

PhD DISSERTATION

RESTORATIVE JUSTICE IN INTERNATIONAL CRIMINAL LAW:
FOREGROUNDING VICTIMS IN THE INTERNATIONAL CRIMINAL COURT
PROCESS

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CHAPTER ONE

INTRODUCTION: THE NEW PROMISE OF INTERNATIONAL CRIMINAL LAW

1.1 Introduction

This thesis argues that international criminal law (ICL), like municipal criminal law and practice, has until the adoption of the Rome Statute of the international criminal court focused on the liability of perpetrators rather than the interests of victims of international crimes. This reflects the view that criminal acts are considered first as wrongs against the entire society and that measures taken as remedy focus on disrupted societal order. At the international level, punishment of those responsible for international crimes such as war crimes, crimes against humanity and genocide is regarded as a means of restoring international peace and security. While this is not problematic in itself, as ultimately international peace and security is expected to underpin most, if not all international action as the key animator, it is argued that a narrow conception of what is, or what should consist of holistic peace and security, coupled with the politics of the moment inform the woeful plight of victims of international crimes. Indeed, the concerns of victims including the recognition of and restitution to them has been, and for the large part still is, an incidental issue, both at the domestic and international plane.

As one would expect, concerns of 'international peace and security' have informed all international action to punish perpetrators of gross human rights violations at the international level. A cursory survey of such

implementation frameworks bear this out. The precursor initiatives in ICL are the International Military Tribunal (IMT) at Nuremberg¹ and the International Military Tribunal for the Far East at Tokyo² established by the Allied Powers at the end of WWII to try German and Japanese responsible for major international crimes committed during that war. The Allied Powers had jointly articulated the view that the threat posed to the international order by expansionist Nazi Germany and Imperial Japan must attract international condemnation and retribution.³ The establishment of the IMT at Nuremberg mandated to prosecute those responsible for crimes against humanity, war crimes and crimes against peace is considered to have planted the seed of contemporary ICL.⁴

While World War II has come to be known for the large civilian casualties and millions of survivors affected by it, victims' concerns were hardly articulated at the

¹ Charter of the International Military Tribunal (Nuremberg Charter) annexed to the London Agreement of 8th August 1945 between the United States, France, United Kingdom (and Northern Ireland) and the Soviet Union

² Charter of the International Military Tribunal For the Far East (Tokyo Tribunal) approved by the supreme Commander of the Allied Powers, General MacArthur on 19th January 1946 as amended by order of Supreme Commander, general Headquarters, APO 500, 26th April 1946

³ See notably the Moscow Declaration of 30th October 1943 signed by Roosevelt, Churchill and Stalin reprinted in Morris & Scharf, Vol 2 (1998) 470 from 38 *AJIL* (Supp. 1944) See also Bierzanek, R 'War Crimes: History and Definition' in Bassiouni, MC & Nanda, Ved P A *Treatise on International Criminal Law* (1973) 559-586 at 573 detailing various declarations affirming that no war criminal would go unpunished

⁴ Nuremberg established the principles that underpin ICL, the most important being individual criminal responsibility. These are contained in the Nuremberg Principles adopted by the UN General Assembly. See Gen Assembly resolution UN GA Res 95/1 of 11th December 1946. See also chapter two

trials.⁵ In fact, the focus of the trials was to punish major war criminals rather than address specific victims' concerns in their own right.⁶ Consequently, victims mostly featured as a statistic to depict the horror of the war and thus served to aggravate the blame attributable to those indicted. After all, the trials were justified by the fact that waging a war of aggression had jeopardized international peace and security, which became the centrepiece of the proceedings.⁷ Many years later, there have been various corrective initiatives, judicial and extra judicial, seeking the recognition of, and attention to the plight of World War II victims.⁸

All post-Nuremberg initiatives aimed at creating a coherent body of international criminal law and institutions created to enforce ICL have all been justified by considerations of international peace and security.⁹ The Statutes of the International Criminal Tribunal for Rwanda (ICTR),¹⁰ the International Criminal Tribunal for the Former

⁵ The total estimated human loss of life caused by World War II was roughly 62 million people, of whom 37 million were civilians. See Wikipedia, the free encyclopedia, accessible at <http://en.wikipedia.org/wiki/World_War_II_casualties> (accessed on 10th January 2006)

⁶ Art 2 Statute of the IMT (Nuremberg Charter) art 2 Tokyo Charter

⁷ Infra note

⁸ See for instance, the movement relating to crimes committed against women and the Tokyo Women's Tribunal discussed in the next chapter

⁹ Following the adoption of the Nuremberg Principles by the International Law Commission (ILC) on request by the UN General Assembly, codification efforts aimed at compiling a draft international criminal code focused only on crimes with a political element and which concerned the maintenance of international peace and security. See Sunga, Lyal S *The Emerging System of International Criminal Law Developments in Codification and Implementation* (1997) 4-5. Also General Assembly Resolution 177 (II) of 21 Nov 1947

¹⁰ UN Security Council Resolutions 955 (1994) of 8 November 1994 on the establishment of the ICTR and resolution 827 (1993) of 25 May 1993 on the establishment of the ICTY

Yugoslavia (ICTY)¹¹ and that of the special Court for Sierra Leone (SCSL) clearly articulate that the imperative to try 'those who bear the highest responsibility' for genocide, war crimes and crimes against humanity is in the interest of international peace and security.¹² Without delving into a scrutiny of the issues reserved for the next chapter, it is pertinent to note that whereas a contrary position is not proposed, a broader understanding of the elements that impact on peace and security of societies is urged. To repeat, this has not been the case. The problem lies in the view, misguided at that, that to punish those most responsible for crimes is a guarantee for peace in post conflict societies. There is greater merit to adopt a holistic approach to such a situation, which would dictate that establishing accountability for international crimes means that victims' concerns beyond prosecutions have to be addressed. In fact, it is often the case that rather than trials, victims may prefer mechanisms that focus on restoration, rehabilitation, memorialisation and reparations.¹³ A cursory glance at normative framework of the tribunals, and their subsequent practices thus reflect the fringe position of the victim in ICL.¹⁴ Victims' interests are only addressed within the general objective of maintaining international peace and security, within

¹¹ Resolution 827 (1993) of 25 May 1993 on the establishment of the ICTY also the recent SC resolution 1593 (2005) referring Darfur for investigation by the ICC

¹² The Security Council has always, in establishing international criminal tribunals, expressed that it is acting within its mandate under Chapter VII of the United Nations Charter (UN Charter). *Tadic v Prosecutor* has confirmed legality of ICTY prosecutions arguing that the SC acted on behalf of the international community, and squarely within its mandate in establishing the ICTY. See similarly *Akayesu v Prosecutor* (ICTR)

¹³ Infra note 65

¹⁴ See chapter two

which, perhaps, their rights will not be violated again.¹⁵ Whereas, this approach rightly assumes that the absence of peace and security creates an environment in which more victims may be generated, it blinds itself to the fact that there are specific concerns that must be dealt with as a consequence of the violation of victims' rights.¹⁶

Although the international criminal court (ICC) which is vested with the power¹⁷ to try persons for genocide,¹⁸ crimes against humanity,¹⁹ and war crimes²⁰ is still founded on the premise of 'international peace and security',²¹ the Rome Statute shifts the paradigm of ICL in so far as it recognizes that taking account of victims' concerns should be part of the broader approach to achieving justice, peace and security in post conflict situations.²² For the first time in the history of international criminal tribunals, the statute contains numerous provisions that addresses various concerns and elaborates a fairly extensive list of the rights of victims of international crimes.²³

¹⁵ See subsequent sections articulating the extent to which victims' rights are addressed by the prosecutions *per se*. Aldana-Pindell, *infra* note 65

¹⁶ Violation of a right gives rise to an imperative to remedy the wrong. Even at the level of state responsibility, an internationally wrongful act attributable to a state gives rise to an international responsibility of that state to supply reparations, irrespective of the restoration of peace. See article 1 ILC Articles on State Responsibility. See also *Chorzow Factory Case* (PCIJ)

¹⁷ Art 5 Rome Statute

¹⁸ Art 6 Rome Statute

¹⁹ Art 7 Rome Statute

²⁰ Art 8 Rome Statute

²¹ See Preambular references to the recognition that that commission of crimes over which the ICC has jurisdiction 'threaten the peace, security and well-being of the world'

²² Preamble, Rome Statute

²³ See section 1.5 below

In the following pages of this study, it is contended that the ICC offers a wonderful opportunity for the centralization of victims in the international criminal process and the entrenchment of restorative justice as an integral element of ICL processes. In this regard, the thesis sets out to conduct a systematic and comprehensive study of restorative justice in ICL by tracing the development of the rights of victims in criminal law processes both in select municipal systems and international criminal tribunals but with a keener focus on the operationalisation of the new 'victims' regime' in the ICC. In particular, it explores and suggests the principles for the foregrounding of victims in the processes of the ICC and more broadly, international criminal justice.

