the Prosecutor v Joseph Kony, Vincent Otti, Ondjia Namukwaya, and Dominic Ongwen*, Decision initiating proceedings under Article 19, requesting observations and appointing counsel for the Defence, ICC-02/04-01/05-320, 21 October 2008. See also *Situation in Uganda*, ICC-02/04-101 paras.93-94.

82(4) which ‘adversely affects’ the victim.77 The purpose of these three specific articles was to ensure victims had an input into important decisions which affect their interests.78

**b) General victim participation**

The main overarching provision for victims to participate in the majority of proceedings is Article 68(3):

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

This Article emulates Principle 6(b) of the UN Victims’ Declaration. The difficulty with incorporating the Declaration into the Rome Statute is that the principles are declaratory in nature rather than legally binding, leaving them open for States to determine their operation.79 As a result, the language of Article 68(3) does not stipulate the modalities of victim participation. The drafters of the Rome Statute intended that the Court’s procedural rules would give effect to the Declaration, but judges would have discretion as to what role victims should have in proceedings.80 The first ten years of the Court have seen the development of victim participation in proceedings through judicial interpretation. The judges relying on Article 21, on applicable law, have interpreted Article 68(3) in light of other provisions within the Statute, Rules, and Regulations, as well as the jurisprudence of human rights and domestic courts to adapt it to the framework of the Court. It is this judicial interpretation which has provided the flesh and life to the skeletal language of the Rome Statute on victims.

As there are potentially millions of victims within the jurisdiction of the ICC, they cannot all personally participate in the Court’s proceedings; instead participation is carried

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77 See Chapter 4.
79 Vasiliev Ch.1 n 5, p652-653; and Chung n 1, p516-517.
out through victims’ legal representatives (VLRs). VLRs are meant to facilitate the communication of victims’ interests to the ICC, so that it can tailor proceedings, measures and, more generally, justice to their needs. A victim applies to the ICC to participate through a seven page application form, the Court then determines the veracity of their identity and link to a crime within the jurisdiction of the case, before assigning them to a legal representative of their choice. The judges then determine whether victims can participate based on the requirements of Article 68(3).

As such, VLRs are able to participate in proceedings before the Court where victims’ personal interests are affected. The Court, adopting the jurisprudence of the regional human rights courts, has found that victims’ interests are affected in criminal proceedings against the accused owing to their rights to truth and justice. In order to present victims’ ‘views and concerns’ the Court has established that VLRs can participate in proceedings by eight different modalities: to attend hearings; make oral motions, responses, and submissions; file written submissions; access evidence; ask questions; submit evidence; call witnesses; and to be notified. These modalities are discretionary owing to the protection of other interests before the Court, such as the rights of the defendant, meaning that victims do not automatically have the right to participate. The proceedings of the Court are distinguishable from previous tribunals, because of the physical presence of VLRs voicing victims’ views and concerns. For instance, in the Lubanga case, the VLRs at the beginning of the trial discussed the charges against the accused, as well as the expectations

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81 Article 68(3), and Rules 90-92. Chung n 1, p525.
82 McConigle Ch.1 n 27, p359.
83 Rule 89, RPE; and Regulation 86, ICC Regulations.
84 Article 68(3).
85 Prosecutor v Katanga and Chui, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case ICC-01/04-01/07-474, 13 May 2008, para.31-44; Prosecutor v Bemba, Fourth Decision on Victims’ Participation, ICC-01/05-01/08-320, 12 December 2008; Prosecutor v Abu Garda, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, ICC-02/05-02/09-121, 29 September 2009, para.3; Prosecutor v Al Bashir, Decision on Applications a/0011/06 to a/0013/06, a/0015/06 and a/0443/09 to a/0450/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case, ICC-02/05-01/09-62, 15 December 2009, para.4-5.
86 Rules 91-92, and 144. See Lubanga, ICC-01/04-01/06-1119; Katanga and Chui, ICC-01/04-01/07-474; Katanga and Chui, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788, 22 January 2010; and Bemba, ICC-01/05-01/08-320.
and experiences of the victims they represented. Nevertheless, the interpretation and practice of victim participation gives rise to a number of challenges as to the extent to which the Court can be responsive to victims’ needs.

2. Challenges to incorporating victim participation into proceedings

As discussed in Chapter 1, the ICC is not victim-centred justice, as there are other interested parties before the Court, such as the prosecution and the defence. Instead, victim-orientated justice is the Court being responsive to victims’ needs while reaching a fair balance with other interests where they conflict, thereby adopting procedural justice outlined in Chapter 1. The Rome Statute and the RPE give the impression that the Court could provide victim-orientated justice by Article 68(3) and procedural modalities outlined above. However, there remain three areas of concern: the rights of the defendant, collective participation, and determining outcomes, which highlight the difficulty of the Court being responsive to victims’ needs and achieving a fair balance.

a) Rights of the defendant

Article 68(3) stipulates that victims are only permitted to participate before the Court if it is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial. For some commentators and judges, victim participation has been the most contentious issue in relation to the rights of the defendant. Chapter 2 outlined the exclusion of victim participation at previous tribunals on this basis. This was on account of adopting adversarial trial proceedings from common law jurisdictions, which prohibited victims owing to fears they would undermine the “equality of arms” between the two parties. The ICC utilises mixed criminal proceedings between common and civil law practices by including victim participation, the independence of the Prosecutor, and protection of the

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87 See Prosecutor v Lubanga, ICC-01/04-01/06-T-107-ENG, 26 January 2009.
88 See Jouet Ch.1 n 205; and Judge Pikis discussed subsequently.
89 See also Jorda and de Hemptinne Ch.1 n 183, p1389-1392.
rights of the defendant. Where victims and defendants’ rights do conflict the ICC needs to reach a fair balance between them in order to ensure justice, as outlined in Chapter 1.

Concerns over violation of the rights of the defendant by the participation of victims have been expressed by Judge Pikis at the ICC who viewed their role as a ‘highly qualified participation limited to the voicing of their views and concerns.’ Judge Pikis asserted that the fairness of the trial rests in the equality of arms where the Prosecutor has the burden of proof to prove the guilt of the accused, which the defence rebuts. For Judge Pikis, the participation of victims risks them undermining the equality of arms by becoming second accusers, thereby taking more of a ‘defence side’ to the discussion of victim participation. Instead the majority of judges have qualified the participation of victims in light of defendants’ rights, rather than limiting them to a symbolic function as suggested by Judge Pikis. They have differentiated victims from the prosecution and the defence by calling them ‘participants’ rather than parties, indicating their reduced status. Two issues arise here which emphasise the delicate balance the Court tries to achieve between the rights of victims and defendants: victims presenting evidence and anonymous participation.

(1) Victims presentation of evidence

Presenting evidence affords victims a means to bring to light materials and perspectives that are important to their interests in truth and justice. The Court has recognised that victims can present evidence as part of their participatory role, though it has restricted this by finding that leading and presenting evidence will be primarily by the prosecution and the defence. The drafters of the Rome Statute envisaged that victim participation would be necessarily evidential as they would:

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90 McGonigle Ch.1 n 27, p227.
91 Separate opinion in Prosecutor v Lubanga, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, ICC-01/04-01/06-925, 13 June 2007, para.15 quoted in his separate opinion in Lubanga, ICC-01/04-01/06-1432-Anx, para.6 and 15.
92 Lubanga, ICC-01/04-01/06-925 para.19. Schabas, Ch.1 n52, p324. See also Separate Opinions of Judge Pikis and Judge Kirsch in Lubanga, ICC-01/04-01/06-1432, paras.23-28.
93 Bemba, ICC-01/05-01/08-320 para.20; and Lubanga, ICC-01/04-01/06-2127, para.24.
94 Lubanga, ICC-01/04-01/06-1432, para.93; Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, ICC-01/05-01/08-807-Corr, 19 July
'have the right to participate in the proceedings with a view to presenting additional evidence needed to establish the basis of criminal responsibility as a foundation for their right to pursue civil compensation.'

This position neglects victims’ interest in presenting evidence as part of their rights to truth and justice, but it does acknowledge their ability to submit evidence on the culpability of the accused. However, the Court has taken different approaches. At one end of the spectrum, Judge Pikis has asserted that victims have no role in presenting evidence, whereas at the other end, Trial Chamber III has allowed victims to present evidence on the responsibility of the accused. The general approach by Court has been to enable victims to present evidence through three participation modalities of: (1) submitting evidence; (2) asking questions; and (3) calling witnesses. These modalities do not appear in the Statute, RPE or Regulations, but are based on Article 69(3) of the Rome Statute, which enables the Court to request all relevant ‘evidence that it considers necessary for the determination of the truth.’ This indicates that victims’ role is to aid the Court in the clarification of facts rather than determination of the responsibility of the accused.

On the first modality the Court has recognised that VLRs can submit incriminating evidence on the defendant’s guilt as long as it satisfies three admissibility criteria namely (1) relevant material, (2) probative value, and (3) probative value outweighs its prejudicial effect. Allowing VLRs to submit evidence can present an opportunity to highlight facts that the prosecution or the defence have overlooked or neglected. However, on the two occasions where evidence was submitted by the VLRs, the judges rejected their submissions.
as they repeated evidence already before the Court or it lacked probative value.\textsuperscript{100} Submitting evidence has so far not engendered a conflict between the rights of the victims and the defendant, but the Court retains very strict control of VLRs ability to do so.

The other two modalities of questioning and calling witnesses have been more contentious and required a more delicate balancing of rights by the Court. With regards to VLRs questioning witnesses, the Court has established that in order to achieve a balance between the rights of the victims and the defendant a number of criteria must be adhered to: questions must be neutral in nature (i.e. they must not be a cross-examination nor ‘combative’); relevant to victims’ personal interests; and not be leading or closed questions.\textsuperscript{101} The Court has emphasised that VLRs are not auxiliary prosecutors to prove the guilt or innocence of the accused as in civil law countries, but rather assistants to help the judges determine the truth, therefore having a more neutral role.\textsuperscript{102} VLRs in the \textit{Lubanga} and the \textit{Katanga and Chui} cases, for instance, focused their questions on highlighting the suffering of victims, the context of victimisation, and continuing hardship victims continue to face.\textsuperscript{103}

Different Chambers of the Court have taken diverging approaches in balancing victims and defendants’ rights with regards to questions asked by VLRs. Trial Chamber II in the \textit{Katanga and Chui} case has followed a more restrictive approach to questioning by limiting them to factual points, so as to preserve the equality of arms between the

\textsuperscript{100} See \textit{Prosecutor v Lubanga}, Decision on the request by the legal representative of victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07 and a/0162/07 for admission of the final report of the Panel of Experts on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo as evidence, ICC-01/04-01/06-2135, 22 September 2009. \textit{Prosecutor v Katanga and Chui}, Decision relative à trois requêtes tendant à la production d’éléments de preuve supplémentaires (ICC-01/04-01/07-3217-Conf), ICC-01/04-01/07-3217-Red, 4 January 2012.

\textsuperscript{101} \textit{Lubanga}, ICC-01/04-01/06-2127, paras.28-30; \textit{Katanga and Chui}, ICC-01/04-01/07-1665, paras.82 and 90-91; \textit{Katanga and Chui}, ICC-01/04-01/07-1788, paras.72-75; and \textit{Bemba}, ICC-01/05-01/08-807-Corr, paras.30-32; \textit{Katanga and Chui}, ICC-01/04-01/07-474 para.135.

\textsuperscript{102} \textit{Lubanga}, ICC-01/04-01/06-2127, para.28-29.

\textsuperscript{103} For instance, \textit{Lubanga}, ICC-01/04-01/06-T-39-ENG, 21 November 2006, p95 and 141. See McGonigle Ch.1 n 27, p318.
prosecution and the defence.\textsuperscript{104} Trial Chamber II’s strict adherence to this approach can be seen where a VLR asked a witness on a meeting with Katanga whether he had any children as bodyguards with him? This was objected to by the defence as it was linked to the responsibility of the accused, and was instead modified into a more neutral question by the judges.\textsuperscript{102} Accordingly, the victims’ role was to voice their experiences and emotions on the harm they have suffered rather than presenting evidence on their interests in truth and justice.\textsuperscript{106}

This is in contrast to Trial Chambers I and III which have allowed VLRs to question witnesses on factual and legal points that at times have been linked to the responsibility of the accused.\textsuperscript{107} Trial Chamber III in the \textit{Bemba} case has taken this further, with the judges declaring that,

\begin{quote}
‘the interests of victims are not limited to the physical commission of the alleged crimes under consideration. Rather, their interests extend to the question of the person or persons who should be held liable for those crimes, whether physical perpetrators or others. In this respect, victims have a general interest in the proceedings and in their outcome. As such, they have an interest in making sure that all pertinent questions are put to witnesses.’\textsuperscript{104}
\end{quote}

In the trial the VLR’s questions to a witness concentrated on the responsibility of the defendant by asking them about Bemba’s role in the chain of command and whether he was informed of the commission of crimes.\textsuperscript{109} This approach is consistent with a victim-orientated justice, which recognises victims’ interests in truth and justice, as well as their independent perspective from the prosecution.

McGonigle contends that questioning by VLRs at the ICC can have a negative impact on the prosecution and the defence, as it is repetitive, disproves a point, or addresses the guilt of

\begin{footnotesize}
\textsuperscript{104} Katanga and Chui, ICC-01/04-01/07-1665, paras.90-91; and Katanga and Chui, ICC-01/04-01/07-2288, para.112.
\textsuperscript{105} Katanga and Chui, ICC-01/04-01/07-T-141-Red-ENG, 14 May 2010 p28-34. See McGonigle Ch.1 n 27, p300.
\textsuperscript{106} McGonigle ibid, p300.
\textsuperscript{107} See ibid, p298-300.
\textsuperscript{108} \textit{Prosecutor v Bemba}, Decision (i) ruling on legal representatives' applications to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses, ICC-01/05-01/08-1729, 9 September 2011, para.15.
\textsuperscript{109} Bemba, ICC-01/05-01/08-T-160-Red-ENG, 13 September 2011.
\end{footnotesize}
the accused.\textsuperscript{110} Furthermore she argues that in order to protect the equality of arms and the rights of the defendant, victims should be prevented from presenting evidence on the culpability of the accused.\textsuperscript{111} However, McGonigle’s and Trial Chamber II’s interpretation inhibits victims from presenting their interests in truth and justice. Nor does it reach a fair balance between the interests of victims and the defendant. The European Court of Human Rights has recognised that victims do not necessarily infringe the equality of arms as they ‘cannot be regarded as either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different.’\textsuperscript{112} The ICC has also adopted such a position by stating that victim participation is supposed to provide them with an independent voice, which is consistent with the intention of the drafters to ensure justice for victims.\textsuperscript{113} Therefore the Court’s position that victims are to remain neutral is incorrect as they have an interest in determining the culpability of the accused. Instead, it is the judges who have to be neutral and balance the interests before them.

On the final evidential modality, the Court can call a witness or victim on the VLRs’ behalf on the condition that it will provide ‘important information’ and a ‘genuine contribution to the ascertainment of the truth’ which the other parties have not dealt with.\textsuperscript{114} Trial Chamber II has also set out some criteria for evaluating the VLRs’ applications for victims to testify, namely: has the matter already been addressed by the prosecution so as to avoid repetitions; is it closely related to the charges; is it typical of the experiences of a larger group of victims or is the victim uniquely apt to give evidence; and will it bring to light new information to the Chamber?\textsuperscript{115}

\textsuperscript{110} McGonigle Ch.1 n 27, p319-320.
\textsuperscript{111} Ibid, p334-335.
\textsuperscript{112} Berger v France, App No 48221/99 (ECtHR, 21 May 2003), para.38.
\textsuperscript{113} Situation in DRC, ICC-01/04-101, para.51; and Prosecutor v Bemba, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, ICC-01/05-01/08-2138, ICC-01/05-01/08-2140, 23 February 2012, para.25.
\textsuperscript{114} In accordance with Articles 64(4)(d) and 69(3). Katanga and Chui, ICC-01/04-01/07-1665, paras.45-48.
\textsuperscript{115} Ibid. para.30.
As of July 2012, the Court has called ten victims to testify based on requests by their VLRs. In *Lubanga* and *Katanga and Chui* cases the Court required victims to testify under oath so that their testimony would be used as evidence, giving them the status of witnesses. These victims were allowed to discuss at length their victimisation, other crimes which occurred, and the responsibility of the accused. The Court has found victims personally voicing their views and concerns should ideally be made through their legal representatives, in order to protect the defendant who can only cross-examine witnesses. In the *Lubanga* case, Trial Chamber I decided that the purpose of victims presenting their views and concerns was not part of the evidence, but to provide the judges with a contextual understanding of the facts before the Court. This approach exhibits the Court’s use of victims to further its determination of the truth.

In the *Bemba* case Trial Chamber III allowed three victims to express their views and concerns through live video link, on the basis of their harm being representative of a larger group of victims before the Court. The issue arose of whether the defendant’s rights were being violated during the victims’ presentations, as they were discussing incriminating evidence about the accused, who was unable to cross-examine them. On this basis the defence and prosecution objected to the Chamber. However, the judges disagreed with them on the grounds that victims needed to narrate in their own words the factual background to the charges which their views and concerns arose from. Furthermore, the judges stated that

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116 Three victims have testified in the *Lubanga* case, two in the *Katanga and Chui* case, and five in the *Bemba* case. See *Prosecutor v Bemba*, Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, ICC-01/05-01/08-2138, 22 February 2012.


118 Article 67(1)(e). *Prosecutor v Lubanga*, Order issuing public redacted version of the "Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial", ICC-01/04-01/06-2032-Anx, 9 July 2009, para.25-26; and *Katanga and Chui*, ICC-01/04-01/07-1788tENG, paras.86-89. See McGonigle Ch.1 n 27, p321-325.

119 Ibid, ICC-01/04-01/06-2032-Anx, para.25.

120 *Bemba*, ICC-01/05-01/08-2138, paras.39-51. Victims a/0542/08, a/0394/08, and a/0511/08. See *The Prosecutor v Bemba*, Transcripts 25-26 July 2012, ICC-01/05-01/08-T-227-Red-ENG and ICC-01/05-01/08-T-228-Red-ENG.

victims' views and concerns would not form part of their final determination of evidence.\textsuperscript{122} In contrast to the other Chambers, this decision is more in the interests of victims.

Nevertheless, Judge Steiner in Trial Chamber III dissented on the decision of allowing victims to present their views and concerns before the Court. She declared that, "meaningful participation ... implies that victims have an independent voice in the trials, a "right to be heard" which ... constitutes one of the most significant features of the proceedings before the International Criminal Court."\textsuperscript{123} She found that the criteria (of 'important information' and making a 'genuine contribution to the ascertainment of the truth') 'unreasonably restrict the rights recognised for victims by the drafters of the Statute.'\textsuperscript{124} Judge Steiner argued that such an approach lacked any legal basis, but was founded on 'hypothetical' risks of unduly delaying the trial and violating the rights of the defendant.\textsuperscript{125} She also criticised the majority's approach of being utilitarian by amalgamating victims' views rather than trying to ensure a more representative sample to present their distinct interests, as the VLRs had proposed eight victims, but the Court had only granted three. Instead the criteria should have been based on '(i) relevance; (ii) probative value; and (iii) the potential prejudice to the accused.'\textsuperscript{126}

Accordingly, Judge Steiner believed that the five additional victims requested by the VLRs should have been allowed to present their views and concerns. This was due to them meeting the three criteria, as well as being able to provide insightful information on the crimes committed by Bemba's militia and the harm caused to victims. Although allowing more victims to testify would require a few days more of the trial, amounting to 18 days, this was diminutive considering the prosecution had taken 177 days. Additionally, bearing in mind the number of victims was then 2,287,\textsuperscript{127} it would still be a smaller percentage than

\textsuperscript{122} Ibid, p19-22.
\textsuperscript{123} Bemba, ICC-01/05-01/08-2140, para.25.
\textsuperscript{124} Ibid, para.11.
\textsuperscript{125} Ibid, para.25 citing Prosecutor v Bemba, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, ICC-01/05-01/08-2012-Red, 9 February 2012, paras.12-16.
\textsuperscript{126} Ibid para.26 citing Prosecutor v Bemba, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, ICC-01/05-01/08-2012-Red, para.49.
those who testified in the Lubanga case, i.e. three out of 129. Therefore the criteria used by the Court to reach a fair balance between victims and defendants were inadequate as this failed to sufficiently consider victims’ needs. Instead, Judge Steiner’s approach is consistent with victim-orientated justice as it respects that victims’ interests are fundamental in the determination of justice.

(2) Anonymous participation

Anonymity involves the identity of victims being withheld from the public and the defendant, so as to prevent them from suffering further victimisation. However, anonymity can prevent an accused from challenging the veracity of an individual’s identity and statements. In trying to reach a fair balance between victims and defendants’ rights Pre-Trial Chamber I, as well as Trial Chambers I-III have all stated that victims who participate anonymously will be limited to making opening and closing statements, accessing public documents, and participation in public hearings. Trial Chamber I found that while there is a need to protect the accused from anonymous accusations, victim participation would be undermined if they had to give up their protection of anonymity in order to participate. Accordingly, ‘[t]he greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself.’ As an additional safeguard, the Chamber emphasised that it will always know the identity of the victim and will be in the best position to judge the extent of his/her participation.

128 Ibid, para.21.
129 See John R.W.D. Jones, Protection of Victims and Witnesses, in Cassese et al, Ch.1 n 183, 1355-1370, p1365.
130 Prosecutor v Lubanga, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, ICC-01/04-01/06-462, 22 September 2006, p.6-7; Lubanga, ICC-01/04-01/06-1119, paras.130-131; Prosecutor v Lubanga, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' participation of 18 January 2008, ICC-01/04-01/06-1191, 26 February 2008, para.36; and Katanga and Chui, ICC-01/04-01/07-474, para.184; Bemba, ICC-01/05-01/08-807, paras.61-69.
131 Lubanga, ICC-01/04-01/06-1119, para.130; Lubanga, ICC-01/04-01/06-1191, para.36; Katanga and Chui, ICC-01/04-01/07-474, para.182.
132 Lubanga, ICC-01/04-01/06-1119, para.131.
133 Ibid.
In contrast, Pre-Trial Chamber III found that there is no distinction in the way in which anonymous and non-anonymous victims can participate. This decision is more in line with ensuring justice for victims by taking the reasoning of Trial Chamber I further, i.e. acknowledging that to force victims to choose between protection and participation undermines their autonomy and threatens their safety. This approach is also consistent with human rights jurisprudence which recognises the obligations on States to guarantee the protection and participation of victims in criminal proceedings, as well as judicial oversight to protect the defendant’s rights. Moreover, the Court is obliged to protect victims under Article 68(1) with no qualification on victim participation under Article 68(3), or vice versa. Nevertheless, the distinction in participatory rights between anonymous and non-anonymous victims makes no difference in practice, as they are commonly represented by the same legal representatives.

b) Collective participation

One of the difficulties with victims participating before the ICC is the mass victimisation involved in international crimes. This is exacerbated by the concentration on those most responsible for international crimes at the Court, i.e. the authors and commanders in charge of the thousands of perpetrators who committed crimes against numerous victims. Accordingly, international criminal justice is necessarily asymmetrical justice. By way of example, in the Bemba case alone there are 4,452 victims participating before the Court on the responsibility of a single individual. Victims are unique individuals who are unlikely to speak with one voice, but to allow thousands of individuals to participate personally in a

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134 Bemba, ICC-01/05-01/08-320, para.99.
135 Ibid.
136 Myrna Mack-Chang v Guatemala, Merits, Reparations and Costs, Series C No 101 (IACtHR, 25 November 2003), para. 199; Case of Plan de Sánchez Massacre Ch.1 n 154, para.94; and Doorson v the Netherlands Ch.1 n 196, para.70.
137 McGonigle Ch.1 n 27, p285.
138 Prosecutor v Bemba, Public redacted version of "Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings", ICC-01/05-01/08-2247-Red, 19 July 2012.
criminal trial would be unworkable.\textsuperscript{139} The Court has reconciled these conflicting requirements by organising victims into groups based on their common interests and representation by a single VLR.\textsuperscript{140} The ICC has found that individuals will only participate personally in exceptional and limited circumstances.\textsuperscript{141} This is in line with the travaux préparatoires of the Court which only included victim participation through legal representation.\textsuperscript{142}

The Regualtions of the Court stipulate that a Chamber must ensure VLRs consider the ‘views of the victims, and the need to respect local traditions and to assist specific groups of victims.’\textsuperscript{143} The Court has been careful to guarantee effective communication between VLRs and victims by requiring counsel to come from the victims’ area and to speak the same language.\textsuperscript{144} Additionally, the Court has established support teams in the Hague and the field to ‘facilitate regular exchanges’ between victims and their VLRs.\textsuperscript{145} The ICC Registry also notifies victims, and conducts outreach to affected communities to inform them of the work and progress of the Court as well as their ability to participate in proceedings.\textsuperscript{146} The Court has acknowledged that without notification victims’ rights would ‘remain little more than a theoretical exercise.’\textsuperscript{147} In all, these measures are consistent with human rights law and


\textsuperscript{140} \textit{Lubanga}, ICC-01/04-01/06-1119, para.115-116; and \textit{Prosecutor v Katanga and Chui}, Order on the organisation of common legal representation of victims, ICC-01/04-01/07-1328, 22 July 2009, para.11.

\textsuperscript{141} \textit{Prosecutor v Kony et al}, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05-134, 1 February 2007, para.6. Rule 90(2). Victims can also be provided with financial assistance if they cannot afford legal representation, Rule 90(5).

\textsuperscript{142} Draft article 43(8) Decisions taken by the Preparatory Committee at its Session held from 4 to 15 August 1997, A/AC.249/1997/L.8/Rev.1, p36-37.

\textsuperscript{143} Regulation 79(2).

\textsuperscript{144} \textit{Katanga and Chui}, ICC-01/04-01/07-1328 para.15; and \textit{Prosecutor v Bemba}, Decision on common legal representation of victims for the purpose of trial, ICC-01/05-01/08-1005, 10 November 2010, para.10.

\textsuperscript{145} Ibid ICC-01/04-01/07-1328 para.17; and ibid ICC-01/05-01/08-1005, paras.24-27.

\textsuperscript{146} See ICC Outreach Reports 2007-2010, Public Information and Documentation Section, Outreach Unit.

\textsuperscript{147} \textit{Situation in Uganda}, ICC-02/04-101, para.164.
ensuring procedural justice for victims by ensuring effective representation of their interests through communication, consultation and information with their VLRs.\footnote{148 Principle 2 UN Victims’ Declaration; and Principle 24 UNBPG; Güleç v Turkey para.82; and Mapiripán Massacre Ch.1 n 156, para.219.

149 Prosecutor v Bemba, Public redacted version of “Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings”, ICC-01/05-01/08-2247-Red, 19 July 2012.

150 Katanga and Chui, ICC-01/04-01/07-1328, para.12.

151 Ibid ICC-01/04-01/07-1328, para.16.

152 Bemba, ICC-01/05-01/08-1005, para.18-20.

153 Ibid, para.19.

154 Statement by the Women’s Initiatives at the opening of the Trial of Jean-Pierre Bemba Gombo, 22 November 2010, p4, cited from McGonigle Ch.1 n 27, p328.}

As the Court has become more organised and knowledgeable about the victim participation regime it has reduced the number of VLRs, provided there is no vast difference in interests among those they represent. By way of example, in the Lubanga case, seven VLRs in two teams participated on behalf of 129 victims, whereas in the Bemba case, as of July 2012, there were two VLRs and one member of the OPCV representing 4,452 victims.\footnote{149} In the case of Katanga and Chui, Trial Chamber II split the common legal representation between those victims who were former child soldiers and the larger group of those who had been attacked by the militias in Bogoro on the 24\textsuperscript{th} February 2003.\footnote{150 Where a conflict in interests arises between victims under one VLR, the Court can split the group and order the Office of the Public Council for Victims to represent the separate group of victims.} The Court has to ensure that in organising collective participation victims’ interests are adequately represented. For instance, in the Bemba case, Trial Chamber III grouped the victims geographically.\footnote{152 This allowed victims of the same family and community to be represented together and facilitated contact between them and their legal representative.} However, the Women’s Initiatives for Gender Justice (WIGJ) warned the Court that organisation of victims into geographical groups, especially considering their numbers, may not protect victims’ distinct interests, such as those who suffered sexual violence.\footnote{154 Instead, WIGJ proposed that victim representation should be organised on the nature of the crimes committed against them so as to reduce conflicting interests, such as in the Katanga and Chui cases.}
Chui case mentioned above. As McGonigle points out, with increasing number of victims participating under a single representative, conflicts of interests will be difficult to avoid.155 Such situations may require VLRs to represent opposing interests, but this may reduce their effectiveness.

A further concern is that those victims who apply to participate before the Court are not representative of those victimised in a conflict; for example, urbanised and educated victims are more likely to come before the ICC, due to their having better access to the Court and intermediaries who can provide assistance in filling in forms and applying for legal representation.156 The Rome Statute and the RPE obliged the Court to be responsive to vulnerable victims’ needs, as well as to ensure that no individuals or groups are discriminated against in participating before the ICC.157 In certain situations, the Registry and the Court have tried to correct under-representation. For instance, in authorising the investigation in Côte d'Ivoire, the Court requested the Registry to conduct further research into the views of vulnerable groups after their original report had been dominated by males and certain ethnic groups.158

Victim participation has been further collectivised by Pre-Trial Chamber III (PTC-III) in the Prosecutor v Laurent Gbagbo case. The Registry proposed collective victim applications through a group application form with participation to be facilitated by an individual victim representative.159 In turn they would be represented by a single VLR. An amicus curiae report made by the Redress Trust discussed the practice of collective participation in light of other mechanisms, including the strength of victims being together, but noted the risk of tensions within a group, under-representation of gender and vulnerable

155 McGonigle ibid, p329.
156 Chung n 1, p513.
158 Situation in Republic of Côte d'Ivoire, ICC-02/11-14 para.211.
159 Prosecutor v Gbagbo, Organization of the Participation of Victims, ICC-02/11-01/11-29-Red, 6 February 2012.
groups, and that they do not usually speak with one voice. The OPCV also warned of the dangers of collective participation, such as the dominance of certain victims’ views, the loss of individuals’ voices, the creation of further complexity and if not properly regulated the causing of secondary victimisation. Single Judge Fernández de Gurmendi in PTC-III maintained that collective application and participation would still protect victims’ heterogeneous views and ensure individual claims for reparations.

The approach adopted in the Gbagbo case may indicate the future of victim participation, especially with increasing pressure from limited resources on account of a growing number of cases and victims before the Court. There is a further problem that collectivising victims is contrary to human rights law which protects the rights of the individual. A challenge for the Court is to accommodate victims’ individual rights within collective participation; this will be difficult where their interests conflict, such as in sentencing or reparations. It may require VLRs to represent different perspectives and for the Court to reach a compromise between contradictory views. Moreover, introducing new levels of representations risks an additional person misrepresenting the interests of victims. The Court should ensure victims’ interests are represented, as far as possible, to make participation meaningful through professional advocates who have the capacity and resources to present those interests, rather than amalgamating their perspectives.

c) Determining outcomes

Article 68(3) specifies that victims’ views and concerns are to be presented and ‘considered’ by the Court. The European Court has found that victims’ rights should not be ‘theoretical or illusory’ but ‘practical and effective’. With regards to victims’ right to a fair trial this can ‘only be seen to be effective if the observations are actually “heard”, that is duly

162 Prosecutor v Gbagbo, Second decision on issues related to the victims’ application process, ICC-02/11-01/11-86, 5 April 2012.
considered by the trial court." Victims’ ability to present their views and concerns before the ICC does demonstrate some procedural justice by respecting their interests and allowing them to have an input into proceedings, as examined in Chapter 1. Procedural justice is also supposed to ensure that victims’ interests are taken into consideration in the determination of substantive outcomes, such as truth and justice. The extent to which this is done at the ICC can be found by analysing the Court decisions on victim participation in the investigation, trial and sentencing proceedings. These stages are important in determining truth and justice with regards to charges, responsibility and punishment being established.

(1) Participation in the investigation

The investigation is a significant point in the determination of truth and justice owing to the selection of charges and perpetrators for trial. Victim participation in investigations has long been established by the regional human rights courts as a fundamental part of ensuring its effectiveness and countering impunity. This is because it can provide oversight of prosecutorial discretion in the selection of perpetrators and charges, which can more accurately identify those responsible. The role of victims in this stage is necessary to safeguard their interests, as well as to provide public scrutiny and accountability. The Inter-American Court of Human Rights has determined that victims in an investigation should have, ‘substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation.’ The European Court has established that victim participation is a procedural right attaching to fundamental rights, such as the right to life. This includes the

164 Ibid.
165 Particularly with violations of the right to life or prohibition on the use of torture, and inhumane and degrading treatment: Kaya v Turkey Ch.1 n 198, para.121-126; McKerr Ch.1 n 194, para.115; Street Children case Ch.1 n 198, para.227; Mapiripán Massacre Ch.1 n 156, paras.116 and 119; and Al-Skeini v United Kingdom, App no 55721/07 (ECtHR, 7 July 2011), para.167.
167 Human rights cases n 165.
168 Street Children case Ch.1 n 198, para.227.
169 See Mettraux Ch.1 n.124.
modalities of victims being informed of a decision not to prosecute, some access to the investigation and case file, including witness statements, and to present their interests.\textsuperscript{170}

At the ICC the Prosecutor is obliged to consider and respect the interests of victims in investigations under Articles 53(1)(c) and 54(1)(b). Rule 92(2) also provides that the Prosecutor will inform victims when deciding not to initiate an investigation or prosecute under Article 53. Unlike in some national courts, victims before the ICC have no right to initiate criminal investigations or prosecutions.\textsuperscript{171} Additionally, Article 68(3) does not explicitly state that victims can participate in investigations, just in ‘proceedings determined to be appropriate by the Court’. In some of the first decisions of the Court, Pre-Trial Chambers I and II found that the investigation is an appropriate proceeding in which victims can participate.\textsuperscript{172} Pre-Trial Chamber I recognised that they are important in an investigation, ‘to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered.’\textsuperscript{173} The Chamber further determined that victim participation is not inconsistent or prejudicial to the ‘integrity and objective of the investigation’ nor to ‘efficiency and security’.\textsuperscript{174} Accordingly, VLRs could participate in the investigation provided that they did not give victims access to the record nor adversely affect the Prosecutor’s ability to conduct investigations.\textsuperscript{175} They could also present victims’ views and concerns to the Chamber as well as submit evidence to the investigation.\textsuperscript{176} This is in line with the jurisprudence established by the human rights courts.

