THE EVOLUTION OF VICTIMS' ACCESS TO JUSTICE

Unless otherwise specified:

"Article": *refers to the Rome Statute*
"Rule": *refers to the Rules of Procedure and Evidence*
"Regulation": *refers to the Regulations of the Court*
"Regulation (RR)": *refers to the Regulations of the Registry*

INTRODUCTION

Based on recent developments in international human rights and humanitarian law and some fundamental weaknesses of previous international criminal tribunals, those negotiating the Statute of the International Criminal Court (Rome Statute) recognised for the first time in history the rights of victims to participate and to reparation in international criminal proceedings.

In 1985, the United Nations General Assembly adopted the Declaration of Basic Principles for Victims of Crime and Abuse of Power[1], setting out the rights of victims in the criminal justice process, including the right of access to justice, the right to be treated with basic respect and dignity, the right to protection and assistance, and the right to reparation. This Declaration has served as the "cornerstone" for establishing legal rights for victims under international law.

A range of mechanisms has developed to provide victims with access to justice when they are unable to obtain redress before their national courts. At the national level, the mechanism of universal jurisdiction is evolving as a tool in the fight against impunity to ensure that individual perpetrators are brought to justice. At the international and regional levels, victims have increasingly gained access to human rights mechanisms with jurisdiction over violations committed by states, including the United Nations Treaty Monitoring Bodies and the African, European, and Inter-American human rights courts and commissions. Finally, international criminal justice has developed to end impunity for individuals responsible for the most serious crimes under international law including war crimes, crimes against humanity and genocide.

At the Nuremberg and Tokyo Tribunals, established after the Second World War, and the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), established at the end of the century, the interests of victims were to a large extent overlooked and their role was generally restricted to that of witnesses. However, there has been a growing movement, supported by a range of non-governmental organisations as well as some states, to recognise the role of international justice in providing not only retributive justice, the punishment of the guilty, but also restorative justice, by permitting victims to participate in proceedings and receive reparations for the harm they have suffered. One of the major achievements of the Rome Statute is the recognition of an independent status of victims.

1. Adopted by the UN General Assembly, 29 November 1985, Resolution 40/34, available at www.ohchr.org/english/law/victims.htm.

Yet, the establishment of the International Criminal Court (ICC) has not diminished the need for a range of mechanisms at the national, regional and international levels to provide victims with effective access to justice. Under the Rome Statue, states continue to have primary responsibility for bringing to justice those responsible for crimes under international law. The ICC is complementary to national criminal jurisdictions, meaning that it will act only where national systems are unwilling or unable to do so. When the ICC does intervene, it will only be able to prosecute a limited number of suspected perpetrators. It therefore remains vital to continue the development of the full range of mechanisms available to victims.

This Chapter examines the evolution of victims' rights under international law and provides an overview of the range of mechanisms available for victims to seek justice.

I. THE EVOLUTION OF VICTIMS' RIGHTS UNDER INTERNATIONAL LAW

The recognition of victims'rights before the ICC is largely influenced by the evolution of victims' rights under international law.

1. Core Instruments

1.1. International Instruments

The three core international instruments on victims' rights:

- The United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power
- The United Nations 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 – the "Van Boven / Bassiouni Principles"
- The United Nations principles for the protection and promotion of human rights through action to combat impunity – the "Joinet / Orentlicher Principles"

The United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power

The adoption of the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Declaration on Justice for Victims) by the General Assembly, on 29 November 1985[2], represented a major step forward in the recognition of victims' rights. The UN Declaration on Justice for Victims was the first international instrument to specifically focus on the rights and interests of victims in the administration of justice. This instrument is primarily concerned with the position of victims before national criminal justice systems, but the general principles are equally applicable to the international system. Guidelines on the use and application of the Declaration are provided in the Handbook on Justice for Victims[3].

> *"Victims . . . are entitled to access to the mechanisms of justice and to prompt redress . . . for the harm that they have suffered".*
> UN Declaration on Justice for Victims 1985, principle 4

The aim of the UN Declaration on Justice for Victims is to "ensure that all victims have access to the justice system as well as support throughout the justice process". Detailed guidance is provided on designing the justice system so as to minimise the obstacles that victims may face in seeking justice.

The United Nations 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 – the "Van Boven / Bassiouni Principles"

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2. Resolution 40/34, available at www.ohchr.org/english/law/victims.htm and in the Annex of this chapter.
3. *UN Handbook on Justice for Victims*, United Nations Office for Drug Control and Crime Prevention, 1999, available at www.uncjin.org/standards/9857854.pdf.

> *"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 the international legal principles of accountability, justice and the Rule of law".*
> Preamble to the 2005 Van Boven / Bassiouni Principles

The "Van Boven/ Bassiouni Principles" [4] were adopted by the UN Commission on Human Rights and by the UN General Assembly in 2005. They set out the rights of victims of gross violations of human rights or serious violations of international humanitarian law to an effective judicial remedy and reparations, and the duties of states to prevent violations, investigate, prosecute and punish perpetrators, provide effective access to justice to victims and afford full reparation[5].

The United Nations principles for the protection and promotion of human rights through action to combat impunity – the "Joinet / Orentlicher Principles"

The "Joinet / Orentlicher Principles" [6] set out the duties of states to investigate violations of human rights and international humanitarian law and to bring the perpetrators to justice. At its 61st session in 2005, the UN Commission on Human Rights took note of the Joinet/Orentlicher Principles[7], recalled that the principles "have already been applied at the regional and national levels", and encouraged states, intergovernmental organizations and non-governmental organizations to draw upon them in developing and implementing effective measures to combat impunity[8].

Principle 1 defines the general obligations of states to take effective action to combat impunity:

> *"Impunity arises from a failure by states to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations".*

The Joinet/ Orentlicher Principles also define the right to know[9], the right to justice[10] and the right to reparation and guarantees of non-recurrence[11].

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4. *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*; adopted by the Commission on Human Rights, Resolution 2005/35, 19 April 2005; adopted by the General Assembly, Resolution 60/147 of 16 December 2005, available at www.ohchr.org/english/law/remedy.htm and in the Annex of this Chapter. See also the preliminary study and first draft of the principles of Mr Theo Van Boven, Special Rapporteur, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, E/CN.4/Sub.2/1993/8, 2 July 1993, available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=6780. Mr Cherif Bassiouri was nominated in 1998 to pursue this study and produce a final draft of the principles.
5. Van Boven / Bassiouni Principle 3.
6. *Updated set of principles for the protection and promotion of human rights through action to combat impunity*, 8 February 2005, E/CN.4/2005/102/Add.1; see also *Report of Diane Orentlicher, independent expert to update the set of principles to combat impunity*, 18 February 2005, E/CN.4/2005/102, available at http://ap.ohchr.org/documents/dpage_e.aspx?m=138.
7. Resolution on Impunity 2005/81, 21 April 2005, para. 20, available at www.derechos.org/nizkor/impu/impuresol.html.
8. Ibid, p. 21.
9. Joinet / Orentlicher Principles 2-18.
10. Joinet / Orentlicher Principles 19-30.
11. Joinet / Orentlicher Principles 31-38.

1.2. Regional instruments

The Council of Europe Recommendation on the Position of Victims within the Framework of Criminal Law and Procedure

"...Considering that the objectives of the criminal justice system have traditionally been expressed in terms which primarily concern the relationship between the state and the offender;
Considering that consequently the operation of this system has sometimes tended to add to rather than to diminish the problems of the victim;
Considering that it must be a fundamental function of criminal justice to meet the needs and to safeguard the interests of the victim;
Considering that the needs of the victim should be taken into account to a greater degree, throughout all stages of the criminal justice process...".

Council of Europe, Recommendation on the position of victims within the framework of criminal law and procedure 1985, Preamble

In 1985, the Council of Ministers of the Council of Europe issued a *Recommendation on the position of victims within the framework of criminal law and procedure*, calling for states to ensure that the needs of victims are taken into account in the national criminal justice process[12]. The recommendation requires that victims should be kept informed at all stages of proceedings, that they should have a right to challenge a decision not to prosecute or a right to bring private proceedings, and that they should be able to obtain compensation within the criminal justice process[13].

The Council of the European Union Framework Decision on the Standing of Victims in Criminal Proceedings

In 2001, the Council of the European Union adopted a *Framework Decision on the standing of victims in criminal proceedings*, urging member states to provide victims with a "real and appropriate" role in the criminal justice system and to ensure that the rights and legitimate interests of victims are recognized[14]. The Framework Decision also contains provisions on affording assistance to victims before and after criminal proceedings[15].

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12. Recommendation R (85) 11 on the position of the victim within the framework of criminal law and procedure.
13. Some of these recommendations were reiterated in 2000 in Recommendation R (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system. See also Recommendation R (87) 21 on assistance to victims and the prevention of victimisation, adopted in 1987 and updated in 2006. The Committee of Ministers has adopted several other recommendations dealing with victims of certain categories of crimes: R(85)4 on violence in the family; R(97)13 concerning intimidation of witnesses and the rights of the defence; R(99)19 concerning mediation in penal matters, R (2000)11 on action against trafficking in human beings for the purposes of sexual exploitation; R(2001)16 on the protection of children from sexual exploitation; R(2005)09 on the protection of witnesses and collaborators of justice.
14. Article 2, European Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, Official Journal L 82 of 22 March 2001.
15. For example, member states are required to ensure that national legislation on criminal proceedings guarantees to victims the following rights: to be heard in the proceedings and to furnish evidence; access from the outset to information of relevance for the protection of their interests; access to appropriate interpreting and communication facilities; the opportunity to participate in the proceedings as a victim and to have access to legal advice and, where warranted, legal aid free of charge; the right to have legal costs refunded; a suitable level of protection for crime victims and their families, particularly as regards their safety and protection of their privacy; and the right to compensation. Under Article 18 of the Framework Decision, the European Commission is required to draw up a report on the measures taken by member states to comply with the Framework Decision. The first report was made public on the 16 February 2004: Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings. The report was incomplete and unsatisfactory since only ten countries provided the text of the provisions enacting into national law the requirements laid down by the Framework Decision.

2. Victims' Rights

2.1. The right to an effective remedy

> *"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".*
> Universal Declaration of Human Rights 1948, Article 8[16]

All principal universal human rights instruments contain provisions that establish a right to an "effective remedy" for victims of human rights violations[17]. The right to an effective remedy is also recognized in human rights instruments dealing with specific rights[18]. It includes the right to investigations, prosecutions and punishment of those responsible for human rights violations, as well as the right to reparations[19].

2.2. The right to be treated with respect and dignity

The UN Declaration on Justice for Victims provides that "[v]ictims should be treated with compassion and respect for their dignity"[20]. The Van Boven/ Bassiouni Principles also require that "[v]ictims shall be treated with humanity and respect for their dignity and human rights" [21].

Treating victims with respect includes keeping them informed at all stages of the proceedings of the developments in the case that concerns them[22].

2.3. The right to protection and assistance

The UN Declaration on Justice for Victims requires states to take measures to ensure the safety of victims, their families and witnesses on their behalf, from intimidation and retaliation[23]. The Declaration also contains detailed provisions on the assistance and support which should be provided to victims

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16. Adopted by the UN General Assembly on 10 December 1948, available at www.un.org/Overview/rights.html.
17. 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*.
18. See, for example, Article 1 of the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 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.unhchr.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.
19. For example, Article 13 of the European Convention on Human Rights has been interpreted by the European Court of Human Rights as requiring states to carry out criminal investigations and prosecutions in cases involving violations of the right to life and to humane treatment: see, for example, Gulec v. Turkey, 28 Eur. H.R. Rep. 121 (1998); Kurt v. Turkey, 27 Eur. H.R. Rep. 373 (1998); Aksoy v. Turkey, 23 Eur. H.R. Rep. 553 (1996).
Articles 8 and 25 of the American Convention on Human Rights have been interpreted by the Inter-American Court of Human Rights and the Inter-American Commission for Human Rights to impose a duty on states to undertake criminal investigations and prosecutions of the perpetrators of human rights violations and to ensure reparation to victims.
The Inter-American Court has also held that Article 25 imposes a duty on states to provide victims access to a criminal trial and that Article 8 requires the trial to be conducted in a way that guarantees procedural fairness to victims: see for example, Velasquez Rodriguez v. Honduras, Case No. 4, Inter-Am. C.H.R., OEA/ser. C; Paniagua Morales v. Guatemala, Case No. 37, Inter-Am. C.H.R., OEA/ser.C, paras. 155-56; Blake, Case No. 48, Inter-Am. C.H.R., OEA/ser. C, para. 97; Castillo Paez, Case No. 43, Inter-Am. C.H.R., OEA/ser. C, paras. 105-107.
Article 7(1) of the African Charter on Human and Peoples' Rights has been interpreted by the African Commission on Human and Peoples' Rights to include the right to appeal to competent national organs: see Commission Nationale des Droits de l'Homme et des Libertés vs. Chad (merits), African Comm. Hum. & Peoples' Rights, Communication No. 74/92.
20. *UN Declaration on Justice for Victims*, Principle 4.
21. Principle 10, *Treatment of Victims*.
22. See *UN Handbook on Justice for Victims*, at 35; and *UN Declaration on Justice for Victims*, Principale 6(a).
23. Principle 6.

before, during and after legal proceedings. Measures of assistance include material, medical, psychological and social assistance[24].