Apart from the general problem that one faces when discussing remedies in international law—that of terminological uncertainty,²⁴ this study is confronted with two related challenges, which perhaps render the study necessary and relevant: the fact that the link between restorative justice and human rights violations has attracted limited commentary in academic literature²⁵ (a fact more telling within the context of ICL) and the paucity of useful jurisprudence from international criminal tribunals in this regard, a fact one may attribute to their limited mandates. In developing principles of reparative justice and in elucidating the 'victims' regime' in the Rome Statute, it is recognized that the ICC will inevitably have to rely on relevant jurisprudence of select national tribunals, international human rights treaty oversight

²⁴ Infra, note 119

²⁵ Cunnen, infra note 55

bodies however disparately justified. The sparse lead provided by international criminal tribunals is equally useful.²⁶

The objective of the analysis of some of these tribunals is fourfold: to trace the development of the law and jurisprudence relating to the victim in criminal processes; ascertain the rights of the victim within the context of ICL and, in particular, rights relating to restitution; establish what the Rome Statute provides in this regard; and attempt to trace a trajectory for the development of principles by the ICC relating to restitutive justice in the ICL process and implementation of other provisions relevant to victims, notably participation.

1.2 Rethinking international criminal law

As a branch of public international law (PIL), international criminal law (ICL) is concerned with the prohibition and processes of punishment of crimes which it elaborates as being of an international character. As noted by Cassese, it is the body of international rules that proscribe international crimes and require states to prosecute and punish at least some of those crimes. Since punishment involves a process (or processes), it also regulates international proceedings for prosecuting persons accused of such crimes.²⁷

²⁶ See discussion in chapter four

²⁷ Antonio Cassese, *International Criminal Law* (2003)15. See also Cherif M Bassiouni & Ved P Nanda, *A Treatise on International Criminal Law* (1973); Ilias Bantekas & Susan Nash, *International Criminal Law* (2003); John Dugard & Christine van den Wyngert, (eds) *International Criminal Law and Procedure* (1996)

It has been variously suggested that the term 'international criminal law' is inaccurate as far as it is suggestive of a distinct, coherent system of a branch of PIL, concluding that 'norms of international criminal law form neither a coherent nor integrated system' and that 'currently established mechanisms do not provide a panacea to correct this situation.'²⁸ ICL is indeed a body of law in development. While there is in place a handy system of norms and practices, one cannot exactly speak of a unified system of ICL, 'characterized by broad and coherent material coverage as well as fair and effective institutional implementation.'²⁹ There seems to be agreement that the arrival of the ICC has changed, or perhaps more accurately, will change this, in so far as it will streamline and develop further this body of law hitherto marked by ad hoc arrangements.³⁰

That aside, two issues related to this accepted definition of ICL need to be addressed here, one raised by Cassese but which may not be of much relevance to this study while the other, which arises from developments introduced by the Rome Statute. First, Cassese wonders why not the definition of ICL should not incorporate, and indeed suggests that it should incorporate recognition of the 'national element' of ICL, given its notable significance at least in development and implementation of ICL.³¹ Whereas it is desirable that

²⁸ See Sunga (1997) *supra* note 9 at 2-8 whose work investigates the state of ICL which has developed by leaps and bounds since Nuremberg; Cassese, *supra* note 28 at 16-19

²⁹ *Ibid*

³⁰ See generally Dinah Shelton (ed) *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (2000);

³¹ See Cassese (2003) 1-2 who suggests that a contemporary conception of ICL should include various fundamental questions

the notion of ICL should recognize the national sphere, for its important role in ICL, it is submitted that the utility of such recognition is not immediately apparent. Further, this suggestion seems to reflect, wrongly so, that 'the national aspect' is insignificant in other related branches of Public International Law (PIL) such as human rights, which equally has, though to a lesser extent, benefited from its interplay with municipal systems. This thesis therefore downplays this specific definitional aspect of ICL as the exclusion of 'the national aspect' in a definition of ICL has not limited its selective fertilization by jurisprudence from the domestic sphere.³²

To return to the second issue, perhaps of greater importance and relevance to this thesis: 'representation' of the victim in a definition of ICL, in light of the new paradigm of ICL contained in the Rome Statute. In light of these developments, discussed in some detail later on, the question is whether the 'classical' conceptualization of ICL outlined above is tenable, and whether a rethink is necessary. While this may be a question fit for a broader inquiry beyond the scope of this study, it is opined that that definition is reflective of the 'old order', representing dated institutions, practices, philosophy and ways of thinking. To take cue from the victim rights movement in which activists urged a redefinition of crime

relating to the role played by national courts in ICL on account that: they have contributed enormously to development of ICL; international tribunals take into account domestic case law; that the ICC is complementary to domestic courts and that international tribunals rely on state cooperation for effective implementation of their mandates

³² In a later chapter the contribution of domestic law to ICL is discussed in the context of the foundational principles that govern ICL, including the place of victims in ICL

and thus criminal law to reflect a 'deserved' place for victims, the new model of ICL must inform new ways in international criminal justice.³³ The new role and place of victims in this system should conceptually underpin all aspects of ICL starting at the definitional level. This task must lie in the lap of the Court itself as it begins to establish jurisprudence in light of its overarching station in the ICL framework. This proposition in no way purposes to make a meal of issues of basic definition, as long as sound jurisprudence reflective of the ICC's mandate emerges from early on in the Court's work.

Granted, ICL is a relatively new branch of PIL, having developed through various institutions since Nuremberg;³⁴ and that it is not yet a coherent, self-sufficient system and that as a developing body of law, 'its substantive, as well as procedural elements continue to evolve through complex processes'.³⁵ Its incoherence, when identified, is said to be partially attributable to the mode of its development.³⁶ While most branches of PIL such as international human rights law (IHRL) and humanitarian law (IHL) have emerged and developed through conventional norm generation processes (treaties), ICL has developed piecemeal, through various institutions. As will be advanced further on, apart from the fixation with a narrow

³³ See Carrie J. Niebur Eisnaugle 'An international "truth commission": utilizing restorative justice as an alternative to retribution' (2003) 36 *Vanderbilt Journal of Transnational Law* 209-241 at 213

³⁴ Cassese (2003) 16; Sunga (1997) 7

³⁵ Cassese (2003) 17; Sunga (1997) 7 The adoption of the statutes of the *ad hoc* tribunals ICTR, and ICTY and ICC have further contributed to the development of the substance and procedure of ICL. See further authorities

³⁶ Rome statute has contributed in consolidating the developments in ICL over the last 50 yrs, but we are not yet there

concept of 'international peace and security' as the rationale for creating such institutions, their establishment and operation in disparate contexts in which they have been rationalized by, and subject to differing factors is part of an array of factors responsible for the relegation of victims in international criminal law.

1.3 Victims in ICL-Retribution as a foundational paradigm of (ICL)

One basic argument advanced in this thesis is that ICL, like municipal criminal law from which it has 'borrowed' various aspects (at least some of the major systems) is founded on a retributive model of justice that focuses on the perpetrator both as a target of criminal sanction and beneficiary of due process guarantees and that this led to the relegation of the victim of crime to a peripheral role in proceedings before international criminal tribunals. An examination of domestic criminal systems that have influenced the content and processes of ICL as well as international criminal tribunals, a task reserved for a subsequent chapter bears this out.³⁷

It has been rightly observed by various commentators that in societies that predate the western-style centralised state, the current dual legal system that draws a distinction between criminal and civil sanctions did not exist.³⁸ The gradual centralisation of political power

³⁷ Chapter 2 examines the place of victims in the processes of international criminal tribunals

³⁸ Richard Boldt 'Restitution, criminal law and the ideology of individuality' (1986) 77 *Journal Crim L & Criminology* 969-1022 at 981

oversaw the development of this dichotomy with the effect that the imposition of criminal sanction for wrong doing was 'appropriated' by the state in pursuit of what one commentator has pejoratively labelled 'fictive interests of the collective'.³⁹

Since this 'appropriation' of the right of the victim of crime to enforce remedies for injury, the notion of criminal trial has entailed the deployment of the power of the state to restrain individuals from certain forms of conduct through imposition of criminal sanction.⁴⁰ In this arrangement therefore, criminal procedure is said to be about defendants and that the interests of the victims are, 'supposed to be subsumed under the general public interest.'⁴¹ The underpinning justification of this is the maintenance of public order and the peaceful coexistence within the state or society indicating that criminal conduct is of greater concern to the larger polity than the individual victim to whom direct injury may have been caused, or their family.⁴² With this approach, the offenders' punishment constitutes 'pay off' to society instead of the victim.⁴³ Consequently, the victim of crime is said to benefit indirectly when sanction is meted out to