The Pre-Trial Chambers’ decisions were later overturned by the ICC Appeals Chamber which interpreted ‘proceedings’ as only ‘judicial proceedings’.\textsuperscript{177} Accordingly, the

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{170} Ogur v Turkey, App no 21594/93 (ECHR, 20 May 1999), para.92; Güleç v Turkey, App no 21593/93 (ECHR, 27 July 1998), para.82; and McKerr Ch.1 n 194, para.148.
\item\textsuperscript{172} Situation in DRC, ICC-01/04-101; and Situation in Uganda, ICC-02/04-101.
\item\textsuperscript{173} Ibid ICC-01/04-101 para.63; followed in Situation in Darfur, Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, ICC-02/05-111-Corr, 6 December 2007, para.11.
\item\textsuperscript{174} Ibid ICC-01/04-101, paras.57-58; and Situation in Uganda, ICC-02/04-101, paras.88-89.
\item\textsuperscript{175} Ibid ICC-01/04-101, paras.58-59.
\item\textsuperscript{176} Ibid para.70.
\item\textsuperscript{177} Situation in DRC, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the
\end{enumerate}
\end{footnotesize}
Appeals Chamber found that the investigation is not a judicial proceeding which victims can participate in, as required by Article 68(3), but an 'inquiry conducted by the Prosecutor'. Instead they can make 'representations' to the Prosecutor under Articles 15(2) and 42(1) on the investigation or their interests. Compared to the approach of the Pre-Trial Chambers, the Appeals Chamber's decision leaves victims in a far weaker position, akin to writing a letter to the Prosecutor before the ad hoc tribunals. Under the Appeals Chamber's approach, victims can still have an input into the investigative process, but there is no oversight of the prosecutorial selection of perpetrators or charges, or whether the Prosecutor is acting in their interests. This decision has been since followed by other Chambers.

The Appeals Chamber's decision is contradictory with other articles in the Rome Statute and the ability of the Prosecutor to represent victims' interests. First of all, Article 21(3), on the standards established in human rights law, requires victims to have 'full access and the capacity to take part in all the stages of the investigation'. The Appeals Chamber's position also contrasts with Article 15(3), which allows victims to make representations to the Pre-Trial Chamber on an investigation initiated by the Prosecutor. Moreover, the connection to the charges and perpetrators convicted before the Court will determine the scope of reparations victims will be able to claim. Upholding the independence of the Prosecutor to solely conduct investigations is in line with Article 42 and represents a more


178 Ibid ICC-01/04-556, para.45.
179 Ibid, para.53. Confirmed in subsequent appeal of Situation in Darfur, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007, ICC-02/05-177, 2 February 2009.
180 See Chapter 4.
181 Article 53(1)(c).
182 Prosecutor v Ruto, Kosgey, and Sang, Decision on the "Request by the Victims' Representative for authorisation to make a further written submission on the views and concerns of the victims", ICC-01/09-01/11-371, 9 December 2011, paras.16-17.
183 Gomes-Lund et al Ch.1 n 202, para.257.
184 Article 75(2), and Situation in Uganda, ICC-01/04-101, paras.50-53. See Chapter 4.
common law approach to criminal trials. However, entrusting the Prosecutor to respect the interests of victims in an investigation does not always work in practice, as demonstrated by the ad hoc tribunals. This is evident at the ICC where VLRs have made a number of submissions to the Court as well as initiated proceedings during the trials to expand the limited charges made by the Prosecutor against an accused. By way of example, victims in the DRC situation sought to review the decision of the Prosecutor not to proceed to charge Jean-Pierre Bemba for the numerous crimes his militia committed in Ituri. Additionally, in the Kenyan case of *Ruto et al* the VLRs claimed that the Prosecutor had not conducted a meaningful investigation nor considered victims' interests. Both of these claims were dismissed by the Court on the basis of the independence of the Prosecutor. Accordingly, the Appeals Chamber's decision leaves it up the Prosecutor's discretion to consider victims' interests in the investigation which is a crucial juncture in determining the outcomes of truth, justice and reparations at later stages.

A high level of selectivity of perpetrators and charges is the norm in international criminal justice, due to the Court's purpose to prosecute and punish those most responsible for international crimes. Baumgartner suggests that this provides a symbolic function of condemning such crimes. However, this sits uneasily with human rights jurisprudence on the obligation to conduct investigations and prosecutions of those responsible for gross violations of human rights, in order to ensure an effective remedy to victims as well as to end

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185 McGonigle Ch.1 n 27, p226-227. See also *Prosecutor v Muthaura, Kenyetta, and Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382, 23 January 2012; and *Prosecutor v Ruto, Kosgey and Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012. As opposed to criminal court judges in civil law jurisdictions who are responsible for the investigation.

186 Such as Regulation 55 proceedings in the *Lubanga* case discussed in the following sub-section.

187 *Situation in DRC*, Demande du représentant légal de VPRS 3 et 6 aux fins de mise en cause de Monsieur Jean-Pierre Bemba en sa qualité de chef militaire au sens de l'article 28-a du Statut pour les crimes dont ses troupes sont présumées coupables en Ituri, ICC-01/04-564, 30 June 2010. See HRW report n, p36-47.

188 *Ruto et al*, ICC-01/09-01/11-367, 9 November 2011.

189 *Situation in DRC*, Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed, ICC-01/04-582, 25 October 2010; and *Prosecutor v Ruto et al*, Decision on the "Request by the Victims' Representative for authorisation to make a further written submission on the views and concerns of the victims", ICC-01/09-01/11-371, 9 December 2011, paras.16-17.

190 Baumgartner n 171, p437-438.

191 Ibid p438.
impunity. McGonigle questions whether the emphasis in human rights law on victim participation in the investigation, which is normally applied in the domestic level, should be applicable to the ICC.\textsuperscript{192} Aside from the Court's obligation to interpret the Rome Statute in light of international recognised human rights law in Article 21(3), it is appropriate to the ICC as part of the purpose of the ICC to end impunity and deliver justice to victims. Human rights law has found that victim participation is a vital part of ensuring an effective investigation, which is necessarily connected to these two goals of the Court and broader perceptions of it as fair and transparent.

The ICC Prosecutor should be independent, but not unaccountable. Therefore, there needs to be some oversight of his or her discretion to ensure victims' interests are being taken into account. Victim-led prosecutions before the ICC could lead to politicisation of the Court and undermine its impartiality. This is not what victim-orientated justice requires; rather it involves victims participating in proceedings which affect them and the Court considering their interests. The selection of crimes and perpetrators to prosecute should be representative, as far as possible, of all victims' suffering in order to enable them to access their procedural and substantive rights. A representative picture of suffering can also acknowledge the harm caused to different victim groups and clarify the facts. Additionally, it is consistent with the Prosecutor's obligations to act in the interests of justice and victims, and the Court's obligation to determine the truth.\textsuperscript{193} Nevertheless, this should be balanced with the experience of the Milošević case before the ICTY, where a representative prosecution lengthened the trial, with the defendant dying before its completion, so there needs to be some selection of charges. Additionally, State Parties are meant to complement the Court's work where there are gaps.

(2) Participation in the trial

Victim participation in the trial stage can offer victims the opportunity to have their interests considered by the Court in relation to clarifying the facts and determining the

\textsuperscript{192} McGonigle Ch.1 n 27, p341.

\textsuperscript{193} On the basis of Articles 51(1)(c), 54(1)(b), and 69(3).
responsibility of the accused.\textsuperscript{194} The VLRs have brought to light the context of victims’ harm, the continued difficulties they face, their needs and expectations, and presented evidence on the culpability of defendants. VLRs have also tried a number of creative applications to expand the charges against an accused during the trial proceedings to overcome their limited role in the investigation. In the \textit{Lubanga} case, the VLRs attempted to use Regulation 55 to re-characterise the charges against the defendant to include sexual slavery, and cruel and inhumane treatment.\textsuperscript{195} Later in the same case, they sought to include victims who had suffered from crimes committed by the child soldiers who were recognised as the direct victims before the Court based on the charges against the accused.\textsuperscript{196} Yet, the Court rejected all of these requests on the basis of the Prosecutor’s independence.

During the trial of \textit{Lubanga}, Trial Chamber I did allow victims to present evidence on these crimes, such as the documentation of sexual violence and other crimes committed by the defendant’s militia in Ituri, despite not appearing in the charges.\textsuperscript{197} The judges also questioned witnesses on the prevalence of sexual violence against female child soldiers.\textsuperscript{198} Additionally, the Chamber permitted victims to ‘tell their story’ in narrative form, which included the details of these crimes thereby ensuring their documentation.\textsuperscript{199} In the Court’s first judgment in the \textit{Lubanga} case the defendant was convicted of the charges of enlisting and conscripting children to be used into an armed conflict. This did realise certain victims’ rights to truth and justice through officially acknowledging and documenting their harm.

\textsuperscript{194} \textit{Street Children} Ch.1 n 198, para.227.
\textsuperscript{195} \textit{Prosecutor v Lubanga}, Joint Application of the Legal Representatives of the Victims of the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-1891-ENG, 22 May 2009. \textit{Prosecutor v Lubanga}, Clarification and further guidance to parties and participants in relation to the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01-04-01/06-2049, 27 August 2009; \textit{Prosecutor v Lubanga}, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01-04-01/06-2205, 8 December 2009. See McGonigle Ch.1 n 27, p294-296.
\textsuperscript{196} \textit{Lubanga}, ICC-01-04-01/06-1813.
\textsuperscript{197} \textit{Lubanga}, ICC-01-04-01/06-T-145-Red3-ENG, 6 March 2009, p37; and \textit{Lubanga}, ICC-01-04-01/06-T-193-ENG, 17 June 2009, p75-77.
condemning the crimes, and finding the defendant responsible. Although one of the criticisms from the outset of the case was that the charges were too narrow, the Court refused to change this in order to maintain the independence of the Prosecutor.\textsuperscript{200} As a result, the final judgment did not recognise the other alleged crimes committed by Lubanga’s militia despite the evidence presented before the Court.\textsuperscript{201}

These efforts attest to the constraints of international criminal proceedings in trying to deliver justice to victims within its primary function of prosecuting and punishing perpetrators.\textsuperscript{202} The shortcomings of the charges could have been overcome at an earlier stage by modifying them in the pre-trial stage.\textsuperscript{203} Trial Chamber I instead suggested that it would give more weight to sexual violence and inhumane and degrading treatment in the determination of sentencing and reparations.\textsuperscript{204} This may offer some recognition and condemnation of the victims’ suffering. Yet, the Court has not established the responsibility of Lubanga’s militia for committing those crimes; therefore it does not satisfy victims’ right to justice or truth.

With regards to truth, the judges have emphasised the role of victims in helping a Chamber to determine it through presenting evidence.\textsuperscript{205} For instance, in the Bemba case the VLRs ‘helped the Chamber to understand relevant events, such as where they distinguished the use of Lingala by the accused and his militia in comparison to local languages.\textsuperscript{206} Yet, there is a danger that victims’ interests could become secondary to the truth which the ICC is interested in, making them just functional to the Court’s agenda. Moreover, it is hard to reconcile the Court’s goal of determining the truth under Article 69(3) in allowing victims to participate, yet denied their requests to expand the charges against defendant to provide a more representative and truthful account of their crimes. This may further indicate that

\footnotesize{\textsuperscript{200} NGO Joint Letter to the Chief Prosecutor of the ICC on Charges against Thomas Lubanga and DRC Investigation, 31 July 2006.\textsuperscript{201} Ituri: Covered in Blood, n 49, p21-29.\textsuperscript{202} McGonigle Ch.1 n 27, p357-365.\textsuperscript{203} In the confirmation of charges hearing under Article 61(7)(c)(i).\textsuperscript{204} Lubanga, ICC-01/04-01/06-2842, para.630.\textsuperscript{205} Based on Article 69(3) of ‘request the submission of all evidence that it considers necessary for the determination of the truth.’. Lubanga, ICC-01/04-01/06-1119, para.108. Approved by the Appeals Chamber in Lubanga, ICC-01/04-01/06-1432, para.98.\textsuperscript{206} Pena n 8, p502 citing Bemba, ICC-01/05-01/08-T-12-ENG WT, 15 January 2009, p97-98.}
victim participation under Article 69(3) serves more the interests of the Court rather than victims.

A further area where victims’ interests can be taken into account in determining outcomes is in guilty pleas, though none have yet arisen before the Court.207 A Chamber can order the prosecution to present additional evidence and witnesses, or continue the trial so as to provide a more complete presentation of the facts and determination of the defendant’s responsibility.208 Such an approach is respectful of victims’ rights to truth and justice. This is in comparison to the previous international criminal tribunals which neglected victims’ interests in guilty pleas. However, a Chamber is not obliged to make such an order, and remains under its discretion, so the extent to which the Court will be responsive to victims’ needs in this area is questionable.

(3) Sentencing

Sentencing of a perpetrator is supposed to punish them for the wrongfulness of the crime and the harm they have caused. As noted in Chapter 1, punishment in international criminal justice pursues a number of purposes, mainly retribution, but due to the radical evil of such crimes it cannot fully equate the harm caused and is therefore necessarily symbolic.209 Victims can pursue sentencing goals other than retribution, such as ensuring their security or reconciliation. The ICC does allow them to have some input into determining punishment, with VLRs able to make submissions to a Chamber.210 The Court can also take into account aggravating factors such as harm suffered by the victims and their families, their defencelessness, multiple victims, and discrimination, which is similar to the practice of the ICTY.211 The use of victims’ suffering as an aggravating factor reflects the retributive purpose by trying to ensure a proportional punishment.

207 Article 65(4).
208 Ibid.
209 Baumgartner n 171, p438.
210 Article 76 and Rule 143. Prosecutor v Lubanga. Scheduling order concerning timetable for sentencing and reparations, ICC-01/04-01/06-2844, 14 March 2012, para.3.
211 Rules 145(1)(c) and 145(2)(b)(iii-v) RPE.
At the time of writing the Court had only issued one sentencing judgment in the *Lubanga* case. The parties’ submissions and the Court’s judgment in this case offer an insight into the diverse approaches and purposes of victims in the sentencing of perpetrators before the ICC. The Prosecutor’s sentencing submission requested the Court to consider sexual violence and rape as an aggravating factor, despite the defendant not being convicted of them.\(^{212}\) Classifying victims’ suffering in these crimes as aggravating circumstance serves a retributive purpose, but fails to recognise fully their harm and to document the responsibility of the perpetrator. More importantly, sexual violence and rape are not circumstances, but crimes; terming them otherwise diminishes their seriousness. The VLRs’ submissions made no reference to these crimes as aggravating factors, instead they emphasised the harm caused, as well as the vulnerability and age of the children used as soldiers.\(^{213}\)

The Court did find that despite not being charged, sexual violence and rape could be considered aggravating circumstances.\(^{214}\) However, as the Prosecutor did not present sufficient evidence to support such a claim, the majority of the Court rejected it.\(^{215}\) Instead the Chamber found that for the purposes of reparations it would consider sexual violence and rape.\(^{216}\) Such an approach is contrary to human rights law, which stipulates that reparations are grossly insufficient substitutes for accountability.\(^{217}\) Judge Odio Benito also dissented from the majority stating that sexual violence was an aggravating circumstance on the basis of the harm it causes to victims and their families, and sufficient evidence of it had been

\(^{212}\) *Prosecutor v Lubanga*, Prosecution’s Sentence Request, ICC-01/04-01/06-2881, 14 May 2012, para.30-34.

\(^{213}\) *Prosecutor v Lubanga*, Observations sur la peine pour le groupe de victimes V01, ICC-01/04-01/06-2880, 14 May 2012, and Observations du groupe de victimes V02 Sur des éléments de preuve établissant des circonstances aggravantes ou des circonstances atténuantes des faits portés à la charge de l’accusé reconnu coupable, ICC-01/04-01/06-2882, 14 May 2012.

\(^{214}\) On the basis of Rule 145(1)(c)(i-iv), *Prosecutor v Lubanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012, para.67.

\(^{215}\) *Lubanga* ibid, para.75. The Court only considered the victims’ age as reflecting the gravity of the offence, rather than as an aggravating circumstance, paras.77-78.

\(^{216}\) Ibid. para.76.

\(^{217}\) *McKerr* Ch.1 n 194, para.121; and *Al-Skeini* n 16, para.165.
raised during the trial. On this basis Judge Odio Benito believed that the Lubanga should serve 15 years in comparison to 14 years by the majority.

The first sentencing judgment of the Court evidences a retributive stance, by its recognising that victims’ harm could be used to increase the defendant’s sentence in order to provide a more proportional punishment. The inclusion of sexual violence and rape as an aggravating factor may indicate the Court trying to counteract the limited charges, but this is an inappropriate solution, which was not in the victims’ interests. Depending on the case, the Court may be more responsive to victims’ needs in sentencing through the use of mitigating circumstances. The Rules of the Court allow a reduction of a defendant’s sentence if they make efforts to compensate victims. In the Lubanga case, the VLRs of group V01 in their sentencing submission suggested that an apology by Lubanga should be considered a mitigating circumstance. This was considered important to the victims, because of the continuing divisions in Ituri and its potential to help repair their suffering. Although Lubanga did not apologise it does suggest a possible avenue for the Court to be responsive to victims’ other justice needs beyond retribution, such as reconciliation.

3. Participation as victim-orientated justice

Victim-orientated justice is about ensuring that the ICC is responsive to the needs of victims and reaches a fair balance in assessing the differing interests before it. In interpreting fairness, the Court has on a number of occasions recognised that it is not limited to the prosecution and defence, but also includes ‘respect for the procedural rights of victims.’ This is consistent with victim-orientated justice. Numerous appeals have been submitted on the Court’s decisions on victim participation as weighing too much in favour of victims’

\[218\] Ibid, p41-52.
\[219\] Ibid, para.23.
\[220\] Rule 145(2)(a)(ii).
\[221\] Lubanga, ICC-01/04-01/06-2880, paras.17-21.
\[222\] Situation in DRC, Décision relative à la requête du Procureur sollicitant l’autorisation d’interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, ICC-01/04-135, 31 March 2006, para.38; Situation in Uganda, Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-112, 19 December 2007, para.27.
interests, but none have successfully evidenced that it has undermined the rights of the defendant; this is probably due to the Chambers’ strict scrutiny. Although victim participation can impact on the rights of the defendant, it is the role of the judges to permit them to present their interests and arrive at a fair balance.

The Court does try to balance competing interests. In Trial Chamber I judgment of the Lubanga case, for instance, the majority of judges rejected the testimony of five victims. The Chamber had previously acknowledged that where victim participation does become prosecutorial the judges will determine the relevance of such evidence. All five victims had testified in the trial on the crimes they suffered and the responsibility of the accused. The Chamber rejected their testimonies due to the defence’s submissions which evidenced the discrepancies in the victims’ identities and statements. This indicates that the judges can separate relevant evidence from the irrelevant so as to protect the rights of the defendant without denying victims from voicing their interests. Recognising that victim participation can be prosecutorial is consistent with understanding that their right to justice includes establishing the criminal responsibility of the perpetrators, as discussed in Chapter 1.

In comparison to victim participation in national courts, such as partie civile or Nebenklage, victims before the ICC have a more limited form of participation under Article 68(3), as they cannot initiate an investigation or submit an appeal. Victims have greater participatory rights at the international criminal tribunal of the Extra-Ordinary Chambers of the Courts of Cambodia (ECCC), as they can request a specific investigation, appeal a decision, and are not required to evidence their ‘personal interests’ in order to participate. Victims at the ECCC are organised similarly to the ICC through collective civil parties being

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223 For example see Katanga and Chui, ICC-01/04-01/07-2288, and Situation in Darfur, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (c) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, ICC-02/05-110, 3 December 2007.


225 Lubanga, ICC-01/04-01/06-2842, p217-230. Though the majority went too far when it also revoked the victim status of the five who testified. See Judge Benito’s dissent, ICC-01/04-01/06-2842, paras.22-35.

226 See Frase n 51; and Doak Ch.1 n157, p310.

227 Rules 23bis, 55(10), 74(4), 80(2), of the ECCC Internal Rules. See McGonigle Ch.1 n 27.
represented by a single lawyer, but the Cambodia Court also allows a group of them to form victim associations to facilitate collective participation. The ability of other courts and tribunals to give more extensive rights to victims brings into question whether the ICC has reached the correct balance with the defendant’s rights.

In light of the preceding, there are three problems with the current victim participation regime at the ICC which arise as it is (1) costly, (2) disorganised, and (3) largely symbolic in its assurance of justice for victims. With regards to the first of these, victim participation has also been criticised for being both ‘time-consuming and resource intense’. Up until the end of 2011, the combined legal aid costs for victims’ legal representatives in the Lubanga and Katanga and Chui cases amounted to €2.3 million. This figure only covers VLRs and not the expenses incurred by the other parties, the Registry, and the Chambers in determining victim issues. Schabas suggests that victims would benefit more if they have been given the money spent on legal representatives as reparations instead, considering the small amount of money likely to available for reparations. In light of the symbolic role victims have played at the ICC, reparations are likely to be more meaningful to them.

Second, a further problem with victim participation is the miscellany of approaches adopted by the judges, such as on presenting evidence. With each case and Chamber having a divergent approach on victim participation, there is a lack of certainty as to what participation can offer, and whether victims should spend their energies on accessing justice elsewhere. These inconsistencies have resulted in inequality of victim participation before the ICC. These differences seem to stem from the diverse interpretations of judges rather

228 Rules 23 ter and quater, ECCC Internal Rules.
229 Friman n 60, p236.
230 Report of the Committee on Budget and Finance on the work of its sixteenth session, April 2011, ICC-ASP/10/20, p175.
232 McGonigle Ch.1 n 27, p333.
than the differing needs of victims. Judges Steiner and Kaul,234 for instance, have been particularly sensitive to victims' needs and interests, compared to Judges Pikis and Kirsch.235

Third, participation is largely symbolic as victims are only allowed to participate if they do not interfere with the interests of the prosecution or rights of the defendant. Moreover, they have a very minimal impact on determining outcomes. The investigation and prosecution of perpetrators at the ICC remains a contest between the Prosecutor and the defence. Combined with the increasing collectivisation of victims, it is unlikely that they can meaningfully realise their interests in truth and justice. Without a right of appeal, victims cannot challenge the Prosecutor's selection of perpetrators and charges, or decisions by the Court which neglect their interests. This is seems inconsistent with human rights law which protects victims' right to an effective procedural remedy.236 This underscores their weaker position in comparison to the other parties. Therefore victim participation at the ICC is largely symbolic. Complementarity may fill this gap, where State Parties may be more orientated to realising victims' rights. However, it does not establish the ICC as a 'high watermark' for victims in practice.

Together these problems come from a lack of a coherent underlying theory or purpose of victim participation or general role within the ICC. A clear understanding of how justice for victims can work within the framework of the ICC as victim-orientated justice could guide judges' interpretation. This could ensure greater consistency between decisions and reduce inequality, while keeping in mind some sort of flexibility for victims' differing needs. This would also involve recognising victims as independent parties who can participate in investigations, have an evidential role, and may at times need anonymity. Victims' role in the investigation and presenting evidence on the culpability of the accused will enable them to have a more meaningful role in proceedings that can better present and protect their interests. As the judges will know the identities of victims they will be in the best position to balance their interests against the defendant's rights. In turn, having a more

234 See Katanga and Chui, ICC-01/04-01/07-474; and Bemba, ICC-01/05-01/08-320.
235 See Separate Opinions of Judge Pikis and Judge Kirsch in Lubanga, ICC-01/04-01/06-1432.
236 Berger v France n 112; and Perez v France n 163.
coherent understanding of victim participation could minimise time and resources spent on determining modalities and appeals. The Court has been more responsive to victims’ needs and interests in relation to treatment and protection.

E. The Treatment and Protection of Victims at the International Criminal Court

Effective protection and treatment of victims is a necessary requirement of human rights law and procedural justice so as to ensure that their interaction with the Court does not cause them any further victimisation. This section begins by summarising the legal basis of the protection regime of the ICC, before outlining the Court’s treatment and protection system for victims. The subsequent sub-sections examine whether the Court offers victim-orientated justice with regards to protection and treatment by considering the balance between victims and defendant’s rights, as well as the responsiveness to victims’ needs. The section concludes by examining whether the ICC has overcome the problems associated with the ad hoc tribunals and provides adequate victim-orientated justice in light of human rights law and procedural justice.

1. Legal basis of victim protection and treatment

The main provision for victim protection and fair treatment is under Article 68(1) of the Rome Statute, which states that, ‘the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.’ This incorporates the principles of the UN Victims’ Declaration.237 The concepts mentioned in Article 68(1) of privacy, well-being, and dignity, better reflect an individual’s autonomy and a broader spectrum of needs which can be affected by their involvement with the Court. During the drafting of the Rome Statute there was strong support to ensure the utmost protection for victims and witnesses before the ICC after the experience at the ad hoc

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237 Principles 4 and 6(d), UN Victims’ Declaration; and Principle 10 UNBPG. An earlier draft of Article 68 included a provision that the interpretation of the whole article should be interpreted in light of Victims’ Declaration in order to give effect to it. Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, A/AC.249/1998/L.13, Article 61(7).
tribunals. The UN Victims' Declaration was used as a reference point to guide the development of Article 68, as victim protection and fair treatment in international criminal proceedings was generally accepted by delegates.

The resulting provisions within the Rome Statute and the Rules of Procedure and Evidence develop the provisions established at the ad hoc tribunals to protect victims and witnesses from risk of further harm. Consequently, the importance of protecting victims and treating them fairly is firmly established at the ICC as obligatory by the use of 'shall' in Article 68(3), in comparison to the ad hoc tribunals where protective measures were discretionary. The legal framework of the Court indicates that the protection and security of victims is one of the main objectives of the ICC. The Victims and Witnesses Unit is pivotal in this framework.

a) The Victims and Witnesses Unit

The Victims and Witnesses Unit (VWU) within the Registry is established under Article 43(6) of the Rome Statute to provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The VWU conducts assessments of an individual's needs so that it can recommend appropriate protection measures, to minimise the risk of victims, witnesses, and other persons, from


240 See Helen Brady, Protective and Special Measures for Victims and Witnesses, in R.S. Lee n 9, 434-456. Jorda and Hemptinne Ch.1 n 183, p1390.

241 See also Rules 17-19 RPE.
suffering further trauma.242 This is in line with international standards and developments in national jurisdictions which provide support and assistance to victims.243

The VWU also co-operates with State Parties in advising, assisting, and implementing any measures.244 The VWU has established the Initial Response System (IRS) in countries under investigation, which allows victims or witnesses to seek assistance at any time where they believe they or their families are in danger.245 If any calls are received, a local partner extracts the individual(s) and places them in a safe location before the need for further measures of protection are assessed. However, this system relies on local police forces, which may be corrupt or the crimes may involve the government, and could result in further harm to the individual. So far there have been no such incidents.246 The VWU has also created a protection programme (ICCPP).247 The protection programme is similar to witness protection programmes in domestic jurisdictions, in that it can involve the relocation of a witness temporarily or permanently, nationally or internationally, as well as additional measures, such as issuing new identities. Though the VWU only provides protection to victims who appear before the Court to testify or to participate. The Trust Fund for Victims does fund assistance to victims in a number of situations before the ICC, such as psychological counselling, physical rehabilitation and community-based victim sensitisation programmes.248

In the Hague, the VWU supports victims both inside and outside the courtroom. Similar to the ad hoc tribunals, the VWU offers 24 hour ‘psychological, social assistance and

242 Prosecutor v Lubanga, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute, ICC-01/04-01/06-1078, 19 May 2008, para.24; and Prosecutor v Lubanga, Victims and Witnesses Unit recommendations on psycho-social in-court assistance, ICC-01/04-01/06-1149, 31 January 2008, paras.1 and 14.
243 See Principle 6(d) UN Victims’ Declaration; Paragraphs 6-7 and 10, EU Decision on the Standing of Victims in Criminal Proceedings, (2001/220/JHA); and Dignan Ch.1 n 75, p49-54.
244 Rules 16(4), 17(2)(a)(vi), and 18(e). See the Registry and Trust Fund for Victims Factsheet, p3.
246 Courting History: The Landmark International Criminal Court's First Years, Human Rights Watch (2009), p152.
247 Regulation 96, Registry Regulations.
248 See Chapter 4.
advice’ to victims, witnesses, and their families, as well as in-court support assistants to ‘attend to [their] emotional and physical needs’. Additionally, it consists of staff with expertise in trauma, especially sexual violence, and other areas. Accordingly, the ICC Victims and Witnesses Unit builds on the experience and practice of the ad hoc tribunals to provide comprehensive support and protection. As such, the VWU offers a more victim-orientated justice when it comes to ensuring their fair treatment and protection before the ICC, both domestically and at the Hague.

**b) Protective and special measures**

The Court protects victims through protective and special measures. Article 68(1) obliges the Court to ‘take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.’ Protective measures are aimed at preventing the victim from suffering further harm due to their interaction or association with the Court. These include closed hearings (in camera), pseudonyms, voice and facial distortion, public non-disclosure, and redaction of identity or identifying information from the record. Requests for protective measures can be made by the Prosecutor, the defence, a witness, a victim or their legal representative, or the Court itself.

The Court has been clear that the obligations to identify, protect, and respect a victim or witness rests on the party or participant calling the individual to testify. Other organs of the ICC are also responsible for protecting victims and witnesses. Additionally, where protective measures are ordered, the defence, VLRs and other participants are bound by Rule 87(3)(b) and Article 8 of the Code of Professional Conduct for Counsel on professional secrecy and confidentiality.

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249 Regulation 83, Registry Regulations; and *Lubanga*, ICC-01/04-01/06-1149, paras.7-8.
250 See Article 43(6) and Rule 19 RPE.
251 Article 68(2), Rule 87(3), and Regulation 94, Registry Regulations.
252 Rule 87(1) RPE.
253 *Prosecutor v Lubanga*, Decision on various issues related to witnesses' testimony during trial, ICC-01/04-01/06-1140, 29 January 2008, para.36.
254 See Rule 16 on the Registry; and Articles 54(e), (f), and 68(1) on the Prosecutor’s obligation to protect victims during investigations and prosecutions.
Rule 88 provides special measures for vulnerable victims or witnesses who testify before the Court. Special measures include a support person, shielding devices, video conferencing technology, and sensitive questioning. The judges of the ICC have acknowledged that the court environment can be 'foreign and uncomfortable' and even intimidating to victims and witnesses. As such, special measures are meant to facilitate the testimony of a vulnerable victim or witness while protecting their dignity, well-being, safety, and privacy at the ICC. Vulnerable victims and witnesses include those 'traumatized ... a child, an elderly person or a victim of sexual violence'. The open-ended language used in Rule 88, which does not define vulnerable persons or all the special measures the Chamber can order, enable the judges to have some flexibility to determine appropriate measures required by each individual. This individual-based approach recognises that victims' needs differ and may be in opposition to another. The Court has ruled that in fulfilling its mandate towards vulnerable individuals the 'pro-active role of judges under the Statute and the RPE will help to ensure that witnesses are not “revictimized” by their testimony, while also preventing any improper influence being applied to the witness.' Additionally, in making a determination on appropriate measures for a victim the Chamber 'shall have regard to all relevant factors, including age, gender ... and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.' This evidences the sensitivity of the Court to the needs of victims, particularly vulnerable ones, to ensure that secondary victimisation is minimised or avoided.

representation, ICC-01/04-374, 17 August 2007, para.28; Bemba, ICC-01/05-01/08-320, para.111; and Katanga and Chui, ICC-01/04-01/07-1788-tENG, para.113.

256 Rule 88(1).
257 Prosecutor v Lubanga, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November 2007, para.32.
258 Article 68(1). Lubanga, ICC-01/04-01/07-1119, paras.127-128.
259 Rule 88(1) and Article 68(1) which mentions persons who have suffered ‘sexual or gender violence or violence against children.’ See also Prosecutor v Bemba, Victims and Witnesses Unit's amended version of the "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial" submitted on 22 October 2010, ICC-01/05-01/08-1081-Anxl, 8 December 2010.
260 Lubanga, ICC-01/04-01/06-1140, para.35. See Brady n 240, p447.
261 Lubanga, ICC-01/04-01/06-1119, para.127; and Lubanga, ICC-01/04-01/06-1149, para.14.
262 Lubanga, ICC-01/04-01/06-1049, para.32.
263 Article 68(1).
The Court has acknowledged that the use of protective and special measures not only seek to secure victim participation, but also are a 'necessary step in order to safeguard their safety, physical and psychological well-being, dignity and private life'.\footnote{Lubanga, ICC-01/04-01/06-1119, para.128.} Furthermore, the Court has stated that such 'measures are not favours but are instead the rights of victims', thus reflecting their procedural rights.\footnote{Ibid, para.129.} The Rome Statute also affords victims or witnesses the opportunity to present their views and concerns on the implementation of measures.\footnote{Article 68(2).} Therefore, by allowing them some input into the decision-making process it ensures that protection measures are not adopted unilaterally.\footnote{Rule 87(1) and Regulation 42(4) ICC Regulations. Although in victims' applications for participation PTC-II has unilaterally adopted redactions in order to protect the individuals due to the continuing conflict, see Kony et al, ICC-02/04-01/05-134, para.22.}

2. Protection and treatment as victim-orientated justice

Protection and fair treatment of victims is an important element of justice for victims as it is meant to ensure that they do not suffer from secondary victimisation and are respected in proceedings. However, as there are other interests before the Court, particularly the defendant, the judges have to reach a careful balance. Victim-orientated justice requires responsiveness to these needs while balancing them fairly with the interests of other parties in order to prevent secondary victimisation to the victims and violation of the defendant's rights.

a) Balancing the rights of victims and the defendant

Similar to the determinations on victim participation, the Court also has to ensure that any protection measures ordered are not 'prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.'\footnote{Article 68(1).} The Court on a case-by-case basis has developed further criteria for determining the use of protective measures based on the
likelihood of risk facing the individual and the principle of proportionality. The Court’s general approach has been summarised as:

1) the existence of an objectively justifiable risk to the safety of the person concerned or which may prejudice ongoing or further investigations;
2) the existence of a link between the source of the risk and the accused persons;
3) the infeasibility or insufficiency of less restrictive protective measures;
4) an assessment of whether the requested [measures] are prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial; and
5) the obligation to periodically review the decision authorising the [measure] should circumstances change.

