

RIGHTS OF VICTIMS OF CRIME UNDER INTERNATIONAL LAW

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MASTER OF PHILOSOPHY

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DECLARATION

I declare that the dissertation entitled “RIGHTS OF VICTIMS OF CRIME UNDER INTERNATIONAL LAW” submitted by me in partial fulfillment of the requirements for the award of the degree of MASTER OF PHILOSOPHY of Jawaharlal Nehru University is my own work. The dissertation has not been submitted for any other degree of this University or any other university


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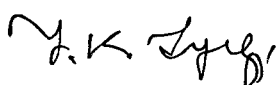

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Abbreviations

ECOSOC	Economic and Social Council
GCU	Gender and Children Unit
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
OPCV	The Office of Public Counsel for Victims
OTP	The Office of the Prosecutor
RPF	Rules of Procedure and Evidence
RR	Regulations of Registry
SCSL	Special Court for Sierra Leone
VPRS	Victims Participation and Reparation Section
VPRU	Victims Participation and reparation Unit
VRWG	Victims Rights Working Group
VTF	Victims Trust Fund
VWU	Victims and Witnesses Unit
WSV	World Society of Victimology

DEDICATED TO MY PARENTS
T.RAMULU
T.RAJAMANI

CHAPTER-I

INTRODUCTION

Crime is an integral part of the risks we face in everyday life. According to the United Nations Office for Drugs Control and Crime Prevention (UNODCCP), 'crime takes an enormous physical, financial and emotional toll on victims. Almost always crime results in victimisation which may be of an individual or a group' (UNODCCP: 1999:iv).¹ There are categories of domestic as well as international crimes such as Genocide, Crimes against Humanity, War crimes and Crime of Aggression.² In the aftermath of a crime the victims are likely to experience a range of physical and psychological effects, which include shock, fear, anger, helplessness, disbelief and guilt. Physical injuries may be of permanent effect and it may lead to negative impact on long-term psychological recovery, since the physical scars serve as a constant reminder of the crime and aggravate post traumatic stress disorder (PTSD).³ The World Health Organization has its own classification of such disorders taking into account the severity of such disorder (WHO: 2007: F 43:1)⁴. The study by S. Solomon and E. Prager (1992:1707) indicates that crime victimisation increases the risk of depression, and PTSD. The findings of study underline the importance of examining all populations that have been exposed to serious trauma.

¹ In May 1996, the United Nations Commission on Crime Prevention and Criminal Justice, at its fifth session, adopted a resolution (ECOSOC, resolution 1996/14) to develop a manual or manuals on the use and application of the "Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power". Pursuant to the resolution a group of experts from more than 40 countries with the support of the Office for Victims of Crime in the United States Department of Justice and the Ministry of Justice of the Netherlands prepared a "*Hand Book on Justice for Victims*". The document was developed in co-operation with the United Nations Office at Vienna, Centre for International Crime Prevention, Office for Drug Control and Crime Prevention (UNODCCP). A brief "*Guidelines for Policymakers*" has also been developed to highlight programmes and policies that have been put into effect in various jurisdictions to implement the Declaration and to ensure that the effectiveness and fairness of criminal justice, including related forms of support, are enhanced in such a way that the fundamental rights of victims of crime are respected.

² The Statute of the International Criminal Court (ICC) has categorised the crimes under article.5 i.e. Genocide, Crimes against Humanity, War crimes and Crime of Aggression. see Articles 6-9, Rome Statute

³ See, Guidelines for policy makers (UNODCCP:1999), p.4

⁴ The WHO has described the Post Traumatic Stress Disorder as "a delayed or protracted response to a stressful event or situation (of either brief or long duration) of an exceptionally threatening or catastrophic nature, which is likely to cause pervasive distress in almost anyone. Typical features include episodes of repeated reliving of trauma in intrusive memories ("flashbacks"), dreams of nightmares occurring against the persisting background of a sense of "numbness" and emotional blunting, detachment from other people, unresponsiveness to surroundings, anhedonia, and avoidance of activities and situations reminiscent of the trauma. Anxiety and depression are commonly associated with the above symptoms and signs and the onset follows the trauma with a latency period that may range from few weeks to months".

Secondary victimisation is another major area of concern of victims of crime. This victimisation occurs not as a direct result of the crime but through the response of the institutions and individuals towards the victim. Institutionalized re-victimisation is most apparent within the criminal justice systems. At times it may amount to a complete denial of human rights. Victims often find that the investigating agencies are unwilling to investigate and prosecutor unwilling to charge perpetrators, which erodes their confidence in justice system. Furthermore, a large proportion of victims refuse to testify during the trial, which leads to acquittal or dismissal of the prosecution case. Moreover, it creates a situation which leads to repetition of crimes.

In many criminal justice systems in the world, victims of crime are often being ignored.⁵ They are rarely allowed to fully participate in decisions that concern them and seldom receive the assistance, support and protection they need. Redress for the harm they suffered as a result of victimisation is often not available and when it is, it is too often insufficient or late in coming. Each type of victimisation requires a different kind of intervention to support and protect the victims of crime, for example, women, and child. The effective way to address the many needs of crime victims is to establish programmes that provide social, psychological, emotional and economical support, and effectively help victims within criminal justice and social institutions. The United Nations Office for Drugs Control and Crime Prevention (UNODCCP: 1999) has recognized the core components of victims' services. These are (a) Crisis Intervention, (b) Counselling, (c) Advocacy, (d) Support during Investigation of a Crime, (d) Support during Criminal Prosecution and Trial, (e) Support after Case Disposition, (F) Training for Professionals and Allied Personnel on Victim Issues, (g) Violence Prevention and other prevention services, (h) Public Education on Victim Issues.⁶ The declaration also emphasis on preparation and follow-up of the informal mechanisms for the resolution of disputes including mediation, arbitration and customary justice or indigenous practices. It should also utilised where appropriate to facilitate conciliation and redress of victims in avoiding

⁵ See UNODCCP 'Justice for Victims' p.1

⁶ For more information see, "Guidelines for policy makers" UNODCCP: 1999. p.29.

unnecessary delay in the disposition of cases and the execution of orders or decrees and awards granting to the victims.⁷

1.1 Background

The right to redress in its various forms has existed in every organized society. Significantly, no legal system known to humankind has ever denied the right of victims to private redress of wrongs. So far, international legal instruments have not given victims a greater role (Bassiouni 2006:206). The right to remedy is a fundamental legal principle which constitutes both a general principle of law and a customary rule of law recognised and applied in all legal systems. Providing remedies to victims of crimes finds its roots in the earliest societies and in many early religious traditions. Legal systems throughout history have provided different forums for the adjudication of claims. They differed as to access, procedures, remedies, decision-making processes and enforced mechanisms.

The scientific study of victimology can be traced back to the 1940's and 1950's. Until then, the primary focus of research and academic analysis in the field of Criminology was on regulation of crimes and criminal perpetrators, rather than on victims. Benjamin Mendelson and Von Henting, who are considered as "fathers of Victimology", began to study the subject from the victims' perspective.(Bharat B.das:1997:24-25). The word "victimology" was coined in 1947 by Mendelson from the Latin word "*victim*" and Greek term "*logos*" meaning, science of victims,⁸ hence, the primary object of victimology is the 'victim'. The credit goes to Mendelson (1937:877), who was an attorney in Romania; for bringing the attention of international community through his first study on "Method to be used by Counsel for the Defence in the Research made into Personality of the Criminal", in 1937. The study was based upon a survey among the criminals, their families and their victims. According to him, the personality of the victim was crucial in attracting the criminal, and he believed that victim contribution was one of the reasons for victimisation. Hans Von Henting (1941:303) took a similar

⁷ General Assembly resolution.A/RES/40/34, 29 November 1985 Para. 7, p.1

⁸ *ibid*

approach in his article "Remarks on the Interaction of Perpetrator and Victim" in 1941. He advanced a dynamic conception of the genesis of crime, argued that the victim of crime is no longer a passive object, but become an active object in the process of criminalisation and decriminalisation. Victimology is concerned with a wide range of problems. It investigates the relationship between offender and victim in crime causation. The victimology also deals with the process of victimisation and its attention to the problem of victim-offender sequence, i.e. the question of whether or not victimization can have crimogenic effect or can encourage crime (Schneider.H.J:1982:15).

One of the earliest calls for reforms came from Margery Fry.⁹ She argued for shelters for battered women, State compensation schemes for victims of crime, and for reconciling the victim and the offender (Weiterkamp: 1999:150). Fry, argued for restitution and restorative justice schemes as well as for state administered compensation schemes. She believed that victim compensation should be seen as an integral part of an enlightened social policy similar to Workers' Compensation programmes.

The working paper on Victims of Crime prepared by the Secretary-General, which was placed at the United Nations Seventh Congress on the Prevention of Crime and the Treatment of Offenders, has "noted that various aspects of victimisation and potential modes of response have received various degrees of attention in different places and at different times. It emphasized that in the shrinking world of mass communications and increased exposure to various forms of human suffering, greater empathy, stress on civil rights, and the quests for social justice have aroused a growing consciousness of the need for more effective action on behalf of victims of whatever kind".¹⁰ During the 1970's a number of international and regional colloquia had been held, reflecting the growing interest in victimology and the development of more effective policies to meet the need of crime victims.

⁹ Margery Fry was a British prison reformer and also worked for Quakers' 'war victims' relief mission in France from 1917-1919 and she was the first woman magistrate in Britain. See for more details "*Historical Dictionary of British Women*" Europa publications Taylor and Francis group" revised edition 2003, London.p.179.

¹⁰ For more information see, Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, A/CONF.171.4. 31st July 1985.

On the other hand, international recognition of victimology came through the first International Symposium, which was held in 1973 at Jerusalem. The symposium dealt extensively with the question of compensating victims of crime. In its conclusion, it recommended that all nations should as a matter of urgency give consideration to the establishment of state system of compensation to the victims of crime, and that the nations should seek to achieve maximum efficacy in the application of these schemes. It was also recommended that information about the operation of such system should be widely disseminated not only to the experts, but also to the general public. It was further recommended that compensation schemes be evaluated with a view to improve their application (Stephen Schafar: 1960:125). The Second International Symposium on Victimology (Bosten, 1976), focused on the problems of comparative victimological research and, in addition, on the questions of whether or not potential victims are to be included in the process of crime prevention and crime control, and of whether or not the victim of crime should play an active role in the criminal procedure (Hans Joachim Schneider 1982:12). The Third International Symposium on Victimology was held in September 1979, Munster. It led to the establishment of the World Society of Victimology (WSV) in 1979.

1.2 The Evolution of Victims' Rights in International Law

The 20th century witnessed the beginning of wars in which new weapons were used and it resulted in to mass human victimisation and material destruction. This culminated in the tragedies of World War I (WW-I) and World War II (WW-II). An estimated 70-170 million people have died since WW-II in over 250 conflicts around the world (Bassiouni 1999:25). International law is concerned about the protection of the individual is in part a result of legal developments that occurred in the wake of the atrocities of WW-II and the international community's subsequent pursuit of individual criminal responsibility (Basssiouni:1999:13). After WW-II, a number of international legal instruments were adopted, which provided for protections and rights for individuals, requiring States to enact domestic legislation to protect these rights.¹¹ The international

¹¹ See, for example, Article 2(3), International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR); Universal Declaration on Human Rights, GA Res. 217A (III), 10th Dec 1948 A/810.p 71.

community's enunciation of internationally protected individual rights was accompanied by efforts to ensure the protection of these rights through a variety of international enforcement mechanisms.¹²

In the 1960s victimology movements were not only concerned with monetary compensation to victims of common crimes, but also offered an incentive to governments by linking such compensation with victims' co-operation in the pursuit of criminal prosecutions. Canada, France, Germany, the Netherlands, and several states within the United States began providing victim compensation for common crimes and thereby encouraged victim participation in criminal proceedings.¹³ In the 1980s the experts of victimology and other fields sought to extend monetary compensation to other forms of redress, including medical, psychiatric and psychological treatment and to expand the basis of such compensation and redress modalities to violations committed by State agencies and State officials (Tobolowsky 1999:21).

During the period of 1980's and 1990's, the cause of victims rights have been fundamentally strengthened by the initiatives of the United Nations General Assembly. It adopted a resolution on the "*Declaration of Basic Principles of Justice for Crime Victims and Abuse of Power*".¹⁴ The Declaration defines victims in the broadest sense; as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their

¹² For a discussion of these enforcement mechanisms, see Lasco, 'Repairing the Irreparable: Current and Future Approaches to Reparations', (2003) 10 *Human Rights Brief* 18. See also Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights', Aldana-Pindell 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes', (2002) 35 *Vanderbilt Journal of Transnational Law* 1399.

¹³ See also the compilation of national legislation on victimology and victims' rights, available at: <http://www.victimology.nl/>.

¹⁴ The concept of victim's needs and rights became a matter of international concern mainly because of the efforts made by the United Nations. The U.N. Congress on Prevention of Crime and Treatment of Offenders took up the cause and contributed substantially in drafting a declaration of victim's Right (Ottawa, 1984) and placed it on the agenda of the 7th U.N. Congress in Milan, between Aug-Sep.1985. The Declaration is based on the philosophy that victims should be adequately recognized and treated with respect for their dignity. They are entitled to access to judicial mechanisms and prompt redress for the harm and loss suffered, including receiving adequate specialized assistance in dealing with emotional trauma and other problems caused by the victimisation. The Declaration recommends the member states measures to be taken on behalf of victims of crime at the international, regional and national levels to improve access to justice and fair treatment, restitution, compensation and assistance

fundamental rights, through acts or omissions that are violations of national criminal laws or of internationally recognized norms relating to human rights".¹⁵ More importantly, the declaration reflects the collective will of the international community to restore the balance between the fundamental rights of suspects and offenders and the rights and interests of victims. The resolution on 'Basic Principles and Guidelines' is the significant development in recognizing the right to remedy.¹⁶

More importantly the UN Draft Convention on Justice and Support for Victims of Crime and Abuse of Power 2006, provides an individual victim a right to redress which became an indispensable component to protect individual human rights (Bassiouni 2006:211). Nevertheless, international human rights law has sought to slightly expand victims right to access, disclosure, compensation, reparations, are symbolic recognition in the criminal proceedings.

The significant contribution in this account was achieved by the establishment of the ad hoc tribunals namely the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹⁷, the International Criminal Tribunal for Rwanda (ICTR),¹⁸ the International Criminal Court (ICC), and Truth commissions. The Statute of the ICC has embodied the provisions of: (a) victim participation in the proceedings; (b) protection of victims and witnesses during Court proceedings; (c) the right to reparations or compensation; and (d) a trust fund out of which reparations to victims may be made.¹⁹

The United Nations has endorsed a series of developments, together with the above mentioned declarations, like the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, resolutions passed by the

¹⁵ See Annex of the General Assembly resolution 40/34, supra note.8, Para.1 and 18.

¹⁶ See General Assembly Resolution., A/RES/60/147, 21 March 2006. It is important to note that this Resolution was adopted by the General Assembly on the report of the Third Committee (A/60/509/Add.1) the matter having been referred to the Third Committee on the basis of the Economic and Social Council's Resolution 2005/30 of 25 July 2005, which in turn was based on the Commission on Human Rights Resolution 2005/35 of 19 April 2005. The same was prepared based on the Independent Expert report by Mr. M. Cherif Bassiouni, which was focused on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. for more information see ECOSOC resolution, E/CN.4/2000/62 18 January 2000.

¹⁷ See, Article 106 of Rules of Procedure and Evidence of ICTY.

¹⁸ See, Article 106 of Rules of evidence of ICTR.

¹⁹ Articles 57, 68(3) and 75 (victims participation in various stages of court proceedings); Articles 43 and 68 (protection of victims and witnesses); Articles 75 and 85 (rights to reparation and compensation); and Articles 75 and 79, ICC Statute (trust fund for victims).

Economic and Social Council (ECOSOC),²⁰ and in its resolution²¹ the Plan of Action for the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Some of the principles expressed in these instruments are incorporated in the provisions of legally binding treaties, for example, Articles 24 and 25 of the United Nations Convention against Transnational Organized Crime²². The duty of the State is to make reparations for its acts or omissions is well-established in treaty-based and customary law. The Permanent Court of International Justice affirmed this principle in the *Chorzow Factory Case* when it stated:

It is a principle of international law that the breach of an engagement involves an obligation to make reparations in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.²³

1.3 Scope and Objectives of the Study

The group of experts noted, “Victim has often forgotten by many of the criminal systems”(UNODCCP: 1999).²⁴ In many societies the victim could aptly be termed the “forgotten person” in the administration of justice. Considerable attention has quite justifiably been paid to ensuring due process for the defendant, who is, after all, threatened with State-imposed punishment, and should therefore, be afforded every possibility of establishing his or her innocence, and presenting other considerations in his or her defence. This degree of attention has not, however, been paid to the victim. Thus the present study focuses on the core issues involved in the rights of crime victims. Starting with the rationale of rights to remedy, restitution by the offender, and

²⁰See, resolutions of the ECOSOC, 1986/10, 1989/57 and 1990/22 which stressed the need for the effective implementation of the Declaration. The ECOSOC called upon U.N. Secretary-General to consider the preparation, publication and dissemination of offering assistance to victims of crime. The ECOSOC in its resolution 1995/13 of 24 July 1995, called upon member-states to provide input on the advisability of preparing a manual on the use and application of the Declaration.

²¹ See for more information, ECOSOC resolution 1998/21 of 28 July 1998.

²² See Articles 24 and 25 provides “Assistance to and protection of victims” under the United Nations Convention Against Transnational Organized Crime and the Protocols related to the convention.

²³ See *Chorzow Factory* (Claim for Indemnity), Jurisdiction, PCIJ Reports 1927, Series A No.8, 21.

²⁴ See UNODCCP (1999) “*Hand book on Justice for Victims*” p.2.

compensation by the state for the victims of crime, and the basic obstacles to implement the same in criminal law system and to evaluate what are the major international changes under victims of crime movement and its developments. Secondly, the study seeks to analyse the judgements of the international criminal courts in order to find the progress of the subject in the international criminal justice systems. Thirdly, it examines the international conventions concerned with the subject. Finally, an attempt will be made to evaluate the UN Draft Convention on Victims of Crime under the present context. Though there are many international crimes, the present study focused on core crimes, which come under international criminal tribunal's jurisdiction. The present study will examine the following issues:

- To look into the definitional aspects of victim of crime under international law, whether it is comprehensive or incomplete.
- To study the needs of victims of international crimes
- To briefly examine relevant case laws on rights of crime victims dealt with by international criminal courts.
- To analyze the provisions under various international conventions explicitly dealing with the rights of the crime victims.
- To analyze the UN Draft Convention on Crime Victims' 2006

1.4 Research Methodology

The study would use primary sources in the form of the official documents of the United Nations, resolutions of its organs, international conventions, including the UN Draft Convention on Victims of Crime and judgments of the international tribunals. The secondary sources of literature would include books, articles in various international legal journals and other reports of research institutes. Internet sources will also be used to gather and examine information on the subject.

Chapterisation

1. Introduction

2. The second chapter will examine the definitional aspects of crime victims under various international instruments. It deals with the following categorization of victims and the provisions related to the rights of the crime victims under various international conventions, and also other declarations or resolutions adopted by United Nations.

3. The third chapter covers the evolving Jurisprudence of international tribunals, on the issue and lacunas in existing laws. It considers the rights of crime victims before the trial, during the trial and after trial.

4. The fourth chapter deals with the negotiating history of the UN Draft Convention on Victims of Crime and need of the convention in the present context.

5. The last chapter summarises the observations of the study and also proposes suitable recommendations.

CHAPTER -II

RIGHTS OF VICTIMS OF CRIME UNDER INTERNATIONAL LAW

Traditionally, criminal justice focused on providing rights and protection to the accused in order to guarantee that he or she tried in accordance with fundamental principles of due process, as he or she is facing a potential conviction and deprivation of liberty. This would be applicable to both the common law and civil law systems, although the modalities for affecting these principles vary between the systems. (Chiefflet :2003:75) the procedure and practice of the International Criminal Tribunal for the former Yugoslavia (ICTY) with respect to the victim shows that this principle also applies to the international criminal law regime. The victim is first and foremost dealt with as witness, having no right to representation or participation as seen in most civil law systems and less provisions for compensation. "If witnesses will not come forward or if witnesses refuse or otherwise unwilling to testify, there is minimal evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and Tribunal's ability to accomplish"¹

Victims and witnesses are pivotal in the proceedings before the Tribunal.² The need to protect victims and witnesses, admitted in most national legal systems, is also recognised in international law. Victims of crime are increasingly relying upon the concept of a duty to repair harm in seeking redress for injuries they have suffered due to the criminal conduct of another, at the national, regional and international levels. The acts very often involve violations of human rights. Such claims can arise in one of the five procedural (1) an interstate case of diplomatic protection brought by the state of

¹ *Prosecutor v. Brdanin and Tadic*, Motion for Protective Measures, Case No. IT-99-36-PT, 10 January 2000, para.14

² While the Nuremberg Tribunal relied heavily on documents in the course of its proceeding and allowed a very limited number of witnesses to testify, the ICTY finds itself in very different position. Contrary to post-war Germany, the States of the former Yugoslavia kept their hands free and the cooperation with the Tribunal's requests for assistance in terms of production of documents remained non-existent for some time. As a result, offences are proved directly from testimony of the witnesses of crimes. (Riem 2005:1821)

nationality of the victims, on their behalf, against the state responsible for the injury;(2) a claim brought directly by the victims against the responsible state in an international forum, provided local remedies have been exhausted; (3) a claim brought by the victims against the responsible state in national judicial or administrative bodies; (4) a claim brought by the victims against the individual perpetrators in an international forum;(5) and a claim brought by the victims against the individual perpetrators in a national forum. It is increasingly claimed that 'justice for victims', i.e. prosecution and punishment of perpetrators, is required for social reintegration, reconciliation, and long-term peace and security within the state and in the international community. Recent empirical studies, however, call into question some of the more optimistic expectations of criminal prosecution, at least in the context of gross and widespread violations of human rights. (Laurel Fletcher and Harvey Weinstein 2002:573)

2.1 Remedies for Victims of Crime

The word remedies contain two separate concepts, the first being procedural and the second substantive. In the first sense, remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies. The second notion of remedies refers to the outcome of the proceedings; the relief afforded to the successful claimant".³ The Universal Declaration on Human Rights 1948 provides "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".⁴ All principal universal human rights instruments contain provisions that establish a right to an effective remedy for victims of human rights violations (Ian Brownlie and Guy S. Goodwin-Gill: 2007)⁵ The right to an effective remedy is also recognized in human rights instruments dealing with specific rights. It includes the right to investigation, prosecution and punishment of those

³ Remedies are 'the means by which a right is enforced or the violation of a rights is prevented, redressed or compensated' (Black's *Law Dictionary*:1990: 1294)

⁴ See Article 8, adopted by the UN General Assembly on 10 December 1948, available at www.un.org/Overview/rights.html.

⁵ See, Article 2(3) of the International Covenant on Civil and Political Rights 1966; Article 13 of the European Convention on Human Rights; Articles 8 and 25 of the American Convention on Human Rights; and Article 7(1) of the African Charter on Human and Peoples' Rights.

responsible for human rights violations, as well as the right to reparation.⁶ The practice of the United Nations human rights bodies, many of the declarations/ resolutions of the General Assembly, Economic and Social Council, have addressed victim's rights and also international criminal tribunals in its proceedings dealt with the victim's rights. The definition of the victim and the basic international declarations/resolutions, provisions of statutes of the international criminal tribunals and international conventions, which deal with victims' rights, are discussed below.

2.2 Definition of the Victim

According to Oxford dictionary (2005), 'Victim' is (i) a person who has been attacked, injured or killed as the result of a crime, an accident, etc; (ii) a person who has been tricked; (iii) An animal or a person that is killed and offered as a sacrifice; to be damaged or killed by. The American heritage dictionary's (2004) definition of 'Victim' which includes a person or creature sacrificed in religious rites⁷ The Merriam web dictionary (2008) provides a similar definition⁸ The United Nations Crime Congress working group(1985), the first time defined broad to the above it provides 'victim' as "persons who have suffered loss, damage or injury, to their persons, property or human rights as result of conduct which is: (a) a violation of national penal laws; (b) a crime under international law; or (c) a violation of internationally recognised human rights principles; or which (d) otherwise amount to an abuse of power by persons occupying positions of political or economic authority". The working group accepted that a victim may be an individual or collectively a group, class, community of individuals, economic business entity, political group or organisation.

The working group recognised that the term victim includes both natural as well as legal persons. The interesting thing here is that it was the only instrument, which considered a

⁶For further details see, Article XIII of the draft Convention on the Prevention and Punishment of the Crime of Genocide, prepared by the secretariat May 1947, "When genocide is committed in a country by the government in power or by sections of the population, and if the government fails to resist it successfully, the State shall grant to the survivors of the human group that is a victim of genocide redress of a nature and in an amount to be determined by the United Nations." available at www.un.org/millennium/law/iv-1.htm; Articles 4 and 12-14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment, adopted by the UN General Assembly on 10 December 1984, entered into force 26 June 1987, available at www.ohchr.org/english/law/cat.htm; Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination, adopted by UN General Assembly on 21 December 1965, entered into force 4 January 1969, available at www.unhcr.ch/html/menu3/b/d_icerd.htm; and Articles 8 and 12 of the Convention for the Protection of all Persons from Enforced Disappearance adopted by the UN General Assembly on 20 December 2006.

⁷ See The American Heritage® Dictionary (2004) which defines 'victim' as i) a person who suffers from a destructive or injurious action or agency: a victim of an automobile accident. ii). a person who is deceived or cheated. as by his or her own emotions or ignorance, by the dishonesty of others, or by some impersonal agency: a victim of misplaced confidence; the victim of a swindler; a victim of an optical illusion. iii). a person or animal sacrificed or regarded as sacrificed: war victims. iv) a living creature sacrificed in religious rites."

⁸ It's defined 'victim' as 1) a living being sacrificed to a deity or in the performance of a religious rite; 2) One that is acted on and usu. adversely affected by a force or agent: 3) one that is injured, destroyed, or sacrificed under any of various conditions: 4) one that is subjected to oppression, hardship, or mistreatment.

legal person as victim whereas, the subsequent United Nations instruments including the 2006 UN Draft Convention on Justice for Victims and Support for Victims of Crime and Abuse of Power, have acknowledged only a natural person as victim. The statute of the International Criminal Court is an exception to this.

The UN Declaration on Justice for Victims (40/34:2005) contains a broad definition of victims:

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States.
2. A person may also be considered a victim regardless of whether the perpetrator has been identified, apprehended prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

A major innovation of this definition was that it included not only the direct victims of crimes, but also those who have suffered indirectly: the victim's family and dependents. The definition also includes those who have suffered harm in intervening to assist victims through mentally and physically. The Van Boven / Bassiouni principles also adopt the broad definition of victims contained in the UN Declaration on Justice for Victims.⁹

Both the ad hoc tribunals The ICTY,¹⁰ (ICTR),¹¹ contain a very limited definition of victims, which provides that is "A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed." The requirement to fall under the definition of the victim is the crime must have been committed against the victim. Which implies those who suffer harm from the consequences of a crime, i.e. who are not specifically targeted, are not recognised as victims. In other words, the dependents and family members are not covered under this definition, which is the lacuna in it. Boven principles went ahead recognising the immediate family or dependents of direct victim.

⁹ Principle 8 defines "Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

¹⁰ See, the Rules of Procedure and Evidence of the ICTY. Under Rule 2 (A).

¹¹ See, the Rules of Procedure and Evidence of the ICTR. Under Rule 2 (A) of the Rules of Procedure and Evidence.

According to the Rules of Procedure and Evidence (RPE) of the International Criminal Court (ICC):

- (a) "Victims" mean 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.¹²

In order to fall within the definition, a person has to show that he or she suffered harm as a result of the commission of any crime within the jurisdiction of the Court. There is no requirement that the crime directly targeted him or her, or that the harm suffered was directly caused by the crime. The definition should therefore be interpreted to include victims' families and dependents, referred to as 'indirect victims' in addition, victims "may" include certain organisations or institutions which have suffered 'direct harm' to property.¹³ An issue of concern before the drafters of the statute was the precise definition as a person and not a moral or abstract entity. That person, however, could be part of a collectively or group. (Bassiouni 2006:255)

This definition is connected to the broad role envisaged for victims under the Rome Statute. Those who are considered victims under Rule 85 (RPE) of the ICC can be permitted to participate in court proceedings and can seek reparations. With the establishment of the International Criminal Court, victims have gained an unprecedented opportunity to see those responsible for serious crimes under international law brought to justice. The unique regime of the ICC holds the promise of becoming an effective instrument for victims to vindicate their rights. Victims and other non-governmental organisations continue to campaign to ensure that this promise is fulfilled.¹⁴ It is

¹² Rule 85 of the ICC Rules of Procedure and Evidence takes into account the evolution of the status and the definition of victims in international law, considering the above mentioned UN instruments.

¹³ The Rome Statute does not contain definition of "victims". Agreeing on a definition proved to be very controversial and was left to the drafting of the Rules of Procedure and Evidence. However, the travaux préparatoires (records of the negotiations) of Article 75 expressly provided that "victims" and "reparation" should be defined in accordance with the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Declaration on Justice for Victims) and the draft Van Boven Principles 23.

¹⁴ See, Victims Rights Working Group established in 1997, is a group of organizations have promoted the interests and needs of victims in criminal justice and human rights bodies. It continues to work on victims' rights before the International Criminal Court. For more details visit URL: [http:// www.vrwg.org/](http://www.vrwg.org/).

important to note that, the definition of the victim in the United Nations Draft Convention on Justice and Support for Victims of Crime and Abuse of Power, prepared on 14th November 2006 (herein after the UN Draft Convention on Victims of Crime) has also narrowed down the definition to natural persons.¹⁵

2.3 Categories of the Victims

The United Nations Working Group survey has classified the victims into four categories on the basis of the crimes. They are as follows:

- (a) Victims of conventional crimes, such as murder, robbery, assault or arson;
- (b) Victims of new and non-conventional forms of crime, such as illegal drug trafficking, organised crime, computer crime, terrorism, hijacking, bribery and corruption;
- (c) Victims of illegal abuses of economic power, such as offences against labour regulations, consumer fraud, environmental offences, market and trading abuses by transnational corporations, exchange control valuations, and tax evasion, bribery and corruption;
- (d) Victims of illegal abuse of public power, such as human rights violations and abuse of authority by or other states agencies of control, including wrongful arrest, and imprisonment.

The definition under the ICC Statute contemplates four types of victims (Bassiouni: 2006:257)(1) those individuals who directly suffer harm;¹⁶ (2) dependents or family of a direct victim who suffer indirectly because of the primary victimisation;¹⁷ (3) individuals injured while intervening to prevent violations¹⁸; and (4) collective victims¹⁹ such as organisations or entities (Bloomfield, Barnes and Huyse (2003).

¹⁵ (1) "Victims" means natural persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering or economic loss or violations of fundamental rights in relation to victimizations identified under 'scope'. (2) A person is a victim regardless of whether the crime is reported to the police, regardless of whether a perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term 'victims' also includes where appropriate, the immediate family or dependants of the direct victims and persons who have suffered in intervening to assist victims in distress or to prevent victimization."

¹⁶ The first category of victims includes those individuals who personally are the victims of violations such as torture and arbitrary arrest or property confiscation.

¹⁷ The second category includes members of their household or dependants who suffer because of the primary violation. For example, if the primary income earner is 'disappeared' or unable to work because of injuries sustained, then the family suffers loss as well. The trauma suffered by the family members of a victim can be severe and have long-lasting implications. This can include: serious socio-economic deprivation, bereavement, the loss of a breadwinner.

¹⁸ The third category includes individuals who are injured trying to intervene on behalf of a victim. Injuries that such a person might suffer are from physically trying to pull a victim from harm's way, loss of employment or imprisonment for challenging authorities for persecuting a targeted group.

¹⁹ The collective victim is, perhaps, best illustrated by organisations or entities who suffer harm to property that is dedicated to religious, educational, humanitarian or charitable purposes. This includes those entities

2.4 United Nations General Assembly Resolutions on Victims of Crime

2.3.1 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

Immense contribution from the United Nations Bodies on victims rights, among them the General Assembly, Economic and Social Council (ECOSOC) along with the United Nations Office of the Drugs Control and Crime Prevention (UNDOC) would be in the fore front, the “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” adopted on 29th November 1985. Initially this was prepared by the United Nations 7th Crime congress at Milan, which laid down the minimum standards for the treatment of crime victims and it has been heralded as the ‘*magna karta*’ of the international victims movement. The declaration based is on the belief that victims should be treated with compassion and respect their dignity and that they are entitled to prompt redress for harm that they have suffered, through accesses to the criminal justice system, reparation and services to assist for recovery of their property (UNODCCP.a 1999: iv). This declaration, however is not legally binding by itself, but, it is considered as a landmark achievement of the international victims movement to advance their interest’s.

Ten Core Basic Principles of Justice for Crime Victims²⁰

1. Victims must be treated with compassion and respect;²¹
2. Victims have a right to information on the proceedings;²²

that are in fact the community’s custodians of cultural property, such as historical monuments. Collective victims are part of a specific population, targeted as such. This fourth category also includes victims who belong to an identifiable group whose victimisation, irrespective of the merits of the case by and against the causes of the conflicts that gave rise to it, was based on their belonging to a given group. Since WWII, three non-international conflicts have produced an estimated total of five million collective victims. The recognition of collective victims is found in the following international and regional treaties and instruments: Article 1, ICESCR; Article 1, ICCPR; Article 2, Indigenous and Tribal People’s Convention; Article 2, Optional Protocol to CEDAW; and Article 3(2). European Framework Convention for the Protection of Minorities. (Mayagna 1999:85)

²⁰ Van Dijk, J, 2005, ‘Benchmarking Legislation on Crime Victims: The UN Victims Declaration of 1985’. in Vetere, E. & David, P. (eds), *Victims of Crime and Abuse of Power: Festschrift in honour of Irene Melup, 11th Congress on Crime Prevention and Criminal Justice. policies*. Available at . www.tilburguniversity.nl/intervict/publications/050707.pdf (accessed on 2.2.08)

²¹ According to the declaration, victims should be treated with dignity and respected at all stages of the criminal justice proceedings. See for details Article.4 annex to the declaration (UNODCCP:1999) at p.18

²² Victims should ensure that judicial and administrative officials provide with timely information on procedural and practical issues regarding their case, as well as the scope and relevance of any decisions taken. *Ibid.* Article 6(a) of the annex to the declaration. At p.19

3. Victims have a right to present their views to the judicial authorities;²³
4. Victims are entitled to legal aid;²⁴
5. Victims have a right to see their privacy/identity protected;²⁵
6. Victims have a right to protection against retaliation/intimidation;²⁶
7. Victims have a right to be offered the opportunity to participate in mediation;²⁷
8. Victims have a right to receive compensation from the offender or state;²⁸
9. Victims have a right to restitution;²⁹
10. Victims have the right to receive social support/assistance.³⁰

2.3.2 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

The General Assembly adopted the resolution on '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 2005'³¹.

²³ Victims are entitled to present their views and concerns in proceeding where their interests are affected at an appropriate stage, and the same should be consider, without prejudice to the rights of the accused. *Ibid* Article 6(b) at p.20

²⁴ Victims are entitled to get cost-free legal aid before the court during the proceedings. *ibid* Article 6 (c) at p.21

²⁵ Measures should be taken to minimize the inconvenience to the victims while protecting their identity, privacy, whenever it is required, *Ibid* Article 6 (d) at p.22

²⁶ Victims should be ensured to their safety and the members of his/her family, and also witnesses on their behalf from intimidation and retaliation from the perpetrator *Ibid*

²⁷ Victims are entitled to recourse the alternative disputes resolutions through informal mechanisms such as customary justice or indigenous practices and traditions including mediation and arbitration to felicitate conciliation to redress their grievances. *Ibid* Article 7, at p.23

²⁸ Victims and dependents of the family members, who have sustained significant bodily injury or impairment of physical or mental health or died as a result of the crimes, are entitled to seek compensation from the accused. When offender is not in a position to compensate to the victims of his crime for any reasons the state should endeavour to provide financial mechanism to the victims.

Ibid. Article 12 at, p.26.

²⁹ Victims are entitled to right to restitution from the offender or third parties, which includes the return of the property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization and also restore the legal rights which ere effected. *Ibid.* Article 8, at, p.24

³⁰ Victims are entitled to get all the necessary material, medical, psychological, and social assistance through governmental, voluntary, community- based and indigenous means. *Ibid.* Article 14, at, p.27.