³⁹ Ibid. See chapter 3 for the origins of the victims movement and the argument for 'restitutionary model of justice

⁴⁰ Chapter 3 considers the progressive relegation of victims of crime within criminal process in select jurisdictions and the movements in some of these domestic systems to reassert the place of victims

⁴¹ Ybo Buruma 'Doubts on the upsurge of the victim's role in criminal law' in Hendrik Kaptein & Marijke Kaptein (eds) *Crime, Victims and Justice: Essays on Principles and Practice* (2004) 1-15 at 1 [Hampshire: Ashgate Publishing House]

⁴² See Boldt, *supra* note 38

⁴³ Buruma, *supra* note 41

a perpetrator. Commentators point to the 'promise of non repetition' as the main gain by the victim.⁴⁴

The result of this emphasis has been the subordination of the victim to the 'greater good' of society and hence preponderant focus on the perpetrator rather than victims of crime, with the latter featuring in the criminal process only as state witness. Granted the deterrent function of prosecution, questionable as it may be, this approach view seems to blind itself to at least two facts: that the real injustice occasioned by criminal conduct is the loss and harm suffered by the victim; and that while it may be contented that criminal trial indirectly responds to the victim's injury, it is not suited to address all concerns raised by victimization. The result is that the victim is not only marginalized in the process, but no attempt is made to repair the injury incurred.

At the domestic level, the problems of the criminal justice system so structured spawned the victims' movement in a number of jurisdictions notably the USA that championed victims' rights in the criminal justice system.⁴⁵ These efforts in search of an inclusive and victim-sensitive paradigm planted the seed of the restorative approach to criminal justice that has gained increasing prominence in some countries.⁴⁶ Some of the gains at this level were

⁴⁴ Though not entirely uncontested, it is often asserted that when the deterrent function of punishment is achieved, the victim of a specific crime may rest in the assurance that the same will not be repeated

⁴⁵ On the origins of the victims' movement, see for instance Lynne N Henderson, "The Wrongs of victims' rights' (1985) 37 *Stanford LR* 937-1021. Chapter 3 considers in some detail the victims movement in select jurisdictions

⁴⁶ Ibid

seized upon by the muted 'victims movement' at the international level in the late 80s and have found expression in the Rome Statute.⁴⁷

Before this important milestone, international criminal law had followed the tradition in the major national criminal justice systems where, in spite of some reforms, victims still play a fringe role in the criminal justice processes.⁴⁸ As such, victims of international crimes have continued to be dissatisfied with the initiatives at the international level through which international law proscriptions against genocide, war crimes and crimes against humanity have been enforced since World War II.⁴⁹ By urging creativity in interpretation, this work considers the adequacy of and the operationalisation of specific victim rights inaugurated by the Rome Statute.

1.4 Introducing restorative justice in ICL: new way of thinking?

The term 'restorative justice' does not lend itself to easy definition. As a general concept, it consists of 'a wide-ranging movement...seeking to transform the systems that are in place to deal with interpersonal and intergroup conflict' and that '...definitions vary from this basic premise, evidenced by subtle differences in the goals and methods that make up a restorative paradigm.'⁵⁰ If what Eisnaugle considers as the basic premise of restorative

⁴⁷ See chapter 2 and 3

⁴⁸ Chapter 2

⁴⁹ The next chapter discusses this in some detail

⁵⁰ See Eisnaugle supra note 33 at 211 quoting Peggy Hutchison & Harmon Wray, What Is Restorative Justice?, New World Outlook, July/Aug. 1999, at 4

justice is accurate, an immediate niggling problem, to which this section returns later, presents itself: that of regarding a crime not just as a conflict, but an interpersonal conflict.⁵¹

Lamenting the lack of preciseness in definition, Coben & Harley observe that it may be considered an umbrella term for a spectrum of practices used in association with the criminal justice system, but more generally, to describe approaches to dispute resolution in disparate settings such as neighbourhoods, schools, and workplaces.⁵² This work restricts itself to restorative justice as may be applicable within the criminal justice setting, in particular within ICL.⁵³

Of wide import, the term has been used interchangeably with 'transformational' or 'transitional' justice to describe

⁵¹ Infra note. See Guttler on the redefinition of crime by the restorative justice movement

⁵² James Coben & Penelope Harley 'Intentional conversations about restorative justice, Mediation and the practice of law' (2004) 25 *Hamline J. Pub. L. & Pol'y* 235-334 at 239. James Coben & Penelope Harley at 240

⁵³ Restorative justice approaches which have been increasingly deployed in the dispute resolution field both at municipal level and internationally are not limited to their relevance as a response to crime. In some jurisdictions where the concept is recognized, restorative approaches are increasingly used in conflicts that do not disclose a crime, including problems in schools (bullying, truancy); workplaces (labour disputes, sexual harassment); and within families (child welfare, family violence). See in this regard James Coben & Penelope Harley supra note; Pennell and Burford (1996); Mark S. Umbreit, Robert B. Coates, Betty Vos, *Community Peacemaking Project: Responding to Hate Crimes, Hate Incidents, Intolerance and Violence through Restorative Justice Dialogue* (2002) (using five community cases to examine a range of types of hate crimes, types of communities and uses of dialogue), available at <<http://0-ssw.che.umn.edu.innopac.up.ac.za:80/rjp/Resources/Resource.htm>> (accessed on 25 November 2005)

the work of truth and reconciliation commissions.⁵⁴ As this work considers a number of case studies specifically South Africa and Rwanda, this is particularly relevant especially in situations where such mechanisms have been deployed as the sole, or part of an array of responses to mass atrocities that may invoke the operation of ICL.

Restorative justice is not just a set of practices or processes bereft of a 'philosophical' or teleological underpinning. Cunnen agrees with the identification of restorative justice and reparations for human rights abuses as both practices and a set of values.⁵⁵ In the same vein, Coben & Harley conceive restorative justice beyond specific practices to include 'a set of principles, and even a philosophical approach to life'.⁵⁶ Similarly, Eisnaugle adverts to 'a set of values and ideals that define a just reaction to the commission of a crime and the crime committer.'⁵⁷ Without immediately launching into an in-depth discussion, some of identifiable principles or values that underpin restorative justice include healing and making

⁵⁴ James Coben & Penelope Harley, *supra* note 52 at 240. Even more loosely, and perhaps in a manner not particularly relevant to this study, restorative justice has been employed in association with 'community justice'. Some authors use them interchangeably. See for instance, Adrian Lanni 'The future of community justice' (2005) 40 *Harvard Civ Rgts-Civ Lib LR* 359. Others draw a sharp distinction, for instance Leena Kurki 'Restorative and Community Justice in the United States' (2000) 27 *Crime & Just.* 235

⁵⁵ Chris Cunnen 'Reparations and restorative justice: responding to gross violations of human rights' in Heather Strang & John Braithwaite, *Restorative Justice and Civil Society* (2001) 83-98 at 93 [Cambridge: Cambridge University Press] 87; See also John Braithwaite & Heather Strang 'Introduction: Restorative Justice and Civil Society' in Heather Strang & John Braithwaite, *Restorative Justice and Civil Society* (2001) at

⁵⁶ James Coben & Penelope Harley, 240

⁵⁷ Eisnaugle, *supra* note 33 at 211

amends,⁵⁸ reconciliation,⁵⁹ guarantee against repetition of crime(s)⁶⁰ and restoration⁶¹ or repairing harm caused to victims that may entail 'offering some form of recompense involving where possible restitution, compensation and reparation.⁶² The challenge, if one thinks of it as such, is to apply restorative justice appropriately to international criminal law and more specifically, to the work of the ICC.