These criteria demonstrate the Court striving to achieve a fair balance between the rights of the victims and the defendant. In comparison to the ad hoc tribunals there is no requirement at the ICC for victims to be significant to the prosecution’s case so as to avail of protection, thereby recognising the importance of protecting victims rather than ensuring the prosecution’s case. In order to assess whether this balance has been fair for victims, this sub-section will examine the Court’s practice of ordering protective measures. The three main types of protection measures are (1) confidentiality, (2) anonymity, and (3) relocation. Confidentiality and anonymity can affect the rights of the defendant and will be analysed here, whereas relocation will be discussed in the following sub-section in relation to victims’ needs. First, confidentiality measures seek to protect the individual from the media and the public through closed sessions (in camera), visual and facial distortion, the use of pseudonyms, and prohibition of disclosure of parties and participants of the individual’s

269 Prosecutor v Katanga and Chui, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, ICC-01/04-01/07-475, 13 May 2008, para.2; Prosecutor v Katanga and Chui, Decision Granting Protective Measures for Witness 323 during In-Court Testimony/ICC-01/04-01/07-1795-Red-tENG, 27 January 2010, para.6; and Prosecutor v Lubanga, Redacted Decision on the variation of protective measures under Regulation 42 on referral from Trial Chamber II on 22 July 2009, ICC-01/04-01/06-2209-Red, 16 March 2010, para.10.

270 This decision refers to redactions but has been edited to reflect the Court’s general approach to protective measures, original footnotes are removed, Prosecutor v Katanga and Chui, Decision on the Prosecutor’s Application for Protective Measures Pursuant to Article 54(3)(f) of the Statute and Rule 81(4) of the Rules, ICC-01/04-01/07-989-tENG, 25 March 2009, para.4 citing Katanga and Chui, ICC-01/04-01/07-475, para. 71-73; Prosecutor v Lubanga, Decision establishing general principles governing applications to restrict disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, ICC-01/04-01/06-568, 13 October 2006, para. 37; Prosecutor v Lubanga, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", ICC-01/04-01/06-773, 14 December 2006, paras.21, 33 and 34. See also Prosecutor v Katanga and Chui, ICC-01/04-01/07-1795-Red-tENG para.6; and Prosecutor v Katanga and Chui, Decision on the protection of the neutral and impartial status of information providers, ICC-01/04-01/07-2055-Red, 5 May 2010, para.11.
identity. While the defendant has the right to a public trial under Article 67, the Court has ruled that this right can be suspended so as to protect a victim or witness by holding a closed session under Article 68(2). This is similar to the ad hoc tribunals, but without the requirement that they only be applied in 'special considerations'.

Second, an anonymity measure is where the identity of the individual is not disclosed to the public or the defendant. This is a more controversial measure than confidentiality owing to the fears of anonymous accusations, and so a more delicate balance is required. For victims applying, participating, or seeking reparations the Court has been willing to keep their identities anonymous through redactions, provided they meet the criteria outlined above, rather than a guaranteed right of protection. The Court’s reasoning for this has been to ensure that victims can participate without fear of being subjected to further trauma. At the situation or pre-trial level, the Court has taken a more lenient approach to redactions by using them extensively for victims as they do not impact the rights of the defendant until the case trial stage.

The Court has yet to deal conclusively on full anonymity for those victims and witnesses testifying, but has left the door open by stating that such measures can be consistent with the rights of the defendant and a fair and impartial trial, due to judicial oversight and procedural safeguards. In reaching this standpoint the ICC has adopted the

271 Article 68(2), Rule 87(3), Regulation 94 and Article 8 of the Code of Professional Conduct for Counsel.
272 Katanga and Chui, ICC-01/04-01/07-474, paras.21-22.
273 Tadić, para.42.
274 Rule 87(3)(a) and Regulation 94(g) Registry Regulations. See Katanga and Chui, ICC-01/04-01/07-475, para.59; and Prosecutor v Katanga and Chui, Décision sur la protection de 21 témoins relevant de l'article 67-2 du Statut et/ou de la règle 77 du Règlement de procédure et de preuve, ICC-01/04-01/07-1332, 24 July 2009.
275 Lubanga, ICC-01/04-01/06-462, p6; and Lubanga, ICC-01/04-01/06-1119, paras.128-129.
276 Kony et al., ICC-02/04-01/05-134 para.21; Situation in DRC, ICC-01/04-374 para.28; and Katanga and Chui, ICC-01/04-01/07-579.
277 Lubanga, ICC-01/04-01/06-773 para.50; and Prosecutor v Kony et al, Decision on victims' applications for participation a/0192/07 to a/0194/07, a/0196/07, a/0200/07, a/0204/07, a/0206/07, a/0209/07, a/0212/07, a/0216/07, a/0217/07, a/0219/07 to a/0221/07, a/0222/07 to a/0230/07, a/0234/07, a/0235/07, a/0237/07, a/0324/07 and a/0326/07 under rule 89, ICC-02/04-01/05-375, 10 March 2009, p7-8.
jurisprudence of the European Court of Human Rights.\textsuperscript{278} The European Court recognises that in certain situations it is ‘necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest.’\textsuperscript{279} Although Article 68(5) allows the Prosecutor not to disclose any evidence if it ‘may lead to the grave endangerment of the security of a witness or his or her family’, it is qualified by ‘prior to the commencement of the trial’, meaning that victims who testify in the trial will have their identity disclosed to the defence. Generally, the Court has required testifying victims to relinquish their anonymity so as to ensure the fair trial rights of the defendant.\textsuperscript{280} However, the human rights jurisprudence does allow victims to testify anonymously provided there is an identifiable risk and the evidence given is not sole or decisive in the defendant’s conviction. Thus the Court’s willingness to force victims to choose between testifying and maintaining the anonymity seems to be at odds with the jurisprudence of the European Court, considering the gross violations of victims’ rights if they are identified, such as occurred before the ICTR.

A solution suggested during the drafting of the Rules of Procedure and Evidence was the appointment of an ‘independent guardian of the witness’.\textsuperscript{281} The guardian would investigate the identity and reliability of the victim, so as to ensure the rights of the defendant and the protection of victims. The Court would monitor their role. This approach would maintain the anonymity of testifying victims, as well as being consistent with human rights standards by guaranteeing adequate judicial oversight and procedural safeguards, provided it is not the sole or decisive evidence on which the Court relies on to ensure a conviction.

Nonetheless, there remains a disagreement within the Court on how to ensure an effective balance between the rights of the defendant and victims when it comes to

\textsuperscript{278} Kostovski \textit{v} the Netherlands, App no 11454/85, (ECtHR, 20 November 1982), paras.43-44; \textit{Doorson v the Netherlands} Ch.1 n 196, paras.69-72; and \textit{Rowe and Davis v the United Kingdom}, App No 28901/95, (ECtHR, 16 February 2000). See \textit{Katanga and Chui}, ICC-01/04-01/07-474, fn64.

\textsuperscript{279} Rowe and Davis ibid. para.61 cited from \textit{Katanga and Chui}, ICC-01/04-01/07-475, p21.

\textsuperscript{280} \textit{Katanga and Chui}, ICC-01/04-01/07-1788-ENG, paras.92-93.

anonymity, especially in relation to the extent of victim participation. Lessons can hopefully be learnt from the ICTY experience, as discussed in Chapter 2, where in the Tadić case the Tribunal allowed anonymity on the basis that the judges would know victims' identity and be able to assess their authenticity. The legal framework of the ICC for protecting victims and witnesses places a greater emphasis on their needs than the ad hoc tribunals. Additionally, in light of Article 21(3) the Court is obliged to interpret the Rome Statute in light of human rights law, which does allow victim anonymity when testifying and participating. Accordingly, for the ICC judges a fair balance between victim and defendant rights would allow anonymous testifying and participating provided appropriate safeguards are maintained.

b) Responsiveness to victims' needs

The ICC judges have striven to ensure that protection measures respond to victims' needs. This can be seen in the Court's approach to the determination of harm in deciding whether protection measures are necessary. It has found that harm is not limited to the physical sense, but can also include psychological harm and even serious forms of intimidation in certain cases, such as death threats. In ordering protection measures the Court requires an individual to be ‘exposed to an evidenced-based (established) danger of harm or death.’ However, the Office of the Prosecutor (OTP) has argued that such a high threshold puts individuals at too much risk before being able to avail of the protection programme. Instead, the OTP contended that risk should be “as close as possible to zero” and 'eliminated'. This was rejected by the Trial Chamber as inappropriate in practice. Instead, the Court's approach is consistent with human rights law, which requires a 'real and

282 Ibid, para.29.
283 Prosecutor v Lubanga, Decision on the prosecution and defence applications for leave to appeal the Trial Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, ICC-01/04-01/06-1557, 16 December 2008, paras.27-28.
284 Prosecutor v Lubanga, Decision issuing a confidential and a public redacted version of "Decision on disclosure issues, responsibilities for protective measures and other procedural matters, ICC-01/04-01/06-1311-Anx2, 8 May 2008, para.56.
285 Ibid. para.78.
immediate' danger.\textsuperscript{286} It could be said that it is more responsive to victims' needs by not requiring the danger to be imminent.

Article 68(1) obliges the Court to 'take appropriate measures to protect ... victims' without qualifying which victims are to be protected. The protection of potentially millions of victims who suffered crimes within the jurisdiction of the ICC could be unworkable in practice. The approach of the VWU in interpreting Rules 85 and 87 has been to protect those 'victims who appear before the Court', i.e. victims testifying or participating in person before the Court.\textsuperscript{287} However, the Court has a wider obligation to victims under Article 68(1), which does not specifically refer just to those 'appearing before the Court'.\textsuperscript{288} Accordingly, the Court has ordered protection measures not only for victims appearing before it as witnesses or participants, but also those who are applying to participate.\textsuperscript{289} Yet, even extending protection to those applying to participate before the ICC can still number in their thousands. Moreover, the Court does not have the resources to provide individual protection measures on the ground, especially in cases of continuing conflict, such as in the DRC.\textsuperscript{290} Instead, the Court has used redactions of victims' identity to protect them when they are applying to the Court and participating before the ICC.\textsuperscript{291} This approach is a workable solution to the wide definition of victims in Rule 85 by respecting the privacy and safety of all victims who interact with the Court.

The most extreme protective measure of the Court is to relocate a victim, witness, or other person to a different region or country in order to protect them. Relocation measures have been a contentious issue within the ICC. The Prosecutor has used 'preventative relocation' of witnesses to move individuals who are risk, against the advice of the VWU. In one case the Prosecutor had forcibly removed two witnesses from their homes and family

\textsuperscript{286} Osman v United Kingdom, App no 23452/94 (ECtHR, 28 October 1998), para.116. See Doak Ch.1 n 157, p39-44.
\textsuperscript{287} Article 43(6) and Rule 17(2)(a). See Lubanga, ICC-01/04-01/06-1078.
\textsuperscript{288} See ibid ICC-01/04-01/06-1078, para.20.
\textsuperscript{289} Kony et al., ICC-02/04-01/05-134, para.21.
\textsuperscript{290} Lubanga, ICC-01/04-01/06-462 p6; ibid ICC-02/04-01/05-134, paras.21-24; Situation in DRC, ICC-01/04-05-374, para.20-21; and Kony et al., ICC-02/04-01/05-375, p7-8.
\textsuperscript{291} Lubanga, ICC-01/04-01/06-462, p6; and ibid ICC-02/04-01/05-134, para.24.
ties to another location. The Appeals Chamber recognised, in endorsing the arguments of the VWU, that relocation is a serious matter that can ... have a “dramatic impact” and “serious effect” upon the life of an individual, particularly in terms of removing a witness from their normal surroundings and family ties and re-settling that person into a new environment. It may well have long-term consequences for the individual who is relocated - including potentially placing an individual at increased risk by highlighting his or her involvement with the Court and making it more difficult for that individual to move back to the place from which he or she was relocated, even in circumstances where it was intended that the relocation should be only provisional. Where relocation occurs, it is likely to involve careful and possibly long-term planning for the safety and well-being of the witness concerned.

This understanding of the Court acknowledges the individual, familial, and social impact of relocating a person. The decision therefore represents the Court taking an individual-focused perspective which is more likely to serve the interests of victims, rather than the interests of the Prosecutor. In this case, the Appeals Chamber ruled that the VWU is in the best position to determine who is to be relocated, due to its expertise, legal position and criteria, along with the consultation and consent of the individual. This approach is more respectful of victims' autonomy and responsive to their needs rather than to facilitate the agenda of the Prosecutor or the Court in prosecuting perpetrators.

Special measures can also ensure the Court is responsive to the safety and psychological needs of victims. The Court’s Rules permit the attendance of a support person during a victim’s testimony, including ‘counsel, a legal representative, a psychologist or a family member.' This reflects domestic practices and the UN Victims’ Declaration position towards vulnerable victims and witnesses. Rule 88(2) goes further than the practice of the ICTY, which provided a support officer in an adjacent room to support

292 Prosecutor v Katanga and Chui, Victims and Witnesses Unit’s considerations on the system of witness protection and the practice of “preventive relocation”, The Registry, ICC-01/04-01/07-585, 12 June 2008, paras.39-42.
293 Ibid.
294 Prosecutor v Katanga and Chui, On the appeal of the Prosecutor against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber 1, ICC-01/04-01/07-776, 26 November 2008, para.66; endorsing ICC-01/04-01/07-585, paras.9, 24, 32-34 and 39-41.
295 Ibid, ICC-01/04-01/07-776, paras.92 and 98.
296 Rule 88(2).
297 Ibid, Principle 6(c)-(d), UN Victims’ Declaration. See Brady n 240.
witnesses before, during, and after their testimony,\textsuperscript{298} by allowing support persons to also attend the testimony of the individual in court. This attendance could be vital for a vulnerable individual in alleviating some of their stress or apprehension in testifying. Additionally, the Court has used live video-link evidence for vulnerable witnesses from their home areas in order to minimise the disruption in their life and the risk of attention being drawn to them who may be noticed missing if they travel to the Hague to testify, such as occurred before the ad hoc tribunals. In the \textit{Lubanga} trial, for instance, the Chamber used video-link testimony for three witnesses.\textsuperscript{299} This is in line with human rights law and procedural justice to ensure proceedings minimise inconvenience to victims and protect them from further harm.\textsuperscript{300}

The judges have also been respectful to victims when testifying or presenting their views before the Court. Rule 88(5) stipulates that the ‘Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.’\textsuperscript{301} The judges so far have controlled cross-examination and been supportive of victim-witnesses and participating victims by giving them numerous breaks when they need them during their testimony. In contrast to previous tribunals, the Court usually allows victims and victim-witnesses to testify by first ‘telling their story’ in narrative form, without interruptions or leading questions.\textsuperscript{302} This may avoid some of the dissatisfaction victims faced when testifying at previous tribunals. The judges have also gone beyond their obligations in the Statute and RPE by being empathetic and respectful to victims, thanking them for attending and helping the Court to determine the truth, as well as wishing them the

\textsuperscript{298} Information booklet on ICTY Witnesses Ch.2 n 126, p15-16.
\textsuperscript{299} The Reflections of a Trial Judge, 6 December 2010, ASP-9, para.15.
\textsuperscript{300} Principle 6(d) UN Victims’ Declaration.
\textsuperscript{301} Rules 70-71 also exclude issue of consent in questioning victims of sexual violence.
\textsuperscript{302} See McGonigle Ch.1 n 27, p322, fn610.
This respect displays procedural justice by valuing their input and listening to what they want to say.\textsuperscript{304}

c) **Victim-orientated justice?**

The judicial interpretation by the judges of the ICC goes beyond the functional use of measures by the ad hoc tribunals to ensure a witness’s testimony, by instead recognising the needs and rights of victims to be protected and supported from further trauma. This is clearly in line with notions of procedural justice for victims and human rights standards. A fair balance between the rights of victims and the defendant has yet to be struck in some areas, such as anonymity, with a preference for protecting the rights of the latter. The Court can take note of the human rights jurisprudence in this area so as to avoid the mistakes of the ad hoc tribunals.

The statutory and procedural rules on protection of victims and witnesses at the ICC are far more extensive than that of the ad hoc tribunals. The focus of the Court is to protect victims in line with their 'particular needs and circumstances'.\textsuperscript{305} Additionally, the VWU and the judges’ sensitivity to victims creates a more supportive environment for them. The success of protection and special measures remains to be seen in the long term. In comparison to previous tribunals, the judges of the ICC are more willing to recognise that the rights of the defendant can be limited to protect victims and avoid further victimisation through proceedings. This may reflect a better understanding of victims’ needs and recognition of their importance in fulfilling the purpose of the Rome Statute in ensuring justice for them. There has been only one report of a participating victim being intimidated, with most victims who interact with the Court being very satisfied with the way they are

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\textsuperscript{304} See Chapter 1.

\textsuperscript{305} Rules 17(2)(a) and 86.
treated. Overall, the treatment and protection system of the ICC is victim-orientated justice by being responsive to their needs.

F. Conclusion

The start of this Chapter quoted the UN Secretary General Kofi Annan stating that the Court's 'overriding interests must be that of the victims and the international community', with other commentators saying victims are at the heart of international criminal justice. Although the victim provisions of the ICC may be innovative in international criminal justice, heralding them as a 'high-water mark' is misleading when compared to more advanced regional human rights courts' jurisprudence and national practice. The criminal proceedings of the ICC are retributive in nature. While it is unrealistic to assume that victims' interests would dominate the ICC, the drafters did intend that one of the purposes of Court was to deliver justice to victims. The construct of victim-orientated justice developed in Chapter 1 does provide some insight into how the ICC can be responsive to victims' needs whilst balancing them against other interests. When examining the Court's proceedings the adherence to victims' interests and needs in proceedings is less evident. The provisions in the Rome Statute do offer victims some form of procedural justice by treating them fairly and with respect, in contrast to previous tribunals. However, these have not resulted in the ICC being responsive to their substantive rights. Even though the Court has recognised victims' rights to truth and justice, their input is not sufficiently considered in the determination of truth and justice, particularly in the investigation. Where victims' interests are adhered to is when they do not conflict with or infringe the rights of the defendant or the independence of the Prosecutor, namely certain protection measures and reparations. Accordingly, this gives the impression that victims' role in the proceedings of the ICC is symbolic. Reparations at the ICC could offer a more victim-centred justice, or at least one that can satisfy their substantive needs.

IV. Reparations and Responsibility under the Rome Statute

A. Introduction

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

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

This Chapter begins by considering the theoretical and normative basis of reparations, before moving to outline the drafting of reparation provisions and then the Court’s reparation regime under the Rome Statute. The subsequent section examines the interpretation of the reparation regime by the ICC and practical difficulties in light of international and human rights jurisprudence. The final parts of this Chapter assess whether solutions can be found to these challenges through the work of the Trust Fund and State Parties.

responsibility. The Chapter concludes by finding that reparations at the ICC will only be successful through complementarity with State Parties.

B. The Theoretical and Normative Basis of Reparations

Reparations are measures which are meant to repair the harm caused to an injured party. As established in the Chorzow Factory case, they are to, 'as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.' The 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNBPG) states that reparations are intended to 'promote justice by redress.' For this thesis, reparations are victim-centred justice as they concentrate on remedying victims' harm.

Drawing from principles of equity in many national jurisdictions, reparations seek to return the victim to the status quo ante (original position) through restitutio in integrum (returning to the victim all they have lost). Therefore, they can be the instruments of corrective justice. However as discussed in Chapter 1, corrective justice is more of a mathematical formula of ensuring equality. Rombouts and Paramentier contend that returning victims to their original position may restore them to a position of inequality, such as discriminated minority, or it may be impossible to return them as they may be severely harmed or dead. In light of this issue human rights law has found that reparations are not meant to enrich or impoverish victims or their heirs, but to repair their harm.

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4 Chorzow Factory, (1928), Ch.1 n 165, para.125.

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

6 Velásquez Rodríguez, Ch.1 n 154, paras.25-26; Plan de Sánchez Massacre Ch.1 n 154, para.52; Godínez Cruz Ch.1 n 154, para.24; Blake v Guatemala Ch.1 n 154, para.31; and Papamichalopoulos and Others v. Greece Ch.1 n 154, para.34. Dinah Shelton, Remedies in International Human Rights Law, (OUP 2005, 2nd edn) p9 and 65.

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


9 Garrido and Baigorria Ch.1 n154, para.43.
remedies can be more reparative in nature, rather than corrective. Reparations can also involve distributive justice by redressing inequalities in society through the redistribution of goods, such as the representation of different ethnic groups in government.

Reparation can also be used as a deterrent to dissuade individuals or States from committing wrongful acts. An economic theory of reparations asserts that it ‘ought to deter possible wrongdoers from causing (greater) social costs in the future’ by equating “the value of damages with the value of harm.” However, certain harms cannot be quantified in monetary terms. Moreover, deterrence focuses on punishing the perpetrator and their future acts rather than redressing the suffering of the victim. In international law and human rights law, reparations are non-punitive so as to focus on remedying the harm of the victim. For the purpose of this thesis, reparations are predominately reparative in nature to remedy the harm suffered by victims, but responsibility still plays an important part in determining who should provide them.

Responsibility for reparations stems from a wrongful act by a person or entity, which contravenes the rights of an injured party. As Shelton points out, it is the, ‘rights-infringing nature of the wrongful conduct that is the source of the claim. Otherwise a person’s losses due to a falling tree would be legally equivalent to an injury resulting from torture.’ There are three levels of responsibility for reparations for international crimes: individual, State, and international. The first arises from the autonomy and capacity of individuals to make their own free and informed decisions, with them being held to account for their consequences. In domestic law, individuals can be responsible for their wrongful acts in both civil and criminal proceedings depending on whether the act is defined as criminal by violating public interests or just giving rise to damages between private parties. Obliging a responsible individual to make reparations re-establishes the legal order through holding

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10 Separate Opinion of Judge Cançado Trindade, the *Street Children* case Ch.1 n 198, para.42.
11 Rombouts and Paramentier n 8, p159.
12 Shelton n 6, p18.
13 Velásquez Rodríguez Ch.1 n 154, para.38; ILC Commentaries on Articles of State Responsibility, p99 and 107; Principle 15 UNBPG.
14 Ibid. p12.
16 Shelton n 6, p25.
them accountable and remedying the harm they have caused. The ad hoc tribunals permitted compensation and restitution to be based on the individual criminal responsibility of perpetrators convicted before them, though no orders were ever made.17

State responsibility occurs when a State violates an international obligation, such as under an international treaty.18 A breach of primary rules by a State committing a wrongful act, e.g. violating an obligation under a treaty, creates a new relationship between two or more States, requiring the responsible one under secondary rules, i.e. on responsibility, to cease the breach and provide reparations to the injured State.19 As stated in the Chorzow Factory case ‘[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.’20 State responsibility allows for a remedy to be made to an injured party, while also functioning as a condemnation of the State’s breach and the ‘restoration of the international legality, [and] respect for international law.’21 The International Court of Justice has recognised that although most reparation orders in international law are inter-State, in certain cases a State can be ordered to provide reparations to individuals.22 Under human rights law, individuals and groups are right-holders who can directly claim reparations against States for violating their rights.23

State responsibility can also emanate from jus cogens (non-derogable) norms, which impose strict liability on States for committing international crimes such as genocide, war crimes, and crimes against humanity, as well as gross violations of human rights. Breaches of jus cogens norms are deemed 'objectively illegal' or wrongful as they violate the 

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17 Articles 24(3) and 23(3) of the ICTY and ICTR Statutes respectively as well as common Rule 106, RPE.
18 Article 2, RSIWA.
20 Chorzow Factory Ch.1 n 165, p21. See also Article 31, RSIWA.
21 Alain Pellet, The Definition of Responsibility in International Law, Crawford et al. n 19, 4-15, p15.
23 Velásquez Rodríguez Ch.1 n 155, para.134.
fundamental interests of the international community.\textsuperscript{24} A State cannot be held criminally responsible for international crimes, as established at Nuremberg ‘[c]rimes against international law are committed by men, not by abstract entities’.\textsuperscript{25} Instead when \textit{jus cogens} norms are breached, the responsible State is under an obligation to prosecute the perpetrators and provide reparations to the victims, in order to cease and alleviate the harm, thereby reasserting their non-derogable status.\textsuperscript{26} Where a State fails to comply with their obligations arising from breaching a \textit{jus cogens} norm, \textit{obligatio erga omnes} (obligations flowing to all) occur, whereby the collective interests of other States are affected by the breach can seek to invoke the responsibility of the responsible State.\textsuperscript{27}

International responsibility is reflected in \textit{erga omnes} obligations, which require every State to ensure the enforcement of binding international law. Under the Article 48 of the Articles on State Responsibility (RSIWA), which sets down principles on State responsibility, a non-injured State can invoke the responsibility of another State where the obligation breached is owed to a group of States and protects a collective interest, such as under multilateral treaties, i.e. ‘obligations \textit{erga omnes partes},’ or it is owed to the international community as a whole.\textsuperscript{28} It is due to the ‘importance of the rights involved’ that non-injured States have a ‘legal interest’ in ensuring their protection and the maintenance of international law.\textsuperscript{29} The commission of international crimes is the ‘concern of all States’ as they ‘threaten the peace and security of humankind and ... shock the conscience of humanity.’\textsuperscript{30} A non-injured State which invokes the responsibility of another is entitled to claim from the responsible State cessation of the wrongful act and to make guarantees of non-repetition, as well as fulfilment of reparation to an injured State or the beneficiaries of the obligation breached.\textsuperscript{31} Furthermore, for serious breach of \textit{jus cogens} obligations all States

\textsuperscript{24} Article 53 Vienna Convention. Orakhelashvili Ch.1 n 7, p242; and \textit{Prosecutor v. Kupreškić et al.} (IT-95-16) Judgement, 14 January 2000, para.520. Article 40, RSIWA.
\textsuperscript{26} Article 40, RSIWA; and Orakhelashvili Ch.1 n 7, p243.
\textsuperscript{27} Bassiouni Ch.1 n 7, p72.
\textsuperscript{28} See ILC Commentaries RSIWA n 13, p126.
\textsuperscript{30} Ibid para.33-34; Bassiouni Ch.1 n 7, p69; and Article 48, RSIWA.
\textsuperscript{31} Article 48(2).
are obliged to take lawful action to bring it to an end and to refuse to recognise the situation as lawful.\textsuperscript{32}

Reparations in international law and human rights law fall under the heading of an effective remedy for victims. Remedies are ways to redress a harm or violation through procedural mechanisms such as courts, and substantive outcomes, i.e. convictions and reparation orders.\textsuperscript{33} In human rights law, remedies have long been established as essential for individuals to seek redress against the State for violating their rights.\textsuperscript{34} According to the UNBPG, victims’ right to remedies includes ‘equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.’\textsuperscript{35} As discussed in Chapter 1, remedies can be synonymous with justice for victims or victim-centred justice, and reflect both procedural and substantive elements.\textsuperscript{36} Reparations also contain these elements. Procedural justice for reparations involves victims to be informed, to participate, to be able to claim reparations, and to appeal decisions. Substantively, reparations redress victims’ harm through appropriate measures. The discussion of an effective remedy throughout this Chapter in relation to the ICC can therefore be understood as ensuring victims’ procedural and substantive rights to reparations.

C. The International Criminal Court’s Reparation Regime

Reparations have been notably absent from international criminal law. With the introduction of reparation provisions in the Rome Statute of the ICC this shortcoming has been addressed on paper, though it remains to be seen whether it will be an effective remedy.

\textsuperscript{32} Articles 40 and 41, RSIWA.
\textsuperscript{33} Shelton n 6, p7.
\textsuperscript{34} See for instance Article 8 of the Universal Declaration of Human Rights, and Article 2 of the International Covenant on Civil and Political Rights.
\textsuperscript{35} Principle 11, UNBPG.
\textsuperscript{36} The distinction between justice for victims and victim-centred justice is that the former is from a victims’ perspective of what justice means to them based on their needs, whereas the latter is the determination of justice by the Court being responsive to victims’ needs. Victim-orientated justice is the Court balancing victims’ interests with other parties’ rights to decide justice, as discussed in Chapter 1.
for victims in practice. This section begins by considering the drafting of the reparations provisions within the Rome Statute, before outlining the Court's reparation regime.

1. Drafting of reparation provisions

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

In the early drafts of the Statute of the ICC, the International Law Commission (ILC) specified that compensation was to be determined by the Court and enforced through national courts as with the provisions at the ad hoc tribunals. However, many delegates were worried that reparations, considered as a civil matter, would be inappropriate for a criminal court owing to their complexity and the large numbers of victims involved in international crimes. As a compromise, the ILC draft Statute (1993) included a trust fund

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under the UN Secretary-General for the ‘benefit of victims of crime’ collected from fines or confiscated property.  

Nonetheless, the Preparatory Committee, established to draft the Statute for the Rome Conference, included such a reparation provision. This differed considerably from the final Article 75, as it originally included State responsibility for reparations. Under Article 73(b) of the draft Statute, the Court could make a reparation order against a State if the convicted person is unable to do so and ‘... in committing the offence, was acting on behalf of the State in an official capacity, and within the course and scope of his/her authority.’  

Article 73(c) also provided that where crimes were committed by non-state actors, the Court may recommend the State to ‘grant an appropriate form of reparations to victims’. Therefore Article 73 reflected the position of international and human rights law that reparations should be the responsibility of the State if the perpetrator is indigent.

At the beginning of the Rome Conference, reparations were undetermined and included a number of proposals which provided for both State responsibility and direct orders by the Court against individuals. Many States wanted to avoid reparation orders being made against them; some saw that reparations would detract from the purpose of the Court to punish perpetrators, while others wanted to ensure effective reparations for victims through State paid orders. Motivated by NGOs, delegations modified a joint proposal made by France and the United Kingdom during the Preparatory Committee to arrive at the final draft of Article 75. The delegates realised that retributive justice through punishment of the defendant was not enough to satisfy victims’ needs for justice and to ensure them an effective remedy. Therefore the inclusion of reparation at the ICC under Article 75 was an

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41 Ibid.
42 Principle 16, UNBPG.
43 McKay n 37; Muttukumaru, Ch.1 n 221; and Boven Ch.3 n 7, p900.
45 Muttukumaru Ch.1 n 221, p264.
attempt by the drafters to deliver 'justice for victims' or 'justice in a wider sense' reflecting
norms in human rights law. The Trust Fund for Victims under Article 79 was also adopted
to act as a repository for fines and to provide legal assistance to victims.

While reparations were accepted as part of the ICC framework, the drafters intended
that the Court should focus on individual criminal responsibility. Muttukumaru suggests
that if State responsibility had been included in Article 75 it would have resulted in the
rejection of the whole article, thereby preventing victims from accessing reparations through
the Court. However, as the rest of this Chapter will argue, individual criminal responsibility
cannot provide victims with an effective remedy through reparations before the ICC, but also
requires a complementarity approach based on State Parties' obligations under the Rome
Statute.

2. Outline of the reparation regime of the ICC

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

1. The Court shall establish principles relating to reparations to, or in respect of, victims,
including restitution, compensation and rehabilitation. On this basis, in its decision the Court
may, either upon request or on its own motion in exceptional circumstances, determine the
scope and extent of any damage, loss and injury to, or in respect of, victims and will state the
principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate
reparations to, or in respect of, victims, including restitution, compensation and
rehabilitation. Where appropriate, the Court may order that the award for reparations be
made through the Trust Fund provided for in article 79.
3. Before making an order under this article, the Court may invite and shall take account of
representations from or on behalf of the convicted person, victims, other interested persons or
interested States.
4. In exercising its power under this article, the Court may, after a person is convicted of a
crime within the jurisdiction of the Court, determine whether, in order to give effect to an
order which it may make under this article, it is necessary to seek measures under article 93,
paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article
109 were applicable to this article.

46 McKay n 37, p166.
47 Muttukumaru Ch.1 n 221, p264.
48 International Seminar on victims' access to the International Criminal Court,
PCNICC/1999/WGRPE/INF.2. Rule F. See also Thordis Ingadottir, The International Criminal Court:
The Trust Fund for Victims (Article 79 of the Rome Statute), A Discussion Paper, (PICT February
2001), p27.
49 Muttukumaru Ch.1 n 221, p268.
50 Ibid. p268.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

There are a number of lacunae in Article 75 including the principles of the reparation regime, the role of victims, appropriate types of reparations and the co-operation of State Parties. These lacunae provide judges with the flexibility to determine the scope and extent of reparations. The judges can order reparations directly against the convicted person or through the Trust Fund for Victims.\(^51\) The Court has the power to order State Parties to seize a defendant's assets derived from international crimes to be used for reparations or fines.\(^52\) Victims and other interested parties can make representations to the Court on the substance of the reparation orders.\(^53\) Additionally, State Parties have a role to play in co-operating with the Court and enforcing reparation orders.\(^54\) The Rome Statute also protects victims' rights to claim reparation before other international or national bodies.\(^55\)

There are a number of advantages in an international criminal justice mechanism adjudicating on reparations. The ICC offers victims an avenue for reparations. As international crimes can invariably involve the actions or inactions of a State, it may be unwilling to allow victims to claim reparations. Moreover, a conflict may have destroyed the domestic judicial infrastructure and national resources making their claims difficult, if not impossible. Additionally, reparation orders by the Court could have the added value of being independent and impartial as they are determined by an external international body, which may promote perceptions of fairness. This may be important in establishing reparations as a norm for domestic institutions to follow. By including reparations in the mandate of the ICC, it can highlight and to redress the suffering of victims in addition to determination of guilt of the perpetrator.

Reparations at the ICC also represent the broadening of international criminal justice beyond retributive justice. Under the Rome Statute reparations are not punitive, as they do

\(^{51}\) Article 75(2).
\(^{52}\) Articles 75(2) and 75(4), 57(3)(e), 93(1)(k), and Rules 99, 146-148.
\(^{53}\) Article 75(3).
\(^{54}\) Article 75(4) and (5).
\(^{55}\) Article 75(6).
not appear under Article 77 on applicable penalties, which include separate punitive orders such as fines and forfeitures.\(^{56}\) Furthermore, the title ‘Reparations to victims’ indicates that reparations at the ICC are directed at remedying victims’ harm. This is consistent with human rights law which affirms the victim-centred nature of reparations.\(^{57}\) However, they are not completely distinct from the retributive function of the Court, as reparations are based on the conviction of a defendant and the crimes they are convicted of.

