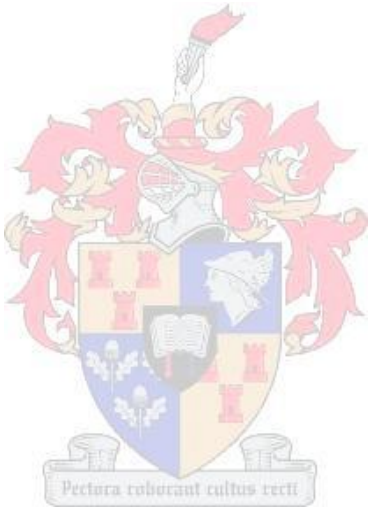
STATE COOPERATION WITHIN THE CONTEXT OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CRITICAL REFLECTION



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away from the Court are not sufficiently addressed. The practice of the two *ad hoc* Tribunals on how to deal with the complexities of cooperation – often in difficult political environments is useful.[161] Nevertheless, the Rome Statute does not support the evaluation of these issues to national courts, but rather to interpretation by the Court judges.

3.3 THE RIGHTS OF VICTIMS OF INTERNATIONAL CRIMES

The Rome Statute has codified the rights of victims of international crimes for the first time in the history of international law. Victims of the core crimes are entitled to the right to participate in legal proceedings before the Court as well as the right to receive reparations. It may be important to first assess how this right of victims of international crimes arose under international law and how the right has developed over the years to the right to participate in legal proceedings and to reparations at the Court.

3.3.1 The right to participate in legal proceedings

The participation of victims of crimes within the jurisdiction of the Court in legal proceedings is said to be one of the major achievements of modern day international

[161] For more on the complexities of co-operation between international criminal tribunals and states, see Peskin V, *International Justice in Rwanda and the Balkans – Virtual Trials and the Struggle for State Cooperation* (2008) Cambridge. See further Decision on assigned counsel application for interview and testimony of Tony Blair and Gerhard Schröder, *Prosecutor v. Milosevic*, Case No. IT-02-54, 9 December 2005 and the earlier decision in Decision on Application for Subpoenas, *Prosecutor v. Krstić*, Case No. IT-98-33-A, 1 July 2003.

criminal justice.[162] This status to express "views and concerns" through legal representation had never before been accorded to victims at an international criminal tribunal. The shift in the Rome Statue from provisions purely retributive in nature to incorporating restorative aspects of justice through the inclusion of this right of victims to participate in the proceedings was in response to criticisms of the *ad hoc* Tribunals where there was no provision in the ICTR and ICTY Statutes expressly addressing victims.[163] In incorporating this right to participate in legal proceedings, the drafters of the Rome Statute were cognizant of this new role that victims would play in dispensing international criminal justice and particularly that the right to participate in legal proceedings may give a measure of satisfaction to those who have suffered harm.[164]

The general principle that victims have a right to participate in proceedings is captured in Article 68 (3) of the Rome Statute. Earlier provisions of the Rome Statute also specify proceedings in which victims' views must be sought.[165] Article 68 (3) provides that:

> "Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which

[162] Chung "Victims' Participation at the International Criminal Court: Are concessions of the Court clouding the promise" 2008 6 *Northwestern University Journal of Human Rights* 159-227, 159.
[163] Jorda C & de Hemptinne J, *The Status and Role of the Victim, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 1387, 1388 (Antonio Cassese et al. eds., 2002) (stating that the Rome Statute "appears to mark a new step forward ... victims are accorded the double status denied to them by the provisions setting up the *ad hoc* Tribunals. First they are able to take part in the criminal process.... Secondly, they are entitled to seek form the Court reparations ....").
[164] *See* Silvia A. Fernández de Gurmendi, *Definition of Victims and General Principle, in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 427, 429 (Roy S. Lee ed., 2001)
[165] Under Article 15 Rome Statute, *supra* note 1, victims may be heard when the Prosecutor commences investigations *proprio motu*; under Article 19 Rome Statute *supra* note 1, victims may be heard when questions relating to jurisdiction or admissibility are raised; and under Article 53 Rome Statute, *supra* note 1, as read with Rule 92(2) RPE victims may be heard when the Prosecutor determines not to investigate or prosecute based on the interests of justice.