As a process, restorative justice 'brings[s] together those affected to establish truth and provide a framework for reconciliation.'⁶³ Conceived as such, the three most commonly used practices are victim offender mediation⁶⁴ noted for its advantages within the criminal setting;⁶⁵ family group conferencing,⁶⁶ and circles.⁶⁷ Additionally, and

⁵⁸ See Braithwaite & Strang in Heather Strang & John Braithwaite, supra note 55 at

⁵⁹ Cunnen, supra note 55 at 88

⁶⁰ Cunnen, at 92

⁶¹ Ibid

⁶² See Pettit & Braithwaite (1993) at cited in Cunnen, supra at 94

⁶³ Ibid

⁶⁴ Victim-offender mediation involves the face-to-face meeting of victim and offender after the careful preparation of each party by a skilled, specially trained mediator. The meetings are facilitated by the mediator who has the responsibility to ensure a safe and comfortable environment. On mediation as a social process of conflict resolution, see generally Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1994); Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 2nd Edition (1996)

⁶⁵ One advantage of victim-offender mediation is that it offers offenders a chance to initiate voluntary reparation to their victims, which reparation is not limited to financial payments but may include an apology and explanation of how the offence came about, as well as work for the victim, work for a community cause chosen by the victim, or a specific undertaking (e.g. to attend a counselling course) See James Coben & Penelope Harley, 241; Tony F. Marshall, *Restorative Justice: An Overview* 8 (Centre for Restorative Justice & Peacemaking, 1998)

⁶⁶ The number of participants is expanded in family group conferencing to include the offender's family, the victim's family or supporters and community contacts of the offender (such

perhaps of more relevance to this thesis, the offering of restitution, the writing of letters of apology, community service, and the use of victim impact panels or community reparation boards are considered as restorative justice practices.⁶⁸

For the purposes of this study, as dictated largely by practical considerations, the term restorative justice is deployed, in a limited and rather nuanced form. As the discussion above demonstrates, because of the multiplicity of contexts in which restorative justice has been used, one may be apt to confuse in what respect it is employed given its apparent fluidity in meanings attributed to it in such disparate contexts. Apart of clarity of demarcation, delineation is further necessitated by the fact that the term has largely been deployed in reform debates at national level and hardly in international law, especially not in ICL.⁶⁹ This is not to indicate that the principles of restorative justice are new to public international law. Brownlie locates such principles squarely in the debate on the law of state responsibility regarding reparations for human rights violations noting that it is a broad term that encompasses a variety of measures that may be required of a defendant state including, but not limited to restitution,

as a teacher, neighbour, employer) who are interested in offering support or help

⁶⁷ This is a larger group, expanded to include community members. See James Coben & Penelope Harley, 241

⁶⁸ James Coben & Penelope Harley, 240

⁶⁹ Recent debates within the context of ICL relate to how truth and reconciliation commissions can be used alongside mixed international tribunals such as the Special Court in Sierra Leone as a response to international crimes. See for instance William Schabas 'Conjoined Twins of justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court' 2 (2004) *Journal of International Criminal Justice* 1082-1099.

compensation, apology, prosecution of responsible persons and guarantees of non-repetition.⁷⁰

The affirmation of restorative justice principles in PIL notwithstanding, the potential links between restorative justice and human rights violations is not well explored, a fact attested to by the dearth of literature on the subject.⁷¹ To the advantage of this study, perhaps, the sole comment by Van Ness makes some useful, though incomprehensive reference to the possible links between restorative justice and criminal law standards.⁷² It is useful, if only for the reason that it clarifies a bit more the possible parameters of restorative justice, to highlight these here without delving into an in-depth discussion to be returned to later. Perhaps consistent for restorative justice theory and international criminal standards is that they both include the requirement: that states must balance interests of victims, offenders and the public; that victims and offenders must have access to formal and informal dispute resolution mechanisms; for comprehensive action in regard to crime prevention; that government provide impartial, formal judicial mechanisms for victims and offenders; and that there must be help for the community reintegration of victims and offenders.⁷³

⁷⁰ Ian Brownlie, *Public International Law* (1998) 460; see also Daniel Bodansky, John R. Crook & Dinah Shelton 'Righting wrongs: reparations in the articles on state responsibility' (2002) 96 *American JIL* 833; Max du Plessis 'Reparations and International Law: How are Reparations to be Determined (Past Wrong or Current Effects), Against Whom, and What Form Should They Take?' (2003) 22 *Windsor YB Access to Justice* 41

⁷¹ See Cunnen, *supra* note 55 at 83. This is however beyond the scope of this thesis

⁷² Cunnen, *supra* note 55 at 84

⁷³ Van Ness, *supra* note quoted in Cunnen, *supra* at 84. See chapter four

There is no doubt that the perceived shortcomings of the retributive approach to crime informed the victim movement both in the US and Europe. This fact must, as of necessity influence such an approach at the international level. Howard Zehr, considered as the original thinker in the restorative justice movement has stated:

Restorative justice holds that criminal behaviour is primarily a violation of one individual by another. When a crime is committed, it is the victim who is harmed, not the state. Instead of the offender owing a debt to society, which must be 'paid back' by the offender being subjected to some form of state imposed punishment, the offender owes a specific debt to the victim - which can only be repaid by making good the damage caused.⁷⁴

Indeed, the restorative justice movement rationalised their proposals with the inability of the existing paradigm founded solely on punishment of offenders to deliver satisfactory justice, especially with respect to victims of crime. Protagonists advocated for an approach that would constructively address the interests of the state to fight crime as well as the concerns of victims.⁷⁵ Measures such as restitution, reparations, participation and rehabilitation elaborated further below were identified as being integral to such an approach.⁷⁶

To clarify, for the purpose of this thesis, restorative justice is meant, a wholesome conception of justice that seeks to take into account the interests, as far as

⁷⁴ Howard Zehr *The Little Book of Restorative Justice* (2002) quoted in Henderson supra note 45 at

⁷⁵ Ibid. See also Guttler supra note; Strang, Heather *Revenge: Victims and Restorative Justice* (2002) 44

⁷⁶ See Allison Morris & Gabrielle Maxwell, *Restorative Justice for Juveniles* (2000); Declan Roche, *Accountability in Restorative Justice* (2003) 3 who states that four values are contained in restorative justice: personalism, reparation, participation and reintegration

possible, of all parties in an international criminal prosecution: the international community (substituting the state at the national level) seeking the punishment of perpetrators of international crimes and victims. If workable, such an approach would, it is hoped, steer ICL from the current model which, to repeat, is premised on a paradigm of retribution. While it may be necessary that reference be made to the place and interests of the previously 'dominant' parties in ICL namely the international community (represented by the prosecution) and perpetrators who enjoy considerable protections, this thesis seeks to analyse and advance the victim within this process. Inevitably, main focus is on the victim although reference is made as far as possible to the underlying function of the ICC as well as countervailing interests of perpetrators.

To repeat, a limited concept of restorative justice that bundles together relevant elements of the traditional concept of restorative justice is adopted here.⁷⁷ Indeed, a very specific understanding of restorative justice is assumed, dictated mostly by practical reasons. Apart from a limited number of practices mentioned in the last instance—restitution and apology,⁷⁸ this thesis leans more towards a view of restorative justice as a philosophy and set of values, some of which are mentioned above, rather than strict practices or methods of approaching criminal justice.

⁷⁷ Since our main focus of analysis is on the ICC, guidance is sought from the Rome Statute as far as the mechanisms of bringing to the fore the rights and concerns of the victim are concerned

⁷⁸ Supra note 65. Some more probable one such as community service may not comport with the Rome Statute. See chapter four

For practical reasons, it would be ill-advised, and certainly untenable in light of certain principles of ICL⁷⁹ to adopt restorative justice in the 'classical' sense. For instance, if one indiscriminately considers restorative justice as consisting of practices-mediation, circles and conferencing, these, though more practically applicable at national level, may be impossible to implement in the framework of any supranational forum adjudicating ICL, especially the ICC which is geographically removed from the possible theatre from where parties to a case (or conflict) may be.⁸⁰

Another difficulty in adopting restorative justice strictly as 'practices,' which difficulty arises from the view advanced by restorative justice of crime as an interpersonal conflict between the perpetrator and victim, is that of identity of those to participate in the process. Given that the state is invariably responsible for gross human rights violations, difficulty arises in considering the state as a party to the conflict, especially in identifying proper participants in practices such as mediation and circles.⁸¹ A similar problem does not arise with respect to prosecutions seen as a distinct category, because ICL asserts, as one of its basic tenets, individual

⁷⁹ For instance, questions of incompatibility with fair trial guarantees and legality may arise. These are considered in chapter four

⁸⁰ The possibility of a 'circuit' ICC does not necessarily eliminate obstacles of mounting any of the RJ methods

⁸¹ See above Cunnen supra note 55 at 84 on the possible inadequacies that arise from the view of crime as a conflict between two parties especially where the perpetrator is the state, is common for gross human rights violations

criminal responsibility for international crimes of concern to the ICC.⁸²

There is yet another reason dictating the view of restorative justice as a set of values rather than a method or process. This lies in the nature of crimes over which the ICC has jurisdiction. Genocide, war crimes and crimes against humanity are clearly crimes of a serious nature that carry peremptory obligations at international law, one of which is mandatory prosecution as affirmed by the Rome Statute.⁸³ Invariably referred to as 'gross human rights violations', and 'grave breaches' of humanitarian law, and most of which carry an obligation *erga omnes*, they oblige states, among other things, to prosecute and to provide effective redress to victims.⁸⁴ In light of this, the adoption of approaches that oust or render prosecution impossible would not comport with international law.⁸⁵ In

⁸² See generally Elies Van Sliedregt *The criminal responsibility of individuals for violations of International Humanitarian Law* (2003) [The Hague: T.M.C. Asser Press]; Allison Marston Danner 'Guilty associations: joint criminal enterprise, command responsibility, and the development of international criminal law' (2005) *California LR* 75;