The second part of the reparation regime of the ICC under Article 79 is the Trust Fund for Victims (TFV), established by the Assembly of State Parties in 2002.\(^{58}\) Article 79 states that:

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

The TFV has a dual mandate of supporting reparation orders made by the Court and assisting victims. Its first mandate under Articles 79(2) and 75(2) is to transfer money or property collected by fines or forfeitures from the defendant or convicted person through an order of the Court.\(^{59}\) Additionally, the TFV can supplement funds already deposited with it to be used for reparations orders where the convicted person is indigent and there are insufficient resources for victims.\(^{60}\)

The second mandate of the TFV is to provide ‘physical or psychological rehabilitation or material support for the benefit of victims and their families’ who have suffered from crimes within the jurisdiction of the Court under Rule 85.\(^{61}\) This covers a wider category of beneficiaries than those who are likely to receive reparations ordered by

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\(^{57}\) *Velásquez Rodríguez* Ch.1 n 154, para.38; and Principle 15, UNBPG.

\(^{58}\) Resolution ICC-ASP/1/Res.6, adopted at the 3\(^{rd}\) plenary meeting, on 9\(^{th}\) September 2002.

\(^{59}\) ICC-01/04-439 para.10; ICC-02/04-114, para.10; and ICC-01/05-29, para.7.

\(^{60}\) TFV Regulation 56.

\(^{61}\) On the definition of victims. Article 79(1). TFV Regulations 42 and 50(a)(i).
the Court against a convicted person. The TFV is similar to the two UN Trust Funds established for Torture and Slavery. The flexible mandate of the TFV means it can fund assistance to victims without having to wait for the conviction of the defendant; this adheres to the principle in human rights law that a victim should receive support without the perpetrator having to be identified, apprehended, prosecuted, or convicted. As of 2012, the TFV funded projects in Uganda, the Democratic Republic of Congo (DRC), and the Central African Republic (CAR); beneficiaries of the TFV are selected on the basis of demographic data, targeted outreach, and consultation with victims to identify those with the most need. For instance, in the CAR situation, the TFV identified victims of sexual violence as a group who received little or no donor or government support. In order to maximise the benefits of the Trust Fund to the greatest number of victims, the TFV collectivises them into groups which will receive communal assistance rather than individual support, so as to provide more efficient disbursement and to reduce infrastructure costs.

In 2011 alone the Trust Fund supported programmes for over 80,000 victims, such as reconstructive surgery, village saving schemes, counselling, and community reconciliation. Funding for the TFV comes from a number of sources, including fines or forfeitures and awards for reparations collected by the Court as well as voluntary donations and contributions from the Assembly of State Parties (ASP). Between 2004-2012 the TFV collected €9.98 million from 33 countries, with €4.5 million (2007-2011) spent on projects in

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62 Ingadottir n 48, p27.
63 A/48/520; ibid, p28; and Shelton n 6, p236.
64 Ingadottir ibid; and Marieke Wierda and Pablo de Greiff, Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims, (International Centre for Transitional Justice 2004).
65 Principle 2 UN Victims’ Declaration; and Principle 9, UNBPG. Adopted by the TFV see ICC-02/04-114 para.30; and ICC-01/04-439, para.30.
66 TFV Summer Progress Report 2012.
67 TFV Regulations 60 and 61.
69 ICC-02/04-114 para.34; and ICC-01/04-439, para.34.
70 See the TFV Summer 2011 Progress Report.
71 Ibid. para.2, Article 79(2) and Rule 98 of the RPE. See also Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3 (2005) Regulations 20-41.

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Northern Uganda and the DRC. For many victims the projects supported by the TFV have transformed their lives by helping them to heal and integrate into society. By way of example, in 2003 Santa, a 35 year-old Northern Uganda woman, was burnt inside her home as part of a Lord’s Resistance Army’s attack on her village. The burns disfigured her face and neck, and as a result she became immobile and stigmatised in her community. In 2008 she received surgery through AVSI and Interplast funded by the TFV. ‘Before the surgical operation, Santa says, “... my eyes would not see, my lips were twisted, and coupled with a stiff neck, I was unable to cook or dig ... but now I can happily cook, and dig and my eyes are just fine.”

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

The assistance mandate of the Trust Fund for Victims is a novelty of the Rome Statute, both in the sense of making a meaningful impact in the lives of victims and assisting them without the need to determine the identity or responsibility of the perpetrator. Thus it is a victim-focused initiative. This is in sharp contrast to the retributive justice of the Court’s criminal trial or reparation orders, which focus on the defendant or the convicted person. The

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72 TFV Programme Progress Report Fall 2010; and TFV Programme Progress Report Summer 2012, July 2012.
73 TFV Summer 2011 Progress Report.
74 Association of Volunteers in International Service Foundation.
75 Ibid p23.
76 Schabas, Ch.3 n 231, p501.
success of the reparation regime of the ICC to be responsive to victims’ needs will depend on the way in which it is interpreted.

D. Interpreting the International Criminal Court’s Reparation Regime

For its part, the language of Article 75 is left open-ended, enabling the judges to draw from a number of sources to determine the principles and scope of reparations. Article 21 stipulates that the Court shall apply the Rome Statute and Rules of Procedure and Evidence first, and then ‘where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.’ The Appeals Chamber of the ICC has found that judges can only apply international law to lacunae when interpreting the Rome Statute. As a number of these exist in Article 75 the principles established in international law on reparations could provide guidance to the Court’s judges in interpreting reparations at the ICC.

The purpose of reparations outlined in international law noted above could provide an important guiding principle for the Court’s reparation regime. In order for reparations to be an effective remedy, further principles may be used, such as appropriateness, by responding to the harm with the most suitable type of reparation, and proportionality, by going no further or no less than fully remedying the victims’ harm. Additionally, Article 77 Article 75(1). David Donat-Cattin, Article 75: Reparations to Victims, in O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, (Hart 2008), p1399-1412, p1402.
78 Article 21(1)(a)-(b).
80 Chorzow Factory Ch.1 n 165, para.125.
81 See Article 31, RSIWA and ILC Commentaries p94. Also recognised in human rights law, Principles 2, 3 and 15 of the UNBPG. See Velsáquez Rodriguez Ch.1 n 154, para.66; Garrido and Baigorria Ch.1 n 154, para.69; Selmouni v France, App no 25803/94 (ECtHR, 28 July 1999), para.79; Hugh Jordan v the United Kingdom, App no 24746/94 (ECtHR, 4 August 2001), para.159; and Aksoy v. Turkey Ch.1 n 155, para.98. Bozize v Central African Republic, Communication no.449/1990, UN Doc. CCPR/C/50/D/428/1990, 26 April 1994.
21(3) obliges judges to interpret the Rome Statute consistently with 'internationally recognized human rights'. The Appeal Chamber has held,

> 'Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights ...'

Therefore the ICC must interpret and apply reparations in line with internationally recognised human rights, which could have wide reaching implications on the scope and content of reparations at the Court. However, the ICC is not a human rights court, and there is likely to be a number of differences between the two fora in their conceptions of reparations, particularly with regard to individual and State responsibility. The Inter-American Court of Human Rights has distinguished the two:

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

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

1. **Eligibility of victims**

   Article 75(1) requires the Trial Chamber to determine 'the scope and extent of any damage, loss and injury to, or in respect of, victims'. A definition of damage, loss, or injury

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

83 See Dinah Shelton, Reparations for Victims of International Crimes, in D. Shelton n 37, 137-161.

84 Velásquez Rodríguez Ch.1 n 155, para.134; *Pueblo Bello Massacre v Colombia*, Merits, Reparations and Costs, Series C No 140 (IACtHR, 31 January 2006), paras.91, 112 and 122.
is absent from the statutory or procedural framework of the Court. Nonetheless, following
the UN Victims' Declaration harm can include physical and psychological damage or injury,
economic loss, and substantial impairment of fundamental rights. This abides by the
interpretation of the Court of harm for victim participation, discussed in the previous
Chapter. This approach will not only ensure consistency between the trial and reparations
stage, but will also link the recognition of harm to a remedy.

It is likely that both direct and indirect victims will be able to claim reparations
before the ICC. Although the English version of Article 75(1) and (2) only refers to
reparations being made ‘to, or in respect of, victims’, the French version identifies
reparations being made to ‘aux victimes ou à leurs ayants droit’ (the victims or their
dependants/family members). The exclusion of the word ‘family’ from the final English
text of Article 75 was due to disagreements on its definition. In line with the Court’s
jurisprudence on participation and norms established in international human rights law,
which include victims of indirect harm, the English version’s language of ‘in respect of’
must include indirect victims. Furthermore, in relation to Article 33 of the Vienna
Convention on the Law of Treaties, the language which follows the object and purpose of the
treaty should prevail. In this case the French text is preferred, due to it following more
closely the object and purpose of the Rome Statute, as the drafters intended to do justice to
victims, both direct and indirect. Additionally, other types of victims may also be able to

85 Situation in Democratic Republic of Congo, Decision on the Applications for Participation in the
Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101, 17
January 2006, para.115.
86 Statut de Rome de la Cour pénale internationale, A/CONF.183/9, Article 75(1) et (2). Gilbert Bitti
and Gabriela Gonzalez Rivas, The Reparations Provisions for Victims Under the Rome Statute of the
International Criminal Court, in the International Court of Arbitration (ed.), Redressing Injustice
Through Mass Claims Processes: Innovative Responses to Unique Challenges, (OUP 2006) 299-322,
p311.  
87 Dwertmann Ch.3 n24, p86; and Schabas, Ch.1 n18, p911.  
88 See Principle 2, UN Victims' Declaration, and Principle 8 UNBPG. See X v Federal Republic of
Germany, App no 4185/69, (ECtHR, 13 July 1970); Velásquez Rodríguez Ch.1 n 154, para.39;
Aloëboetoe et al v Suriname, Reparations and Costs, Series C No 15 (IACtHR, 10 September 1993),
para.54; and Blake Ch.1 n 154, para.57.  
90 Muttukumaru Ch.1 n 221, p264.
claim reparations. In light of Rule 85(b) certain legal persons could benefit from reparations, such as a school or hospital harmed by international crimes.  

The language of Article 75(2) stipulates that reparations are to be made against a convicted person, meaning that only victims of the crimes the defendant is convicted of will be able to claim reparations. The Court can only prosecute a select number of persons and crimes, due to its limited resources. Moreover, as discussed in Chapter 3, victims do not have any input into the prosecutorial selection of perpetrators and crimes, thereby denying them their procedural right to have autonomous standing to bring a reparation claim to the Court. Consequently, in practice it is likely that very few victims will be eligible for reparations before the Court.  

This distinguishes the ICC from human rights law which permits victims to have standing to claim reparations if they have suffered a violation of their rights, thereby being victim-focused rather than the convict-focused of the ICC.  

As a result, the Rome Statute creates a reparation gap. As discussed in Chapter One, providing reparations to certain victims may label them as more worthy than others, causing further victimisation to those excluded. Moreover, distribution of a convicted person’s assets to victims at the ICC could deny others a resource to claim reparations, such as in the Lubanga case which only recognised child soldiers as victims.  

This labelling of victims is brought into sharper focus in the Lubanga case due to the ethnicity of the conflict in Ituri which involved fighting between the Hema and Lendu. In Lubanga the victims, who are all child soldiers, belong to the Hema group, whereas victims of Lubanga’s other crimes which were not charged are Lendu. Furthermore, in the Katanga and Chui case which also deals with Ituri conflict, a few of the victims are Lendu former child soldiers, but the majority before the Court are Hema. This risks causing further victimisation to victims in the Lendu community through denying the recognition and access to reparations, despite suffering from

91 For example, a/0188/06 (Situation in Democratic Republic of Congo, "Corrigendum à la « Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par ..." ICC-01/04-423-Corr, 31 January 2008, para.142-143.


93 Lubanga, ICC-01/04-01/06-1813, 8 April 2009.
massacres and other crimes committed by Lubanga's militia.\textsuperscript{94} This is the result of unrepresentative prosecutorial selection during investigation. Therefore there is a need for domestic reparation bodies to complement the Court, as discussed in the final section.

2. Reparation proceedings

Under Article 75, reparations are to be made against a convicted person, indicating that reparation proceedings will commence after a defendant has been found guilty.\textsuperscript{95} Reparation proceedings are an important way for victims to avail of their procedural rights. By presenting their interests it can help the Court determine reparations that can more effectively remedy their harm. Progressing to the Court's reparation stage is not automatic, but requires a victim to request reparations proceedings or the Court to initiate on its own motion.\textsuperscript{96} Additionally, under Article 75(2) the use of the word 'may' indicates that there is no obligation on the Court to order reparations against a convicted person. However, the ICC has recognised the importance of reparations for victims and to the 'success' of the Court.\textsuperscript{97}

Article 75(3) is the key provision for victims to inform the Court of their views on reparations.\textsuperscript{98} In making submissions to the ICC, they can request the type of reparations and describe their damage, loss or injury.\textsuperscript{99} Human rights courts have found it important to hear victims' views on the content, implementation and operation of reparations, such as the location of a clinic, services offered, and time-frame, in order to remedy effectively their harm.\textsuperscript{100} Yet, the language of Article 75(3) – that the Court 'may invite' representations – signifies a discretionary element in permitting victims' representations. The French and

\textsuperscript{94} Ituri: Covered in Blood, HRW Ch.3 n 49.
\textsuperscript{95} See also Article 76(3).
\textsuperscript{96} Rules 94 and 95.
\textsuperscript{98} See also Article 82(4), and Rule 97(2). Rules 94(2); 95(1); 96 and 218(4) also provide notification to victims on reparations consistent with Principles 24, UNBPG.
\textsuperscript{99} Rule 94(1).
Spanish versions of Article 75(3) require that the ‘Court shall take account’ of representations omitting the phrase ‘may invite’.\textsuperscript{101} Read in light of Article 33 of the Vienna Convention of Treaties, the French and Spanish versions reflect a meaning which follows the object and purpose of the Rome Statute. Additionally, the French delegation, which proposed the draft of Article 75 with the United Kingdom,\textsuperscript{102} suggested that victim representations were important to ensuring the Court had the complete information before it.\textsuperscript{103} Together these sources suggest that victim representations to the Court should be considered in determining reparations; this is consistent with procedural justice for victims by permitting their input into decisions which affect their interests.

The role of victims in reparations proceedings may be more participatory than just providing representations. Judge Kirsch suggests that in comparison to participation in the trial under Article 68(3), in reparation proceedings victims will play a more leading role, such as submitting evidence and calling witnesses.\textsuperscript{104} Additionally, participation under Article 75(3) does not face the same limitations as in the criminal trial in Article 68(3), where it has to be in victims’ personal interests and balanced against rights of the defendant and a fair and impartial trial. Victims can also appeal a reparation order if they are ‘adversely affected’ by it, giving them a procedural remedy which they do not have in the criminal trial proceedings before the Court.\textsuperscript{105} Staker suggests that victims could make an appeal on this ground if the Court refused to order reparations on their behalf.\textsuperscript{106}

Zegveld compares the participation of victims under Article 75 to the practice in civil law countries of \textit{partie civile}, where victims join the prosecution’s criminal case so as to make a compensation claim upon the defendant’s conviction.\textsuperscript{107} Article 75 may share some of the procedural rights of \textit{partie civile}, such as leading evidence, participation in the

\begin{footnotes}
\item[101] Donat-Cattin n 77, p1407.
\item[104] Partly dissenting opinion of Judge Philippe Kirsch, 23\textsuperscript{rd} July 2008, ICC-01/04-01/06-1432-Anx, para.22. See Rule 94 RPE.
\item[105] Article 82(4).
\item[107] See Zegveld n 22.
\end{footnotes}
criminal trial, and a right to appeal. Furthermore, the focus on the individual responsibility of a convicted person indicates a more civil compensation claim. However, titling Article 75 as 'Reparations to Victims' in the Rome Statute implies a more substantive right to reparations. This is due to the usage of the word 'reparations' in international and human rights law, of which compensation is only one type. Furthermore, the Court has also distinguished victims' role in criminal proceedings to ensure their substantive rights to truth, justice, and reparations.\textsuperscript{108}

In practice, the ability of thousands of victims to participate and communicate with the Court will be tempered by its limited resources. The drafters of Article 75 felt that where there are a few victims, the Trial Chamber could hear evidence from each victim on his/her views and individual damage, loss, or injury.\textsuperscript{109} The boards of the Assembly State of Parties (ASP) have suggested that where a defendant is indigent reparations proceedings should be brief so as conserve resources for reparation orders, rather than spent on legal aid and other court costs associated with victim participation.\textsuperscript{110} In light of the above discussion on Article 75(3), the Court is obliged to receive victims' representations, though the provision does not distinguish whether their representations are in written or oral form. As a compromise in cases of mass victimisation it is likely that victim participation could be reduced to written representations, rather than being excluded entirely or limited to a few victims.

There are a number of solutions to allow mass representation and participation of victims in proceedings. The Court could use a small number of victims' legal representatives (VLRs) to participate on the victims' behalf in proceedings while allowing written representations to be made by individuals, as the Court has done in relation to their participation in the trial. Additionally, consulting victims possibly through the organs of the Registry could document their views on reparations.\textsuperscript{111} Alternatively, under Rule 97, victims,

\textsuperscript{108} See Chapter 3.
\textsuperscript{110} Establishing effective reparation procedures and principles for the International Criminal Court, September 2011, VRWG, fn.3 citing the Report of the Committee on Budget and Finance, Seventeen Session, para.36.
their legal representatives, and the convicted person could request, or the Court of its own motion could appoint, experts to ‘assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims’. \[112\] Experts have been used in other reparation mechanisms to consult victims and develop reparation programmes which were acceptable to all the parties involved. \[113\] They can also provide additional information on the suffering of victims that may have been excluded from the trial, as well as expertise on victimisation from different professional perspectives, such as psychology, criminology and medical. \[114\] Therefore experts could overcome some of the criticism of the ad hoc tribunals (being time-consuming and unfamiliar) by injecting their knowledge so as to expedite the Court’s reparation proceedings. Together these measures could help the Court to balance its restricted resources against being overwhelmed by mass victim participation.

3. Types of reparations

Article 75(1) and (2) of the Rome Statute specify that the Court can order reparations ‘including restitution, compensation and rehabilitation’. Neither the Rome Statute nor the Rules of Procedure and Evidence (RPE) define the contents of these reparations, leaving it to judicial discretion. However, international and human rights law recognise that reparations include: restitution, compensation, rehabilitation, measures of satisfaction, and guarantees of non-repetition. \[115\] These various types of reparations seek to remedy an individual or a group’s harm in different ways, each having their own benefits and drawbacks. \[116\] The Inter-American Court of Human Rights has emphasised that a combination of measures is necessary to redress the differing harms victims suffer. \[117\] The ICC is bound by international human rights law under Article 21(3) and can apply

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\[112\] Rule 97(2).

\[113\] See the role of a Special Master in the Swiss banks litigation in the US, Ferstman and Goetz n 92, p343. See also the appointment of experts in Aloeboetoe n 88, para.39.

\[114\] See 19 Tradesmen Ch.1 n 156, expert witness testimony p36-39; and Redress n 96, p51.

\[115\] Ibid; Principles 19-23, UNBPG; Articles 30, and 35-37 RSIWA, but does not include rehabilitation; and Loayza Tamayo n 7, para.85.

\[116\] Garrido and Baigorria Ch.1 n154, para.41; Blake Ch.1 n 154, para.34; and 19 Tradesmen v Colombia Ch.1 n 156, para.223.

\[117\] See Plan de Sánchez Massacre Ch.1 n 154, para.93; Pueblo Bello Massacre n 84; Moiwana Community Ch.1 n 195; Ituango Massacres v Colombia, Preliminary Objection, Merits, Reparations and Costs, Series C No 148 (IACtHR, 1 July 2006); Mapiripán Massacre Ch.1 n 156; and the Las Dos Erres Massacre Ch.1 n 199.
international law principles under Article 21(2). Thus the Court is in a position to draw from this jurisprudence established on these different types of reparations to ensure its orders effectively remedy victims’ suffering.

a) Restitution

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

b) Compensation

Compensation seeks to provide monetary or economic awards to victims for the harm or loss they have suffered. In many legal systems, victims of crime or their next of

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118 Shelton n 6, p272. See Principles 8-11 UN Victims’ Declaration, and Principle 19, UNBPG.
119 Ibid. Shelton; Principle 19, UNBPG; and Papamichalopoulos and others v Greece Ch.1 n 154, para.38; and Chorzow Factory Ch.1 n 165, para.125.
120 See Loayza-Tamayo n 7.
kin, especially in homicide, are provided with compensation for their injury and loss. In international law compensation is a substitute where restitution is impossible. Compensation can enable victims the ‘freedom of choice’ to spend the money as they see fit to redress their suffering. According to the Lusitania case, it ‘... is measured by pecuniary standards, because, says Grotius, “money is the common measure of valuable things”. Compensation can cover:

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

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

To put this into context, in the Caracoza v Venezuela case, 276 civilians, including a number of children, were killed by government forces in response to public protests during a

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state of emergency.\textsuperscript{130} The Inter-American Court awarded the 37 victims killed, their 44 next of kin, and three survivors $31,000-$63,000 for pecuniary damages as the result of funeral and medical costs, as well as loss of earnings. An additional $2,000-$53,000 was ordered for non-pecuniary damages due to the ‘various types of physical and psychological ailments, grief, anguish, intense fear, and frustration’ they all suffered as a result.\textsuperscript{131} Compensation can therefore be used to indemnify a wide range of harm that victims can suffer from.

In cases of mass victimisation involving hundreds or thousands of victims, compensation can be an efficient way to disburse funds to victims without having to work out the modalities of returning property or establishing long-term support programmes.\textsuperscript{132} For instance, the UN Claims Commission established after the Gulf War awarded $52.4 billion of compensation to 1.55 million victims who suffered harm as a result of Iraq’s invasion of Kuwait.\textsuperscript{133} However, such a large fund is generally rare in post-conflict situations, due to the damage caused to the local economy and infrastructure, and so fully remedying the harm through compensation may be unviable.

While the utility of compensation is apparent, quantifying the suffering of victims into monetary amounts can denigrate the value of human life and dignity by placing a price on a person or loved one’s suffering or life. In the \textit{Street Children} case before the Inter-American Court involving the abduction, torture, and murder of three children and two young adults by the Guatemalan police, Judge Cançado Trindade decried the use of compensation as reducing humans into economic values or ‘homo oeconomicus’,\textsuperscript{134} thereby rejecting an economic analysis of reparations. He continued:

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

\textsuperscript{130} \textit{Caracazo v Venezuela}, Reparations and Costs, Series C No. 95 (IACtHR, 29 August 2002).
\textsuperscript{131} Ibid para.100.
\textsuperscript{132} Waterhouse n 100, p261; and \textit{Moiwana Community v Suriname} Ch.1 n 195, paras.213-215.
\textsuperscript{133} UN War Crimes Commission webpage: www.uncc.ch accessed 02/08/2012.
\textsuperscript{134} The \textit{Street Children} case Ch.1 n 198, Separate Opinion of Judge Cançado Trindade, para.34, citing \textit{Loayza Tamayo} n 7, Joint Separate Opinion of Judges A.A. Cançado Trindade and A. Abreu Burelli, para.9.
contemporary legal doctrine has been attempting to devise distinct forms of reparation - inter alia, restitutio in integrum, satisfaction, indemnizations, guarantees of non-repetition of the wrongful acts - from the perspective of the victims, so as to fulfil their needs and claims, and to seek their full rehabilitation.¹³⁵

Therefore compensation is useful, but is only one component of remedying victims’ harm. As encapsulated by Shelton, monetary compensation is, ‘incapable of restoring or replacing the rights that have been violated and, as a substitute remedy, are sometimes inadequate to redress fully the harm ... [it can however] supply the means for whatever part of the former life and projects remain possible and may allow for new ones.’¹³⁶

c) Rehabilitation

Rehabilitation, the third type of reparation mentioned in Article 75, can be a type of restitution as it is the process of trying to reinstate an ‘individual’s full health and reputation after the trauma of a serious attack on one’s physical and mental integrity... [so as to] restore what has been lost.’¹³⁷ However, it can be distinguished from restitution as it involves healing the integrity of the individual rather than returning goods or benefits to them. The World Health Organisation defines rehabilitation as, ‘the combined and co-ordinated use of medical, social, education and vocational measures for training or retraining the individual to the highest possible level of functional ability.’¹³⁸ The UN Victims’ Declaration also calls for ‘necessary material, medical, psychological and social assistance’ to victims.¹³⁹ Rehabilitation may need to go beyond individual assistance to remedy familial, communal, or social bonds damaged as a result of the crime or violation, such as reconciliation measures between communities or education programmes to sensitise communities to victims’ suffering.¹⁴⁰

¹³⁵ The Street Children case ibid, para.28.
¹³⁶ Shelton n 6, p291. Waterhouse n 100, p260-261.
¹³⁷ Shelton ibid p275. See Principle 21, UNBPG.
¹³⁹ Principle 14.
¹⁴⁰ See the TRC Report Vol.5, p175.
The European Court of Human Rights has limited rehabilitation for physical and psychological harm to compensation for the cost of medical treatment.\textsuperscript{141} The Inter-American Court followed the same approach until the \textit{19 Tradesmen v Colombia} case in 2004 where it ordered compensation together with rehabilitation measures.\textsuperscript{142} In this case, involving the execution and disappearance by paramilitary and military forces of 19 merchants, an expert witness testified that the victims’ next of kin suffered psychological harm as result, and excessive consumption of drugs and alcohol in order to cope with the harm caused.\textsuperscript{143} The Inter-American Court ordered the State to provide specialised healthcare without charge to the next of kin on an individual, familial, or collective level and to deal with any substance abuse.\textsuperscript{144}

In the \textit{Plan de Sánchez Massacre} case, the Guatemalan army attacked an indigenous Mayan village killing 268 civilians. Mostly women and the elderly were massacred, girls were raped, and homes destroyed causing the displacement of the civilian population. Building on the \textit{19 Tradesmen} case, the Inter-American Court ordered rehabilitation expanding it beyond healthcare to include: a housing and development programme; a healthcare centre; Mayan education; and infrastructure - a road, sewage and potage water system for the remaining 317 survivors.\textsuperscript{145} These forms of rehabilitation not only redressed the suffering at the individual level, but allowed the community as a whole to rebuild and continue its cultural activities. Rehabilitation has therefore developed from just remedying the victim’s physical or psychological harm, to providing measures to repair a wide scope of damage that affects families and communities.


\textsuperscript{142} \textit{19 Tradesmen} Ch.1 n 156, para.278.

\textsuperscript{143} Carlos Martín Beristain, doctor, specialist on the care of victims of torture, human rights violations and other forms of violence, p32-36, ibid. Cited by the Court at paras.276-278.

\textsuperscript{144} Ibid. para.278.

\textsuperscript{145} \textit{Plan de Sánchez Massacre} Ch.1 n 154, paras.105 and 110; see also \textit{Moiwana Community} Ch.1 n 195, para.214; the \textit{Ituango Massacre v Colombia} n 117, paras.403 and 407; and \textit{Las Dos Erres Massacre} Ch.1 n 199, paras.266-270.
**d) Other forms of reparation**

Although Article 75 only mentions three types of reparation, the Court may use other forms recognised in international and human rights law of satisfaction and guarantees of non-repetition. Mégré suggests that one of the reasons why more property or monetary-based reparations of restitution, compensation, and rehabilitation only appear in the Rome Statute is due to the other types requiring the action and responsibility by the State rather than individuals.\(^{146}\) This is in line with Muttukumaru’s observations of the drafters wanting to avoid State responsibility.\(^{147}\) However, the omission of satisfaction and guarantees of non-repetition does not mean that they are redundant. The use of the term ‘including’ in Article 75(1) and (2) suggests that the three types of reparations mentioned are illustrative rather than conclusive, thereby permitting the addition of other types of reparations.\(^{148}\) This is further supported by Rule 94(1)(f) of the Rules of Procedure and Evidence (RPE) which mentions ‘other forms of remedy’ that a victim can request.\(^{149}\)

Measures of satisfaction repair the moral damage suffered by victims.\(^{150}\) They can also ‘awaken […] public awareness to avoid repetition’, and ‘maintain remembrance of the victim.’\(^{151}\) This can help to counter the psychological effects of international crimes and impunity by publicly and officially recognising victims’ harm and reaffirming their trust in the State and society.\(^{152}\) In international law, satisfaction involves a variety of measures that endeavour to repair the moral damage of a State, i.e. the ‘honour, dignity and prestige’ caused by a violation or crime that cannot be redressed by restitution or compensation, due to its intangible and unquantifiable nature.\(^{153}\) Measures of satisfaction are therefore symbolic.

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\(^{147}\) Muttukumaru Ch.1 n 221, p268.

\(^{148}\) Mégré n 146, p136.

\(^{149}\) See also the original victim application form for reparations, part F(1) which refers to ‘other form of reparations.’

\(^{150}\) *Plan de Sánchez Massacre* Ch.1 n 154, para.93; and Shelton n 6, p78.

\(^{151}\) Principle 22, UNBPG; *19 Tradesmen* Ch.1 n 156, paras.272-273; *Myrna Mack-Chang* Ch.3 n 136, para.286.

\(^{152}\) Correa Ch.1 n 111.

\(^{153}\) Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9th July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior* affair, 30th April 1990 UNR1AA, vol. XX 215-284, p267-273; *Corfu Channel* case n 19. See ILC Commentary on RS1WA, 2001 (A/56/10) p105. Arrest
and include ‘... an acknowledgement of the breach, an expression of regret, [or] a formal apology.’\(^{154}\) A judgment by a court against a State or individual for a crime or violation can also be a measure of satisfaction as it attributes and determines their responsibility.\(^{155}\)

In human rights law, satisfaction is more broadly conceived as fulfilling victims’ needs for non-monetary outcomes such as justice, recognition of their suffering, the truth, and reaffirming their dignity.\(^{156}\) As such, satisfaction is generally considered a residual form of reparation that is required to remedy fully victims’ harm.\(^{157}\) This broader interpretation of satisfaction may be more applicable to the ICC, due to human rights law focusing on victims as individuals and groups of atrocities akin to crimes against humanity, such as massacres. The Inter-American Court has ordered satisfaction measures including: prosecution of those responsible;\(^{158}\) cessation of the violation;\(^{159}\) plaques and memorials;\(^{160}\) renaming a well-known street, square, or school in the name of the victim(s);\(^{161}\) the search, identification and burial of victims or massacred or were disappeared;\(^{162}\) and scholarships for victims.\(^{163}\) These can promote reconciliation within society and prevent future violations by establishing the facts of what occurred, who was responsible, and who the victims were.\(^{164}\)

Satisfaction can also allow community reintegration. Memorials, scholarships, and other official acknowledgements help to memorialise publicly what happened, reconcile

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154 Article 37(2), RS1WA.

155 See the Corfu Channel case n 19, p35; and Rainbow Warrior affair, p272-273.

156 Velásquez Rodríguez Ch.1 n 154, para.36; El Amparo v Venezuela, Reparations and Costs, Series C No 28 (IACtHR, 14 September 1996), para.35; Loayza Tamayo n 7, para.153; and Moiwna Community Ch.1 n 195, para.216. See Principle 22(b, d, f, and h), UNBPG; and Mégret n 146, p129.

157 McCarthy n 56, p170.

158 Velásquez-Rodríguez Ch.1 n 154, paras.34-35; Plan de Sánchez Massacre Ch.1 n 154, paras.98-99; and Principle 22(f), UNBPG.

159 Principle 22(a), UNBPG.

160 Myrna Mack-Chang Ch.3 n 136, para.284; Moiwna Community Ch.1 n 195, para.218; and Pueblo Bello Massacre n 84, para.278. Principle 22(g) UNBPG.

161 Myrna Mack-Chang Ch.3 n 136, para.286; Street Children Ch.1 n 198, para.103; Contreras et al. v El Salvador, Merits, Reparations and Costs, Series C No 232, (IACtHR, 31 August 2011), paras.207-208; and Principle 22(g), UNBPG.

162 Pueblo Bello Massacre n 84, paras.270-273; Principle 22(c), UNBPG; and Article 15, International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).

163 Myrna Mack-Chang Ch.3 n 136, para.285.

164 19 Tradesmen Ch.1 n 156, paras.258-259; and Plan de Sánchez Massacre Ch.1 n 154, para.93. See also Principle 22, UNBPG.

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differences, and emphasise that they cannot be repeated in the future.\textsuperscript{165} By way of example, in the \textit{Mapiripán Massacre v Colombia} case, over a hundred paramilitaries attacked the town of Mapiripán and detained, tortured, and executed at least 49 civilians, destroyed their bodies, and threw them into a river, causing the survivors to abandon the town and seek refuge elsewhere. The Inter-American Court ordered the State to construct a memorial, provide rehabilitation to survivors and families, identify, recover and return the remains of victims to their next of kin, and to guarantee the safe return of the survivors to Mapiripán, allowing them to reintegrate into the community and the possibility of future reconciliation.\textsuperscript{166}

The second form of alternative reparations is the guarantee of non-repetition. These are legislative amendments and institutional reforms made by States to prevent the repetition of violations and atrocities.\textsuperscript{167} Mégret defines guarantees of non-repetition as ‘a commitment made by the State to never engage again in the practices that led to violations, backed by a number of reforms and restructuring initiatives to make good on that promise.’\textsuperscript{168} Guarantees of non-repetition can include ensuring effective civilian control over military forces, strengthening judicial independence, and promoting human rights standards.\textsuperscript{169} For instance, in the \textit{Ituango Massacre v Colombia} case before the Inter-American Court, 19 civilians were murdered by paramilitary forces, who also looted property, detained, tortured and displaced the civilian population. Although the massacre was carried out by non-state actors, it had occurred due to Colombia’s failure to protect its citizens and to properly investigate, prosecute, and punish those responsible. The Court ordered Colombia to carry out a human rights education programmes for its armed forces and security agencies because of their collaboration, tolerance, and acquiescence of the violations.\textsuperscript{170} The Inter-American Court also uses guarantees of non-repetition to raise public awareness, to improve ‘collective

\begin{thebibliography}{99}
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\bibitem{Moiwana} \textit{Moiwana Community} Ch.1 n 195, para.218.
\bibitem{Mapiripan} \textit{Mapiripán Massacre} Ch.1 n 156, paras.305-315.
\bibitem{UNBPG} \textit{Principle 23}, UNBPG; Article 30, RSIWA; and Article 24(5), ICPPED. See also \textit{Garrido and Baigorria} Ch.1 n 154, para.41; \textit{Loayza Tamayo} n 7, para.85; \textit{19 Tradesmen} Ch.1 n 156, para.222; \textit{Plan de Sánchez Massacre} Ch.1 n 154, para.54; and \textit{Moiwana Community} case Ch.1 n 195, para.216.
\bibitem{Mégret} See Mégret n 146, p130.
\bibitem{Principle} See Principle 23, UNBPG.
\bibitem{Ituango} \textit{Ituango Massacre} n 117, para.409.
\end{thebibliography}
memory’, and to move beyond just the removal of laws by creating new State support mechanisms to prevent recurrence of violations in the future.\textsuperscript{171} Accordingly, they can redress the causes of the conflict, such as abusive armed forces, so as to avoid future victimisation.