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

Victims can present these views and concerns through their legal representatives and in accordance with the Court's Rules of Procedure and Evidence (RPE). In particular, victims have an absolute right to attend trial proceedings,[166] a discretionary right to participate in the questioning of witnesses,[167] the right to participate in pre-trial procedure such as investigations[168], the right to be heard on matters relating to decisions on reparations[169] and to intervene in appeals concerning reparation orders.[170] Article 68(3) also curtails victims' right to participate where they would infringe on the rights of the accused. In this sense, there is a balancing of interests among the parties in the proceedings. Lee observes that 'victims do not have the right to become a genuine party to the proceedings, but they do have the right to be represented before the ICC.'[171]

3.3.1.1 Victims' participation in the phases of proceedings

At the outset, victims of crimes within the jurisdiction of the Court can only participate in proceedings once the Court's jurisdiction has been seized in accordance with Article 12. Participation of these victims in Court proceedings is not automatic.

[166] Rule 91 (2) RPE
[167] Rule 91 (3) RPE
[168] Article 15 (3) Rome Statute, *supra* note 1.
[169] Article 75 (3) Rome Statute, *supra* note 1.
[170] Article 82(4) Rome Statute, *supra* note 1.
[171] Lee 'XI' in The International Criminal Court: Elements Of Crimes And Rules Of Procedure And Evidence.

Victims who fall under a situation that is before the Court must fulfil certain requirements to participate on Court proceedings. Rule 89 of the RPE suggests that each individual victim must prepare an application to the relevant Chamber for determination of victim status. The interpretation by the judges at the ICC of this right to participate in legal proceedings has however drawn much attention and it is meritorious to reflect on the various interpretations of the right to participate in legal proceedings.

3.3.1.2 Participation at the investigative stage of proceedings

Aldana-Pindell points that 'the Rome Statute and ICC RPE do not grant victims complete autonomy to make decisions regarding either the initiation of criminal investigation or how the investigation should proceed before trial.'[172] Investigative powers lie squarely on the Prosecutor in accordance with Article 42 of the Rome Statute. What then is the role of victims at the investigative stage of proceedings at the Court? The first decision on this right to participate was issued in January 2006 by the Pre-Trial Chamber in the investigation of crimes in the situation in the DRC and effectively the first interpretation of Article 68 (3) of the Rome Statute.[173] The Pre-Trial Chamber, while recognizing that the general right to participate in the investigation stage of proceedings was not expressly granted by the Rome Statute, nevertheless granted victims the right to participate in the investigative stage of the proceedings. The Chamber found that this participation of victims was "consistent

[172] See Aldana-Pindell, 'In vindication of justiciable victims' right to truth and justice for state-sponsored crimes' 35*Vanderbilt Journal of Transnational Law* 1399-1501, 1429.
[173] Situation in the DRC, Situation No. ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, Public Redacted Version, para. 63 (Pre-Trial Chamber I, Jan. 17, 2006) [hereinafter 17 January 2006 DRC Decision].

with the object and purpose of the victims participation regime established by the drafters of the Statue."[174] Article 68(3) therefore imposes an obligation on the Court *vis-à-vis* persons recognised as victims in terms of which they are authorised, irrespective of 'any specific proceedings being conducted in the framework of such an investigation, to be heard by the Chamber in order to present their views and concerns and to file documents pertaining… [to an] investigation of … [a] situation'.[175] Article 68(3) entails both substantive and procedural elements of the right to participation in that it affords individuals standing to claim their status as victims and to assert their recognised rights.

At the investigative stage, victims known to the Office of the Prosecutor and the Registry may express their views and concerns where a Pre-Trial Chamber adopts measures in relation to the protection of persons and evidence. This includes the protection and privacy of witnesses and victims; preservation of evidence; protection of arrested persons[176] or those who have appeared in response to summons; and the protection of national security information.[177] Equally, a unique investigative opportunity may arise, which requires immediate security of evidence, thus necessitating adoption of measures considered essential for the defence trial. Victims may also express their views and concerns during such unique investigative opportunity. Victims, through their legal representatives also participate in the pre-trial phase of the confirmation of charges proceedings.