³¹ The Basic Principles and Guidelines also called Van Boven or Bassiouni Principle on victims of crime. In pursuant to the ECOSOC resolution 1998/43, the office the Human Rights Commission on Human Rights requested its Chairman to appoint an independent expert to prepare a revised version of the basic principles and guidelines elaborated by Mr. Theo van Boven with a view to their adoption by the General Assembly. In Pursuant to paragraph 2 of resolution 1998/43. the Chairman of the Commission on Human Rights appointed Mr. M. Cherif Bassiouni to carry out this responsibility. Final report of the Special

Recognizing that, in honouring the victims right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms under international law in the field.³² The resolution recommended the members states to consider the guidelines and to promote and respect them and bring them to the attention of members of the executive bodies of the state, in particular law enforcement bodies and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general. The basic principles are:

(a) Obligation on the States to Respect, Ensure Respect for and Implement International Human Rights Law and International Humanitarian Law

The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from; (a) Treaties to which a State is a party; (b) Customary international law; (c) The domestic law of each State. State parties are obliged to incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system; while adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice, and also make available adequate, effective, prompt and appropriate remedies, including reparation under the scope of obligation.³³

(b) Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian law

In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and the duty to punish her or him. States should also facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance and protection of victims and witnesses.

Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33 of the ECOSOC. General Assembly Res.(2005)A/RES/ 60/147 "Van Boven / Bassiouni Principles"

³² See, Preamble of the resolution.

³³ The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law. includes, inter alia, the duty to: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) Investigate violations effectively, promptly, thoroughly and impartially and where appropriate, take action against those allegedly responsible in accordance with domestic and international law.

(C) Limitations of Statutes

The provisions of an applicable treaty or contained in other international legal obligations, limitations of such statutes shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law. Limitations of domestic laws /statutes for the crimes under international law, including time limitation which are applicable to civil claims and other procedures should not be unduly restrictive.

(d) Treatment of Victims

Victims should be treated with humanity and respect for their dignity and human rights and required measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care.

(e) Victims Right to Remedies

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the following victim's right as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for the harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

(f) Access to Justice

Obligations of the States arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws for the victims of international crimes. To that extent the States should disseminate, information through public and private mechanisms, about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law and to take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims.

Through providing proper assistance to victims seeking access to justice, availability of all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy under the international law. In addition States should also endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive adequate and prompt reparation for gross violations of international human rights law or serious violations of international humanitarian law.

(g) Reparation

Reparation should be proportional to the gravity of the violations and the harm suffered which includes provided with full and effective reparation, as laid out in principles 19 to 23, which refer to forms of Restitution,³⁴ Compensation,³⁵ Rehabilitation,³⁶ Satisfaction,³⁷ and Guarantees of non-repetition.³⁸ In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law.³⁹

³⁴ The States should restore the victim his/her to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred subject to the possibility of the situation or case. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property. See principle 19 of annex

³⁵Victim should be provided for any economically assessable damage, as which is appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as, physical or mental harm, lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential, moral damage, Costs required for legal assistance, or medicine and medical services, and psychological and social services. see for article principle 20 of annex

³⁶Rehabilitation should include medical and psychological care as well as legal and social supporting services. See principle 21 of annex

³⁷ Satisfaction should include, where applicable, any or all of the following: (a) Effective measures aimed at the cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; (f) Judicial and administrative sanctions against persons liable for the violations; (g) Commemorations and tributes to the victims; (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels see principle 22 of annex.

³⁸ 23. Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention: (a) Ensuring effective civilian control of military and security forces; (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (c) Strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of the society and training for law enforcement officials as well as military and security forces; (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

³⁹ In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided



(h) Access to Relevant Information

States should develop all means to inform the public in general and victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. It also applies to the representatives of the victim.⁴⁰

(i) Non-Discrimination

The application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.⁴¹

(j) Non-Derogation

Nothing in these Basic Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. It should be understood that these Basic Principles and Guidelines are without prejudice to special rules of international law.⁴²

(k) Rights of the Others

These principles should not be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.⁴³ Present resolution has extensively elaborated the principles for example; Principle of Reparation and it imposes the obligations on member states to implement the victims rights at domestic and international levels.

2.3.3 UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL (ECOSOC)

(a) Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (ECOSOC: 1989/57annex)

The Economic and Social Council bearing in mind the General Assembly resolution (40/34) recommended member states to take the necessary steps to give effect to the provisions of the declaration for protection of victims of crime and abuse of power. While recalling section III of its resolution 1986/10 of 21 May 1986, in which it recommended that continued attention be given to the implementation of the General

reparation to the victim. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

⁴⁰ *Ibid* principle 24 of annex

⁴¹ *Ibid* principle 25 of annex

⁴² *Ibid* principle 26 of annex

⁴³ *Ibid* principle 27 of annex

Assembly declaration with a view to developing the co-operation of non-governmental organisation and the public in securing justice and in promoting integrated action on behalf of victims at the national, regional and international levels. The council also recommended that member States in collaboration with relevant services, agencies and organizations should endeavour:

- a) To encourage the provision of assistance and support services to victims of crime;⁴⁴
- b) To develop suitable training for all those persons who are dealing with services to victims;⁴⁵
- c) To establish effective channels of communication among all those who are involved with victims services;⁴⁶
- d) To ensure that victims are kept informed of their rights and opportunities;⁴⁷
- e) Practice of informal mechanisms for the resolution of disputes;⁴⁸
- f) To establish a monitoring and research programmes;⁴⁹
- g) To undertake studies to identify the needs of victims in case of non-reported crimes

(b) Plan of Action for the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (ECOSOC: 1998/21 annex)

The Secretary-General,⁵⁰ while acknowledging the active participation of the member states and intergovernmental and non-governmental organizations active participation recommended the following steps.⁵¹

- a) Capacity –building;⁵² b) Information-gathering, information exchange to research;⁵³

⁴⁴ In view of different social, cultural and legal systems, on the basis of experiences of different models and methods of service delivery and the current state of knowledge concerning victimization including their emotional impact, and the consequent needs.

⁴⁵ To enable professionals to develop the skills and understanding needed to help victims to bring out the trauma.

⁴⁶ For dissemination of information to enable them to prevent further victimization as a result of the workings of the system;

⁴⁷ With respect to redress from the offender, third parties or State, as well as of the progress of the criminal proceedings and any other opportunities if any.

⁴⁸ Informal mechanisms should consider the wishes and sensibilities of victims and that the outcome is at least as beneficial for the victims of crime.

⁴⁹ To keep the needs of victims and the effectiveness of services provided to them should be under constant review.

⁵⁰ In the present plan of action, references to the Secretary-General are understood as signifying primarily the United Nations Office on Drugs and Crime and institutes of the United Nations Crime Prevention and Criminal Justice Programme network.

⁵¹ See sections I to V of annex.

⁵² It is recommended to all stakeholders of the plan to incorporate victim assistance modules in technical cooperation projects and to assist interested member states in applying the Guide for Policy Makers on the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

- b) Prevention of victimization;⁵⁴ c) Actions at the regional and international levels;⁵⁵
- c) Coordination of relevant initiatives;⁵⁶

(c) Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime

The objectives of the guidelines are to assist in the review of national and domestic laws, procedures and practices so as to ensure full respect for the rights of child victims and witnesses of crime and contribute to the implementation of the convention on the rights of child, by parties to the convention.⁵⁷ To assist Governments, international organizations, public agencies, non-governmental and community-based organizations and other interested parties in preparing and implementing legislation, policy, programmes and practices that address the core issues related to child victims and witnesses of crime.⁵⁸ Present guidelines would apply to the Child victims and witnesses under the age of 18; regard less of their role in the offence or in the prosecution of the alleged offender or groups of offenders.⁵⁹

(d) Declaration on the Elimination of the Violations against Women 1993

The General Assembly has recognised that the violence against women is an obstacle in the achievement of equality, development and peace, as accepted in the

⁵³ It is recommended that to support the international database on practical national and regional experiences in providing technical assistance in the field and bibliographic and legislative information, including case laws on the subject.

⁵⁴ It is requested to member states, upon request, in responding to cases of large-scale victimization, terrorism and man-made catastrophes that are the result of criminal negligence and all stake holders are encouraged to conduct public information and education campaigns designed to prevent and curtail victimization and re-victimisation.

⁵⁵ It is requested to explore the possibility of developing regional commissions, is requested to explore the possibility of developing regional mechanisms for monitoring victimization and providing recourse and/ or redress for victims.

⁵⁶ Secretary-General has requested to member states in strengthening coordination arrangements and procedures to foster joint planning and implementation of victim-related activities.

⁵⁷ See, Article 1 of annex.

⁵⁸ See, Article 3 of annex (a) To assist in the review of national and domestic laws, procedures and practices so that these ensure full respect for the rights of child victims and witnesses of crime and contribute to the implementation of the Convention on the Rights of the Child by the parties to that Convention; (b) To assist Governments, international organizations, public agencies, non-governmental and community-based organizations and other interested parties in designing and implementing legislation, policy, programmes and practices that address key issues related to child victims and witnesses of crime; (c) To guide professionals and where required, volunteers who are working with child victims and witnesses of crime in their day-to-day practice in the adult and juvenile justice process at the national, regional and international levels, consistent with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; (d) To assist and support those caring for children in dealing sensitively with child victims and witnesses of crime;

⁵⁹ See, Article 9 of the annex.

Nairobi forward looking strategies for advancement of women.⁶⁰ In which a set of measures to combat violence against women was recommended, the full implementation of the Convention on the Elimination of All Forms of Discrimination against Women⁶¹, under article 2 the declaration has defined the violence against women. Violence against women shall be includes Physical, sexual and psychological violence occurring in the family and the community including battering, sexual abuse of female children in the household, dowry related violence, rape, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation, sexual harassment and intimidation at work, in educational institutions, trafficking, forced prostitution.

(e) Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice⁶²

The General Assembly pointing out the multifaceted nature of violence against women suggests that different strategies are required for different manifestations of violence and the various settings in which it occurs. The practical measures, strategies and activities described under the resolution can be introduced in the field of crime prevention and criminal justice to deal with the problem of violence against women except where otherwise specified, the term “women” encompasses “girl children”.⁶³ Member States were urged to periodically review, evaluate and revise their laws, codes and procedures, especially their criminal laws, and revise their civil laws at domestic level to ensure their value and effectiveness in eliminating violence against women and to remove provisions that allow for or condone violence against women.⁶⁴

The resolution further urged the member states with regard to victim support and assistance to make available to who have been subjected to violence information on rights and remedies and information of schedules of the proceedings till disposal of their

⁶⁰ Report of the World Conference to Review and Appraise the Achievements of the United Nations decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985 (United Nations: 1985) chapter I, section, 1.

⁶¹ See. General Assembly resolution 48/104 adopted on December 20, 1993.

⁶² General Assembly resolution A/RES 52/86 annex.

⁶³ See, Article 1 of annex.

⁶⁴ See. Article 6 (a). of the resolution.

case. Encouragement for lodging complaints, assurance of formal and informal mechanisms as per the sensitive needs of the violence victims, for prompt and fair redress of the harm they suffered including the compensation and restitution from the offender and the state as well. Further the resolution recommended for establishing a registration system for judicial protection and restraining orders, where such orders are permitted by national law, so that police or criminal justice officials can quickly determine whether such an order is in force.⁶⁵

2.5 United Nations Compensation Commission

In 1991, after the war in Iraq, the UN Security Council established a Compensation Fund and UN Compensation Commission (UNCC), under Chapter VII of the UN Charter, to administer and process compensation claims arising out of Iraq's unlawful invasion and occupation of Kuwait.⁶⁶ The UNCC was not envisioned as a court or tribunal, but rather a 'claims resolution facility'.⁶⁷ It was designed to deal with property compensation issues arising from unlawful activities and international human rights and humanitarian law violations. The UNCC was the first victim-compensation system ever to be established by the Security Council acting under Chapter VII of the UN Charter (Crook: 1993). It provided individual victims with a primary role in the process of compensation. In contrast to the established practice of providing compensation only to the injured States, the UNCC compensation scheme provides a pioneering procedure whereby a State is required to provide direct compensation to both individual victims and corporate entities.⁶⁸ Since its establishment in 1991, the UNCC has received over 2.7 million claims seeking compensation in excess of \$350 billion (US).

⁶⁵ See, Article 10 of the resolution.

⁶⁶ See, Security Council Resolution. 692, adopted on 20 May 1991, S/RES/692 (1991).

⁶⁷ Secretary-General's Report, 2 May 1991, S/22559.

⁶⁸ Individual victims and corporations were required to present their claims through their respective governments or international organisations on behalf of those individual victims who are not in a position to have their claims filed by a government. The latter types of claims were submitted by the United Nations Development Program and the UN High Commissioner for Refugees.

2.6 International Criminal Tribunals and Victims of Crime

2.6.1 The Nuremberg and Tokyo Tribunals

The International Military Tribunal at Nuremberg (herein after called Nuremberg Tribunal) was established by the London Agreement of 8 August 1945 Nuremberg Charter (Taylor.T 1992:307). The Nuremberg Tribunal was established for the just and prompt trial and punishment of the major war criminals of the European Axis.⁶⁹with respect to the war in the Far East, the Declaration of Potsdam, which provided that “stern justice shall be meted out to all war criminals” in Japan, was issued on 26 July 1945, and on 19 January 1946, the Supreme Commander for the Allied Powers by executive decree, established the International Military Tribunal for the Far East (Tokyo Tribunal).Victims did not have a particular status before either of the tribunal. They had no possibility of initiating investigations or prosecutions. There was neither particular unit entrusted with providing assistance and support to victims, nor were there provisions on providing victims with reparations (Zappala.S 2003:312).

The Charters of the Tribunals did not even contain definition of victim, in line with the peripheral role granted to victims in the proceedings. In fact, the involvement of witnesses before both tribunals was limited. At the Nuremberg Tribunal, the meticulous record keeping of the Nazi regime meant that many elements of the charges could be proved by written evidence.⁷⁰ The prosecution team therefore decided, to put no witnesses they could possibly avoid (Von Hebel, H. A. M, et al. (1999:38) and the prosecution was largely based on documentary evidence. By the time the trials began, the Allied Forces had access to German military archives as well as to the reports of national commissions, which had heard about 55,000 witnesses (Wald P.M 2002:219). In Nuremberg, very few survivors were heard as witnesses; the prosecution was mainly focused on documentary evidence. (Tobias Lock and Riem 2005:1821) even called the IMT largely victim-free, stating that testimonies of the victim could have made the trials more dramatic and thus more memorable for the public, as there would have been a

⁶⁹ See Article 1 Nuremberg Charter.

⁷⁰ See Security Council Res. 692, adopted on 20 May 1991, S/RES/692 (1991) at 57.

personalisation of the crimes. The proceedings would thereby have been legitimised, and there would also have been a therapeutic effect for the community of the survivors.

2.6.2 International Criminal Tribunal for the Former Yugoslavia (ICTY)⁷¹

On may 1993, the UN Security Council took the extraordinary and unprecedented step of deciding to establish the International Criminal Tribunal for the Former Yugoslavia (herein after called ICTY)⁷² as a mechanism for the restoration and maintenance of international peace and security (Rachel Kerr:2004). In its resolution adopting the Statute of the International Criminal Tribunal for the former Yugoslavia, the Security Council decided that the work of the International Tribunal should be carried out without prejudice to the right of victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law.⁷³The statute of the ICTY provides under Article 22, relating to protection of victims as; The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.⁷⁴Rules of Procedure and Evidence (RPE) of the ICTY, Articles 105 and 106 RPE⁷⁵ relating to Restitution of Property and Compensation to victims provides:

- (a) After a judgment of conviction containing a specific finding as provided in Rule 98 *ter* (b), the Trial Chamber shall, at the request of the Prosecutor, or may, *proprio motu*, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.⁷⁶
- (b) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty.
- (c) Such third parties shall be summoned before the Trial Chamber and be given an opportunity to justify their claim to the property or its proceeds.

⁷¹ The ICTY was established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

⁷² See Security Council Resolution 827/1993 of 25 May 1993, the resolution is extremely significant innovation in the use of mandatory enforcement powers by the Security Council, and the manifestation of the explicit link between peace and justice.

⁷³ See Security Council Resolution 827 (1993) preamble.

⁷⁴ See Article 22 of Statute of ICTY.

⁷⁵ These Rules of Procedure and Evidence, were adopted pursuant to Article 15 of the Statute of the Tribunal has came into force on 14 March 1994.

⁷⁶ As amended by 25 July 1997, amended 10 July 1998, amended 12 Apr 2001

- (d) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order, as it may deem appropriate.
- (e) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.
- (f) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order, as it may deem appropriate.
- (g) The Registrar shall transmit to the competent national authorities any summons, orders and requests issued by a Trial Chamber⁷⁷

Compensation to Victims

- (a) The Registrar shall transmit to the competent authorities of the States concerned the judgment finding the accused guilty of a crime, which has caused injury to a victim.
- (b) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.⁷⁸
- (c) For the purposes of a claim made under paragraph (b) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.⁷⁹

2.6.3 International Criminal Tribunal for Rwanda (ICTR)⁸⁰

Article 21 of the Statute of the ICTY has provided the provision for the protection of victims and witnesses as;

The International Tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victims identity.

In pursuant to article 21 of the ICTR Statute, the Rules of Procedure and Evidence⁸¹ (RPE) of ICTR provided under Rule 105 and 106 for Restitution of Property and Compensation as;

⁷⁷ Paragraphs (C), (D), (E) and (F) were Revised 30 Jan 1995 and amended on 12 Apr 2001

⁷⁸ Revised 12 Nov 1997

⁷⁹ Amended 12 Apr 2001

⁸⁰ The Security Council of United Nations acting under Chapter VII of the Charter of the United Nations, established an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994. S/RES/955 (1994) adopted on 8th November 1994. (The full name of the ICTR is "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Rwanda since 1991". IT/32/Rev. 41 28 February 2008).

⁸¹ These Rules of Procedure and Evidence, adopted pursuant to Article 14 of the Statute of the Tribunal, were came into force on 29 June 1995. Up dated RPE, of 14th march 2008.

(a) After a judgment of conviction containing a specific finding as provided in Rule 88 (b) The Trial Chamber shall, at the request of the Prosecutor, or may, at its own initiative, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.⁸²

Compensation to Victims⁸³

(a) The Registrar shall transmit to the competent authorities of the States concerned the Judgement finding the accused guilty of a crime which has caused injury to a victim.

(b) Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.

(c) For the purposes of a claim made under Sub-Rule (b) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

The provisions of the Statute of the ICTY and the ICTR and their Rules of Procedure and Evidence dealing with victims almost exclusively dealt with their protection. In fact part of witness protection schemes which are not addressed completely needs of victims as such. Indeed, victims who do not intended to testify will not benefit from the tribunal. On the other hand, witnesses who are not direct victims of crimes under the jurisdiction of the Tribunal can access such protection.⁸⁴ The regime set up under the Rules is clearly designed to protect victims and witnesses who are intending to testify before the Tribunal. However, the definition of witness is broad⁸⁵ and includes persons whom a party initially intends to call but eventually decides not to call, as well as persons who initially show interest in testifying before deciding not to.⁸⁶ Those persons who fall in these categories are considered as witnesses for protection purposes from the moment they participate in one aspect of the proceedings. As such, they may benefit from protective measures. The practice of the tribunals, with respect to the victims that the

⁸² See Rule 105 of RPE.

⁸³ Rule 106 of RPE of ICTR.

⁸⁴ Some observations of the ICTY have noted: These sections [the Victims and witnesses Sections in the ICTY and ICTR] are misnamed by the Statute to the extent their title implies responsibilities with respect to victims other than witnesses. In fact, the work of the sections involves only potential or actual witnesses (whether or not victims) for proceedings in both Tribunals.

⁸⁵ According to figures available from the Victim and Witness section Unit, 12 per cent of those who actually attended to The Hague for purpose of testifying later on the prosecution had given up from testifying.

⁸⁶ This approach is consistent with the jurisprudence of the European Court of Human Rights (ECHR), which has considered the definition of a witness as an "autonomous" concept, basically including any person, irrespective of his or her status under criminal procedural law, who possesses information relevant to criminal proceedings (see *Kostovski v. Netherlands*, Series A, Vol.166, Para. 40).

victim is the first and foremost dealt with as a witness, having no right to representation or participation and no provision of compensation before the Tribunals.

2.6.4 International Criminal Court (ICC)

The International Criminal Court was established by the Rome Statute of ICC⁸⁷ and adopted at a Plenipotentiaries conference in Rome on 17 July 1998, at present there are 106 state parties. The jurisdiction of the Court is limited to the most serious crimes of concern to the international community as a whole. The court has jurisdiction over (a) the Crime of genocide; (b) Crimes Against Humanity; (c) War Crimes; and (d) the Crime of Aggression.⁸⁸ The Rome Statute is more sensitive to the needs and rights of victims and witnesses. Article 43 of the Statute provides for Registrar to set up a Victims and Witnesses Unit within the Registry to provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma related to crimes of sexual violence.⁸⁹ In the interest of Justice, to protect the dignity of the witnesses and the victims, and to avoid any misgivings, the VWU services provided to prosecution and defence witnesses are be kept as separate as possible. This applies to lodging, assistance, translating services, interpretation and all other VWU operational functions (Ingadottir: 2003:9).⁹⁰

The Victims and Witnesses Unit is of fundamental importance to the work of the International Criminal Court for two reasons, Firstly, the Court does not have the power to compel a witness to appear before the Court. Thus witnesses appearance will depend on their willingness to come to The Hague.⁹¹ The unit's services will facilitate effective investigation, prosecution and defence by encouraging them to come forward.

⁸⁷ See Article 1 of the Rome Statute.

⁸⁸ See Article 5 of Rome Statute.

⁸⁹ See Article 43 of Rome Statute.

⁹⁰ The following rule is proposed in the current draft for the Rules of Procedure and Evidence: "To ensure the efficient and effective performance of its work, the Unit shall:...(ii) Recognising the specific interests of the Office of the Prosecutor, the defence and witness, including, where necessary, by maintaining an appropriate separation of the services between the Prosecution and defence witnesses, and act impartially when cooperating with all parties, and in accordance with rulings and decisions of the Chambers".

⁹¹ Accordingly to article 64.6(b) of the Rome Statute, the Court can "require the attendance and testimony of witnesses by obtaining if necessary, the assistance of States as provided in the Statute." According to

Second, the VWU is essential not to make victims and witnesses unnecessarily suffer twice. In any instances they will have to travel to a foreign country, appear before an alien court, participate in unfamiliar proceedings, in a language that is not their own, face the perpetrators, testify about horrendous experiences, encounter cross-examination, possibly putting themselves and others at risk, and at least for some subject themselves to possible prosecution or arrest. The VWU will prepare them, both materially, physically and psychologically to withstand the trial.

Article 75 of the Rome Statute reflects an important advancement in the international law relating to victims, by permitting victims to claim reparation for the wrongs they have suffered. Article 79 provides for the establishment of a Trust Fund for victims and their family. The Preparatory Commission therefore drafted, and the Assembly of the States Parties adopted, a resolution entitled Establishment of fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.⁹² A Board of Directors will setup the activities and projects of the Trust Fund and allocation of the property and money available to it, bearing in mind available resources and subject to the decisions taken by Court.⁹³ The Rules of the Procedure and Evidence (RPE) have a subsection on the Victims and Witnesses Unit, stipulating the responsibilities of the Registrar relating to victims and witnesses,⁹⁴ functions and responsibilities of the unit,⁹⁵ and expertise in the Unit⁹⁶. Chapter 4 of the Rules of the Procedure and evidence on deals with various stages including a definition of victims⁹⁷ protective measures,⁹⁸ participation of victims in the proceedings,⁹⁹ and reparations to victims.¹⁰⁰

article 93.1(e) of the Rome Statute, State Parties are obligated to "facilitate the voluntary appearance of persons of persons as witnesses or experts before the Court."

⁹² Resolution ICC-ASP/1/Res.6 adopted at the 3rd plenary meeting, on 9 September 2002, by consensus: "Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims."

⁹³ See, Para. 7 of the Annex to the resolution.

⁹⁴ See, Rule 16 Rules of Procedure and Evidence (RPE).

⁹⁵ See, Rule 17 and 18 of RPE.

⁹⁶ *Ibid.*, Rule 19 of RPE.

⁹⁷ *Ibid.*, Rule 85 of RPE.

⁹⁸ *Ibid.*, Rule 87-88 of RPE.

⁹⁹ *Ibid.*, Rules 89-93 of RPE.

¹⁰⁰ *Ibid.*, Rules 94-99 of RPE.

According to Rule 17 of the Rules of Procedure and Evidence, the Victims and Witnesses Unit (VWU) main tasks are to (1) provide and advice on the protective and security measures; (2) assist access to medical, psychological, and other appropriate assistance ; (3) make available to the court confidentiality; and (4) elaborate on Code of Conduct. In carrying out these tasks, the Unit has a consultative role with other organs of the Court and the defence. Furthermore, where is necessary, the Unit shall maintain an appropriate separation of services provided to the prosecution and defence witnesses.¹⁰¹ The victims Participation and Reparation Unit deals with functions relating to victims participating in the proceedings, whether that is in the criminal proceedings¹⁰² or in the reparation proceedings.¹⁰³ Furthermore, the Victims Participation and Reparation Unit assist in the administration of the Trust Fund for Victims.

2.6.5 The Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) was established in 2002, by an agreement between the United Nations and the Government of Sierra Leone (the Special Court Agreement)¹⁰⁴ to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and national law, committed in the territory of Sierra Leone since 30 November 1996. The Statute of the Court was annexed to the Special Court Agreement. The Rules of Procedure and Evidence¹⁰⁵ were adapted from those of the ICTY and the ICTR. The SCSL is independent from the national justice system. The Court is composed of national and international judges and prosecutors and applies a combination of national and international law. The seat of the SCSL is in the capital of Sierra Leone, Freetown.¹⁰⁶ Despite the fact that the SCSL was established after the adoption of the Rome Statute of the International Criminal Court (ICC), the SCSL did

¹⁰¹ *Ibid.*, Rule 18(b) of RPE.

¹⁰² See, Articles 15.3, 19.3, and 68.3 of the Rome Statute, and also Rules 16, 50, 59, 89, and 93 of RPE.

¹⁰³ See Articles 57.3 (e), 75, and 82.4 of the Rome Statute, and also Rules 94-99 of RPE.

¹⁰⁴ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002, available at www.sc-sl.org/scsl_agreement.html.

¹⁰⁵ Rules of Procedure and Evidence (RPE). Adopted on 16 January 2002, as amended on 13 May 2006, available at www.sc-sl.org/Rulesofprocedureandevidence.pdf.

¹⁰⁶ For a complete and general presentation of the Special Court for Sierra Leone see for example: The Special Court for Sierra Leone under scrutiny. International Center for Transitional Justice (ICTJ), March 2006, at p.56. Available at www.ictj.org/static/Prosecutions/Sierra.study.pdf.

not incorporate the provisions on victims rights to participate in proceedings and to claim and receive reparations. As with the ICTY and the ICTR, victims do not have the right to participate in proceedings and there are no provisions enabling victims to seek reparations before the Special Court. Compensation can only be obtained through domestic courts and national legislation.¹⁰⁷ Rule 105 In terms of the protection of victims and witnesses the statute of the SCSL provides; the accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.¹⁰⁸

The RPE provides that witnesses should receive relevant support, counselling and other appropriate assistance, including medical assistance, physical and psychological rehabilitation, especially in cases of rape, sexual assault, and crimes against children.¹⁰⁹ The Registrar has required to setup a Victims and Witnesses Unit (VWU) to offer appropriate protection to victims and witnesses. The VWU, in consultation with the Office of the Prosecutor, is required to providing protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. Vulnerable witnesses are to be given assistance in testifying before the court and more general support.¹¹⁰

2.7 International Conventions on Victims of Crime

2.7.1 Convention for the Protection of All Persons from Enforced Disappearance 2007¹¹¹

The United Nations has recognized the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity. This is the first convention that recognizes that the victims of enforced disappearances are not only disappeared themselves but also their relatives. It

¹⁰⁷ See, Rule 105 SCSL of RPE.

¹⁰⁸ See, Article 17(2) Statute of the SCSL.

¹⁰⁹ See, Rule 34 SCSL of RPE.

¹¹⁰ See, Article 16 (4) of the SCSL Statute, which is similar to Article 46 (3) of the Rome Statute of the ICC.

¹¹¹ Adopted on December 20th of 2006 opened for signature on 6th February 2007. so far 73 states have signed and ratified 4 states.

acknowledges the right of the families to know the fate of their relatives, and also recognizes that victims of enforced disappearance have a right to reparation for the wrong that was done to them. Article 24 of the Convention reads as; "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance. Each victim has the right to know the truth it pose the obligation on the member States to take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains and ensure that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.

The right to obtain reparation covers material and moral damages and, where appropriate, other forms of reparation such as:(a) Restitution; (b) Rehabilitation; (c) Satisfaction; including restoration of dignity and reputation; (d) Guarantees of non-repetition. Every Member State shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.

2.7.2 Convention on the Elimination of All Forms of Racial Discrimination 1966

The Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin, and also considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination. Article 6 of the Convention on the Elimination of all forms of Racial Discrimination¹¹² provides that;

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

¹¹² Adopted by General Assembly resolution 2106(XX) and opened for signature and ratification on 21 December 1965. The convention entered into force on 4 January 1969.

2.7.3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

Article 14 of the convention¹¹³ against torture provides that each State Party should ensure in their legal systems providing the victim of torture obtain redress and has an enforceable right to fair and adequate compensation including, rehabilitation as possible. In the case of the death of due torture the victim or his dependents shall be entitled to compensation. Without prejudice the right of compensation at domestic laws. The more significant development with convention is the UN General Assembly established the Fund in 1981 to receive voluntary contributions from Governments, non-governmental organizations and individuals for distribution to non-governmental organizations, which are providing assistance to victims of torture and members of their family. In 2002, more than 80,000 victims were assisted through the Fund with the support of donors.¹¹⁴

2.7.4 The Convention against Transnational Organized Crime 2000

The first treaty¹¹⁵ against transnational organised crime also include the provisions with requiring States Parties to take measures to protect witnesses, to assist and protect victims, and to co-operate with other enforcement authorities to offer protection to victims and witnesses under Articles 24-26. for the protection of witnesses and their relatives under Article 24 each member should take appropriate measures¹¹⁶ to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered under this Convention with out prejudice to the rights of the defendants. For the Assistance and protection to victim

¹¹³The Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. The convention has entered into force with a object to make more effective struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world on 26 June 1987.

¹¹⁴ See for details of fund <http://www.un.org/apps/news/story.asp?NewsID=6647&Cr=torture&Cr1=#>

¹¹⁵ General Assembly resolution 55/25, adopted on 15 November 2000, the copy of the Convention available at <http://www.odccp.org/palermo>.

¹¹⁶ Procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons and also providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation

States are required to take under Article 25 appropriate measures to provide access to compensation and restitution subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings.

2.7.5 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime¹¹⁷

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children also contains a number of provisions dealing specifically with the protection of victims of human trafficking, including physical protection, protection against intimidation, measures to permit victims of trafficking to remain temporarily¹¹⁸ or permanently in the receiving State, protection measures at the time of repatriating the victims to their own country to ensure that due regard is given to their safety and of their relatives.

Article 6 of the Protocol provides that each State Party shall protect the privacy and identity with the assistance in presenting the views and concerns of the victims and information on relevant court and administrative proceedings. It also provided measures should be taken for physical, psychological and social recovery of victims, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.¹¹⁹ The domestic legal systems should contain measures for victims to obtain compensation for damage suffered

¹¹⁷ Supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children will be useful in preventing and combating that crime.

¹¹⁸ Each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases giving consideration to humanitarian and compassionate factors, see, Article 7 of the Protocol.

¹¹⁹ In particular, the provision of: (a) Appropriate housing; (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; (c) Medical, psychological and material assistance; and (d) Employment, educational and training opportunities. In applying the provisions, the age, gender and special needs of victims in particular the special needs of children.

Repatriation of victims of trafficking in persons¹²⁰

The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party. Shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

2.7.6 The United Nations Convention against Corruption 2003

The United Nations convention against corruption¹²¹ also contains similar provisions under Article 32 concerning the protection of victims/witnesses of corruption. It provides the protection not only victims but also expert witnesses. According to the convention member States are under obligation to provide appropriate measures¹²² under Article 32 of the convention with its domestic system for effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and persons close to them.

It also provide the compensation for damage under Article 35 in accordance with principles of members domestic laws, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation. The convention provides the procedure for return of the property.¹²³ Property confiscated by a State Party shall be disposed of, including by return to its prior legitimate owners, or bonafide third parties in accordance with the provisions of this Convention and its

¹²⁰ See, Article 8 of the protocol Convention against Corruption.

¹²¹ The Convention approved by the Ad Hoc Committee was adopted by the General Assembly by resolution 58/4 of 31 October 2003 and entered into force on 14 December 2005.

¹²² Through establishment of procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons and also Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety, such as permitting testimony to be given through the use of communications technology such as video or other adequate means

¹²³ See, Article 57 of Convention against Corruption.

domestic law.¹²⁴In the case of embezzlement of public funds or of laundering of embezzled public funds¹²⁵ as referred to in articles when confiscation was executed¹²⁶ on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party. In the case of proceeds of any other offence when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property. In all remaining cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime. Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.¹²⁷

2.5.7 Convention on the Rights of the Child 1989

The Convention on the Rights of the Child¹²⁸ noting that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity. Article 19 of the convention provides that; States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.¹²⁹

¹²⁴ See, Article 31-55 of Convention against Corruption.

¹²⁵ See, Article 17-23, of Convention against Corruption.

¹²⁶ See, Article 55 of Convention against Corruption.

¹²⁷ Available at URL: http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf

¹²⁸ General Assembly Resolution 44/25. 1989 without vote on November 1989. The convention was entered into force 2 September 1990.

¹²⁹ Protective measures also includes effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child. as well as for other forms of prevention and for identification. reporting. referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore. and, as appropriate. for judicial involvement.

2.7.8 Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949

Even though the term victim does not appear in the Geneva Conventions or other humanitarian law treaties,¹³⁰ they are obviously the primary concern of International Humanitarian Law (IHL). Such victims may then be defined as those who suffer because they are affected by an armed conflict; they are termed as war victims. This definition potentially refers to an entire population that has been caught up in an armed conflict. This does not mean that war victims are left without rights, their supreme right being the right to protection.¹³¹ Indeed, the main purpose of IHL is to protect war victims.¹³² To contend that violation of the right to protection entails a claim to reparation would, however, be absurd, since every member of the population affected by the armed conflict is a victim (Zegveld 2003:5). The following provisions of the convention related to victim protection are;

Protected Persons

Persons protected by the Convention¹³³ are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State, which is not bound by the Convention, are not protected by it. Nationals of a neutral State, who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are¹³⁴.

¹³⁰ The term victim does, however, appear in the title of the two Protocols Additional to the Geneva Conventions of 1949: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (hereinafter "Additional Protocol I") and Protocol Additional II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.

¹³¹ Although the different conventions are limited in scope, the Law of Geneva serves to provide protection for all those who as a consequence of an armed conflict, have fallen into the hands of the adversary. The protection envisaged is against the arbitrary power which one party acquires, in the course of an armed conflict, over persons belonging to the other party.

¹³² The right to protection entails, among other things, the right to humanitarian assistance.

¹³³ See, Article 4 of the Geneva Convention IV.

¹³⁴ The provisions of Part II are, however, wider in application, as defined in Article 13.

Non-renunciation of rights¹³⁵

Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the in the convention.

Provisions common to the territories of the parties to the conflict and to occupied territories

(a) Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

(b) Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion. However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.¹³⁶

(c) Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them. These several organizations shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations. Apart from the visits of the delegates of the Protecting Powers and of the International Committee of the Red Cross, the Article 143 provides the Detaining or Occupying Powers shall facilitate as much as possible visits to protected persons by the representatives of other organizations whose object is to give spiritual aid or material relief to such persons.¹³⁷

Fundamental guarantees

Persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth,

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.

¹³⁵ See. Article 8 of the Geneva Convention IV.

¹³⁶ See. Article 27 to the Geneva Convention IV.

¹³⁷ See. Article 30 to the Geneva Convention IV.

birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons. The acts¹³⁸ which are endangered to the protected persons should be prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

Protection of women

1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.
2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.
3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.¹³⁹

Protection of children

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.
2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.
3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.
4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.
5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.¹⁴⁰

¹³⁸ (a) Violence to the life, health, or physical or mental well-being of persons, in particular (i) Murder; (ii) Torture of all kinds, whether physical or mental; (iii) Corporal punishment; and (iv) Mutilation; (b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; (c) The taking of hostages; (d) Collective punishments; and (e) Threats to commit any of the foregoing acts.

¹³⁹ Article 76 Protocols I to the Geneva Convention.

¹⁴⁰ Article 77 Protocol I to the Geneva Convention.

Repression of breaches of this Protocol

The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

- (a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
- (b) unjustifiable delay in the repatriation of prisoners of war or civilians;
- (c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- (d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
- (e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.¹⁴¹

Aliens in the territory of a party to the conflict

With the exception of special measures authorized by the present Convention, in particular by Articles 27 and 41 thereof, the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace. In any case, the following rights shall be granted to them;

- (1) They shall be enabled to receive the individual or collective relief that may be sent to them.
- (2) They shall, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned.
- (3) They shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith.
- (4) If they reside in an area particularly exposed to the dangers of war, they shall be authorized to move from that area to the same extent as the nationals of the State concerned.
- (5) Children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned.¹⁴² Internees shall retain their full civil capacity and shall exercise such attendant rights as may be compatible with their status.¹⁴³

¹⁴¹ Article 85 protocol I to Geneva Convention.