⁸³ Rome Statute Preambular affirmation that the Rome Statute declares intolerance to impunity requiring that no perpetrator of a gross human rights violations should go unpunished

⁸⁴ See M Cherif Bassiouni *International Criminal Law Vol I Crimes* (1999) 44-46 on meaning of obligation *erga omnes*; Ian D Seiderman, *Hierarchy in International Law* (2001) [Intersentia: Hart];

⁸⁵ See generally Ian Seiderman *supra*; Ben Chigara *Amnesty in International Law: the Legality under International Law of National Amnesty Laws* (2002) (on the inapplicability of amnesty to this order of international crimes) [Edinburgh Gate Harlow: Pearson Educational Ltd]; generally Naomi Roht-Arriaza (ed) *Impunity and Human Rights in International Law and Practice* (1995); Diane Orentlicher 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1990) *100 Yale L.J* 25 37; Raquel Aldana-Pindell, 'In vindication of justiciable victims' rights to truth and justice for state-sponsored crimes' (2002) *35 Vanderbilt J Transnat'l Law* 1399-1501 on the obligation to prosecute at least the most serious crimes;

fact, a restorative approach would not be incompatible with prosecutions, in the case of the ICC, of crimes adjudged of a most serious nature. Indeed, one of the values of restorative justice is the guarantee against repetition, something that trials are said to do, and may indeed offer in this case.⁸⁶

In considering prosecution as part of, or an element that can fulfil at least one requirement of restorative justice, this discussion collapses Buruma's proposed distinction, and a rather arbitrary one at that, between 'a fundamentally non-punitive restorative justice' and a 'victim oriented criminal law approach' meant to include more rights for victims in the criminal justice system.⁸⁷ Since the more visible reforms implemented in a number of western countries may be said to fall more in the latter 'category,' he suggests that this means that this 'category' is 'basically punitive and not primarily damage-centred or conflict-centred as restorative justice is: the perpetrator is still in the middle of the procedure, although the victim can have his say as well.' This distinction is untenable, or rather inapplicable for our purposes for at least two reasons. First, if it is accepted that participation is a principle of restorative justice, the reforms in pursuit of the 'victim oriented criminal law' clearly define and place them under restorative

Cassese, supra note at on crimes carrying an obligation erga omnes

⁸⁶ See Chris Cunnen supra note 55 at 93 noting that some form of guarantee against repetition is a key value in the restorative justice literature

⁸⁷ See Ybo Buruma, supra note 44 at 2. Includes rights such as right to counsel by victims, discovery of documents in the prosecution dossier, information on proceedings and to be heard by prosecutor in serious crimes

justice. Secondly, where the reformed criminal law framework provides for restitution, as in the case of the Rome Statute, it is difficult to sustain this distinction. Here, the concept of restorative justice entails criminal law provisions meant to amplify the victim's voice in the criminal proceedings in addition to any none punitive remedies. Any regime that provides such a composite framework is, in our view, necessarily restorative.

1.5 What are the rights and concerns of victims?

Although both were defined by their advocacy and assistance for victims, the victim movements in the United States and that in Europe took two distinct trajectories. While the former focussed on victim rights, the latter dedicated its efforts to a less confrontational course—that of victim support.⁸⁸ While references are made to it in this study, the European movement is for this reason not particularly useful in a 'rights based' discourse of restorative justice such as the one to which this study is dedicated.⁸⁹ The movement in the US, which from the start pursued a legislative agenda,⁹⁰ identified various concerns formulated as rights of victims of crime in the municipal criminal justice system. These included the right to restitution (compensation), participation at the sentencing stage, assistance in participating in the criminal justice system

⁸⁸ For more on the global 'victim movement', see Heather Strang, *Repair or Revenge* (2002) 26-34 [Oxford: Oxford University Press]

⁸⁹ This is not to assert that the European experience is without progressive developments in this regard. Victim related regimes in a number of jurisdictions are highlighted later on

⁹⁰ At the federal level, these initiatives led to the convening of the President's Task Force on Victims of Crime. This and other initiatives at state level are considered in chapter three

and protection from intimidation by the defence, accused persons or their agents.⁹¹ Chapter three returns to this case study.

As stated in the introduction, the regime established by the Rome Statute with respect to victims is largely new in the arena of international criminal tribunals. The Statute and the Rules of Procedure and Evidence (RPE) adopted under it provide for a fairly extensive catalogue of rights and concerns of victims that for the most part reflects, but also goes beyond the victim rights movement in various municipal jurisdictions. While very adoption of the Statute affirms the now settled standard that it is the right of victims of human rights violations to see the perpetrators of at least the most egregious crimes prosecuted,⁹² it recognizes that from a victim's standpoint, restitution as well as rehabilitation must be integral to responses to such crimes. Also important to the process must be an effective participation of victims in the process, which must be facilitated, coupled with adequate protections in this regard.⁹³

The modalities by which the views and concerns of victims are to be articulated before the ICC are inscribed in the RPE,⁹⁴ while the foundational principle is affirmed in art 68 (3) of the Statute, which enacts that:

[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be

⁹¹ Christopher S Goddu 'Victim's "rights" or fair trial wronged' 41 *Buffalo LR* 245-272 at 245. See also James H Stark & Howard W Goldstein *The rights of crime victims* ACLU Handbook (1985) at 3-4 cited in Goddu (TBA)

⁹² See Raquel Aldana-Pindell supra note 65 at 1438

⁹³ This thesis analyse the regime on these terms

⁹⁴ Section III Rules of Procedure and Evidence of the ICC

presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

The thesis considers these concerns and all appurtenant thereto by analysing relevant provisions in the Statute and RPE together with existing jurisprudence in order to properly locate the victim in the ICC and by extension ICL in general. However, keener focus will be on restitution, and any other novel provisions in ICL introduced by the ICC.

The implementation of this new regime, demands a delicate balance dictated by what has been, and perhaps will remain the core mission of the ICC or any other international criminal tribunal.⁹⁵ Elizabeth Guigou's comment captures this aptly:

Such is the magnitude of our mission: to put the individual back at the heart of international criminal justice system, by giving it the means to accord the victims their rightful place. A noble task, but one whose difficulty is readily appreciable by all. Since the aim is to allow the victims, concretely, to become parties to the international criminal proceedings, without undermining the effectiveness of the International Criminal Court, without diverting it from its task of law enforcement⁹⁶

⁹⁵ See art 1 ICTR Statute; art 1 ICTY Statute and art 1 Statute of the Special Court for Sierra Leone

⁹⁶ French Minister for Justice's statement at the Paris Seminar on Access of Victims to the International Criminal Court, quoted in Emily Haslam 'Victim participation at the International Criminal Court: A triumph of hope over experience?' in Dominic MacGoldrick, Peter Row & Eric Donnely (eds) *The Permanent International Criminal Court: Legal and Policy Issues*' 315-334 at 316

This statement suggests, as argued at length in a later chapter,⁹⁷ that the individual has hitherto been a peripheral player, if at all, in the international criminal justice system. Indeed, this is the fundamental assumption of this study. While reserving this for later inquiry, it also identifies a theme that must run through this discourse on victims regime under ICL-that of balancing their concerns against other considerations be they of a legal or operational character, including the Court's law enforcement functions which in turn alludes to traditional guarantees enjoyed by suspected perpetrators. The rights and concerns of victims are briefly discussed below, to highlight issues for deeper inquiry at a later opportunity.

1.5.1 The right to participate

The Rome Statute has been praised for revolutionizing international law of victims.⁹⁸ Of relevance to the right to participate, some early commentators regard as 'landmark'⁹⁹ provisions that facilitate victim participation in the court and cast them beyond their traditional role as witnesses in which role, commentators allege objectification.¹⁰⁰ While this accomplishment is new at

⁹⁷ See chapter two

⁹⁸ Emily Haslam Supra note 74 at 315; SA Fernandez de Gurmendi, 'Elaboration of the Rules of Procedure and Evidence' in Lee Roy S Lee (ed) *The International Criminal Court: Elements of crimes and Rules of Procedure* (2001)235 at 255 (TBA)

⁹⁹ G Bitti & K Friman, 'Participation of victims in proceedings' in Lee (ed) supra 456

¹⁰⁰ See Emily Haslam, supra note 96 at 17; M-B Dembour & Emily Haslam 'Silencing hearings? Victim-witnesses at war crimes trials' (2004) 15 *European JIL* 151 that chronicles the woes of victims in a specific case before the ICTY *The Prosecutor v Radislav Krstic* (2nd August 2001), Case No IT-98-33-T, but reveals problems previously encountered by victims before international criminal tribunals

international law, the reform agenda for greater integration of victims of crime orchestrated by the victim's rights movement in a number of jurisdictions had achieved a modicum of success in this regard, notably in the US.¹⁰¹ The victim's rights movement in that country focussed its efforts to enhance victims' participation in the criminal process on their role at the sentencing stage, notably by making a statement in open court.¹⁰² According to Henderson, this approach appears to be ironical because one would expect that the most politically visible activity in the movement should focus at the beginning, rather than the end of the criminal process.¹⁰³ The argument for a right to restitution equally incorporated a right of the victim to participate in its determination, typically at the sentencing stage.¹⁰⁴