In all, the jurisprudence on reparations affirms that different types are available to victims of mass atrocities. The Inter-American Court has developed a corpus of jurisprudence on reparations which aims to be sensitive to victims’ needs and so is insightful for the ICC in achieving victim-centred justice. Yet, it is unclear whether the ICC has the jurisdiction or the will to order measures of satisfaction or guarantees of non-repetition, which are normally used against States to carry out programmes and reforms, instead of individuals.\textsuperscript{172} This has divided commentators. Mégret points out that the ICC could potentially order measures of satisfaction and guarantees of non-repetition, especially for groups where individual compensation to numerous victims would be insufficient. He places them in the wider purpose of the Court in delivering reparations, which are more than just \textit{restitutio in integrum}, but transformative justice as they seek to transform the situation of the victims and society through various remedies and reforms, making the ICC an ‘actor of transitional justice’ rather than just an international criminal court.\textsuperscript{173} However, Mégret does not deal with the issue of State responsibility, instead preferring other forms of reparation to be carried out by the Court through the Trust Fund, which in itself raises certain problems on capacity and responsibility.

Donat-Cattin takes a similar approach to Mégret. Although Donat-Cattin states that the ICC does not have the jurisdiction to order reparations against States, measures of satisfaction and guarantees of non-repetition could be ordered by the Court, without suggesting whether the individual or the Trust Fund should be responsible for carrying these types of reparations out.\textsuperscript{174} Keller excludes other forms of reparation on account of the

\begin{footnotes}
\item[171] Plan de Sánchez Massacre Ch.1 n 154, para.104.
\item[172] Muttukumaru Ch.1 n 221, p264.
\item[173] Mégret n 146.
\item[174] Donat-Cattin n 77, p1411.
\end{footnotes}
Court’s lack of jurisdiction over States.\textsuperscript{175} Henzelin, Heiskanen, and Mettraux also neglect satisfaction and guarantees of non-repetition owing to their absence from Article 75.\textsuperscript{176} However, in order to remedy substantively the harm suffered by victims and to be compliant with human rights jurisprudence, all five types of reparations are necessary due to the extent of harm international crimes cause and to achieve victim-centred justice. The Court may need to call upon a State to provide reparations to victims in order to ensure an effective remedy; this point is returned to in the final section of this Chapter. The ICC ordering all these types of reparations raises a number of difficulties in relation to individual responsibility.

4. Difficulties in ordering reparations before the International Criminal Court

There are a number of difficulties in ordering certain reparations against defendants before the Court, of which three are identified here. First, reparation awards will be inadequate as convicted persons before the Court are likely to be indigent or have hidden their assets. The Court can request State Parties to freeze bank accounts and seize any assets of the accused to be used for reparations.\textsuperscript{177} But as Jorda and Hemptinne point out, many defendants before the ad hoc tribunals were unable to afford the cost of their own defence, making it rare for defendants before the ICC to afford a reparation scheme for thousands of victims.\textsuperscript{178}

The Court could use the reserves of the Trust Fund for Victims (TFV) to supplement reparations orders against the convicted person.\textsuperscript{179} In 2012 the TFV had €1.2 million in reserve for the Court to use for reparations in its first two cases of Lubanga and Katanga and

\textsuperscript{176} Marc Henzelin, Veijo Heiskanen, Guenael Mettraux, Reparations to victims before the International Criminal Court: Lessons from international mass claims processes, \textit{Criminal Law Forum} 17(3/4) (2006) 317-344; and Zegveld n 22.
\textsuperscript{177} Articles 57(3)(e), 77(2), 93(1)(k), and 109; and Rule 218. See \textit{Prosecutor v. Thomas Lubanga}, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06-US-Corr, 24 February 2006, paras.136-141.
\textsuperscript{178} Jorda and de Hemptinne, Ch.1 n 183, p1415; and Wierda and Greiff n 64, p10.
\textsuperscript{179} Article 75(2) and Rule 98.
Chui. Yet, this funding is likely to be insufficient to support the needs of the victims in these two cases, who already number in their hundreds with further applications pending. Victims in the Bemba case may have a better chance of claiming reparations based on the defendant's resources as €5.2 million of his assets were seized by the Court. Yet, even in this case there are 4,452 victims. If the numbers of victims remain at this amount, they would only receive €1168 each. This would be far less than the tens to hundreds of thousands of Euros ordered by the regional human rights courts to each victim, plus rehabilitation and measures of satisfaction to remedy effectively their harm. For instance, the Abuyeva and others v Russia case before the European Court involved the killing of 24 civilians by Russian aerial bombardment of a refugee 'safe zone' in Chechnya. The Court ordered between €30,000-120,000 to the victims for death of a relative or injuries suffered. In the Mapiripán Massacre v Colombia case the Inter-American Court awarded between $50,000-$350,000 for the torture, dismemberment, murder, and disposal of at least 49 civilians in a nearby river, plus other types of reparations.

While these amounts were awarded against States, they were decided on an equitable basis to remedy victims' harm. Both these courts came to these amounts due to the seriousness of the violations against these individuals to the extent that they were compared to crimes against humanity. These cases therefore provide a good comparison to the crimes before the ICC and the appropriate amount required to compensate their harm. Despite the crimes before the ICC being the most serious and grave, the reparations based on the resources of the convicted person or the TFV are likely to be grossly insufficient to remedy

180 ICC Trust Fund for Victims assists over 80,000 victims, raises reparations reserve, ICC Press Release, 23 March 2012.
181 496, 129 in Lubanga and 365 in Katanga and Chui, as of July 2012.
183 Bemba, ICC-01/05-01/08-2247-Red.
184 See Pablo de Greiff, Reparations and Justice, in J. Miller and R. Kumar (eds.), Reparations: Interdisciplinary Inquiries, OUP (2007) 153-175, p158-159; Sandoval-Villalba Ch.1 n 146; Blake Ch.1 n 154; Myrna Mack Chang Ch.3 n 136; Plan de Sánchez Massacre Ch.1 n 154; and Papamichalopoulos Ch.1 n 154, para.34.
185 Abuyeva and others v Russia, App No 27065/05, (ECHR, 2 December 2010).
186 Mapiripán Massacre v Colombia, Merits, Reparations and Costs, Series C No 134 (IACtHR, 15 September 2005).
the suffering of victims. This is in contrast to reparation orders by human rights courts against States, which are more likely to have the resources and capacity to provide mass-claims reparations programmes. Consequently, the reliance on individual responsibility by the Court impedes the amount of reparations victims can receive from the ICC.

A number of commentators have suggested that reparations should be made on a collective or symbolic basis, due to lack of available resources, the potential thousands or tens of thousands of victims requesting reparations, and the time required to analyse each claim at the ICC.\footnote{Keller n 175, Mégr\'et n 146, Ferstman and Goetz n 92; Wierda and Greiff n 64; and Rombouts Ch. 1 n 102, p 200.} The Court could order collective reparations to be paid by the convicted person or the TFV in order to maximise their limited resources.\footnote{Rule 97(1).} Individual reparations are measures aimed at remedying the individual person's harm, such as restitution or compensation for looted property. Collective reparations are measures awarded to a group to remedy their communal harm, such as a memorial for victims of a massacre, but they can also benefit society as a whole, e.g. human rights education of military forces. For instance in the \textit{Saramaka People v Suriname}, the Inter-American Court ordered collective reparations to protect the Saramakas' communal rights to land and compensation to be paid into a development fund for them.\footnote{\textit{Saramaka People v Suriname}, Preliminary Objections, Merits, Reparations, and Costs Judgment, 28 November 2007 Series C No 172, paras.194-202.} Symbolic reparations can be both individual and collective as they recognise the victim's or group's harm or 'moral status'\footnote{Conor McCarthy, Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory, \textit{International Journal of Transitional Justice}, 3(2) (2009) 250-271, p271.} by offering a small monetary sum or constructing a memorial to acknowledge their suffering.\footnote{See \textit{Albert Wilson v. the Philippines}, Communication No.868/1999, UN Doc. CCPR/C/79/D/868/1999 (2003).}

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

However, collective reparations risk compromising individual victims' right to a remedy by being utilitarian and responding to the needs of the group. Instead, reparations are supposed to remedy appropriately all victims' harm, both individual and collective. The Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC) only allow collective awards and explicitly exclude individual monetary payments. Excluding individual restitution or compensation could allow the harm of international crimes to remain, such as poverty as a result of the death of the breadwinner in a family, destruction of an individual's possessions or home, or a severe physical or psychological disability preventing them from earning a living. Additionally, the UN Human Rights Committee has also ruled that 'symbolic' or less than full compensation is inadequate and ineffective as a remedy. For the purpose of this thesis, individual and collective reparations are not mutually exclusive, but complement each other in remedying the different aspects of victims' harm, particularly in light of the suffering that international crimes cause to individuals and groups, as explored in Chapter 1. This could preclude the sole reliance on symbolic reparations to redress victims' harm. The use of both individual and collective reparations is supported by the jurisprudence of the Inter-American Court and the UNBPG; the Court should follow such an approach in order to provide victim-centred justice.

The ICC Rules of Procedure and Evidence (RPE) permit judges to award individual and/or collective reparations. The Court could order the construction of a memorial or a health centre to provide rehabilitation, using the confiscated assets of the convicted person to

192 Wierda and Greiff n 64, p6.
194 Rule 23(1)(b) and 23 quinquies(1).
195 Albert Wilson n 191, para.5.14.
196 Principle 8, UNBPG.
197 See for instance: 19 Tradesmen Ch. 1 n 156, para.222; Plan de Sanchez Massacre Ch. 1 n 154, paras.54 and 93. Principles 8, 19-23, UNBPG.
198 Rule 97(1).
fund these programmes. Alternatively, the convicted person could voluntarily apologise, such as in the Duch case before the Extra-Ordinary Chambers in the Cambodian Courts; alternatively, the convicted person could voluntarily apologise, for example, as occurred in the Nikolić case before the ICTY; \(^{199}\) make a full, public disclosure of what happened to allow the victims to find out the truth, such as Jean Kambanda at the ICTR; \(^{201}\) or order their armed forces to stop committing atrocities. \(^{200}\)

A second problem is that individuals cannot carry out certain types of reparation, such as rehabilitation, satisfaction, and guarantees of non-repetition. An apology by a convicted person could lack sincerity as it may only be due to criminal and appeal proceedings being complete, or to obtain a reduced sentence. \(^{202}\) Furthermore, a convicted person lacks the capacity to perform other reparations which can only be facilitated by the State, such as recovery of victims’ bodies and reform of institutions which caused victimisation. Therefore reparations based on individual responsibility of a convicted person are likely to be limited to monetary or proprietary-based reparations.

Third, ICC reparation orders by only concentrating on the responsibility of a convicted person may exclude the responsibility of the State in the victim’s harm. International crimes can involve both individuals, such as a Head of State, as well as State institutions. \(^{203}\) For example, Omar al-Bashir, President of Sudan, has been indicted by the ICC for international crimes committed in Darfur, which were carried out by State institutions, such as the Sudanese army, and other actors, e.g. the Janjaweed. \(^{204}\) As such, a number of perpetrators, groups, and institutions may be responsible for victims’ harm. The State can necessarily be involved in international crimes, due to their widespread and


\(^{201}\) Prosecutor v Jean Kambanda, ICTR 97-23-S, 4 September 1998, para.50.

\(^{202}\) Mégrèt n 146.


\(^{204}\) See Prosecutor v Al Bashir, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1, 4 March 2009; and Prosecutor v Al Bashir, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-95, 12 July 2010.
systematic nature as explored in Chapter 1.\textsuperscript{205} Prosecuting only an individual perpetrator, such as a Head of State, allows the victimising structures and other perpetrators to enjoy impunity leaving victims ‘defenceless’ and ‘fosters chronic recidivism’.\textsuperscript{206} Therefore, such partial responsibility undermines the Rome Statute’s objective of ending impunity and delivering justice to victims. The Trust Fund for Victims is supposed to supplement the shortcomings of reparations against convicted persons before the ICC.

\textbf{E. The Trust Fund for Victims}

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

For the first issue, a number of scholars have suggested that problems of the convicted person being indigent can be overcome by the TFV.\textsuperscript{207} Fischer goes as far to declare that the TFV, ‘... is the mechanism through which the international community can “right the wrongs” of international ... crimes.’\textsuperscript{208} This is unrealistic given the limited resources of the Trust Fund and the multitude of victims within the Court’s jurisdiction. With limited resources it may mean that awards through the TFV would be small, inadequate, and symbolic by being unable to fully remedy victims’ harm. As the cases before the Court increase, it is also questionable whether reliance on the Trust Fund’s resources is sustainable in the future.

On the second issue, with regard to the inability or lack of capacity of the convicted person to carry out reparative programmes, the ICC could use the TFV as it has funded the operation of a number of assistance programmes in the DRC and Northern Uganda. These programmes could be extended to cover victims in a reparation order by the Court. The Trust

\textsuperscript{205} See A. A. Cançado-Trindade, \textit{The Access of Individuals to International Justice}, (OUP 2011).
\textsuperscript{206} \textit{White Van} case Ch.1 n 201, para.173.
\textsuperscript{207} Keller n 175, Mégret n 146, Jordaan and Hemptinne Ch.1 n 183.
Fund could also facilitate the construction of memorials, commemoration days, or scholarships for victims. The TFV has no physical presence itself in these situations, but funds programmes which are carried out by intermediaries, such as intergovernmental, international or national NGOs.

Nevertheless, using the TFV to address these two concerns raises the conceptual problem of attributing responsibility. If reparations and assistance are both funded by the resources of the Trust Fund and carried out by NGOs, it makes it difficult to distinguish reparations ordered by the Court from charity or humanitarian aid. The conceptual coherence of reparations is further undermined by the responsible party not being held liable for reparations. This is because the funds used by the TFV do not come from convicted persons, but are voluntary contributions made by State Parties of the Rome Statute. Jorda and de Hemptinne suggest the use of the reparations through the TFV demonstrates State Parties wanting to ensure their collective interests of remedying victims' harm, such as under *erga omnes partes*. However, *erga omnes partes* only gives rise to other State Parties invoking the responsibility of the State which has committed the breach, rather than them undertaking the responsibility to provide reparations. This issue goes back to the theoretical basis of reparations mentioned at the start of this Chapter, where responsibility occurred because of the wrongful act of an individual or State. A responsible individual or State is obliged to make reparations to remedy the harm they have caused so as to hold them accountable and to vindicate the law. For victims, the origin of reparations can be important as the culpable person is made to acknowledge and remedy their suffering. To exclude such an aspect neglects the corrective and reparative justice elements of reparations. The focus of the ICC on the convicted person thus creates conceptual difficulties in the locus of responsibility. As the Court has not committed a wrongful act, granting reparations through

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209 Ferstman and Goetz n 92, p341.
210 Jorda and de Hemptinne Ch.1 n 183, p1416.
211 Article 48, RS1WA.
212 Walleyn Ch.3 n 306, p362.
the Trust Fund does not infer that the ICC is responsible by fulfilling the obligations of a State, nor does this give rise to victims’ right to make such claims against the ICC.

Focusing on one institution to provide justice and reparations to millions of victims is clearly unrealistic. However, as the Rome Statute was established to provide justice to victims and to end impunity, the mandate of the Statute needs be reconciled with the practice of the Court. The solution to this lies in the notion of complementarity and State responsibility, in that State Parties have the primary responsibility to fulfil the Rome Statute’s mandate, with the ICC only being a last resort. Reparations through the ICC do not negate a State’s responsibility to provide reparations to victims.213 Thus the reparation regime of the Rome Statute includes the Court and State Parties working together to provide justice to victims through prosecution and reparations in order to end impunity.

F. State Responsibility for Reparations

As outlined above, State responsibility for reparations only arises when a State commits a wrongful act. A State is not responsible for all conduct within its jurisdiction, such as that committed by non-state actors, unless a rebel movement becomes the new government.214 It is only responsible when its actions or inactions are considered wrongful in themselves, separate from the violations committed by the non-state actors.215 A State’s responsibility for its inactions arises where: it does not protect its citizens from non-state actors committing international crimes;216 or it fails to investigate, prosecute, and punish those who commit international crimes.217 This second part is consistent with State Parties’ obligation under the Rome Statute to investigate and prosecute those responsible for international crimes. The failure of a State to do so acknowledges the existence of impunity.

213 Article 75(6).

214 Article 10(1), RSIWA; Principle 12 UN Victims’ Declaration; and Principle 16, UNBPG.

215 Pueblo Bello Massacre n 84, para.123.

216 Velásquez Rodríguez Ch.1 n 155, para.175-176; Loayza-Tamayo n 7 para.168; General Comment No.31 para.8.

217 Article 146, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287; Velásquez Rodríguez Ch.1 n 154, para.32; Osman v United Kingdom, App no 23452/94 (ECtHR, 28 October 1998), para.115.
As discussed in Chapter 1, international crimes generally involve the actions or inactions of a State owing to their widespread and systematic scale. International criminal justice only holds those individuals most responsible to account, but is meant to be complemented by States who have the primary obligation to provide reparations to victims of international crimes. The Court by focusing only on the responsibility of individuals for international crimes displaces responsibility from the State and obscures the reality of international crimes, which are committed by both. International law and human rights law recognise the ‘duality’\footnote{Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgement, [2007] ICJ Reports 43, para.173.} of responsibility at the individual and State level for international crimes, which ‘co-exist ... for the eradication of impunity.’\footnote{Separate Opinion of Judge Cançado Trindade, Plan de Sánchez Massacre Ch.1 n 154, para.39.} The individual perpetrator is criminally punished and the State is responsible for investigating, prosecuting, and punishing those responsible and providing reparations to victims.\footnote{Velasquez Rodriquez Ch.1 n 155, para.134; Pueblo Bello Massacre n 84, paras.91, 112 and 122; and Principle 16, UNBPG.} Holding all individuals accountable for international crimes may not be enough to end impunity, especially where State institutions committed atrocities or allowed a cause of victimisation to continue, such as abusive or discriminative policies of the armed forces, as in South Africa under apartheid. A State cannot be held criminally responsible as it is a legal entity; therefore reparations remain the primary means for holding it accountable.\footnote{Judgement of the International Military Tribunal, IMT Official Documents, Vol. 1, (1947) p223.} Reparations are necessary to fill the gap between retributive justice and remedying victims’ harm, including the causes of victimisation. As the purposes of the Rome Statute and the International Criminal Court are to end impunity and deliver justice for victims, this section will examine how State responsibility for reparations can be used to complement the Court’s orders.
1. **State responsibility and the Rome Statute**

The ICC only has jurisdiction over individuals who commit international crimes and not States. As mentioned above on the drafting of the reparation provisions in the Rome Statute, the drafters excluded State responsibility for the purposes of reparations. Conversely, the Rome Statute does not transfer responsibility for reparations to the ICC. Rather the Rome Statute maintains State responsibility for reparations, as can be seen in Article 25(4) which stipulates ‘[n]o provision ... relating to individual criminal responsibility shall affect the responsibility of States under international law.’ This is supported by Article 75 which touches upon State co-operation and enforcement of the Court’s reparation orders. The drafters intended that these references to the State would recognise that it is in the best position to remedy as far as possible the consequences committed by international crimes. Accordingly, the ICC would establish reparation principles and leave them for national authorities to implement. This evidences a reparative complementarity approach, whereby the State is primarily responsible for reparations with the ICC only ordering reparations in the cases before it. Such an approach is connected to the external element of justice for victims at the ICC, discussed in Chapter 1, by maximising the impact of the Court through catalysing States to fulfil their obligations. Importantly for the reparation regime of the ICC, reparative complementarity could overcome its shortcomings through the support of reparation mechanisms in State Parties.

As the ICC has no jurisdiction over States it cannot hold them responsible when they do not provide reparations to victims. However, other State Parties can invoke the responsibility of a State which has committed a breach based on obligations *erga omnes partes*, i.e. as part of a multilateral treaty, which affects a collective interest. With regards

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222 Article 1, Rome Statute.
223 Muttukumaru Ch.1 n 221, p264. See also Resolution ICC-ASP/10/Res.3, para.2, 20 December 2011.
224 Article 25(4), Rome Statute.
225 Article 75(4) and (5) discussed below.
228 Article 48, RSIWA.
to the Rome Statute, the obligation to investigate and prosecute those responsible is breached when a State is unwilling or unable to do so, and therefore it affects State Parties’ collective interest in ending impunity, as discussed in Chapter 1. 229 The Inter-America Court has also recognised that the failure to eliminate impunity violates victims’ right of access to justice, requiring the other States to collectively adopt all measures to ensure it does not continue. 230

With regards to reparations, in invoking the responsibility of a State which has breached its obligations, other State Parties can require it to cease the breach and make guarantees of non-repetition, as well as performance of reparations to beneficiaries of the obligation breached. 231 One way to do this outside of the Rome Statute is to bring a claim before the International Court of Justice (ICJ). 232 This could be an important enforcement mechanism to ensure States compliance with the Court’s reparation orders. Without such enforcement, the ICC would become powerless, abstract, and an ineffective remedy for victims.

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

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

230 Goiburú et al. v Paraguay, Merits, Reparations and Costs, Series C No 153(IACtHR, 22 September 2006), para.131; La Cantuta v Peru, Merits, Reparations and Costs, Series C No 162 (IACtHR, 29 November 2006), para.160; and Anzualdo Castro v Peru Ch.1 n 203, para.125.

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

232 Article 36, Statute of the International Court of Justice, 18 April 1946. A similar obligation under Article 6 and 7 of the 1984 UN Convention Against Torture was invoked before the ICJ in the case of Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), 20 July 2012.
to the convicted person to support reparation orders. This could provide an important avenue for victims to seek restitution of their property and fund reparation orders. Article 93(1)(g) on ‘the exhumation and examination of grave sites’ could also be useful for measures of satisfaction ordered by the ICC in identifying and returning the bodies of victims to their next of kin. Of course, use of the word ‘may’ in the article implies there is no obligation on judges to order measures under Article 93(1). Such requests under Article 93(1)(g) or (k) would be consistent with the jurisprudence established by the regional human rights courts and international human rights conventions, which obligate a State to restore property and the bodies of deceased victims. Clearly in most cases these measures will not be full and effective remedy. Article 93(1)(l) permits the Court to request co-operation from a State to provide ‘any other type of assistance’ to give effect to a reparations order. This could be used as a broader basis to request a State to complement the Court’s reparation regime.

Unlike Article 75(4), Article 75(5) is not limited to the measures outlined in Article 93(1), so it may provide a wider avenue for the ICC call upon a State to carry out other reparation measures. Under this Article ‘(a) State Party shall give effect to a decision under this article as if the provisions of Article 109 were applicable to this article.’ Article 109(1) on ‘enforcement’ stipulates that State Parties ‘shall give effect’ to the enforcement of fines and forfeitures ordered by the ICC. This requires State Parties to enforce the reparation orders at the national level. Turning again to the Vienna Convention on the Law of Treaties, the ICC judges could rely on the preparatory work of Article 75 in interpreting its application. In earlier drafts of Article 75, the Court could determine the scope and extent of victimisation as well as the principles for reparation so that victims could rely on it to pursue remedies in domestic proceedings. Rule 219 of the RPE affirms this by requiring States not to modify ‘the reparations specified by the Court, the scope or the extent of any damage, loss or injury determined by the Court or the principles stated in the order, and shall

233 Article 15, ICPPED, UN Doc. A/RES/61/177 (2006); Papamichalopoulos and others v Greece Ch.1 n 154, para.38; and Pueblo Bello Massacre n 84, paras.270-273.
234 Article 32(1).
facilitate the enforcement of such order.’ Furthermore, Article 88 of the Rome Statute obliges each State Party to ensure that there are procedures available in their national law for co-operation with the Court. Therefore under Article 75(5) the Court could make a reparations judgment and outline principles and the extent of victimisation to be enforced through domestic courts.

Under the Rome Statute a State would be responsible for complementing reparations at the ICC in two situations. In the first situation, the Court could call upon a responsible State Party to supplement reparation orders made by the ICC against a convicted person under Article 75. In this situation, there are three levels where the Court could call upon a responsible State. To begin with, where the convicted person has the assets to fund reparations for all victims, the Court could request a State to provide certain reparations which are impossible for the incarcerated person to carry out, such as rehabilitation, measures of satisfaction, and guarantees of non-repetition. In the second instance, where the convicted person is indigent, the Court after determining the extent of victimisation and appropriate reparations could call upon a State to provide reparations to victims, with the TFV only used to provide interim rehabilitation, consistent with its current assistance mandate, so as to avoid any conceptual difficulties with reparations and to minimise the continuing effects of the crimes on victims. This would be coherent with the responsibility of a State under international law and human rights law for its actions or inactions in international crimes and impunity. In the third instance, where the convicted person is indigent and a responsible State is unwilling to provide reparations to victims, the Court could refer the matter to the ASP or Security Council, for its failure to comply with a request of the Court, thereby engaging international responsibility.

The second situation of reparative complementarity, responsible States would have a general obligation to provide a national reparation scheme for victims outside of the ICC in order to end impunity effectively. This would remove the reparations gap between those few

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236 Articles 40, RSIWA; Velásquez Rodríguez Ch.1 n 155, paras 175-177; Blake Ch.1 n 154, para.64; 19 Tradesmen Ch.1 n 156, para.175; Principles 15-16, UNBPG.
237 Article 87(7).
victims before the ICC and the majority who had suffered from international crimes. This approach adheres to the principle in human rights law that reparations are based on the victims' harm without the need for the perpetrator to be identified, apprehended, prosecuted, or convicted.\textsuperscript{238} As the Court only has jurisdiction over convicted persons for the purposes of reparations, the Statute does not provide proceedings to adjudicate on this second situation. Therefore it would be incumbent on the State to carry out reparations consistent with principles established by the Court in reparation cases. Failure of a responsible State to provide reparations could be enforced by State Parties through the ICJ on the basis of international responsibility, or victims could claim violation of their rights at regional human rights courts on the grounds of State responsibility.

2. Reparative complementarity: a solution?

Effectively, the inclusion of reparative complementarity follows the drafters' intentions on reparations by recognising that the State is in the best position to carry them out and it is also in harmony with its obligations under international law and human rights law. This approach is still interpretatively and legally possible due to the ambiguous language of Article 75, the \textit{jus cogens} nature of international crimes and the obligation to provide reparations.\textsuperscript{239} In applying reparative complementarity to the problems facing the Court's reparation regime - limited reparations, inadequate resources, and the issue of responsibility - State responsibility could be a solution to these inadequacies.

The Extra-Ordinary Chambers in the Courts of Cambodia (ECCC) in its reparations decision in the \textit{Duch} case came to a similar finding.\textsuperscript{240} The Cambodian Chamber found that victims' reparation requests for rehabilitation and memorials should be carried out by the Cambodian government or non-governmental organisations. The Chamber refused to order measures of satisfaction or rehabilitation to be carried out by the Cambodian Court on the grounds that such measures interfered with the national government's prerogatives to

\textsuperscript{238} See Principle 2, UN Victims' Declaration; and Principle 9, UNBPG.

\textsuperscript{239} Separate Opinion of Judge A.A. Cançado-Trindade, \textit{Street Children} Ch.1 n 198, para.36; \textit{White Van} case Ch.1 n 201, para. 173; and \textit{Ituango Massacres} n 117, paras.128-129.

\textsuperscript{240} Duch, 001/18-07-2007/ECCC/TC, Judgement, para.66.
provide reparations. A distinction must be drawn between the reparations regimes of the ECCC and the ICC. The ECCC is based on a *partie civile* system in Cambodian law, which allows victims to attach their civil claims to a criminal prosecution. Additionally, the ECCC Internal Rules stipulate a restricted scope of only collective and moral reparations, and do not include a trust fund for victims. In contrast, at the ICC reparations under Article 75 are likely to be based on international and human rights law, which permit different types. Moreover, Article 75(4) and (5) specify State co-operation and enforcement of reparations with the ICC. Nevertheless, the *Duch* decision is still relevant as it indicates an important point: that the State is primarily responsible for reparations. The difficulty with the *Duch* decision is that the Court refused to call upon the Cambodian government to fulfil its international obligations to provide reparations for the victims.

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

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241 Rule 23 of the ECCC Internal Rules (Rev.8). These rules were amended after the *Duch* judgement to include a fund for victims. See Redress n 1 p22-23.
242 Articles 35 and 37, RSIWA; and Rose, n.52, at 309.
243 See Correa Ch.1 n 111, 185-234.
244 In Uganda see HRW, Justice for Serious Crimes Before National Courts: Uganda’s International Crimes Division, (2011).
to remedy victims’ harm, including their protection and participation in proceedings to ensure effective reparations.

Reparation decisions at the ICC should thus place victims at the centre of reparations by determining their harm and appropriate types to remedy it effectively, then to decide where the resources should come from, instead of being dictated by the convicted person’s assets. Otherwise, reparations are centred on the successful conviction of the perpetrator, resulting in symbolic reparations for victims. The difficulty of reparations in international criminal justice is compounded by its asymmetrical nature, which concentrates on the responsibility of single perpetrators despite international crimes involving thousands of victims. This is not to remove reparations from the ICC, but to seek solutions which allow the Court to move from a solely retributive justice to a more reparative justice and achieve victim-centred justice. Key to the success of the reparation regime of the ICC is the support of other State Parties through reparative complementarity.

G. Conclusion

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

Reparations provide the opportunity for the ICC to push the boundaries of international criminal justice beyond the parameters of defendant-focused criminal justice, by delivering justice directly to victims of international crimes. Thus international criminal
justice moves from retributive justice to a more remedial one. However, a narrow reading of the Rome Statute, which sees the convicted person as the only source of reparation, will be inadequate to remedy victims' suffering and may be a source of secondary victimisation. Although the TFV can fund some assistance, it is not reparation. In order to offer justice to victims under the Rome Statute, State Parties need to remedy impunity by prosecuting those responsible and awarding reparations to victims. As this Chapter has argued, the ICC does not absolve State Parties from their obligations to provide reparations to victims of international crimes, rather it affirms it. The next Chapter examines how the external element of the Court in catalysing justice for victims in domestic jurisdictions through complementarity has worked in practice in the situation of Northern Uganda at the ICC.
V. The Impact of the International Criminal Court on Victims in Northern Uganda

A. Introduction

The first State referral and case before the ICC was on the situation in Northern Uganda. In order to gain a greater insight into the success of the ICC outside the courtroom, this Chapter examines the Ugandan situation,\(^1\) with regard to the delivery of the Rome Statute’s objectives of ending impunity and providing justice to victims. As the last two Chapters have argued, realisation of victims’ substantive rights to truth, justice, and reparations under the Rome Statute will be through the actions of State Parties, as only a fraction of them are likely to gain access to the ICC. Accordingly, the success of the Court in delivering justice to victims is not only to be judged by how many of them participate, are protected, or receive reparations before the ICC, but how State Parties fulfil their obligations under the Rome Statute to investigate and prosecute those responsible, as well as to provide reparations. Thus this involves the external element of the Court achieving justice for victims by catalysing the Ugandan government to fulfil its obligations under the Rome Statute, mentioned in Chapter 1.

While the ICC has only been operating for ten years and opened its investigation in Uganda in 2004, this Chapter analyses the Court’s work up until 2012 and suggests the need to seek enforcement of the Ugandan government’s obligations under the Rome Statute. The views of key stakeholders, including victims, are integrated into the text to provide anecdotal knowledge of their perceptions of the Court and domestic developments. This bottom-up perspective attempts to add clarity to assessing the situation in Northern Uganda.

This Chapter begins by outlining the historical and political context of the Northern Ugandan conflict, as well as the scale of victimisation so as to set the context. The following section discusses the impact of the ICC on the conflict, before examining victims in the Court’s proceedings. The subsequent section analyses complementarity in how the Ugandan

\(^1\) It is therefore not representative of other situations.
government is fulfilling its obligations under the Rome Statute and the impact of the ICC in Uganda by considering what norms, values, and standards have been internalised by domestic institutions and actors through the Court’s intervention. The Chapter concludes by finding that the Rome Statute’s objectives of ending impunity and delivering justice to victims in Northern Uganda have not been achieved.

**B. Background to the Northern Ugandan Conflict**

Since 1986, the Ugandan government has been fighting various northern rebel groups, most notably the Lord’s Resistance Army. Although the northern conflict has its roots in colonialism, it is also the result of cycles of victimisation through atrocities committed by both northern and southern forces. Many Acholi, who make up a large proportion of Northern Ugandans, see the current conflict as revenge for the Luwero triangle massacres. The Luwero triangle massacres were committed against southern civilians in the 1980s by the Ugandan army mostly made up of northern Acholi and Lango soldiers under northern President Milton Obote. With the coming to power in 1986 of Yoweri Museveni, a south-westerner, Northern Ugandans feared brutal reprisals for Luwero, which many witnessed. This brought back memories of Idi Amin’s massacre of Acholi and other northerners in the 1970s. Over the past twenty-five years the conflict in Northern Uganda has been defined by its brutal use of violence against civilians by both the Lord’s Resistance Army and the Ugandan government.