[174] 17 January 2006 DRC Decision, *supra* note 173, para. 50
[175] 17 January 2006 DRC Decision, *supra* note 173, para 200-237
[176] Victim representation in the situation in Libya is on-going at the Court although the suspects *Saif Al-Islam* and *Mohammed Al-Senussi* are under arrest in Libyan government custody.
[177] Articles 57(3) (c) and Article 54(3) (f) Rome Statute, *supra* note 1, in relation to the duties of the Prosecutor.

Victims in a number of cases before the Court have expressed their views and concerns about the charges that have been brought against suspects who have been arrested or summoned to appear before the Court.[178] The concluded confirmation of charges hearings in the two Kenya cases *Prosecutor v. Muthaura, Kenyatta & Ali* and *Prosecutor v. Ruto, Kosgey & Sang* highlighted challenges in victim participation and legal representation at the Court. On several occasions, Victims' Legal Representatives lodged complaints about the lack of access to their clients owing to either security situation in Kenya or the lack of adequate funds from the Registry to effectively consult and confer with clients. In both cases, Victims' Legal Representatives were based outside of Kenya. As a result of these hiccups, the Trial Chamber seized with the matter has recently decided that the victims in the Kenya cases would be represented by local counsel who would interface with the Office for the Public Counsel for Victims. No doubt, effective participation at the pre-trial stage not only sets the tone for the trial stage but also is imperative for the effective exercise of victims' rights in the entire Court process.

Chung notes two major developments following the first decision to grant participatory rights to victims at the investigative stage of proceedings. First, due to the slow processing of hundreds of applications from victims in the situations under investigation by the Court, in the Darfur region of The Sudan; the DRC; northern Uganda; and the Central African Republic ("CAR"), there was growing evidence that the system of victims' participation established in the early decisions was failing the very victims it was meant to serve.[179]

[178] Victims were represented in the confirmation charges in the following cases: Kenya, DRC, CAR, Cote d'Ivoire, Darfur
[179] Chung, *supra* note 162, 160

Van den Wyngaert supports this critical failing and explains that the process of receiving individual applications from victims, in standard forms plus supporting evidence, which often have to be translated to one of the Court's official languages, is a long and cumbersome process.[180] These applications are also circulated to the different parties for their observations before a final determination is made by the judges - first to grant victim status and then to confer the right to participate in a proceeding. Moreover, an order issued by a Chamber granting a victim the right to participate in any one stage of the proceedings does not guarantee that they can participate in subsequent stages of the proceedings. Victims are compelled to submit further applications for assessment of the personal interest[181] at every stage of proceedings. Van den Wyngaert laments that this process may work in a national proceeding where the number of victims is not as voluminous as at the Court. The case-by-case approach adopted by the Court inevitably delays legal proceedings and may not be sustainable as the number of situations and cases increase.[182] This problem, in the practice of the Court, was discussed at the conference in Rome prior to the adoption of the Rome Statute. Some delegates at the Rome conference mostly having the adversarial model in mind had feared the 'crippling effect' of granting participatory rights to victims beyond their more traditional role as witnesses.[183]

Chung further notes that, two years after this first decision on victims' right to participate in legal proceedings was issued, the second development relates to the Pre-

[180] Van den Wyngaert "Victims Before International Criminal Courts: Some views and concerns of an ICC Trial Judge" 2011 44 *Case Western Reserve Journal of International Law* 475-493, 478

[181] In the 17 January 2006 DRC Decision, *supra* note 173, the Pre-Trial Chamber's view is that applications by victims will be on a case-by case basis to determine the impact of the victims' interests.

[182] Van den Wyngaert, *supra* note 180, 479-480

[183] Mekjian GJ & Varughese MC,'Hearing the Victims' Voice: Analysis of victims' advocate participation in the trial proceeding of the International Criminal Court' 2005 XVII 1 *Pace University School of Law Journal* 1-49, 19.