One must indeed find it odd that such was the trajectory of the reform agenda with regard to participation, yet we must be quick to speculate that perhaps it was because of the impact that victim statement would have on the outcome of the trial. Henderson seems to take this view in her attempt to explain the justification for victim participation at this stage through a number of theories including deterrence, incapacitation, retribution, 'fairness', 'due process' and 'recognition' noting that it was largely intended to influence the outcome of the trial by obtaining a finding 'favourable' to the victim.¹⁰⁵ If justice is

¹⁰¹ Modest advancement was made both at federal and state level, with various states adopting what were dubbed 'Victims Bill of Rights'. See Henderson, *supra* note 45 and chapter 3

¹⁰² Henderson *supra* note 55 at 986

¹⁰³ *Ibid*

¹⁰⁴ Henderson, 1007

¹⁰⁵ We consider these further in chapter 3

entailed, not just in the outcome of a trial, but also the process, a dispensation that permits broader participation in the entire process at the ICC must necessarily be a better one. Admittedly, tribute to the ICC with regard to victims is 'founded upon a widespread assumption that victims either do or can benefit from participation in the international criminal proceedings.'¹⁰⁶ A later chapter will delve deeper into this question. though, but without venturing into possible theories of 'victim hood' and victimisation at this stage, it is possible that victims may indeed obtain or feel a measure of justice not just by the outcome, but by being permitted a say in the process, albeit tempered by the necessities expediency and the rights of perpetrators. While the sentencing stage is important in the trial, participation may have added benefits to the victim, including a therapeutic element, and the knowledge that one has a certain influence on the process.

For our purposes therefore, participation is not limited to the sentencing stage of the trial. It covers a range of 'roles' by victims in the procedure from start to end by which the victim's visibility and centrality to the process is enhanced in vindication of their rights. This includes the right to be appropriately consulted and to information at various stages in the trial process.¹⁰⁷ Indeed, the Rome Statute 'expands' the ambit of issues related to participation by victims in the process of the ICC from the

¹⁰⁶ Emily Haslam, *supra* note 74 at 315

¹⁰⁷ Parallels will be drawn between this and the Nebenklage procedure in Germany which allows victims a number of roles in the process. See Pizzi, William T & Perron, Walter 'Crime victims in German courtrooms: a comparative perspective on American problems' (1996) 32 *Stanford JIL* 37

investigation level to the conclusion of the trial. While scrutiny of the Statute to establish how it may ameliorate the plight of victims of international crimes is reserved for later, it is useful to briefly outline some of the relevant provisions.

The basic principle that governs participation by victims in the process is established under art 68 (3) of the Statute,¹⁰⁸ as complimented by various other substantive provisions in the Statute, and the RPE which sets out the modalities of participation at all stages of the ICC proceedings.¹⁰⁹ Indeed, this means that victims will, subject to art 68 (3) have their concerns articulated at the investigation, pre-trial,¹¹⁰ trial¹¹¹ and sentencing stages, including determination of restitution.¹¹²

1.5.2 Reparations and the language of remedies in international law

Restitution as a right of victims of crime has been central to the claims of the victim rights movement. Its centrality is acknowledged by many commentators who concur that restitution is perhaps the most important concern for

¹⁰⁸ Supra note 94

¹⁰⁹ Art 89 Section III RPE

¹¹⁰ Art 15 (3) permits victims to make representations to trial chamber when an investigation is commenced *proprio motu* by the Prosecutor; art 53 (2) on interests of victims; art 54 requiring the Prosecutors to respect rights of persons arising under the Statute; 57 on privacy of victims before the Pre-trial Chamber

¹¹¹ Art 54 presence of victims at hearings; various Trial Chamber's functions relevant to victims

¹¹² It is not yet clear at what stage of the process issues of restitution will be raised. The Court has a mandate to develop principles in this regard

victims of crime anywhere. Henderson's words seem to echo this convergence of opinion:

While many propositions advanced on the behalf of past victims may be of marginal concern to them, compensation for injuries can be of central importance. If crime victims have 'rights,' the right to recover from the wrongdoer is the most tenable individually based right.¹¹³

It is no surprise, perhaps, that the provision for reparations in the Rome Statute, which inaugurates and firmly establishes restitution squarely in ICL,¹¹⁴ read together with the provision for a Victims Fund¹¹⁵ have attracted the loudest plaudits in the ICC victims' regime.¹¹⁶ As a matter of introduction, article 75, in its relevant parts provides that:

[t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.¹¹⁷

If indeed this is the most important introduction by the Rome Statute in ICL, and it is not difficult to so conclude considering the woeful record of previous tribunals alone,¹¹⁸ it must, on a hierarchy of propositions occupy a prominent pedestal in this debate. Accordingly, this thesis accords greater attention to it in relation to other provisions of relevance to victims. Needless to emphasise at this stage, this provision implicates a host of

¹¹³ Henderson supra note 45 at 1007

¹¹⁴ Art 75 Rome Statute

¹¹⁵ Art 79 Rome Statute

¹¹⁶ See Emily Haslam, supra note 74 ; Vahida Nainar 'Giving victims a voice in the International Criminal Court' (1999) *UN Chronicle* Issue 4 accessed at <<http://www.iccwomen.org/sources/article.-unchronicle.htm>>

¹¹⁷ Art 75(1) Rome Statute

¹¹⁸ See chapter two

pertinent legal issues as well as questions relating mostly to its implementation to which we return in a later chapter.

Of immediate concern is the question of terminology in the context of remedies, an area riddled with uncertainty and confusion.¹¹⁹ Even at municipal level, commentators lament about this lack of clarity.¹²⁰ While the Rome Statute may provide some guidance as to what remedies are applicable in ICL, but more specifically under the Statute itself, there is still much to be clarified in terms of operational principles. In light of article 75, that makes reference to reparations, restitution and compensation all in the same breath, it is useful to appreciate the broader language of remedies in international law. Needless to state, a clear understanding of these terms is imperative for our purposes in light of the tendency by legislators, courts and scholars alike to use them eclectically, sometimes attributing similar meaning.¹²¹

Indeed, one of the most crucial questions posed at the Rome Conference during deliberations for the adoption of the Rome Statute was whether a possible right to reparations would be limited to compensation, or would extend to other

¹¹⁹ See Dinah Shelton, *Remedies in International Human Rights Law* (1999) 1 lamenting the lack of precise theory and terminology of remedies in international law

¹²⁰ See for instance Andrew Kull 'Rationalising restitution' (1995) 83 *California LR* 1191-1242 at 1191 decrying the 'linguistic confusion that bedevils the law of restitution'

¹²¹ Alan T Harland 'Monetary remedies for victims of crime: Assessing the role of the criminal courts' (1982) *University of California LR* 52 60-64 describing this confusion within the context of US debates

forms of reparations.¹²² As suggested by the formulation of the question on remedies by the Conference, as well as its reflection in article 75 of the Statute, the term 'reparations' is of wide import. With a basis in tort and the law of state responsibility,¹²³ reparations is a generic term representing 'all types of redress, material and non-material, for victims of human rights violations.'¹²⁴ As such, restitution, compensation and rehabilitation cover particular aspects of reparation.¹²⁵ Although reparation, which is 'generally framed as repair for past damage, putting the victim back where he or she would have been had the wrong not occurred',¹²⁶ would normally denote a monetary consideration (compensation) or 'other valuable resources' it is not limited to this.¹²⁷ Moral reparations or 'satisfaction' consists of various non-material forms including official acknowledgement of wrong, apology, disclosure of the details of the offence, service to the victim or a cause chosen by them.¹²⁸ Satisfaction may be

¹²² Christopher Muttukumaru 'Reparation to victims' in Roy S Lee (ed) *The International Criminal Court: The making of the Rome Statute: Issues, Negotiations, Results* (1999) 262-270 at 263

¹²³ Naomi Roht-Arriaza 'Reparations decisions and dilemmas' (2004) 27 *Hastings International and Comparative Law Review* 157-219 at 129. Various human rights treaties provide for the right to an 'effective remedy' and exhort states to ensure such in case of violation of protected rights. *Infra* note 146 and 147

¹²⁴ Theo van Boven 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms' UN Doc E/CN.4/Sub.2/1993/8 of 2 July 1993, para 13

¹²⁵ *Ibid*; also Ben Saul 'Compensation for unlawful death in international law: a focus on the Inter-American Court of Human Rights' (2004) 19 *American University ILR* 523-584 at 541

¹²⁶ Naomi Roht-Arriaza *supra* note 123 at 1160

¹²⁷ Naomi Roht-Arriaza 159; Kerry O'Shea Gorgone 'Between vengeance and forgiveness: facing history after genocide and mass violence' (2000) 24 *Suffolk Transnational LR* 211-232 at 218

¹²⁸ James Coben & Penelope Harley, *supra* note 52 at 241; Tony F. Marshall, *Restorative Justice: An Overview* 8 (Centre for Restorative Justice & Peacemaking, 1998); Naomi Roht-Arriaza *supra* note 123 at 158-160

fulfilled by more elaborate ways of 'telling the story' including an undertaking to memorialisation.¹²⁹ The thesis will seek to establish to what extent such remedies are permissible and practical under the ICC regime of remedies.