The Van Boven/ Bassiouni Principles state that "appropriate measures should be taken to ensure [victims'] safety, physical and psychological well-being and privacy, as well as those of their families" [25]. States should "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 of their families and witnesses, before, during and after proceedings" [26]. States should also provide "proper assistance to victims seeking access to justice" [27].

2.4. The right to reparation

Traditionally providing reparation to victims was not treated as a high priority in the prosecution of crimes. However, the evolution in national legal systems has been accompanied by a parallel evolution in international criminal law, largely influenced by the developments in the case law of the European and Inter-American Courts of Human Rights[28].

The UN Declaration on Justice for Victims introduced the notion into international law of an individual right to reparations[29]. The right to reparation of victims of gross violations of international human rights law and serious violations of international humanitarian law is the main focus of the Van Boven/ Bassiouni Principles, according to which victims have a right to "adequate, effective and prompt reparation" which should be "proportional to the gravity of the violations and the harm suffered" [30]. The Joinet/ Orentlicher Principles provide: "Any human rights violation gives rise to a right to reparation on the part of the victims or his or her beneficiaries, implying a duty on the party of the state to make reparation and the possibility for the victim to seek redress from the perpetrator" [31].

II. COMMON LAW AND CIVIL LAW APPROACHES

The position of the victim in national criminal justice systems varies significantly between states, and depends above all on whether states have adopted a common law or civil law approach. States in which the common law system applies include Uganda, the United Kingdom, and the United States. The civil law system is widespread in continental Europe and, for example, in Democratic Republic of Congo.

In the common law system, the victim's role is usually limited to that of witness. The active involvement of the victim is often considered to be in conflict with basic principles of criminal justice, and there has been significant resistance to according victims a more significant role. The main concerns

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24. Principles 14-17.
25. Principle 10, *Treatment of Victims.*
26. Principle 12 (b), *Access to Justice.*
27. Principle 12 (c), *Access to Justice.*
28. See for example, Shelton, D., *Remedies in International Human Rights Law* (Oxford University Press, 2001), at 432; Minow, M., *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, 1999), at 224, Bassiouni, C., "Reconnaissance internationale des droits des victimes", in *Terrorisme, victimes et responsabilite penale internationale*, SOS Attentats, (Calmann-Levy, 2003), at 166 and seq; Bassiouni, C., "Searching for Peace Achieving Justice: The need for accountability", *Nouvelles Etudes Penales*, vol. 14 (1998), p. 45; Almeida, I., «Compensation and Reparations for Gross Violations of Human Rights», *Nouvelles Etudes Penales*, vol. 14 (1998), p. 399; Danieli, Y., «Justice and Reparations: Steps in the healing process», *Nouvelles Etudes Penales*, vol. 14 (1998), p. 303.
29. Principles 4 and 8 - 13.
30. Principle 11 (b), *Victims' Right to Remedies*; see also Principles 14 – 23.
31. Principle 31, *Rights and Duties Arising out of the Obligation to Make Reparation.*

voiced by those from common law backgrounds relating to the participation of victims in criminal proceedings are that the addition of a third 'party' would disrupt the balance of the criminal process, which is traditionally a contest between prosecution and defence, and that it would considerably delay proceedings, thereby jeopardising the right of the accused to a fair trial.

In contrast, civil law systems generally allow victims an active and central role in criminal proceedings, permitting them to participate and claim reparation[32].

1. Initiation of criminal proceedings

In the **common law** criminal system, it is considered that crimes are committed against the state and it is therefore the state that brings the prosecution. The role of victims is generally limited to providing information or evidence of the crime. In some states in which the common law applies, such as the United Kingdom, it is possible for the victim to initiate a private prosecution. However, the victim bears the cost of the investigation and potentially that of the prosecution if it fails, and this option is rarely used.

Many **civil law** systems recognize the right of the victim to initiate criminal proceedings as a civil complainant *('constitution de partie civile')*. Under some systems, victims can thereby oblige the authorities to investigate. In France, for example, if the court decides on the motion of the victim, acting as partie civile, that the case should be heard, the prosecutor is obliged to take over the prosecution. The cost of the proceedings is then borne by the state.

2. Participation and reparation

Under the **common law** approach, victims have no formal legal status. They are not considered as parties to proceedings. Victims' can participate as witnesses at the request of the prosecution or the defence.

In some common law jurisdictions, limited opportunities for victims to make representations have been introduced, for example, asking victims to provide 'victim impact statements', containing details of the effects that the offence has had on the victim[33]. These statements are taken into account by the criminal judge at the sentencing stage. Other reforms have recognised the rights of victims to be notified and kept informed of the progress of criminal proceedings. For example, in England and Wales, the *Code of Practice for Victims of Crime* of 2005[34] includes provisions on the right to be informed if the police decide not to pursue an investigation[35], the right to information on support services[36], the right to be notified within specific time limits of progress in the investigation of crimes committed against them[37], the right to be notified of any arrest[38] and the right to be informed of the status of cases before the courts[39]. The Code makes specific provision for vulnerable and intimidated victims[40]. In Ireland, the

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32. For an in-depth study of the role of victims at the national level, in the member states of the Council of Europe, see Brienen, M.E.I. and E.H. Hoegen (2000) *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on te Position of the Victim in the Framework of Criminal Law and Procedure* 1178 pages, Dissertation, University of Tilburg. (dissertation advisor: professor Marc Groenhuijsen, Faculty of Law). Nijmegen, The Netherlands: Wolf Legal Productions, available at http://www.victimology.nl/onlpub/Brienenhoegen/BH.html.
33. For example, Ireland, Criminal Justice Act of of 27 July 1993 (6/1993), section 5.
34. The Code entered into force in April 2006, available at www.homeoffice.gov.uk/documents/victims-code-of-practice.
35. Article 5.2, *Code of Practice.*
36. Article 5.3, *Code of Practice.*
37. Articles 5.9 – 5.12.
38. Articles 5.14 – 5.17.
39. Articles 5.18 to 5.35 and sections 7 and 8.
40. Section 4. The Code only applies to direct victims of criminal conduct and expressly states that its provisions do not extend to third parties or indirect victims such as witnesses of violent crimes, Article 3.2.

Charter for Victims of Crime of 1999 contains specific provisions aimed at keeping victims informed of action taken on their complaints, on the status of criminal proceedings and on their outcome.

Under the common law system, victims cannot generally obtain reparation through criminal proceedings, although in some circumstances victims may be entitled to an award of compensation from the criminal judge after the conviction of a defendant. Generally, in order to obtain an award for reparations against the perpetrator, victims have to initiate entirely separate civil proceedings, thereby exposing themselves to potential liability for legal costs. This is particularly problematic since in many cases the convicted criminal does not have the means to pay an order for damages. Many common law jurisdictions have established statutory compensation schemes to provide reparations to victims[41].

Systems applying the **civil law** approach generally allow victims a much more significant role in proceedings. Victims are permitted to varying extents to become parties to proceedings (as *partie civile*) and to claim reparation within the criminal trial. They generally have the right to request the authorities to perform certain investigative acts; to inspect legal documents; to question witnesses and experts, where this is relevant to the claim for reparation; and to appeal decisions which affect such claims. In many civil law jurisdictions, including France, Germany and the Nordic jurisdictions, victims can choose to be legally represented. In some circumstances, the legal representative is paid for by the state, if the victim lacks the means to do so.

In France[42], parties other than the victim, including non-governmental organizations, may also be permitted to join as parties civiles. Once admitted to participate in proceedings, the partie civile in the French system, has the right to be informed about the evidence gathered and the same rights as the defendant to be informed about the progress of the case. Other rights include the right to address the court regarding the facts of the case and to make representations regarding the appropriate sentence.

The capacity for victims, and in some cases NGOs, to directly invoke criminal and/or civil procedures has a direct impact on victims' access to justice, particularly in cases based on the principle of universal jurisdiction.

III - UNIVERSAL JURISDICTION

The principle of universal jurisdiction allows the national authorities of any state to investigate and, where there is sufficient evidence, to prosecute the suspected perpetrators of crimes committed outside a state's territory, even where those acts have no particular connection to that state. This principle is based on the notion that some crimes, such as genocide, crimes against humanity, war crimes and torture, are of such exceptional gravity that they affect the fundamental interests of the international community as a whole. Accordingly, there is no condition that the crime be linked to the state exercising universal jurisdiction by the nationality of the suspect or the victim, or by harm to the state's own national interests.

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41. For example, in England and Wales under the *Criminal Injuries Compensation Act* of 8 November 1995 (UK ST 1995 c 53).
42. French Code of Criminal Procedure, Articles 2-9.

Although the principle has formed part of international law for centuries, it was only after Judge Garzon of Spain initiated proceedings against former head of state Augusto Pinochet on the basis of universal jurisdiction in 1998 that this mechanism started to be used in the fight against impunity[43].

1. Victims' access to justice and universal jurisdiction

For many victims of genocide, crimes against humanity, war crimes and torture, who are unable to obtain justice in their own countries, either because there is no functioning justice system, or because the state is unwilling to prosecute, universal jurisdiction is the only means of bringing prosecutions and ensuring that justice is served.

Some international treaties require states parties to exercise universal jurisdiction. For example, the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** provides that "the State Party in the territory under whose jurisdiction a person alleged to have committed any offence [of torture] is found shall... if it does not extradite him, submit the case to its competent authorities for the purposes of prosecution"[44]. The **Convention on the Protection of all Persons from Enforced Disappearances** also provides for the exercise of universal jurisdiction for alleged acts of enforced disappearances where the suspect is on the territory of a state party[45].

The four **Geneva Conventions** go further by obliging state parties to "search for persons alleged to have committed or to have ordered to be committed... grave breaches", and to "bring such persons, regardless of their nationality, before its own courts". A state party may also, in accordance with the provisions of its national legislation, "hand such persons over for trial to another [state party] concerned, provided such [state party] has made out a prima facie case" [46].

Other international instruments include references to the duty of states to exercise universal jurisdiction. For example, the **Van Boven/ Bassiouni Principles** state that in cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, "where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law, appropriate provisions for universal jurisdiction" [47]. The **Joinet/ Orentlicher Principles** require states to "undertake effective measures . . . that are necessary to enable their courts to exercise universal jurisdiction over serious crimes under international law in accordance with applicable treaties of customary and treaty law"[48].

The exercise of universal jurisdiction is an important complement to the role of international tribunals[49]. Indeed, although international and internationalized courts are making significant progress in bringing to justice those suspected of crimes under international law, they are subject to significant limitations. Tribunals such as the ad hoc tribunals for the former Yugoslavia and Rwanda or the Special Court for Sierra Leone have jurisdiction that is limited to the crimes committed in a particular region and in a specific conflict. The ICC can only exercise jurisdiction over international crimes committed after 1 July 2002. Limited resources further require international and internationalized courts to focus on those bearing the greatest responsibility for the crimes that have been committed.

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43. Henzlin, M., *Le principe de l'universalité en Droit penal international, Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité* (Helbing and Lichtenhahn, 2000), at 419-422.
44. UN Convention against Torture, Article 7(1).
45. Convention on Enforced Disappearances, adopted by UN General Assembly, 20 December 2006, Article 9.
46. Geneva Convention I, art. 49, Geneva Convention II, art.50, Geneva Convention III, art. 129, Geneva Convention IV, art. 146.
47. Principle 4.
48. Principle 21, *Measures for Strengthening the Effectiveness of International Legal Principles Concerning Universal and International Jurisdiction.*
49. See further Section V of this Chapter.

In order to fill the "impunity gap" which exists between the small number of prosecutions at the international level and the large number of perpetrators who are never brought to justice before national courts, the principle of universal jurisdiction is an indispensable tool.

The preamble to the Statute of the International Criminal Court emphasises accordingly that the investigation and prosecution of international crimes is the primary responsibility of states. The preamble recalls that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", and provides that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions".