Trial Chamber's granting leave for an appeal to determine whether the various decisions of the Pre Trial Chambers had correctly interpreted the governing rules to permit them to grant a "procedural status of victim" or theoretical right to participate, during the investigative and pre-trial stages of the proceedings.[184] There was an urgent need to clarify how applications for participation in the investigative and pre-trial stages of proceedings are to be dealt with.

3.3.1.3 Participation at the Trial Stage of Proceedings

The trial stage is the most visible platform for victims participating in legal proceedings at the Court. In this stage, victims are not only represented as witnesses called by either the Prosecution or the Defence, but they are considered as a party to the trial proceedings represented by Counsel of their choice. Concern has been raised that the presence of victims as a party in the trial stage unduly prejudices the accused in that Counsel for Victims may take on the role of *Prosecutor bis*. Musila notes that

> The Prosecutor's and victims' interests do not always converge and that the Prosecutor may often be driven by the singular objective in the furtherance of her/his law enforcement function – establishing guilt as efficiently as possible,

[184] Chung, *supra* note 162, 161; *See* Situation in Darfur, Sudan, Situation No. ICC-02/05-118, Decision on Request for Leave to Appeal the "Decision on the Requests of the OPCV on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor," Public, 7-8 (Pre-Trial Chamber I, Jan. 23, 2008) [hereinafter First Darfur Grant of Appeal]; Situation in the Democratic Republic of the Congo, Situation No. ICC-01/04-438, Decision on Request for Leave to Appeal the "Decision on the Requests of the OPCV on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor," Public, 7-8 (Pre-Trial Chamber I, Jan. 23, 2008) [hereinafter First DRC Grant of Appeal].

> a fact that may lead to ignoring issues central to victims' claims and concerns.[185]

If the first trial at the Court in the case *Prosecutor v. Thomas Lubanga Dyilo* is anything to go by, the trial judges are astute and have been seen to uphold the rights of the accused to a fair trial.

The trial process in an adversarial system presupposes that the Prosecution will build its case against the accused and discharge the burden of proof. The Defence on its part will make submissions aimed at creating a reasonable doubt that the accused committed the crimes for which s/he is charged. The Court's RPE however have adopted a hybrid version of both the adversarial and inquisitorial system much like the RPE of the ICTR and ICTY. In the Court's context, the inclusion of the expression of victims' views and concerns is akin to the *partie civile* under the French legal system. How do the trials at the Court run? All parties, including victims' legal representatives make oral presentations and interventions at the hearing, through written submissions or both. Victims' legal representatives are not silent observers during proceedings and the Pre-Trial Chamber in the situation in the DRC supports this.[186] It is true as well that victims' legal representative are permitted to observe proceedings and make submissions based on their observations.[187] Rule 89 RPE directs that victims' legal representatives can make opening and closing statements. It provides in relevant portion:

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[185] Musila G, Rethinking International Criminal Justice: Restorative justice and the rights of victims at the International Criminal Court, (Berlin, Lap Lambert Academic Publishing) 2011, 153.
[186] *Situation in the Democratic Republic of Congo* (*Prosecutor v. Thomas Lubanga Dyilo*) Decision on the Arrangements for Participation of Victims a/001/06, a/002/06 and a/003/06 at the Confirmation Hearing, 22 September 2006 [hereinafter Lubanga Confirmation Hearing] at 6 – the Pre-Trial Chamber confirmed that Victims' Legal Representatives can make opening and closing statements.
[187] Rule 91 (2) RPE; *See* written submissions relating to *Lubanga Confirmation Hearing*

> "[…] Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements."

Rule 91(2) provides that:

> "A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in the hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's interventions should be confined to written observations or submissions. The Prosecutor and the Defence shall be allowed to reply to any oral or written observation by the legal representative for victims."