The Oxford Education Dictionary defines restitution as the action of restoring or giving back something to its proper owner, or making reparation to one for loss or injury previously inflicted.¹³⁰ Additionally, restitution refers to the body of substantive law, and the set of remedies associated with this body of law in which liability is not founded on tort or contract but depends on unjust enrichment.¹³¹ Remedies usually entail the return or restoration of something to its rightful owner or status. Used within the criminal justice system, possibly beyond its classical application, restitution would entail 'compensation for loss, especially full or partial paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or a condition for probation'.¹³²

This thesis employs this term in these two respects: compensation ordered as part of a criminal sentence for injury or loss sustained and restoration of property stolen

¹²⁹ The Inter American Court on Human Rights has on numerous occasions required governments to construct monuments in remembrance of victims of gross human rights violations. See generally Ben Saul *supra* note 127 at 157. See also recommendations of the TRC in South Africa

¹³⁰ Oxford education dictionary at

¹³¹ Hull *infra* speculating whether restitution should apply in all three instances or only to the second meaning: civil liability based on unjust enrichment. See *infra* on the problems of definition of remedies

¹³² Hull *intro*; John Dawson on 'restitution without enrichment' (1981) 61 *B.U LR.* 563, 577

or looted in the course of war. While restitution as understood in the latter sense has been the subject of concern of ICL since, or more accurately at Nuremberg,¹³³ it is new (and perhaps this is what is applauded as an innovation) as used in the former sense. The mode of implementation of this provision in the Rome Statute is the subject in a later chapter.

Compensation is defined as something (such as money) given or received as payment or reparation (as for a service or loss or injury).¹³⁴

1.5.3 The right to protection (protective measures)

This right that arises naturally from the participation of witnesses in the criminal process relates to the protection of witnesses in the criminal process, as well as providing safeguards for victims against 're-traumatisation' by the process. Although one may expect that this right should be afforded to a victim who testify in the prosecution, circumstances may arise where 'non-witness' victims require protection especially where there is a backlash directed at a class of victims. While some countries have elaborate systems of witness protection as discussed in chapter three, practice at the international level has been wanting.¹³⁵ Numerous questions, some of which are briefly

¹³³ Art 28 of the Nuremberg Charter provided that 'in addition to any punishment imposed by it, the tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany'. The Tokyo Charter did not have a similar provision. See chapter 2

¹³⁴ The Oxford Advanced Learners dictionary

¹³⁵ See for instance for the ICTR Goran Sluiter 'The ICTR and the protection of witnesses' (2005) 3 *Journal Intl Crim Just* 962-975

mentioned here but to be addressed in detail in a subsequent chapter have been raised.

The Rome Statute establishes the general standard that all organs of the Court must respond appropriately to protect the privacy, dignity, physical and psychological well-being and the security of victims and witnesses, especially when the crimes involve sexual or gender violence, while fully respecting the rights of the accused.¹³⁶ To coordinate these functions, a Victims and Witnesses Unit is established in the Registry of the Court, to provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses and victims including those victims who appear before the Court and others who are at risk on account of testimony.¹³⁷ An Office of Public Counsel for Victims, which will provide support and assistance to victims and victims' legal representatives, was established.¹³⁸ When fully operational, it should play a key role in ensuring effective victim participation in the proceedings.

It is indeed notable that witness protection through the adoption of protective measures is perhaps the only concern of victims that has hitherto received considerable attention in international criminal law, at least since the establishment of the ad hoc tribunals, which have overseen some interesting developments in this regard.¹³⁹

¹³⁶ Art 68 (1) Rome Statute and Rules 87 & 88 RPE

¹³⁷ Arts 43(6) and 68 (4)

¹³⁸ On 19 September 2005. See the ICC Newsletter, November 2005 at <http://www.icc-cpi.int/library/about/newsletter/index_21.html>

¹³⁹ See Goran Sluiter supra note 135 at 962 noting that protection of witnesses occupies a prominent place in 10 years of practice of the International Criminal Tribunal for Rwanda

Despite this, it is argued that its application remains deficient, perhaps because the attribution of such rights to victims essentially constitutes a counter claim to the assertion by accused perpetrators of traditional fair trial guarantees. That witness protection undercuts the rights of accused persons is a vehement assertion of some commentators. Among these, the accused's rights to and public trial and adequate time and facilities to prepare a defence are cited.¹⁴⁰ It becomes imperative that the international tribunal balances these competing claims. This work will, by analysing witness protection under the ICTR and ICTY statutes and relevant jurisprudence by these bodies establish whether the ICC statute makes advancements in this regard and how best the new system can be implemented.¹⁴¹

1.6 Why restitutive rights in an international criminal tribunal?

While this question is fundamental to this thesis, it may be considered artificial since the Rome Statute has already established this reality. This is not so. An answer to this question not only highlights this reality, but also explains the fervent efforts that went into its inclusion before, and at the Diplomatic Conference as well as celebration of this feat by various commentators.¹⁴²

¹⁴⁰ See Goran Sluiter 972

¹⁴¹ Rome Statute provisions, Rules of Procedure and Evidence (RPE)

¹⁴² For a history of the provision, see various in Triffterer *Commentary on the Rome Statute of the International Criminal Court: observer's notes article by article* (1999) 965-1014 and further ahead (chapter four)

Since unprecedented trial of war criminals at Nuremberg and Tokyo, the idea that victims of human rights violations have a right to seek action against the responsible individuals or states is well established in numerous international human rights instruments¹⁴³ both at global¹⁴⁴ and regional level.¹⁴⁵ Developments in the recognition and general acceptance of fundamental rights and attendant obligations after World War II undercut the absolutist concept of sovereignty and unequivocally established that the protection of people's' rights would no longer be solely a concern of a sovereign state.¹⁴⁶

Although entrenchment of these principles in international instruments comes with a positive obligation that states should facilitate recourse to effective remedies at domestic law by incorporating them in their laws and establishing relevant institutions, advancements in norm

¹⁴³ Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995) 1-11

¹⁴⁴ Art 8 Universal Declaration of Human Rights (UDHR); Arts 2(3)a, 14 International Covenant on Civil and Political Rights (ICCPR) G.A. Res. 217A (111), U.N. GAOR, 3rd Sess., arts. 8,10, at 71, U.N. Doc. A/810 (1948); art 14 the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (1984); 23 I.L.M. 1027, 24 I.L.M. 368; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power G.A. Res. 40/34, U.N. GAOR, 40th Sess., U.N. Doc. A/RES/40/34 (Dec. 11, 1985); art 6 International Convention on the Elimination of All Forms of Racial Discrimination;

¹⁴⁵ At 21 African Charter on Human and Peoples' Rights; art 5 (5) European Convention for the Protection of Human Rights and Fundamental Freedoms and arts 10, 63, 68 American Convention on Human Rights; American Declaration XXXX

¹⁴⁶ Mark S. Ellis & Elizabeth Hutton 'Policy implications of World War II reparations and restitution as applied to the former Yugoslavia' (2002) 20 *Berkeley JIL* 342-354 at 343; M Cherif Bassiouni, Searching for Peace and Achieving Justice: The Need for Accountability, 59 *L. & Contemp. Probs.*, (1996) 9 , n.2 (citing Erik Hobsbawm, *The Age of Extremes: A History of the World, 1914-1991* (1995))

generation at the international level have not been matched by effective implementation domestically. Both civil and criminal processes at this level except in a few countries where some reforms have been undertaken proffer little or no avenue to victims.

Increasingly therefore, although international mechanisms are meant to compliment the domestic, they are often the only available viable route to justice for victims. When a state is unable to prosecute perpetrators for want of infrastructure, it is needless to entertain the thought of the possibility that victims' concerns could be addressed in such a situation. On this account, it is opined that the international institutions established to punish perpetrators should be equally empowered to attend to specific victims concerns.¹⁴⁷ To do otherwise would be an abdication by the international community as a collective of commitments expressed in treaties regarding victims. While this explains the need for mechanisms that complement domestic efforts to incorporate victims' concerns and rights, it does not necessarily explain why an international body adjudicating criminal law should do so, especially regarding restitution.