The access of victims to justice though universal jurisdiction largely depends on whether the national system has a civil law or common law approach. In systems that do not provide for victims to participate as *parties civiles*, victims have to rely on a decision of the prosecuting authorities to pursue a complaint based on universal jurisdiction. In order to ensure effective access to justice for victims, these systems should enable victims to challenge a decision not to investigate. However, this is currently not the case in a number of countries. This provides the prosecution with absolute discretion and makes exercise of universal jurisdiction entirely dependent on the will of the prosecuting authorities to initiate an investigation.

Where victims can initiate proceedings by becoming *parties civiles*, victims have an increased possibility of forcing the prosecution to pursue a complaint. This should increase the chances of having a complaint investigated. The possibility for victims to directly submit complaints to a judge was essential in the initiation of prosecutions in Europe (ex. Belgium, France and Spain) and in Africa (ex. Senegal). Victims' access to justice helps to ensure an impartial and equal application of universal jurisdiction and increases the chances of universal jurisdiction becoming a viable tool to fight impunity.

2. Universal jurisdiction in Europe

Most European states have accepted the principle of universal jurisdiction over specific war crimes and human rights violations through the ratification of international treaties such as the Convention against Torture and the four Geneva Conventions. Universal jurisdiction is becoming an increasingly common tool in Europe and several European countries exercised jurisdiction on this basis during the 1990s. Nevertheless, an adequate legal basis for exercising universal jurisdiction is still lacking in many European justice systems and there is still a long way to go before the universal jurisdiction principle is definitively established in all European legal systems.

States do not generally provide for the exercise of universal jurisdiction over crimes other than those that are the subject of specific conventions obliging states parties to exercise such jurisdiction[50]. Moreover, in practice, attempts by victims to invoke universal jurisdiction have revealed serious shortcomings on the part of national legal systems to prosecute such cases effectively. The inadequacies of national legislation vary from country to country, but common problems are the failure to provide specifically for jurisdiction over crimes committed abroad, failure to provide definitions of crimes and failure to set down appropriate penalties[51].

For example, in France, universal jurisdiction based on treaty obligations, in respect of certain offences, has been incorporated into national legislation, but absolute universal jurisdiction based on customary

50. REDRESS, *Universal jurisdiction in Europe, Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide*, 30 June 1999, p. 7 available at www.redress.org/publications/UJEurope.pdf.
51. Ibid, p. 7.

international law has not. As a result, universal jurisdiction cannot generally be exercised in French courts, on the basis of domestic law, in respect of certain crimes under international law, including crimes against humanity and crimes of genocide. A limited exception is provided by Law No. 95-1 of 2 January 1995 and Law No 96- 432 of 22 May 1996 which allow for the exercise of absolute universal jurisdiction in relation to crimes under international law committed in the former Yugoslavia and Rwanda[52].

In order to deal with these disparities and to fill the gaps in legislation, attempts have been made to create a consistent approach in Europe through the approximation and/or harmonisation of European standards concerning the exercise of extraterritorial jurisdiction[53]. A common approach to universal jurisdiction within the European Union would be consistent with the strong commitment of the EU in favour of the International Criminal Court and would help to improve judicial cooperation. A proposal has therefore been made for the adoption of a EU Framework Decision on International Crimes including the definitions of crimes under the Rome Statute of the International Criminal Court and the Convention against Torture. This could help to approximate jurisdictional Rules and perhaps also the level of penalties[54].

3. Universal jurisdiction in the United States: the Alien Tort Claims Act (ATCA)

Courts in the United States have been applying the principle of universal jurisdiction in a very unique way in civil proceedings filed by non-U.S. citizens against the alleged perpetrators of grave human rights violations, resulting in awards of damages to victims. In these cases, the federal courts do not impose a requirement that the wrong was committed in the United States or that the defendant is a U.S. citizen.

These relatively recent developments were made possible as a result of a groundbreaking interpretation in 1980 of a statute enacted by the U.S. Congress in 1789 which states:

> *"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."*

This provision, now known as the Alien Tort Claims Act (ATCA)[55], was adopted partly to enable ambassadors to seek a civil redress in U.S. federal courts and to combat piracy. But in 1980, the ATCA attained a level of significance that could not have been predicted. In the case of *Filártiga v. Peña-Irala*[56], the Second Circuit Court of Appeal interpreted ATCA as providing for the right of non-U.S. citizens, victims of human rights violations committed abroad, to bring a civil action against those allegedly responsible, provided the latter are on U.S. territory. This condition can even be fulfilled where the accused is transferring flights at a U.S. airport. In the *Filártiga* case, the father of a seventeen-year old boy of Paraguayan nationality, who had been tortured to death in his country by a police officer who later fled to New York City, filed a civil action in the United States against the alleged torturer under ATCA. The court stated that:

> *"Deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.*

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52. FIDH, Legal Action Group, *France, Universal Jurisdiction : the status of implementation of the principle of universal jurisdiction*, October 2005, n°431, available at http://www.fidh.org/article.php3?id_article=3562; also available in French: *Compétence universelle : Etat des lieux de la mise en œuvre du principe de compétence universelle*, available at www.fidh.org/IMG/pdf/gaj_compuniverselle2005f.pdf.
53. FIDH and REDRESS, *Legal remedies for victims of "international crimes", Fostering an EU approach to extraterritorial jurisdiction*, March 2004, p.3, available at www.fidh.org/article.php3?id_article=926.
54. Ibid, p. 31.
55. 28 U.S.C., Section 1350.
56. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

> *Thus, whenever an alleged torturer is found and served with process by an alien within our border, Section 1350 (ATCA) provides federal jurisdiction"*[57].

Today in the United States, most proceedings concerning grave violations of human rights are brought under ACTA, whether against individuals or corporations allegedly complicit in the violations, and damages have been awarded.

In 1991, the U.S. Congress recognized this interpretation of ATCA by enacting the Torture Victim Protection Act (TVPA). The TVPA gives a specific cause of action in cases of torture and extra-judicial killings. The TVPA applies both to U.S. and non-U.S. citizens.

In the case of *Sosa v. Alvarez-Machain*, concerning the kidnapping of a victim of Mexican nationality, the United States Supreme Court recognized and affirmed the possibility for victims of human rights to bring claims in U.S. courts under ATCA[58]. The court stated that in order for ACTA to apply, the human rights norm violated must be "specific, universal and obligatory"[59].

Lawsuits brought under the ATCA are civil cases, which means that victims can bring claims and do not require the Attorney General's consent as in criminal cases. Civil actions usually have less onerous procedural and evidentiary requirements than criminal actions, making civil universal jurisdiction under ATCA a useful tool for victims.

IV - STATE RESPONSIBILITY AND VICTIMS' ACCESS TO INTERNATIONAL AND REGIONAL HUMAN RIGHTS MECHANISMS

States are the traditional subjects of international law. At the international level, mechanisms have been designed enabling victims of human rights violations to present individual complaints against states before Committees, otherwise called "Treaty Monitoring Bodies" (Section 1 below), whilst at the regional level, Human Rights Commissions and Courts can receive individual complaints against states (Section 2). These procedures only have jurisdiction over **state responsibility** for human rights violations. Complaints can therefore only be brought against states or state bodies. Complaints cannot be brought before these mechanisms against individuals.

Individuals who claim to have suffered violations of rights contained within international conventions can submit written complaints to these bodies, provided that the object of the complaint is not pending before another international jurisdiction[60] and that they have exhausted all available domestic remedies. The latter requirement has been applied with some flexibility. For example, in situations of internal or international armed conflict, or where the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been

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57. Ibid., p. 878.
58. *Sosa v. Alvarez-Machain* 124 S. Ct. 2739 (2004).
59. Ibid. at 124 S. Ct. 2739 (2004), 331 F.3d at 612 (quoting *In re* Estate of Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994).
60. See ACHR, Article 46 (c), ECHR Article 35(2)(b), ICCPR Protocol, Article 5.2, CAT, Article 22(5)(a).

violated, the requirement might be lifted[61]. It has also been interpreted not to require the victim to pursue remedies which are inaccessible, only theoretically available or which do not provide any reasonable chances of success[62]. Domestic remedies have also been presumed to be unavailable where victims lacking the means to pay for legal representation do not have access to legal aid and where a "generalised fear" prohibits victims from exercising their rights[63].

1. The Universal System: the United Nations Treaty Monitoring Bodies

At the international level, a number of United Nations Committees ("Treaty Monitoring Bodies" or "Treaty Bodies") have been established to monitor state compliance with particular human rights conventions. Several of these Committees can receive complaints against States from individual victims.

The Treaty Bodies which can receive individual complaints are:

- The Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR)[64];
- The Committee on the Elimination of Racial Discrimination, which monitors the implementation of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD)[65];
- The Committee against Torture, which monitors the implementation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[66];
- The Committee on the Elimination of All Forms of Discrimination against Women, which monitors the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[67];
- The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, which monitors the implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)[68];
- The Committee on the Rights of Persons with Disabilities, which will monitor the implementation of the International Convention on the Rights of Persons with Disabilities[69];
- The Committee which will monitor the implementation of the Convention for the Protection of All Persons from Enforced Disappearance[70].

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61. See for example, Eur. Ct. H.R., *Akdivar and others v. Turkey*, judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, para. 68.
62. See for example, Eur. Ct. H.R., *Johnston and Others v. Ireland*, judgment of 18 December 1986, Series A no. 112, p. 22, para.45; Human Rights Committee, Communication n°84/1981 *Dermit Barbato* add 40, A/38/40; Communication n°458/1991 *Albert Womah Mukong*, add 40, A/49/40.
63. Human Rights Committee, comm.n°564/1993 *Leslie v Jamaica*, add.4., A/53/40; Int.-Am.Ct.H.R. Consultative Opinion OC-11/90, *Exception to the exhaustion of domestic remedies requested by the Inter-American Commission*, Serie A 11.
64. The International Covenant on Civil and Political Rights (ICCPR) was adopted on 16 December1966 by the General Assembly, Resolution 2200A (XXI) and entry into force on 23 March 1976. Available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.
65. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted by UN General Assembly resolution 2106 (XX) of 21 December 1965, entered into force 4 January 1969. Available at www.unhchr.ch/html/menu3/b/d_icerd.htm.
66. Pursuant to Article 17 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations General Assembly on 10 December 1984, entered into force 26 June 1987. Available at www.unhchr.ch/html/menu3/b/h_cat39.htm.
67. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, entered into force on 3 September 1981. Available at: www.un.org/womenwatch/daw/cedaw/cedaw.htm.
68. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) was adopted in 1990 by the UN General Assembly and entered into force on 1 July 2003. Available at www.ohchr.org/english/law/cmw.htm.

The procedures before these committees are very similar. Individuals and groups of individuals who claim to have suffered violations by a state party of any of the rights set out in the founding conventions can submit written complaints. However, in order for the relevant committee to be able to receive and consider such complaints, the accused state must have ratified the optional protocol to the respective convention (for example, the HRC and CEDAW) or made a declaration recognizing the competence of the committee to receive and consider individual communications (for example, CAT and CERD).

The committee examines the complaint and invites the state concerned to submit comments. The committee then issues a finding on the violation(s) committed, which can include recommendations to remedy violations.

These committees differ from courts; they are quasi-judicial bodies. They issue decisions that are non-binding but of a legally authoritative and persuasive nature.

2. Regional Systems

2.1. The European system

The European Convention on Human Rights (ECHR) was adopted by the Council of Europe in 1950 and came into force in 1953[71]. The institutions of the ECHR are the European Court of Human Rights (European Court)[72] and the Committee of Ministers[73], based in Strasbourg, France. The system for the enforcement of the ECHR formerly included the European Commission of Human Rights (European Commission), but on 1 November 1998, when Protocol 11 to the ECHR came into force, the European Commission was abolished and its functions were merged into those of a permanent and full-time European Court.

The ECHR provides for two procedures by which member states can be held accountable for violations of the fundamental rights and freedoms recognised in the Convention:

- States parties can refer alleged breaches by another state party of the rights contained in the ECHR to the European Court[74]; and
- Complaints can be submitted to the European Court by individuals and non-governmental organisations[75].

Previously, it was only possible for individuals to submit complaints if the accused state had made a declaration accepting the jurisdiction of the court in such cases. However, since the coming into force of Protocol 11, the individual complaints procedure has become an automatic and compulsory procedure for all states parties to the ECHR.