The Lord’s Resistance Army (LRA) led by Joseph Kony has been fighting the Ugandan government since 1987. The LRA has cut off civilians’ lips, ears, noses, and limbs; burnt civilians alive in their homes; abducted and used 24,000-38,000 children and

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3 Allen ibid. p28-30; Branch ibid p57.
28,000-37,000 adults as combatants, porters, and "wives," and committed mass murder, pillaging, and torture. Some of the most notably LRA massacres include the 1995 Atiak massacre of over 200 civilians, the 2004 Barlonyo massacre where over 300 civilians were killed, and the 2004 Lukodi massacre of 60 civilians. Those abducted by the LRA were also subjected to beatings, torture, and in many cases forced to kill their families, civilians, or other abductees as part of their initiation. Although the LRA does not generally commit rape when attacking villages or camps, those girls and women captured in raids are often forcibly used as "wives" for commanders, thereby institutionalising rape and sexual slavery.

The Uganda army (UPDF, previously NRA) is also responsible for atrocities, abuses, and neglect committed as part of its "counter-insurgency" strategy against the LRA. Since 1986, the NRA/UPDF has used brutal counter-insurgency tactics against the LRA. These have indiscriminately targeted the whole Northern Ugandan population, such as extra-judicial executions, torture, rape, and pillaging. From 1996-2006, the UPDF also used murder, torture, and aerial bombardment to corral over 90% of the northern population, some 2 million civilians, into so-called "protected villages". Often the UPDF gave civilians days or even hours to leave their homes before shelling or shooting them on sight. The "protective villages" title is a misnomer, considering the camps were inadequately protected by the UPDF. Moreover, without effective assistance, the camps resulted in high civilian

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8 Uprooted and Forgotten n 5, p21-22; and Allen n 2 p43. Interview with former LRA members, Gulu, 7th July 2011.
9 Uganda People's Defence Force/National Resistance Army.
12 Abducted and Abused n 6, p64.
mortality, due to insanitary conditions, lack of food, and insufficient medical supplies.\textsuperscript{13} Between January to July 2005 alone, some 25,694 civilians died (including 10,054 children) in protected villages in Northern Uganda, of which 3,971 were killed in combat, giving an average figure of 1,000 civilians dying each week from camp conditions.\textsuperscript{14}

The Ugandan security forces also perpetrated numerous abuses and atrocities. The UPDF and the Local Defence Units (LDU) often beat, tortured and killed civilians who left the camps, dissented, or refused to join them.\textsuperscript{15} Ugandan security forces have been implicated in numerous rapes as well as forcibly recruiting children as combatants.\textsuperscript{16} Additionally, the insecurity in Northern Uganda meant civilians' livestock, possessions, and homes were subjected to pillaging and destruction by government forces, particularly in relation to their prized cattle, which were decimated by raids from UPDF soldiers and neighbouring Karamojong raiders.\textsuperscript{17} Some UPDF commanders have also profited from the conflict, through seizing displaced people's land or acts of corruption.\textsuperscript{18}

Accordingly, the Acholi saying ‘when two elephants fight, it is the grass who suffers’\textsuperscript{19} epitomises the brutality of the conflict on the civilian population. One female elder commented that both parties were ‘crushing us like nothing’ with people being ‘burnt like leaves’.\textsuperscript{20} Dolan characterises the situation of Northern Ugandans as ‘social torture ... evidence[d] in widespread violation, dread, discretion, dependency, debilitation and humiliation of all which are tactics and symptoms typical of torture, but perpetrated on a mass rather than individual scale.’\textsuperscript{21} Consequently, due to both the violence and the ‘piny

\begin{itemize}
\item \textsuperscript{14} Ministry of Health, ibid.
\item \textsuperscript{15} See Abducted and Abused n 6.
\item \textsuperscript{16} Breaking the circle n 11; HURIFO n 13, p15-17.
\item \textsuperscript{18} Allen n 2, p49.
\item \textsuperscript{19} Interview, female victim, 9\textsuperscript{th} July 2011.
\item \textsuperscript{20} Interview, 9\textsuperscript{th} July 2011.
\end{itemize}
marac' (bad surroundings) such as structural inequalities, displacement, neglect of basic needs, and economic and political marginalisation, most Northern Ugandans have been directly and indirectly victimised. Despite the removal of the LRA from Northern Uganda and the return of relative peace in 2006, victims and affected communities still feel the effects of the conflict with many continuing to suffer from painful memories, disability, and poverty.

As the result of at least twenty-five years of conflict, there are numerous victims, with the conflict spilling into the neighbouring countries of Southern Sudan, Central African Republic, and the Democratic Republic of Congo (DRC). Victimisation and suffering in Northern Uganda is not limited to certain groups or localities, but is endemic. Research carried out by the Berkeley Human Rights Centre reveals the extent of Northern Ugandans' victimisation with 95% of respondents identifying themselves as direct victims, with 88% reporting being displaced, 57% household members killed, and 45% abducted, with many Northern Ugandans subjected to numerous other crimes and violations. As such, the UN Office of the High Commissioner for Human Rights has recognised victims' suffering as 'a wide range of physical, emotional, psychological, cultural and economic harms, both as individuals and communities ... different harms have had a compounding effect.'

Victimisation is also complex with children or adults being abducted by the LRA and forced to commit crimes, causing them to be both victims and perpetrators. Abductees can suffer from stigmatisation upon returning home, due to them being forced to commit crimes against their local communities. Girls and women can suffer sexual abuse and

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24 Transitioning to Peace: A Population-Based Survey on Attitudes about Social Reconstruction and Justice in Northern Uganda, Human Rights Centre, University of California Berkeley, December 2010, p22.
26 See Abducted and Abused n 6; Worst Place to be a Child, Civil Society Organisation for Peace in Northern Uganda, March 2007; and Making Peace Our Own, ibid.
violence in captivity, and as a result be ostracised upon returning home. In sum, victimisation in Northern Uganda is endemic, compounding, and complex. This is consistent with the discussion in Chapter 1 on the harm international crimes cause. Responses to the conflict need to remedy this harm as well as the sources of the victimisation and inequality, such as southern National Resistance Movement’s dominance of the government and military, northern political marginalisation, ineffectual local courts and police, and impunity for crimes committed.

Yet, there has been little or no accountability for those responsible or remedies for victims for these abuses and atrocities; ‘impunity is a drug’ which has fuelled the conflict in Northern Uganda. Traditionally, the Ugandan government has responded to the conflict through a carrot and stick approach – amnesties and military force. Military operations against the LRA have always resulted in violent backlashes against civilians. The Ugandan Amnesty Act 2000, which enabled members of the LRA to return home without the fear of prosecution, was introduced after persistent advocacy by the Acholi Religious Leaders Peace Initiative (ARLPI) as a means to achieve peace, reconciliation, and forgiveness for the Northern Ugandan conflict. Local chiefs have also used traditional ceremonies to cleanse the returnee’s spirit and reconcile them with their victims and communities. The use of amnesties and traditional ceremonies can offer peace and reconciliation, but impunity remains without the prosecution of those most responsible and reparations to victims. It is within this context that the International Criminal Court (ICC) intervened.

28 Doom and Vlassenroot, n 4, p27.
29 See Allen n 2; and Dolan n 21.
C. The International Criminal Court’s Intervention in Northern Uganda

In 2003, Uganda was the first situation to be referred to the ICC by the Ugandan government, citing its inability to apprehend and prosecute the LRA, due to them operating outside the borders of Uganda. On the 29th July 2004, the Prosecutor of the ICC announced the opening of an investigation into the situation in Uganda. The Pre-Trial Chamber II (PTC-II) unsealed the arrest warrants on the 13th October 2005, naming the top five LRA commanders Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo, and Dominic Ongwen. Since 2005, Lukwiya and Otti have been confirmed killed. The three outstanding commanders remain at large and continue to kill with impunity. Their most notorious attack was the massacre of over a thousand civilians in northern DRC on Christmas Eve 2008, abducting over twelve hundred civilians and displacing over a hundred thousand more. Seven years on, the issuing of the ICC arrest warrants for the LRA leadership have yet to result in the apprehension and prosecution of the three remaining commanders. The following sub-sections examine the direct impact of the ICC on the Northern Ugandan conflict and subsequent legal developments at the ICC for victims.

1. The International Criminal Court’s impact on the Northern Ugandan conflict

The investigation by the Prosecutor of the ICC has had some positive impact on the conflict in Northern Uganda. The LRA arrest warrants highlighted victims’ suffering by bringing international attention to the conflict. Grono and O’Brien suggest that the arrest warrants pushed the LRA to seek peace in order to avoid prosecution, as well as prompted

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34 Prosecutor v Kony et al., Decision on the Prosecutor’s Application for unsealing of the warrants of arrest, ICC-02/04-01/05-52, 13 October 2005.
35 The ICC has only been able to confirm through a DNA test the death of Lukwiya. See Prosecutor v Lukwiya, Decision to terminate the proceedings against Raska Lukwiya, ICC-02/04-01/05-248, 11 July 2007; Uganda's LRA confirm Otti death, BBC News 23 January 2008; Prosecutor v Otti, OTP’s Submission of Information Regarding Vincent Otti, ICC-02/04-01/05-258, 8 November 2008.
the Sudanese government to stop supporting them and instead allow the UPDF to pursue them in southern Sudan. Since 2006, the LRA have been kept outside of Uganda allowing displaced civilians to return to their homes and to rebuild their lives. The resulting peace process and ceasefire have vastly improved the security situation in Northern Uganda. The Court’s impact on the peace process, it must be noted, did not occur in a vacuum, nor was it the sole factor in bringing the LRA to the peace talks. The increased military co-operation of central Africa governments against the LRA, effectiveness of the UPDF, and the support of the Sudanese government, also encouraged the willingness of the LRA to seek peace.

Yet, local leaders contend that the ICC was a ‘stumbling block’ for the peace process, due to the unwillingness of the Court to withdraw the arrest warrants, causing the process to collapse. They argue that the Court’s intervention in Northern Uganda is at odds with local approaches, such as amnesties and traditional justice mechanisms. The refusal of the Court to remove the arrest warrants for the LRA leadership has resulted in local hostility, particularly amongst religious and traditional leaders. Together, amnesties and traditional ceremonies were considered by opponents of the ICC as the best way to deal with the complex victimisation of abductees, who had been forced to commit atrocities. This was especially true for children, who were mostly believed to be ‘innocent’ by their families and communities. The intervention by the ICC therefore clouded the responsibility of abductees and the hope for peace. This perception has perpetuated a myopic dichotomy of peace versus justice and local versus international, where the ICC is seen to be pursuing the LRA against the peace sought by local leaders and their stance of ‘peace first, justice later.’ This has hampered support for the Court in Northern Uganda. The ICC has engaged in an outreach

41 See Allen n 2; and Branch n 2.
42 Finnström n 25, p222.
programme in Northern Uganda organising events, training, and information sessions with communities, victims, civil society and local leaders to improve their understanding of the Court and to counter perceptions that it is against peace.44

Victims’ views of the intervention of the ICC have varied over time, due to the influence of the peace negotiations and the prevailing discourse of peace versus justice, but their demands for accountability and redress have not changed much.45 This can be seen by 84% of Northern Ugandan respondents support for accountability measures, 89% for determination of the truth, and 87% for amnesties.46 Thus victims have a multi-faceted notion of justice that is not simply broken down into the dichotomy of peace versus justice.47 Additionally, in contrast to transitional justice arguments raised in Chapter 1 of international criminal justice being contrary to local needs, some victims consider that the ICC to be more impartial and independent than national courts.48 However, most would prefer to see justice locally, suggesting in situ proceedings of the Court in Northern Uganda would be appropriate if any of the LRA indictees are captured.49 Thus victims have diverse needs which require a comprehensive approach.50

Despite the dichotomy of peace versus justice and local versus international, the Court’s impact on the conflict, amongst other factors, has been mostly positive in terms of peace and security for Northern Uganda. However, the LRA leadership have not yet been prosecuted and punished for their crimes, nor have UPDF leaders who have also been implicated in atrocities in the DRC.51 Sadly, the ICC, without the support of State Parties to apprehend the LRA, remains powerless to stop the atrocities it continues to commit in

44 See ICC Outreach Reports Ch.3 n 147.
45 See Berkeley Human Rights Centre reports: Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda, July 2005; When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda, October 2007; and Transitioning to Peace n 24.
46 Transitioning to Peace ibid, p39-46.
47 Making Peace Our Own n 25.
48 Transitioning to Peace n 24, p41.
49 Ibid.
50 Ibid.
Central Africa. The Ugandan government has also been unwilling to hold senior UPDF commanders and politicians responsible for atrocities. Proceedings before the ICC have enabled some victims to access the Court.

2. Proceedings before the International Criminal Court

Due to the LRA commanders remaining at large, there have been very few proceedings before the ICC. Nonetheless, the ICC proceedings on Northern Uganda, involving victims’ applications to participate, protection measures, and an admissibility hearing, have been important in acknowledging their suffering and allowing their views to be heard. This section examines the investigation and selection of charges in recognising victims’ suffering, before moving on to discuss victim participation, protection, reparations and the Trust Fund for Victims.

a) Victim recognition

The arrest warrants against the LRA indictees includes murder, enslavement, rape, sexual enslavement, inhumane acts of inflicting serious bodily injury, pillaging, and the forced enlistment of children committed as part of attacks on two Internally Displaced Persons (IDP) camps. These charges encapsulate the suffering of LRA victims. However, a number of factors, such as the one-sided nature of the investigation, bring into question the impartiality and suitability of the Court’s intervention. Additionally, questions still remain about one of the indictees, Dominic Ongwen, and the recognition of LRA victims in other countries and outside the temporal jurisdiction of the Court. Collectively these issues undermine victims’ recognition before the ICC.

First, on the one-sided nature of the investigation of the ICC, arrest warrants have only been issued for the LRA, but not the UPDF. The Office of the Prosecutor (OTP) has stated that investigations on the UPDF and the Ugandan government remain on-going, but no warrants have been forthcoming. The preference of prosecuting LRA crimes is that they

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52 See the arrest warrants n38.
53 Otim and Weirda, n 38, p22.
54 Statement by the Chief Prosecutor on the Uganda Arrest Warrants, 14 October 2005 p2-3.
have been ‘much more numerous and of much higher gravity than alleged crimes committed by the UPDF’,\textsuperscript{55} and the ‘maintenance of impartiality cannot be equated with equality of blame.’\textsuperscript{56} The crimes committed by the LRA are more numerous and have a higher gravity by seeking to cause widespread and systematic harm to victims through massacres, mutilations, burning people alive and forced recruitment. However, the Ugandan government’s response to such crimes has been ineffectual by its inadequate protection of the civilian population, lack of investigation, prosecution, and punishment of those responsible, and using disproportionate force against civilians. The UPDF has committed numerous atrocities on a widespread and systematic scale, with two million civilians affected through forced displacement alone.\textsuperscript{57} Tens of thousands of Northern Ugandans have also died, at least, from the government’s counter-insurgency and internment policy. Recognising the responsibility of the Ugandan government is not about equality of blame, but acknowledgement that both through its actions and inactions the government caused further suffering to victims.

There have been a handful of soldiers prosecuted before military courts for certain murders and cases of torture.\textsuperscript{58} Yet, there has been no accountability within the higher echelons of the Uganda army or government for the mass forced displacement and abuses against Northern Ugandan civilians, or for its failure to protect them.\textsuperscript{59} Additionally, military courts are closed to the public and victims, which prevents them from knowing who is prosecuted and for which crimes, thereby undermining transparency and effective accountability.\textsuperscript{60} For forced displacement the prosecution of individual soldiers is insufficient. As it was a government policy it also involves State responsibility.

\textsuperscript{55} Ibid.
\textsuperscript{57} See Breaking the circle n 11; HURIFO n 13; and Abducted and Abused n 6.
\textsuperscript{58} See Gulu court martial convicts 120 UPDF soldiers, New Vision, 20 September 2007.
\textsuperscript{59} See Dolan n 21, p151-152.
\textsuperscript{60} Left to Their Own Devices: The continued suffering of victims of the conflict in northern Uganda and the need for reparation, Amnesty International (2008), p17. Interview with a member of civil society, Gulu, 13\textsuperscript{th} July 2011.
The use of force to displace and corral civilians into camps and then to neglect their basic needs could amount to crimes against humanity. This is due to it affecting 90% of the Northern Ugandan population as part of a widespread or systematic attack against the civilian population in the furtherance of State’s policy to commit such an attack.61 Displacement by force is justifiable under international law, which permits it if demanded by ‘imperative military reasons’ or the ‘security of the civilians’. This is on the condition ‘that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.’62 With displacement lasting over ten years and civilians in the camps dying at five times the rate of those being killed in combat, a case could be made that the government’s policy of “protected villages” was not completely imperative, nor did the camps provide satisfactory conditions.63 Alternatively, such conditions within the protected villages could be extermination as a crime against humanity, by the ‘intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.’64 Moreover, the use of 24 hour warnings to civilians to leave their homes by the UPDF before facing bombardment or shot on sight for being suspected rebel collaborators, thus making them ‘legitimate’ targets of the government’s use of torture, pillaging, and extra-judicial executions, indicates the illegality of such activities as war crimes.65

Others have gone as far to say that the Northern Ugandans suffering, especially the Acholi, is the ‘slow destruction of an entire ethnic group ... [amounting] to genocide.’66 This harm is consistent with the findings of the International Criminal Tribunal for Rwanda in the Akayesu case that genocide by physical destruction can be a ‘slow death’ through a ‘subsistence diet, systematic expulsion from homes and the reduction of essential medical

61 Under the Rome Statute: Article 7(1)(d) Crime against humanity of deportation or forcible transfer of population; and Article 7(1)(e) Crime against humanity of imprisonment or other severe deprivation of physical liberty.
62 Article 17(1), Additional Protocol II to the Geneva Conventions of 1977; and Article 8(e)(viii), Rome Statute.
63 See Abducted and Abused, n 6, p60-68.
64 Article 7(1)(c), 7(2)(b) or a war crime under Article 8(e), Rome Statute.
65 See Article 8(e)(i, iv, or v).
66 Olara Otunnu, MP and former Presidential candidate, in Branch, n 10, p182.
services below minimum requirement.\textsuperscript{67} It would require proof of the Ugandan government’s specific intent or \textit{dolus specialis} to commit genocide. No matter what the crime amounts to, the lack of prosecution has prevented the recognition of the numerous victims of the Ugandan government. Consequently, this has caused them further psychological suffering and denied them access to the Court. It also undermines the positive impact, legitimacy, and impartiality of the ICC in Northern Uganda.

The co-operation between the ICC and the Ugandan government has been perceived by some commentators to compromise the impartiality and independence of the Court. The appearance of the ICC Prosecutor Luis Moreno Ocampo with President Museveni at the announcement of the State referral in January 2004 has perpetuated a biased perception of the Court’s intervention in Northern Uganda.\textsuperscript{68} Without its own police force or resources in Uganda, the ICC is heavily reliant on the co-operation and protection of the Ugandan government. This dependence and failure to prosecute the UPDF has led Ssenyonjo to define the Court’s prosecution of the LRA as a ‘political tool’ of the Ugandan government.\textsuperscript{69} Branch argues that their criminalisation legitimises the government’s use of force, thereby perpetuating only the responsibility of the LRA for crimes committed during the conflict.\textsuperscript{70} This may be part of a structural or political limitation of the Court in relation to State referrals, where the Court can only intervene in a situation to the extent that it does not challenge the legitimacy of the State or its narrative of the conflict. As a result the ICC, at least implicitly, will always co-operate with the State, though in Uganda it was perceived as colluding with the Ugandan government which compromised its impartiality.

This perceived bias has been strongly voiced by victims as one of the most disappointing parts of the intervention of the ICC, as it denies the recognition of their harm as a result of the actions or inactions of the Ugandan government. As one member of civil

\textsuperscript{67} \textit{The Prosecutor v Akayesu}, Judgement, ICTR-96-4-T, 2 September 1998, paras.505-506. Although it may be difficult to prove a clear intent of the Ugandan government.
\textsuperscript{68} Allen n 2, p128.
\textsuperscript{70} Branch n 2, p189-193.
society commented, the prosecution of the LRA represented “victor’s justice”. This provides a direct parallel to criticism of the Second World War tribunals. A former LRA abductee also believed that “the ICC is together with the government of Uganda.” Accordingly, many victims find it difficult to discern the impact the ICC has made. Most support the proposition that the Court would increase its legitimacy in Northern Uganda if the arrest warrants were executed and UPDF perpetrators prosecuted.

Second, one of the main fears of the Court’s intervention in Northern Uganda was that it would arrest and punish all those who fought with the LRA. This fear is apparent with one of the indictees in the ICC arrest warrants, Dominic Ongwen, a senior LRA commander, but also a victim of the LRA. Ongwen, like thousands of other Northern Ugandan children, was abducted at the age of ten on his way to school and suffered the same initiation as other LRA abductees. However, Ongwen rose through the ranks as a result of being a skilled fighter and the deaths of senior commanders. As Baines states, charged with enslavement, ‘Ongwen is the first known person to be charged with the war crimes which he is also a victim.’ The ICC will face a difficult balance on the complicated issue of the responsibility of child soldiers who become adult commanders without losing sight of their victimisation and indoctrination from a young age. Such a decision will also establish a precedent for Ugandan courts on how to deal with other abducted LRA commanders.

Third, a further issue which remains unresolved is how the ICC will deal with additional crimes committed by the LRA. The LRA arrest warrants were issued in 2005 and focus exclusively on crimes in Northern Uganda, despite them committing crimes in neighbouring countries in this time. The Prosecutor has the power to amend the warrants to

71 Interview, Kampala, 30th June 2011
72 Interview, Gulu, 7th July 2011
73 UVF Report n99, p6; and Transitioning to peace, n 24, p43.
76 Ibid.
77 Ibid.
78 Ibid p163-164.
79 See Allen n 2.
include new charges\textsuperscript{80} and has indicated that investigations of LRA crimes are still on-going.\textsuperscript{81} However, only victims who suffered crimes within the jurisdiction of the Uganda situation are able to apply to participate. Currently, there is a backlog of nearly 2,000 applications which the Court has yet to decide on, and since 2009 there have been no victim application proceedings.\textsuperscript{82} With minimum staffing and funding of the Victims Participation and Reparations Section, which facilitates victims’ application and participation, alongside the scaling down of the Ugandan field office in Kampala to focus on other situations, it remains unclear whether the ICC will bring forward new charges to include LRA crimes committed in the DRC, Central African Republic, and Southern Sudan.

Finally, the Court’s narrow temporal jurisdiction under the Rome Statute has limited recognition of victims before the ICC. The temporal scope of the Court only covers crimes committed after the Rome Statute came into force on the 1\textsuperscript{st} July 2002.\textsuperscript{83} With the conflict going back to at least 1986 and the LRA being pushed out of Uganda in 2006, the majority of crimes Northern Ugandan victims suffered from are likely to be outside the Court’s jurisdiction. Additionally, victim recognition is not representative geographically, as certain areas were more affected by violence during different periods, such as the town of Gulu, which suffered the brunt of the violence pre-2002 by both parties, and is therefore mostly excluded from the Court’s jurisdiction.\textsuperscript{84} As a result, victims who suffered before 2002 are unable to participate in proceedings or to receive any reparations from the perpetrators if any cases are completed before the ICC. The limited temporal scope of the ICC may also explain the lack of charges against the Ugandan government, due to the policy of protected villages beginning in 1996 and the government’s brutal counter-insurgency operating since 1986.

As established in Chapter 3 to ensure justice for victims, while accepting the limits of a criminal court, victim recognition should be based on a representative picture of

\textsuperscript{80} Under Articles 58(6) and 61(4), and Rule 128 of the RPE. The Pre-Trial Chamber can also request the Prosecutor to amend the charges to include other crimes, under Article 61(7)(c)(ii).

\textsuperscript{81} Prosecutor \textit{v} Kony \textit{et al}, ICC-02/04-01/05-52, para.24. See also Prosecutorial Strategy 2009-2012, OTP, 1 February 2010, para.32.

\textsuperscript{82} Kony \textit{et al}., ICC-02/04-01/05-375.

\textsuperscript{83} Article 11 of the Rome Statute. See for instance victim applications rejected for a/121/07 and a/0124/07, ICC-02/04-01/05-356.

\textsuperscript{84} Interview, ICC official, Kampala, 28\textsuperscript{th} June 2011.
suffering in a conflict. This is to enable acknowledgement of the scale of victimisation and to provide a clear historical narrative. Despite the attention the ICC warrants have brought to victims’ suffering in Northern Uganda, their recognition before the Court has fallen short of providing a representative picture and an accurate documentation of the conflict. Black and white conceptions of perpetrator and victim inhibit the recognition of the complex victimisation in Northern Uganda. With the indictment of Ongwen, the Court endangers labelling all LRA combatants as simply perpetrators, when many of them were also victims of the LRA and the Ugandan government’s failure to protect them. Furthermore, as Allen argues, the obligation on the Prosecutor to conduct investigations on the basis of the interests of victims and justice, as required under Article 53(1)(c) of the Rome Statute, requires analysing which victims and whose justice are relevant to the ICC investigation in the Northern Ugandan conflict. As discussed in Chapter 3, victims are unable to participate in the investigation stage which prevents them from effectively presenting their interests to the Prosecutor in selecting which crimes to prosecute. This restrictive recognition of victims in Northern Uganda has hindered victims’ access to the ICC through participation.

b) Victim participation

As of July 2012, there are twenty-one victims, all of whom are Ugandan, participating in the Uganda situation and forty-one in the Kony et al case before the ICC. While the arrest warrants for the LRA remain outstanding, victims have had only one opportunity to participate at the ICC during the admissibility proceeding, regarding whether the case should still be heard before the Court or referred back to Uganda. The admissibility proceedings were initiated by Pre-Trial Chamber II, due to the Ugandan government suggesting that by having adequate judicial mechanisms in place the Kony et al case would no longer be admissible before the ICC, thereby removing the threat of arrest and transfer to

85 Allen n 2, p177.
86 See Situation in Uganda, ICC-02/04-101, 10 August 2007; Situation in Uganda, Decision on victims’ applications for participation, ICC-02/04-125, 14 March 2008; Situation in Uganda, Decision on victims’ applications for participation, ICC-02/04-170, 17 November 2008; and Prosecutor v Kony et al., Decision on victim’s applications for participation, ICC-02/04-01/05-356, 21 November 2008.
the Hague from the minds of the LRA commanders.\textsuperscript{87} However, Pre-Trial Chamber II emphasised that the determination of whether the Ugandan situation and the LRA case were still within the jurisdiction of the ICC was a decision for the Court to make rather than the Ugandan government.\textsuperscript{88}

Before the Pre-Trial Chamber II decision, the Office of Public Counsel for Victims (OPCV) made observations on the developments in Uganda based on its own research and the views of 237 victims, including the sixty-two victims already participating in the case and situation.\textsuperscript{89} Additionally, Redress and the Uganda Victims' Foundation (UVF) submitted an \textit{amicus curiae} brief on the status of the Ugandan government's implementation of the Agreement and Annexure, relevant legal texts, and the experiences of victims seeking justice under Ugandan courts.\textsuperscript{90} The \textit{amicus} identified the continued impunity and lack of access to justice for victims in Uganda, with Redress and the UVF also rejecting local formal criminal justice mechanisms and the government's sincerity in providing them redress. This, alongside the submissions by the OPCI\textit{V}, were rejected by the Trial Chamber as 'unsuitable to build the background for a proper determination' of admissibility at this stage.\textsuperscript{91} The Chamber based its decision on the lack of clear legalisation, procedure, physical institutions, and expertise in Uganda to be able to prosecute the \textit{Kony et al} case.\textsuperscript{92} While victims' representations were rejected, their participation in the proceedings ensured that their voices were heard and documented by the Court, which provided a more accurate account of developments on the ground.


\textsuperscript{88} See admissibility decision ibid, para.51.

\textsuperscript{89} \textit{Prosecutor v Kony et al.}, Observations on behalf of victims pursuant to Article 19(1) of the Rome Statute with 55 Public Annexes and 45 Redacted Annexes, Office of Public Counsel for Victims, ICC-02/04-01/05-349, 18 November 2008.

\textsuperscript{90} \textit{Prosecutor v Kony et al.}, Amicus Curiae submitted pursuant to the Pre-Trial Chamber II "Decision on application for leave to submit observations under Rule 103", ICC-02/04-01/05-353, 5 November 2008.

\textsuperscript{91} \textit{Kony et al.}, ICC-02/04-01/05-377, para.50.

\textsuperscript{92} Ibid. para.49-52.
The outright rejection by the Court of the victims' interests is disconcerting, suggesting that their views and concerns are unimportant in determining judicial issues. While admissibility is a procedural issue rather than a substantive one, referring the case back to Uganda would have a significant impact on victims' access to justice, and therefore it is not just a procedural issue. This may further indicate that victim participation is not meaningful in important decisions. In light of the purpose of victim participation outlined in the previous two Chapters, it is clear that participation does not offer victims the opportunity to determine the truth, justice, or reparations, particularly when the perpetrators remain at large and they cannot challenge the selection of the LRA as the only indictees. Accordingly, it is questionable whether victim applications to the ICC are worthwhile, when victims and intermediaries are taking the time and effort to fill in forms, reliving the trauma, and expecting some sort of response from the ICC when in the end the Court is not making the effort to reciprocate by deciding on their applications and taking their views into account.

For those victims who have participated at the ICC, outreach programmes, or through the Trust Fund, the views of the Court are somewhat more positive. Victims participating at the ICC believe it gives them an important opportunity to have their views heard. As one victim said to an ICC official, 'I know what I have written, that is my voice, my story. It is leaving my village to go to another place, it is very important to me and I want the world to know what happened.' A number of victims interviewed were also keen to participate at the ICC in order to tell the world the crimes they endured. As such, there remains a willingness by victims to engage with the Court to ensure accountability and redress for the harm they have suffered.

c) Victim treatment and protection

The ICC has paid greater attention to the treatment and protection of victims. In the decision on unsealing the arrest warrants in the Kony et al case, the Court decided that due to

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95 Interview, ICC official, Kampala, 28th June 2011.
the continued ‘unpredictability of the security environment in Uganda’ and the need ‘to ensure to the fullest extent possible the safety and protection of victims and witnesses’, it was necessary to redact all the names and identifying information of victims and witnesses.\textsuperscript{46}

Since the beginning of the investigation in Northern Uganda, the Office of the Prosecutor (OTP) and the Victims and Witnesses Unit (VWU) have also made inroads in developing a treatment and protective security plan for victims and witnesses in Uganda. The Initial Response System (IRS) established a 24-hour emergency hotline in four areas of Northern Uganda covering eleven towns in co-operation with the Ugandan Police Force.\textsuperscript{97} The IRS includes training of local police, regular contact with local authorities, and testing the responsiveness of the system.\textsuperscript{98} Up until July 2011 there had been no reported protection problems with victims or witnesses involved with the ICC, and due to improved security in Uganda, the system is under assessment of whether or not to be cancelled in 2012.\textsuperscript{99} The establishment of a protection programme in Uganda for victims and witnesses, which traditionally did not have one, is an important step in building the capacity of local institutions, such as the Ugandan Police, to protect such vulnerable individuals. In relation to treatment, the prosecution and the VWU have also instituted a medical and psycho-social support programme for victims both participating as witnesses and as participants.\textsuperscript{100}

Nonetheless, the protection of victims and witnesses by the Court does have some faults. Without its own protection units or police force, the ICC is reliant on government forces to carry out the bulk of its protection programme.\textsuperscript{101} This may bring into question the effectiveness of the system if any warrants are issued against the Ugandan government, as the protection programme may not protect victims of government abuses. Additionally, the OTP may have already put some victims at risk, or at least hindered its investigations of

\textsuperscript{46} \textit{Prosecutor v Kony et al, ICC-02/04-01/05-52, para. 22.}
\textsuperscript{97} Kampala Field Office Report, para.8.
\textsuperscript{98} Ibid para.10.
\textsuperscript{99} Interview, ICC official, Kampala, 28\textsuperscript{th} June 2011. Ibid, para.8.
\textsuperscript{100} Kampala Field Office Report, para.11.
\textsuperscript{101} Ibid, para.10.
atrocities by government forces through the use of UPDF escorts when conducting interviews of Northern Ugandan victims and witnesses.102

d) Reparations and the Trust Fund for Victims

As reparation proceedings of the ICC are reliant on the conviction of a defendant, no reparation orders have yet been issued by the Court. However, the Trust Fund for Victims (TFV) has been active in funding assistance to some of the victims in Northern Uganda.103 Between 2007 and 2011 the Trust Fund funded sixteen projects which have directly reached 38,625 victims and members of affected communities.104 As the security situation has improved in Northern Uganda, the TFV has become the biggest support agency in providing assistance and rehabilitation to victims.105 One TFV official identified the Trust Fund’s work as more ‘corrective’ than humanitarian assistance, as it specifically focuses on victims of crimes within the Court’s jurisdiction, distinguishing it from humanitarian assistance which supports the needs of the general affected population.106 The Trust Fund’s supported projects in Uganda include medical and psychological rehabilitation, vocational training and farming equipment, victim sensitisation, and reconciliation. Five of the TFV projects have provided physical rehabilitation, including reconstructive surgery and prosthetic limbs, to 1,200 victims of mutilation.107 As mentioned in the previous Chapter, with regard to Santa, these programmes funded by the TFV can vastly improve victims’ lives.

While the TFV projects are directly benefiting 38,625 victims, these numbers need to be broken down into different types of assistance otherwise its effectiveness may be overstated as assisting the needs of a larger group of victims than in reality. The majority of victims who have benefited from funding of the TFV have received victim sensitisation,

102 Branch n 2, p188.
104 Learning from the TFV’s Second Mandate: From Implementing Rehabilitation Assistance to Reparations, Fall 2010, Programme Progress Report, p22; Summer 2011 Programme Progress Report; and Winter 2011 Programme Progress Report.
105 Interview with TFV official, Kampala, 28th June 2011.
106 Ibid.
which involves informing them and communities about their rights, or community reconciliation through peace builders, who promote healing, victims' rights and reconciliation in communities. By 2011, of the 38,625 direct victims of the TFV, 26,144 of them have benefited from community peace building, rather than more substantive or tangible assistance, such as medical treatment, counselling, or livelihoods projects.\textsuperscript{108} In the case of such endemic and compounding victimisation, it is questionable whether using peace builders is the most appropriate form of assistance and expenditure of the resources of the TFV, considering the more tangible forms of support desperately needed by Northern Ugandan victims.\textsuperscript{109} Moreover, the long term harmful consequences caused by international crimes raises the concern of how long the TFV can sustain its support to these victims. While the TFV determines the scope and extent of assistance programmes based on its own research, victims have no access to an application process or participation on the selection of projects or beneficiaries.\textsuperscript{110} This is not to deride its usefulness or importance, but to highlight that the Trust Fund is only funding certain types of assistance to a limited group of victims. In comparison to justice for victims outlined in Chapter 1 the TFV is insufficient to remedy victims' harm.\textsuperscript{111} As such, the TFV constitutes only interim assistance.