Henderson has commented with regard to restitution and victims' rights within the criminal process:

While many propositions advanced on the behalf of past victims may be of marginal concern to them, compensation for injuries can be of central importance. If crime victims have "rights," the right to recover from the wrongdoer is the most tenable individually based right. Restoration of the victim to the status quo ante is what the tort system is supposed to accomplish, and its failure to do so in

¹⁴⁷ This is often the case in post conflict societies, for instance Rwanda after the genocide in 1994

instances of criminal harm has led many commentators and politicians to advocate grafting tort principles onto the criminal law, typically at the sentencing stage.¹⁴⁸

A number of commentators who criticize the distinction between the criminal and civil law have rightly argued that abandoning victims of crime to their devices and requiring that they pursue civil remedies in a different forum is 'unnecessarily burdensome and duplicative'.¹⁴⁹ For victims of international crimes, recourse to a civil forum at the international level is out of question in the absence of such tribunal from which such remedies may be sought. There have been international tribunals that have adjudicated civil remedies due to states to whom internationally recognized wrongs have been committed, but one is yet to be established with regard to international crimes that affect individuals.¹⁵⁰ To repeat, all international criminal tribunals, since Nuremberg (except the ICC) have lacked competence to adjudicate beyond criminal sanction.

The idea that an international criminal tribunal, can and indeed should dispense 'wholesome justice' that incorporates victims is not new. The earliest proposal for a permanent international criminal court recognised the need to incorporate a restitutive element in such a tribunal. This proposal, made in 1872 by Gustave Moynier, one of the founders of the International Committee of the Red Cross suggested the creation of an international criminal court to try people for breaches of the laws of

¹⁴⁸ Henderson, *supra* note 45 at 1007

¹⁴⁹ See for instance 'Victim Restitution in the Criminal Process: A Procedural Analysis, 97 *Harvard LR* 931, 933-37 (1984)

¹⁵⁰ US-Iran, Libya See Rosalind Nixon article

war as then established.¹⁵¹ More specifically, it proposed that persons convicted in such a court for breaches of the Geneva Convention of 1864¹⁵² should pay compensation to victims, the scope of which he did not expressly specify and can be considered to have been limited to the principal victims-the combatants.¹⁵³ In case of convicted persons' inability to pay, their governments were to step in. The latter suggestion, which would imply state responsibility to pay compensation to victims of international crimes (at the time limited to the Convention of 1864) was the subject of intense debates during the negotiation of the Rome Statute of the ICC.¹⁵⁴

It has been argued that national criminal law is largely based on a paradigm of retribution. Consequently, even where such a criminal justice systems works thereby

¹⁵¹ See Draft convention for the establishment of an international judicial body suitable for the prevention and punishment of violations of the Geneva Convention by Gustave Moynier, Geneva, 1872 (art 1) (Draft Moynier Convention); Gustave Moynier 'Note sur la creation d'une institution judiciaire internationale proper a réprimer les infractions a la Convention de Genève *Bulletin international des Sociétés de secours aux militaires blessés*, Comite international, No. 11, avril 1872 at 122-227 (Cited in Amnesty International 'The International Criminal Court: ensuring an effective role for victims' at <<http://www.vrwg.org/Publications/02/AIRoleforvictims99.pdf>>(accessed on 12 January 2005) at 3

¹⁵² Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 August 1864), which laid the foundation for contemporary international humanitarian law but was later replaced by the Geneva Conventions of 1906, 1929 and 1949 on the same subject

¹⁵³ Art 7 Draft Moynier Convention; See Christopher Keith hall, 'The first proposal for a Permanent International Court' *International Rev. Red Cross* No 322 at 57-74 at 73, also available at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JP4M>> (Accessed on 6^h February 2006). See also Amnesty International supra note 85?

¹⁵⁴ The idea of state responsibility to pay restitution was the subject of protracted debates at the Rome Conference. See mutakawira, in Lee

eliminating the need for international intervention, victims remain on the fringe.

1.7 Defining the victim

The question as to who should be regarded as a victim of an international crime is a relevant one in light of the Rome Statute which establishes a regime in which the 'victim' may play a greater role and enjoy more rights. At the domestic level, while the entire community may be regarded as 'victim', for reasons that criminal behaviour may redound to every member of such society, in real terms, the victim of a crime is one who has directly suffered a wrong that amounts to a criminal offence ie the 'real victim'.

In this thesis while emphasis in analysis of rights and concerns is placed on direct or 'real' victims of crime, it is considered that this conception of victim is inadequate in light of developments in international law. Rather than adopting a narrow view of 'victim', this thesis adopts a broad conception of the term which comports with recent developments at international law and the need to address wrongs as broadly as possible. The Victim's Declaration of 1985, which constituted the first effort at international law to set out a non-binding regime relevant to victims of crime and human rights violations, proffers the following comprehensive definition of victims:

'Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights (...).

'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'.¹⁵⁵

This definition encompasses individuals as well as collectivities. Theo Van Boven report rightly echoed the assumption of the Sub-Commission resolution 1989/13 commissioned the study that that both individuals and collectivities are inherent victims of gross violations of human rights.¹⁵⁶ In extending the protection, the definition covers family members or dependants of the direct victim of a crime and further allows the judge discretion for the determination of a person's status as a victim in cases where they are not direct victims or are not family member or dependant of one considered as a victim (direct). In terms of the damage, it is not limited to physical injury. The alleged criminal conduct that causes harm must be one that infringes a fundamental right of an individual in order to be considered as a victim.

1.8 Conclusion

This introductory chapter has set out the broad conceptual framework for the entire study and highlighted basic terminology. It has identified the relevant issues of

¹⁵⁵ Para 1 & 2 (1985) UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by General Assembly resolution 40/34 of 29 November 1985. See also final report by Theo van Boven to Sub-Commission on Prevention of Discrimination and Protection of Minorities 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms' UN Doc E/CN.4/Sub.2/1993/8 of 2 July 1993

¹⁵⁶ See final report by Theo van Boven to Sub-Commission on Prevention of Discrimination and Protection of Minorities 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms' UN Doc E/CN.4/Sub.2/1993/8 of 2 July 1993, para 14

concern to victims set out in the Rome Statute and argued for a possible tempered conception of international criminal law in light of the victims' regime of the Rome Statute. The chapter concluded that there is a multitude of challenging legal issues implicated in this regime, and that to fulfil the promise to victims, bold and ingenious interpretation, though bound by established principles of international criminal justice (largely expressed in the Statute) is necessary.

A NOTE ON CHAPTERISATION

Chapter ONE

This chapter has set out the broad conceptual framework for the entire study and set possible parameters of basic terminology. It has also identified the relevant issues of concern to victims set out in the Rome Statute and argued for a tempered conception of international criminal law in light of the victims' regime of the Rome Statute.

Chapter TWO

By tracing the process of international criminal law historically from Nuremberg to Sierra Leone, this chapter seeks to establish that victims have played a peripheral role, and perhaps still do, in the international criminal justice system which has been based on a paradigm of retribution driven mainly by a narrow conception of the interests of 'international peace and security'. By examining a variety of 'alternative' or parallel fora to which victims may have resorted in the past on the basis of universal jurisdiction or some other basis, [such as US federal Courts under the Alien Tort Claims Act], it also shows that such attempts have produced disappointing results, making a stronger case for a forceful ICC.

Chapter THREE

This chapter examines the place of victims in a select number of domestic criminal law systems within the context of the trend in several of these countries towards a

concept of restorative justice. US, Germany, Britain, Rwanda and South Africa have been provisionally selected as case studies within specific contexts. For instance, Rwanda and South Africa present attempts to deploy restorative justice in post conflict societies [for Rwanda, parallel to the ICTR].

Chapter FOUR

The purpose of this chapter is to outline the provisions of the Rome Statute and the Court's Rules of Procedure and Evidence (RPE) relating to restorative justice, and to establish whether they advance the rights of victims in ICL. In particular, the chapter will discuss the operationalisation of specific rights and concerns relating to victims outlined in chapter one.

Chapter FIVE

Proceeding from the position that international law lacks a coherent theory or consistent practice of remedies for victims of human rights violations, and the requirements of article 75, this chapter critically analyses existing standards and available jurisprudence from various national and international tribunals to suggest principles of reparative justice under the Rome Statute.

Chapter SIX

Chapter 6 considers the victim's regime within the context of complementarity and the dynamics that may impact upon its effectiveness. Questions including state legislative,

implementation obligations, various aspects of cooperation are considered.

Chapter SEVEN

This chapter summarises the conclusions reached in the preceding chapters and outlines recommendations.