The RPE support the role of the legal representative to intervene in the trial proceedings by questioning a witness, an expert or an accused.[188] However, the Trial Chamber reserves the right to regulate the right to question in terms of Rule 91(3) (b) to take into account 'the rights of the accused, interests of witnesses, the need for a fair, impartial and expeditious trial and to give effect to Article 68 paragraph 3', which relates to personal interests of the victims, appropriateness and the defendant's rights. The Appeals Chamber has endorsed the position that Rule 92(5) RPE which provides for a mandatory right for victims or their legal representatives to be notified in a timely fashion of all public proceedings and filings before the Court. In the Appeals Chamber's, view, victims will additionally be afforded access to confidential

[188] Rule 91(3)(a) RPE

material to the extent that such access does not breach other necessary protective measures if in the view of the Chamber a victim's personal interests are materially affected. In the RPE and Chambers' decisions, we see that the Court judges' have ensured that this innovative aspect of legal proceedings that includes a new party – victims – does not prejudice the accused and does not create a *Prosecutor bis* situation. The Trial Chamber remains in control of the interventions of victims' legal representatives.

Victims are permitted to participate in reparations proceedings, which commence at the end of a trial and where an accused has been found guilty of the offences with which (s) he is charged. Reparations proceedings commence at the Trial Chamber and are subject to appeals. In this regard, Article 82(4) Rome Statute provides that:

> "Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States."[189]

Legal representatives are invited to make submissions orally, in writing or both as the Chamber pleases relating to orders for reparations that it will make.

3.3.1.4 Participation at the appellate stage and other proceedings

Victims are allowed to participate in appellate proceedings where their interests are shown to be affected. The Appeals Chamber in *Prosecutor v Thomas Lubanga Dyilo* agreed with victims and the Prosecutor that since the Trial Chamber's ruling to

[189] Article 82(4) Rome Statute, *supra* note 1.

dismiss charges against the accused based on abuses by the Prosecutor of non-disclosure of exculpatory materials covered by Article 54(3)(e) of the Rome Statute, affected victims' interests in that they could no longer participate in the trial and concomitantly would not be able to request for reparations in the case, the victims could then participate in the appellate proceedings and submit their views and concerns pertaining to the Prosecutor's motion to appeal.[190]

Where there is an appeal relating to reparations orders, Rule 91 (4) RPE provides as follows:

> "A legal representative of the victim, the convicted person or a bona fide owner of property adversely affected by an order under Article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence."

3.3.2 Victims' rights to reparations under international law

Reparations are the embodiment of a society's recognition, remorse and atonement for harms inflicted.[191] To an extent, reparations represent the acknowledgment that the recipient has experienced some form of harm and that there is a need to redress this harm and restore the individual to the place that (s)he was before the harm took place. However, it is clear that in so many instances that it is not possible to fully restore the individual who has gone through the trauma of an event to the state prior to the event, particularly because restoration is not merely a matter of quantum. This is true in the

[190] *Prosecutor v Thomas Lubanga Dyilo*, 'Decision on the Participation of Victims in the Appeal' 6 August 2008, ICC-01/04-01/06 OA 13.
[191] Roht-Arriaza N, 'Reparations Decisions and Dilemmas' (2004) 27 *Hastings International and Comparative Law Review*, 157-219 [hereinafter Roht-Arriaza], at 159.

case of killings, torture, rape and even destruction to personal property, which has sentimental value attached to it. In these cases reparations are not to be seen as replacement of what was lost because that is not possible as illustrated above, but reparations are aimed at assisting the harmed individual to, in a sense move on with their lives in a positive sense.

There has been a progressively growing legal basis for the redressing victims of gross violations of human rights and serious violations of humanitarian law. Reparations has long been a recognized principle of international law and evidenced in human rights instruments as well as in the decisions of regional human rights and national courts. It has a basis in both tort (delict) and the law governing state responsibility.[192] Van Boven describes reparations in human rights, as a generic term representing 'all types of redress, material and non-material, for victims of human rights violations'.[193]

Reparations can encompass a variety of concepts including damages, redress, compensation, satisfaction and restitution.[194] Each component represents a unique remedy to victims. Compensation refers to the amount of money awarded by a judicial or quasi-judicial body after an assessment of harm suffered. Restitution is a return to the situation before the harm occurred. Rehabilitation refers to the provision of on-going social, medical, legal and/or psychological care to victims. Satisfaction refers to broader measures, which may be individual or societal, such as the

[192] Roht-Arriaza, *supra* note 193.
[193] Van Boven T, 'Study Concerning the right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms' UN Doc E/CN.4/Sub.2/1993/8 of 2 July 1993 [hereinafter Van Boven], para 13.
[194] Van Boven, *supra* note 193; See also Saul B 'Compensation for Unlawful Death in International Law: A focus on the Inter-American Court of Human Rights' (2004) 19 *American University International Law Review* 523-584, at 541

verification of facts, the search for bodily remains, public apologies, memorialisation, institutional reforms and sanctioning of perpetrators.