With regards to reparations, the Ugandan government will probably be the only source for victims' claims, due to the likelihood of the LRA being without resources from years of fighting. However, as reparation proceedings follow the conviction of the accused, reparations will not be decided by the ICC until the LRA indictees are apprehended, which could mean that a decision could be years away, if ever. A further limitation of the reparations at the Court arises from the narrow charges against the LRA defendants, which concentrate on attacks on two IDP camps. Therefore, even if the LRA indictees are apprehended reparations will only be available to the victims of these two attacks. This

\begin{itemize}
\item \textsuperscript{108} Summer 2011 Programme Progress Report, p6.
\item \textsuperscript{109} See the final section.
\item \textsuperscript{110} See Uganda Victims' Foundation (UVF), The Impact of the ICC on Victims and Affected Communities, March 2010; and interviews with victims discussed in the final sub-section.
\item \textsuperscript{111} See Adrian di Giovanni, The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence? Journal of International Law and International Relations 2(2) (2005-2006) 25-64, p60.
\end{itemize}

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means that victims will have to seek reparations against the Ugandan government through domestic mechanisms.

In all, victims in Northern Uganda are disappointed and frustrated by the ICC, due to its long delays, bias, limited assistance, and failure to execute arrest warrants and provide reparations.\textsuperscript{112} As one victim noted, the ICC "keeps on singing, singing"\textsuperscript{113} the same song about State Parties needing to arrest the LRA without any result, making the Court appear "not serious" in delivering justice to victims.\textsuperscript{114} As another stated, "the ICC is full of words; they are not putting things into action ... it should not continue deceiving people."\textsuperscript{115} These viewpoints may indicate a general sentiment among victims that the intervention of the ICC in Northern Uganda has failed to deliver justice to them. As this thesis argues, the Court is only responsible for delivering justice for the few cases that reach it, with the majority of victims reliant on remedies by their government. However, the Court has not called upon the Ugandan government to complement the Court in this respect. The Ugandan government has nevertheless introduced a number of legal reforms.

\section*{D. Complementarity in Northern Uganda}

Complementarity is the relationship between the ICC and State Parties, which recognises that State Parties have the primary obligation to end impunity by prosecuting those responsible, with the Court as a last resort. Positive complementarity is the incorporation of the Rome Statute and its principles into a State Party's legal system, through ratifying legislation and ensuring the competence of national courts to prosecute international crimes. As discussed in the two previous Chapters, a victim-orientated approach to complementarity, based on State Parties' obligations under the Rome Statute to end impunity and in line with human rights standards, requires realisation of victims' procedural and substantive rights through determination of the truth, prosecution of those responsible, and reparations. As discussed in Chapter 1, the limits of the ICC to deliver

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\begin{itemize}
\item[112] NPWJ n 94, p42.
\item[113] Male victim, focus group one, 9th July 2011.
\item[114] Interview male LRA abductee, Gulu, 7th July 2011
\item[115] Female victim, focus group one, 9th July 2011
\end{itemize}
justice to victims requires the use of complementarity as the external element of the Court in catalysing State Parties to fulfil their obligations towards victims in order to deliver justice to those outside of the few cases before the Court. The catalysing impact of the Rome Statute and the ICC can be seen in domestic jurisdictions through the inclusion of accountability and victim measures. Thus the goals of ending impunity and justice for victims is to be primarily delivered through State Parties; however, without any clear guidance, oversight, or enforcement by the ICC on or of State Parties’ obligations, at least in Uganda, the practice of complementarity is unlikely to achieve the Rome Statute’s goals.

This section begins by examining the 2006-2008 Juba peace process, the most comprehensive peace agreement between the Ugandan government and the LRA, which provides a background for later developments. The following sub-sections examine the legal developments in Uganda on the Amnesty Act 2000, the ICC Act 2010, and the International Crimes Division. The final sub-section pays attention to victims’ access to justice and reparations in Northern Uganda to assess from their perspective whether the Uganda government has complemented the ICC in ending impunity and delivering them justice.

1. The Juba Peace Process

The most significant legal impact of the intervention of the ICC in Northern Uganda has been on the peace process. This was initiated in 2006 by the Ceasefire Agreement between the Ugandan government and the LRA in Juba, Southern Sudan. The unsealing of the LRA arrest warrants prompted both parties to seek a domestic solution to the conflict, after military intervention in Sudan had failed to defeat the LRA or to protect Ugandan civilians. The LRA demanded that the ICC arrest warrants be withdrawn as a precondition to their final signing of the agreement. The Court refused to do so and the peace process

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117 Allen, n 2, p50-53.
118 See Clause 37, the Agreement on Implementation and Monitoring Mechanisms Between the Government of the Republic of Uganda and Lord’s Resistance Army/Movement, Juba, Sudan, 29 February 2008; and Otim and Weirda n 38, p23.
collapsed. This was confirmed by the new UPDF military offensive, Operation Lightning Thunder, in December 2008 against the LRA in the Great Lakes Region.

Before the collapse of the peace process, the parties had accepted a number of agreements, most notably the Agreement on Accountability and Reconciliation and its corresponding Annexure, which provide a ‘blueprint’ for future transitional justice developments within Northern Uganda. The Rome Statute’s influence on these two documents is apparent from the numerous provisions on victims and accountability, which mirror its language. As such, the Agreement itself is justified by the parties on the basis that it is ‘essential to acknowledge and address the suffering of victims ... to promote and facilitate their right to contribute to society.’ Thus they are recognised as the key justification and stakeholders in the success of the transitional process. The Agreement also deems accountability as crucial in ‘preventing impunity and promoting redress’. This is a substantial shift from previous attempted resolutions to the conflict, of military force and amnesties, to supporting accountability and redress to victims.

The Agreement defines victims as ‘persons who individually or collectively have adversely suffered harm as a consequence of crimes and human rights violations committed during the conflict.’ The ‘conflict’ is defined as the period from 1986 in the north and northeast of Uganda. This definition is quite inclusive, covering individual and collective suffering as well as human rights violations, and therefore represents a broader approach than the Rome Statute’s ratione materiae. Defining victims of the conflict as far back as 1986 is a wider temporal scope than of the ICC of 1st July 2002; therefore the Agreement demonstrates a more inclusive recognition of those who suffered during the whole conflict.

119 Prosecutor v Kony et al., B. Kainamura, Ugandan Attorney General, Decision on responses to observations submitted under Rule 103, ICC-02/04-01/05-369-Anx2, 18 February 2009. Agreement on Accountability and Reconciliation signed between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement (LRA/M), 29 June 2007; and the Annexure to the Agreement on Accountability and Reconciliation, 19 February 2008.

120 Clause 8.1, Agreement on Accountability and Reconciliation. See also paragraph 2 of the Preamble.

121 Paragraph 3, Preamble of the Agreement.

122 Clause 1, Agreement.

123 See Article 5, and Rule 85 RPE.
The incorporation of provisions on victim participation, protection, and reparations within the Agreement and Annexure indicates the positive impact of the ICC, as they are not usually recognised in the Ugandan criminal justice system and Constitution. For victim participation, Clause 8.2 of the Agreement adopts similar language to that used by the Court, that the government 'shall promote the effective and meaningful participation of victims in accountability and reconciliation proceedings.' This right to participation is supported by victims' right to be 'informed of the processes and any decisions affecting their interests.' Victims are also entitled to legal representation at the expense of the State. However, victim participation is ambiguous on the way in which 'effective and meaningful participation' will be interpreted. In the trial of Thomas Kwoyelo, discussed below, victims were unable to participate in proceedings, but instead were occasionally consulted through limited outreach to affected communities. This practice by the Ugandan government exemplifies the empty nature of the provision, and is contrary to the interpretation by the ICC of effective and meaningful victim participation which is meant to ensure victims' input into proceedings and the realisation of their substantive rights to truth, justice, and reparations.

For protection, Clause 8.4 specifies that victims 'dignity, privacy and security' shall be respected and protected throughout the implementation of accountability and reconciliation mechanisms, adopting similar language to Rome Statute. Additionally, the Agreement and Annexure also seek to protect and promote the interests of vulnerable groups, such as women and children. This integrates the standards established by the

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124 Under Article 50 of the Ugandan Constitution victims do have a right to remedy, but this is limited to government violations. Interviews with members of the Ugandan judiciary and legal profession.

125 This is reaffirmed in the Annexure under Clause 24. See Lubanga, ICC-01/04-01/06-1119, 18 January 2008 para.85; and Katanga and Chui, ICC-01/04-01/07-474, 13 May 2008, paras.51 and 157; and Bemba, ICC-02/05-02/09-136, 6 October 2009, para.7.

126 Clauses 8.2 and 8.3 of the Agreement.

127 Clauses 3.7 and 3.9.


129 See Chapter 3.

130 Article 68(1) Rome Statute. See the Annexure Clause 4(3) on witness protection.

131 Clauses 10-12 of the Agreement, as well as Clauses 4(c), 4(e), 4(f), 8, 13(c), 20, and 24 under the Annexure.
Rome Statute and other human rights documents. However, formal measures have yet to emerge to protect victims and witnesses. In July 2012, a bill on witness protection for the International Crimes Division was still being scrutinised by the Ugandan Parliament.

In relation to reparations, the Agreement takes a wide approach, including ‘rehabilitation; restitution; compensation; guarantees of non-recurrence and other symbolic measures [satisfaction], such as apologies, memorials and commemorations.’ Reparations can be ordered individually or collectively. While Ugandan civil and criminal proceedings permit compensation to ‘victims of wrongs’, the Agreement goes beyond monetary awards. Furthermore, the Implementation Protocol to the Agreement on Comprehensive Solutions stipulates that the government will be responsible for providing ‘a special fund for victims, out of which reparations shall be paid’, similar to the Trust Fund for Victims. Therefore these provisions acknowledge the Ugandan government’s responsibility and its obligation to provide reparations for the conflict consistent with reparative complementarity.

While the legal impact of the Rome Statute and human rights law is apparent, like other victim provisions, the clauses on reparations do not detail the modalities of implementation. The Annexure outlines that the government will ‘establish the necessary arrangements for making reparations’, but this is predicated on the government reviewing the ‘financial and institutional requirements for reparations’. Accordingly, such a reparation programme under the Agreement and Annexure is discretionary as it may ‘not be driven by the needs of victims but by the government’s decision on how many resources to allocate to

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132 Articles 57(1)(b) and 68(1) Rome Statute, and Rule 85 RPE; and UN Convention on the Rights of the Child, UN Doc. A/RES/44/25, 20 November 1989.
133 Interview, a member of civil society, Kampala, 30th July 2011. Uganda Gets Time to Solve Witness Safety Problem, IWPR, 3 October 2011.
134 Clause 12. See also Clauses 9.1, 12-14 of the Agreement on Comprehensive Solutions Between the Government of the Republic of Uganda and Lord’s Resistance Army/Movement, Juba, Sudan 2 May 2007. Clauses 13 and 14 of the Comprehensive Solutions Agreement also recognise the need to restore livestock and compensate land lost during the conflict in Northern Uganda.
135 Clauses 6.4, 9.2 and 9.3.
136 Article 126(2)(c), Ugandan Constitution; and Article 126 of the Trial on Indictments Act, Ch. 23.
137 Clause 28, Juba, 22nd February 2008.
138 Clauses 16-17, Annexure.
As of July 2012, a reparations programme has yet to emerge for Northern Ugandan victims.

Despite recognising the importance of victims in the transitional justice process, the Agreement and Annexure provide weak legal and procedural protection of their rights. Victims' assistance needs are also not addressed, such as medical and psycho-social support. Although provisions for victims within the Agreement and Annexure appear progressive, victims are left reliant on the Ugandan government’s discretion as to the modalities of the provisions. Furthermore, they have no recourse to challenge government decisions through judicial review or to access their rights through other independent mechanisms.

The Agreement also stipulates different standards of accountability. Under Clause 4.1, the LRA is to be prosecuted before ‘special justice processes’, such as the International Crimes Division of the High Court, and traditional ceremonies, whereas government forces will be held to account before existing criminal justice process. Traditional justice ceremonies, such as mato oput and culo kwor, are meant to provide an ‘overarching justice framework’ through formal and ‘complementary alternative justice mechanisms’. However, these mechanisms could promote impunity and undermine justice for victims, due to their lack of procedural protection for victims, women, children, and other vulnerable groups, as well as their ‘inconsistency with established human rights standards’ under the Ugandan Constitution. The Agreement does clarify that these traditional justice mechanisms will only occur after ‘full accountability’ and therefore they will not be a substitute for prosecutions. Nonetheless, there remains a risk that different accountability mechanisms within the Agreement and Annexure could impair victims’ access to justice and

141 Amnesty International n 139, p23.
143 Mato oput involves ‘traditional rituals performed by the Acholi to reconcile parties formerly in conflict’, culo kwor involves ‘compensation to atone for homicide’, Clause 1 of the Agreement. See Roco Wat I Acoli, n 31. Clause 5.3 of the Agreement and Clause 19 of the Annexure.
144 UVF statement n 140, p3. Articles 32-36, and 42.
145 Clause 1 of the Agreement.
create inequality. This has become apparent with the use of the International Crimes Division for only LRA defendants, while UPDF perpetrators are prosecuted behind closed doors in military courts.

Notwithstanding the progressive nature of the peace process to incorporate provisions for victims, they have not yet been formalised into the Ugandan legal system. The Ugandan government has stated that the Agreement and Annexure are not legally binding, owing to Kony’s failure to sign them. While the ICC had a positive impact on the contents of the Agreement and Annexure, both remain ambiguous on practical implementation of accountability and victim provisions. Thus the Agreement and the Annexure are a ‘blueprint’ for transitional justice in Uganda, but does not offer any concrete redress for victims. The Ugandan government’s amendment of the Amnesty Act 2000, the passing of the International Criminal Court Act 2010, and the creation of the International Crimes Division, emphasise a very selective implementation of the Agreement and the obligations under the Rome Statute. These legal reforms highlight the weakness of complementarity in protecting victims’ interests or ensuring practical congruence with the Rome Statute, as will be seen with the discussion of reparations in the final part of this section.

2. The Amnesty Act 2000

The Ugandan Amnesty Act 2000 offers a blanket pardon from prosecution to any Ugandan citizen, who since 26th January 1986 has engaged in or is engaging in war or armed rebellion against the Ugandan government. The Amnesty Act makes no distinction between the gravity of the atrocities, the number of crimes committed, or the seniority of the reporter. This blank amnesty means that a person who commanded a rebel movement that killed thousands of civilians could be pardoned in the same way as a person who was abducted and forced to commit atrocities. Amnesty reporters also do not have to disclose the

147 Section 2.
148 Mallinder n.30, p23.
truth about their crimes or to offer an apology to their victims.\textsuperscript{149} Senior LRA commanders responsible for international crimes, such as Kenneth Banya, Sam Kolo, and Patrick Opiyo Makasi, have been given amnesties, with other commanders given multiple amnesties, epitomising the prevalence of impunity.\textsuperscript{150} So far over 13,000 former members of the LRA have received amnesty.\textsuperscript{151} Therefore, the Amnesty Act directly conflicts with the Rome Statute by allowing impunity for international crimes.

For victims, the Amnesty Act also denies them the truth, and ‘a right to an effective remedy before an impartial and independent court.’\textsuperscript{152} Furthermore, demobilisation programmes supply each amnesty reporter with financial, domestic, and agricultural awards. This discriminates between victim groups, as victims of other crimes who were not abducted receive no support, and this has caused resentment.\textsuperscript{153} Demobilisation programmes can also create a ‘culture of entitlement’ for those resorting to violence.\textsuperscript{154} As one Northern Ugandan lawyer stated, ‘I am a victim, but I do not have the benefits of a perpetrator who is also a victim.’\textsuperscript{155}

However, amnesty has been beneficial for the tens of thousands of abductees who are victims themselves, as one Northern Ugandan pointed out, ‘if the amnesty was not working, all of us would have been put in prison now.’\textsuperscript{156} Some victims also distinguished victim-perpetrators and the leadership of LRA. For instance, they believed that because Kwoyelo was abducted as a child he should receive an amnesty, ‘Kony was his elder ... children perform exactly what they have been taught. Kwoyelo learnt from Joseph Kony.’\textsuperscript{157} Other focus groups also considered that Kony should be tried and punished, instead of

\textsuperscript{151} Amnesty or prosecution for war criminals? IRIN, 17\textsuperscript{th} May 2012.
\textsuperscript{152} Ssenyonjo n 69, p76.
\textsuperscript{153} Victims, Perpetrators or Heroes? n 27, p14.
\textsuperscript{154} Whose Justice? n 149, p25.
\textsuperscript{155} Interview, Gulu, 5\textsuperscript{th} July 2011.
\textsuperscript{156} Male victim, focus group 5, 14\textsuperscript{th} July 2011.
\textsuperscript{157} Male victim, focus group 5, 14\textsuperscript{th} July 2011.
receiving an amnesty.\textsuperscript{158} Conversely, victims of crimes committed by Kwoyelo deemed that he should be held accountable for his crimes, demonstrating the conflicting interests of victims.\textsuperscript{159} Accordingly, as a Northern Ugandan member of civil society acknowledged, amnesty is a ‘double-edged sword’ in Northern Uganda.\textsuperscript{160} The prosecution of all perpetrators is insufficient to do justice for Northern Ugandan victims. By the same token, amnesties cannot be blanket. To victims it is acceptable for those low-level perpetrators who were abducted and forced to commit crimes to receive an amnesty, but not for senior commanders who voluntarily joined the LRA.\textsuperscript{161}

The Court’s intervention in Uganda did result in an amendment of the Amnesty Act. Originally tabled in 2003, the Amnesty (Amendment) Act 2006 prevents rebel leaders from applying for amnesty.\textsuperscript{162} They are only ineligible for amnesty after a declaration by the Minister for Internal Affairs, who then proposes a statutory instrument for the approval of Parliament.\textsuperscript{163} In 2010 the Minister’s application to disqualify Kony, Odhiambo, Ongwen, and Thomas Kwoyelo from applying for amnesties was unsuccessful after opposition in Parliament.\textsuperscript{164} The impact of the ICC on the Amnesty (Amendment) Act does suggest that amnesties are no longer blanket, nor is every person eligible. Additionally, the Juba peace agreements make no affirmative acceptance of amnesties.\textsuperscript{165} However, on the 23\textsuperscript{rd} May 2012 the Amnesty Act was not renewed by the Ugandan government bringing its application to an end. If Kony had surrendered before this date, he could have claimed one, preventing him from being prosecuted before Ugandan courts.\textsuperscript{166} The Amnesty Act does not prevent the jurisdiction of the ICC, meaning the Ugandan government would still be obliged under the Rome Statute to transfer the LRA indictees to the Hague. Nonetheless, the Court made no reference to the continuation of the Amnesty Act in its admissibility decision, and thus

\begin{footnotesize}
\textsuperscript{158} Focus groups 1 and 2, 9\textsuperscript{th} July 2011.
\textsuperscript{159} Focus group 1, 9\textsuperscript{th} July 2011.
\textsuperscript{160} Interview, Kampala, 30\textsuperscript{th} June 2011.
\textsuperscript{162} Mallinder, n.30, p24.
\textsuperscript{165} Clause 3.9.
\textsuperscript{166} ICD official, Kampala, 1\textsuperscript{st} July 2011.
\end{footnotesize}
missed an important opportunity to reprimand the Ugandan government for offering a blanket amnesty to senior perpetrators in violation of its obligations under the Rome Statute.

3. The International Criminal Court Act 2010

The most positive legislative impact of the ICC on the Ugandan legal system has been the adoption of the International Criminal Court Act 2010 (ICC Act). The Act, for the first time, allows international crimes to be prosecuted under Ugandan criminal law. While Uganda ratified the Rome Statute in 2002, the belated nature of the ICC Act was due to fears that, at least in the 2006 Bill, it would derail the peace negotiations with the LRA.

For victims, the ICC Act represents an important step towards them accessing justice for international crimes in Uganda. As Denis Hamson Obua MP, a victim and survivor of the war, stated, the Act ‘brings justice closer to the people ... it will open the door to the victims of the war to present their grievances directly to the national courts that will be established.’ As such, the ICC Act includes a number of provisions for victims on protection and reparations. Despite Mr Obua’s optimism, these provisions all relate to enforcing requests or orders made by the ICC, thus they do not provide any legal rights to victims in Ugandan courts. For instance, in relation to reparations, section 64 of the ICC Act recognises the Ugandan government’s specific obligation to enforce reparation orders by the ICC in a case, but not a general obligation to provide reparations to all victims of international crimes in the Northern Ugandan conflict, as outlined in the previous Chapter.

The ICC Act does offer greater recognition of victims suffering through improved definitions of crimes. For instance, rape in Ugandan criminal law is defined as ‘unlawful carnal knowledge of a woman or girl, without her consent’ or through force. Whereas, under the ICC Act, incorporating the Rome Statute’s definition, rape is the invasion of a person through penetration into any part of the body with a sexual organ or object without

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169 Ibid. at 3.09.
170 Section 46, 58, and 64.
171 Section 123, Penal Code Act 1950.
genuine consent.\textsuperscript{172} Clearly, the Ugandan definition of rape is archaic, ambiguous as to ‘unlawful carnal knowledge’, excludes male victims and penetration with an object.\textsuperscript{173} The crime of enlisting or conscripting children and civilians to participate in hostilities is also inadequately recognised in Ugandan criminal law as abduction.\textsuperscript{174} This does not represent the magnitude and seriousness of suffering of civilian and child soldiers, such as being subjected to beatings, sexual violence, forced to kill, maim, and loot.\textsuperscript{175} Furthermore, Ugandan domestic criminal law did not previously provide a clear definition of torture, permitting impunity for State agents.\textsuperscript{176} The inclusion of the Rome Statute’s definition of torture provides victims with an avenue for redress if the State or non-state actors use torture.\textsuperscript{177} Additionally, for mass crimes, reliance on Uganda’s domestic criminal law through multiple charges, such as murder, does not reflect the grave, ‘widespread and systematic’ nature of crimes against humanity or discriminatory nature of other crimes.\textsuperscript{178} This is contrary to the distinction of international crimes from domestic ones argued in Chapter 1. The ICC Act therefore increases the recognition of victims and their access to justice through the incorporation of the crimes under the Rome Statute into Ugandan law.

The practice of the International Crimes Division, established in the wake of the ICC Act, explicitly excludes reference to the Rome Statute in the charges against its first accused, Thomas Kwoyelo, due to concerns of non-retroactivity. Instead, the prosecution relied on Ugandan criminal law and the Geneva Conventions Act 1964, which incorporates the Geneva Conventions into Ugandan law. However, the application of the Geneva Conventions is limited to common Article 3, that is to war crimes committed during an

\textsuperscript{172} Article 7 (1) (g)-1 Elements of Crimes para.1 and 2, mirrored in Articles 8 (2) (b) (xxii)-1 and 8 (2) (e) (vi)-1.
\textsuperscript{173} See Uganda v Kyamusungu Ivan, Criminal Session Case No. 107/96 High Court; and Uganda v Odwong Dennis and Olanya Dickson (1992-1993) HCB 71. See Lillian Tibatemwa-Ekirikubinza, Sexual Assaults and Offences against Morality, Fountain Publishers (2005) p4-5.
\textsuperscript{174} Section 126, Penal Code Act 1950.
\textsuperscript{175} See Victims, Perpetrators or Heroes? n 27. Articles 8(2)(b)(xxvi) and 8(2)(e)(vii), Rome Statute.
\textsuperscript{176} See Torture in Uganda, Redress (2007). Torture is prohibited under Article 24 of the Ugandan Constitution, but this can only give rise to a claim before the Ugandan Human Rights Commission, rather than a basis of criminal prosecution.
\textsuperscript{177} Articles 7(1)(f), 8(2)(a)(ii), and 8(2)(c)(i), Rome Statute.
internal conflict such as torture, outrages upon human dignity, taking of hostage, and extra-judicial executions.\textsuperscript{179} This excludes numerous other crimes including gender specific crimes such as rape, sexual slavery, and forced prostitution, as well as forced displacement and enlistment or conscription of civilians and children into hostilities, which all characterised many of the crimes committed during the Northern Uganda conflict. Reliance on these domestic laws, rather than the ICC Act, will thus exclude the majority of victims and provide an unrepresentative picture of the crimes committed in Northern Uganda. As a result, the ICC Act signifies a very limited application of the Rome Statute, without incorporating any victim provisions. Moreover, as the Act was only passed in 2010 the legal principle of non-retroactivity prevents its application to the Northern Ugandan conflict, as in the Kwoyelo case.\textsuperscript{180}

4. International Crimes Division

The Juba Annexure of the Accountability and Reconciliation Agreement stipulated a special division of the High Court to be created ‘to try individuals who are alleged to have committed serious crimes during the conflict.’\textsuperscript{181} Despite the collapse of the Juba peace process, the Ugandan government established the International Crimes Division (ICD) in July 2008 in order to institute accountability and to fulfil the principle of complementarity under the ICC.\textsuperscript{182} The ICD is meant to prosecute persons who committed international crimes in Uganda without the limitation of the temporal scope of the ICC.\textsuperscript{183} Thus the ICD is supposed to be a way to fill the impunity gap left by the Court’s prosecution of the LRA leadership. However as mentioned, under Clause 4.1 of the Agreement, the ICD is to be only used for LRA, not the UPDF. Nonetheless, the creation of the ICD does represent the Ugandan government striving to fulfil its obligations to investigate and prosecute those

\textsuperscript{179} Although it could be argued as an international conflict involving Sudan and Uganda, due to their use of proxy forces, see Doom and Vlassenroot n 4, p28-30.
\textsuperscript{180} Cf. Article 15(2), International Covenant on Civil and Political Rights.
\textsuperscript{181} Para.7.
\textsuperscript{183} Based on existing law under section 14 of the Ugandan Judicature Act 1996.
responsible for international crimes as well as the impact of ICC in catalysing domestic judicial capacity. One civil society observer stated that the establishment of the ICD is ‘heavily driven’ by the intervention of the ICC, with a senior ICD official saying the Court was the ‘trigger for national mechanisms.’

The first indictee before the International Crimes Division was Colonel Thomas Kwoyelo, a former LRA commander, who was captured in a UPDF offensive against the LRA in the Democratic Republic of Congo in 2009. Kwoyelo was charged with 12 counts of wilful murder, taking hostages, and kidnap with intent to murder under the Geneva Convention Act 1964. He also faced 53 counts under the Ugandan Penal Code 1950 for murder, kidnap with the intent to murder, causing serious injury, extensive destruction to property and aggravated robbery committed in Northern Uganda from 1994-1996. The trial commenced in Gulu, Northern Uganda in July 2011. Holding the trial in Gulu allowed victims to attend from neighbouring Pabbo area where the crimes occurred. However, they were unable to participate, and none of them were called as witnesses due to the trial being suspended. The Ugandan Constitutional Court dismissed the case against Kwoyelo in September 2011, after accepting his appeal that the government had discriminated against him by denying his amnesty claim. The collapse of the Kwoyelo trial affirms that impunity is the law in Uganda; this is contrary to the Ugandan government’s obligation to prosecution perpetrators under the Rome Statute. As one civil society interviewee noted, ‘State co-operation is compromised’ through the use of amnesties. Five other prosecutions are planned by the prosecution unit of the ICD for crimes committed in the Northern Ugandan conflict. With the ending of the Amnesty Act 2000 and the capture of General Caesar Achellam in May 2012, a possible trial may be forthcoming. Although with Achellam, like

184 Under Article 141 of the Constitution and Section 20 of the Judicature Act 1996.
185 Interviews, Kampala, 29th June and 1st July 2011.
186 Final Amended Indictment of Thomas Kwoyelo, 5 July 2011.
187 Although sixty victim-witnesses had been scheduled to testify.
188 Thomas Kwoyelo v Uganda, Constitutional Petition No.036/11, 22 September 2011.
189 Interview, Kampala, 30th June 2011.
190 Interview, ICD official, Kampala, 27th June 2011.
many others, he was allegedly abducted as a child into the LRA, and so there are issues as regards addressing his responsibility and victimisation.

The ICD has not integrated victim provisions under the Agreement and Annexure.191 In relation to victim participation, the Ugandan legal system is based on the adversarial trial in common law, which only allows victims to participate as witnesses, with their victimisation only being recognised upon a successful prosecution. Within the ICD, debates on victim participation have been too readily dismissed on the grounds that it does not comply with the adversarial trial tradition and would prejudice juries against the defendant.192 However, the Ugandan High Court, including the ICD, does not use juries, and the unfamiliarity of judges and other practitioners with it could be overcome with training and regulations of proceedings. Some officials of the ICD believe consultation with their staff at outreach sessions are a more appropriate form of victim participation, and this is practice of the court, rather than participating as a party in investigations or proceedings.193 Yet, excluding victims from the investigation and trial proceedings prevents their interests from being heard, as well as independent oversight and accountability of the prosecution and the court. With regards to protection measures, a formal system has not been put in place; instead the court relies on informal protection through the local police.

Reparations are also excluded from the ICD, as according to one official, Kwoyelo is indigent and the government has no intention to provide reparations through the court.194 This exemplifies the difficulty with using the ICD as a remedy for victims, which not only fails to provide them with procedural justice through participation, information, and protection, but also denies them access to substantive redress through reparations. Moreover, the prosecution of individual perpetrators focuses on the responsibility of the LRA while avoiding the responsibility of the Ugandan government in the conflict.

193 Interviews with ICD staff, June/July 2011.
194 Interview in Kampala, 27th June 2011.
The basis of the ICD is to complement the work of ICC under the Rome Statute. However, its lack of victim provisions emphasises the defendant-focused nature of the court, which is only concerned with prosecuting the defendant rather than delivering justice to victims. By focusing on only one party of the conflict, and using restrictive and antiquated crimes, it further limits the recognition of victims and their access to justice. State Parties do have some discretion on how to prosecute perpetrators and to end impunity. There may be difficulties for a State Party and legal practitioners to change their legal system to cater for victims, especially in adversarial criminal trials which are unfamiliar with victim participation. Although reparations could be provided through another body, the focus on the ICD as the sole mechanism to complement the ICC and to redress the conflict detracts from seeking to remedy the victims’ harm. This is due to the retributive justice of the ICD as a criminal justice institution, which focuses on the punishment of perpetrators of international crimes.

The challenge for the Court’s impact is to ensure that the purpose of the Rome Statute, in delivering justice to victims and ending impunity, is effectively translated on to the ground. The practice of complementarity in Uganda does not fulfil the Rome Statute’s mandate, due to the discretionary and non-enforced obligations on State Parties, which allow the Ugandan government to avoid its obligations. As such, the ICD is an ineffective accountability mechanism which appears to be a veneer for impunity and denial of justice to victims. Instead, an enforcement model based on State responsibility is required. As the next sub-section points out, victims strongly identify with State responsibility, the need for truth, justice, and reparations, and the continuing impunity which currently exists under complementarity.

5. Northern Ugandan victims’ access to justice and reparations

Chapter 1 outlined that owing to the limitations of the ICC in delivering justice to victims an external examination of it involves how the Court catalyses domestic justice mechanisms to be responsive to victims’ needs. As discussed in Chapter 4, State Parties are

195 See van der Wilt, Ch.4 n 245.
under an obligation to investigate and prosecute individuals responsible for international crimes, with a failure to do so giving rise to a situation of impunity and the obligation to make reparations to victims. Other State Parties can seek enforcement of these obligations (erga omnes partes) by invoking the responsibility of the responsible State. However, as this sub-section will reveal victims have been denied access to justice, perpetrators have not been investigated or prosecuted, and reparations have only been paid to a few groups.

The situation in Northern Uganda for victims does not evidence that they have access to justice to remedy their harm. The judicial infrastructure of Northern Uganda has been devastated by decades of conflict, with few cases reaching the courts. Even if victims want to access justice they have to pay their way on account of insufficient government funding of the police and judiciary, widespread corruption, and State interference. Many victims cannot afford legal representation, travelling to court, or even to pay the police for their transport costs. Consequently, there is a ‘justice gap’ between those few victims who can seek justice at the ICC and avail of their rights, and the thousands of other Northern Ugandan victims who have to rely on national courts, where they are unlikely to receive any redress.