Individuals, non-governmental organisations and groups of individuals claiming to be victims of violations can submit a complaint to the European Court[76]. The European Court can accept applications from individuals who claim to be direct victims, indirect victims (relatives of persons who have been killed

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69. The International Convention on the Rights of Persons with Disabilities was adopted by the UN General Assembly on 13 December 2006.
70. The Convention for the Protection of All Persons from Enforced Disappearance was adopted by the UN General Assembly on December 2006. It will enter into force one month after the 20th ratification.
71. The text of the European Convention on Human Rights is available at www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf.
72. Web site: www.echr.coe.int/echr.
73. Web site: www.coe.int/t/CM/home_en.asp.
74. ECHR, Article 33.
75. ECHR, Article 34.

or "disappeared")[77] or potential victims of human rights violations (i.e. those who face a significant risk of being directly affected)[78].

The admissibility of the complaint is generally subject to the condition that national remedies must have been exhausted. The application must be submitted within six months of the date on which the final decision at the national level was taken[79].

Once proceedings have been initiated, victims continue to play an essential role in proceedings before the European Court. Victims can present evidence of the violation in question to the European Court and can obtain access to all documents deposited with the European Court's registry. Furthermore, victims' legal representatives can make oral observations during a public hearing. The burden of proving a violation of the ECHR lies primarily with the victim.

Proceedings before the European Court can be very lengthy, usually lasting between three and five years. The European Court considers around 17,000 individual applications every year and gives around 700 judgements on the merits of the case[80]. The judgement of the European Court is limited to establishing whether or not a violation of the ECHR has taken place. In terms of reparations, the European Court's powers are limited to orders for financial compensation. The European Court can also award payment to cover legal costs and expenses.

The decisions of the European Court are binding on member states. They are transmitted to the Committee of Ministers of the Council of Europe, which is responsible for supervising their execution[81]. The Committee can request that individual and general measures are adopted to put an end to the violations in the case under consideration[82]. The execution proceedings in the Committee of Ministers have sometimes led to new investigations and trials of individuals responsible for human rights violations, in particular, for war crimes and crimes against humanity[83].

2.2. The Inter-American system

The Inter-American system differs from the other regional systems in that its origins lie in two distinct, though interrelated, instruments. First, there is the Organisation of American States (OAS) system of human rights, which relies on the Charter of the Organisation of American States and the American Declaration of the Rights and Duties of Man 1948 (American Declaration). Second, there is the system under the American Convention on Human Rights 1969[84] (ACHR). In both cases, the Inter-American Commission of Human Rights (Inter-American Commission) has the authority to receive communications from states and individuals alleging violations of human rights contained within the American Declaration or the ACHR.

The Statute of the Inter-American Commission[85] provides that, for the purposes of the statute, human rights are understood to be:

(a) The rights set forth in the American Convention on Human Rights in relation to the states parties thereto;

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76. ECHR, Article 34.
77. Eur. Ct. H.R., *McCann and others v. the United Kingdom*, judgment of 27 September 1995, Series A no.324.
78. Eur. Ct. H.R., *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31.
79. ECHR, Article 35.
80. See the annual *Survey of the Court's Activities*, available online at www.echr.coe.int.
81. ECHR, Article 46.
82. This approach has been endorsed by the Court in the case of *Papamichalopoulos v. Greece (just satisfaction)*, judgment of 31 October 1995, Series A no. 330-B, para. 34.
83. See, e.g., the Interim Resolutions Res DH (2005) 20, 23 February 2005, and Res DH (2005) 44, 7 June 2005, of the Committee of Ministers of the Council of Europe.
84. American Convention on Human Rights Adopted November 1969, entered into force 18 July 1978. Available at http://cidh.oas.org/Basicos/basic3.htm.

(b) The rights set forth in the American Declaration of the Rights and Duties of Man in relation to the other member states[86].

States parties to the OAS Charter, including those who are also party to the ACHR, automatically recognise the competence of the Inter-American Commission to receive complaints from individuals alleging violations of their rights. The procedures for bringing individual complaints under the OAS Charter system and under the ACHR system are contained in different sources. The OAS Charter system complaints procedure is contained within Regulations 51 to 54 of the Inter-American Commission's Regulations. The complaints procedure under the ACHR is provided for in Articles 44 to 55 of the ACHR.

The major difference between the two systems is that it is only under the ACHR that the Inter-American Commission has the option of transmitting cases to the Inter-American Court on Human Rights (Inter-American Court). No such possibility exists in respect of the OAS Charter system under which the Commission's decisions are final. The decisions of the Commission, unlike those of the Inter-American Court, are not legally binding although they are of a legally authoritative and persuasive nature.

The system for the implementation of the ACHR is similar to that of the ECHR at its inception, before the coming into force of Protocol 11. The ACHR system comprises the Inter-American Commission and the Inter-American Court. The Court has its permanent seat in San José, Costa Rica.

2.2.1. The Inter-American Commission for Human Rights

The ACHR sets out procedures for states parties[87], individuals and organisations[88] to submit complaints to the Inter-American Commission. It should be noted that, whereas the competence of the Inter-American Commission to receive complaints from individuals and organisations is automatic, in order for states to be able to submit complaints to the Commission under the ACHR against other states, both the accused state and the submitting state must have made a declaration recognising the competence of the Inter-American Commission to receive and examine communications from another state[89].

In respect of individual complaints, the ACHR provides:

> *"Any person or groups of persons, or any non-governmental entity legally recognised in one or more member States of the Organisation, may lodge petitions with the Commission containing denunciations or complaints of violations of the Convention by a State party"* [90].

The admissibility of complaints is subject to the condition that "the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment" [91].

If the case is not transmitted to the Inter-American Court, the Inter-American Commission can issue an opinion making a finding of violation(s), and can propose measures to be taken by the state responsible[92].

2.2.2. The Inter-American Court for Human Rights

The jurisdiction of the Inter-American Court is optional: the accused state must have made a declaration accepting its jurisdiction[93]. The ACHR provides that, "[o]nly States Parties and the Commission shall

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85. The full text of the statute is available at www.cidh.org/Basicos/basic15.htm.
86. Article 1(2).
87. ACHR, Article 45.
88. ACHR, Article 44.
89. ACHR, Article 45 (1) and (2).
90. ACHR, Article 44.
91. ACHR, Article 46 (1).
92. ACHR, Article 51.
93. ACHR, Article 62.

have the right to submit a case to the Court"[94]. The ACHR does not give individuals standing to bring a case before the Inter-American Court. Individuals can only present petitions before the Commission, which in turn, may present the case before the Court.

However, over the past decade, the Inter-American Court has adapted its practice and revised its internal Rules to facilitate the access of victims in proceedings before it. The status of victims in proceedings before the Inter-American Court has substantially evolved, through the Court's case-law and reforms introduced to the Rules of Procedure of the Inter-American Court and the Inter-American Commission.

The first significant step was taken in a public hearing at the reparations stage in the case of *El Amparo v. Venezuela*[95], when, for the first time, the judges of the Inter-American Court addressed questions directly to the representatives of the victims, recognizing that, at least at the reparations stage of proceedings, victims' representatives were the "accusing party" before the Inter-American Court.

Following this hearing, it has become common practice for submissions presented by victims' representatives to be accepted at the reparations stage[96].

Building on this practice, the Inter-American Court reformed its Rules of Procedures in 1996 to provide for victims to be able to present their own arguments and evidence at the reparations stage[97]. The Inter-American Court further reformed its Rules of Procedure in 2000 to allow victims, their relatives and legal representatives the right to present petitions, arguments and evidence at all stages of the proceedings.

The revised Rules provide: *"When the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit their requests, arguments and evidence, autonomously, throughout the proceedings.[98]"*

The Inter-American Court considers that allowing victims to present their views in an independent capacity does not affect the rights of defense of the accused state[99].

The rights of victims were further strengthened with the 2000, 2002 and 2003 reforms of the Inter-American Commission's Rules of Procedure which provide that whenever a state which has accepted the jurisdiction of the Inter-American Court does not comply with the Inter-American Commission's recommendations, the case must in principle be referred to the Inter-American Court[100]. The new Rules also provide for consultation with the petitioner and the victim on whether the case should be sent to the Inter-American Court[101]. Once this decision has been made, the representatives of the victims can participate in preparing the case before the Inter-American Court[102].

The Inter-American Court can order appropriate individual and general measures necessary to put an end to the violation(s) found[103]. The Inter-American Court has been particularly creative in devising appropriate remedies for violations, defining reparation as including independent and effective

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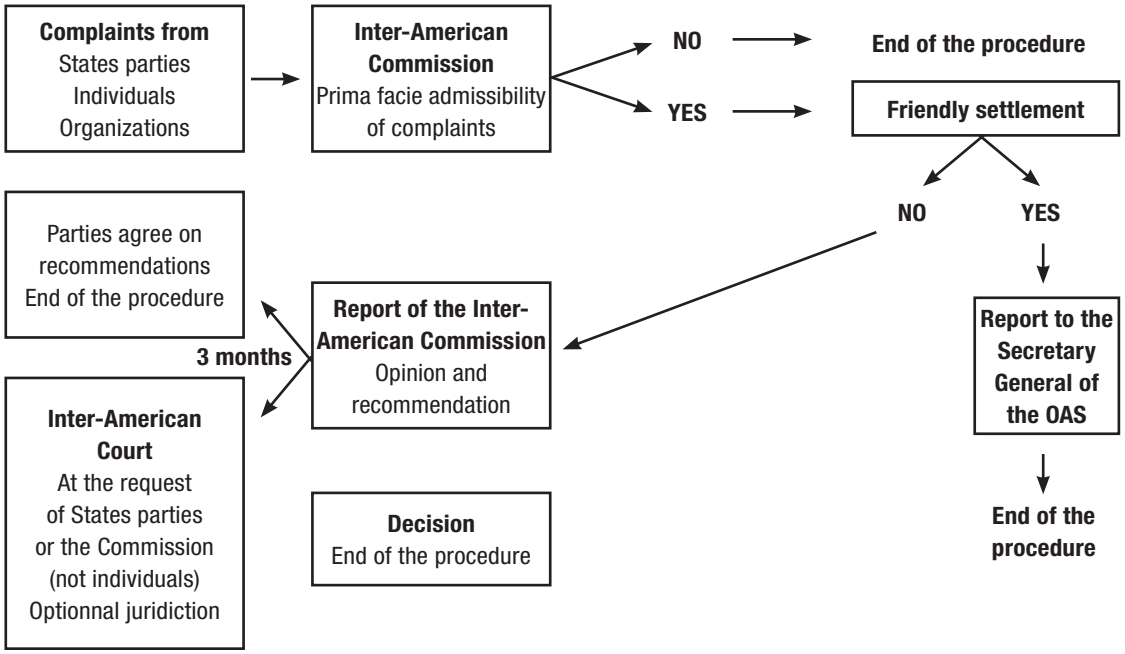
94. ACHR, Article 61.
95. *El Amparo v. Venezuela*, Reparations Judgement , 14 September 1996, paras. 24-28.
96. See generally, Caçado-Trindade A.A., "El Nuevo Reglamento de la Corte Interamericana de Derechos Humanos (2000): La Emancipación del Ser Humano como Sujeto del Derecho Internacional de los Derechos Humanos", Revista IIDH 30-31 Edición *Especial Fortalecimiento del Sistema Interamericano de Protección de Derechos Humanos*, 2001, 45-71, at 51.
97. See Rule 23, Rules of Procedure of the Inter-American Court.
98. Rule 23(1), Rules of Procedure of the Inter-American Court.
99. *Masacre de Mapiripán v. Colombia*, Judgement, 15 September 2005, paras. 58-59 and *Pueblo Bello v. Colombia*, Judgement of 31 January 2006, paras. 55-56.
100. Article 44(1), Rules of Procedure of the Inter-American Commission.
101. Article 43(3), Rules of Procedure of the Inter-American Commission.
102. Article 71, Rules of Procedure of the Inter-American Commission.

investigations and prosecutions, as well as other forms such as financial compensation, physical and psychological rehabilitation, and "satisfaction", which can include measures such as the erection of monuments in memory of victims, or public apologies.

There is no single body responsible for supervising the execution of the Inter-American Court's decisions. However the Court considers itself to be seized of a case until its decision has been fully implemented. The Inter-American Court is required to submit an annual report to the General Assembly of the Organisation of American States, in particular documenting cases which have not complied with the Inter-American Court's judgement[104]. The OAS can choose to take such political action as it deems necessary[105].



2.3. The African system[106]

The African Commission on Human and Peoples' Rights (African Commission)[107] was established in 1987 as the body responsible for the implementation of the African Charter on Human and Peoples' Rights (ACHPR). At the time of negotiating the ACHPR, the possibility of establishing an African human rights court was raised but rejected. In 1998, however, the Organisation of African Unity adopted a protocol to the ACHPR to establish an African Court on Human and Peoples' Rights (the Protocol). The Protocol came into force in January 2004. The creation of the African Court on Human and Peoples' Rights[108] (the African Human Rights Court) was delayed following a decision to merge it with the African Court of Justice, as the African Court of Justice and Human Rights (ACJHR). The African Human Rights Court eventually held its first meeting in July 2006[109], but is yet to become operational.