Reparations can be material (compensation, restitution and rehabilitation) or moral. Moral reparations can include a range of non-material measures which address the victim's felt-needs to be heard, for justice and for measures to avoid repetition of the violating act such as the removal of those most responsible from positions of power and influence, the disclosure of the facts of a victim's mistreatment or official, public apologies from governments for past violations.[195]

Before assessing the right to reparations for individuals as is the possibility under the Rome Statute, the following section shall reflect on the evolution of this right in the form of remedies from a state-centric approach based on traditional international law to the individualised approach stemming from the development of human rights treaties.

3.3.2.1 Inter-State remedies

Traditional international law placed States at the centre of the law of nations. Remedies at the international level were therefore associated with principles of state responsibility. As stated by the Permanent Court of International Justice ("PCIJ") in the *Chorzow Factory* case, the obligation to make reparation to another State for the breach of an international legal obligation is a fundamental principle of international

[195] Roht-Arriaza, *supra* note 191, 159.

law.[196] The International Law Commission ("ILC") has codified this principle.[197] Some conservative interpretations of international law continue to limit reparations to the inter-state level. Consequently aggrieved nationals of any state can only be redressed where their claims are espoused by their state of nationality and the claim is made against another state for the harm caused to the individual.[198] However, since World War II (WWII), international law has shifted dramatically, in both theory and practice, towards the protection of individual human rights and as such, international law now guarantees an individual right to reparation.[199]

3.3.2.2 Remedies under international and regional human rights treaties

The cause of the shift from State to individual-centric understanding of remedies has been the development of international human rights law. Most human rights treaties concluded since WWII includes a right to a remedy.[200] The International Covenant on Civil and Political Rights ("ICCPR"), one of two core human rights treaties, demands that each State Party ensure that any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed

[196] Chorzow Factory case (Jurisdiction); ICJ, Reparation for Injuries Suffered in the Service of the United Nations, para.184; The Wall Advisory Opinion.
[197] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Articles 30-31 and 34-37.
[198] For an example of a conservative interpretation of international law, Diplomatic protection was first espoused by the International Court of Justice in the *Barcelona Traction* case. See also Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni: The Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms UNESCOR, 56th Sess. UN Doc. E/CN.4/2000/62, (January 18, 2000) [hereinafter Bassiouni], at 6.
[199] Though the method by which this reparation is achieved is still open to debate. Shelton D, 'Righting Wrongs: Reparations in the Articles of State Responsibility' 96 *American Journal of International Law* (2002), 833-856 [hereinafter Shelton], at 834. See also the Darfur Commission of Inquiry Report, paras. 596-597, which states the universal recognition of the right to an effective remedy, has a bearing on State responsibility. Thus, an offending State now has an international responsibility to make reparations towards the victims of an internationally wrongful act (which includes international crimes such as genocide, crimes against humanity and war crimes).
[200] See also Shelton, *supra* note 199, 843; Bassiouni, *supra* note 198, 7.

by persons acting in an official capacity.[201] Furthermore, it states that the claim to a remedy should be determined by a competent authority (judicial, administrative, legislative or otherwise) imbued with the power to enforce any remedies ordered.[202]

The right to a remedy has been found to contain both procedural and substantive components.[203] Procedurally, the right to remedy broadly entails that the State afford the victim access to justice. This entails the creation of appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.[204] Generally speaking, this means that the victim should have their claim heard by an independent and impartial remedial body with the ability to afford adequate redress for the alleged violation.[205] Substantively, the United Nations Human Rights Council ("UNHRC") has stated that the right to an effective remedy requires States to make reparations to individuals whose rights have been violated. Such reparation can include, among other measures, restitution, rehabilitation and satisfaction (including public apologies, construction of memorials and the prosecution of human rights violators).[206]