¹⁴² Article 38 to the Geneva Convention IV.

¹⁴³ Article 80 to the Geneva Convention IV.

2.6 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) Protection and care¹⁴⁴

1. All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.

In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

2.6.1 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 June 1977.

Protection of the civilian population¹⁴⁵

The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. Civilians shall enjoy the protection as long as they take a direct part in hostilities.

¹⁴⁴ Article 7 to the protocol I of the Geneva Convention IV.

¹⁴⁵ Article 13 of the protocol II to Geneva Convention IV.

CHAPTER -III

International Criminal Tribunals - Evolving Jurisprudence on Victims of Crime

Establishment of International Criminal Tribunals by the Security Council, for prosecution of gross violations of humanitarian laws and human rights such as Genocide, Crimes against Humanity, War Crimes and Crime of Aggression. The starting point of the jurisprudence on the victims crime can be understood by the initiation of the ICTY. It is not the first Tribunal which dealt the International Crimes, there were other Tribunals before the ICTY, i.e. Nuremberg and the Tokyo Tribunal were least concerned about the victims of crime rather focused on the perpetrator and punishment. The ICTY, ICTR, ICC and Special Tribunal for Sierra Leone were provided a special mechanism for the protection of the Victims and Witnesses Units (VWU). The present chapter will focus on the jurisprudence of these Tribunals/courts through by its procedures and selected case laws.

The object of the International Criminal Tribunals exists so that perpetrators are finally make accountable the crimes which shock the conscience of humanity are not forgotten and victims are recognised and rehabilitated; to prevent recurrence of the atrocious crimes they have suffered. It seems us that a fundamental condition must be fulfilled if these objectives are to be attained that the appropriation by victims, their families and, beyond them, by the society's concerned. UN Secretary-General Kofi Annan emphasised the importance of a victim based perspective in his address to the 2003 Commission on Human Rights: "When we speak of human rights, we must never forget that we are labouring to save the individual man, woman or child from violence, abuse and injustice. It is that perspective of the individual's which must guide your work and not the point of view of contending States".¹ The present chapter deals with the rights of victims available under International Criminal laws, with the jurisprudence of International Criminal Tribunals. For the convenience of the study it focused on the following rights would be examined. The Right to Compassion and Dignity, Right to

¹ Press Release. Human Rights Commission. "UN Secretary General to Commission On Human Rights: We Must Hope A New Era of Human Rights in Iraq Will Begin Now". 24 April 2003. available at: <http://www.unhchr.ch/huricane/huricane.nsf/view01/975E2E36F2593DCAC1256D12002DDDBF?>

Assistance and Protection, Right to information, Right to Participation, Right to Legal Aid, Right to Protection of Privacy and Identity, Right to Reparation.

3.1 Right to Compassion and Dignity

The UN Declaration on Justice for Victims provides that victims should be treated with compassion and respect for their dignity². The Van Boven/ Bassiouni Principles also require that victims shall be treated with humanity and respect for their dignity and human rights.³ Treating victims with respect includes keeping them informed at all stages of the proceedings of the developments in the case that concerns them⁴.

3.1.1 Right to Protection and Assistance

In the first trial before the Tribunal, the Trial Chamber stated that the Statute created an affirmative obligation to provide protection to victims and witness⁵. This proportion has subsequently been accepted as uncontroversial.⁶ While Article 22 includes two forms of protective measures,⁷ the protection regime is only fully set out in the Rules of Procedure and Evidence. It is clear from the jurisprudence of the Tribunal that different stages of the proceedings necessitate different requirements, both in terms of the type of measures required for the protection of the victims and circumstances, which would warrant such measures. The overreaching and inevitable limit to the granting of protection to a victim is the respect of the right of the accused to a fair trial, and in particular the right to a public trial,⁸ the right to have adequate time and facilities for the preparation of the defence⁹ and the right to cross-examine witnesses.¹⁰

²See Principle 4, UN Declaration on Justice for Victims (1984).

³See Principle 10, 'Treatment of Victims'.

⁴ See UN Handbook on Justice for Victims, at p.35

⁵ *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No.IT-94-I-PT, 10 August 1995, Para 27.

⁶ See, *Prosecutor V. Milolevit*, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, Case NO.IT-02-54-T, 19 February 2002, Para.23,(ICTY)

⁷See, Article 22 of the Statute; including, but shall not be limited to the conduct of in camera proceedings and the protection of the victim's identity.

⁸ See, Article 21(2) of the Statute Provides that 'the accused shall be entitled a fair and public hearing, subject to article 22 of the Statute.

⁹ See. Article 21(4)(b) of the Statute provides that the accused shall have the right "to have adequate time and facilities for the preparation of his defense".

¹⁰ Article 21(4) (e) of the Statute provides that the accused shall have the rights "to examine, or have examination of witnesses on his behalf under the same conditions as witnesses against him".

3.1.2 Support and Assistance

Article 68 (1) sets out the general obligation of the Court to protect and support victims and witnesses:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender...and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children...These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Rule 86 establishes, as a general principle, which all the organs of the Court in exercising their functions must take into account the needs of victims and witnesses;

A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses...in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.¹¹

Specific provisions set out the duties of each organ of the Court: the Registry, the Chambers, and the Prosecutor. States Parties and international organisations also have a vital role in ensuring the protection of victims and witnesses.

3.1.3 Role of other Organs of the ICC for the Protection of Victims and Witnesses

3.1.4 The Registry

Within the Registry, the Victims and Witnesses Unit (VWU) was created, in accordance with article 43 (6), in order to provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The VWU's duties include formulating long and short-term plans for their protection¹² and

¹¹ In this regard Rule 19 Expertise provided in addition to the staff mentioned in article 43, paragraph 6, and subject to article 44, the Victims and Witnesses Unit may include, as appropriate, persons with expertise, *inter alia*, in the following areas: (a) Witness protection and security; (b) Legal and administrative matters, including areas of humanitarian and criminal law; (c) Logistics administration; (d) Psychology in criminal proceedings; (e) Gender and cultural diversity; (f) Children, in particular traumatized children; (g) Elderly persons, in particular in connection with armed conflict and exile trauma; (h) Persons with disabilities; (i) Social work and counselling; (j) Health care; (k) Interpretation and translation.

¹² Rule 17(2)(a)(i) RPE of ICC.

assisting them in obtaining medical and psychological assistance.¹³ The VWU also has a vital role in advising and training the other organs of the Court on protection issues.¹⁴ The Registry has a duty to inform victims of the existence of the VWU and the services that it can provide¹⁵. It has a particular duty towards victims of sexual violence to take gender sensitive measures to facilitate their participation at all stages of proceedings.¹⁶ It is also the organ responsible for negotiating agreements with states for the provision of protection and support services on their territory, including relocation agreements

3.1.5 The Trial Chambers

The Chambers have a duty to order necessary measures of protection and to ensure that such measures have been put in place by the other organs of the Court. Article 57 (3) (c) sets out the general obligation of the Pre-Trial Chamber to ensure the protection and privacy of victims and witnesses. This applies to all proceedings before the Pre-Trial Chamber.¹⁷ Article 64 (2) provides that the Trial Chamber has a duty to ensure that the issue of protection of victims and witnesses is taken into account at all stages of the trial: The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Article 64 (6) (e) provides that the Trial Chambers, both prior to trial and during the course of trial, “may, as necessary... provide for the protection of the accused, witnesses and victims”

3.1.6 The Office of the Prosecutor (OTP)

Article 54 (1) (b) requires the Prosecutor, in carrying out investigations and prosecutions, to respect the interests and needs and personal circumstances of victims and witnesses, and provides a non-exhaustive list of the factors to be taken into consideration,

¹³ See, Rule 17(2)(a)(iii) RPE of the ICC.

¹⁴ See, Rule 17 2)(a)(ii) REE of the ICC.

¹⁵ See, Rule 16(2)(a) RPE of the ICC.

¹⁶ See, Rule 16(1)(d) RPE of the ICC.

¹⁷ See, Rule 107 (3) expressly provides that in conducting a review of a decision of the Prosecutor, under Article 53(3), not to investigate or prosecute, the Pre-Trial Chamber has a specific obligation to protect the safety of witnesses and victims and members of their families. The Pre-Trial Chamber has a duty to ensure that effective measures are in place at the preliminary and investigation stages. The Pre-Trial Chambers allocated to the situations in Uganda, the DRC and Sudan (Darfur) have held closed hearings and made specific orders for the evaluation of the security situation on the ground and of the effectiveness of the protection systems in place.

including; age, gender, health, the nature of the crime, in particular whether it involves sexual violence, gender violence or violence against children. Article 68 (1) requires the Prosecutor to take appropriate measures to protect victims and witnesses particularly during the investigation and prosecution of such crimes.¹⁸ Furthermore it has been indicated that, where possible, investigators will attempt to work with witnesses outside areas of conflict, whether in other countries or more secure parts of the same country and that interviews will be conducted only following a clear assessment of protection issues and through means and in locations where exposure is minimised.¹⁹ The Report to the Assembly of States Parties of 2005 states that, in the context of the investigations in Uganda and the DRC, the VWU and the OTP have developed response systems to ensure witnesses know whom to contact and what should do for their security be threatened. Mechanisms and policies have been put into place to ensure 24-hour protection and psychological assistance for victims and witnesses.²⁰ For various reasons, the details of such systems are kept confidential.

3.1.7 Gender and Justice Unit

Humanitarian law has been heavily critiqued for its treatment of women (H Charlesworth and C Chin kin 2000:325). Men adopt the laws for men and in the interests of the men. Although women have historically been victims in conflicts (Cleirin and Tijssen 1994:471) they are largely invisible in the law of war. The law has been inadequate in recognising rules to protect women. Implementation and enforcement of such rules as have existed have been inadequate. The ICTY and the ICTR have sought to operate in a much more gender-sensitive manner.²¹ The establishment of the ICC presented an opportunity to express a contemporary perception of gender justice in humanitarian law (KD Askin 1999:217). The Women's Caucus for Gender justice sought to ensure that

¹⁸ See, Article 54(3) (f) also provides for the Prosecutor to take necessary measures, or request that measures be taken to ensure...the protection of any person during investigations. The OTP should work in close collaboration with the VWU to ensure the necessary measures are in place for the protection of those with whom it comes into contact. Under these provisions the term "witnesses" must be interpreted to include potential witnesses. Those interviewed by the Prosecutor during the investigation stage may in some cases be at risk simply by virtue of being in contact with OTP investigators. In order to limit the risks posed to potential witnesses, the OTP has stated its intention to limit the number of witnesses contacted.

¹⁹ Report to the Assembly of States Parties on the Activities of the Court, 16 September 2005. ICC-ASP/4/16, at p. 52.

²⁰ *Ibid.* at p. 69.

²¹ *Ibid.* at p.473.

gender was taken account of in all aspects of the ICC.²² The Statute has been described as the most gender sensitive piece of international humanitarian law.²³ Gender interests are taken into account in relatively systematic way in the ICC including in the definition of crimes, (DM Koenig and KD Askin 200:3) in the qualifications and criteria for elections for the judiciary,²⁴ the possibility for the prosecutor to appoint advisers with legal experience on sexual and gender violence,²⁵ the establishment by the Registrar of a Victims and Witness Unit.²⁶ The Security Counsel has welcomed the inclusion as war crime of all forms of sexual violence and noted the role of the ICC would play to ending impunity for perpetrators of such crimes.²⁷ The women Heads of States who met at the Millennium Summit expressed support for the ICC.

In 2004, a Gender and Children Unit (GCU) was set up within the Investigation Division of the OTP to establish the capacity and design policies to deal appropriately with vulnerable potential witnesses, in particular children and victims of sexual assault.²⁸ This Unit is required to ensure that there will be a professional response within the Office of the Prosecutor to operational issues relevant to victims. These issues include statement-taking techniques relevant to traumatized potential witnesses, in particular children and victims of sexual assault.²⁹ The GCU is required to conduct pre-interview assessments, face to face with vulnerable victims and witnesses, to evaluate their condition and determine whether they are psychologically fit to be interviewed without causing any re-traumatisation. It can recommend that interviews should not be conducted if it considers that a witness is too vulnerable. The GCU can also refer victims and

²²Source: 'On the Record', Vol. (1), Issue 2, 6-7; Women's Caucus for Gender Justice.

URL: <http://www.iccwomen.org>.

²³ See Statements of H Fry, Secretary of State on the Status of Women of Canada, Special Session of the General Assembly on 'Women 2000: Gender Equality, Development and Peace for the Twenty-First Century', 8 June 2000; A Costa Lobo (Portugal), speaking on behalf of the EU Commission on Status of Women (23rd Session). Available at URL: <http://www.un.org/ga/sessions/special.shtml>.

²⁴ See, Art 36(8) Rome Statute.

²⁵ See, Art 42(9) Rome Statute.

²⁶ See, Art 43(6) Rome Statute.

²⁷ See, The Statement of President of The Security Counsel Relating to International Women's Day, (9 March 2000) visit: URL: <http://www.un.org/events/women/press.html>.

²⁸ Draft Programme Budget for 2004. Assembly of States Parties, ICC-ASP/2/2, 23 May 2003, p.49. URL: <http://www.icc-asp.int/asp/2/2.Pdf>.

²⁹ *Ibid.* at p.53.

witnesses to the VWU for psychological support and care. At the time of writing the GCU has 4 staff members and has developed a list of psychologists.

3.2 States Parties and International Organisations

The co-operation of States Parties is vital to secure the necessary protection for victims and witnesses. States Parties are obliged to comply with requests by the Court to provide assistance in the protection of victims and witnesses.³⁰ This is part of the general obligation to co-operate with the Court and must therefore be fully implemented in national legislation.³¹ The VWU is required wherever necessary to co-operate with states³² and should also cooperate with relevant international organisations, such as UN agencies present in the field of operations, in the implementation of protection measures.³³

3.2.1 Criteria for Protective Measures

The Court is required to take account of the needs and well-being of all victims and witnesses, paying attention to “all relevant factors” in order to determine appropriate measures of protection, support and assistance. Article 68 (1) and Rule 86 contain non-exhaustive lists of factors to be taken into consideration by the Court, focussing on categories of particularly vulnerable victims. These factors are age, gender, health, disability and the nature of the crime. The Court is required to pay particular attention to the needs of children and victims of crimes of sexual or gender violence. The need to pay special attention to victims of sexual violence was emphasized by the Trial Chamber of the ICTY, in the case of *Tadic*³⁴ and several subsequent cases³⁵. The Chamber referred to

³⁰ see, Article 93(1) (j) Rome Statute.

³¹ See Amnesty International, *International Criminal Court: Guidelines for Effective Implementation of the Rome Statute* (AI Index: IOR 40/013/2004), *International Criminal Court: Checklist for Effective Implementation* (AI Index: IOR 40/11/00), available at <http://web.amnesty.org/pages/icc-implementation>

³² Rule 17(2)(a)(vi) RPE of ICC.

³³ The protection of measures to the victim and witnesses should be without prejudice to the rights of the accused as stipulated under Articles 64 (2), 68 (1) and (5) and 69 (2) emphasise that measures of protection must not interfere with the rights of the accused. In some cases this will necessitate a delicate balancing exercise.

³⁴ *Tadic*, IT-94-1, Decision on the Prosecutor’s motion requesting protective measures for victims and witnesses, 10 August 1995

³⁵ See, *Delacic et al*, IT-96-21-T, Decision on the motion of the Prosecution for Protective Measures for Prosecution Witnesses Pseudonymed “B” through to “M”. 28 April 1997, at p.40; *Furundzija*, IT-95-17/1-T, Decision on Prosecutor’s Motion Requesting Protective Measures for Witnesses “A” and “D” at Trial, 11 June 1998, at p. 6 visit: URL: <http://www.un.org/icty/cases-e/index-e.htm>.

the Report of the United Nations Secretary General (1993), recommending the establishment of the ICTY, which notes that, “rape and sexual assault often have particularly devastating consequences which, in certain instances, may have a permanent, detrimental impact on the victim. In addition, traditional court practice and procedures have been known to exacerbate the victim’s ordeal during trial. Women who have been raped and have sought justice in the legal system commonly compare this experience to being raped a second time”. The report concludes that protection of victims and witnesses should be granted “especially in cases of rape or sexual assault”.³⁶ The ICTY Trial Chamber agreed with this conclusion, stating that, “measures to prevent re-traumatisation are particularly important for victims and witnesses of sexual assault”.³⁷ The Court observed that assessment of particular needs of individual victims and witnesses would depend on a case-by case basis.

3.2.2 Measures ordered by the Chambers

Protective measures under Rule 87, and special measures under Rule 88, are measures ordered by the Chambers to protect victims, witnesses and other persons at risk on account of testimony given by a witness, and to assist victims and witnesses giving testimony before the Court. They are based on Articles 68 (1) and (2) and 69 (2) and apply to all stages of the proceedings.³⁸ The Statutes and RPE of the ICTY and the ICTR contain similar provisions.³⁹ These types of measures must be ordered by a Chamber to ensure that they are consistent with the rights of the accused.⁴⁰ Indeed, some of the measures available form exceptions to the general rule that all proceedings must be held in public⁴¹. In deciding on whether to order protective or special measures and the form of those measures, the Chambers are required to ensure that limits to the right of the accused to public justice are imposed only to the extent necessary to ensure the protection

³⁶ *Tadic*, at p.46.

³⁷ *Tadic*, at p.45.

³⁸ Rules 87 and 88 fall under Section III (Victims and witnesses) of Chapter 4 (Provisions relating to various stages of the proceedings) of the RPE. These provisions were originally placed in the chapter on The Trial but were moved to the Chapter on Victims and Witnesses in the Mount Tremblant Document, resulting from the Mount Tremblant meeting in April–May 2000; [URL: http://www.pcnic.com/PCNICC/2000/WGRPE/INF/1](http://www.pcnic.com/PCNICC/2000/WGRPE/INF/1), (24 May 2000).

³⁹ See, Article 22, Statute of ICTY; Article 21, Statute of ICTR; Rules 69, 75, 79 RPE of both Tribunals.

⁴⁰ See, Articles 68(1) and Article 64(2).

⁴¹ See, Articles 64 (7), 67 (1) et 68 (2), of Rome Statue and Regulation 20 of Court.

of victims and witnesses. It should be underlined that the Chambers are required to seek to obtain the consent of the person in respect of whom protective or special measures are ordered whenever possible, before an order is made.⁴²

3.3 Protective Measures

(a) Who is Eligible for Protective Measures?

Rule 87 (1) provides that measures may be ordered to protect a “victim, witness or another person at risk on account of testimony given by a witness”. Under Rule 87, the term “victim” is used without qualification, unlike several of the provisions dealing with the functions of the VWU, which refer to “victims who appear before the Court”.⁴³ Rule 87 must be interpreted in accordance with the definition of victims under Rule 85. All victims who are applied to participate in proceedings, whether or not they travel to the seat of the Court, and whether or not their applications for participation are eventually accepted, should therefore be eligible for protective measures.⁴⁴ It should cover persons at risk on account of having given testimony. It can also include accompanying support persons.⁴⁵

(b) Types of Protective Measures

Rule 87 does not provide an exhaustive list of the forms of protective measures that can be ordered by the Chambers and the judges therefore have a wide discretion to determine appropriate measures in the particular context of each case in accordance with the general obligation of the Court under Article 68. The Chamber will need to take into account the specific circumstances of the victim witness or other person at risk, and

⁴² See, Rule 87(1) RPE of ICC.

⁴³ See, Article 43, Rules 17, 18(c), Regulations of the Registry (RR) 92-95

⁴⁴ There is no definition of other persons at risk on account of testimony given by a witness (other persons at risk) and it will therefore be for the judges to define this category. It should be interpreted broadly to cover all those whose physical or psychological well-being is at risk as a result of testimony before the ICC, including but not limited to witnesses' families, dependents, and persons indicated in the course of testimony.

⁴⁵ Who are persons authorised by the Registry to accompany victims and witnesses to Court to provide support in testifying). Regulation (RR) 91:

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determine measures accordingly.⁴⁶ The following examples of protective measures are listed in Rule 87(3).

- a) That the name of the victim, witness, or other person at risk, or any information which could lead to his or her identification be deleted from the public records of the Chamber.⁴⁷
- b) That the prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing the name of the victim, witness, or other person at risk, or any information which could lead to his or her identification to a third party.⁴⁸
- c) That a pseudonym be used.⁴⁹
- d) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures⁵⁰ or voice⁵¹, the use of audio-visual technology, in particular video-conferencing and closed circuit television, and the exclusive use of sound-media.⁵²

These measures are also intended to protect the identity of victims and witnesses from the public and the press. In addition, measures such as video-conferencing help to protect against re-traumatization by enabling victims and witnesses to give their testimonies outside the courtroom and without seeing the accused and by enabling them to remain in their living place.⁵³ Measures permitting testimony to be given by video-link and prior-recorded testimony are exceptions to the general principle that “the testimony of a witness at trial shall be given in person”.⁵⁴ Rules 67 and 68 set out the procedures for implementing such measures and specific guarantees to protect the rights of the accused.

⁴⁶ Rule 87 (3) provides some examples of measures that can be ordered to “prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or [other person at risk]”. These measures are not aimed at concealing such information from the defence. Protective measures can be ordered individually or in combination.

⁴⁷ Public records include transcripts, orders, decisions and judgements. This is an exception to the principle that all documentary evidence and other evidence submitted to the Chamber during a public hearing can also be released to the public. Rule 87(3) (a) RPE of ICC.

⁴⁸ These measures prevent the release of information to anyone not directly involved in the case, Rule 87(3)(b) RPE of ICC.

⁴⁹ Pseudonyms, usually letters and/or numbers, can be used throughout proceedings and in official documents. Rule 87(3)(d); see also Regulation of the Registry (RR) 103(1)(a).

⁵⁰ See, Regulation (RR) 103(1)(b).

⁵¹ See, Regulation (RR) 103(1)(c).

⁵² See, Article 68(2) Rome Statute.

⁵³ There is a presumption in favour of the use of such measures in cases of victims of sexual violence and in respect of victims or witnesses who are children. *Ibid.*

⁵⁴ *Ibid.*

e) Live testimony by means of audio or video-link technology

Rule 67 enables witnesses to testify from locations outside the court through ‘videoconferences’⁵⁵, or from a ‘separate room’⁵⁶ located in another part of the Court premises. In order to protect the rights of the accused, it provides that the use of audio or video technology must allow the Chamber, the defence, and the Prosecutor to question the witness at the time that he or she testifies.⁵⁷ Furthermore, the Chamber, with the assistance of the Registry, has a duty to ensure that the place where testimony is given is “conducive to the giving of truthful and open testimony”.⁵⁸

f) Prior recorded testimony

Under Rule 68 the Trial Chamber can permit the introduction of “previously recorded audio or video testimony, or the transcript or other documented evidence of such testimony”,⁵⁹. If the witness concerned is present before the Trial Chamber, the admission of the pre-recorded statement is subject to the conditions that the witness does not object, and that the Trial Chamber, the Prosecutor and the defence have the opportunity to question the witness during the proceedings.⁶⁰

g) In camera proceedings⁶¹

Article 64 (1) provides that there must be “special circumstances” justifying the imposition of such an order. This measure is exceptional because of its impact on the right of the accused to a fair and public trial.⁶² When the Chamber makes such an order, it

⁵⁵ See, Regulation of Registry (RR) 103(1) (f).

⁵⁶ See, Regulation of Registry (RR) 103(1) (g).

⁵⁷ See, Rule 67(1) RPE of ICC.

⁵⁸ The venue must also be conducive to the “safety, physical and psychological well-being, dignity and privacy of the witness” Rule 67(3) of RPE of ICC.

⁵⁹ With the condition, the Prosecutor and defence have the opportunity to question the witness. If the witness who gave the testimony is not present before the Trial Chamber, the Prosecutor and the defence must have had the opportunity to question him or her during the recording, Rule 68(a) of RPE of ICC.

⁶⁰ See, Rule 68(b) of RPE ICC.

⁶¹ See, Rule 87(3)(e) of RPE ICC.

⁶² Closed hearings are explicitly permitted in limited circumstances under article 14 of the International Covenant on Civil and Political Rights (ICCPR): “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial Tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary

must make public its reasons for doing so.⁶³ Article 68 (2) imposes a presumption in favour of closed hearings for victims of sexual violence, children who are victims or witnesses. The Chamber can order otherwise but must take into account all the circumstances and in particular the views of the victim or witness. Regulation 20 (3) authorises the Chamber to order the disclosure of all or part of the record of the closed proceedings when the reasons for ordering its non-disclosure no longer exist.

(c) Procedure for Applying Protective Measures

Protective measures can be requested by the prosecutor; or the defence; or witnesses, victims or their legal representatives, or these measures can also be ordered on the Chamber's own initiative. The Victims and Witnesses Unit has a consultative role with respect to both types of measures. Rule 87 (1) provides that the Chamber may order measures after having consulted with the Victims and Witnesses Unit, as appropriate.⁶⁴

(d) Consent

The Chamber must seek to obtain the consent of the person in respect of whom protective or special measures are ordered, whenever possible, before an order is made for⁶⁵ application and variation of protective measures. Once protective measures have been ordered, they continue to have full force and effect⁶⁶ in relation to other proceedings before the Court and remain in place after the proceedings have ended, subject to revision by a Chamber.⁶⁶

in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

⁶³ See, Article 64(1) Rome Statute.

⁶⁴ However, it should be underlined that the VWU can bring matters to the attention of the Chambers on its own initiative and does not have to wait to be consulted. Rule 17 (2) (a) (ii) authorises the VWU to advise the court on appropriate measures and Regulation 41 allows the VWU to "draw any matter to the attention of a Chamber where protective or special measures require consideration".

⁶⁵ Rule 87(1) RPE of ICC.

⁶⁶ Regulation of the Registry (RR) 42 (3).

3.3.1 Special Measures

(a) Who is Eligible for Special Measures?

Rule 88 does not specify those eligible for special measures. Specific reference is made to traumatized victims and witnesses, children, elderly persons and victims of sexual violence, however, this is not an exhaustive list. The Chamber should refer to the general principle under Rule 86.

(b) Types of Special Measures

Special measures under Rule 88 are not defined, although some examples are given. This leaves the Chambers with a wide discretion to determine appropriate measures of protection and assistance. Specific reference is made to measures to facilitate testimonies of traumatised victims or witnesses, a child, an elderly person or a victim of sexual violence. Special measures therefore include but are not limited to measures designed to assist vulnerable witnesses and victims giving evidence before the Court. No distinction is made between psychological and practical support, and Rule 88 should therefore be interpreted as covering both types of measures. Rule 88 (2) provides that the Court can order the presence of an assistant, for example a relative, or a psychologist, to attend the hearing during which the witness will testify under Rule 88 (5), the Chambers have a duty to “be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation”. The Chambers must pay particular attention to attacks on victims of crimes of sexual violence. This provision is particularly important in the light of the experiences of many witnesses giving evidence before the ICTY and ICTR. In contrast to the procedure for protective measures, special measures can also be requested *ex parte* meaning without notifying the other parties to the proceedings.⁶⁷

(C) Procedure on a Chamber’s own initiative

As with protective measures, when the Court proceeds on its own motion, notice and an opportunity to respond must be given to the Prosecutor and the defence, and to any

⁶⁷ See. Rule 88(2) RPE of ICC.

witness (or his or her legal representative) who would be affected by such a protective measure⁶⁸

(d) Financial Assistance

Financial assistance will be subject to the availability of resources and is likely to be minimal. Allowance to cover expenses under Regulation (RR) 84, the Registry can provide an “incidental allowance” for personal expenses. This provision applies to witnesses, victims and other persons at risk, on a discretionary basis.

(f) Dependant Care

The VWU has discretion to provide additional financial assistance to those victims or witnesses who have primary responsibility for caring for another person or persons, where the lack of such assistance would prevent the victim or witness attending court to give evidence. Allowance to cover lost earnings and additional financial support these provisions appear to apply only to witnesses.⁶⁹

(g) Incidental Allowance

1. An incidental allowance for personal expenses may be provided to witnesses, victims who appear before the Court, persons at risk and accompanying support persons who require overnight accommodation at any stage of their journey.
2. The amount of the incidental allowance shall be determined by the Registrar and shall be reviewed annually. The Registrar shall publish the table of the rate of incidental allowance yearly on the website of the Court.⁷⁰

(h) Attendance Allowance

1. Witnesses shall be provided with an attendance allowance as compensation for wages, earnings and time lost as a result of testifying. Witnesses shall not be required to submit a request or any supporting documentation in order to receive the attendance allowance.⁷¹

⁶⁸ See, Rule 87(2)(d) RPE of ICC.

⁶⁹ See Registrar Regulation (RR) 90.

⁷⁰ See Registrar Regulation (RR) 85.

⁷¹ Under Regulation (RR) 85, witnesses are entitled to an “attendance allowance” to compensate them for wages, earnings and time lost as a result of testifying. There is no requirement to submit a request or supporting documents to receive this allowance. The VWU has the discretion to provide an additional allowance (“extraordinary allowance”), under Regulation (RR) 86, to those witnesses who “suffer undue financial hardship” as a result of not being to earn money whilst required at the court. In order to obtain this additional allowance, witnesses must submit a request with any supporting documents to provide evidence of undue hardship.

2. The daily minimum wage rate shall be determined by dividing:
 - (a) The annual salary of the staff of the Court at the General Services, step 1 level 1 in the country in which the witness is residing at the time he or she testifies; by
 - (b) The number of days per year.
3. The attendance allowance shall be calculated by multiplying:
 - (a) A percentage rate of the daily minimum wage rate applicable for the staff of the Court in the country in which the witness is residing at the time he or she testifies. The percentage shall be determined by the Registrar and shall be reviewed annually. The Registrar shall publish yearly on the website of the Court the table of the rate of attendance allowance; by
 - (b) The number of days the witness is required at the seat of the Court or where proceedings are held, including travel days. For the purpose of calculating the attendance allowance, a part of a day used in connection with testifying shall be considered a full day. Regulation (RR) 86

(i) Extraordinary Allowance for Lost Earnings

1. The Registrar may provide an extraordinary allowance for lost earnings for witnesses who suffer undue financial hardship as a result of being absent from legal income earning activities for the purposes of the Court.
2. Witnesses shall submit their request accompanied by any supporting documentation.
3. The Registrar shall inform the participants of any payment of such allowance.

(j) Expert Witnesses

Transportation for expert witnesses who travel for testimony or for support or protection- related purposes shall be arranged by the Registry, in accordance with regulation 81. A daily subsistence allowance shall also be provided.⁷²

3.3.2 Practice of the ICTY and the ICTR on Protective Measures

In the case of *Tadic*, before the ICTY, the Trial Chamber, whilst recognising that the presence of the public and the media contribute to ensuring that the trial is fair, held that the fear of reprisals was significant enough to warrant confidentiality: “With regard to the limitation on the accused right to a public trial, this Trial Chamber has to ensure that any curtailment of the accused right to a public hearing is justified by a genuine fear for the safety of witness R and/ or the members of witness R’s family... In balancing the interests of the accused, the public and witness R, this Trial Chamber considers that the public’s right to information and the accused right to a public hearing must yield in the present circumstances to confidentiality in light of the affirmative obligation under the Statute

⁷² See, Regulation of Registry (RR) 87.

and the Rules to afford protection to victims and witnesses”.⁷³ In order for sensitive information, such as the identity or location of victims or witnesses, to be edited, Regulation 21 (2) establishes that broadcasts of all hearings must be delayed by at least 30 minutes.

3.3.2.1 Orders against the Public Release of Transcripts and Recordings

The general rule is that proceedings before the Court are broadcast live and that all documentary evidence and other evidence introduced at a public hearing can be released to the public. However, a Chamber can order otherwise⁷⁴ objections to the release of information, raised by any participant. The Registry, or the Chamber can make such an order on its own motion.⁷⁵ Such objections should be made “no later than the commencement of the session at which the witness or participant is to appear”.⁷⁶ The chamber can also order other protective measures, in the case of *Blaskic* before the ICTY, following the mistaken disclosure of a prosecution witness statement to the media; the Trial Chamber ordered a series of measures to prevent the recurrence of such an event.⁷⁷

3.3.2.2 The Issue of Anonymous Witnesses

One potential measure for protecting victims and witnesses is to order their anonymity, meaning the non-disclosure of their identities to the accused and his or her legal representatives. This type of measure goes a step further than those listed in Rule 87 (3) and raises controversy due to the potential for interference with the rights of the accused to a fair trial, in particular the right to examine a witness against him or her. The issue of anonymous witnesses gave rise to intense discussions during the negotiations of the Rome Statute (Brady. H 2000:450). The debate provides a clear illustration of the

⁷³ *Tadic*, (IT-94-1-T), Decision on the Prosecutor’s Motion Requesting Protective Measures for Witness R, Trial Chamber II, . 31 July 1996, at p.6.

⁷⁴ See, Regulation 21(7) RPE of ICC.

⁷⁵ See, Regulation 21(8) RPE of ICC.

⁷⁶ The decision to order that information is not released must be based on “the interests of justice” in that such information is “likely to present a risk to the security or safety of victims, witnesses or other persons”. Regulation 21(4) RPE of ICC.

⁷⁷ These measures included: prohibiting the accused, his counsel and representatives from disclosing names to the public except where it was “absolutely necessary” to do so in order to prepare a defence; maintaining a log of the details of those persons who had received copies of witness statements; instructing those persons who received copies of statements not to reproduce them “under pain of sanction for contempt of the Tribunal” and to return the documents as soon as no longer required”. *Blaskic*. Trial Chamber I. Decision of 6 June 1997.

potential conflicts between the rights of the accused and the rights of victims and witnesses to protection. At the time of negotiations, the principle of anonymous witnesses had been accepted by the ICTY in the *Tadic* case⁷⁸. During initial debates on the provisions of the Rome Statute, the Italian delegation introduced a proposal allowing the Court, in exceptional circumstances, to withhold the identity of a witness or witnesses from the accused at trial. It was proposed that the Court could appoint an “independent guardian” of the witness’s identity to protect the rights of the defence: “The guardian would have certain investigatory powers to establish the reliability of the witness and to protect his or her identity, and would report his or her findings to the defence or the Registrar”⁷⁹. It was argued that a “fair trial” does not necessarily include an absolute right to know the identity of the witnesses, provided this can be counter-balanced by other safeguards provided by the Court. Several delegations strongly opposed the proposal⁸⁰, arguing that the accused has a fundamental right under international law to know his accusers as an element of the right to a fair trial. It was eventually decided to avoid any reference to anonymous witnesses in the Statute and to leave the issue for the Court to decide.⁸¹

(a) Anonymous Witnesses

One issue that is highly controversial and problems on relation to the right to fair trial is protecting the anonymity of the witnesses or anonymity can threaten due process rights as well the fair administration of justice. Anonymity concerns the right to fair trial since an accused would be prevented from impugning the reliability of witness’s testimony, contravening the right of the accused to challenge evidence that may incriminate him or her. International law has recognised the right of anonymity under Article 13 of the Convention Against Torture states that steps should be taken by the State Parties to ensure that the compliant and witnesses are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given . One argument is that the right to adequately prepare a proper defence and cross-examination will always

⁷⁸ . *Tadic*, IT-94-1, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995

⁷⁹ PCNICC/1999/WGRPE/DP.20 (28 July 1999) and see Brady, H., op cit. p.450.

⁸⁰ Including Denmark, Singapore, Argentina, the Russian Federation, Finland, Spain, South Africa, Mexico, Australia, and the United Arab Emirates..

⁸¹ See Brady, H., supra at., p.450.

be affected by granting anonymity. The ICTY Rules allow a judge or chamber, on its own motion or at the request of either party or of the witness him or herself, to order appropriate measures for the privacy and protection of certain witnesses, providing that such measures do not interfere with the rights of the accused. When this is requested, a Chamber can include expunging names and identifying information from the Chamber's public records; non-disclosure of certain information to the public; use of image/voice altering devices or CCTV; and the assignment of a pseudonym. Rule 69 provides that witnesses' identities that may be at risk should not be disclosed to the accused until the time when the witness can be brought under the protection of the Tribunal. Evidence may be submitted by deposition for witnesses who are unable or unwilling to testify in an open court setting.

The compatibility of anonymous witnesses and the accused's right to a fair trial was addressed in the *Tadic* case, where the non-disclosure of the accused' identity was extended to the trial itself. This was upheld as being in accordance with the right to public hearing under Article 21(2) of the ICTY Statute, in pursuance of the balance to seek between the duty to protect victims and witnesses and the right to a public hearing. Total anonymity for certain witnesses, even from the accused, was also held to be consistent with the right to fair trial, which also has regard to fairness to the prosecution and the witnesses. The right to cross-examination was only able to be restricted in exceptional circumstances, but the armed conflict in former Yugoslavia was held to be an 'exceptional circumstances par excellence'. The Chamber identified five criteria relevant to the balancing of all interests:

- i) Existence of a real fear for the safety of the witness or the witness's family;
- ii) Testimony must be sufficiently relevant and important to the prosecutor's case to make it unfair to complete him to proceed without it;
- iii) There must be no prima facie evidence that witness is untrustworthy;
- iv) There is no effective protection programme for the witness or the witness' family; and,
- v) The measures must be strictly necessary

The trial Chamber held that all of these criteria were met in this case. The question whether to allow for the identities of witnesses to be concealed from the defence has been

discussed in several cases before the ICTY.⁸² However, it was only in *Tadic* case⁸³ that such measures were granted. The prosecution requested the identity of four witnesses to be concealed from the defence. The Trial Chamber granted the prosecution request and allowed the witnesses to remain anonymous, holding that the principle of a fair trial required not only the protection of the accused but also the protection of victims and witnesses.⁸⁴ Recognising the exceptional nature of such measures, the Chamber concluded that the “The situation of armed conflict that existed and endures in the area where the alleged atrocities were committed is an exceptional circumstance *par excellence*”.