103. Int.-Am. Ct. H.R., *Bulacio v. Argentina*, Judgement of 18 September 2003, Series C no. 100, para. 4 of the operative provisions.
104. ACHR, Article 65.
105. ACHR, Article 65 in fine.

2.3.1. The African Commission on Human and Peoples' Rights

The African Commission is responsible for promoting and protecting the rights set out in the ACHPR[110]. States are authorised to bring cases before the African Commission[111], but there is no provision expressly allowing individual victims of violations to submit complaints. However, the African Commission has interpreted Article 55 of the ACHPR, which refers to "communications other than those of States parties", to grant individuals access to the African Commission.

Article 55 (1) provides:

> *"Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission".*

The findings of the African Commission are in the form of "recommendations" and are not legally binding. The findings must be submitted to the political body under which the African Commission operates, the Assembly of Heads of State and Government of the African Union (formerly the Organisation for African Unity) and must be approved by the Assembly.

The African Commission has no clear legal basis to grant remedies, which has led to an inconsistent treatment of complaints. In many cases, the African Commission either does not deal with remedies or recommends very open-ended remedies, which fail to adequately specify what is required of states, thus impeding implementation[112]. More generally, the African Commission also lacks a mechanism for systematic follow-up regarding the implementation of its recommendations.

2.3.2. The African Court of Justice and Human Rights

Notwithstanding the entry into force of the Protocol to the African Charter on Human and Peoples' Rights for the Establishment of an African Court on Human and Peoples' Rights in January 2004, the Assembly of the African Union in July 2004 decided to integrate the African Human Rights Court with the Court of Justice of the African Union. This delayed the completion of the process of the establishment of the African Human Rights Court. A committee of experts was appointed to draft a new combined statute.

In January 2005, the executive council of the African Union decided that the discussion on the merger of the two courts should not prejudice the operational start of the African Human Rights Court. The judges of the Human Rights Court were elected at the January 2006 AU Summit in Khartoum, Sudan. Since then, Arusha (Tanzania) has been confirmed as the seat of the new court, but the Court was not yet operational at the time of writing.

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106. See FIDH guide: *10 keys to understand and use the African Court on Human and Peoples' Rights*, at www.fidh.org/article.php3?id_article=2067.
107. See African Commission website: www.achpr.org.
108. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted by the Assembly of Heads of State and Government of the Organisation of African Unity on 10 June 1998. The Protocol came into force, following the ratifications of 15 member states, on 25 January 2004. For the full text of the Protocol, see: www.africa-union.org/root/au/Documents/Treaties/treaties.htm.
109. First meeting of the African Court on Human and people Rights, 2-5 June 2006, Banjul (Gambia), see the website of the African Union: www.africa-union.org/root/au/index/index.htm.
110. ACHPR, Article 30.
111. ACHPR, Article 47.
112. For example, *Media Rights Agenda v. Nigeria*, Communication 224/98.

It is understood that the African Human Rights Court will function until the entry into force of the new Protocol creating the new African Court of Justice and Human Rights (ACJHR). Ongoing discussions relate to whether the ACJHR Statute will preserve the specific mandate of the African Human Rights Court as well as the provisions guaranteeing direct access for non governmental organisations and individuals before this Court[113].

The African Human Rights Court is intended to "enhance the efficiency of the African Commission[114]" by providing a judicial mechanism to supervise the implementation of the ACHPR. Under Article 2 of the Protocol: "The Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights".

Article 5 (1) of the Protocol allows the following parties to submit cases to the African Court:

(a) The African Commission;
(b) The State Party which has lodged a complaint to the African Commission;
(c) The State Party against which the complaint has been lodged at the African Commission;
(d) The State Party whose citizen is a victim of human rights violation;
(e) African Intergovernmental Organizations.

In addition, Article 5 (3) provides:

> *"The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34 (6) of this Protocol".*

In order for the African Human Rights Court to have jurisdiction in cases referred by individuals or NGOs, the accused state must have made a declaration accepting such jurisdiction: "At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5 (3)" and the Court cannot "receive any petition under Article 5 (3) involving a State Party which has not made such a declaration" [115].

There are therefore two routes by which claims will be able to come before the African Human Rights Court:

- the first procedure is via the African Commission, but the decision whether or not to transfer the case to the Court is in the hands of the Commission and the state(s) concerned;
- the second procedure bypasses the African Commission, allowing individuals and NGOs direct access to the Court, but this procedure can only be used against states which have made a separate declaration.

In contrast to the African Commission, the decisions of the African Human Rights Court will be legally binding. They will neither be subject to appeal nor to political review[116]. States parties to the Protocol undertake to "comply with the judgement in any case to which they are parties" and to "guarantee its execution"[117].

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113. The new Protocol creating the African Court of Justice and Human Rights will be available on the African Union website. See: www.africa-union.org.
114. Protocol to the African Charter on Human and Peoples' Rights for the Establishment of an African Court on Human and Peoples' Rights, adopted 10 June 1998, entered into force 25 January 2004: www.africa-union.org/root/au/Documents/Treaties/treaties.htm, Preamble.
115. Ibid, Article 34(6).
116. Ibid, Article 28.
117. Ibid, Article 30.

The African Human Rights Court, unlike the African Commission, will also have a clear legal basis to grant remedies:

> *"If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation"*[118].

Decisions of the African Human Rights Court will be transmitted to the member states of the African Union and to the Council of Ministers, which will have responsibility for monitoring its implementation on behalf of the Assembly[119].

V – INDIVIDUAL RESPONSIBILITY AND INTERNATIONAL CRIMINAL JUSTICE

At the international level, the concept of individual criminal accountability was only recognized in the post-World War II Nuremberg and Tokyo charters[120]. Since Nuremberg, there has been a clear recognition that "crimes against international law are committed by [individuals], not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced"[121].

1. The Nuremberg and Tokyo Tribunals

The International Military Tribunal at Nuremberg (Nuremberg Tribunal) was established by the London Agreement of 8 August 1945 (Nuremberg Charter)[122]. The Nuremberg Tribunal was established for the "just and prompt trial and punishment of the major war criminals of the European Axis" [123]. In relation 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 tribunal. They had no possibility of initiating investigations or prosecutions. There was no particular unit entrusted with providing assistance and support to victims, nor were there provisions on providing victims with reparations[124]. The Charters of the tribunals did not contain a definition of victims, in line with the peripheral role granted to victims in the proceedings.

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118. Ibid, Article 27(1).
119. Ibid, Article 29.
120. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, 8 August 1945, Article 6 and Charter of the International Military Tribunal for the Far East, 19 January 1946, Article 5.
121. Nuremberg International Military Tribunal: Judgment and Sentence (1947), at 41-42.
122. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945, available at www.icrc.org/ihl.nsf/FULL/350?OpenDocument; for an account of the negotiations, see Taylor, T. *The Anatomy of the Nuremberg Trials, A Personal Memoir (Back Bay Books, Little, Brown and Company, 1992)*, esp. Chapter 4.
123. Article 1, Nuremberg Charter.
124. Zappala , S., *Human Rights in International Criminal Proceedings* (Oxford University Press, 2003), 312, at 8 and 45.

In fact, the involvement of witnesses before both tribunals was limited. At the Nuremberg Tribunal, the "meticulous record keeping" of the Nazi regime meant the many elements of the charges could be proved by written evidence[125]. The prosecution team therefore decided, "to put on no witnesses [they] could possibly avoid" [126], 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[127].

2. The International Criminal Tribunals for the Former Yugoslavia and for Rwanda

In the early 1990s, the UN Security Council decided to establish *ad hoc* international criminal tribunals in response to the atrocities committed in the conflicts in the former Yugoslavia and in Rwanda. The jurisdiction of both *ad hoc* tribunals is limited to crimes committed in a particular region and in a specific conflict.

The International Tribunal for the Former Yugoslavia (ICTY) was established by a resolution of the United Nations Security Council in May 1993[128] in response to the serious crimes under international law committed during the conflict in the former Yugoslavia. The ICTY has jurisdiction to prosecute individuals for war crimes, crimes against humanity and genocide committed in the former Yugoslavia since 1991. Its seat is in The Hague, Netherlands.

Some 18 months later, in November 1994[129], the Security Council established the International Criminal Tribunal for Rwanda (ICTR), following the deaths of approximately 800,000 Rwandan nationals during the genocide. The ICTR has jurisdiction to prosecute individuals for genocide, crimes against humanity and war crimes committed in Rwanda or committed by Rwanda citizens in the territory of neighbouring states, between 1 January and 31 December 1994. The trial chambers of the ICTR are located in Arusha, Tanzania; the appeals chamber is located in The Hague, Netherlands.

When the ad hoc tribunals were established, the rights of victims were to a large extent overlooked. The mandate of the tribunals as defined in the Security Council resolutions was to ensure the prosecution of those responsible for the atrocities. Only the preamble of the resolution establishing the ICTY containes a reference to victims.

Definition of "victims"

The Rules of Procedure and Evidence of the ICTY and the ICTR contain a very limited definition of victims. Under Rule 2 (A) of the Rules of Procedure and Evidence (RPE) of both tribunals, a victim is "a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed". The requirement that the crime must have been committed 'against' the victim implies that those who suffer from the consequences of a crime, but who are not specifically targeted, are not recognised as victims.

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125. Taylor, T. *The Anatomy of the Nuremberg Trials, A Personal Memoir* (Back Bay Books, Little, Brown and Company, 1992), at 57.
126. Ibid, at .134. See also, generally, von Hebel, H. A. M., "An International Criminal Court- a Historical Perspective", in von Hebel, H. A. M, Lammers, J. G, and Schukking, J. (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (Cambridge University Press, 1999) , at 13 – 38, at 19-22.
127. Wald, P. M., "Note from the Field – Dealing with Witnesses in War Crimes Trials: Lessons from the Yugoslav Tribunal", *Yale Human Rights and Development Law Journal*, vol.5 (2002), at 217-239.
128. Security Council Resolution 827, adopted 25 May 1993, creating the *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, available at http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement.
129. Security Council Resolution 955, adopted 8 November 1994, *on establishment of an International Tribunal and adoption of the Statute of the Tribuna*l, available at http://daccessdds.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement.

This narrow definition is linked to the limited role afforded to victims in the proceedings. In contrast to the system envisaged in the Statute of the International Criminal Court, victims before the ICTY and the ICTR have no rights to participate in proceedings or to claim reparations. Since the effective functioning of the court was not thought to depend on the involvement and participation of victims, it was unnecessary to provide an expansive definition.

A number of efforts have been made by the judges of the tribunals to amend the RPE in order to give victims a greater role, in particular in relation to claiming reparations.

Participation

There are no provisions for victims to participate as parties to the proceedings. Only the prosecutor can initiate proceedings. The prosecutor's decision is made on the basis of information received from a range of sources, notably governments, organs of the United Nations, intergovernmental organisations and non-governmental organisations. The prosecutor does not have a duty to notify victims or provide reasons to justify the decision whether or not to prosecute.

During the course of the trial, the victim can only be heard as a witness and therefore can only participate in the hearing at the request of one of the parties. The participation of victims is thus limited by the strategies adopted by the parties: "In the course of their testimony victims may often be the object of attacks by defence counsel and may have no opportunity to tell their version of the facts, apart from what emerges during examination and cross-examination"[130]. At the outset of the operation of the tribunals it was difficult for the judges to intervene during examination and cross-examination in order to allow victims to tell their stories in their own way, since the judges did not receive the witness statements and therefore had little knowledge of the facts of the case. However the RPE of both tribunals were amended to allow the judges to receive witness statements, or at least a summary of their evidence, enabling them to intervene more effectively to seek the views of victims "and ensure that their role is not merely at the whim of the parties"[131].

Victims are not entitled to legal representation when giving evidence, they have no right of access to the evidence presented during the trial and cannot demand to be kept informed of the progress of the proceedings, even where they are of personal concern to them.

Both tribunals can accept submissions from *amici curiae*, ('friends of the court'): "[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 appear before it and make submissions on any issue specified by the Chamber" [132]. This provision has been used on several occasions to allow states and organizations to submit observations on the rights of victims. However, *amici curiae* are not parties to proceedings; the possibility of making submissions depends on prior authorisation by the relevant chamber and the substance of the intervention is generally limited to questions of law[133].

Protection

Articles 20 (1) of the ICTY Statute and 19 (1) of the ICTR Statute provide that the Trial Chamber must ensure that the 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".