In relation to accountability within Uganda, there have been a number of UPDF cases heard before Ugandan military courts. These cases only represent the tip of the iceberg by prosecuting a few low-ranking personnel. Alternative mechanisms through traditional justice, such as mato oput, a traditional Acholi reconciliation ritual, could provide local justice, but they are not widely supported and lack protection measures for vulnerable groups. The Ugandan Human Rights Commission (UHRC) also offers redress for victims and is often more accessible being located in a number of towns, uncomplicated proceedings, and is able to award compensation. However, the UHRC can only examine human rights

196 See Left to their own Devices n 60.
197 The OHCHR reports the prosecution of six members of LDU and the local UPDF commander for the extrajudicial killing of ten IDPs in 2006, Making Peace Our Own, n 25, para.13.
198 See Allen n 2; and Transitioning to Peace n 24.
violations committed by government forces. Furthermore, the inability of the justice system
to respond to crimes can be seen by the increasing use of ‘mob justice’ in Uganda, which in
2008 and 2009 killed 700 people.\textsuperscript{200} As noted by the OHCHR, there is ‘a general lack of
confidence within the justice system due to delays in judicial proceedings, disregard for
victims’ rights, a high number of dismissals in court and a lack of free legal assistance.’\textsuperscript{201}

With regards to reparations, 97\% of Northern Ugandans support such measures.\textsuperscript{202} Victims view both individual and collective reparations as a necessary, if not fundamental,
part of remedying the conflict in Northern Uganda.\textsuperscript{203} Some believe compensation paid
directly into their hands is an important means of repairing the harm they have suffered, so
that they can determine for themselves the best way to spend it, as ‘money speaks’.\textsuperscript{204} This
could also avoid the money going into the hands of officials, risking it being lost through
bureaucracy and corruption. For the pillaging of livestock, some victims propose the
replacement of cattle, but one victim group noted that the government’s restocking
programme used weak and sick animals. They instead considered compensation as a more
appropriate remedy.\textsuperscript{205} Others believed that with so many victims in Northern Uganda there
may not be enough money for all of them. Therefore other forms of reparations could be
more appropriate, such as rehabilitation that could ‘support very many people’, e.g. medical
and psychological assistance, social and health services, housing, education and vocational
training.\textsuperscript{206} Measures of satisfaction, such as memorials, are also seen as an important way to
remember the past and to inform future generations.\textsuperscript{207}

These views reflect the jurisprudence established in human rights law, as discussed in
the previous Chapter. They also provide some insight into the diversity of needs, which may

\footnotesize{\textsuperscript{200} Ugandan Human Rights Commission Annual Report 2010, p77; OHCHR ibid, para.38.  
\textsuperscript{201} OHCHR n 161, para.31. 
\textsuperscript{202} Transitioning to Peace n 24, p44. 
\textsuperscript{203} Quantitative research by the Berkeley Human Rights Centre supports these findings, with
respondents identifying memorials (90\%), cattle restocking (74\%), financial compensation (66\%),
housing (44\%), education (38\%), and counselling (22\%), as important. Transitioning to Peace n 24,
p44-46. 
\textsuperscript{204} Male victim, focus group three, 10\textsuperscript{th} July 2011. Transitioning to Peace ibid, p44. 
\textsuperscript{205} Interview, Gulu, 6\textsuperscript{th} July 2011. 
\textsuperscript{206} Focus group one, 9\textsuperscript{th} July 2011. 
\textsuperscript{207} Male elder victim, focus group one, 9\textsuperscript{th} July 2011.}
require more than one type of reparation. Additionally, a crime can have a different impact on certain groups, so reparations should respond to the harm suffered by victims rather than the crime. By way of example, male children who were abducted by the LRA were generally used as soldiers whereas female children were used as ‘wives’. Both would need rehabilitation and compensation, but female abductees would also need community sensitisation to avoid stigma and treatment for any sexually-transmitted diseases or reproductive health injuries. A reparations regime for Northern Uganda should offer comprehensive remedies which can be sensitive to these different needs.

Reparations by the Ugandan government could serve to acknowledge its responsibility for atrocities, either committed by its own forces, its failure to protect civilians from attacks by the LRA or raids by the Karamojong, or for allowing the situation of impunity to exist by failing to investigate and prosecute those responsible. Victims strongly believed that the government should be responsible for reparations for atrocities they committed against them, for forcing them into the ‘protected villages’, and inadequately protecting them against the LRA. Research conducted by Berkeley Human Rights Centre indicated that 64% of Northern Ugandan respondents identified the government as responsible. As one former LRA abductee remarked, the government left the Northern Ugandan civilian population ‘in the hands of the rebels’.

Victims have formed a number of associations to claim reparations against the government through the Ugandan courts. For example, the Acholi War Debt Claimants Association, was successful in settling with the government for Shs 2 billion (£500,000) for their 14,000 claimants for livestock and agriculture equipment taken during the conflict, a tiny fraction of their original Shs 45 trillion (£12 billion) claimed for full compensation. There have also been a handful of cases before the Gulu High Court where individual

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208 See “The Dust has not yet Settled” n 161, p71-93.
209 Ibid. p79-80.
210 Ibid. See also TFV Summer Progress Report 2011, p25-27.
211 ‘The Dust has not yet Settled’ n 161, p68-72.
212 All five victim groups supported this when asked who was responsible for the crimes they suffered and reparations, with some also identifying the LRA with the government. See also Transitioning to Peace n 24, p39.
213 Interview, Gulu, 7th July 2011.
victims have been able to overcome the barriers to justice and to claim compensation from members of the UPDF, but there are no reported cases against the LRA due to the predominance of amnesties.

Instead of a general reparations programme for victims of the Northern Ugandan conflict the government has declared that developmental programmes, such as Northern Ugandan Social Action Fund (NUSF), and the Peace Recovery and Development Plan (PRDP), are reparations. However, these programmes involve reconstruction of infrastructure and development of social services to the general population. They are therefore not reparations, as they do not specifically focus on victims and seek to remedy their harm, nor do they involve acknowledgement of their harm and the Ugandan government’s responsibility. The government has provided reparations to certain victims. For instance, in the Mukura massacre on the 11th July 1989, the UPDF rounded up 300 male civilians suspected of being LRA collaborators and put them in a train wagon. When they were released four hours later, 69 of them had suffocated to death. Only in June 2010 did the government apologise, complete the memorial site for the mass grave with a public library, and pay Shs 200 million (£50,000) of compensation. Yet, the provision of reparations at this time coincided with the Presidential elections, and could be interpreted as a ‘political manoeuvre’ to gain support in a traditionally anti-government area. Moreover, victims were not consulted about the amount of compensation. Additionally, some of them were excluded, and it left other victim groups questioning why they did not receive the same. While this massacre was clearly the responsibility of the Uganda government, it has been unwilling to make reparations in similar cases.


215 President asks Acholi to let go of past, Daily Monitor, 29 November 2011.

216 Interview with human rights observer, Kampala, 20th June 2011.

217 See the Mukura Massacre of 1989, Justice and Reconciliation Project, Field Note XII, March 2011.

218 Ibid.

219 Ibid. p17.

220 Interview with a member of civil society, Gulu, 14th July 2011.
Victims are also frustrated with the politics of reparations. Some Northern Ugandans referred to the compensation paid to the victims of the World Cup Final Kampala bombings in 2010, which was paid within weeks, or reparations made to victims of the conflict in Southern Sudan, whereas victims of the Northern Ugandan conflict have received virtually no reparations in the last twenty-five years. One individual asked ‘... are we not human beings?’ expressing the violation of their right to an effective remedy. This point also emphasises their discrimination and denial of their inherent human dignity, by refusing them any reparations in comparison to their southern and northern neighbours. Instead, reparations paid by the Ugandan government to victims have been piecemeal and politically opportunistic. Such politicisation of reparations and the exclusion of Northern Ugandan victims undermines their dignity and causes secondary victimisation. As one victim said "we never see change ... [we] are waiting in vain." The causes of victimisation in Northern Uganda remain unaddressed. As the history of Uganda has on numerous occasions demonstrated, the failure to redress victimisation of the past can lead to their repetition in the future.

Complementarity in Uganda can be characterised as retributive justice, and not victim-orientated justice as it is unresponsive to the needs and interests of victims. The ICC has not tried to maximise justice to victims beyond its own structural limitation by encouraging the Ugandan government to fulfil its obligations under the Rome Statute. While it influenced the Juba peace process, subsequent developments have not resulted in tangible rights for victims. Complementarity does allow State Parties some discretion in its implementation, i.e. a ‘margin of appreciation’, to ‘give effect to norms in light of local understandings.’ As discussed in Chapter 1 on transitional justice, any lasting solution

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221 Focus groups one and two, 9-10th July 2011.
222 Male victim, focus group three, 14th July 2011.
223 See Uganda to compensate LRA victims ahead of vote, Reuters, 18 June 2010.
224 Correa Ch.1 n 111, p189-190.
225 Male elder victim, focus group one, 9th July 2011.
226 Schabas, Ch.1 n 229, p27.
227 Ryngaert Ch.1 n 234, p166.
must come from within the country itself. However, by neglecting the rights of victims as those most affected by the conflict it can only perpetuate the situation of impunity and division from the southern government.

Reparations could redress some of the problems facing Northern Ugandans, but the ICC alone cannot achieve this on its own. A reparative complementarity approach under the Rome Statute, delineated in the last Chapter, could provide victims access to reparations and address the causes of victimisation, which are beyond the capacity of the ICC, such as guarantees of non-repetition. This would be based on the Ugandan government responsibility for committing atrocities, failing to protect civilians, and allowing the situation of impunity to remain. The unwillingness of the Ugandan government to provide reparations could be countered by using international responsibility based on *erga omnes*. As established in Chapter 4, other State Parties could invoke the responsibility of the Ugandan government before the ICJ to fulfil its obligations to investigate and prosecute those responsible under the Rome Statute, as well as to provide reparations to victims.

**E. Conclusion**

Although it may be too soon to judge, the International Criminal Court’s intervention in Northern Uganda has so far failed to deliver adequately the Rome Statute’s two main objectives of ending impunity and delivering justice to victims. As long as the arrest warrants for the LRA remain unenforced and without arrest warrants being issued against those within the UPDF and the Ugandan government, the impact and impartiality of the ICC will be questioned. The failure of the Prosecutor of the ICC to investigate and prosecute crimes committed by both sides, and the unwillingness of the Court in its admissibility decision to declare that amnesties for senior commanders incompatible with the object and purpose of the Rome Statute, permits impunity to remain the law in Uganda. Without any reparations or assistance, many victims continue to suffer from the crimes that were committed against them, with the existence of impunity causing further psychological harm. As the discussion in the previous section emphasises, the ICC has not encouraged the

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228 Joinet Report Ch.1 n216, para.28.
Ugandan government to satisfy Northern Ugandan victims’ complex understanding of justice as entailing amnesties, prosecutions and reparations, nor does it offer redress to the enduring and complex victimisation in Northern Uganda.

The Court’s involvement in Northern Uganda did illuminate the plight of victims. However, in light of the theories discussed in Chapter 1, the danger with the ICC and its extension through positive complementarity is that by using only retributive justice as ‘justice for victims’, it is not a sufficient remedy for victims’ harm. The ICC and positive complementarity can also inhibit the understanding of justice, to the extent that an international construction of justice imposed on a local context can create further injustice by neglecting certain victims, and perpetuating impunity by excluding certain perpetrators. As such, victim provisions at the ICC have not entirely enabled victims to have ownership of justice at the Court.

Complementarity in Northern Uganda has not extended justice for victims to those outside the Court. The Ugandan government’s selective prosecution of perpetrators indicates that its approach to complementarity is focused on the individual responsibility of the LRA, while avoiding its own responsibility in the conflict. The creation of the International Crimes Division may appear to be a complementarity success, an extension of the Court’s normative impact; however, for a significant number of victims it represents a very superficial response to a conflict which caused mass and enduring suffering. Consequently, it remains to be seen whether the ICD can provide a meaningful or effective remedy to those most affected by international crimes committed during the conflict. If complementarity is supposed to be State Parties taking primary responsibility in ending impunity and fulfilling their obligations, it has not yet been successful in Uganda. With the scaling down of the ICC field office in the Uganda situation and the Court refusing further victim applications, there is a danger of neglecting and forgetting the victims of the Northern Ugandan conflict, which will only affirm impunity and deny justice to them.
VI. Conclusion

There have been numerous victim developments since the inception of international criminal justice. The inclusion of various victim provisions within international criminal tribunals and courts has theoretically broadened their scope from retributive justice to more victim-orientated justice. This thesis has tried to understand the meaning behind justice for victims and its application to the International Criminal Court. However, one of the major challenges of meeting victims' needs within international criminal justice is to respond effectively and meaningfully through a single court to international crimes, which unlike domestic crimes involve mass victimisation and perpetration, as well as actions or inactions of the State. International criminal justice thus faces structural limitations as well as political ones, due to the contentious nature of victims and justice in the aftermath of international crimes and intervention of the international community in domestic affairs. The previous Chapters reveal the difficulties in delivering justice to victims of international crimes through the ICC. This conclusion will bring together the key themes discussed in this thesis, as well as outlining the findings and recommendations, before closing with some final remarks.

A. The International Criminal Court: Justice for Victims?

The ICC has made a number of innovations with regards to victims by enabling them to participate, avail of protection and support measures, and to claim reparations. The first ten years of the Court's existence has involved 7 situations and 16 cases, though all have focused on crimes in Africa. The prosecution of a number of perpetrators of international crimes does try to tackle the impunity of such crimes and the denial of victims' recognition, such as charges of genocide in Darfur, ethnic conflict in the DRC and Kenya, and sexual violence in the Central African Republic. The Lubanga case and the situation in Northern Uganda have highlighted the plight of children in conflict and the illegality of recruiting them into armed groups. The intervention of the ICC in Uganda established the importance of victims as part of the transitional justice process. As such, the ICC can be seen to have to
some influence on States in recognising the importance of victims in the transitional justice process. The difficulty remains in developing such gains into more substantive developments for victims at the domestic level. Using the theory of justice to victims constructed in Chapter 1, this thesis makes three findings: (1) the role of victims in proceedings is symbolic and has yet to fully realise their substantive rights; (2) redressing international crimes and ending impunity requires more than prosecuting individuals due to State involvement in such crimes; and (3) State Parties are responsible for complementing the Court through investigations, prosecutions and reparations.

1. **Justice for victims at the International Criminal Court is symbolic**

   First, with regards to victims' role in proceedings at the ICC being symbolic, this can be seen from the limitations placed on victim participation in Chapter 3 and the reliance on the resources of the convicted person and the TFV in reparations discussed in Chapter 4. This is consistent with the findings of Letschert et al who also believe the Court can at best officially acknowledge victims' suffering.\(^{229}\) A symbolic role for victims at the ICC is unsurprising considering the nature of international crimes and the limited resources of the Court. In relation to outcomes, in Court's first ten years it has only made one judgment in the *Lubanga* case. This is in comparison to ad hoc tribunals, which in the space of under twenty years have tried 194 suspects and convicted 109 perpetrators.\(^{230}\) This underlines the inadequacy of the outcomes of the ICC in its first decade. At the individual level, the introduction of this thesis presented the testimony of James who witnessed the murder of his family; as Chapter 5 emphasised the ICC has not yet delivered justice to James and other Northern Ugandan victims.

   International criminal justice does need victims, as discussed in Chapter 1. Henham suggests that victim provisions are possibly included in the ICC to improve its legitimacy by giving the appearance that it provides justice to victims procedurally and substantively so as

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\(^{229}\) Letschert et al Ch.1 n 11, p646.

\(^{230}\) See Chapter 2, Section C.5.
to ensure their co-operation. It could be said that the justice for victims is symbolic for this reason. It is also worth noting that not all victims may want to participate at the ICC for their own safety or personal, social or cultural reasons. However, in light of developments and standards established in international, human rights and national law, justice for victims is to ensure that the harm they have suffered is effectively remedied. This returns the debate to the notion that justice should respond to those most affected by crime, the victims, as the so-called 'faces of injustice'. While victims have the choice of whether to engage with the ICC or not, they need clear information about what the Court can offer them so as to avoid false expectations and secondary victimisation. The ICC itself should try to deliver more meaningful justice to victims in order to ensure its future success.

Externally from the Court, complementarity has not encouraged State Parties to deliver justice to victims through domestic proceedings. As Chapter 5 noted, this is due to a lack of enforcement of their obligations and guidance as to what States should be doing to support the Court. The finding of selective justice in Chapter 5 in the Ugandan situation is parallel to other situations before the Court. For instance, in the DRC, Central African Republic, and Sudan, only minor perpetrators have been prosecuted before the ICC. The approach of the Court in representatively prosecuting perpetrators has improved in the Kenyan situation by including perpetrators on both sides and senior government ministers. The prosecution of former Côte d'Ivoire President Laurent Gbagbo represents the prosecution of a ‘big fish’ and Head of State rather than just non-state actors. Yet, other perpetrators remain at large such as President Omar Al-Bashir, Ahmad Harun and Ali Kushayb in Sudan, as well as Bosco Ntaganda in the DRC. The main distinction between Uganda and the other situations before the Court is that no Ugandan perpetrators are before the ICC whereas the other situations do have suspects before the ICC. With regards to

232 The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012; and the Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 23 January 2012.
complementarity in these situations there has been very little development on the ground for victims, with impunity remaining.\textsuperscript{233} By State Parties not fulfilling their obligations under the Rome Statute it necessarily limits justice to those few who can access the ICC.

2. **Ending impunity requires the prosecution of individuals and the engagement of State responsibility**

As discussed in Chapter 1 and as the case study in Chapter 5 revealed, States are generally involved in international crimes through their actions or inactions. However, as the ICC only addresses individual criminal responsibility of a select number of perpetrators, the causes of victimisation can remain, such as abusive military forces. It is necessary to invoke State responsibility so as to reflect the reality of international crimes and the State’s involvement through its perpetration, collaboration, acquiescence, or failure to protect its citizens. As Chapter 4 mentioned, international law and human rights law have recognised the ‘duality’ of responsibility with international crimes and the need to tackle both in order to end impunity.

Accordingly, ending impunity requires identifying, investigating, prosecuting and punishing those responsible as well as providing reparations to victims. As Chapter 4 outlined, reparations based on individual criminal responsibility will be insufficient to remedy victims’ harm and cannot tackle the causes of victimisation. Therefore State responsibility is a necessary part of remedying international crimes and doing justice for victims. Complementarity thus must include this holistic approach in order to wipe out completely the harm caused by international crimes and the effects of impunity upon victims. Accordingly, effectively ending impunity requires both individual and State responsibility. Incorporating such an approach at the ICC would be consistent with jurisprudence established in international law and human rights law.

3. **State Parties are responsible for complementing the Court through investigations, prosecutions and reparations**

While the ICC has seen a theoretical broadening of justice for victims beyond criminal justice, to include victims' procedural and substantive rights, by itself the Court is not enough. Instead, it requires State Parties to develop remedial mechanisms for victims to ensure their needs and interests are catered for. Thus State Parties are meant to fulfil their obligations under the Rome Statute through complementarity. The danger with international crimes is that the State itself is likely to be involved or large parts of society to have participated in or supported such crimes. The notion of justice and recognising victims can be contentious in post-conflict societies, making the State less inclined to deal with such issues. However, this is contrary to State Parties' obligations under the Rome Statute and in international law.²³⁴

As the experience of Uganda reveals in Chapter 5, complementarity promotes a defendant-focused or retributive conception, which only concentrates on the responsibility of certain individuals, rather than remedying the suffering of victims. Manifestations of positive complementarity, such as the International Crimes Division in Uganda, therefore fail to respond effectively and meaningfully to a significant number of victims' expectations and needs. This by itself may continue the harmful effects of impunity by denying victims justice and allowing the structures which caused the victimisation to occur to remain in place. Additionally, this could risk future victimisation and conflict.²³⁵ As the limitations of the ICC in prosecution and reparations have been made apparent in the previous Chapters, State Parties have an obligation to ensure justice for victims through the investigation and prosecution of international crimes and reparation to victims in order to end impunity. This is consistent with their obligations under the Rome Statute and international law. Otherwise, there will be a real gap in justice and reparations between the ICC and victims relying on domestic courts. As the Inter-American Court of Human Rights has pointed out, the failure

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²³⁴ See Chapter 4.
²³⁵ See Mamdani Ch.1 n220.
to end impunity leads to the defencelessness of victims and chronic recidivism, both of
which are contrary to the object and purpose of the Rome Statute.236

Justice for victims in this thesis has focused on victims' procedural and substantive
rights, but there are two additional elements. A third element is to have effective institutions
and mechanisms in place to realise victims' rights, with the fourth being the political will to
protect and vindicate these rights—thus all four elements are mutually reinforcing. The ICC
to an extent incorporates the third and fourth elements. These additional elements may be
challenging for State Parties to find the resources to develop domestic mechanisms and the
political support to provide for victims' rights as positive victim-orientated complementarity,
particularly where there is no enforcement or guidance from the Court. Provisions for
victims could help to determine whether a State is fulfilling its obligations under the Rome
Statute.

The ICC and Assembly of State Parties (ASP) could also assist State Parties to
develop their domestic judicial and legal capacity, as well as to encourage the political will
to recognise victims' rights as a fundamental part of effectively ending impunity. Such
initiatives could be assisted by international organisations and civil society. This approach
would make the ICC an active part of transitional justice processes. The Court needs to find
the correct balance in complementarity to ensure State Parties are fulfilling their obligations
under the Rome Statute and complementing its own work. While the Rome Statute focuses
on complementarity of State Parties to investigate and prosecute perpetrators of international
crimes, this thesis argues that in order to effectively end impunity it requires a victim-
orientated approach. This external element of justice for victims, outlined in Chapter 1,
requires a State to recognise victims' suffering and rights, and try to remedy their harm and
the causes of victimisation in order to successfully prevent their recurrence. Where State
Parties are unwilling to do this, invoking responsibility under *erga omnes partes* may be an

236 Case of the "White Van" (Paniagua Morales et al.) case v Guatemala, (Merits), Judgment, 8
avenue to ensure the fulfilment of their obligations under the Rome Statute and to realise the external element of justice for victims.

Accordingly, the ICC can better realise justice for victims within its proceedings and orders, as well as with complementarity. Thus this thesis makes a number of recommendations which try to bridge the gap between the theory of justice for victims and the practice of the ICC. Such an approach is about moving justice for victims at the ICC from a symbolic function to a more effective remedy that will help to realise victims’ rights and assist the Court in ending impunity.

B. Recommendations

I. Use victims’ applications to create a historical account of international crimes

Victims’ applications which are examined and accepted by the Court could be used to map out victimisation that occurred as a result of international crimes so as to provide a more accurate historical account. The recording of victimisation could serve to officially and publicly acknowledge victims’ suffering to counter impunity and denial of their harm, as well as to clarify the facts and inform transitional justice processes. This could assist the Court’s reparation orders when it is determining the extent and scale of victimisation for State Parties to complement. To provide a more representative picture the Court may need to carry out more outreach to affected communities to ensure they can submit applications to the ICC.

II. Victim participation in ICC investigations to protect victims’ interests

A role for victims in the investigation at the ICC is consistent with human rights law to guarantee an effective investigation. Judges would need to scrutinise victims’ participation to ensure they are not fraudulent or politically motivated. Participation through VLRs could maintain professional and confidential representation of victims’ interests, while protecting the integrity of the Prosecutor’s investigations. Investigations should be representative of victims’ suffering as far as possible so as to ensure truth and justice. The Pre-Trial Chamber
could also provide oversight of the Prosecutor’s discretion so as to guarantee that the interests of victims are being duly considered and that the Court minimises any secondary victimisation, as well as negating criticisms of partial impunity and politically motivated selective justice.

III. Judges should consider victims’ interests more in the determination of outcomes

An almost silent part of Article 68(3) is that victims' views and concerns are to be presented and 'considered' by the Court. The ICC judges have recognised victims' rights in light of human rights law and victimological research, and allowed them to be represented. However, victim participation has not been meaningful in influencing judicial decision-making. This does not require victims' interests to dominate; rather it means that judges should give more weight to victims' needs and interests when balancing them against the rights and interests of other parties in making decisions. This may require judges to be more sensitised to victims' perspectives and needs through training in this emerging and growing area, so as to ensure their participation is meaningful and able to satisfy their substantive rights.

IV. Allow anonymous participation and testimony of victims

Anonymity is necessary in the aftermath of international crimes to protect victims from further harm. Victims who come before the Court should have access to this level of protection. The Court is obliged to protect victims and they should not have to choose between participation and protection. Thus anonymous and non-anonymous victims should have the same procedural rights before the ICC. Safeguards should be in place to protect the rights of the defendant and ensure the veracity of victims' identity, such as an independent guardian discussed in Chapter 3. Additionally, as judges will know the identity of the victim or witness they should be able to determine their authenticity, as established in Tadić before the ICTY. Together these safeguards should adequately balance the rights of victims and defendants.
V. **Call upon State Parties to complement the Court's reparations orders**

For ICC reparations orders, calling upon a responsible State to support the Court's reparation order is necessary to remedy effectively victims' harm, as outlined in Chapter 4. Responsibility of individual perpetrators for reparation should be the first place to start, but this is unlikely to satisfy victims' needs. Requesting State Parties to provide reparations as part of a reparations order against a convicted person could ensure an effective remedy to victims both conceptually and practically by providing the necessary resources and institutional capacity. This could bridge the gap between those few before the ICC and other victims of international crimes. Reparations based on State responsibility can more adequately remedy international crimes and the effects of impunity which occur and exist due to the actions and inactions of the State. With regards to the Trust Fund, its assistance mandate should remain supporting victims' rehabilitation needs while they await reparations. The role of the TFV in reparation regime of the ICC should be limited to just facilitating the transfer of convicted persons' resources, rather than to fund reparations. In situations such as Northern Uganda where no perpetrators have been apprehended, reparative complementarity should be engaged based on the State's responsibility. Such an approach would be an important part of delivering some measure of justice to victims and ending the effects of impunity on them.

VI. **Monitor and enforce complementarity to guarantee victims' rights and to effectively end impunity**

With regards to complementarity, the Court should engage in greater monitoring and enforcement of positive complementarity to ensure the mandate of the Rome Statute is being fulfilled. State Parties are obliged under the Rome Statute to investigate and prosecute those individuals responsible for international crimes. Where they breach this obligation other State Parties could invoke the responsibility of the responsible State before the ICJ to seek
fulfilment of its obligations and the provision of reparations to victims, as outlined in Chapter 4. The Court could issue official guidance on how impunity can effectively be ended through complementarity and delineate State Parties' obligations under the Rome Statute. The ICC should allow State Parties a margin of appreciation in fulfilling their obligations, so as to be flexible to local needs and domestic legal frameworks, provided they effectively and meaningfully ensure victims' rights. The experience of the regional human rights courts could provide some guidance here.

C. Final Remarks

As the ICC marks its tenth anniversary in 2012, it has taken its first few steps in providing justice for victims. The inclusion of numerous victim provisions within the Rome Statute in 1998 was innovative on paper, but the ICC still needs to make them effective and meaningful in practice. Issues remain within the Court in relation to victim participation and reparations being symbolic. On the ground, in the Court's first State referral of Uganda, victims continue to suffer the consequences of the conflict, and impunity still prevails. The ICC needs to reassess why this is; has the objective of delivering justice for victims and ending impunity been unrealistic or just rhetoric? This thesis argues that while the ICC has been symbolic justice for victims, the Court is also an aspiration to remedy the harm of international crimes and to end impunity.

The first ten years of the ICC have not seen the realisation of the Rome Statute's objectives of ending impunity and providing justice to victims, but it does not mean it can never be. While there are serious challenges facing the Court, it requires thinking of innovative solutions to bring international criminal justice into the twenty-first century by realising justice for victims. The ICC cannot be expected to achieve justice for millions of victims. Key to ensuring this is for State Parties to complement the Court by including victims' rights in domestic procedures. Further research could be conducted on other cases and situations before the ICC to provide a comparative analysis of State Parties in developing victim-orientated complementarity.
This thesis has examined the ICC and provision of justice for victims, and has made a few recommendations to bridge the gap between the two, but due to the complexity of international crimes and victims there is no remedial touchstone. The ICC is only ten years old, it needs to reflect on its experience in this time, not to neglect situations, and learn how to better deliver justice to victims and end impunity more effectively in its coming years. Numerous disagreements and divergent approaches remain, underlining the need for a theory to guide victims’ role in proceedings of the Court and the practice of State Parties. If we are serious about ending impunity and addressing international crimes we have to start with doing justice for those most affected by them, the victims; only by doing so will international criminal justice be meaningful to victims like James, and help to mitigate the recurrence of international crimes in the future. Fundamental to this is to recognise that justice for victims begins with the State; the ICC is only a court of last resort.
Annex

Sample Questionnaire

Government

1.01 Opening Question

1.01.1 Can you tell me how you normally provide for victims of domestic crimes?
1.01.1.1 Are victims able to access justice through national courts?
1.01.1.2 Do victims have access to a national support fund?
1.01.1.3 What protective measures do victims have in domestic criminal proceedings?
1.01.1.4 Can victims participate in criminal proceedings?

1.02 Practice

1.02.1 What challenges have you faced in providing for victims?
1.02.2 Do you think that victims are satisfied with these programs?

1.03 Accountability

1.03.1 Who do you hold responsible for... atrocities?
1.03.2 How do you think perpetrators of crimes against humanity, war crimes and the crime of genocide should be held to account?
1.03.3 Are national courts able to do this?
1.03.4 Do you think victims should have a role within these proceedings?
1.03.5 Are victims protected and supported in these proceedings?
1.03.6 Is prosecution by the government able to deter future perpetration of these crimes?
1.03.7 Do you provide legal aid to individuals to bring claims as victims against state and non-state actors?
1.03.8 What training do you provide to judges, prosecutors and other court staff on victims?

1.04 International Criminal Court

1.04.1 What impact has the ICC had here?
1.04.2 Do you think that the ICC is ending the culture of impunity?
1.04.3 What steps has your government taken in fulfilling its obligations under the Rome Statute?
1.04.4 What reforms have you undertaken to end your inability/unwillingness to prosecute international crimes?
1.04.5 Has the ICC encouraged victims to come forward and participate in cases?
1.04.6 Do you think that the ICC is acting in the interests of victims?
1.04.7 What do you think the legacy of the ICC’s work here will be?
1.05 Closing
1.05.1 Is there anything you would like to add?

Civil Society/NGOs

2.01 Opening Question
2.01.1 Can you tell me what programs do you run for victims?
2.01.2 How long have you been running these programs?

2.02 Practice
2.02.1 What challenges do you face in providing for victims?
2.02.1.1 What are the most common problems?
2.02.1.2 Has the government helped?
2.02.2 How often are you in contact with victims and affected communities?
2.02.3 Do you face intimidation?

2.03 Accountability
2.03.1 Who do you hold responsible for these atrocities?
2.03.2 What do you think is the best way to do this?
2.03.3 Do you think victims can access justice locally? What barriers do they face?
2.03.4 Does the government provided for victims’ needs?
2.03.5 What role should victims play in criminal proceedings?
2.03.6 What do you think of the use of amnesties?
2.03.7 Do you think child soldiers should be held to account for their actions?
2.03.8 What about child soldiers who become commanders?
2.03.9 Should victims have access to reparations?

2.04 International Criminal Court
2.04.1 What impact has the ICC had here?
2.04.1.1 Has it impacted your work?
2.04.2 Has the ICC or any of its officials been in contact with you?
2.04.3 Do you think that the ICC is ending the culture of impunity?
2.04.4 Do you think the ICC has encouraged national courts to take more of an active role in holding those responsible to account?

2.04.5 Do you think victims' participation is important in the ICC?

2.04.6 Has the ICC encouraged victims to come forward and participate in cases?

2.04.7 Do you think that the ICC is acting in the interests of victims?

2.04.8 Has the ICC endangered peace here?

2.04.9 What do you think the legacy of the ICC's work here will be?

2.05 Closing

2.05.1 Is there anything you would like to add?

**ICC Agencies**

3.01 Opening Question

3.01.1 Can you tell me the role of your section/organ?

3.02 Practice

3.02.1 What challenges do you face in providing for victims?

3.02.1.1 What are the most common problems?

3.02.1.2 Has the government helped?

3.02.2 How often are you in contact with victims and affected communities?

3.02.3 Have you ever faced intimidation?

3.03 International Criminal Court

3.03.1 What impact has the ICC had here?

3.03.1.1 Has it impacted your work?

3.03.2 Do you think that the ICC is ending the culture of impunity?

3.03.3 Do you think the ICC has encouraged national courts to take more of an active role in holding those responsible to account?

3.03.4 What training has your section/organ provided to government officials/NGOs/locals?

3.03.5 Do you think victims' participation is important in the ICC?

3.03.6 Do you think the ICC has endangered peace here?

3.03.7 What role does complementarity play in improving victims' rights to access to justice locally?

3.03.8 What do you think the legacy of the ICC's work here will be?
3.09 Closing

2.09.1 Is there anything you would like to add?

Victims

4.01 Opening Questions
4.01.1 Can you tell me what happened?
4.01.2 What harm have you suffered as a result?

4.02 General Views
4.02.1 Do you consider yourself as a victim?
4.02.2 What challenges do you face? / How has it affected your life?
4.02.3 What do you need?
4.02.4 What support have you received?
4.02.4.1 Were you satisfied with this?
4.02.5 What does justice mean to you?
4.02.5 Do you feel confident in the local justice system and police?
4.02.5.1 To make a complaint?
4.02.5.2 To testify as a witness?

4.03 Accountability
4.03.1 Who do you hold responsible?
4.03.2 Have they been held to account?
4.03.2.1 What would you want to happen to them?
4.03.2.2 Were you satisfied with this outcome? [They may not yet have had this outcome]
4.03.2.3 Did you bring or were awarded a compensation/civil claim against the perpetrator?
4.03.3 Has the government helped you?
4.03.4 Have you told anybody – police/NGOs/community about what happened?
4.03.4.1 - if yes what happened?
4.03.4.2 Did you feel safe testifying?
4.03.4.3 Have you been intimidated since?
4.03.5 What do you think of amnesties?
4.03.6 What do you think of the incorporation of militias/rebels into the army?
4.03.7 Should traditional/local justice be used to hold those responsible?
4.02.9 Would you like to participate in a criminal prosecution yourself or through a lawyer?
4.02.9.1 How should victims participate in criminal prosecutions? I.e. witness, tell their story, provide statements on issues, or as co-prosecutors.

4.02.9.2 Should victims participate in investigations? Or be limited to reparation proceedings?

4.02.9.3 Where should trials take place? Local or international? Why?

4.02.10 Should victims have access to reparations? Why?

4.02.10.1 What should reparations include? Monetary compensation; return of land, cattle and personal belongings; medical assistance; apology, memorial, school, or hospital.

4.02.10.2 Who should be responsible for funding reparations? Where should reparations come from? ICC, State, perpetrator?

4.02.10.3 Who should be eligible for reparations? Child soldiers? People who were displaced from their homes? Government soldiers?

4.04 **International Criminal Court**

4.04.1 Have you heard of the ICC?

4.04.1.1 Have you ever been contacted by the ICC or attended one of the outreach sessions?

4.04.1.2 Were you satisfied with it?

4.04.2 What is your opinion of the ICC?

4.04.2.1 What concerns do you have about the ICC’s work?

4.04.3 What role should victims play at the ICC?

4.04.4 Have you ever been subject to intimidation as a result of the ICC’s work?

4.04.4.1 What difference do you think the ICC has made here?

4.04.5 Do you think the ICC has done enough to hold those most responsible to account?

4.04.6 What do you think the legacy of the ICC will be?

4.04.7 Have you ever received support from the ICC’s Trust Fund for Victims? What did it involve?

4.04.7.1 Were you satisfied with this?

4.04.7.2 Do you consider the support from the Trust Fund as reparations?

4.04.8 Who do you think reparations should go to? - Communities or individuals or both?

4.04.8.1 Do you consider it important to receive money from the ICC or from the person responsible for harming you?

4.04.9 Do you think the ICC has helped peace here?

4.05 **Closing**

4.05.1 Is there anything you would like to add?

4.05.2 What has it been like for you today to talk to me?
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