The Chamber considered that, although the accused has a right to examine, or have examined, the witness against him, anonymity only restricts this right to a limited and permissible extent considering the importance of witness protection, especially in the case of victims of gender violence.⁸⁵ The Chamber restricted the availability of this form of protection to cases in which other measures would be insufficient to grant the necessary protection: “any measures taken should be strictly necessary”⁸⁶. Drawing on the case law of the European Court of Human Rights and of national courts, the Chamber set out four factors to be applied when deciding whether anonymity should be granted⁸⁷, and a further series of guidelines underlining the exceptional nature of such measures.⁸⁸

⁸² See for example, *Tadic*, IT-94-1, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995; *Blaskic*, Trial Chamber I, Decision on the requests of the Prosecutor of 12 and 14 May 1997 in respect of the protection of witnesses, 6 June 1997; *Delacic*, Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses, 18 March 1997.

⁸³ *Ibid* Conclusions 11 and 12

⁸⁴ *ibid*, at 55

⁸⁵ *Ibid*, at 67

⁸⁶ *ibid*, at 66

⁸⁷ “First and foremost, there must be real fear for the safety of the witness or her or his family...; Secondly, the testimony of the particular witness must be important to the Prosecutor’s case...; Thirdly, the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy...; fourthly, the ineffectiveness or non-existence of a witness protection programme ... has a considerable bearing on any decision to grant anonymity in this case”, *Tadic*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, pp 62-65. These conditions were approved in *Blaskic*. Decision on the Application of the Prosecutor dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, p.41, although in that case no such measures were ordered.

⁸⁸ “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, such as how the witness was able to obtain the incriminating information but still excluding information that would make the true name

3.4 Right to Information

All stages of the criminal proceedings should take into account the interests of victims. The handbook highlights the role of judges in ensuring respectful and fair treatment of victims. Victims should be notified of the release of the defendant, at least when possible. (UNDOCCP b 1999:12)

(a) Information Management

1. The Registry shall keep information relating to witnesses, victims who appear before the Court and persons at risk, accompanying persons and family members in a secure environment.
2. A secure electronic database shall be maintained for any information relating to persons referred to 41 in sub-regulation 1.⁸⁹

3.5 Right to Participation

The International Criminal Court deals with some of the most serious human rights violations including genocide, torture, rape and slavery. One of the major innovations of the International Criminal Court is the integration of victims in the criminal justice process. The Rome Statute of the ICC and the Rules of Procedure and Evidence contain specific references with respect to the role of victims including notification, reparation and participation. Unlike the Ad-hoc Tribunals for the Former Republic of Yugoslavia and Rwanda, where victims' only role is one of witnesses for the prosecution, the ICC allows victims to also participate as interested parties. However, the Statute and Rules of Procedure and Evidence do not specify just how victim participation is to be put into practice. This is left up to the Court to determine. There is a great deal of ambiguity as well as lack of clarity regarding the mechanisms applicable to victims' participation and rights. A key question for the ICC is how to apply victims' rights.

traceabl. Finally, the identity of the witness must be released when there are no longer reasons to fear for the security of the witness". Tadic. Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses. 10 August 1995, at 71

⁸⁹ See. Registrar Regulation (RR) 88

The central provision of the Rome Statute on victims' participation is Article 68(3), which provides:

“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”.

(a) Participation of Victims in the Proceedings

For the purposes of rule 89 and subject to rule 102 a victim shall make a written application to the Registrar who shall develop standard forms for that purpose which shall be approved in accordance with regulation 23, sub-regulation 2. These standard forms shall, to the extent possible, be made available to victims, groups of victims, or intergovernmental and non-governmental organizations, which may assist in their dissemination, as widely as possible. Victims shall to the extent possible, use these standard forms. The standard forms or other applications described in sub-regulation 1 shall contain, to the extent possible, the following information; The identity and address of the victim, or the address to which the victim requests all communications to be sent; in case the application is presented by someone other than the victim.

If the application is presented in accordance with rule 89, sub-rule 3, evidence of the consent of the victim or evidence on the situation of the victim, being a child or a disabled person, shall be presented together with the application, either in writing or in accordance with rule 102, (a) A description of the harm suffered resulting from the commission of any crime within the jurisdiction of the Court, or, in case of a victim being an organization or institution, a description of any direct harm⁹⁰ (b) A description of the incident, including its location and date and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the harm as described in rule 85; (c) Any relevant supporting documentation, including names and addresses of witnesses; (d) Information as to why the personal interests of the victim are affected; (f) Information on the stage of the proceedings in which the victim wishes to participate, and, if applicable, on the relief sought; (g) Information on the extent of legal representation, if any, which is envisaged by the victim, including the names and

⁹⁰ See, Rule 85 (b) RPE of ICC.

addresses of potential legal representatives, and information on the victim's or victims' financial means to pay for a legal representative. Victims applying for participation in the trial and/or appeal proceedings shall, to the extent possible, make their application to the Registrar before the start of the stage of the proceedings in which they want to participate.⁹¹

(b) The Application Procedure

The VPRS has produced two standard application forms for participation⁹², one for individuals (or in the language of the Court, 'natural persons') and one for organizations⁹³. The VPRS has also produced a booklet with guidance to victims on filling out the forms⁹⁴. However, it should be noted that it is not compulsory to use the standard form: according to Regulation 86 (1), the standard forms are to be used "to the extent possible" by victims. In addition, where a person is unable to make an application in written form, due to disability or illiteracy, that person can make such an application "in audio, video or other electronic form" under Article 68(30) of Rome Statute. The VPRS would assist the victims for filling the forms.

⁹¹ 1. The Registrar may request further information from victims or those presenting an application in accordance with rule 89, sub-rule 3, in order to ensure that such application contains, to the extent possible, the information referred to in sub-regulation 2, before transmission to a Chamber. The Registrar may also seek additional information from States, the Prosecutor and intergovernmental or non-governmental organizations.

2. The Registrar shall present all applications described in this regulation to the Chamber together with a report thereon. The Registrar shall endeavour to present one report for a group of victims, taking into consideration the distinct interests of the victims.

3. Subject to any order of the Chamber, the Registrar may also submit one report on a number of applications received in accordance with sub-regulation 1 to the Chamber seized of the case or situation in order to assist that Chamber in issuing only one decision on a number of applications in accordance with rule 89, sub-rule 4. Reports covering all applications received in a certain time period may be presented on a periodic basis.

4. Before deciding on an application, the Chamber may request, if necessary with the assistance of the Registrar, additional information from, *inter alia*, States, the Prosecutor, the victims or those acting on their behalf or with their consent. If information is received from States or the Prosecutor, the Chamber shall provide the relevant victim or victims with an opportunity to respond.

5. A decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1.

6. There shall be a specialised unit dealing with victims' participation and reparations under the authority of the Registrar. This unit shall be responsible for assisting victims and groups of victims.

⁹² In accordance with Regulation 86

⁹³ Model copies of the standard application forms are These are available at can visit URL: <http://www.icc-cpi.int/victimsissues/victimsparticipation/victimsparticipationForm.html>.

⁹⁴ The booklet is available at: http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf

(c) Stages for Participation in the Proceedings

Article 68 (3) simply states that victims' views and concerns can be presented and considered at stages of the proceedings determined to be appropriate by the Court. The standard form for participation contains a list which the victim and/or the legal representative need to complete to indicate at which stage of proceedings the applicant willing to participate. The stages are; Preliminary examination stage; Pre-trial stage; Trial stage; and Appeal stage and the timing of the application under Regulation 86 (3) provides that victims must "to the extent possible" submit their applications for participation to the Registry before the start of the stage of the proceedings in which they want to participate. The criteria for considering the application for participation is the Chamber must evaluate whether the applicant is a "victim" in the proceedings before the Court; and whether the personal interests of the victims are affected.

(d) Additional Hearings on Matters related to Sentence or Reparations

Pursuant to article 76, paragraphs 2 and 3, for the purpose of holding a further hearing on matters related to sentence and, if applicable, reparations, the Presiding Judge shall set the date of the further hearing. This hearing can be postponed, in exceptional circumstances, by the Trial Chamber, on its own motion or at the request of the Prosecutor, the defence or the legal representatives of the victims participating in the proceedings pursuant to Rules 89 to 91 and, in respect of reparations hearings, those victims who have made a request under Rule 94.

In a historic decision of the International Criminal Court on 17 January 2006, concerning the first applications for participation from victims in Democratic Republic of Congo, which had been submitted by International Federation for Human Rights (FIDH), Pre-Trial Chamber I emphasised: "The Statute [of the ICC] grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests. The Chamber considers that article 68 (3) of the Statute also gives victims the right to participate in the fight against impunity...The Chamber considers that the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the

facts, to punish the perpetrators of crimes and to request reparations for the harm suffered⁹⁵. The victims Participation and Reparation Unit will deal with functions relating to victims participating in the proceedings, whether that is in the criminal proceedings,⁹⁶ or in the reparation proceedings.⁹⁷ Furthermore, the Victims Participation and Reparation Unit will assist in the administration of the Trust Fund for Victims.

(e) Different Role of the Victims

1. Victims as Independent Participants

The Rome Statute and the Rules of Procedure and Evidence of the ICC grant victims an independent role in proceedings. Unlike the International Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR) where victims have to rely on the Prosecutor, judges, or third parties acting as *amici curie* to represent their interests, the ICC allows victims to present their views and concerns to the Court, at all stages of proceedings, when their interests are affected.

2. Submitting Information to the Prosecutor

Victims have an important role in submitting information to the Prosecutor on the commission of crimes that they consider to fall within the ICC jurisdiction. Such information can contribute to the opening of an investigation, as well as to ongoing investigations and prosecutions. NGOs and other members of civil society can also submit information. Information can be of a general nature: for example, the types of crimes committed, the human rights situation, suspected perpetrators, victims, the national justice system, including its ability and willingness to investigate and prosecute perpetrators etc. Information can also focus on specific crimes and include testimonies of witnesses and victims, photographs, images, recordings etc. These submissions are referred to as “communications” in the language of the Court. The legal basis for such communications is Article 15 (1). It is important to highlight that victims can request the Prosecutor to keep all or some of the information confidential. In order to do so, the communication should specify that such information is provided “on the condition of

⁹⁵ *Decision on the applications for participation in the proceedings of VPRS 1-6*. Pre Trial Chamber I, 17 January 2006. Paras 51, 53, 63.

⁹⁶ See, Articles 15.3, 19.3, and 68.3 of the Rome Statute, and rules 16, 50, 59, 89, and 93 of RPE.

⁹⁷ See, Articles 57.3 (e), 75, and 82.4 of the Rome Statute, and rules 94-99 of RPE.

confidentiality and solely for the purpose of generating new evidence” as specified in Article 54 (3) (e).

3. Testifying as Witnesses

Victims can testify before the Court as witnesses, at the request of the prosecution or the defence or of other victims participating in the proceedings.

As witnesses, victims give evidence to the Court to serve the interests of the party calling them and respond to the questions put to them. As a result, they do not necessarily have the opportunity to present their own views and concerns. Before the ICTY and ICTR victims of crimes can only participate as witnesses.

4. Victim as a Participant / Witness

Participation is voluntary called by the defence, the prosecution, other victims participating in the proceedings or the Chamber communicating to the Court their own interests and concerns serve the interests of the Court and the party that calls them. It is up to the victims to decide what they want to say Give evidence in testifying and answering related questions Participation is possible at all stages of proceedings when considered appropriate by the Judges Called to testify at a specific time Always entitled to be represented before the ICC by a legal representative Does not normally have a legal representative normally participates via a legal representative, and need not appear in person always testify in person

5. Amicus Curiae and other forms of Submission

1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.
2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.
3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.⁹⁸

⁹⁸See. Rule 103 RPE of ICC.

(6) Participation in the Decision whether to Investigate or Prosecute

The Prosecutor⁹⁹

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation; he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

3.6 Right to Legal Aid

Rome Statute and the Rules of Procedure and Evidence of the ICC have provided provisions relating to the specific issue of legal representation for the purpose of that victims are unlikely to have experience in criminal proceedings, in particular at the international level, or to have a full understanding of their rights and due to the very nature of the crimes within the jurisdiction of the ICC. Victims have the liberty to choose legal representative.¹⁰⁰ Under Regulation 80 (1) a Chamber, after consulting the

⁹⁹ See. Article 15 Rome of Statute.

¹⁰⁰ Rule 90 (1): "A victim shall be free to choose a legal representative". According to Article 68 (3), victims are not required to have legal representation in order to be able to take part in proceedings: "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..." This provision further states that victims' views and concerns "may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence", subject to firstly legal representatives are required to meet certain criteria and be admitted to the

Registrar, can decide to appoint a legal representative for a victim where the “interests of justice” so require. It will be for the judges to interpret the term “interests of justice”. This provision may be interpreted to allow the Chambers to appoint ad hoc counsel to represent the general interests of victims in proceedings. Many victims are likely to have difficulties in finding appropriate legal representatives, in particular those who meet the necessary qualification criteria. There will also be situations in which victims request to participate in the proceedings without having considered whether to be legally represented. In such cases, victims can obtain assistance from the Victims Participation and Reparation Section (VPRS). Under Rule 16 (1) (b), the VPRS is responsible for: “Assisting [victims] in obtaining legal advice and organising their legal representation” The VPRS can refer victims to the ICC list of counsel and should provide them with details of the legal representatives appearing on the list.¹⁰¹ Victims can also request to see the curricula vitae of legal representatives¹⁰²

The participation of large numbers of victims undeniably slows down the proceedings, and the Court must ensure that it does not do so to the extent that the right of the accused to be tried within a reasonable time and the effectiveness of proceedings are jeopardised. Common legal representation was the solution found to make participation of victims possible, whilst ensuring that the proceedings are effective and defendants’ rights are respected. The only reason that can justify a decision of the Chamber to request victims to choose a common legal representation is to ensure the effectiveness of the proceedings. Ensuring that proceedings are effective is also in the interests of victims themselves. The greater the number of victims participating in proceedings, the more difficult it will be for the Court to hear them all, and the more likely it is that common legal representation will be required.¹⁰³

(a) Financial Legal Assistance

Many victims will not have the means to pay for legal representation before the ICC. The possibility of granting financial legal assistance aid to victims is fundamental to

Registry’s list of counsel; secondly, in certain specified circumstances, the Court can require victims to form groups with a common legal representative

¹⁰¹ Regulation (RR) 112

¹⁰² *ibid*

¹⁰³ Rule 92 (2)

implement the rights of victims' recognised in the provisions of Court. At the time of writing, the system for financing victims' legal representation has not been fully defined.

“It should be noted that victims in areas where the Court conducts investigations would often be extremely vulnerable. As a result of the conflicts and crimes the Court will investigate, large numbers may have been displaced. Poverty and deprivation will often be widespread. The Court's system of financial legal assistance must take all these factors into consideration in order to respond to the reality of victims' situations. If the Court fails to adequately consider the vulnerable conditions of victims, it is highly likely that victims will be discouraged from applying for legal aid and as a consequence, will also be discouraged from applying to participate in the proceedings. The Victims' Rights Working Group (VRWG) has made proposals on matters to be considered in devising the legal aid system for victims.”¹⁰⁴

(b) Financing Common Legal Assistance

In the case of a legal representative chosen by the Court, the issue of funding is particularly relevant. Although, financial assistance towards the costs of legal representation can also be obtained in other circumstances, Rule 90 (5) highlights the necessity of considering this issue in the case of common legal representatives chosen by the Court. “A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance”.

(c) Procedure for Applying for Legal Assistance

Under Regulation (RR) 113 (1), “for the purposes of participation in the proceedings, the Registry shall inform victims that they may apply for legal assistance paid by the Court, and shall supply them with the relevant form(s)”. Victims or their legal representatives must complete the approved standard form produced by the Registry.¹⁰⁵ Under Regulation (RR) 113 (2), in determining whether to grant such assistance, the Registrar will take into account factors including:

- The means of the victims;
- The factors mentioned in Article 68(1) (age, gender, health and nature of the crime)
- Any special needs of the victims;

¹⁰⁴ See VRWG Submission to the ICC Regarding its Application Forms for Indigent Victims, April 2006, available at URL: <http://www.vrwg.org/Publications/1.html>.

¹⁰⁵ See. Regulation of Registry (RR) 131(1).

- The complexity of the case;
- The possibility of asking the Office of Public Counsel for Victims to act; and
- The availability of pro bono legal advice and assistance.

(d) Determination of Victims' Financial Means

In order to qualify for legal assistance, victims are assessed as to their means. Under Regulation 84 (1), “where a person applies for legal assistance to be paid by the Court, the Registrar shall determine the applicant’s means”. Regulation 84 (2) defines the term “means”. The Victims’ Rights Working Group has recommended that there should be a presumption that victims do not have the means to pay for legal representation.¹⁰⁶

(e) The Scope of Legal Assistance

The Registrar will determine whether the applicant shall be provided with ‘full or partial payment’ of legal assistance.¹⁰⁷ Any assistance granted to victims is not guaranteed to cover the full costs of representation. Under, Regulation 83, legal assistance for an accused “shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances”¹⁰⁸ In contrast, when legal assistance is provided to victims, “the scope of legal assistance paid by the Court regarding victims shall be determined by the Registrar in consultation with the Chamber, where appropriate”.¹⁰⁹ Regulation 84 (2) provides that the Registrar “shall allow for expenses claimed by the applicant provided they are reasonable and necessary”. The fees paid to legal representatives consist of a scheme of payment based on a fixed fee system, comprising a maximum allocation of funds for each phase of the proceedings.¹¹⁰ Details on the payment scheme can be found in the reports of the Committee of Budget and Finance to the Assembly of States Parties¹¹¹.

¹⁰⁶ *Ibid* 119

¹⁰⁷ See, Regulation of Registry 84(1).

¹⁰⁸ See, Regulation of Registry 83(1).

¹⁰⁹ See, Regulation of Registry 83(2).

¹¹⁰ See, Regulation of Registry (RR) 133

¹¹¹ See Report to the Assembly of States Parties on the options for ensuring adequate defence counsel for accused persons, ICC/ASP/3/16, Para. 14. For further details see also: Report to the Assembly of States

(f) Decisions on Payment of Legal Assistance

On receipt of the application for legal assistance to be paid by the Court, the Registry is required to immediately acknowledge receipt.¹¹² The Registrar undertakes an assessment of the application to establish whether the applicant has provided all the required details. The applicant must then be informed, as soon as possible if, and to what extent, such material are incomplete and specifies a time period to provide the missing materials.¹¹³

Under Regulation (RR) 132 (3) “The Registrar should make a decision as to whether legal assistance should be paid in full or in part by the Court within ‘30 calendar days’ of the submission by the person concerned of all the documentation required”¹¹⁴. The decision must then be notified to the victim together with the reasons for the decision and instructions on how to apply for review.¹¹⁵ Victims can apply to the Presidency for review of the decision. This must be done within 15 days of notification of the relevant decision. The decision of the Presidency would be final.¹¹⁶ Regulation 85 (1) provides that in “appropriate circumstances”, the Registrar can decide to make a provisional payment of legal assistance, before the final decision has been made. There is a still uncertainty about what appropriate circumstances means, however, Regulation (RR) 132 (3) state that during the 30-day decision making period, “legal assistance shall be provisionally paid by the Court during that period”. The Registry may investigate the means of the victim if legal assistance has been provisionally granted.¹¹⁷

(g) The Office of Public Counsel for Victims

The establishment of the Office of Public Counsel for Victims (OPCV) is a new step in international criminal justice, which seeks to ensure effective participation of victims before the Court. It is an important precedent, which should enhance the system

Parties on options for ensuring adequate defence counsel for accused persons, ICC-ASP/3/6, 17 August 2004; Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons (ICC-ASP/3/CBF.2/3) – Update to Annex 2: Payment details of the ICC legal aid scheme, ICC-ASP./4/CBF.1/8, 15 March 2005. Visit at URL: <http://www.vrwg.org/Publications/1.html>.

¹¹² See, Registrar Regulation (RR) 131(2)

¹¹³ See, Regulation of Registry (RR) 131(2).

¹¹⁴ Under Regulation 85 (1), “the Registrar shall decide within one month of the submission of an application or, within one month of expiry of a time limit set in accordance with the Regulations of the Registry, whether legal assistance should be paid by the Court”.

¹¹⁵ See, Regulation Registry 85(1).

¹¹⁶ *Ibid.*

¹¹⁷ See, Regulation of Registry (RR) 132(5).

of representation for victims.¹¹⁸ The staff of the Office includes persons meeting the necessary qualification criteria to offer legal representation to victims, under Regulation 81 (2) it is a “wholly independent office”, and comes within the remit of the Registry only for administrative purposes. The Registry also carries out a monitoring activity in relation to the Office¹¹⁹. The Code of Professional Conduct of Counsel in discharging all their tasks binds members of the OPCV.¹²⁰

(h) Functions of the OPCV

The functions of the OPCV are to provide legal advice and assistance to victims and their legal representatives, and where necessary to act as legal representatives for victims. Under Regulation 80 (2) the Chamber may appoint counsel from the Office of Public Counsel for Victims as a legal representative of victims. Under Regulation 81 (4), the role of the OPCV is to “Provide support and assistance to the legal representative for victims and to victims, including, where appropriate: (a) Legal research and advice; (b) Appearing before a Chamber in respect of specific issues”. In fulfilling its duty to provide support and assistance to legal representatives, the OPCV is required to produce basic general information on legal cases and issues before the Court as well as specific advice on issues concerning victims.¹²¹ Presently the Office is able to provide effective support and assistance to legal representatives who could require the assistance of members of the Office during the entire proceeding before the Court and is in the process of setting up a library of legal materials to which victims’ legal representatives will have access.

(i) Legal Representation

Several provisions of the Regulations of the Court and of the Registry make reference to the OPCV functions in providing legal representation it will be for the Office itself and the Chambers to determine how it can best fulfill its mandate.

¹¹⁸The Office of Public Counsel for Victims (OPCV) was established under the Regulations of the Court. Although the OPCV is situated within the Registry, for administrative purposes, carries out its functions independently. Source: ICC official website.

URL: <http://www.icc-cpi.int/victimissues/victimscounsel/OPCV.html>.

¹¹⁹ See, Regulation of Registry 81(3)

¹²⁰ See, Regulation of Registry (RR) 115(2).

¹²¹ The OPCV fulfils its duty to provide advice and assistance by producing: (a) Factual background documents on the situations before the Court; (b) Research papers and advice on selected aspects of international criminal law, in particular on law relevant to victims’ participation and reparations; (c) A bibliography on international criminal law.

- Regulation 80 (1) provides that “a Chamber, following consultation with the Registrar may appoint a legal representative of victims where the interests of justice so require”.
- Regulation 80 (2) provides that “the Chamber may appoint counsel from the Office of Public Counsel for Victims” as legal representatives of victims.
- Regulation 81 (4) (b) provides that members of the Office may “appear before a Chamber in respect of specific issues”.

Therefore, the OPCV could provide legal representation by acting in the following capacities: (a) As duty counsel¹²² (b) As ad hoc counsel¹²³ (c) As the permanent legal representative of a group of victims.¹²⁴

3.7 Right to Protection of Privacy and Identity

(a) Delaying Disclosure to the Defence and the Concept of ‘rolling disclosure’

It is clear under the Rome Statute and the RPE that disclosure to the defence can be delayed on the basis of ensuring the protection and security of victims, witnesses and their families. These provisions apply to proceedings prior to the start of trial. Under Article 68 (5) where the disclosure of evidence or information...may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of trial, withhold such evidence or information and instead submit a summary thereof. Furthermore, Rule 81 (4) provides: The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial. No time limit is specified.

¹²² According to Regulation 73 (2) duty counsel must be appointed to any person who requires urgent legal assistance and has not yet secured legal assistance, or where his or her counsel is unavailable. Although no specific Regulation makes express reference to the possibility to appoint the OPCV as duty counsel, nothing would prevent the Chamber from doing so. For example, the OPCV could be appointed as duty counsel when, after an application for participation has been filed by a victim without a legal representative, the Chamber requires the applicant to provide additional information. Appointment of the OPCV as duty counsel would be consistent with Regulation 81 (4) (b).

¹²³ Regulation 80 (1) could be used to appoint an ad hoc legal representative for victims to represent the general interests of victims, for example when issues of disclosure are raised between the Prosecution and the Defence.

¹²⁴ Nothing in the provisions would seem to prevent victims from choosing legal representatives from the OPCV in accordance with the general principle that “[a] victim shall be free to choose its legal representative” Rule 90(1) RPE of ICC, read with Registrar Regulation 80 (2).

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Whereas the ICTR and the SCSL, not permitting anonymous witnesses, have in several cases authorised disclosure of the identity of witnesses to be delayed beyond the start of trial proceedings, applying a system of 'rolling disclosure'.¹²⁵ The timing of disclosure is measured back from the date on which the particular witness is expected to testify.¹²⁶ For example, in the *Bagosora* case¹²⁷ the Chamber allowed the Prosecutor not to disclose the identities of the witnesses until 35 days before the witness was called to give evidence. The need for anonymity may have a special importance in cases of witnesses who are were victims of sexual violence by maintaining anonymity, this would preclude any re-traumatisation as a result of testifying against the accused. Because evidence regarding a victim's prior or subsequent sexual conduct is inadmissible,¹²⁸ there may be little reason to know the victim's identity. (Chinkin 1997:77)

With the usage of methods to protect a witness from the crippling effects of giving *viva voce* testimony, such as video-link evidence as well as in *camera* proceedings, this might lessen the need for anonymity when pitted against the rights of the accused.¹²⁹ The ICC has at its disposal several measures that can be taken to protect victims and witnesses including expunging the names of victims, witness and other persons at risk from the public record; enjoin the Prosecutor, the defence or other participants in the proceedings from disclosing the names using electronic or other special devices for receiving testimony (video-conferencing, close-circum TV; and sound manipulation); having resource to pseudonyms; and making in *camera* proceedings.¹³⁰ Overall, the victim should be kept informed of the proceedings and be permitted to

¹²⁵ This system requires the identity of individual witnesses to be revealed within sufficient time prior to the witness giving evidence to permit the accused to adequately prepare his or her defence.

¹²⁶ See, *Bagosora, Nsengiyumva, Kabiligi et Ntabakuze* (ICTR-98-41-I), Decision and scheduling order on the prosecution motion for harmonisation and modification of protective measures for witnesses, Trial Chamber III, 5 December 2001, at p.22; Gbao, (SCSL-2003-09-PT), Decision on the prosecution motion for immediate protective measures for witnesses and victims and for non-public disclosure, 10 October 2003, at p.58, ruling that disclosure shall be made 42 days prior to the testimony of a particular witness..

¹²⁷ *Bagosora, Nsengiyumva, Kabiligi et Ntabakuze* (ICTR-98-41-I), Decision and scheduling order on the prosecution motion for harmonisation and modification of protective measures for witnesses, Pre-Trial Chamber III, 5 December 2001, at p.22.

¹²⁸ See. Rule 71RPE of ICC.

¹²⁹ See, *Prosecutor v Tadic*, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, (10 August 1995) Case No. IT-94-1-T, P.11.

¹³⁰ Rule 87(3), RPE In the *Tadic* case, it was ruled that where evidence of victim's consent is admitted, the accused must satisfy the Chamber in *camera* that the evidence is relevant and credible. Under the RPE, there is a presumption of the need for in *camera* proceedings involving victims of sexual violence or when children are victims or witnesses. See also Article 68 (2).

participate in the proceedings in meaningful way.¹³¹ This, however is not be prejudice to or inconsistent with the rights of the accused.¹³²

There is no explicit authorisation to conceal the identity of witnesses under the RPE. Article 68(5) permits the non-disclosure of evidence or information that might jeopardise the security of a witness or his/her family. This is restricted up to the time prior to the commencement of trial. The RPE, as well as the ICC Statute, do not speak to whether such measures, like anonymity, can prevail following the commencement of the trial and may reflect the boundaries established by the ICTY.

(b) Prior and Subsequent Sexual Conduct

The introduction of prior, as well as subsequent sexual conduct appears to be a strong exception to the general admissibility of all potentially relevant evidence. This reflects the limited probative value of the evidence of sexual conduct obscured by the overwhelmingly prejudicial values of the information.¹³³ Rule 70 of the RPE appears to codify some of the composite jurisprudence from the ad hoc Tribunals. A victim cannot infer consent by reason of the silence of or lack of resistance.¹³⁴ Moreover, credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred from prior or subsequent conduct of the victim.¹³⁵ Evidence of prior or subsequent sexual conduct of a victim or witness is not admissible.

(c) Video-link Testimony

The use of video-link evidence as well other special electronic means or otherwise is more frequently used in domestic criminal proceedings. Child witnesses' sexual assault complaints and witnesses who are fearful about the consequences of testifying may be permitted to provide evidence outside the courtroom setting. International courts are also cognisant of the rights to fair trial that can be infringed when allowing receiving video-link evidence. The ability to hear evidence in this manner was established by the judges

¹³¹ Amnesty International, (1999), *The International Criminal Court: Drafting Effective Rules, Concerning the Trial, Appeal and Review*. AI Index: IOR 40/12/99 (1999) p12.

¹³² See, Article 69 (2) Rome Statute.

¹³³ *Prosecuter v Delalic, Mucic Delic and Landzo*, judgment, (16 Nov 1998) Case No IT-90-21-T Para. 70 holding that evidence of prior sexual conducted was irrelevant and inadmissible.

¹³⁴ Rule 70(c) RPE of ICC.

¹³⁵ Rule 70 (d) RPE of ICC.

of the ICTY due to inability and unwillingness of some witnesses to attend the proceedings. Subsequently, Rule (A) of the ICTY was drafted in the interests of justice where the Chamber has authorised it.

In the *Tadic* case, the Trial Chamber declared that the testimony of witnesses must be shown to be sufficiently important to make it unfair to proceed without the testimony and that the witness is unable or unwilling to come to the ICTY.¹³⁶ If this is done, there is the need for an agreement between the parties on the appropriate location; the appointment of a presiding officer to attend with the witness and ensure that the testimony is given freely and voluntarily, and the use of technology allowing the witness to see the questionnaire, judges and the defence, and *vice versa*. The rules of perjury and testimony under a solemn oath are to prevail. The right to cross-examination is to be preserved.¹³⁷ The ICC Statute allows for evidence to be given through electronic or other special means, especially in cases of sexual violence against children, as well as the introduction of documents or written transcripts.¹³⁸ This is pursuant to Article 69 (2) of the ICC Statute where the Court will allow recorded testimony, as well as the introduction of documents or written transcripts, subject to the measures not being prejudicial to or inconsistent with the rights of the accused.¹³⁹ In those cases, the Court will allow

¹³⁶ 25 June 1996 Case No IT-94-1-T, Decision on the Defence Motion to Summon and Protect Defence Witnesses, and of the Giving of Evidence by Video-Link.

¹³⁷ *Delalic* Case No IT-96-21-T, decision on the motion to allow witnesses K, L, and M to give their testimony by way of Video-Link conference. In this case, the Chamber added a third condition to the *Tadic* criteria, requesting that the accused must not be prejudiced in his or her right to confront witnesses. In that case, Video-Link evidence was held to be suspect so the Chamber could not find the evidence to be reliable when evaluating the evidence in total. See Para 18.

¹³⁸ See Art 68 (2). There are general rules permitting the pre-Trial Chamber to gather evidence that would be admitted at trial although such measures are only to be used when strictly necessary and the defence has a right to be present and to cross-examine the witness. The measures must be necessary to ensure the efficiency and integrity of the proceedings. See Art 56 of the *ICC Statute*. See also rule 71 (c) of the ICTY Rules.

¹³⁹ See Art 69 (2) of the *ICC Statute* and Rules 67-68 of the RPF. Rule 89F and Rule 92 *bis* of the ICTY Rules allow for written evidence to be admitted where a statement seeks to prove a matter other than the acts and conduct of the accused as charged in the indictment. Factors that would favour the admission of such a written statement include, but are not limited to, circumstances in which oral testimony of facts similar to the evidence in question had already been admitted, where the statistical analysis of the ethnic composition of the population in the places to which the charge relate. Other factors that would favour admission of such written statements include: where it concerns the impact of crimes upon victims or relates to the character of the accused or to factors to be taken into account in determining sentence. However, a preference for written statements may evolve, as seen with the ICTY, in the interests of efficiency and speedier trials.

evidence to be given in this way unless directing otherwise.¹⁴⁰ Witnesses cannot be compelled to travel to the Court so that State Parties could facilitate the taking of witness testimony under oath in their territories.¹⁴¹ Rule 68 of the RPF allows for the submission of pre-recorded audio or video testimony, as long as the witness is present before the Court and does not object to the previously recorded testimony and can be examined. Where the disclosure of evidence of information may lead to a witness's security (or his/her family) being gravely endangered such information can be withheld before trial with only a requirement to present a summary of such evidence, subject to the obligation not to be prejudicial to or inconsistent with the rights of the accused and a fair and impartial.¹⁴²

However, the *ICC* may need to exercise different standards of reliability relating to evidence given by video-link or any evidence given out of court. The judges will not have the opportunity to assess the witness' demeanour or other characteristics while the evidence is given. Moreover, its reliability may be questioned when provided out of Court, with limited or no opportunity for cross-examination. It is impossible to envisage all trial matters where prescriptive rules of evidence would cover every possible scenario developments. This is exactly what transpired with the ad hoc Tribunals, leading to noble achievements in the rules of evidence.

3.8 Right to Reparation

Specific emphasis will furthermore be put on the concept of victim reparation and the *ICC*. The *ICC* reparation regime is applauded as the first international attempt to provide reparations to victims of international crimes. However, the reparation regime may turn out to be a dead letter.

(a) Object of the Reparation

The right of victims of gross violations to reparation is a fundamental principle of international law¹. For the first time in the history of international criminal justice,

¹⁴⁰ See, Article 68(2) (4) Rome Statute.

¹⁴¹ See Article 93 1(b) some have suggested that *ICC* States have legislation in place which permit the prosecution of a witness for *ICC* offences or for false statements before a national judicial officer for contempt. See Amnesty International, *supra* note 18 at p. 19

¹⁴² See, Article 68 (5) Material information in the Prosecutor's possession or under his control may only be used in evidence during the trial if they have been previously disclosed to the defence.

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victims now have recourse to a mechanism that allows them to claim reparations before an international Tribunal. Prior to the International Criminal Court was established, no international regime existed that allowed victims to apply for and receive reparations from individual perpetrators. Victims are unable to claim reparations before the International Tribunals for former Yugoslavia and Rwanda (ICTY and ICTR), and judges are only able to make orders for the restitution of property.¹⁴³ The only hope that victims have of obtaining any compensation is to pursue their claims before national courts on the basis of convictions rendered by the international Tribunals.¹⁴⁴

Reparation is central in the context of getting justice. During the genocide people lost their loved ones, they suffered psychological and physical injuries and many lost everything they owned. For most of them, justice is not complete unless the process includes reparation for both material and moral damages. Reparation would mean the difference between abject poverty and restored dignity for numerous survivors. Although reparation can take many forms, this section focuses on reparation in the form of compensation and restitution for material and moral damages.¹⁴⁵

The ICCPR includes the most elaborate provision on the obligation to provide an effective remedy. Under article 2 (3), each state party undertakes to ensure that any person, whose rights and freedoms under the Covenant are violated, shall have access to an effective remedy. Consequently, this legal obligation can only be invoked in connection with other rights in the Covenant, and does not have direct horizontal effect. The supervising body of the ICCPR, the HRC, recognises the right to a remedy as inherent to the Covenant as a whole and as such non-derogable¹⁴⁶.

¹⁴³ . Articles 24 (3) of the Statute of the ICTY and 23 (3) of the Statute of the ICTR state that the Court is authorized to make an order for the return of "any property and proceeds acquired by criminal conduct . . . to their rightful owners".

¹⁴⁴ Rule 106 of the Rules of Procedure of both Tribunals states that the Registrar "shall transmit to the relevant national authorities" the judgement finding the accused guilty of a crime that has caused injury to a victim. The national court is bound by the judgement of the Tribunal: "the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury".

¹⁴⁵ UN General Assembly Resolution 59/137, adopted on 17 February 2005, Assistance to survivors of the 1994 genocide in Rwanda, particularly orphans, widows and victims of sexual violence, A/RES/59/137.

¹⁴⁶ HRC. General Comment No 29, CCPR/C/21/Rev.1/Add.11, Para. 14.