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130. Zappala, S., *Human Rights in International Criminal Proceedings*, at 222.
131. Ibid, at 222.
132. Rule 74, RPE of the ICTY. Rule 74, RPE of the ICTR is drafted in very similar terms.
133. See *Information concerning the submission of amicus curiae briefs*, adopted by the ICTY and ICTR on 27 March 1997, which specifies that "in general, amicus submissions shall be limited to questions of law, and in any event may not include factual evidence relating to the elements of a crime charged". See also, *Bagasora*, ICTR-96-7, Decision on the amicus curiae application by the Government of the Kingdom of Belgium, 6 June 1998.

The RPE of both tribunals provide for protective measures including the possibility of holding closed hearings[134], deleting names and other identifying information from the tribunals' public records, non-disclosure to the public of any records identifying the victim, giving of testimony through image or voice altering devices or closed-circuit television and using pseudonyms[135]. Rule 69 of the RPE of both tribunals provides that the Prosecutor (in the case of the ICTY), or either of the parties (in the case of the ICTR) may "in exceptional circumstances", apply to a Trial Chamber "to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk". This is subject to the caveat that the identity of the victim or witness must be disclosed, "in sufficient time "to allow adequate time for preparation" for the other party. Controversially, the ICTY has permitted the prosecution to call "anonymous witnesses", i.e. witnesses whose identities are not disclosed to the defence[136].

The RPE of both tribunals provided for the creation of a Victims and Witnesses Assistance Unit within the registry to support and protect victims and witnesses[137]. The unit advises on measures necessary to guarantee the safety of witnesses and can initiate applications for protective measures[138]. It has been tasked with developing short- and long-term plans for the protection of witnesses who have testified and who "fear a threat to their life, property or family". In addition, the unit provides support to victims and witnesses, in particular to victims of sexual violence, including physical and psychological rehabilitation, and practical assistance, for example, in making travel and accommodation arrangements. However, the units of both tribunals have been criticised regarding the lack of comprehensive witness protection programmes.

Practical problems include the lack of any definition of "witnesses" and when such a person qualifies for protection from the unit, and the fact that contact is mainly with the registry, whereas the relationship of victims and witnesses with the tribunal prior to trial is mainly through the prosecution[139].

The Victims and Witnesses Unit of the ICTY has provided personal escorts to accompany witnesses from their homes to The Hague and back. It has established a witness relocation programme for cases where giving evidence endangers the safety of victims after the trial has concluded. However, the section has had insufficient funding and is understaffed[140].

The ICTR has been severely criticised for not fully implementing provisions on victims' protection. Victims have reported being threatened and harassed. Several potential witnesses were assassinated. Victims also reported that no measures had been taken after the proceedings, once they went back to Rwanda. As a result, two major victims' associations, Ibuka and Avega, decided to boycott the ICTR and called upon victims they supported to do likewise At the same time, the Rwandese authorities, following a political disagreement with the ICTR, tightened regulations on victims and witnesses leaving the country in order to testify at the tribunal's seat in Arusha. This caused several trials to be postponed because witnesses were not available.

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134. Rule 79, ICTY and ICTR RPE.
135. Rule 75, ICTY and ICTR RPE.
136. See further Chapter VI, *Protection, Support and Assistance.*
137. Rule 34, ICTY RPE.
138. Rules 34, 69 and 75, ICTY and ICTR Rules of Procedure and Evidence.
139. Henham, R. J., *Punishment and Process in International Criminal Trials* (Ashgate Publishing Ltd., 2005), at 72.
140. Wald P. M., "Note from the Field, Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal", *Yale Human Rights and Development Law Journal*, vol.5, 2002, 217-239, at 221.

Reparation

The provisions of both tribunals relating to reparations are inadequate to ensure the effective implementation of victims' right to reparation[141]. The Security Council resolutions establishing the tribunals stated that they were created for the "sole purpose" of prosecuting those responsible for violations. The resolution establishing the ICTY refers to reparations in its preamble, but only to the extent that "the work of the International Tribunal shall 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"[142]. The resolution establishing the ICTR contains no reference at all to reparations for victims. The Statutes and RPE of both tribunals give little guidance on reparation.

The tribunals can make orders for the restitution of property. Under Articles 24 (3) of the Statute of the ICTY and 23 (3) of the Statute of the ICTR, the tribunals are authorized to make orders for the return of "any property and proceeds acquired by criminal conduct . . . to their rightful owners". This power may be exercised by the trial chamber, at the request of prosecutor or on its own initiative, following a judgment of conviction containing a specific finding of 'unlawful taking of property'. The chamber is required, at the request of the prosecutor, or can decide on its own motion, to hold a special hearing on the question of restitution[143]. Provision is made for third parties to be summoned before the trial chamber in order to justify their claim to the property or proceeds, but victims do not have any right to intervene in the proceedings to argue their case or to challenge submissions made by the parties.

There are no provisions concerning awards for compensation or other forms of reparations for physical or emotional injury before the tribunals. In order to obtain these forms of reparation, victims have to make claims before national courts. Rule 106 of both tribunals provides that the Registrar "shall transmit to the relevant national authorities" the judgment finding the accused guilty of a crime that has caused injury to a victim. The victim will not have to prove the criminal responsibility of the defendant, or that the crime caused the victim's injury, before the national court, since the national court is bound by the judgment of the tribunal: "the judgment of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury"[144]. However, this procedure for obtaining reparation poses numerous problems. The national justice systems in the former Yugoslavia and in Rwanda, following years of conflict, were not in a position to implement this procedure effectively. In fact, the procedure has never been exercised before national courts.

In 2000, responding to proposals by the Prosecutors, the ICTY commissioned a working group to study the issue of providing compensation to victims. In September 2000, the working group submitted a report to the UN Secretary General and the Security Council[145]. In respect of the regime set out in the RPE, the judges of the ICTY concluded that it appeared "unlikely to produce substantial results in the near future"[146].

The report stresses the right of victims to reparation under international law and makes recommendations for the amendment of the Statute and the RPE to allow for financial compensation to be granted to victims, concluding that the fairest and most appropriate means would be through the establishment of international claims commissions or trust funds. However, these recommendations have never been implemented.

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141. See Bassiouni, C., *Reconnaissance internationale des droits des victimes*, Terrorisme, victimes et responsabilite penale internationale / SOS Attentats (Calmann-Levy, 2003), 134-185, at 176.
142. Resolution 827, UN Security Council.
143. Rule 105 ICTY and ICTR RPE.
144. Rule 106 (C) ICTY and ICTR RPE.
145. Letter from the Secretary-General addressed to the President of the Security Council (2 November 2000) UN Doc. S/2001/1063; Letter from the Secretary General addressed to the President of the Security Council (14 December 2000) UN Doc S/2000/1198.
146. ICTY Judges' Report of 13 September 2000 on Victims Compensation and Participation.

3. The Internationalised Criminal Courts

Internationalised criminal courts, also called hybrid or mixed tribunals, emerged at the end of the 1990s. They are sometimes referred to as the "third generation" of international criminal jurisdictions (the Nuremberg and Tokyo Tribunals being the first, the ad hoc tribunals being the second). Examples of such bodies include the Special Court of Sierra Leone, the Extraordinary Chambers in Cambodia, the Special Panels for East Timor, and the Internationalised Panels in Kosovo[147].

Like the ICTY and the ICTR, these are ad hoc institutions, created to address particular situations, for a limited amount of time. However, unlike those tribunals, internationalised criminal courts have both international and national components. They are composed of international and local staff, including judges, and prosecutors, and apply a combination of international and national law. They are located in the countries in which the crimes were committed.

3.1. 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)[148], 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 Evidence[149] were adapted from those of the ICTY and 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[150].

Despite the fact that the SCSL was established after the adoption of the Rome Statute of the International Criminal Court (ICC), the SCSL did not incorporate the provisions on victims' rights to participate in proceedings and to claim and receive reparations. As with ICTY and 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[151].

In terms of the protection of victims and witnesses the SCSL Statute 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"*[152].

The RPE provide 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"[153].

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147. See generally, Romano, C. P. R., Nollkaemper, A., Kleffner, J. K., *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press, 2004), LVIII and Ascensio H., Lambert-Abdelgawad E. et Sorel J.M. (eds.), *Les juridictions pénales internationalisées* (Cambodge, Kosovo, Sierre Léone, TimorLeste), Société de la Législation comparée, UMR de droit comparé et CERDIN, Coll. De l'UMR de droit comparé (vol.11), 2006.
148. 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.
149. Rules of Procedure and Evidence, Adopted on 16 January 2002, as amended on13 May 2006, available at www.sc-sl.org/Rulesofprocedureandevidence.pdf.
150. 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, 56p. available at www.ictj.org/static/Prosecutions/Sierra.study.pdf.
151. Rule 105, SCSL RPE.
152. Article 17(2), SCSL Statute.
153. Rule 34, SCSL RPE.

Article 16 (4) of the SCSL Statute, inspired by Article 46 (3) of the Rome Statute of the ICC, requires the Registrar to set up 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 tasked with 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.

The trial of Charles Taylor, former president of Liberia

On 29 March 2006, Charles Taylor, the former president of Liberia, was finally arrested and transferred to the SCSL. An indictment had been issued against him in March 2003 containing charges of war crimes and crimes against humanity. The president of the SCSL made a request for Charles Taylor to be transferred to the premises of the International Criminal Court, so that he could be tried before a trial chamber of the SCSL, sitting in The Hague. This request was based on a concern for security in the region[154]. The Security Council agreed to the transfer in resolution 1688 (2006)[155]. However, the original justification for establishing the SCSL in Freetown, Sierra Leone, had been so that the tribunal would be more accessible for victims and witnesses and have a greater deterrent effect. Indeed, through its trials and outreach activities, the SCSL has managed to effectively involve the population. During proceedings in the Charles Taylor case, the SCSL will need to pay particular attention to the issue of access of victims and witnesses to the court and ensure that it is effective.

3.2. The Extraordinary Chambers in the Courts of Cambodia

The Extraordinary Chambers of Cambodia are national courts, which will operate with international participation. They were established by domestic law, the Law on the Establishment of the Extraordinary Chambers 2001[156]. An agreement between the UN and the Cambodian government[157] (Extraordinary Chambers Agreement), which was finally concluded following years of negotiation in June 2003, sets out the conditions for international participation in the chambers. The Extraordinary Chambers Agreement was implemented into national law through amendments to the Law on the Establishment of the Extraordinary Chambers in 2004 (Extraordinary Chambers Law)[158].

The Extraordinary Chambers were established to prosecute senior leaders of the Khmer Rouge and those bearing greatest responsibility for crimes committed under the regime in Democratic Kampuchea between 17 April 1975 and 6 January 1979. The Extraordinary Chambers Agreement came into force in April 2005, and the judges were inaugurated in July 2006[159].

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154. SCSL, press release 30 March 2006, Special Court President Requests Charles Taylor be Tried in The Hague, available at www.sc-sl.org/Press/pressrelease-033006.pdf.
155. Security Council, Resolution 1688, 16 June 2006 available at www.un.org/News/Press/docs/2006/sc8755.doc.htm.
156. *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*,10 August 2001, available at www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20promulgated%20(Eng%20trans%206%20Sept%202001).pdf.
157. Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea, 6 June 2003, available at http://daccessdds.un.org/doc/UNDOC/GEN/N02/554/25/PDF/N0255425.pdf?OpenElement.
158. Law Approving the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 19 October 2004, available at www.cambodia.gov.kh/krt/pdfs/Kram%20promulgating%20Agreement%2019%20October%202004-En.pdf.
159. For general information and resources, see réseau internet pour le droit international at www.ridi.org/boyle/infoeecstruct.htm (English and French); www.justicepourlecambodge.com; Victims' Rights Working Group Bulletin No. 5 (2006); and Boyle, D., «The Rights of Victims, Participation, Representation, Protection, Reparation», Symposium on Khmer Rouge trials, *Journal of International Criminal Justice* (2006), at 307-313.

Unlike the Special Court for Sierra Leone, the Extraordinary Chambers (ECCC) form part of the national court structure and operate under Cambodian rather than United Nations administration.

As regards victims' rights, apart from several irregular references[160], the Extraordinary Chambers Agreement of 2003 simply provides that "[t]he procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant Rule of Cambodian law, or where there is a question regarding the consistency of such a Rule with international standards, guidance may also be sought in procedural Rules established at the international level" [161].

The draft Regulations of the ECCC provide for participation, protection and reparations for victims before the Chambers. However, at the time of writing, the interaction of the Regulations with provisions of national law is unclear.

All sources of Cambodian criminal procedure[162] give victims a range of rights, allowing them to participate in criminal proceedings either as witnesses, complainants or as *parties civiles*[163]. Under the current legislation on criminal procedure of 8 February 1993, victims can make complaints to police or judicial authorities, but they cannot force an investigation. Whether or not to investigate and prosecute remains at the discretion of the investigating judge or prosecutor. However, victims have the possibility of intervening as *parties civiles* once proceedings have been initiated by the prosecutor and continue to enjoy this right until the moment a final judgement is delivered[164]. *Parties civiles* have access to the case file containing the evidence in the case. These provisions currently constitute the "applicable law" before the Extraordinary Chambers[165].

These rights of victims to participate in proceedings are supplemented and clarified in the draft Cambodian Code of Criminal Procedure currently before the Council of Ministers[166], which will constitute the "applicable law" before the Extraordinary Chambers, if it comes into force in time. In addition to the current provisions enabling victims to participate in proceedings, this legislation will allow victims to initiate proceedings as *parties civiles*[167]. Victims can thereby force an investigation when the prosecutor has not initiated proceedings. These provisions represent significant progress with respect to the implementation of victims' rights of access to justice[168].
It is clear from the provisions of the Extraordinary Chambers Agreement of 2003 that the above outlined provisions relating to victims' participation are to be applied before the Extraordinary Chambers. This

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160. 2003 Agreement: Articles 23 and 24; and 2004 Law: Articles 24, 33, and 36.
161. 2003 Agreement, Article 12(1).
162. The main, although not exhaustive sources are the Supreme National Council, *Provisions Dated September 10, 1992 Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period*; available at: <http://www.bigpond.com.kh/ council_of_jurists/> (SNC Code), and the Law dated 8 February 1993 on Criminal Procedure, adopted by the State of Cambodia (1993 Law on Criminal Procedure).
163. See Bonnieu, M., *Guide to Cambodian Criminal Law*, FUNAN, 2005, at 23; Stuart COGHILL, *Resource Guide to the Criminal Law of Cambodia*, International Human Rights Law Group and Cambodian Defenders Project, 2000, Chapter 2, para. 2.06; Chapter 3.
164. Article 131.
165. See generally FIDH *Report, Articulation between the International Criminal Court and the Khmer Rouge Tribunal: The Place of Victims*, Phnom Penh, 2-3 March 2005, published June 2005, available on the FIDH website at: www.fidh.org/article.php3?id_article=2642.
166. *Projet de code de procédure pénale*, Mission d'assistance technique française, draft dated 25 February 2005; the texts in this proposition are based on the most recent French draft of the Code; however, references are also included to the unofficial English Embassy translation of an earlier draft of the Code for information.
167. Article L. 121-3.
168. FIDH Report, *Implementation of the Rome Statute in Cambodian Law*, March 2006, n°443/2, available on FIDH website at: www.fidh.org/article.php3?id_article=3317.

approach is also in accordance with the Extraordinary Chambers Law, which (unusually) grants victims the right to appeal decisions of the trial chamber:

> *"The Extraordinary Chamber of the appeals court shall decide the appeals from the accused persons, the victims, or by the Co-Prosecutors . . .*[169]*"*

Most criminal law systems, even those which permit extensive victim participation in proceedings, do not recognise a right to appeal for victims[170]. It has been pointed out that it is difficult to understand how victims could appeal a decision if they were not parties to proceedings[171].

In respect of victim protection, the Extraordinary Chambers Agreement provides: "The co-investigating judges, the co-prosecutors and the Extraordinary Chambers shall provide for the protection of victims and witnesses." Protection measures include in camera proceedings and concealing the identity of victims and witnesses[172]. This provision of the Agreement is incorporated in the Extraordinary Chambers Law:

> *"The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses"*[173].

However, neither the Agreement, nor the Law set out detailed measures for protection: for example, no provision is made for long or short term protection programmes to deal with security outside the courtroom, or for counselling programmes[174].

The Extraordinary Chambers Law does not make provision for ordering reparations for victims. Under Cambodian criminal procedure, it is possible for victims who are *parties civiles* to claim reparations as part of criminal proceedings. It is also possible for victims to initiate parallel civil proceedings. These provisions should be applied as constituting "the applicable law" in accordance with Article 12 (1) of the Agreement.

The Extraordinary Chambers Law provides that unlawfully obtained property should be returned to the state[175]. It is hoped that these funds will be used by the Cambodian government to provide reparations to victims, perhaps in the form of symbolic reparation such as constructing monuments in memory of victims.

3.3. The Special Panels of East Timor (Timor Leste)

In 2000, soon after taking over the administration of East Timor, the United Nations Transitional Administration in East Timor (UNTAET) set up an internationalized tribunal, to try those responsible for crimes committed in East Timor before and after the referendum on independence in September 1999[76].

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169. 2004 Law, Article 36.
170. Meijer, E. E., "The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal", in Romano, C. P. R., Nollkaemper, A., Kleffner, J. K., *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press, 2004), LVIII, at 201- 232.
171. David Boyle, "The Rights of Victims: Participation, Representation, Protection, Reparation", *Journal of International Criminal Justice*, Vol. 4, No. 2, 2006.
172. 2003 Agreement, Article 23.
173. 2003 Agreement, Article 33.
174. Generally on the protection of victims see Collective for the Victims of the Khmer Rouge, *Proposals relating to the rights of victims on the Khmer Rouge before the Cambodian Extraordinary Chambers*, Paris, April 2006, at 19-22.
175. 2004 Law, Article 38.
176. UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor (6 March 2000); and UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (6 June 2000).

The Special Panels are part of the District Court of Dili, forming part of the national court structure. They have jurisdiction to try crimes under international law and certain provisions of national law. The prosecution service is composed almost exclusively of international lawyers and the investigation unit is staffed entirely by international investigators. Each panel is composed of one national and two international judges[177].

The Statute and Rules of the Special Panels were heavily inspired by the Statute of the International Criminal Court. There are provisions concerning both the participation and protection of victims. The Transitional Rules of Criminal Procedure provide that measures must be taken to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, taking into account factors such as age, gender, health, and the nature of the crime[178]. In terms of participation, victims are entitled to request the prosecutor to conduct specific investigations and to be heard in proceedings[179]. Victims can also submit requests for a review of a decision of the prosecutor to dismiss a case[180]. In practice, however, many of these measures are not adequately implemented. For example, no protection or counselling programmes have been put in place for victims or witnesses.

With respect to reparations, a Trust Fund is to be established for the benefit of victims of crimes within the jurisdiction of the panels and for their families, funded by forfeiture collected from convicted persons[181], but this is yet to come into existence.

3.4. The Internationalised Panels in Kosovo

On 10 June 1999, one day after the end of the NATO bombing campaign in Kosovo, the United Nations Security Council adopted Resolution 1244 (1999), which established the United Nations Mission in Kosovo (UNMIK) and set up a UN administration for Kosovo[182]. The Special Representative of the UN Secretary General (SRSG), head of the UN administration for Kosovo, holds all legislative, executive and judicial authority in Kosovo[183].

Under its mandate to maintain peace and security, UNMIK created a Technical Advisory Commission on Judiciary and Prosecution Service[184] that recommended the establishment of a new ad hoc tribunal to hear cases involving breaches of international humanitarian law or ethnically related crimes sitting in Kosovo, largely modelled on the ICTY, called Kosovo War and Ethnic Crimes Court (KWECC)[185]. But the idea of establishing the KWECC was finally abandoned in September 2000, and in December 2000 UNMIK decided to adopt a hybrid approach within Kosovo's criminal justice system[186].

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177. For a general presentation of the Special Panels, see *The serious crimes process in Timor Leste: in Retrospect*, ICTJ, March 2006, available at www.ictj.org/static/Prosecutions/Timor.study.pdf.
178. UNTAET Regulation No. 2001/25, (14 September 2001), s. 36 (8).
179. Ibid, s. 12.
180. Ibid, s. 25.
181. UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, (6 June 2000), s. 25.
182. *Lessons from the deployment of International judges and Prosecutors in Kosovo*, ICTJ, March 2006, available at www.ictj.org/static/Prosecutions/Kosovo.study.pdf.
183. UNMIK, Regulation n° 1999/1, On the authority of the interim administration in Kosovo, 25 July 1999, available at www.unmikonline.org/Regulations/1999/re99_01.pdf.
184. UNMIK, Regulation n°1999/6, On recommendations for the structure and registration of the judiciary and prosecution service, 7 September 1999, available at www.unmikonline.org/Regulations/1999/re99_06.pdf.
185. The idea was that both ICTY and KWECC would have concurrent jurisdiction, but that the ICTY would have primacy; see UNMIK, "Kosovo: Reconstruction 2000," April 2000, available at www.seerecon.org/kosovo/documents/reconstruction2000/index.html and UNMIK, Press Release, "Tense Atmosphere at Joint Meeting of IAC and KTC: Hague Tribunal and War Crimes Court to Work Together," June 3, 2000, available at www.unmikonline.org/press/mon/lmm030600.html.
186. Bassiouni (C.), *Introduction to International Criminal Law*, New York Transnational publishers, 2003, at 557.

United Nations Regulation 2000/6[187] allowed the SRSG to appoint an international judge and an international prosecutor to work within the existing national judicial system. At the end of 2000, the United Nations decided to go further[188], allowing the SRSG to appoint Special Panels of three judges composed of two international judges and one national judge.

No clear criteria were established to determine the jurisdiction of the Special Panels. Any party to a prosecution at any stage in the proceedings can make a request to the Department of Justice, for example for the appointment of international prosecutors or the assignment of a case to a special panel. The SRSG, after recommendation by the Department of Justice, adopts a final decision on the assignment of an international prosecutor or a special panel, where necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.

The Provisional Criminal Procedure Code for Kosovo[189] sets out the rights of victims during all stages of the criminal proceedings, including the right to call attention to facts and introduce evidence which has a bearing on establishing the criminal offence, or on finding the perpetrator of the offence[190]. Under the same provision, victims also have the right to file claims for damages in criminal proceedings and can therefore introduce evidence to establish the claim. During trial proceedings, victims are entitled to introduce evidence, put questions to the defendant, witnesses and expert witnesses, to make submissions and to present clarifications concerning their testimony. Victims can also inspect the record of proceedings and items of evidence. Furthermore, the competent authority conducting the criminal proceedings must at all stages of the proceedings consider the reasonable needs of the injured parties, especially of children, elderly persons, persons with a mental disorder or disability, physically ill persons and victims of sexual or gender related violence[191].

The protection of victims and witnesses was also one of the priorities of UNMIK and considerable resources were devoted to this task. The Court can order, for example, that the identity of a witness remains undisclosed to the defence. The anonymous witness provision is also available to defence witnesses[192]. Ensuring the protection of witnesses and victims remains a significant challenge: intimidation and attacks are frequent[193] and in many cases the UNMIK has had to find homes and new identities for witnesses outside of Kosovo.

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187. UNMIK, Regulation n° 2000/6, On the appointment and removal from office of international judges and international prosecutors, 15 February 2000, available at www.unmikonline.org/Regulations/2000/re2000_06.htm.
188. UNMIK Regulation 2000/64, On assignment of International judges/prosecutors and/or change of venue, 15 December 2000, available at www.unmikonline.org/Regulations/2000/re2000_64.htm.
189. UNMIK, Regulation 2003/26, 6 July 2003, available at www.unmikonline.org/Regulations/2003/RE2003_26_PCPC.pdf
190. Article 80, Provisional Criminal Procedure Code for Kosovo.
191. Article 78, Provisional Criminal Procedure Code for Kosovo.
192. UNMIK Regulation 2001/20, On the Protection of Injured Parties and Witnesses in Criminal Proceedings, 20 September 2001, amended by UNMIK Regulation. 2002/1, 24 January 2002, which extended the temporal applicability of Regulation 2001/20, and Administrative Direction 2002/25.
193. *Lessons from the deployment of International judges and Prosecutors in Kosovo*, ICTJ, March 2006, at 26.

4. The International Criminal Court

4.1. The road to Rome : establishing the International Criminal Court [194]

The establishment of the International Criminal Court (ICC) has a long history.

Efforts to create a global criminal court can be traced back to the late 19th century when, in 1872, Gustave Moynier (one of the founders of the International Committee of the Red Cross) proposed a permanent court in response to the crimes of the Franco-Prussian War. The League of Nations took up the task in 1937, adopting a convention for the creation of an international criminal court, but the convention never entered into force.

In 1948, following World War II and the establishment of the Nuremberg and Tokyo tribunals, the UN General Assembly passed a resolution, entrusting the International Law Commission (ILC) with the task of preparing a draft statute for a permanent international criminal tribunal with jurisdiction over genocide and other similar crimes[195]. In the same year the General Assembly adopted the UN Convention on the Prevention and Punishment of the Crime of Genocide providing for the creation of an international criminal tribunal.