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In most of the cases where a violation is found, the HRC indicates the most appropriate remedies to bring relief to the victim. The type of reparation depends on the nature of the violated human right and on the facts of the case.¹⁴⁷ The HRC has held that compensation should take due account of both the seriousness of the violation and the resulting damage. Restitution, i.e. restoring the victim to the original situation before the violation, seems to be recommended when possible. Rehabilitation should include medical and psychological care, and has been recommended in for example cases concerning torture¹⁴⁸. When the victim is deceased, appropriate compensation is to be paid to the surviving family¹⁴⁹. The case law of the HRC has in a significant way contributed to the development of the right to an effective remedy. Its practice has evolved to include a set of state obligations, including the duty to investigate, to bring those responsible to justice and to pay compensation to the victims.

The UN Declaration¹⁵⁰ is one of the earlier UN efforts to deal with rights of victims. The Declaration establishes a framework of principles. Where appropriate, offenders should make fair restitution to victims of crime or their families and dependants.¹⁵¹ The UN draft Convention on Justice and Support for Victims of Crime has provided that states parties shall legislative to make offenders responsible for paying fair restitution to victims, their families or dependents.¹⁵² Compensation when restitution is

¹⁴⁷ *Wilson v. Philippines*, HRC, No. 868/1999, 11/11/2003, Para. 9

¹⁴⁸ *R.S. v. Trinidad and Tobago*, HRC, No. 684/1996, 15/4/2002, Para. 9

¹⁴⁹ *Lantsova v. Russia*, HRC, No. 763/1997, 15/4/2002, Para.11 and *Interights v. Trinidad and Tobago*, HRC, No. 580/1994, 19/4/2002, Para. 12.

¹⁵⁰ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. adopted by UN General Assembly Res. 40/34 of 29 November 1985 it is to be noted that the Declaration does not specifically mention victims of international crimes, and its focus is more on domestic criminal law.

¹⁵¹ *Ibid.* Principle 8, When a public official or another official agent caused the harm, the state, or the state or government successor, is responsible for restitution.(principle.11) If the offender is not able to compensate the victim, the state should make an effort to provide financial compensation(principle12 and 13) In this regard, national funds for compensation of victims are encouraged. Victims should receive necessary assistance, including psychological and material assistance, through governmental or other means.(principle 14)

¹⁵² Such restitution include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights. See UN Draft convention article 10,

fully available from the offender or other sources, States parties shall endeavor to provide compensation¹⁵³

Articles 75 of the Rome Statute reflects an important advance in the international law relating to victims, by permitting victims to claims reparation for the wrongs they have suffered. Article 79 provides for the establishment of a Trust Fund for victims and their family.¹⁵⁴ A Board of Directors will be created to “establish and direct the activities and projects of the Trust Fund and allocation of the property and money available to it, bearing in mind available resources and subject to the decisions taken by Court.”¹⁵⁵ The Rules of the Procedure and Evidence have a subsection on the victims and witnesses Unit, stipulating the responsibilities of the Registrar relating to victims and witnesses¹⁵⁶, functions, responsibilities of the Unit and expertise in the Unit¹⁵⁷. Provision of remedies to victims of crimes has historically been seen as a way to settle disputes between the offender and the victim, thus preventing individualised vindication and further disturbances of peace.

The reparation regime is independent from victims’ participation in proceedings; victims do not have to have participated in preliminary and/or trial phases in order to apply and/or to be eligible for reparation awards. The Trust Fund for Victims (Trust Fund) is one of the most important and innovative aspects of the Rome Statute’s provisions for victims. It was established pursuant to Article 79 (1) of the Statute, Rule 98 of the Rules of Procedure and Evidence, and Resolution 6 of the Assembly of States

¹⁵³ *Ibid* To victims who have suffered significant bodily injury or implement of physics or mental health as a result of international violent crime; the victims family, in particular dependents of persons who have died as a result of such victimization (Article 11 (a)(b)).

¹⁵⁴ The Preparatory Commission therefore drafted, and the Assembly of the States parties adopted, a resolution entitled “Establishment of fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims” Resolution ICC-ASP/1/Res.6 adopted at the 3rd plenary meeting, on 9 September 2002. by consensus: “Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims.”

¹⁵⁵ See Para.7 of the Annex to the resolution. *ibid*

¹⁵⁶ See. Rule 16 RPE of ICC.

¹⁵⁷ See Rules 17.18.19 RPE of ICC.

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Parties, adopted on 9 September 2002,¹⁵⁸ “for the benefit of victims of crimes within the jurisdiction of the court, and of the families of such victims

The statutes of the ICTY and ICTR did not provide for the establishment of trust funds.¹⁵⁹ This has been seen as a major defect in the contribution of these Tribunals to justice for victims. Indeed, the Trust Fund was created partly as a result of the experiences of these two predecessors of the International Criminal Court. The Trust Fund has two main roles. Firstly, under Article 75 (2), the Court may make awards to victims through the Trust Fund rather than to victims directly.¹⁶⁰ In such cases, the Trust Fund will be responsible for the implementation of the reparations orders. Secondly, the Trust Fund has a wider mandate: to use the voluntary contributions that it receives to carry out projects aimed at assisting larger groups of victims, who may not have necessarily suffered directly from the particular crimes of the particular individuals who are prosecuted before the ICC.

It should be highlighted that, in view of the unique nature of the ICC reparations system, many aspects of the implementation of the provisions on reparation remain uncertain. The Court has not yet adopted principles relating to reparations (as required under Article 75(1)). Furthermore, at the time of writing the ICC has not yet dealt with requests for reparations and the Trust Fund has not begun its activities. It will be through the development of the Court’s jurisprudence and the practice of the Trust Fund, that the details of the system, and its success, will be determined.

¹⁵⁸ Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, Resolution ICC-ASP/1/Res.6, 9 September 2002..

¹⁵⁹ In 2000, the judges of both Tribunals submitted recommendations to the UN Secretary General and the Security Council on the issue of compensation to victims. They proposed the establishment of trust funds or international claims commissions, considering that this would be the fairest and most appropriate means of enabling the ad hoc Tribunals to provide reparations to victims. However, no such funds were established; see letter from the Secretary-General addressed to the President of the Security Council (2 November 2000), annexing a letter from the President of the International Criminal Tribunal for the former Yugoslavia, Judge Jorda, UN Doc. S/2000/1063; letter from the Secretary General addressed to the President of the Security Council (14 December 2000) annexing a letter from the President of the International Criminal Tribunal for Rwanda, Judge Navanethem Pillay, UN Doc S/2000/1198; and ICTY Judges’ Report of 13 September 2000 on Victims Compensation and Participation visit.URL:<http://www.icty.org/reports>.

¹⁶⁰ Article 75 (2) of the Rome Statute: “Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79.”

(b) Forms of Reparation

The general principle under international law is that “reparation must, 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”¹⁶¹. Reparation should be proportionate to the harm suffered. The various forms of reparation as defined under international law includes

- i. Restitution,
- ii. Compensation,
- iii. Rehabilitation,
- iv. Satisfaction and
- v. Guarantees of non-repetition¹⁶².

The term ‘reparation’ therefore encompasses, but goes far beyond, financial compensation. The ICC can make orders for all these types of reparation, in each case choosing the most appropriate form(s) to redress the particular damage suffered by the victim. Restitution, compensation and rehabilitation are the only forms of reparation expressly referred to in the Rome Statute. The basic provisions regarding reparations before the Court appear in Article 75 of the Statute and Rules 94–98 of the finalized draft Rules of Procedure and Evidence.

Article 75(1) provides that the Court shall “establish principles relating to reparations to, or in respect of, victims” and, based on these principles, the Court may “determine the scope and extent of any damage, loss and injury to, or in respect of, victims” and paragraph 2 authorizes the Court either to “make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation” or, where appropriate, to “order that the

¹⁶¹ See Permanent Court of International Justice, *Chorzow Factory Case*, Merits, 1928, P.C.I.J., Sr.A, N°17 (September 13) at 47 or available At <http://www.icjci.org/cijwww/cdecisions/ccpij/serie>.

¹⁶² UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (Van Boven/ Bassiouni Principles), E/CN.4/2005/L.48; see also, for example, the Draft Articles on State Responsibility adopted by the International Law Commission in 2001 (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001); Principles 8-10 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34 of 29 November 1985; the Universal Declaration of Human Rights (Article 8); International Covenant on Civil and Political Rights (art. 2.3); the Convention against Torture and other Cruel Inhuman and Degrading Treatment (art.14); the International Convention on the Elimination of All Forms of Racial Discrimination (art.6); the Convention on the Rights of the Child (Article 39); the American Convention on Human Rights (art.25, 63.1); the European Convention of Human Rights (arts.5, 13, 41); the African Charter on Human and People’s Rights (arts. 7, 21.2)..

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award for reparations be made through the Trust Fund provided for in Article 79.” Paragraph 3 provides that before making an order for reparations, 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.”

Victims’ requests for reparations would be filed with the Registrar, who would duly notify the person named in the request or identified in the charges, and to the extent possible, to any interested persons or any interested states, subject to any protective measures.¹⁶³ Rule 95 of the Rules of Procedure and Evidence provides that the Court, when determining orders for reparations on its own motion, would request the Registrar to notify the persons against whom the order may be made, and to the extent possible, victims, interested persons and interested states. While those interested in making representations regarding reparation are required to file written requests with the Registrar in accordance with Rules 94 and 95, it is envisioned that oral representations could be made in certain circumstances. These representations would be made during the Sentencing hearing or subsequent hearings scheduled by the Trial Chamber.¹⁶⁴

Rule 97 specifies how reparations are to be assessed. Paragraph 1 provides that: Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both and paragraph 2 allows for the appointment of appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.

The reparations provisions are without prejudice to the rights of victims under national or international law, and are without prejudice to the responsibility of states under international law. The possibility for the Court to award collective reparations is

¹⁶³ Rule 94

¹⁶⁴ Art. 76(3) read with Rule 143

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likely to have a significant effect in shaping and developing new jurisprudence on creative means and mechanisms for reparations. There is likely only to be a limited amount of funds for reparations awards when compared with the rights and needs of victims, and therefore collective awards may be, at times, the only method to bring a certain measure of justice to victims. Rule 98(1) provides that “individual awards for reparations shall be made directly against a convicted person”, and Paragraphs 2–4 detail modalities for using the Trust Fund for Victims to allocate or distribute the reparations awards made by the Court to victims. Paragraph 2 provides that the Court may order that awards for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim.

Where as paragraphs 3 and 4 provide that awards for reparations be made through the Trust Fund, “where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate,” or when made “to an intergovernmental, international or national organization approved by the Trust Fund.” Paragraph 5 provides that “other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.” At the time of writing, the modalities for the operation of the Trust Fund for Victims were still under discussion by the Preparatory Commission for the International Criminal Court.¹⁶⁵

The Court may decide to request assistance from states parties such as the execution of searches and seizures and the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes, for the purposes of facilitation of forfeiture proceedings.¹⁶⁶ States parties would have the obligation to give

¹⁶⁵ Art. 79(3) of the Statute provides that the Assembly of States Parties has the responsibility for developing the criteria for management of the Trust Fund for Victims. However, in recognition of the need for detailed discussions on the issue, the Bureau tasked the Preparatory Commission to prepare recommendations for the Assembly of States Parties on the Trust Fund for Victims. It was initially placed within the Working Group on Financial Regulations and Rules and later transferred to the Working Group on Financial Issues. The main issues discussed by delegates related to a proposed management structure of the Fund and its relationship with other bodies of the Court, voluntary contributions, and the scope of beneficiaries.

¹⁶⁶ Art. 75(5) provides that 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. Art. 93(1)(h) deals with searches and seizures

effect to fines and forfeitures ordered by the Court, as well as reparations orders.¹⁶⁷ In this regard, Rule 217 of the Rules of Procedure and Evidence provides that:

The Presidency shall, as appropriate, seek cooperation and measures for enforcement [...] as well as transmit copies of relevant orders to any State with which the sentenced person appears to have direct connection by reason of either nationality, domicile or habitual residence or by virtue of the location of the sentenced person's assets and property or with which the victim has such connection.

Rule 218(3) provides that:

In order to enable States to give effect to an order for reparations, the order shall specify: (a) The identity of the person against whom the order has been issued; (b) In respect of reparations of a financial nature, the identity of the victims to whom individual reparations have been granted, and, where the award for reparations shall be deposited with the Trust Fund, the particulars of the Trust Fund for the deposit of the award; and (c) The scope and nature of the reparations ordered by the Court, including, where applicable, the property and assets for which restitution has been ordered

In accordance with Rule 219, national authorities do not have the ability to modify the reparations specified by the Court, the scope or extent of any damage, loss or injury determined by the Court or the principles stated in the order. However, parties adversely affected can appeal orders for reparations.¹⁶⁸

(i) Restitution¹⁶⁹

“Restitution should, wherever possible, restore the victim to the original situation before the [violations] occurred. Restitution includes, as appropriate: restoration of liberty,

and k with the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes.

¹⁶⁷ Art. 75(5) specifically refers to the applicability of Article 109 (dealing with the requirements of state parties to enforce fines and forfeitures, and/or to take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited), to the reparations orders of the Court.

¹⁶⁸ 34. Art. 82(4) of the Rome Statute provides that A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under Article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

¹⁶⁹ Restitution is traditionally considered to be the primary form of reparation, since it aims to re-establish the situation of the victim as it was prior to the commission of crimes. However, given the types of crimes that will come before the ICC, it will generally be impossible to restore victims to their original situation before violations occurred.

enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property."¹⁷⁰

(a) Jurisprudence of the ICTY and the ICTR on Restitution

Rule 105 establishes a procedure allowing the ICTY and the ICTR Tribunals to order the restitution of property with three conditions: a conviction must be pronounced against the accused, and a specific finding made as to the unlawful taking of property, the unlawful taking of property must be "associated with the crime", and the Chamber must be seized of a request by the Prosecutor or act *Proprio motu*. The requirement of the existence of conviction against the accused and of a specific finding comes clearly out of the reading of both Rule 105 (A) and Rule 98 *ter* (B) of the Rules. One may wonder whether to fulfil these conditions, the accused must have been specifically convicted of looting or plunder of property. Indeed, the second requirement that there be an association between the unlawful taking of property and the crime for which the accused has been convicted does not demand identity between those two offences.¹⁷¹

Is it possible for the Tribunal to hear evidence on every potential claim of unlawful taking of property brought against subordinates of the accused? Would it be fair to the accused to do so, considering the time such a process would inevitably take? In reality, unless the trial is relatively limited in scope, it will be virtually impossible for all such victims to obtain restitution. Furthermore, the person convicted does not have to be in actual possession of the property. This has two consequences: first, the person convicted does not have to be the main perpetrator of the unlawful taking of property; secondly, the Tribunal can order that property "in the hands of third parties otherwise not connected with the crime" be restituted. This latter proposition is expressly provided for in Rule 105 (C), according to which third parties shall be given the opportunity to justify their claim and prove their good faith.

¹⁷⁰ Principle 19. UN Basic Principles and Guidelines on the Right to a Remedy and Reparation

¹⁷¹ However, the related condition that a specific finding be made, while legitimate will be harder to prove if the accused is not charged with specific events leading to the unlawfully taking of property, either directly or by others. This is especially the case in trials where, for example, the accused are the high level commanders or officials under whose authority thousands of victims may have been deprived of their property as part of a large-scale campaign of persecutions.

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Moreover, as an individual victims do not enjoy *locus standi* before the Tribunal. The *Naletilic & Martinovic*¹⁷² case might prove to be a first, as in its-trial brief the prosecution has expressed an intention to raise the issue of restitution. A formal request will only be admissible if the accused are found guilty, the application of Rules 105 and 106. It has suggested in Article 24 (3) of the Statue includes both “the restitution of property as well as compensation for injuries”, and that the unlawful taking of property also covers the “use of human beings as property through acts such as enslavement, forced prostitution, or forced labour”.

It even goes as far as to claim that, in the context of widespread or systematic acts of persecution, a finding that the accused is liable for the pillaging and destruction of homes and other property “should confer standing in subsequent restitution proceedings to all victims. Associated with such acts during the relevant time or factual finding, thereby giving a very broad interpretation of the requirement set forth in Rule 98 *ter* (B). Upon fulfilment of these conditions starts a process that traditionally belongs to the procedure applicable to civil in domestic jurisdiction, the Tribunal being responsible for determining the rightful owner of property on the balance of probabilities. To that effect, the Chamber must convene a hearing and request the assistance of the competent national authorities to determine the rightful owner if it is not able to do so.

However, it is not certain whether the national authorities will always be in a position to make an “affirmative determination” as to who the rightful owner is, as required by Rule 105 (E), especially in the potential absence of documents such as real estate property records. Moreover, the Chamber may “in the meantime order such provisional measures for the preservation and protection of the property and proceeds as it considers appropriate.” It has, however, been pointed out that as such provisional measures aiming at preserving the property can only be ordered after a judgement of conviction has been entered, its impact may be limited. As stated above, Rule 105 is yet to be applied by the ICTY. However, on its own, this procedure will not be an answer for the thousands of persons who lost property, destroyed in the course of the wars and the

¹⁷² See *Naletilic and Martinovic case IT-98-34 (ICTY)* at Para 94

various campaigns of ethnic cleansing, and cannot be retrieved, especially in light of the lack of authority of the Tribunal to compensate them.

ii. Compensation

Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from violations of international human rights and humanitarian law, such as: (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; and (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.”¹⁷³

Compensation can be awarded as a substitute for restitution. The role of compensation is to “fill in the gaps so as to ensure full reparation for the damage suffered”¹⁷⁴. Awards of compensation should be distinguished from awards to victims for other purposes, such as the costs of the proceedings. Regional and international Tribunals and commissions have dealt extensively with the issue of compensation to victims. As assessed under international law, awards of compensation can be provided for loss of earnings, pension, psychological and medical expenses, but also pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium. The United Nations Compensation Commission has elaborated principles in relation to compensation for international crimes.¹⁷⁵

(a) Lack of Authority of the Tribunals to Order Compensation

Rule 106 is dedicated to the issue of compensation; the Statute has not conferred on the Tribunal the power to order such measures. The Security Council has affirmed the work of the International Tribunal shall be carried out without prejudice to the right of the victim to seek, through appropriate means, compensation, for damages incurred as a

¹⁷³ Principle 20, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation

¹⁷⁴ Commentary to the Draft Articles on State Responsibility for Internationally Wrongful Acts, Report of the International Law Commission on its Fifty-Three Session, GA: Supplementary No. 10 (A/56/10): Ch. IV.E (November 2001), at 245, referring to the *Chorzow Factory Case*, 1928, P.C.I.J., Sr.A, N°17 (September 13), at 47-48.

¹⁷⁵ Source: URL: <http://www.unog.ch/uncc>.

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result of violations of international humanitarian law. According to Rule 106, a victim may bring an action for compensation before a national jurisdiction or other competent body, but not before the Tribunal. Former ICTY President Antonio Cassese described the underlying context in which Rule 106 was adopted in the following terms: “this is a sort of a hint to the victim: please go to the national court and try to get some sort of vindication of your rights. However, this approach has not produced any results so far, and in light of the state of the jurisdictions in the region to date, it is unlikely to produce any in the near future.

The statutes of the ICTY and ICTR focused on retributive justice and neglected to provide for restorative justice in the form of reparation for victims. In post-war Yugoslavia and Rwanda, domestic courts were ill prepared to handle such cases.¹⁷⁶ The President¹⁷⁷ of the ICTY proposed to the UN Security Council the establishment of a ‘claims commission’ that would provide a ‘method of compensation’ for the victims of crimes in the former Yugoslavia. This effectively ended any prospect that the proceedings before the Tribunal would be extended to include the granting of compensation to the victims of crimes committed in the former Yugoslavia. In addition, the Security Council is yet to respond to the President’s invitation to create a compensation commission. The situation is similar at the ICTR where the judges have rejected proposals to amend the ICTR Statute with the aim of providing direct redress to victims.¹⁷⁸

¹⁷⁶ Rules 105 or 106 have yet to be applied in the jurisprudence of the ICTY, and no restitution or compensation was ordered pursuant to these provisions in the national courts of the former Yugoslavia. In October 2000.

¹⁷⁷ When Judge Navanethem Pillay was the President of the ICTR, addressed a letter to the UN Secretary General on behalf of the judges and in response to complaints from Rwandans of injustice. Rwandans at one stage called a boycott of the Tribunal and were particularly aggrieved that the Tribunal was providing HIV/Aids anti-retro viral medication to detainees in its custody, whereas victims of the genocide were not receiving any aid or treatment. We requested the UN to remedy the gap in the Statute, and make provision for compensation for victims. (Judge Navi Pillay 2007:12) letter dated 12 October 2000 from the President of the ICTY addressed to the Secretary-General, S/2000/1063, Annex, and Para. 45.

¹⁷⁸ See Letter of 14 December 2000 by the UN Secretary-General to the UN Security Council. 15 December 2000, S/2000/1198, at Annex.

iii. Rehabilitation

Rehabilitation should include medical and psychological care as well as legal and social services.¹⁷⁹ Rehabilitation seeks to diminish as far as possible the psychological trauma as well as physical and social consequences of the crimes committed. Measures of rehabilitation have been included in judgements of the Inter-American Court of Human Rights and decisions of other international bodies such as the UN Committee of Human Rights and the UN Committee against Torture.¹⁸⁰ These awards have included social, medical and psychological measures. Support services can be provided directly, or the cost of such services can be awarded to victims in the form of monetary awards. In such cases, monetary awards for the purpose of rehabilitation should be distinguished from awards of compensation.

iv. Satisfaction

Satisfaction should include, where applicable, any or all of the following: (a) effective measures aimed at the cessation of continuing violations; (b) verification of the facts and full public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (c) the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the express or presumed wish of the victims, or the cultural practices of the families and communities; (d) an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) public apology, including acknowledgement of the facts and acceptance of responsibility; (f) judicial and administrative sanctions against persons liable for the violations; (g) commemorations

¹⁷⁹ Principle 21, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation UN Declaration on victims of crime described the services which are need to address the needs i.e. Crisis intervention, Counselling, Advocacy, Support during investigation of crime, Support during criminal prosecution and trial, Support after case disposition, Training for allied professional on victim issues, Violence prevention and other prevention services, Public education on victim issues (UNDOC:1999 Hand book on Justice for Victims, at p.16

¹⁸⁰

and tributes to the victims; (h) inclusion of an accurate account of the violations in international human rights law and humanitarian training and in educational material at all levels.”¹⁸¹

Satisfaction includes measures aimed at establishing and publicising the truth about what occurred, including through judicial investigations and prosecutions, and symbolic measures, such as public apologies, monuments and commemorative ceremonies. The judgement of the Court itself can be considered a form of satisfaction, as a record of the truth surrounding violations, but the Court should consider the wide range of other measures. Satisfaction should include, where applicable, any or all of the following:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.¹⁸²

v. Guarantees of Non-repetition

“Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention: (a) ensuring effective civilian control of military and security forces; (b) ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (c) strengthening the independence of the judiciary; (d) protecting persons in the legal, medical and health-care professions, and human rights defenders; (e) providing, on a

¹⁸¹ See. Principle 21 of ‘UN Basic Principles and Guidelines on the Right to a Remedy and Reparation’.

¹⁸² See. Principle 22 of ‘UN Basic Principles and Guidelines on the Right to a Remedy and Reparation’.

priority and continued basis, human right and international humanitarian law training for law enforcement officials, as well as military and security forces; (f) promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (g) promoting mechanisms for preventing and monitoring social conflicts and their resolution; (h) reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.”¹⁸³

The Joint/Orentlicher principles¹⁸ refer to “guarantees of non-recurrence”, including reform of state institutions, disbandment of armed forces, demobilization and social reintegration of child soldiers, and reform of laws and institutions that might perpetuate impunity¹⁸⁴

3.8.1 Types of Damage, Injury and Harm

The types of harm in respect of which the ICC can order reparations are not defined in the Rome Statute or the RPE. However, in accordance with international law and other provisions of the Statute and the Rules, the term ‘harm’ should include physical harm, psychological harm, and material harm.¹⁸⁵

(a) The Definition of “harm”

There is no provision specifying the types of harm that individuals must have suffered to be considered victims under Rule 85. However, in the context of the other provisions of the Rome Statute and the Rules of Procedure and Evidence, as mentioned in the records of the negotiations of these instruments,¹⁸⁶ and in accordance with international human

¹⁸³ See, Principle 23 of ‘UN Basic Principles and Guidelines on the Right to a Remedy and Reparation’

¹⁸⁴ See, Principles 35-38 Joint/Orentlicher, E/CN.4/2005/102/Add.1

¹⁸⁵ This was accepted by Pre-Trial Chamber I of the ICC in its Decision on the Applications for Participation in the Proceedings of VPRS 1 to VPRS 6 of 17 January 2006, ICC-01/04, Para’s 81, 115-116 and 131, where the Chamber referred to internationally valid principles that recognise “emotional suffering” and “economic loss” as types of harm. In its decision, the Chamber made extensive reference to case law of the European and the Inter-American Courts of Human Rights.

¹⁸⁶ During negotiations, explicit reference was made to the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Declaration on Justice for Victims), adopted by the General Assembly, 29 November 1985, Resolution 40/34; and to the Basic Principles and Guidelines on the Right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of humanitarian law (Van Boven/ Bassiouni Principles), adopted by the General Assembly, 16 December 2005, Resolution 60/147

rights law,¹⁸⁷ harm must be understood to include physical, psychological and material harm. This interpretation was confirmed in the decision of Pre-Trial Chamber I of 17 January 2006.¹⁸⁸ “As a result of the commission of a crime within the jurisdiction of the Court”: the causal link between the crime and the harm suffered the term “as a result of” indicates that there is no requirement that the crime directly targeted the victim. Nevertheless a causal link between the crime and the harm suffered is necessary. In accordance with the developments in international human rights and humanitarian law, the definition should include the family or dependants of the direct victim and “persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”¹⁸⁹. This was confirmed by Pre-Trial Chamber I in its decision of 29 June 2006.¹⁹⁰

(b) ICC Jurisprudence

In its *Decision on the applications for participation in the proceedings of VPRS 1–6*, the Pre-Trial Chamber I considered that “in the absence of a definition, the Chamber must interpret the term [harm] on a case-by-case basis in the light of Article 21 (3) of the Statute, according to which ‘the application and interpretation of law pursuant to this Article must be consistent with internationally recognized human rights’.¹⁹¹ The Chamber referred to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Declaration on Justice for Victims), and the “Van Boven/ Bassiouni principles”, noting that both instruments recognize both “emotional suffering” and “economic loss” as forms of harm.¹⁹²

¹⁸⁷ Article 21 (3) of the Rome Statute, entitled Applicable law, requires the application and interpretation of law in proceedings before the ICC “must be consistent with internationally recognized human rights”.

¹⁸⁸ *Decision on the applications for participation in the proceedings of VPRS 1 – 6*, 17 January 2006, ICC-01/04-101. Para 81.

¹⁸⁹ See for example. UN Declaration on Justice for Victims, Para 2, and Van Boven/ Bassiouni Principles, Principle 8, op. cit.

¹⁹⁰ *Decision on Applications for Participation in the Proceedings* submitted by VPRS 1 to VPRS 6 in the Case of the *Prosecutor v. Thomas Lubanga Dyilo*, 29 June 2006, ICC/01/04-01/06, p. 7, n. 24.

¹⁹¹ See *Decision on the Applications for Participation in the Proceedings of VPRS 1 to VPRS 6* of 17 January 2006, ICC-01/04. and paragraph 81.

¹⁹² *Ibid.*, Para. 115. Under the UN Declaration on Justice for Victims, “Victims” means “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights”. The Van Boven/ Bassiouni Principles adopt the same definition.

The Pre-Trial Chamber I also cited jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights, noting that both courts have repeatedly awarded reparations for harm due to emotional suffering or economic loss. In respect of emotional suffering, the Court highlighted the judgment of the European Court of Human Rights in the case of *Keenan v. the United Kingdom*,¹⁹³ in which the victim, the mother of the direct victim, was awarded non-financial damages for the anguish and distress she had suffered on account of the conditions in which her son had been detained. The Chamber concluded that, “in accordance with internationally recognized human rights, emotional suffering and economic loss constitute harm within the meaning of Rule 85 of the Rules”.¹⁹⁴ This decision concerned applications of victims to participate in proceedings, but the definition of harm is equally applicable to the issue of reparations.

However, an important limit to those who can benefit from orders for reparations is that since they are awarded against individual perpetrators, they are restricted to the victims of crimes for which that individual has been convicted before the Court. The category of victims who may potentially benefit from reparations orders will be to a large extent dependent on the strategy of the prosecutor in terms of the cases, individuals and charges chosen for prosecution. Many victims within a particular situation will fall outside the limited cases selected by the Court for prosecution and will therefore not be able to obtain reparations through court orders. This is where the independent role of the Trust Fund will be most significant.

3.8.2 Orders for Reparation

(a) Who is Eligible for Reparation orders?

Under Article 75 (2) the Court can make an order specifying appropriate reparations “to, or in respect of, victims”. Under Rule 85, the term “victims” includes individuals and certain organisations where they have suffered direct harm to property. The term “in respect of” should be interpreted to include the families and dependents of victims.

¹⁹³ European Court of Human Rights. *Keenan v. the United Kingdom*. “Judgment”, 3 April 2001, Application No. 27229/95, Para. 138.

¹⁹⁴ Pre-Trial Chamber I of the ICC in its *Decision on the Applications for Participation in the Proceedings* of VPRS 1 to VPRS 6 of 17 January 2006. ICC-01/04. paragraph 116.

(b) Against whom can Reparation Orders be made?

Under Article 75 (2), the Court can make an order “directly against a convicted person”. During the negotiations of the Rome Statute, states discussed the possibility of also permitting the Court to make orders against states. However, this controversial proposal was eventually rejected and the final version of the Statute seems to exclude such orders. However, an order of the Court does not exclude the possibility for victims to pursue other forms of reparation from states before other national or international bodies. Article 75 (6) provides that “Nothing in this Article shall be interpreted as prejudicing the rights of victims under national or international law”.¹⁹⁵

The fact that the Court can only order reparations following a conviction, affects the timing of such orders: orders can only be made at the conclusion of a trial.¹⁹⁶ Furthermore, it means that the participation of victims’ during the pre-trial and trial stages may be vital “If the investigation or prosecution is not successful the victims will lose the opportunity to have their requests for reparations dealt with by the Court”.(Bitti, G., et al :2003:313.)

3.8.3 Procedure for Reparation

(a) Initiation of the Procedure

Under Article 75 (1), the Court can order reparations either upon request or on its own motion. Rule 94 sets out the procedure for individual requests (1), while Rule 95 sets out the procedure for orders on the Court’s own motion (2).

(b) The Decision to order Reparations

The general obligation to notify the accused and other interested persons or States After the request for reparation has been submitted, or when the Court considers making an order on its own initiative, the Registrar is required to provide notification to the accused and, to the extent possible, to any interested persons or any interested states.¹⁹⁷ Those notified can make representations to the Chamber, which must be filed with the Registrar.

¹⁹⁵ Furthermore the Court has not yet established the principles relating to reparations as required under Article 75(1) Rome Statute...

¹⁹⁶ Article 75(2) Rome Statute states: “The Court may make an order directly against a convicted person specifying the appropriate reparations to, or in respect of, victims”.

¹⁹⁷ See, Rules 94 (2) and 95 (1) RPE of ICC

During negotiation of the Rules, the issue arose as to when the accused should be notified of the existence of claims. Article 75 (3) uses the expression 'convicted person', which implies that the accused should only be notified once he or she has been found guilty. Some delegates argued that the accused should be told that there are claims for compensation as soon as he or she is arrested and brought before the Court; others argued that notification should be made only after the confirmation of charges when it was clear whether a person would face any claims. (Lewis, P. and Friman, H.:2001)

The latter argument prevailed and Rule 94 (2) thus provides for notification to be made 'at commencement of the trial' (subject to any protective measure), because by that stage charges have been confirmed, and claims can be clearly linked to those charges. The early notification of all parties, including interested states, should help to facilitate co-operation in the implementation of any future orders. The notification of interested states is particularly important in this context because of the need for their assistance and their co-operation, in accordance with Chapter IX of the Rome Statute, which deals with co-operation mechanisms.

(c) Assessment of the Scope and Extent of Damage, Loss, or Injury

Before making an order for reparations, in order to ensure that all those concerned have the opportunity to make their interests known, the Court can invite, and is required to take into consideration, representations from the convicted person, victims, and other interested persons or interested States.¹⁹⁸ At this stage once again, representations must be filed with the Registry.¹⁹⁹ Rule 97 provides:

1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.
2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.
3. In all cases, the Court shall respect the rights of victims and the convicted person. Evidence relating to reparations can be adduced at various points throughout the proceedings. Under Regulation 56, the Trial Chamber can hear witnesses and examine their evidence for the purpose of making a reparation order during the trial procedure.

¹⁹⁸ See, Article 75(3) Rome Statute.

¹⁹⁹ See, Rules 94(2) and 95(1) RPE of ICC.

Although the Court cannot make an order until the accused has been convicted, this helps to avoid witnesses having to come to court twice, first to give evidence at trial and again to give evidence concerning reparation. The Chamber can also, where necessary, order a separate hearing on the issue of reparation.²⁰⁰ Under Rule 91(4), with the authorisation of the Chamber, the victim's representative can question the accused, witnesses and experts. It should be noted that during such a hearing different rules apply to the questioning of witnesses by victims' representatives. In particular, the Chamber cannot require a representative to submit his or her questions to the Court in written form, nor can it restrict the order and the form of the questions, nor ask the questions itself on behalf of the victim's representative.

(d) The Standard of Proof

In order for a victim to be able to receive an award for reparations, the nature and amount of the damage that has been suffered must be proved and a link must be established between the harm suffered by the victim and the crime(s) for which the accused has been convicted. The Rome Statute only specifies the standard of proof for conviction and does not refer to the standard to be applied in assessing reparations.

(e) What Standard of Proof will be Required?

The question of the standard of proof for reparations was extensively discussed during negotiations of the Rules. It was generally recognised that the standard of proof should be lower than that for conviction, which requires proof "beyond reasonable doubt",²⁰¹ but that a causal link between the crimes prosecuted and the harm, loss or injury suffered by a victim was necessary. Some states were concerned that failing to specify a standard may lead to too high a threshold being imposed, whilst other delegates were concerned that a minimum standard should be specified to avoid too much discretion being left to the Court. Canada proposed to link the standard of proof to the findings of the criminal proceedings: "After conviction, any damage, loss or injury resulting from the crime, including the nature or amount thereof, need only be proved on a balance of probabilities for the purpose of a reparation order. Where damage, loss or injury has been proven as part of the definition of the crime which the person was convicted the Court may rely on that finding in determining reparations".²⁰²

²⁰⁰ See, Article 76(2),(3) Rome Statute and Rule 143 RPE of ICC.

²⁰¹ Article 66 (3) reads: "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt".

²⁰² Canadian proposal, as cited in Lewis, P. and Friman, H., "Reparations to victims," in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Lee, R.S. (ed.)), Transnational Publishers (2001), 485..

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However, the wording 'balance of probabilities' was considered by many states to be difficult to understand as a concept, alien to their national systems, and insufficiently precise. The United States made an informal proposal, dealing only with individual reparations. According to this proposal, the Court should have been able to rely on certain findings made during the course of a trial. If the crime was proven during the trial, the US envisaged that the Court would "not require proof beyond reasonable doubt [that the victim's harm was caused by the crimes committed by the convicted person] but may order reparations if the proof shows that it is more likely than not that the convicted person caused the victim's damages, loss or injury".²⁰³

However, consensus on the appropriate standard could not be reached. And it was decided that, standard of proof should be regulated by the Court when establishing principles for reparations in pursuant to Article 75 (1). These principles have not yet been established and it therefore remains unclear what standard of proof will be required.

(f) Individual or Collective Awards

The Court can decide whether to order reparations on an individualized or on a collective basis, or both. Rule 97 (1) implies that as a general rule awards should be made on an individual basis, but that collective awards may be ordered where the Court "deems it appropriate". In view of the seriousness of the crimes before the Court, the extent of damage, loss and injury caused, the potential number of victims, and the likelihood that convicted persons will have only limited financial resources, the possibility of making collective awards enables the Court to provide some redress to a greater number of victims: "In some situations, the sheer number of victims and perpetrators may overwhelm the best efforts to provide full redress to victims; collective awards may be the only method to bring a certain measure of justice".