However, these initiatives remained dead-letter, largely due to the tensions of the Cold War, and it was not before the early 1990s that the United Nations took up the issue again, this time successfully.

In 1994, the ILC presented a draft statute for the International Criminal Court and it was agreed that the General Assembly would call a conference to discuss its future. However, strong disagreements between states forced the General Assembly to postpone the conference to enable participants to solve the major problems arising from this first text. Accordingly, an Ad Hoc Committee was created to review the draft. However, no agreement was reached and in 1996 the General Assembly created a Preparatory Committee (Prep Com) to take over the negotiations.

Meanwhile, the United Nations Security Council had established the ad hoc tribunals: the International Criminal Tribunal for Former Yugoslavia (ICTY) in 1993[196] and the International Criminal Tribunal for Rwanda (ICTR) in 1994[197], pursuant to Chapter VII of the Charter of the United Nations.

In 1996, the United Nations General Assembly adopted a resolution determining that "the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court [. . .] would be held in Rome from 15 June to 17 July 1998, with a view to finalizing and adopting a convention on the establishment of such a court" [198]. The Prep Com met six times between 1996 and 1998. In April 1998, the Prep Com adopted a consolidated draft text of the Statute of the International Criminal Court. Despite numerous sessions and heated debates, many controversial issues remained to be solved.

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194. See Articles by Christopher Hall: Hall, C.K, "The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court", *American Journal of International Law*, Vol. 91, No. 1 (Jan., 1997), at 177-187; Hall, C.K, "The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court", *American Journal of International Law*, Vol. 92, No. 1 (Jan., 1998), at 124-133; Hall, C.K, "The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court", *American Journal of International Law*, Vol. 92, No. 2 (Apr., 1998), at 331-339; and Hall, C.K, "The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court", *American Journal of International Law*, Vol. 92, No. 3 (Jul., 1998), at 548-556
195. GA Res. 260B (III), UN Doc. A/760, at 12-13.
196. SC Res. 827, 25 May 1993.
197. SC Res. 955, 8 November 1994.
198. G.A. Res. 47/33, U.N. GAOR.

After a further month of negotiations, the Statute of the ICC was adopted in Rome on 17 July 1998. 120 states voted in favour, 7 against (although the list is anonymous, it is well known that those States were China, Iraq, Israel, Libya, Qatar, USA, Yemen) and 21 abstained from voting[199].

The ratification of the Statute of the ICC (Rome Statute) by 60 states was required for the Court to enter into force, which took less than four years. The Rome Statute finally came into force on 1 July 2002[200].

Like most international instruments, the Rome Statute is the product of difficult negotiations and compromises and is therefore less than perfect. However, the ICC presents an unprecedented opportunity for victims of crimes under international law to seek justice, to participate in proceedings and to obtain reparations.

The Path towards the International Criminal Court

- **1872:** Proposal for a permanent court in response to the crimes of the Franco-Prussian War;
- **1937:** Draft Convention for the creation of an International Criminal Court;
- **1948:** Experiences of the Nuremberg and Tokyo tribunals and first draft Statute for an International Criminal Tribunal. Adoption of the UN Convention on the Prevention and Punishment of the Crime of Genocide, providing for an international criminal tribunal;
- **1994-1996:** Draft Statute for the International Criminal Court prepared by the ILC and the Ad Hoc Committee of the UN GA;
- **1996-1998:** Negotiations within the Preparatory Committee;
- **17 July 1998:** Adoption of the Statute of the International Criminal Court at the conclusion of the Rome Conference;
- **1 July 2002: Entry into force of the Rome Statute.**

4.2. The International Criminal Court: a unique system of justice for victims

The strong commitment to victims' rights in the provisions of the Rome Statute and Rules of Procedure and Evidence of the ICC is the result of intense negotiations involving human rights organizations and delegations from very different legal systems[201]. Unlike the previous ad hoc international criminal tribunals which, based mainly on common law principles, did not provide for victim participation in proceedings other than as witnesses, the Rome Statute includes provisions inspired by civil law systems which provide for a much more prominent role for victims in the proceedings.

The procedure before the ICC is a unique combination of common law and civil law, a hybrid of the major national justice systems: "While elaborating the Statute, it was easy to agree in principle that a universal court could not be perceived as favouring one legal system over the other, and that it was therefore essential to find suitable compromises between the main criminal justice systems. This proved to be extremely difficult in practice, although eventually progress was made in reconciling legal traditions and creative compromises were achieved that do not strictly belong to any particular system"[202].

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199. See FIDH Press Release "The road doesn't stop at Rome", 7 December 1998, available at: www.fidh.org/article.php3?id_article=872.
200. See FIDH Press Release "Finally, the International Criminal Court!", 9 April 2002, available at www.fidh.org/article.php3?id_article=2125.
201. See generally, The REDRESS Trust, *Promoting the Right to Reparation for Survivors of Torture: What Role for the International Criminal Court*, June 1997; and *Justice for Victims at the ICC*, June 1998, available at www.redress.org, / Amnesty International, *Ensuring an effective role for victims*, July 1999, available at www.vrwg.org/Publications/02/AIRoleforVictimsJuly99.pdf.
202. Fernandez de Gurmendi, S.A., "Elaboration of the Rules of Procedure and Evidence", in Lee, R. (ed), *The International Criminal Court : Elements of Crimes and Rules of Procedure and Evidence* (2001), at 251.

Reaching a definition of "victims"

The Rome Statute does not contain a 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[203].

The UN Declaration on Justice for Victims[204] 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.

The Van Boven / Bassiouni Principles[205] also adopt the broad definition of victims contained in the UN Declaration on Justice for Victims.

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, drawing on the above mentioned UN instruments.

Rule 85 provides that:

(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.

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

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203. A/CONF.183/C.1/WGPM/L.2/Add.7, 13 July 1998, note 5, at 5.
204. General Assembly, 29 November 1985, Resolution 40/34, available at www.unhchr.ch/html/menu3/b/h_comp49.htm.
205. 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, adopted by the Commission on Human Rights, Resolution 2005/35, 19 April 2005; adopted by the General Assembly, Resolution 60/147 of 16 December 2005, available at www.ohchr.org/english/law/remedy.htm, Principle 8.

'indirect victims' [206]. In addition, victims "may" include certain **organisations** or **institutions** which have suffered 'direct harm' to property.

This definition is connected to the broad role envisaged for victims under the Rome Statute. Those who are considered victims under Rule 85 can be permitted to participate in court proceedings and can seek reparations[207].

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[208].

206. See the Decision of the Pre-Trial Chamber I on 22 June 2006 providing that *"la Chambre considère que le lien de causalité exigé par la règle 85 du Réglement au stade de l'affaire est démontré dès lors que la victime, ainsi que, le cas échéant, la famille proche ou les personnes à charge de cette victime directe, apportent suffisamment d'éléments permettant d'établir qu'elle a subi un préjudice directement lié aux crimes contenus dans le mandat d'arrêt ou qu'elle a subi un préjudice en intervenant pour venir en aide aux victimes directes de l'affaire ou pour empêcher que ces dernières ne deviennent victimes à raison de la commission de ces crimes"*; and see further Chapter IV, *Participation*.
207. See further Chapter IV, *Participation* and Chapter VII, *Reparations and the Trust Fund for Victims*.
208. See generally Victims' Rights Working Group: www.vrwg.org/. The Victims' Rights Working Group, established in 1997, is a group of organizations, including FIDH, that 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.* See also, for example, FIDH, *Garantir l'effectivité des droits des victimes*, October 2004, www.vrwg.org/Publications/02/fidhasp.pdf.

ADDITIONAL DOCUMENTS

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

A. Victims of crime

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, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is 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.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Access to justice and fair treatment

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(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 such information;

(b) 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;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Restitution

8. 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.

9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of 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 a community.

11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution 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 occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. 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.

Assistance

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

B. Victims of abuse of power

18. "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 do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

19. States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

20. States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18.

21. States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.

United Nations A/RES/60/147

General Assembly

Distr.: General
21 March 2006

Sixtieth session
Agenda item 71 (*a*)

Resolution adopted by the General Assembly

[*on the report of the Third Committee (A/60/509/Add.1)*]

60/147. 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,

Guided by the Charter of the United Nations, the Universal Declaration of Human Rights,[1] the International Covenants on Human Rights,[2] other relevant human rights instruments and the Vienna Declaration and Programme of Action,[3]

Affirming the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels,

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 international law in the field,

Recalling the adoption of 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 International Humanitarian Law by the Commission on Human Rights in its resolution 2005/35 of 19 April 2005[4] and by the Economic and Social Council in its resolution 2005/30 of 25 July 2005, in which the Council recommended to the General Assembly that it adopt the Basic Principles and Guidelines,

1. *Adopts* 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 International Humanitarian Law annexed to the present resolution;

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[1] Resolution 217 A (III).

[2] Resolution 2200 A (XXI), annex.

[3] A/CONF.157/24 (Part I), chap. III.

[4] See *Official Records of the Economic and Social Council, 2005, Supplement No. 3* and corrigendum (E/2005/23 and Corr.1), chap. II, sect. A.

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2. *Recommends* that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials 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;

3. *Requests* the Secretary-General to take steps to ensure the widest possible dissemination of the Basic Principles and Guidelines in all the official languages of the United Nations, including by transmitting them to Governments and intergovernmental and non-governmental organizations and by including the Basic Principles and Guidelines in the United Nations publication entitled *Human Rights: A Compilation of International Instruments*.

64th plenary meeting
16 December 2005

Annex

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

Preamble

The General Assembly,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights,[1] article 2 of the International Covenant on Civil and Political Rights,[2] article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination,[5] article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[6] and article 39 of the Convention on the Rights of the Child,[7] and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV),[8] article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977,[9] and articles 68 and 75 of the Rome Statute of the International Criminal Court,[10]

[5] Resolution 2106 A (XX), annex.

[6] United Nations, *Treaty Series*, vol. 1465, No. 24841.

[7] Ibid., vol. 1577, No. 27531.

[8] See Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915).

[9] United Nations, *Treaty Series*, vol. 1125, No. 17512.

[10] *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998*, vol. I: *Final documents* (United Nations publication, Sales No. E.02.I.5), sect. A.

Recalling the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular article 7 of the African Charter on Human and Peoples' Rights,[11] article 25 of the American Convention on Human Rights,[12] and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[13]

Recalling the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and General Assembly resolution 40/34 of 29 November 1985 by which the Assembly adopted the text recommended by the Congress,

Reaffirming the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims,

Noting that the Rome Statute of the International Criminal Court requires the establishment of "principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation", requires the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, and mandates the Court "to protect the safety, physical and psychological well-being, dignity and privacy of victims" and to permit the participation of victims at all "stages of the proceedings determined to be appropriate by the Court",

Affirming that the Basic Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity,

Emphasizing that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms,

Recalling that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity,

[11] United Nations, *Treaty Series*, vol. 1520, No. 26363.
[12] Ibid., vol. 1144, No. 17955.
[13] Ibid., vol. 213, No. 2889.

Noting that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively,

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 the international legal principles of accountability, justice and the rule of law,

Convinced that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines,

Adopts the following Basic Principles and Guidelines:

I. Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law

1. 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.

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

(*a*) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;

(*b*) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

(*c*) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;

(*d*) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.

II. Scope of the obligation

3. 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*) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

(*d*) Provide effective remedies to victims, including reparation, as described below.

III. Gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law

4. 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, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should 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 to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

IV. Statutes of limitations

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

V. Victims of gross violations of international human rights law and serious violations of international humanitarian law

8. For purposes of the present document, 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.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

VI. Treatment of victims

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate 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 to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. Victims' right to remedies

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

(*a*) Equal and effective access to justice;

(*b*) Adequate, effective and prompt reparation for harm suffered;

(*c*) Access to relevant information concerning violations and reparation mechanisms.

VIII. Access to justice

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

(*a*) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;

(*b*) 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;

(*c*) Provide proper assistance to victims seeking access to justice;

(*d*) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

IX. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. 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. 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 reparation to the victim.

16. 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.

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. 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.

20. *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 gross violations of international human rights law and serious violations of international 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;

(*e*) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. *Rehabilitation* should include medical and psychological care as well as legal and social services.

22. *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.

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 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.

X. Access to relevant information concerning violations and reparation mechanisms

24. States should develop means of informing the general public and, in particular, 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. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

XI. Non-discrimination

25. 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.

XII. Non-derogation

26. 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. In particular, it is understood that the present Basic Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Basic Principles and Guidelines are without prejudice to special rules of international law.

XIII. Rights of others

27. Nothing in this document is to 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.