An explanatory note produced by the Court on victims' participation and reparations states that "an advantage of collective reparation is that it can provide certain

²⁰³ United States proposal, as cited in Lewis, P. and Friman, H., "Reparations to victims," in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Lee, R.S. (ed.)), Transnational Publishers (2001), 485.. 55. Shelton, D.L. and Ingadottir, T., *The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Article 79)*. Center on International Cooperation (1999); and see Lewis, P. and Friman, H., "Reparations to victims," *op. cit.* 483.

relief to a community as a whole, and help place its members in a position to reconstruct their lives”, and provides examples including money spent on centers that provide services to victims or on symbolic measures such as victim commemorations.²⁰⁴

(g) Expert Assistance in the Assessment of Appropriate Reparations

The Court can request the assistance of experts in assessing reparations under Rule 97 (2). Experts may be appointed on the Court’s own motion, or at the request of victims, their legal representatives, or of the convicted person. Experts can advise the Court on a wide range of issues relating to reparations, to assist in “determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations”.²⁰⁵

Experts can thus provide advice and assistance on issues including how to assess harm, and the particular needs of victims, taking into account their individual circumstances; whether the Court should order individual or collective awards in particular cases; which form of reparation would be most suitable for an individual victim or group of victims etc. In order to be able to carry out their functions and adequately assess the harm suffered by particular categories of victims, experts must have relevant knowledge and experience of injuries and harm resulting from the commission of crimes within the jurisdiction of the Court and of the national context. Particular expertise is required to assess the harm caused by sexual violence. To this end, under Rule 97 (2), when the Court makes such appointments, it shall ensure that they are “appropriate experts”. At the request of the Chamber, the Registry may provide information on appropriate experts to assist the Court.²⁰⁶ The Court is required to invite as appropriate victims, their legal representatives, the convicted persons, as well as interested persons and interested States, to comment on the report produced by the appointed experts.²⁰⁷

²⁰⁴ See, ICC Background Note no: ICC2005.028-EN, Victims’ Participation and Reparations.

²⁰⁵ See, Rule 97 (2) RPE of ICC.

²⁰⁶ See, Registrar Regulation (RR) 110(2).

²⁰⁷ See, Rule 97(2) RPE of ICC.

(h) Appeals of Reparation Orders

Significantly, victims have the right to appeal an order for reparations.²⁰⁸ Reparation orders may also be appealed by the convicted person him – or herself, as well as by a *bona fide* property owner whose rights are adversely affected by any such order. Article 109 (1) provides that effect shall be given to orders “without prejudice to the rights of bona fide third parties”. This refers to the possibility that there may be additional claims from others creditors or victims who have not applied to the ICC for reparations. Appeals must be filed with the Registrar²⁰⁹ not later than 30 days from the date on which they have been notified of the reparation order that they wish to appeal.²¹⁰ Extensions of this time limit are only possible where the victim can show good cause for the delay in filing the appeal.²¹¹ The Appeals Chamber has the power to confirm, reverse, or amend an existing reparation order.²¹²

3.8.4. Effectiveness of Reparation Orders

(a) Measures to Prevent the Dissipation of Assets

In order to ensure the effectiveness of orders for reparation, the Court can request protective measures, to preserve assets that may become the subject of a future reparation order. Protective measures can provide for “the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes”.²¹³ Rule 99 provides that both the Pre-Trial Chamber and the Trial Chamber can determine whether protective measures should be requested. Under Article 57 (3) (e), the Pre-Trial Chamber can ask State Parties to take such measures once a warrant of arrest or summons has been issued, having due regard to the strength of the evidence and the rights of the parties concerned, “in particular for the ultimate benefit of victims”. It appears that the Trial Chamber can only request protective measures once the accused has been convicted. Article 75 (4) provides 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

²⁰⁸ See, Article 82 (4) Rome Statute and Rule 150 RPE of ICC, provides more details on the procedure.

²⁰⁹ See, Rule 150(3) RPE of ICC.

²¹⁰ See, Rule 150(1) RPE of ICC.

²¹¹ See, Rule 150(2) RPE of ICC.

²¹² See, Rule 153(1) RPE of ICC.

²¹³ See, Article 93(k) Rome Statute.

order to give effect to an order, which it may make under this Article, it is necessary to seek protective measures. This procedure can be initiated by the Trial Chamber on its own motion, or at the request of victims or their legal representatives, who have made a request for reparations or who have given a written undertaking that they will do so.²¹⁴

(b) Jurisprudence of the ICC

The issue of protective measures and the interpretation of Article 57 (3) (e) was considered by the Pre-Trial Chamber I in its *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*.²¹⁵ The Chamber noted that Article 57 (3) (e) refers only to making protective orders for the purpose of forfeiture, but considered that in light of the reference to the 'ultimate benefit of victims' and in the context of the provisions of Rule 99, Article 57 (3) (e) must be interpreted to allow protective measures to be ordered for the purpose of future reparations orders.²¹⁶ The Chamber concluded that: "As the power conferred on the Court to grant reparations to victims is one of the distinctive features of the Court, intended to alleviate, as much as possible, the negative consequences of their victimisation, it will be in the 'ultimate interest of victims' if, pursuant to Article 57 (3) (e), the cooperation of States Parties can be sought in order to take protective measures for the purpose of securing the enforcement of a future reparation award".²¹⁷

(c) Notification

In accordance with the aim of such measures, the Court is not generally required to give notice of proceedings for protective measures, unless in the particular circumstances the Court considers that notification could not "jeopardize the effectiveness of the measures".²¹⁸ Rule 99 (3) requires the Registrar to provide notification of the measures, "as soon as is consistent with the effectiveness of the

²¹⁴ See, Rule 99(1) RPE of ICC.

²¹⁵ See for more details. Decision on 24 February 2006, ICC-01/04-01/06-8-US-Corr.

²¹⁶ 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, 24 February 2006, ICC-01/04-01/06-8-US-Corr, paragraphs 130-134

²¹⁷ *Ibid.* para 135

²¹⁸ See. Rule 99(2) RPE of ICC.

measures requested” and to notify “those against whom a request is made and, to the extent possible, to any interested persons or any interested States”. The Registrar will at that stage invite them to make representations “as to whether the order should be revoked or otherwise modified”. Rule 99 (4) gives the Court discretion to determine the appropriate timing and conduct of such proceedings.

3.8.4.1 Enforcement of Reparations Orders

(a) Effective C-operation from States Parties in the Enforcement of the Court’s orders will determine the Effectiveness of the Reparation Process.

States Parties are responsible for the enforcement of reparation orders.²¹⁹ In general, under Articles 86 and 88, States Parties are required to “cooperate fully with the Court” and to “ensure that there are procedures available under their national law for all of the forms of cooperation”. Under Article 75 (5) together with Article 109, State Parties “shall give effect to decisions on reparations, in accordance with the procedure of their national law”. Rule 219 specifies that “the national authorities should not modify the reparations specified by the Court, the scope or extent of any damage, loss or injury determined by the Court or the principles stated in the order, and shall facilitate the enforcement of such order”. Article 109 (2)²²⁰, provides that States shall “take measures to recover the value of the proceeds, property or assets ordered by the Court”. Any funds recovered by the State must be transferred to the ICC.²²¹

States Parties may confront legal problems in fulfilling their obligations to enforce orders at the national level. For States Parties to be able to provide effective assistance and collaborate with the Court they must have enacted effective national legislation implementing the Rome Statute. To date, few national laws provides adequately for enforcement proceedings. Effective implementation will also depend in a large part on the state of the national justice system and the independence of national judges. The assistance of non-States Parties may also be necessary for the enforcement of reparation orders, in particular when the convicted person’s assets are in the territory of a non-State Party. Article 87 (5) (a) provides that cooperation and assistance of non-State

²¹⁹ See, Article 93 (1) (k) Rome Statute.

²²⁰ According to Article 75 (5), this provision applies to reparation orders.

²²¹ See, Rule 109(3) RPE of ICC.

Parties can be achieved “on the basis of an ad hoc arrangement, an agreement with such a State or any other appropriate basis.”

Article 87 (5) (b) provides that a non-State Party that agrees to an ad hoc arrangement is bound by it. If such an agreement is not respected, the Court is entitled to refer the situation to the Assembly of States Parties. In other cases, there will be practical problems. In states recovering from conflict, or which do not support ICC proceedings, it is likely to be difficult to trace, freeze and seize assets. Further more, “mutual assistance in criminal matters is traditionally slow and a major source of frustration for requesting authorities”. This problem is exacerbated by “the speed with which debtors can move their assets if they learn that a freezing or seizure order is imminent”. Finally, if the perpetrator’s assets are not available or he or she is insolvent, states may be unable to implement reparations orders.

3.8.5 The Trust Fund for Victims

“What compensation could you ever give that would be adequate for the loss of a loved one? You couldn’t possibly ever replace the one who is no longer there. But, frequently, symbols can be powerful. With the Trust Fund, a country, a nation, the international community says, symbolically: ‘We cannot compensate you, but we want to show you that we care, we want to show that we hope that this small thing that we do for you will somehow pour balm on your wounds and help those wounds to heal.’” Archbishop Desmond Tutu, Board of Directors of the Trust Fund, April 2004.²²²

The Trust Fund is one of the most important innovations introduced by the Rome Statute concerning victims. It was established pursuant to Article 79 (1), Rule 98 of the Rules of Procedure and Evidence, and Resolution 6 of the Assembly of States Parties of 9 September 2002.²²³ The Trust Fund performs two principal functions, it implements reparations orders made by the Court and has a discretion to use ‘voluntary contributions’

²²² His Eminence Archbishop Desmond Tutu, on behalf of the Board of Directors of the Trust Fund at the ceremony marking their first meeting, The Hague, 22 April 2004. Cited in Bonneau, K. and Ferstman, K., “The Regulations of the Trust Fund for Victims are Finally Adopted,” *Victims’ Rights Working Group Bulletin*, Issue No 5 / February 2006.

²²³ See, Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, Resolution ICC-ASP/1/Res.6, 9 September 2002.

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received from various sources to provide assistance to victims in situations investigated by the Court, whether or not they have suffered directly or indirectly from the crimes prosecuted before the Court. As such, wide communities of victims of international crimes are eligible for potential assistance from the Trust Fund as reparation for the crimes suffered.

Under Rule 98, there are three different situations in which the Chamber can order reparations awards to be made through the Trust Fund:

- a. Individual awards to victims;
- b. Collective awards to victims;
- c. Awards to intergovernmental, international or national organizations approved

a. Individual Awards to Victims

Under Rule 98 “The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim”. This provision indicates that as a general Rule awards should be made directly transferred to victims. Circumstances in which it may be impracticable or impossible to do so, thus justifying transfer through the Trust Fund, may include, for example, when there is a large number of individual victims, when the victim to whom reparations have been ordered is a child, or is temporarily incapable. It is difficult to predict how often the Trust Fund will be used to assist in distributing individual awards. When individual awards are deposited with the Trust Fund, they are required to be kept separately from the other resources of the Fund and must be “forwarded to each victim as soon as possible”.

b. Collective Awards to Victims through the Trust Fund

Under Rule 98 (3), the Court may order that a collective award be made through the Trust Fund, “where the number of victims and the scope, forms and modalities of reparations makes a collective award more appropriate”. This option can be used to make orders to fund projects that can benefit a whole community of victims of crimes for which person(s) have been convicted before the Court. The Court could, for example, order reparations to be used for the building of a school, a hospital, or a health center. The role

of the Trust Fund in the implementation of collective awards for reparations should enable the reparations regime to operate effectively where there are large numbers of victims.

c. Collective Awards made to Intergovernmental, International or National Organisations

Rule 98 (4) provides: “Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organisation approved by the Trust Fund”.

The Chamber can order an award for reparations to be implemented by an organisation that has been approved by the Trust Fund. Organisations can be used to implement individual or collective awards. Before making such an order, the Court is required to consult with the Trust Fund, as well as with the states concerned. The procedure and criteria for the selection and approval of intergovernmental, international or national organizations to which reparation awards can be made are not specified. There are several options for identifying appropriate organisations: the Trust Fund could put out a call for proposals; it could invite cold applications; it could identify additional criteria relating to the suitability of the implementing body (for instance, a certain size, knowledge of a particular situation, proven independence and impartiality; proven capacity to manage grants, etc (Redress 2003:34).²²⁴

3.8.6 Fines and Forfeiture

As with awards for reparations, when the Chambers make orders for resources collected through fines and forfeiture to be transferred to the Trust Fund, the Board is required to determine the use of such resources in accordance with any instructions contained in the Court’s order. However, if the orders do not contain further stipulations or instructions, the Board can determine the use of such resources in accordance with Rule 98 and any relevant decisions of the Court.²²⁵ The Board can also seek further guidance from the

²²⁴ Redress/Forensic Risk Alliance, *The International Criminal Court’s Trust Fund for Victims – Analysis and options for the development of further criteria for the operation of the Trust Fund for Victims*, December 2003, 34.

²²⁵ See. Regulation 44 Victim Trust Fund (VTF).

Chamber, which made the order.²²⁶ It is unclear whether the standard practice will be for the Court to specify how fines and forfeiture are to be used, or whether it will leave this to the discretion of the Trust Fund.

3.8.7 Use of other Resources: The Trust Fund's wider role in Assisting Victims and their Families

The "other resources of the Trust Fund" are "resources other than those collected from awards for reparations, fines and forfeitures"²²⁷. These include therefore voluntary contributions and resources allocated by the Assembly of States Parties.²²⁸

3.8.8 Who can benefit from the other Resources of the Trust Fund?

Article 79 (1) provides that the Trust Fund is established "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims".²²⁹ Rule 98 (5) states that, "other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of Article 79." The Regulations of the Trust Fund state that the other resources of the Trust Fund are for the benefit of "victims of crimes within the jurisdiction of the Court... and their families, who have suffered physical, psychological and/ or material harm as a result of these crimes".²³⁰ None of these provisions limit the potential beneficiaries of the Trust Fund to victims of crimes prosecuted by the Court. Instead, they extend to victims of crimes "within the jurisdiction of the Court", meaning that the Trust Fund can assist victims regardless of whether their specific case has been prosecuted before the Court, provided that there is a clear link to the jurisdiction of the Court.

This provision aims to give the Trust Fund the necessary flexibility and independence from the organs of the Court to be able to provide effective assistance to

²²⁶ See, Regulation 45 (VTF).

²²⁷ See, Regulation 47 (VTF).

²²⁸ Under Regulation 36 (VTF), if the Assembly of States Parties does not specify how such contributions are to be used, "the Trust Fund may allocate these contributions to its General Account".

²²⁹ See, Regulation 42 (VTF) 42

²³⁰ See, Regulation 48 (VTF) 48

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victims. A narrower approach, limited to victims of crimes prosecuted by the Court would excessively limit the role of the Trust Fund and would mean that it was entirely dependent on the choices of the Prosecutor in terms of those victims it could act to benefit. The groups of victims to whom assistance could be provided would be extremely limited, particularly in view of the limited prosecution strategy adopted by the Prosecutor. Such an approach would mean that the needs of all other victims in a situation under investigation by the Court would be excluded. Other victims from the same communities as those who are victims of the particular crimes prosecuted before the Court would not be eligible for assistance. The role of the Trust Fund is to ensure that reparations can benefit entire communities and not only those who are victims of crimes that happen to be the subject of prosecutions before the ICC.

CHAPTER - IV

UNITED NATIONS DRAFT CONVENTION ON VICTIMS OF CRIME: 2006

The background of the convention can be studied through the United Nations Crime Congress initiatives. Since its foundation, the United Nations, drawing on the principles of the Charter and the International Bill of Human Rights has formulated numerous international instruments in crime prevention and criminal justice.¹ The United Nations congresses on the prevention of crime and the treatment of offenders have contributed to this process of standard-setting on victims². The present chapter going to deal the back ground and negotiating history of the convention and analysis of provisions of the convention

4.1. Role of the UN Crime Congress

Initially, in pursuance of the Resolution 7 of the Sixth United Nations Crime Congress,³ entitled "Preventions of the Abuse of Power"⁴ an item on illegal abuses of

¹ See preface of the "Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice" the Compendium was prepared with hope that it will contribute to a wider knowledge and an increased awareness of United Nations crime prevention and criminal justice standards, proving to be of value to all those who are both interested in crime control and concerned with the observance of human rights in the administration of justice. Copy of compendium is available at <http://www.ifs.univie.ac.at/~uncjin/compend/1999-06-30>

² The work of the United Nations Crime Congress had been expanded in this field by the additional standards adopted by the Seventh Congress (Milan, 1985) and endorsed by the General Assembly in its resolution 40/32 of 29 November 1985, namely the Milan Plan of Action. The Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power together with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, The Basic Principles on the Independence of the Judiciary; and the Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoner.

³ The United Nations Congress for Prevention of Crime and Treatment of Offenders, The United Nations Office on Drugs and Crime (UNODC), The United Nations Crime Prevention and Criminal Justice Programme Network are the basic institutions which made a effort to ensure the widest possible dissemination of the standards and norms related to victims, including through the development of training manuals, modules and tools as well as conducting of training courses for the implementation of standards and norms related to victims as well as in the provision of training to personnel whose work involves contact with victims. In its research activities the institutes were considered to conducting "Victimological research" as well as comparative research related to justice for victims. in particular in areas such as a) effectiveness of existing protection measures; b) training programmes for public services and for associations and organizations providing assistance to victims; c) compensation schemes for victims; and d) organization of assistance to victims.

economic and public power was included in the United Nations work programme for the biennium 1982-1983 under the sub programme on "Crime and Development" in accordance with recommendations of the Sixth Congress three reports were prepared. namely: "Legislative provisions against abuses of power and measures used for their prevention and control"⁵, "Patterns, trends, dynamic and impact of criminal acts involving abuses of power and the typology of offenders and victims"⁶, and "Guidelines for measures on behalf of victims of crime and abuse of power"⁷.

The events of the UN Crime Congress in early 1980's have expressively drawn attention to the fact of massive disasters involving criminal negligence and claiming thousands of victims, killings of political opponents or others. However, invisible reported cases of torture, organised criminality, and widespread instances of ordinary street crime, provoking vigilante counteractions and a further spiral of violence. The survey of the United Nations Crime Congress noted, that in many parts of the world the citizens at large are the victims, afraid to leave their homes at night, to follow their favourite pursuits and customary life-styles, often living almost in a state of a siege. Whether the danger is real or exacerbated by the pervasive anxiety fanned by the publicity given to crimes or, on the contrary, the omnibus silence surrounding them.⁸ As a part of its initiatives the Crime Congress has conducted a global survey. A United Nations survey questionnaire entitled "Redress, assistance and restitution/ compensation for victims of crime and of abuse of power"⁹, which was addressed early in 1985 to all

⁴ See, Sixth United Nations Congress on prevention of Crime and the Treatment of Offenders, Caracas, Venezuela, 25 August to 5 September 1980: Report prepared by the Secretariat (United Nations publication, sales No. E.81.IV.4), Chap I section B.

⁵ See, E/AC.57/1984/12.

⁶ See, E/AC.57/1984/13.

⁷ See, E/AC.57/1984/14.

⁸ See, 'Survey of redress, assistance, restitution and compensation for victims of crime'. Report of the Secretary-General. Item 5 of the provisional agenda of Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders held at Milan, Italy, from 26 August to 6 September 1985. A/CONF.121/4 31st July 1985.

⁹ The purpose of this report was to present the results of this survey so as to provide an overview of the situation of crime victims, their needs and relevant developments in meeting them, as well as areas identified as requiring future action. This information is intended to complement the policy-oriented discussion of the subject-matter contained in the working paper on item 5 of the Congress agenda, entitled "victims of crime" (A/CONF.121/6), which is in pursuance of the recommendations of the Committee on Crime Prevention and Control, is concerned with both the victims of traditional and newer crimes and those of illegal abuses of power.

members and non-member States of the United Nations, to national correspondents in the various countries, and to the intergovernmental and non-governmental organisations concerned. The questionnaire sought information on the existing practices, as well as on proposals for reforms. Both quantitative and qualitative information was obtained, and special care was exercised to reflect accurately the social, economic, legal and cultural realities of the various countries involved.

The main avenues of questionnaire “recourse and redress; informing victims of their rights and options; special police services and procedures for victims; judicial processes; alternatives to formal judicial processes; restitution;¹⁰ compensation;¹¹ health and social services’ redress and assistance for new and special forms of victimisation; training for personal who deal with victims; research forms of victimisation; training for personal who deal with victims; research; and major issues and parameters for action at the national, regional and international levels”. A total replies were received from 70 countries,¹² along with two non member States of the United Nations. The replies were represented wide cross-section of countries in all geographical regions, and the findings can thus be said to have a reasonable degree of validity and representativeness.

The working group of the United Nations noted that there has been considerable development of interests in the victims of crime. Although the attention has been focused primarily on the offender and on the process of social control, the contributions of victimologists and victims’ advocates and development of empirical tools such as and to the possibilities for more effective and informed action on their behalf.¹³ Reflecting this concern, the topic “victims of crime” has been placed on the agenda of the seventh United Nations Congress on the prevention of Crimes and Treatment of offenders, to be held in Milan, Italy, from 26 August to 6 September 1985.

¹⁰ The term “restitution” was defined as payments or service by an offender (whether individual, corporation, state, or other entity), either to the direct victims or to indirect victims such as the family of the victims or the community.

¹¹ For the purpose of the survey, the term “compensation” was defined as payments to victims by an official body (e.g. the courts or other tribunals) from special public/state funds.

¹² In which India also submitted its report of the survey. See for the countries list at pp.6-7 of the report

¹³ “Victims of Crime” Working paper prepared by the Secretariat through Item 5 of the Provisional agenda, at Seventh United Nations Congress on Prevention of Crime and the Treatment of Offenders which was held at Milan, Italy, from 26th August to 6th September 1985. A/CONF.121/6 on 1st August 1985. at p.3

The working group has acknowledged that “the plight of victims of crime and of illegal abuses of power has been arousing increasing concern in recent years. Proliferating instance of victimisation both of individuals and vulnerable groups, highlighted by the media, have provoked feelings of empathy, of shared vulnerability and of the need for more effective preventive and remedial action. Though the response still lags far behind the need, there seems to be a growing recognition that the common bond of humanity and self-interest, as well as the climate of insecurity and fear in which so many people live, require strengthened ties of social solidarity and joint action to reduce the suffering and damages which criminal and other illicit and noxious acts inflict.”¹⁴ And it also noted that victimisation, both individual and collective, is an aged-old phenomenon, which has at times reached genocide proportions.

The decimation of certain racial, religious and ethnic groups is tragic testimony to this. Innocent victims of terrorism against and by the State, victimisation through harmful economic practice exhibiting flagrant disregard of human life and health, or double standards victimisation the weak and unknowing- such instances abound, which few possibilities for recourse. It also noted that historically, redress has played an important role. Traditionally, under customary systems of justice, the focus has been on repairing the damage to other groupings. But in the modern context, the victim is all too often left without remedy. Indemnification of, and other aid to, crime victims is an important issue, which deserves priority. Various aspects of victimization and potential modes of response have received various degrees of attention in different places and at different times. During the 1970’s a number of international and regional colloquia have been held, reflecting the growing interest in “victimology” and the development of more effective policies to meet the need of crimes.¹⁵ This was the first time, how ever, that global United Nations conference is focusing on the subject.

The working committee on Crime Prevention and Control stressed that attention should be paid to the victims of illegal abuses of power; consideration should also be given to the victims of traditional crime, particularly of offences involving violence or

¹⁴ *Ibid*

¹⁵ *Ibid* at p.6

brutality¹⁶. In pursuance of Resolution 7 of the Sixth Congress,¹⁷ the formulation of guidelines on behalf of such victims had been included in the regular United Nations work programme. In order to relate the guidelines to this agenda item of the Seventh Congress, their scope was expanded to include also the victims of ordinary crime.¹⁸ The committee on Crime Prevention and Control recommended that the International Meeting of Experts on this topic arrive at a final text for submission to the Seventh Congress.

The international preparatory meeting welcomed the formulation of the draft guidelines and made further recommendations, on the basis of the work of a drafting group, proposing a draft resolution and declaration on justice and existence for victim¹⁹. This text was revised on the basis of comments received from members of Committee on Crime Prevention and Control and governmental and non-governmental quarters for submission to the Congress.²⁰ In addition, to felicitate discussion on this subject, a synthesis of the main principles of justice and assistance for victims, which have emerged from the preparatory work on this agenda item, is contained in the annex to this report.

In order to ascertain the position of victims and the measures available to them proposed recourse or redress, assistance and restitution or compensation, and to provide an empirical basis for the Congress deliberations a comparative survey on this subject has been conducted as part of the regular work programme, which was summarised in document.²¹ In accordance with Economic and Social Council resolution²², a report on the situation of women as victims²³ has also been prepared in connection with this agenda item. The contributions of governments and of non-governmental organisations which have taken special initiatives in this area and provided valuable inputs. It was decided that, despite the wide range and numerous kinds of victimisation, certain common approaches can be pursued and specific action requirements formulated as a basis for

¹⁶ E/CN.5/1983/2, para.138.

¹⁷ See for more details A/CONF.87/14.

¹⁸ See for more details E/AC.57/1984/14.

¹⁹ See for more details A/CONF.121/IPM.4. Annex I.

²⁰ See for more details A/CONF.121/IPM.4/Add.1.

²¹ See the report A/CONF.121/22.

²² Economic and Social Council Resolution E/1984/49.

²³ A/CONF.121/16, para.9.

strategies at various levels intended to reduce victimisation and to improve the situation of victims.

The Seventh United Nations Congress on Prevention of Crime and Treatment of offenders, recognising the needs of more effective measures at the international, Regional and national level on behalf of victims of crime and victims of abuse of power, recommended that the General Assembly should adopt the following draft resolution and draft Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Which was designed to assist governments and the international community in their efforts to secure justice and assistance for victims of crimes and abuse of power.²⁴

While acknowledging that millions of people throughout the world suffer harm as a result of crime and the abuse of power and that the rights of these victims have not been adequately recognised, also recognised that the victims of crime and abuse of power, and also frequently their families, witnesses and others who aid them, are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders.²⁵

Subsequently, in pursuance of the 7th Crime Congress Resolution the General Assembly in its 96th plenary meeting²⁶ adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, annexed to Resolution of 40/34 on 29th November 1985 (herein after called UN draft Declaration of Basic Principles) Professor Van Dijk noted that the declaration, although not legally binding by itself on member states, is seen as a landmark achievement of the international movement to advance the interests of crime victims. It can also be used as a benchmark against which progress in domestic policies can be measured.²⁷

²⁴ See "Seventh United Nations Congress on the Prevention of Crime and Offenders" held at Milan, from 26th August to 6th September 1985. Report prepared by the Secretariat, A/CONF.121/22/Rev.1 at p.43

²⁵ *Ibid.*, at p.44.

²⁶ See the preamble of the GA Resolution 40/34, which was adopted without vote.

²⁷ See Jan Van Dijk (2006) "*Victims' Rights in International Criminal Law*" presented at the International Conference on Actions for Crime Victims, University of Rome La Sapienza/ Ministry of the Interior/ John Jay College, NY City, Roma, Italy, from August 19 - 21 gennaio. Van Dijk is a Research Director INTERVICT, University of Tilburg, The Netherlands and Deputy director, United Nations Interregional Crime and Justice Research Institute (UNICRI) Turin.

4.1.2 Towards a UN Draft Convention on Victims of Crime

The declaration had twenty years of journey after its adoption. It was noted that the Declaration represents an historic achievement for those who have concerned about the poor treatment and lack of justice for the millions of victims in the world each year who suffer from physical, psychological and material harm due to the criminal conduct of individuals, private organisations and governments. The unanimous agreement to the Declaration in the General Assembly indicates that this is an issue that transcends differing cultures, religions, criminal justice systems, social structures, and stages of economic development around the world. The Declaration provides for State obligations in respect of two broad categories of victims, the traditional category of victims of crime²⁸ and 'victims of abuse of power'²⁹ (Lamborn 1987:60).

Sam Garkawe (2005: 5) argued that now it has become the obligation of all states to take the standards articulated in the Declaration to another level by agreeing to the adoption of a Victims Convention. Naturally, there would be many issues to be negotiated before a Convention could be agreed upon, one of the most important being which categories of victims are to be included in the Convention's scope. One point is obvious, however, and that is whatever further categories of victims the Convention eventually covers, it will certainly contain the traditional category of crime victims. Sam Garkawe³⁰ pointed out five main arguments in favour and need of the Convention.

²⁸ Victims of the actions or omissions of individuals are defined as crimes by national laws.

²⁹ Lamborn argued that victims of international human rights violations that should have been defined as criminal by the State, but are not due to the State deliberately deciding not to define them as criminal

³⁰ The expert is an associate professor at Southern Cross University, School of Law and Justice, and member of the World Society of Victimology's UN liaison committee. Present paper is presented by the author at at the recent 11th United Nations Congress on Crime Prevention and Criminal Justice held in Bangkok on 18-25 April to workshop 'The Victims Movement in the World', organised by the World Society of Victimology 2005.1 Southern Cross University, School of Law and Justice, and member of the World Society of Victimology's UN liaison committee.

1) Many of the principles contained in the Declaration have already been included in international Treaties

Recently Van Dijk (2005:2) has analysed that out of the 10 main principles³¹ of justice found in the Declaration, the UN Convention against Transnational Organized Crime (UNTOC) contains 4 of these³², whereas UNTOC's Protocol Against Trafficking in Persons, Especially Women and Children contains 6 in a mandatory form and another 3 in an optional form.³³ This clearly shows that the principles contained in the Declaration are not so obscure, vague or uncertain that agreement could never be reached on the precise wording of a Victims Convention. The main effect of such a Convention would be to make available the agreed principles across the board to all types of crime victims, not just those who are the subject of specific Conventions.

2) Preparing a draft Convention and open for ratification, would invite international public/NGO's pressure on all States that would be beneficial for victims and their advocates in turn, it would also help directly, ultimately the largest problem with all international Declarations and pronouncements in favour of victims.

3) The issue of implementation

It was argued that while majority of the principles in the Declaration have been acted upon by a considerable number of states and there is much rhetoric supporting the Declaration, overall implementation has been spasmodic, and in the case of some States, non-existent. Even in the generally supportive and relatively wealthy environment of Europe, implementation of Europe's equivalent to the Declaration, Council of Europe

³¹ These are 1.Compassion and respect, 2 Information on proceedings 3.Presentation of views to court 4.Legal advice 5.Protection of Privacy physical safety, 6.Informal Dispute, 7.Social and Medical Assistance, 8.Restitution/Compensation by Offender, 9.Compensation by the State, 10.Capacity building/cooperation.

³² *Ibid* UNTOC has recognised the Right to Presentation of views, Protection of privacy, Social assistance, Restitution, . capacity building

³³ *Ibid* UNTOC's Protocol has recognized the Right to compensation. Information on proceedings, Presentation of views, Protection of privacy/identity and safety. Capacity building/ cooperation. Legal aid (optional) Social assistance (optional) Restitution/Compensation from state(optional).

Recommendation 85/11 shows 'relatively poor results for several Member States' (Brienen & Hoegen, 2000).

4) From the Legal point of view the present General Assembly Declaration on Basic Principles and Guidelines is insufficient or 'Bodies of Principles' or 'Guidelines'. States generally do not take these as much seriously as Conventions, and they cannot be taken to task for a breach of these in the same manner as for a breach of a Convention. No matter how widely supported, they do not have the same status as Conventions under international law. They do not have any binding effect, nor do they produce the precise obligations on States when they ratify a Declaration.³⁴

As such the Convention forms a 'hard law' which is binding international law, when a state breaches its obligations under the convention, it leads their acts in violation of their international legal obligations and thus may be subject to the international legal principles of State Responsibility.³⁵ Furthermore, the international standards found in a Convention, as opposed to a Declaration, are in a number of legal systems much more likely to be accepted by the courts to help in the interpretation of ambiguous legislation or to develop courts' jurisprudence in situations where no legislation exists.

5) In the present context one should view the issue of the poor treatment of victims through out the world as a human rights issue. One of the key observations that those in the victims movement continually make is that subsequent to victimization most crime victims are treated poorly and do not receive adequate material, psychological and social support. They can thus be viewed as a class of people, like other classes of people who are marginalized or suffer from violations of their rights, such as people tortured, disappeared without legal process or racially discriminated against, who are in need of the benefits of human rights protection. Seen in this light, like with so many other human

³⁴ It is conceded that the dichotomy between 'hard law' and 'soft law' is not so clear-cut - 'soft law' can often be as effective as and may lead to 'hard law'. On the other hand, due to the weakness of the international legal system, so called 'hard law' is often treated as optional (i.e. like 'soft law') by states.

³⁵ However, it is submitted that there is no doubt the increased importance of State obligations written down in much clearer and more unequivocal language generally found in Conventions. Failure by a State to live up to their commitments found in a binding Convention could in a particularly high profile case of victimisation, lead to that state having to answer for their behaviour in an international forum and can be highly embarrassing.

rights issues, there should be a natural progression from a non-binding Declaration to a binding Convention.³⁶ There is thus no logical reason why a Victims Convention cannot likewise be placed on the agenda and making the standards found in the Declaration more binding and visible. Many of the current human rights Conventions are concerned with certain categories of victims, such as torture victims, victims of discrimination on the grounds of gender and race, abused children, and victims of inadequate economic and social support by States. They do refer, in very general terms, to the right of victims to 'an adequate remedy' if their rights are violated.

However, a Victims Convention would both be more general in its scope in terms of embracing the whole range of different types of victims, as well as being focused specifically on the plight of victims. This is in contrast to the other human rights Conventions, those primarily focus on the role of States in preventing human rights violations, and only mention victims incidentally. The presumption of Sam Garakwe would be that the push for a Victims Convention will be worth the effort and will improve the prospects for victims all around the world. All aspects of crime should be viewed not only in terms of prevention, intervention and prosecution but also in terms of a comprehensive response to victims for they are too often forgotten.

4.2 The Expert Group Meeting - A Draft Convention on the Rights of Victims of Crime, Abuse of Power and Terrorism³⁷

4.2.1 Opening of the Expert Meeting

³⁶ All the major human rights Conventions originated with Declarations. For example, both the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights were derived from the 1948 Universal Declaration of Human Rights. On this basis there is no reason why the situation of victims should be treated any differently than other human rights issues. The process of further norm setting in human rights is not yet complete and is ongoing. For example, recently in 2003 the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family came into force, and presently, the UN resolution converted into a Convention on the Rights of people with disabilities and also Convention on the enforced disappearance tuned into convention.

³⁷ "Towards implementation of the UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power –A Draft Convention on the Rights of Victims of Crime, Abuse of Power and Terrorism Expert Group Meeting was held in Tilburg on 12-15 December 2005. The expert meeting was organised by (The International Victimology Institute) INTERVICT of Tilburg University. A number of international experts attended the for meeting, follow up to the Bangkok consensus on victim rights Pp.1-17.

While inaugurating the meeting Professor Marc Groenhuijsen noted that this was the first international meeting to be organised by International Victimology Institute. The meeting was conducted with four basic objectives.³⁸ The background paper for the Expert Meeting, prepared by Dr Irvin Waller³⁹, summarised the progress that had been achieved in the implementation of the UN Victim Declaration. He stressed that much progress had indeed been achieved, in particular in the more developed member states. He also paid tribute to the work of the United Nations in following up on the Victim Declaration in order to promote further implementation. However, he also noted the widespread view of many experts that the level of implementation is not as high as it could be, even in the most developed countries. With this in mind many academics and service providers had suggested thinking of raising the level of legal norms dealing with victims, for example to that of a binding Convention. The first objective of the meeting is to discuss whether a UN Convention would be the proper instrument to stimulate further implementation of, and compliance with, the basic principles contained in the 1985 UN Victim Declaration. He stressed that this objective is worded very carefully in the form of a question, and should not be understood as a foregone conclusion. Should the negotiation of such a Convention be deemed a useful avenue to explore, the second objective is to consider what elements such a Convention might contain. The third objective is to consider the possibility of establishing the position of a United Nations Secretary-General's Special Rapporteur on Victims of Crime, Abuse of Power and Terrorism, and to propose terms of reference for such an authority. The fourth objective is to develop a strategic plan for further work along these lines.

4.2.2 Would a UN Convention be the Proper Instrument to Stimulate further Implementation of Declaration on Basic Principles of Justice for Victims of Crime.

³⁸ In order to achieve the objectives of the meeting, each topic is to be introduced by one of the participants, followed by a prepared response by another participant. This first exchange of views would be followed by a group discussion. Should indeed the idea of a Convention seem feasible, the participants introducing the different topics might prepare draft language or at least a checklist of elements that could go into such an instrument. The proposal was adopted by consensus.

³⁹ Professor of Criminology, University of Ottawa.

Mr Sam Garkawe⁴⁰ introduced the first topic and noted that there was already much resistance to the idea of any new UN Convention at all, and therefore it would obviously be a difficult task to get a majority of states to support such an idea. Secondly, even if the Convention is negotiated and approved, there is no guarantee that States would adhere to it. He further noted that there were four main arguments for a Convention. The UN Victim Declaration marked an important step, but it is not binding. A Convention would be binding and would therefore influence domestic law. Although there would still be gaps in implementation, States would be under pressure to ratify and comply with the Convention. Secondly, if the Convention contains provisions designed to promote implementation, such provisions could provide various victim groups with a better focal point as well as a channel for having a direct influence on the international level. Thirdly, the Convention would provide a framework for analysis, by giving concerned individuals and groups the standards to use when assessing State action. At the same time, having binding standards can have a major effect on the courts. Standards contained in a binding convention have a greater influence on domestic law than other international instruments.

Fourthly, a Convention could help to persuade mainstream institutions to give more attention to victim interests. For example the victim provisions in the Statute of the International Criminal Court have given this issue more visibility. Garkawe presented the alternative ways for a Convention. One is to continue to work on the basis of the UN Declaration, for example by gathering more information on the level of implementation. A second alternative is to seek to get States to agree more conventions with victim-related elements. This, however, is a piecemeal approach, and Mr Garkawe argued for seeking to have consistent standards for all victims.

A third alternative would be to work on the basis of existing human rights instruments, in particular those that deal with, e.g., the right to life, the right to privacy and the right to humane treatment. However, also this would be insufficient from the point of view of victims, since many of the needs of victims could not be answered on the basis of human rights instruments. A fourth alternative, one to be considered by the

⁴⁰ Associate Professor. Southern Cross University. Lismore. Australia.

expert meeting is the establishment of a Special Rapporteur. Such a non-treaty mechanism could coexist with the idea of a Convention. Indeed, a Convention could help to clarify the mandate of the Special Rapporteur.

Dr Jan van Dijk⁴¹ responded to the first objective by noting that, although there are factors inhibiting the negotiation of a Victim Convention, there were also factors supporting such an approach. Firstly, although there has been a decline in the amount of conventional crime in most of the developed world, there were other regions, such as Latin America and Africa, where urban insecurity is very high on the domestic political agenda. Secondly, one reason that the debate about crime has lost some of its profile in the UN is that the terrorism issue has overshadowed it. Terrorism, in turn, is an issue where there is obviously a large potential need for victimological expertise. A third factor is that the establishment of the International Criminal Court in the Hague and the present extensive interest in war crimes, shown for example by the discussion on establishing a fund for victims of war crimes, are forces that could be harnessed.

Fourthly, the September 2005 Summit at the United Nations, although it proved a difficult meeting, did agree on the responsibility of governments to protect their own people against collective crimes, such as genocide and tribal conflict – once again, an issue of human security. Van Dijk has noted further the fact that the negotiation of the Palermo Convention with its three protocols, and the Corruption Convention, have led to a paradox. So far, the progress of implementation of these five instruments has been disappointing.

There has also been little interest among major donors in implementation, perhaps due in part to the clear shift in the development aid world away from programmes and agenda, towards direct budget support and direct support to governments. At the same time, the adoption of binding Conventions and protocols could be seen to have lowered

⁴¹ Research Director, INTERVICT and Deputy Director of UNICRI.

the status of the UN Declaration; whereas before it has been termed “soft law,” now in comparison with the binding instruments it might even be considered “non-law.”⁴²

Waller responded that the importance of making people aware of the practical importance of victim issues. “The Convention on the Rights of the Child has a clear focus on children; this is a topic people want to do something about. Mutual legal assistance, for example, is seen as a technical issue that has less fascination. If people could understand that the crime programme is actually doing something for ordinary people, more results could be achieved. Support could be found for example from within the framework of World Health Organisation and of groups working on behalf of victims of violence and victims of traffic crime.

Young has noted that the idea of providing victim assistance, or rights to victims, is not a popular subject. Victims are stigmatised in many parts of the world. Broad-ranged victim issues are not popular in many countries. The Convention on the rights of the child, or on women, or on terrorism is popular, because they are focused. One way of generating support for victim issues is to focus on it.

4.2.3 The Definition of Victims of Crime, Abuse of Power and Terrorism

Dr Kumar introduced the topic⁴³ while noting the definitions given in the Victim Declaration, of victims of crime and of abuse of power, respectively. He further noted that it is important to recognise that the Declaration was adopted in 1985. Since then there have been developments that should also be considered while examining the definitions. The problem on definition of victims of abuse of power is that it seems to presume that violations of international human rights standards are limited to the field of

⁴² In the discussion, several points were made. It was noted that many criminal acts are dealt with through traditional and restorative justice processes and not the formal criminal justice system. This had not been considered in the UN Victim Declaration, and should be kept in mind when speaking of a possible UN Convention or other options. It was also noted that at the time that the Victim Declaration was drafted, there were several factors that had influenced the reluctance on the part of some States towards the concept of abuse of power.

⁴³ Professor in School of Law, City University of Hong Kong, also served as a Co-Rapporteur.

criminal law. There is another issue of the interpretation of what constitutes “substantial impairment.”

Dr Kumar suggested that this would create a lesser threshold of protection than what may be already guaranteed in domestic constitutions and legislations. There is, furthermore, the risk of allowing numerous interpretations of what constitutes such “substantial impairment.” He suggested that there is an urgent need for victimologists to work more with human rights practitioners and public policy specialists.

With regard to victims of terrorism, expert argued that since there was no general consensus on the definition of terrorism, there could also be no consensus on the definition of victims of terrorism.⁴⁴ Therefore, the question is how to move ahead in formulating a suitable definition of victims of terrorism in the light of the absence of a consensus as to the definition of terrorism, and the different understandings and interpretations of terrorism in domestic legislation.

This is particularly important when seeking to bring about a global consensus on the idea of a Victim Convention. Another issue is how to address the lack of serious and recognisable space for the concept of “victims” in the work of the counter-terrorism committee and other UN bodies discussing the problem of terrorism and even in discussions relating to terrorism and human rights. Mr Kumar asked whether addressing this issue would help in bringing greater focus on the victims of terrorism, and what its implications would be.

He concluded by raising selected other issues, such as the relationship between security, development and human rights, the position of victims of acts committed by multinational corporations, and the position of victims of disasters such as the recent tsunami, hurricanes, infectious diseases, earthquakes and even poverty. On this last point, although there are arguments for including such victims in a possible Convention, it

⁴⁴ However, the report of the High Level Panel appointed by the United Nations Secretary-General to look at “Threats, Challenges and Change” has elements – in particular paragraph 164 – that may be helpful in this regard. Also, Security Council resolution 1566 of October 2004 lists certain acts that are never justifiable.

should also be noted that such an expansion of the scope of the proposed convention could arguably reduce its effectiveness.⁴⁵

Paulo Sergio Domingues⁴⁶ responded by noting that there are different definitions of “victims,” for example in the various protocols to the Palermo Convention,⁴⁷ and also the definition of abuse of power has changed since the adoption of the Victim Declaration in 1985. It is clear that there is wide political support for helping victims of terrorism, an issue not covered as such in the Victim Declaration. It is important to consider not only direct victims, but also indirect victims, and also witnesses.⁴⁸ During the discussion, the need was stressed for specificity in defining the concept of victims. The issue of victims of abuse of power and of multinational corporations has been a sensitive one. Although the Victim Declaration refers to victims of environmental crime, the instrument does not extend to natural disasters as such.⁴⁹ Other speakers argued for including such types of victimization. Furthermore, there is greater awareness of the needs of victims of terrorism. Victims of HIV were also identified as receiving widespread attention. It was also noted that, if victims of abuse of power were to be included, they would necessarily be subject to different standards of protection. This is due to the fact that victims of “traditional” crime can turn to criminal proceedings for protection, but this is not the case for victims of (non-criminalized) abuse of power.

Dr. Groenhuijsen summarised the discussion by suggesting that the working definition of victims should be based on the definition used in the European Union framework decision of 15 March 2001, with the addition of a reference to “individual or

⁴⁵ *Ibid supra* at p.5

⁴⁶ Federal Judge and Director of the Court, São Paulo State

⁴⁷ It to be noted that as the The United Nations Convention on Transnational Organized Crime adopted in Palermo, Italy, in December 2000, the convention also called ‘palermo convection’

⁴⁸ He pointed out that it is not always easy to know who the victim is in an interaction between two persons, for example in connection with organised crime – is the victim “only” a victim, or was he or she also involved in the organised crime? A victim may become a witness; a witness in turn may become a victim because of the fact that he or she is a witness.

⁴⁹ Some participants argued that including these elements might increase opposition to the idea of a convention. Even the concept of victims of corruption could cause difficulties, in particular if local standards of conduct are not taken into consideration.

collective” victimisation.⁵⁰ Article (2) of the Victim Declaration should be used, and reference should be made to the victims of criminal abuse of power and criminal terrorism. Separate provisions should apply to witnesses. Whether or not the victims of substantial impairment of their fundamental rights should be included within the scope was identified as an issue requiring further reflection.

4.2.5 The Right of Victim Services

Dr. Marlene Young⁵¹ introduced the topic of the right of victims to services. She noted that the provisions in the Victim Declaration were relatively brief, vague and indeed to some extent confusing. For example the issue of environmental crime is not clearly addressed in a consistent fashion in the instrument. Another example is drug-related crime, which can cause collective victimisation (for example, the victimisation of the residential area surrounding a “crack house”). Also this is an issue that is not specifically addressed in the Victim Declaration. Dr. Young has suggested that in future work these issues need to be clarified. She opined that the EU Framework Decision is somewhat more specific, but also it contains some vague elements.

Dr. Young noted what the European Forum for Victim Services has called the “social rights” of victims of crime. The listing of these rights overlaps to a large extent with how these rights have been understood for example in the United States: “the right to recognition by society, the right to information, the right to access to health care services, the right to financial compensation and support, the right to home security, the

⁵⁰ Council Framework Decision (The Council of the European Union), on the standing of victims in criminal proceedings of 15 March 2001(2001/220/JHA) provides the definition under Article 1 (a) “victim” shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State; available at URL:http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001F0220&model=guichett

⁵¹ President, International Organization for Victim Assistance and chairperson, World Society of Victimology

right to employment, the right to education, the right to victim support services, and the right to protection of privacy.”⁵²

In the discussion, it was emphasised that should a Convention be drafted, it should have a separate section on assistance or services to victims, as an issue distinct from compensation and restitution, and distinct from information and access to justice. The initial drafting of such a section should seek to specify these rights, using as a point of departure for example the work of the European Forum.⁵³ A distinction could tentatively be made between the need of the victim for immediate, medium-term and long-term assistance. Reference was also made to the importance of provisions on training and guidelines for practitioners providing services. Caution was also expressed on the importance of bearing in mind the cost to the State and the community of providing services. Provisions should be drafted to include a reference to “progressive realization” of the right to the provision of such services, to “provision of these services within the framework of available resources,” or to “provision by States and the community of these services to the maximum extent of their available resources.”⁵⁴

4.2.6 The Right of Victims to Information

Professor Groenhuijsen noted that not keeping victims informed about the progress of a case reported to the police has been seen as one of the greatest denials of the dignity of the victims. In practice, it is often only through the media – if at all – those victims have often found what happened with the case. Article 6(a) of the Victim Declaration deals with this right of the victim to information.⁵⁵ This provision, however, can be regarded as

⁵²She noted that in the United States, reference is also made for example to the right to transportation and, in particular, to the right to satisfaction of spiritual needs. She concluded by noting that also certain other special issues should also be addressed, such as the special needs of juvenile victims (for example when victimization is dealt with at school), the question of medical malpractice, and the right of victims to services in cases where the offence in question is not dealt with by the formal civil or criminal justice system. *Ibid supra* see note 43 at p.7

⁵³ The work of the European Forum on the right of victims to standards for services was also deemed helpful in analysing these rights and the provision of these rights, as was the current work in the Council of Europe on updating the 1985 recommendation.

⁵⁴ It was noted that such an approach is evident in, for example, article 4 of the Convention on the Rights of the Child and article 6 of the protocol to the Palermo Convention, on trafficking in persons.

⁵⁵ Article 6 (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested

quite limited. Various guidelines in the Council of Europe recommendation, in turn, provide for wider provision of information, and the European Union framework decision (art. 4),⁵⁶ which contains a detailed list of the minimum information that should be provided to the victim, is wider still.

There is a growing tendency in international instruments to increase the amount of information to be provided to victims. The Council of Europe recommendation currently being drafted will further expand on this issue. Groenhuijsen doubted that whether this continuous expansion was sound policy? it can be suggested that States have not succeeded very well in implementing the existing standards. If victim rights are human rights, the norm should be that the Government should be able to comply with the existing norms in every State that has accepted the instruments. A decision should be made on the proper level of detail to be used on any future instrument on victims.

Another question posed by him for complying with the provisions of international instrument is the question of how to provide victims with information in a form in which they can understand. Oral information by police officers at the time of the report has

such information; see Annex Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. GA RES A/40/34.

⁵⁶ Article 4 "Right to receive information".

1. Each Member State shall ensure that victims in particular have access, as from their first contact with law enforcement agencies, by any means it deems appropriate and as far as possible in languages commonly understood, to information of relevance for the protection of their interests. Such information shall be at least as follows: (a) the type of services or organisations to which they can turn for support; (b) the type of support which they can obtain; (c) where and how they can report an offence; (d) procedures following such a report and their role in connection with such procedures; (e) how and under what conditions they can obtain protection; (f) to what extent and on what terms they have access to: (i) legal advice or (ii) legal aid, or (iii) any other sort of advice, if, in the cases envisaged in point (i) and (ii), they are entitled to receive it; (g) requirements for them to be entitled to compensation; (h) if they are resident in another State, any special arrangements available to them in order to protect their interests.

2. Each Member State shall ensure that victims who have expressed a wish to this effect are kept informed of: (a) the outcome of their complaint; (b) relevant factors enabling them, in the event of prosecution, to know the conduct of the criminal proceedings regarding the person prosecuted for offences concerning them, except in exceptional cases where the proper handling of the case may be adversely affected; (c) the 'court's sentence.'

3. Member States shall take the necessary measures to ensure that, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released, a decision may be taken to notify the victim if necessary.

4. In so far as a Member State forwards on its own initiative the information referred to in paragraphs 2 and 3, it must ensure that victims have the right not to receive it, unless communication thereof is compulsory under the terms of the relevant criminal proceedings. *Ibid* supra note 63 at, article 4

seemed to be ineffective. Written information is an option, but in Netherlands, research on the some 35 different letters of information that have been prepared showed that these were quite difficult for the victims to understand, given the overall educational level of many victims. The third problem was how to locate victims. He suggested that it would seem to be reasonable to have a provision to the effect that not all information need be provided to all categories of victims. The focus could be, for example, on victims of serious offences and on certain categories of victims.⁵⁷

During the discussion, a reference was made to the difference between countries in literacy and in literary traditions. The judicial process is not necessarily “citizen-friendly,” and should be reviewed from this point of view.⁵⁸ It was argued that a distinction should be made between the right to information (in general) and the right to be informed (on key points)⁵⁹ and it was noted that all victims did not want information. Therefore there should be an explicit opt-out provision, on the basis of the Code of Practice that a distinction should be made between vulnerable and intimidated victims on one hand, and others. The first category should be seen to be entitled to more information and more frequently. Groenhuijsen summarised the discussion by noting that, most participants were of the view that provision of information is extremely important, and that since victims have more rights, they thus have a need for more information. Since many cases do not proceed to the prosecutor or to the courts, the police should provide at the information as early stage as possible, ideally. The information should be accurate, expeditious and appropriate. Victims should have the right to “opt-out” of receiving further information. Finally, a balance should be maintained between the right of the victim, the suspect / defendant, and the society to information.

4.2.7 Restitution and Restorative Justice

⁵⁷ *Ibid* supra note 43, at p.8

⁵⁸ It was noted by the committee that Considerations should be given, for example, to providing victims with information at an early stage of contact with the police or at the beginning of proceedings regarding the nature of the criminal justice process, and the rights and obligations of victims.

⁵⁹ It was further stressed, on the basis of practice, that information should be accurate, expeditiously conveyed, and appropriate in terms of the information provided. With reference to the Code of Practice for Victims of Crime prepared by the Home Office of the United Kingdom in 2005.

Professor Groenhuijsen introduced the topic of restitution and restorative justice by referring to the different definitions that exist of these concepts. He gave as a working definition of 'restitution the return of property and the payment of material and moral damage by the offender to the victim'. In the light of Articles 8⁶⁰ through 11 of the Victim Declaration provide a good point of departure. In respect of article 8, he noted that the Declaration does not distinguish between restitution ordered through civil and through criminal proceedings. He argued on the basis of the available empirical evidence shows that restitution ordered through criminal proceedings is more valuable, and should be preferred; as such the Victim Declaration does not contain provisions on civil litigation, and argued that such provisions would be of importance. Attention should be paid to making such civil proceedings more accessible, expediting them and reducing the cost and inconvenience to the victim. In the case of article 9⁶¹, restitution as a sentencing option, he noted the prevalence of two models. One is the so-called compensation order or restitution order, which is regarded as a relatively effective measure. A second model is the so-called "*partie civile*" model, where the victim can present a civil claim in criminal proceedings. In his view, this is less effective, in particular due to the difficulties that victims have in enforcing the court orders. He argued that in the case of both models the State should assume the responsibility for the enforcement of the court order.⁶²

In respect of restorative justice Groenhuijsen identified three main modalities:

- i) Victim-offender mediation,
- ii) Family group counselling, and
- iii) Sentencing circles.

⁶⁰ See Article 8 of Declaration. "Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights."

⁶¹ See, Article-9 Declaration 'Governments should review their practices, regulations and laws to consider resolution as an available sentencing option in criminal cases, in addition to other criminal sanctions' *ibid* supra note at 63

⁶² He referred to article 9(3) of the EU framework decision, which provides that recoverable property belonging to victims which was seized in the course of criminal proceedings shall be returned to the victims without delay, unless this is urgently required for the purpose of criminal proceedings.

He argued that the possible Convention should deal at least with victim-offender mediation, as the most widespread modality.⁶³ The draft UN Declaration on mediation has been subject to difficult negotiations for many years. This raises the question of whether or not provisions on mediation should be included in a Convention. For this we can take the inspiration can be taken from the European Forum Statement on the position of the victim within the process of mediation⁶⁴. This Statement takes victim rights as the point of departure. Important issues in this regard are the acceptance by the offender of his or her responsibility for the offence and the acknowledgement of the adverse consequences of the offence for the victim, and the issue of the free and informed consent of the victim and the offender.

In the discussion of Expert meeting, it was noted that articles 8 through 11 of the Victim Declaration should be read in conjunction with articles 5 and 7, which refers to informal procedures and to mechanisms for the resolution of disputes. It was suggested that these provisions should be further developed, and there was general agreement that the State should take greater responsibility for the enforcement of court orders for restitution.⁶⁵

As for the wording of article 9, which refers to restitution as a sentencing option in addition to other criminal sanctions, it was argued that restitution could be an independent sanction in its own right, as indeed is the case in some jurisdictions. It was further argued that the enforcement of compensation orders should have priority over fines. In the case of compensation orders, care should be taken that the offender is not subject to separate and parallel compensation obligations under both criminal and civil proceedings. In addition providing for restorative justice options, which could also be

⁶³ There are several international protocols and standards that deal with mediation. However, it has so far not proven possible to agree on such standards within the framework of the United Nations.

⁶⁴ See Article 10, which deals with 'Penal mediation in the course of criminal proceedings' according to this article 1. Each Member State shall seek to promote mediation in criminal cases for offences, which it considers appropriate for this sort of measure.

2. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account. *Ibid* supra note 58.

⁶⁵ However, some participants noted that such an approach may prove difficult in at least some jurisdictions. At the same time, caution was expressed against claims that the criminal justice system should in general be the preferred option. Depending on the circumstances, civil proceedings or informal proceedings might in fact be preferable.

called alternative forums, attention should be paid as far as possible to securing the rights of the victim to, for example, services.⁶⁶

4.2.8 The right of Victims to Participation and Representation

Dr Joutsen⁶⁷ began by noting that the issue of “access to justice” is the key in criminal justice systems, access is limited to recognised victims of crime. Victims of (non-criminal) abuse of power have access at most to civil justice remedies. He observed that the three key international instruments on participation and representation, these or (a) The UN Victim Declaration; (b) The 1985 Council of Europe Recommendation; and (c) The European Union Framework Decision, will allow the states concerned with a considerable “margin of appreciation” in deciding what procedural rights (if any) should be granted to the victim. Each country is relatively free to go about determining how it understands the concept of “participation” (and representation).

Essentially, participation can be active or passive as the victim is a source of information at various points along the process. Furthermore, the victim’s participation may relate to the criminal proceedings, or this participation may be limited to civil proceedings, either alongside or apart from the criminal proceedings.

Joutsen also dealt with the role of victims in prosecution, in the presentation of civil claims, and as a witness. From the point of view of the victim it is almost always preferable to have the offence prosecuted by the public prosecutor. From the point of view of the State, furthermore, it is generally preferable to centralize control over prosecution in the hands of the prosecutorial authorities. In respect of civil proceedings, as already noted by Professor Groenhuijsen, the mechanism of “action civile” has been developed to allow for victim participation.⁶⁸

⁶⁶ *Ibid* supra note 63 at p.10

⁶⁷ Director, International Affairs, Ministry of Justice, Helsinki

⁶⁸ At the discretion of the court, the victim is allowed to present his or her civil claim during the criminal procedure. In some countries, such presentation of civil claims is relatively common; in others, relatively rare. Many countries (such as common law countries) do not allow such a combination of criminal and civil proceedings. Although as has already been noted at the expert meeting, the “action civile” system is often under-utilized and ineffective. Dr Joutsen agreed that it does provide a mechanism for victim participation in the proceedings.

He concluded that it is difficult to establish the "proper" position of the victim in procedural law. Laws foreseeing an active role for victims may fail because the majority of victims remain passive (largely, perhaps, due to ignorance of their rights), while laws foreseeing a passive role may lead to widespread discontent among those who wish to be heard.⁶⁹ In particular, the right of allocution may become limited to only certain persons, offences or rights. The alternative to a right of allocution is to assure that the prosecutor through presents information regarding the harm caused to the victim to the court. The use of "victim impact statements" or "victim statements of opinion" is in practice, in particular in the United States.

Mr Garkawe responded on issue of right to participation of the victim in adversarial proceedings is also a contentious issue. This could be seen in particular in the drafting of Article 6(b)⁷⁰ of the Victim Declaration. The language used in this provision was subsequently used in other instruments, such as the Palermo Convention and its protocols. It was doubtful if any more specific provision on such participation could be included in any possible Convention, and he argued that the formulation of article 6(b) should be left more or less intact.⁷¹

⁶⁹ He noted that Problems may also arise when the role of victim overlaps with that of witness. Even if some victims do wish to have their day in court, there remains the danger that any attempt at large-scale reform may lead to unintended results.

⁷⁰ Article -6 (b) provides that "Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system".

⁷¹ As for the right of the victim to representation, a discretionary provision has been included in article 68(3) of the statute of the International Criminal Court. Including such a provision in a possible Convention, however, would raise problems. One such problem is that the rights in some jurisdictions are greater than this. It might be suggested that a provision be qualified by "where allowed by the legal system." He noted that while considering the possibility of limiting this right to the case of certain serious offences.

During the deliberations it was noted that perhaps the concept of the “personal interests” of the victim could be defined more precisely. Otherwise, that the formulation of article 6(b) as such was a useful point of departure. It also not accepted the by the meeting that the role of the private prosecution in this regard⁷². It was suggested that a possible Convention should give more attention than at present in the Victim Declaration to the status and protection of victims as witnesses. It was also suggested that attention be paid to victims who were not able to present their views of concerns due, for example, to disabilities.

4.2.9 The Right of Victims to Compensation from the State and internationally

This topic was introduced by Ms McLaughlin She mentioned that there are collective claim processes (September 11 funds etc), trust funds like the ICC and other individual states, trust fund for comfort women in Japan (compensation from the state and private sources) which are in place. She recognised that there are challenges for state to put in resources and we should bear in mind this while formulating the provisions relating to compensation.⁷³ She mentioned that Trust funds are reparation funds for restitution, compensation and rehabilitation of the victims. The court decides in the ICC as to what reparations are, but this will not be the case in relating to the victims under the convention.⁷⁴The question is what makes this set of victims so distinctive. It was

⁷² Some speakers stressed in particular that private prosecution not only leads to arbitrariness in prosecution, it may even have a harmful impact on the victim. Furthermore, the victim may be vulnerable in the case of unsuccessful private prosecution to claims for compensation from the alleged offender. It was therefore generally agreed that a possible Convention should not make specific reference to such a right. Reference was made to the present trend in some states in the United States to giving standing to victims. The scope and constitutionality of this is at the moment subject to litigation in court. It was also noted that, in the United States, private prosecution is used relatively widely in the state of Alabama, where this right is subject to permission by the prosecutor.

⁷³ One approach would be to use the existing language of the ICC and make those provisions more obligatory. It is also important to encourage states to expand the benefits it had given to victims.

⁷⁴ She noted that the Trust Funds are specifically designed for the victims and families of the victims. There is a management committee in the ICC, which deals with this. There is a debate between the NGOs and states as to how to use the money. As far as the September 11 fund, the USA used a separate fund that was funded by the congress for the victims. Average claims for the victims were to the tune of US\$ 1.2 million. The victims had to give up the right to file a civil suit against the government as well as the airline companies. The victims made their individual case and the compensation was determined on the basis of several factors including the life long earnings of the victims and many other factors in relation to particular individual. During the discussions the 9/11 victims received it brought out further information that other terrorist acts did not receive this type of compensation as. This has also caused tremendous problems within the victims' community in the USA. particularly those victims of other terrorist acts. The victims of other

suggested that the language of the convention could use words like “prompt and effective” etc, so that member states are obligated to provide for compensation. It was noted that compensation has never been *ad valorem*.

It was not based on actual entitlements and was rather based on the principle of *ex gratia* payment. The state gives some money in the form of restitution. When the court awards the actual damage, it will be determined on the basis of what a particular victim is actually entitled. It was suggested that there is a need to push for as many services for victims. In case of UN declaration it carefully avoid the use of obligatory language and words like “state should endeavour” was used. It was also noted that information regarding compensation measures should be made available for the victims as most of the time this is not available.

It was noted that restitution or reparation is based on the principle of liability, but state compensation is not. This is based on the principle of “social solidarity” most of the national compensation schemes were restricted to “serious violent crimes”. However, it is possible that state compensation is not possible for “serious property crimes”. It was suggested that the text of the UN declaration should be adopted and limit it to serious violent crimes. At the level of compensation, in the modernised state compensation rules, there are provisions for providing more emergency grants.⁷⁵ It says that the state has to pay compensation for foreign nationals. The principle of reciprocity will become an important limiting factor under these circumstances.

It was noted that the exact wording of the convention should take into account whether the words “mental health” should be included. Also, the question of “intentional violent act” as opposed to “serious violent act” needs to be borne in mind while drafting the provisions of the convention. It was suggested that a provision relating to counselling should be included in the convention. The cultural factors may become relevant in the

terrorist acts were affected by this deal. It was noted that this arrangement out of the 9/11 compensation scheme was called as an “indemnity fund”.

⁷⁵ In the light of the fact that there is massive migration, cross border victimisation, the issue of whether or not state has to pay compensation for foreigners becomes an important issue. It was noted that the EU Directive in 2004 made provisions for compensation in relation to cross border victimisation.

context of counselling.⁷⁶ It was suggested that another appropriate word be used, and the convention should contain provision for alternative methods of funding. This would help in persuading the state parties to support the convention. There was discussion among the discussants as to whether the victims of terrorism be given special treatment. It was accepted that no particular set of victims be given any special treatment and that all types of victimisation be treated equally.

4.2.9 (a) The Prevention of Victimization

Professor Waller⁷⁷ introduced the topic of the prevention of victimization. He brought to the attention of the discussants some historical factors relating to the UN declaration. It is important to be aware that the debate leading up to the 1985 declaration whether the declaration should concern itself to merely principles of justice for victims or it should have provisions that discuss prevention of victimisation. The resolution accompanying the declaration did refer to this in articles 4(a) and (b). He observed that the Riyadh rules had provisions relating to prevention of victimisation. The Urban guidelines also had provisions for prevention of victimisation. The 2002 guidelines for prevention of crime which Professor Jan van Dijk helped in preparing has discussed the importance of social risk factors, social factors, importance of cities, responsibilities of governments to tackle identifiable risk factors in a comprehensive way.⁷⁸

⁷⁶ It was noted that the ICC Trust Fund uses the phrase "rehabilitation of victims". However, in the council of Europe, there were strong objections to the word "rehabilitation".

⁷⁷ Professor of Criminology, University of Ottawa

⁷⁸ Professor Waller referred that there have also been other development actions since 1985. There have been 2 reports from the WHO – the world report on violence and health which discussed 7 different sorts of violence. Each of those 7 chapters discusses the ways by which violence can be prevented and what steps can be taken to help victims of violence. The second report of the WHO was on traffic fatalities and injuries. He was of the view that this is also a major issue concerning victimisation. To underline the seriousness of the issue, he mentioned that traffic fatalities are projected to become the third major cause of deaths by the year 2020. This is due to several factors including the fact that developing countries like China and India are growing at a fast pace of economic growth and not sufficient steps are being taken to prevent such victimisation. He noted that 3000 people die on roads every day. He also mentioned that a Canadian Supreme Court case - Jane Do Case (victim of sexual violence) while referring to a principle in the Canadian Constitution through which courts can order the government to pay reparation if it was found reasonable in a democratic society.

Waller suggested that the convention should consider making provisions for prevention of victimisation. After elaborate discussion on this issue, it was decided that the convention would have a provision on prevention of repeat victimisation. However, since “prevention of victimisation” as opposed to “prevention of re-victimisation” does not directly and substantially concern itself to the core concerns of victims, it was suggested he would prepare a draft that will be acceptable to victim support organisations.⁷⁹ Besides, the above issues, the discussion also focused on ‘Mechanisms for implementation: national laws, training, projects and research’, ‘Monitoring, encouragement, enforcement and remedies.’ ‘Strategies for adoption and ratification by Governments, Strategy for public support’ and the creation of the position of the UN Secretary General’s Special Rapporteur⁸⁰

4.3 UN Draft Convention on Victims of Crime: 2006

As a follow-up to Garkawe’s call for a convention, along with Experts Groups meeting the international victimology field started a discussion leading to ⁸¹A cogent Draft Convention was prepared by Expert Group of Committee after taking all the points into consideration the same was entitled “**Draft United Nations Convention on Justice and Support for Victims of Crime and Abuse of Power**”⁸² Recognises that ‘millions of people, including many women and children, throughout the world still suffer harm as a result of crime, abuse of power and terrorism, and that the rights of these victims still have not been adequately recognized, and that they may, in addition, suffer hardship when assisting in the prosecution of perpetrators’⁸³

⁷⁹ It was noted that in Europe it is controversial to present crime prevention as victim support. This is not acceptable by many victim organisations. There are policy papers adopted by the European Forum on this matter are available at www.euvictimservices.org It gives room for individual organisation to make crime prevention as one of its priorities. But many others do not see it as part of their work and they feel very strongly that it does not belong to the mandate of victim support work.

⁸⁰ See for details pp.15-17 of the meeting Ibid supra n.63

⁸¹ The more information on its history can found in the article of page 6&8 of the expertmeeting.

⁸² The draft convention was prepared on 14th November of 2006 at Tilburg University Netherlands. Copy of the convention available at URL: <http://www.tilburguniversity.nl/intervict/undeclaration/convention.pdf>

⁸³ See preamble of the convention

The draft is currently being circulated in relevant governmental non-governmental institutions. The convention consist of total 25 articles under four parts part-I⁸⁴ deals with including definition of the Victim with the scope and commitment of states to reduce the victimisation, part-II deals with rights of the victim and duties of the states⁸⁵ i.e., access to justice and fair treatment of the victim, protection of victims and witnesses and experts, information of the case proceedings, assistance, restorative justice restitution including reparation, compensation. Part-III deals with Implementation, Monitoring and Cooperation, Committee on Justice and Support for victims and abuse of power.⁸⁶ Final part deals with concluding provisions including process of ratification of convention and withdrawal of membership.⁸⁷

4.3.1 Drawbacks of the Convention

(a) The Idea and actual use of Framework Conventions

The term 'framework convention' refers to the objective of fixing norms defining an action programme for states, without immediately creating subjective rights for individuals, and leaving states a wide margin of discretion concerning the necessary means to implement the convention, thereby enabling them to take particular circumstances into account.(Willem van Genugten 2006:24) Translated into the concept of framework convention and into co-regulation in the field of victims' rights, using a communicative approach would suggest that when opting for a less intrusive legal instrument, states would be more willing to accept the contents of the convention. Of course, more emphasis will then have to be put on reviewing the results of the implementation and compliance process to find out if the objectives of the convention are really being met in practice. But then again, in a communicative approach also the implementation and compliance process can be made more accessible for non-governmental actors, which might generate extra legitimacy and commitment.

(b) Monitoring Implementation and Compliance

⁸⁴ See Article 1-4 of the Convention.

⁸⁵ See Article 5-11 of the Convention.

⁸⁶ See Article 12-16 of the Convention.

⁸⁷ See Article 17-25 of the Convention.

Over the course of decades, the ways to improve the implementation of and compliance with international law have evoked many heated debates and have led to extensive academic literature. Various implementation and compliance theories have been developed to analyse what factors potentially affect implementation and compliance.⁸⁸ In short, on a macro level, some theories contended that a state's implementation and compliance performance is linked to the extent that a state engages in international institutions that can create norms affecting state behaviour.⁸⁹ This is referred to as the managerial approach, which relies on a problem-solving approach instead of a coercive one.⁹⁰ Others adhere to the so-called realistic approach, claiming that the extent to which a state complies with international norms depends on factors such as a state's political, economic, and military power.⁹¹ Still other theorists add another component and question whether 'states tendency to comply depends upon the messenger- individual or institution- that is asking them to comply'.⁹²

While it would also become obvious, that there are many ways of looking at these mechanisms. Considering that the monitoring mechanism in the proposed Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power resembles, to a large extent, international human rights treaties, the discussion on the monitoring of

⁸⁸ For an overview of various theories, see P.M. Haas, 'Why Comply, or Some Hypotheses in Search of an Analyst', in E.Brown Weiss, *International Compliance with Nonbinding Accords*, Studies in Transnational Legal Policy, NO.29, American Society of international Law, 1997, pp.21-49. Note his remark on p.22 where he rightly notes that implementation is first of all a matter of State choice. See also V. Collingwood, 'Conditionality in International Politics: Exploring the Relationship between Law and Power', unpublished paper presented to a colloquium of the Center for Transboundary Legal development, Tilburg University, 9 June 2004, for an analysis of different theories. The paper is on file with the authors of this article.

⁸⁹ See A.Chayes and A.Chayes, *The New Sovereignty: Compliance with International Regulatory Arrangements* (Cambridge MA, Harvard University Press 1995) pp.88-134. see also R.Keohane, 'International Realation and International Law: Two Optics', 38 *Harvard International Law journal* (1997) pp. 487-502 at 490.

⁹⁰ Chayes and Chaes, *Supra n. at p.3*

⁹¹ See S.R. Ratner. 'Does International Law Matter in Preventing Ethnic Conflict?'. 32 *New York University Journal of International Law and Policy*.(200) pp. 647 - p.648.

⁹² Ratner. *ibid* at page 658.

implementation and compliance focuses upon this field.⁹³ Learning from human rights monitoring procedures.

4.3.2 A preliminary Assessment of the UN Draft Convention

By seeing at the draft Convention as a framework⁹⁴ convention, one will immediately observe that it contains many characteristics thereof. It includes differentiated types of rules and obligations, addressing in a strict sense some of the topics that are no longer really controversial. At the same time, programme-type provisions have been drafted on other issues where there is no consensus as yet. An example of this is the provision on compensation.

Such programmatic rules may gradually gain strength during the implementation process, but will also allow for a differentiation between states parties' implementation, while the final objectives remain clear. And even as to the compensation issue, it would be good to keep in mind that framework conventions often arise out of a compromise between some states claiming that hard law is the only proper and lasting approach to be able to tackle a worldwide existing problem effectively and other states that do not want to lose control over the situation in their own country or think they are unable to live up to the expectations of the other parties due to, for instance, budgetary problems or a lack of knowledge and manpower.

As to the notion co-regulation, it can be observed that the draft Convention seems to fully address the needs and capacities in the victims' rights field. advantages and characteristics of co-regulation, in particular the notion that involving civil society organisations in the rulemaking process will be more successful than a more traditional top-down approach of law making that is going to result in both compromise rules and reluctance in monitoring and enforcement efforts, are extremely relevant in the victims' rights field.⁹⁵ The way the present draft has been prepared, one could realise that many of

⁹³ Sss B.Ramacharan, 'The Concept of Human Rights in Contemporary International Law', I Candian Human Rights Yearbook (1983) at p. 280 and P.Alsotn, 'Conjuring up New Human Rights: A proposal for Quality', 78 AJIL (1984) at pp. 614-15.

⁹⁴ The word frame work to the present used by Willem van Genugten in his article. supra note 95 at 142

⁹⁵ Ibid supra note 95 at p.146

the forgoing insights are already practised, although the terms framework convention and co-regulation have not been used. After the initial preparations, discussed in the introduction to this section, the World Society of Victimology (WSV) stated to gather support for the idea of a convention at the level of states.

One of the lessons learned from the human rights field would be that a strong supervisory committee of independent experts is needed that in daily practice creates or is given the space to strengthen its supervisory procedures. The right to complain about his or her specific case, but also consider the importance of non-judicial procedures, meaning that a convention could be important in terms of compliance and enforcement but that alternative monitoring procedures should not be ignored as well to effectuate the standards of the Convention through national legislation and interpretations of many of the programme-typed provisions of the Convention.

The Committee created space for itself, by simply doing its work carefully, and was backed by the Committee of Ministers, despite original hesitation. These remarks should be taken into consideration when constructing a supervisory mechanism for the draft UN victims' rights convention. The convention is proposed to establish a Committee on Justice and Support of Victims of Crime, Abuse of Power. Its composition and mandate should include the following elements:

"The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems. The Committee shall establish its own rules of procedure."⁹⁶

(1) States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

(a) Within two years of the entry into force of the Convention for the State Party Concerned; (b) thereafter every five years.⁹⁷

(2) Reports made under the present Article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

⁹⁶ See Article 14 (a),(g) of Draft Convention.

⁹⁷ See Article 15

- (4) The Committee may request from States Parties further information relevant to the Implementation of the Convention
- (6) States Parties shall make their reports widely available to the public in their own Countries.
- (7) The Committee is entitled to make on-site visits to assess progress made in the Implementation of the Convention

It is suggested that the Committee, in order to foster the effective implementation of the Convention and to encourage international co-operation in the victims' right field:

Cooperation

- (1) In order to foster the effective implementation of the Convention and to encourage International co-operation in the field covered by the Convention;
 - (a) The United Nations Office on Drugs and Crime, the specialized agencies and other United Nations organs shall be entitled to be representing at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the United Nations Office on Drugs and Crime, the specialized agencies and other competent bodies, as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the United Nations Office for Drugs and Crime, the specialized agencies and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;
 - (b) The Committee shall develop a regular dialogue and discuss possible areas of cooperation with all relevant actors, including national human rights institutions, governments, relevant United Nation bodies, specialized agencies and programmes, in particular with the United Nations Office on Drugs and Crime, the Counter-Terrorism Committee of the Security Council and the Office of the United Nations High Commissioner for Human Rights;
 - (c) The Committee shall transmit, as it may consider appropriate, to the United Nations Office for Drugs and Crime, specialized agencies and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

The composition and mandate of the Committee are modelled on the standard approach as applied in UN human rights conventions. However, as discussed above, international organisations and supervisory bodies in the field of human rights as well as minority rights have developed different ways to better monitor the implementation of and compliance with implementation norms. Based on the previous analysis, some other issues should be taken into consideration when discussing more detailed arrangements concerning the supervision of the (possible) future victims' rights convention.

Firstly, what kind of monitoring mechanism would influence implementation and compliance by states in the field of victims' rights? What would be the best way to enhance the commitment of states to implement and comply with the full range and huge variety of victims' rights, from the right to respect for the dignity of victims, the getting

compensation for damages and such things as receiving a priority status when it comes to housing? Would one type of supervisory procedure be sufficient, or would it better to think in terms of mixed procedures, varying from (quasi-) judicial decision-making on concrete complaints to advisory and dialogue approach for their issues?

Secondly, whatever choices will be made, as with all international norms and instruments, one cannot simply trust that state parties will automatically act in accordance therewith. Therefore, there should always be a supervisory body, composed of independent experts, as foreseen in the draft Convention. But having such an independent supervisory body does not automatically mean that its work should have the character of international independent (quasi-) legal decision-making, as is the case with, for instance, the UN Committee on Human Rights. Depending on the character of the convention to be adopted, the mandate of the committee could vary from giving 'views'/judgements, to 'assisting' a political decision-making body in forming its opinions on the state's behaviour in the field of victims' rights. As to the latter, we again refer to the positive experiences with the double-side monitoring mechanism of the Council of Europe Framework Convention for the Protection of National Minorities.

Thirdly, Victims, or groups of victims, should be given the right to address the committee of the independent experts, both in the form of providing information- by submitting shadow reports or attending hearings- and by complaining against any violations of their rights. Both elements are included in the draft. The first element has most probably been left aside because the Committee is allowed to establish its own rules of procedure, which might include the wish to make use of knowledge in the NGO world. The second because of the fact that a complaint procedure would not be appropriate in light of the open character of some the provisions in the draft convention. At a later stage such complaint procedures should be taken into consideration.

That could relate to an individual complaint procedure, working with admissibility criteria as incorporated in the main UN human rights conventions (and further elaborated upon by the relevant elements could be open to such individual complaints. In addition, the right to complain could also be given to groups of victims,

collectively submitting their claims, or even to NGOs acting within the format of *action popularis*, as is the case with the Protocol on collective complaints, which was added to the European Social Charter in 1995. Especially in a situation of gross violations of rights, with their long-term and devastating effects upon human beings, such additional supervisory procedures would be indicted in our opinion.

Fourthly, Apart from the follow-up procedures foreseen in the draft convention there should be other follow-up methods to ensure that a state confronted with a negative opinion by the committee cannot escape its responsibilities. One could especially think of appointing a special Committee Rapporteur for the follow-up, but also of offering good offices, mediation and conciliation.

Finally, The Draft Convention aims at cooperation between the Committee and other actors in the victims' rights field. This includes intergovernmental as well as non-governmental actors. As to the latter, however, it would be important to transcend the level of cooperation, and make national as well as international NGOs full co-owners or stake holders of the victims' rights convention project as well they might be able to create a substantial counter-force against indifferent or unwilling states and contribute to serious follow-up in the long run. (Willem van Genugten et al 2006:152-54)

CHAPTER -V

CONCLUSION

The Latin maxim “*ubi jus ibi remedium*” (for the violation of every right, there must be a remedy) is the fundamental principle for the right to remedy for violations of human rights. Justice Roy (1961) of India wrote: ‘that a wrong done to an individual must be redressed by the offender himself or by someone else against whom the sanction of the community may be directed.’ The United Nations International Victim Survey stressed that “The victims are the “gatekeepers” of the criminal justice system, for most offences would not be known were it not for initiative taken by or on behalf of victims.¹

The UN Draft Convention on Victims of Crime is a landmark development in the victim’s rights movement. It has defined the victim comprehensively, including the immediate family or dependents of the direct victim and persons who have suffered in intervening to prevent victimisation, but the Convention has excluded legal persons from its coverage, which is the lacuna in the definition. Whereas, the International Criminal Court has wide definition that includes the natural and organisations, which have sustained direct harm to any of their property or person.

The definition of a victim under the Rome Statute and Rules is broader than those set out in the ICTY and the ICTR provisions, which do not require that the victim be directly a target of the crime. The other difficulty in the scope of the definition² which mentioned ‘a person regardless of whether the crime is reported to the police, regarding of whether a perpetrator is identified, apprehended, prosecuted or convicted.’ It seems practically difficult to implement the provision at domestic and international levels due to vary in the practice at both levels.³

¹ See, Survey of Redress, Assistance, Restitution and Compensation for Victims of Crime, at p.15.

² See article 1 of the “UN draft Convention on Victims of Crime” 2006

³ Because of the reason most of the domestic criminal laws are providing the compensation to the victim subject to the conviction of the accused for example India. Existing international criminal tribunals practice reveals that victim cannot be provided any reparation unless conviction of the perpetrator in the case. Moreover there are no modalities established under Basic Principles of justice for crime and UN Draft convention, as such the scope of the definition is too wide and impossible to implement in the present scenario

At presently there is no global legally binding instrument specifically on victims of crime. There is an urgent need for a legally binding global instrument to address the needs and rights of the victims of crime under one umbrella. However, There is no doubt that the adoption of the Convention would be a comprehensive instrument to fill the vacuum in international criminal law.

It is unfortunate to note that victims are treated as mere witnesses to a crime, and their status as victims of crime does not give them any additional rights, or the status of party to the proceedings. Proceedings before Nuremburg and Tokyo tribunals largely relied on documentary evidence and witnesses. Even the statutes i.e. the ICTY and the ICTR, does not contain provisions which allows victims for participation as party rather it limited to examining as witness before its proceedings.

However, in the case of the ICC, victims are allowed to participate in several stages of the proceedings at the discretion of the court.⁴ But there is a great deal of ambiguity as well as lack of clarity in the mechanisms applicable to victims' access, participation and rights. For example, the ICC Statute uses alternatively the term 'participant' and 'party' in addressing victims without regard to the implications of these terms for the role of victims in the proceedings. If the victim is deemed a 'party', then the victim has certain procedural rights by implication. If the victim is a 'participant', then the victim has only those procedural rights specified in the Statute. As a 'participant', a victim does not have the right to present evidence or to examine and cross-examine witnesses for the prosecution and for the defence. As a 'party', it may by implication have such rights, although there is nothing in the legislative history of the ICC Statute to assume that the victim was to be anything more than a participant.

⁴Article 68(3), ICC Statute allows presentation of the views and concerns of victims where the personal interests of the victim are affected. Such views and concerns are to be presented at appropriate stages of the proceedings as determined by the Court. In January 2006, Pre-Trial Chamber I considered a request on behalf of victims to be granted status as victims in the procedure to allow them to present their views and concerns.

International criminal Tribunals i.e. the ICTY, and the ICTR, played an significant role for the enforcement of international criminal and humanitarian law, but fail to address adequately the issue of victim reparations. And also hybrid tribunals that have been established in East Timor, Sierra Leone and Kosovo and the tribunal in Cambodia have also inadequately addressed the issue of victims' reparations. The tribunals' statutes and judge-made rules of procedure and evidence provide only limited guidance on the issue of reparations. In particular, the legal provisions of both tribunals limit reparations to the return of stolen property 'to their rightful owners', without providing redress for personal injuries of a physical or mental nature.

Judge E. Odio Benito (2007:14-16) Judge at the International Criminal Court, provided an overview of the ICC approach to reparation for victims at the conference.⁵ Indicating, "Making these provisions a reality for the thousands of victims remains our biggest challenge." She also noted that the concept of harm would need to be defined. The Pre-trial Chamber has already adopted a two-way concept of 'victims of a case' and 'victims of a situation,' in relation to their participation in the proceedings, even though there is one general concept of victims in rule 85. Article 75 creates a mandate for judges to establish principles relating to reparations. "As on March 2007 this provision has not been applied in relation to a case as no victims have applied for reparations and the Court has not established any principles on reparations." The principles upon which the judges will determine the scope and extent of any damage, loss or injury to or in respect of victims, might include the universal principle of non-discrimination or the principle of proportionality between the harm suffered and the reparation granted and the cost for the perpetrator.

According to Vahida Nainar⁶ (2007:27) the challenge of the "reparation policy is not only to reconcile, rehabilitate, compensate or to dignify but also to address some of

⁵ The conference on "Reparations for victims of genocide, crimes against humanity and war crimes: Systems in place and systems in the making" held at in The Hague, from 1-2 March 2007. The Conference focused on the effective implementation of the right to reparation. It explored the practice of governments, national and international courts and commissions to consider questions of application, process, implementation and enforcement.

⁶ Vahida Nainar presently working as Adjunct Professor at International Women's Human Rights Law Clinic, City University of New York, and a human rights activist working on issues of gender, conflict and justice. discussed in the conference. The study was conducted in six post-conflict situations in different

the root causes that led to the violations in the first place.”⁷ Although the restoration of victims to their status prior to the violation has never really been or could be achieved, to use it as the standard of reparation is in itself quite problematic. Restoration to a status prior to the violation would merely return the victim to her prior marginalised and possibly persecuted status. With regard to women, re-establishing the situation prior to the violation would in effect, in some contexts, restore the gender *status quo*. This could mean restoring women to being partial or sometimes non-rights bearing individuals. It would also mean endorsing and perpetuating the reality of withholding human rights, of discrimination and bias against women.⁸ Ms Nainar observed some of the principles that should be incorporated into reparation policies:⁹

1. Non-discrimination¹⁰
2. Reparations policies and programmes must comply with the standard set by all the human rights treaties.¹¹
3. Removal of structural and administrative obstacles¹²

stages of establishment, functioning and implementation of truth and reconciliation commissions: Guatemala, Peru, Chile, Rwanda, Sierra Leone and Timor Leste.

⁷ The legal notion of reparations as explained in some of the early jurisprudence is essentially a directive to wipe out the consequences, as far as possible, of the violation and re-establish the situation as it was before. This understanding basically returns victims to their status prior to the violation, which as a conceptual notion is restrictive and potentially endorses the discrimination and prejudice against the marginalised population.

⁸ For example, women often find themselves in or negotiate a more public role for themselves in times of conflict. And yet, in the conflict resolution phase or in post-conflict peace negotiations and peace keeping discussions, the normative gender values play a role when all actors, national and international, involved in these processes do not recognize the public roles women play and often ignore and neglect women as potential partners in the discussions. For reparation policies to be relevant and meaningful to women, the status quo with regard to gender needs to be challenged.

⁹ Ms Nainar indicated that the question of reparational justice for sexual violence was not adequately thought out and is considered equal to justice for the theft of a goat or of cattle, which women themselves do not find adequate.

¹⁰ Reparation policies and procedures are often formulated by attitudes that are inherently discriminatory. Some of these discriminatory attitudes are that crimes against women are the inevitable collateral damage of war, that they need not be investigated, that the testimony of women cannot be trusted, that women can be represented by men in their families, that women need not be consulted. It is important therefore to ensure that reparation policies are guided by the principle of non discrimination on the basis of gender

¹¹ Reparation policies must at the very least ensure that they do not derogate from the standards set by all the human rights treaties, both in its formulations and directives and its effect or the impact upon implementation of the policies. It imposes a positive obligation on states and the authorities affording reparations - they need to rise to the standard.

¹² For example, if reparation policies involve issuing land to women, but the existing law prevents women from owning land, then the policy means nothing in practice. Structural changes often need to be put in place before reparations policies can be meaningful to women. The removal of administrative obstacles to access reparation is often necessary, such as the requirement for birth or death certificates where none exist

4. Justice must be made available and accessible for women¹³

5. Affirmative action to achieve effective equality in real terms¹⁴

Victims' right to redress has not been universally guaranteed, but rather has been dependent on States 'whims and political exigencies'. Even in cases where victims' reparations issues are addressed, a victim-oriented resolution does not always ensue. Where victims' reparations issues have been eventually addressed, they have been dealt with in the context of peace settlements, national reconciliation programmes or peace-building efforts. Moreover, they have often been subordinated or even sacrificed to political or strategic considerations. Worse, victim's reparations have sometimes been bargained away completely in peace negotiations or postponed indefinitely (Aldana-Pindell 2002:1399).

It is important to note that the economic factors remain critical in any evolution of victims' rights. Who bears the costs? Victims of State violence are often denied their rights when the government that has perpetrated the harm is still in power, or when a new government is impoverished. The post-genocide regime change in Rwanda illustrates the difficulty of this question. Can a Tutsi government with no resources be expected to provide compensation to Tutsi citizens for violations committed by a Hutu regime? The International Panel of Eminent Personalities, appointed by the Organisation of African Unity to investigate the genocide, went a step further and concluded that actors in the international community owe reparations to Rwanda.

In reality, it is highly unlikely that any country will step forward and accept responsibility for the genocide. This means that Rwanda has to deal with the problem alone, though it should be mentioned that international donors finance 60 % of Rwanda's public spending. The large number of victims makes reparation hard. Altogether, an

or the non recognition of women as the head of the household, or the refusal to open bank accounts in women's name, common in some Muslim societies.

¹³ When women speak of justice they usually mean social justice. Rehabilitation programmes must address the specific needs of women and incorporate elements that have the effect of ensuring social justice to women, for example: education programmes that prioritise women for education or skills training, housing provided to women as the head of the household or provision of other kinds of sustainable livelihoods.

¹⁴ Affirmative action must be recognised and recommended by reparation policies to bring women victims of conflict into the mainstream of economic, social and political life of the new transitional nation. These may include quotas for jobs, the allocation of land and for political positions.

estimated number of one million people could claim compensation, when including next of kin of deceased. Should the state compensate for each lost relative where someone lost the whole family? Should the amount be different depending on which relative you lost, e.g., your mother, your grandfather or your sister? Alternatively, should each person receive a fixed amount not depending on the number of relatives lost? Questions such as these are difficult but require clear answers (Carla Ferstman 2002:669).

Recommendations to Strengthen Victims Rights under International Law

In the light of above facts and discussion, the present study makes few recommendations for better implementation of victims of crime. Firstly, the welcome measure is acknowledgement of victims of crime at international level through resolutions or human rights declarations would require appreciation. Secondly, the urgent need of adoption of the “UN draft convention on justice and support for victims of crime and abuse of power, 2006’ while taking the experiences from the past practice of human rights conventions. Thirdly, the United Nations should take initiative to effective performance of the International Victims Fund while mobilising more voluntarily and obligatory funds by member states of the United Nations and members of the Rome Statue by recognizing the requirement of repair the harm through obligation of the international community as a whole, and also should take steps to motivate the states to create statewide compensation boards / funds to ensure the fulfillment of rights of victims of crime at domestic level.

Fourthly, the outreach and consultation programmes should reach with effective mechanisms at conflict and post-conflict situations to affected persons so as to make the victims aware of their rights and obligations of the states moreover the reparation programmes should be prepared according to the needs of the victims. Fifthly, the Statutes of the International Tribunals are not provided any special provisions to the victims of persons with disability. It is necessary to provide the special measures while recognizing them under categories of victims taking into account of their vulnerability. Sixthly, cultural property has not covered under the definition of property under the Statutes of the ICTY, the ICTR, and the ICC. In result, the victims of crime are denied to claim reparation for the destructions of their cultural monuments. Moreover, the cultural

and traditional practices are indispensable from the life and their recognition which attached to the cultural property. As such the expansion of the definition of property to cover cultural property is more relevant and necessary.

Finally, despite the positive developments in international law, much more is needed to make this academic progress a reality for victims on the ground. While the UN draft Convention would be a triumph for victims of crime on its adoption, as such the quest for reparation has not yet ended. The realisation of victims' rights requires the establishment of implementation mechanisms and governments will have to take their obligations and duties from being mere words on a paper and put them into practice, otherwise the international legal system would be far from being victim-oriented.

By honouring victims' rights to benefit from remedies and reparation, the international community expresses solidarity with victims and reaffirms the principles of accountability, justice and the rule of law. Recognising the rights of victims of gross human rights violation is the most crucial imperative of our age. Remembering the words of Dr. Esther Mujawayo;

The wounds that victims have that are not visible are worse than those that are visible an amputated arm can get sympathy, but working as a therapist I often see that the invisible wounds, those that cannot be expressed, are the most difficult. Many people alive today are living with the trauma of what they saw, heard, smelled and underwent and it is still there hurting. People also have to live with the guilt that they have not been able to bury their families. Many of the survivors struggle to give back to the dead their humanity. In Rwanda, in addition to the killings and destruction, the whole society has been broken, the values have been totally broken. This picture is very relevant to reparations, as we must see what it is that we are repairing and rebuilding. This must include the values of society. With regard to compensation and reparations I think that no compensation is possible; Nothing. Even justice is not possible. This does not mean we should forget, we have to try, even with small things. For that we have to have reparations and justice, even if it never has the same value of my family, I am still alive and want to be alive.¹⁵

¹⁵ Dr. Esther Mujawayo is a therapist, and survivor of the 1994 Rwandan genocide, noted at the conference on "Reparations for victims of genocide, crimes against humanity and war crimes: Systems in place and systems in the making" The Peace Palace, at The Netherlands between 1-2 March 2007.

APPENDIX

DRAFT

UN Convention on Justice and Support for Victims of Crime and Abuse of Power

PREAMBLE

The States Parties to this Convention:

Recalling the resolution of the UN General Assembly (GA/RES/40/34) in 1985 which called upon Member States to take the necessary steps to give effect to the provisions contained in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,

Recognizing that millions of people, including many women and children, throughout the World still suffer harm as a result of crime, abuse of power and terrorism, and that the rights of these victims still have not been adequately recognized, and that they may, in addition, suffer hardship when assisting in the prosecution of perpetrators,

Noting the partial progress achieved by some Member States in

- legislating the basic principles of justice into domestic laws combined with a high level office to implement policies and programs to provide comprehensive measures for victims of crime;
- providing victims of crime with better information, support services, reparation from offenders, compensation from the state and a role in criminal proceedings;
- establishing programs to protect victims of crime who are vulnerable, for instance because of gender or age;
- launching permanent boards and legislation to promote the use of effective and proven prevention of victimisation at all levels of government.

Noting the initiatives at the UN to implement the Declaration, including:

- UN Commission endorsement of the website Victimology.nl in 1998;
- UN Commission approval of The Guide for Policy Makers and the Handbook on Justice for Victims in 1999;
- Statute of Rome in 1998 (and later the Rules of Procedure and Evidence) to establish the International Criminal Court;
- Convention on Trans-national Organized Crime in 2000 and its optional protocol in 2002 on trafficking that include specific sections for victims;
- ECOSOC adoption in 2002 of the Guidelines on Restorative Justice;
- UN Commission funding in 2003 for 19 pilot projects;
- ECOSOC adoption in 2005 of the Guidelines for Child Victims and Witnesses;
- ECOSOC acceptance in 2002 of crime prevention guidelines;
- UN General Assembly adoption of the Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in 2005.

Recognizing that some issues relating to justice and support for victims are handled increasingly through a variety of processes often referred to as restorative justice. This includes systems found in indigenous societies and incorporates principles of community involvement in dispute reconciliation; perpetrator accountability; victim empowerment; and restoration of harmony in relationships and community. Some examples include mediation, family group conferencing, community justice systems and *gaçaça*,

Noting in 2005 the inclusion in the Declaration of the UN Crime Congress in Bangkok by the Member States of the following paragraph:

“17. We recognize the importance of giving special attention to the need to protect witnesses and victims of crime and terrorism, and we commit ourselves to strengthening, where needed, the legal and financial framework for providing support to such victims, taking into account, *inter alia*, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.”

Recognizing the importance of promoting full use and application of the UN Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power.

Have agreed as follows:

PART I GENERAL CONSIDERATIONS

Article 1

Definitions

- (1) ‘Victims’ means natural persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering or economic loss or violations of fundamental rights in relation to victimizations identified under ‘scope’.
- (2) A person is a victim regardless of whether the crime is reported to the police, regardless of whether a perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term ‘victims’ also includes, where appropriate, the immediate family or dependants of the direct victims and persons who have suffered in intervening to assist victims in distress or to prevent victimization.
- (3) A ‘witness’ is a person who could be called to a court or other appropriate forum to provide testimony.
- (4) An ‘expert’ is a person who by virtue of specialized training, particular knowledge or experience assists the legal system.

Article 2

Scope

This convention covers natural persons who are victimized by acts or omissions that:

- (a) are violations of criminal laws of States Parties or abuse of power;
- (b) are acts of terrorism, and others as defined in international instruments relevant to

terrorism, intended to cause death or serious bodily harm to civilians or noncombatants, or damage to property, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Article 3

General application

- (1) Nothing in this Convention shall diminish any provisions which protect the rights and interests of victims which are contained in the law and practice of a State Party or international law in force in that State.
- (2) States Parties shall undertake to implement these provisions to the maximum extent of their available resources. For planning purposes, States Parties shall set priorities for implementing the provisions and seek to provide them over time through progressive realization of goals.
- (3) States Parties shall ensure that the provisions contained herein shall be applicable to all, without discrimination of any kind, such as race, color, gender, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability. This will be without prejudice to providing special justice and support best suited to victims who are particularly vulnerable because of age, gender, disability or other characteristics.
- (4) States Parties shall ensure that all officials and other persons dealing with victims treat them with courtesy, compassion, cultural sensitivity, and respect for their rights and dignity.

Article 4

Commitment to reduce victimization

States Parties shall commit to provide both justice and support for victims and to reduce victimization consistent with international guidelines by, *inter alia*, developing:

- (a) more effective detection, prosecution, sentencing and corrections of perpetrators, consistent with internationally recognized norms;
- (b) measures to reduce the risk of occurrence of crimes by tackling their multiple causes;
- (c) strategies to reduce the opportunity for crime by improving protection for property and persons;
- (d) collaboration between civil society and relevant governmental institutions, in areas such as schooling, social services, family, public health and economic sectors;
- (e) institutional frameworks to improve the planning, cost effectiveness and sustainability of strategies;

- (f) greater public participation in, and engagement with, strategies in both the short and the long term;
- (g) international cooperation to exchange proven and promising practices and seek trans-national solutions.

PART II RIGHTS AND DUTIES

Article 5

Access to justice and fair treatment

- (1) States Parties shall provide victims with access to the mechanisms of justice and redress which is expeditious, fair, inexpensive and accessible, as provided for by domestic legislation, through:
 - (a) judicial and administrative mechanisms which will enable victims to obtain redress;
 - (b) informal mechanisms for the resolution of disputes, including mediation, arbitration, and customary justice processes or indigenous practices, where appropriate, to facilitate conciliation and redress for victims;
 - (c) information about their rights in seeking redress through all these mechanisms.
- (2) States Parties shall ensure that the judicial, administrative and informal processes are responsive to the needs of victims. This should be facilitated by:
 - (a) giving the victim a fair hearing within a reasonable time in the determination of their entitlement to a remedy for the injury, loss or damage suffered by them as a result of their victimization without prejudice to the accused;
 - (b) allowing the views and concerns of victims to be presented and considered at appropriate stages of proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant domestic criminal justice system;
 - (c) allowing victims to present their views and concerns themselves or through legal or other representatives without prejudice to the discretion of the court, tribunal or other appropriate authority, and in consonance with the relevant domestic criminal justice system;
 - (d) the prompt return to victims of their property taken or recovered by the police or any other agency in the course of the investigation;
 - (e) providing to victims, where appropriate, the right of appeal against decisions of the prosecutorial authority not to prosecute in cases where they were victimized;
 - (f) providing proper assistance to victims throughout informal, administrative, investigative and judicial processes;
 - (g) taking measures to minimize inconvenience to victims and protect their privacy wherever appropriate;
 - (h) ensuring the safety of victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
 - (i) avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims;

(j) ensuring the enforcement of any order or decree granting awards to victims.

(3) States Parties shall reimburse victims and witnesses for their reasonable expenses related to the procedure incurred as a result of their legitimate participation in criminal proceedings.

Article 6

Protection of victims, witnesses and experts

(1) States Parties shall take appropriate measures in accordance with their domestic legal systems to protect the safety, physical and psychological well-being, dignity and privacy of victims, witnesses and experts from potential retaliation or intimidation and, as appropriate, for their relatives and other persons close to them.

(2) The measures envisaged in paragraph 1 of this article may include:

(a) establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) providing evidentiary rules to permit victims, witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other appropriate means;

(c) agreements or arrangements with other States Parties for the relocation of persons.

Article 7

Information

(1) States Parties shall ensure that victims have an enforceable right to information, and must be informed of this, from their first contact with law enforcement or other agencies. States Parties shall ensure that victims receive general information in the most expeditious and efficient method appropriate to the culture such as through oral or written communication with concern for literacy and literary traditions. Specific information should be given person to person. Such information should facilitate an informed understanding for victims and shall be at least as follows:

(a) the type of services or organizations to which they can turn for support;

(b) the type of support which they can obtain, including the availability of health and social services and other relevant assistance;

(c) where and how they can report an offence;

(d) procedures following such a report and their role in connection with such procedures;

(e) their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(f) how and under what conditions they can obtain protection;

- (g) to what extent and on what terms they have access to legal advice or legal aid;
 - (h) requirements for them to be entitled to compensation;
 - (i) if they are resident in another State, any special arrangements available to them in order to protect their interests;
 - (j) where and how victims could obtain more information.
- (2) States Parties shall ensure that victims who have expressed a wish to this effect are kept informed of:
- (a) the outcome of their complaint;
 - (b) relevant factors enabling them, in the event of prosecution, to know the conduct of the proceedings regarding the person prosecuted for offences concerning them, except in exceptional cases where the proper handling of the case may be adversely affected;
 - (c) the court's sentence.
- (3) States Parties shall take the necessary measures to ensure that the victim is notified, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released.
- (4) In so far as States Parties take forward on their own initiative the information referred to in paragraphs 2 and 3, they shall ensure that victims have the right not to receive it, unless communication thereof is compulsory under the terms of the relevant criminal proceedings.

Article 8

Assistance

- (1) States Parties shall ensure that the necessary material, medical, psychological and social assistance to victims is provided through government, voluntary, community-based and indigenous means. Such assistance may be provided through any agencies or comprehensive programs that are appropriate under domestic laws or norms.
- (2) States Parties should be encouraged to develop networks of criminal justice, social services, health and mental health services, victim assistance services and other relevant groups or institutions in order to facilitate referrals, coordination and planning among those providing assistance.
- (3) States Parties should be encouraged to establish local and regional victim assistance centers to coordinate networks, develop and make referrals, and provide outreach to victims and direct services where appropriate.
- (4) States Parties shall facilitate the referral of victims by the police and other relevant agencies to victim assistance centers or other service institutions.
- (5) Language understood by victims should be encouraged. If translators are needed, they should be trained in the subject matter that they are addressing and victim support

personnel should be familiar with common terms that will be used.

(6) States Parties shall seek to establish the following kinds of assistance to victims:

A. Immediate Assistance:

- (a) medical attention and accompaniment to medical exams, including first aid, emergency medical attention and medical transport. Support services should be provided to victims when forensic examinations are called for or in the aftermath of death;
- (b) material support such as shelter, housing, transportation, or property repair;
- (c) crisis intervention, involving crisis counseling and problem solving;
- (d) information and notification about what happened to the extent that such information does not interfere with investigation, including notification of any immediate responsibilities to the criminal justice system. Assistance should be offered in notifying family or friends of what happened;
- (e) protection from repeat victimization should be provided through the development of safety and security plans. This may include information on police surveillance, relocation, emergency communication and the like. It may also involve assistance with obtaining protection orders through the judicial system;
- (f) victims should be protected from media intrusion; general support and advocacy should be offered when victims interact with social, justice and medical institutions as well as appropriate referrals for urgent needs;
- (g) confidentiality and privacy should be guaranteed to the extent allowable under current law and policy.

B. Medium term Assistance:

- (a) the continuation of the services provided under A 'Immediate Assistance';
- (b) psychological health and spiritual interventions that may include post-trauma counseling, mental health therapy, pastoral counseling, or traditional healing intercessions;
- (c) assistance with financial needs or claims including filing and advocacy for compensation claims, restitution, insurance, or emergency funds.
- (d) legal referrals should be provided for legal assistance in the criminal or civil justice systems. To the extent possible such legal assistance should be free.
- (e) Information, support and assistance concerning options for participation in alternative justice forums should be provided.

C. Long term Assistance:

- (a) the continuation of the services provided under A 'Immediate Assistance' and B 'Medium Assistance';
- (b) assurances and re-establishment of the victim's place in the community and in the workplace should be encouraged;

Article 9

Restorative justice

- (1) States Parties shall endeavor, where appropriate, to establish or enhance systems of restorative justice, that seek to represent victims' interests as a priority. States shall emphasize the need for acceptance by the offender of his or her responsibility for the offence and the acknowledgement of the adverse consequences of the offence for the victim.
- (2) States Parties shall ensure that victims shall have the opportunity to choose or to not choose restorative justice forums under domestic laws, and if they do decide to choose such forums, these mechanisms must accord with victims' dignity, compassion and similar rights and services to those described in this Convention.

Article 10

Restitution including reparation

- (1) States Parties shall legislate to make offenders responsible for paying fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.
 - a) States Parties shall review their practices, regulations, laws and their constitution to ensure that restitution is an available sentencing option in criminal cases.
 - b) In cases of environmental crime, States Parties shall legislate to include restitution to restore the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of the community.
 - c) Where public officials or other agents acting in an official or quasi-official capacity have violated domestic criminal laws, States Parties shall legislate to provide restitution to victims from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurs is no longer in existence, the State or Government successor in title shall provide restitution to the victims.
 - d) When there is a court order for restitution, the State Party shall be responsible for enforcing the order.
 - e) In cases where the offender is under a legal obligation to pay restitution as well as other pecuniary sanctions, the former shall have precedence over the latter.
 - f) In cases where the victim seeks restitution through civil remedies, States shall endeavor to expedite these proceedings and minimize expenses.

Article 11

Compensation

- 1) When restitution is not fully available from the offender or other sources, States Parties shall endeavor to provide compensation to:
 - (a) victims who have sustained significant bodily injury or impairment of physical or mental health as a result of intentional violent crime;
 - (b) the victims' family, in particular dependants of persons who have died as a result of such victimization.
- (2) Compensation shall be provided for:
 - (a) treatment and rehabilitation for physical injuries;
 - (b) pain and suffering and other psychological injuries caused to victims;
- (3) States should also consider compensation for loss of income, funeral expenses and loss of maintenance for dependants.
- (4) The establishment, strengthening and expansion of national, regional or local funds for compensation to victims should be encouraged. States Parties may consider providing funds through general revenue, special taxes, fines, private contributions, and other sources.
- (5) These funds shall guarantee fair, appropriate and timely compensation. They should also allow for emergency and/or interim payments. Special care should be taken to make the funds accessible. This requires, *inter alia*, extensive dissemination of information on the eligibility criteria and the procedure to be followed. States should also consider other means to raise public awareness of the existence of these funds.
- (6) Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.
- (7) In cases of cross border victimization, the State where the crime has occurred should pay compensation to the foreign national, subject to the principle of reciprocity.

PART III IMPLEMENTATION, MONITORING AND COOPERATION

Article 12

Implementation

- (1) States Parties shall take appropriate measures to:
 - (a) bring into force the laws, regulations and administrative provisions necessary for the implementation of this Convention;
 - (b) establish and enhance such institutions and mechanisms as may be necessary for the achievement of the objectives of this Convention;

- (c) ensure the establishment and/or enhancement of appropriate procedures, which are victim-friendly and which must be adhered to.
- (2) States Parties shall ensure that personnel dealing with victims and witnesses make every effort to adopt an interdisciplinary and cooperative approach in aiding them. This approach may include protocols for the different stages of the justice process to encourage cooperation among bodies that provide services to victims and witnesses.
- (3) States Parties shall ensure the building of partnerships among local, national and international stakeholders, including intergovernmental and non-governmental organizations, civil society as well as the private sector in the implementation process. To this end, all stakeholders shall be encouraged to contribute to the resources required for implementation.
- (4) States Parties shall foster, develop and improve international cooperation in order to:
- (a) facilitate the more effective protection of victims' interests in informal, administrative or judicial proceedings;
 - (b) promote mutual assistance for the purpose of facilitating collection and exchange of information and the detection, investigation and prosecution of crimes.
- (5) States Parties shall provide adequate training, education and information to all persons working with victims and witnesses with a view to improving and sustaining particular methods, approaches and attitudes that protect and deal effectively and sensitively with victims and witnesses. This training should particularly be aimed at avoiding secondary victimization.
- (6) States Parties shall ensure that sufficient information, advice and assistance be provided to:
- (a) victims in order to enable them to be empowered to seek assistance from appropriate quarters so as to be able to receive justice, support and assistance in respect of their victimization;
 - (b) members of the public in order to enable them to understand the reasons for provision of justice, support and assistance to victims.
- (7) States Parties shall foster, develop and improve cooperation between States in order to facilitate the more effective implementation of the provisions contained in this Convention and the more effective protection of victims' interests in criminal proceedings, whether in the form of networks directly linked to the judicial system or of links between organizations which provide support to victims.

Article 13

Monitoring

- (1) States Parties shall take appropriate measures to monitor the efficiency and effectiveness of policies and measures designed for the implementation of this Convention. In particular, they shall undertake periodical review and evaluation of their legislation, regulations and procedures, including through research.

- (2) States Parties shall ensure that the various agencies, organs or bodies dealing with victims shall submit periodical reports to an appropriate authority within their domestic jurisdiction designated for this purpose.
- (3) States Parties undertake to make the principles and provisions of this Convention widely known, by appropriate and active means.

Article 14

Committee on Justice and Support for Victims of Crime and Abuse of Power

- (1) For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the Convention, there shall be established a Committee on Justice and Support of Victims of Crime and Abuse of Power, which shall carry out the functions hereinafter provided.
 - (a) The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.
 - (b) The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
 - (c) The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.
 - (d) The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
 - (e) The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.
 - (f) If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

- (g) The Committee shall establish its own rules of procedure.
- (h) The Committee shall elect its officers for a period of two years.
- (i) The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.
- (j) The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.
- (k) With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 15

- (1) States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:
 - (a) within two years of the entry into force of the Convention for the State Party concerned;
 - (b) thereafter every five years.
- (2) Reports made under the present Article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.
- (3) A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.
- (4) The Committee may request from States Parties further information relevant to the implementation of the Convention.
- (5) The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.
- (6) States Parties shall make their reports widely available to the public in their own countries.
- (7) The Committee is entitled to make on-site visits to assess progress made in the implementation of the Convention.

Article 16

Cooperation

(1) In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

- (a) The United Nations Office on Drugs and Crime, the specialized agencies and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the United Nations Office on Drugs and Crime, the specialized agencies and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the United Nations Office for Drugs and Crime, the specialized agencies and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;
- (b) The Committee shall develop a regular dialogue and discuss possible areas of cooperation with all relevant actors, including national human rights institutions, governments, relevant United Nations bodies, specialized agencies and programmes, in particular with the United Nations Office on Drugs and Crime, the Counter-Terrorism Committee of the Security Council and the Office of the United Nations High Commissioner for Human Rights.
- (c) The Committee shall transmit, as it may consider appropriate, to the United Nations Office for Drugs and Crime, specialized agencies and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;
- (d) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the matters covered under this Convention.

PART IV Concluding provisions

Article 17

The present Convention shall be open for signature by all States.

Article 18

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 19

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 20

- (1) The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
- (2) For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 21

- (1) Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.
- (2) An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.
- (3) When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 22

- (1) The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
- (2) A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
- (3) Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 23

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 24

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 25

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.

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