Remedies are also available for violations of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). Though the rights guaranteed in this treaty are to be realised progressively,[207] the Committee on Economic, Social and Cultural Rights has stated that it considers the rights contained in the ICESCR to be capable of direct and immediate operation within the domestic legal system of each State

[201] Article 2(3) (a) ICCPR.
[202] Article 2(3)1(b)-(c) ICCPR.
[203] Shelton, *supra* note 199, 839.
[204] UNHRC General Comment No. 31, para. 15.
[205] Shelton, *supra* note 199, 839.
[206] UNHRC General Comment No. 31, para. 16.
[207] Article 2(1) ICESCR.

Party.[208] Furthermore, States have been encouraged to create accessible, timely and effective judicial or administrative remedies for all justiciable ICESCR rights.[209]

The right to a remedy is also reflected in every regional human rights treaty. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") states that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."[210] The American Convention of Human Rights ("ACHR") empowers the Inter-American Court of Human Rights ("IACtHR") to "rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."[211] Lastly, the African Charter on Human and Peoples' Rights ("ACHPR") contains provisions ensuring access to justice, the right to adequate compensation in the case of spoliation of resources and enshrining judicial independence.[212] The absence of an explicit and general guarantee of a right to an effective remedy has been somewhat addressed by the conclusion of the Protocol to Establish the African Court on Human and People's Rights which empowers the Court to "make appropriate orders to remedy [a] violation, including the payment of fair compensation or reparation."[213]

[208] Committee on Economic, Social and Cultural Rights, General Comment No. 9
[209] Shelton, *supra* note 199, 847; ECOSOC, General Comment No. 3; ECOSOC, GC No. 9
[210] Article 13, ECHR.
[211] Article 63, ACHR.
[212] Articles 7, 21(2) and 26 ACHPR
[213] Article 27(1) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

A State which fails to protect an individual's human rights commits an independent, further violation if it also denies the victims of those violations an effective remedy. While most scholars seem relatively firm in this opinion, the areas of controversy in this field surround the precise contours of the effective remedy and whether it can be provided through different means. Some international treaties specify particular means by which remedy must be afforded[214] while the ICCPR remains relatively open to judicial, administrative and other methods being used.

3.3.2.3 The UN Basic Principles and Guidelines on Reparations

The right to reparations developed further in 1985 with the conclusion of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter Basic Principles of Justice).[215] Though focused on domestic crimes, these principles set forth comprehensive standards for a State's obligation to provide reparations to individual victims of crime.[216] The principles state that redress should be granted through formal or informal procedures that are expeditious, fair, inexpensive and accessible. The principles also state that perpetrators should provide reparations directly and that States should establish national reparations funds to compensate in the event of a perpetrator's indigence.[217] Lastly, the Basic Principles of Justice state that victims participate in proceedings which affect their personal

[214] Convention Against Torture, Art 14 specifies that States Parties are to ensure victims of torture obtain redress and have an enforceable right to fair and adequate compensation. Though it should be noted that even in this case, litigation surrounding the Convention Against Torture has revealed that reparations can still be denied when a claim is brought outside of the State in which the torture took place. See *Al-Adsani v. Kuwait*; *Al-Adsani v. United Kingdom*.
[215] *Basic Principles of Justice*.
[216] Bassiouni, *supra* note 198, 9.
[217] *Basic Principles of Justice*, Annex, A, 8; Annex, A, 4; Annex, A, 5.

interests.[218] There is a connection between the Basic Principles of Justice's concern for victim's dignity and participation and the inclusion of victim's participation and reparation provisions in the Rome Statute.[219]

The Basic Principles of Justice helped to lay the foundation for the eventual conclusion of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles and Guidelines).[220] While not legally-binding[221], the Basic Principles and Guidelines aim to consolidate and organize existing obligations to as great a degree as possible. Thus, several prominent voices in international law consider them to be representative of the current status of the right to reparations under international law.[222] The Basic Principles and Guidelines state that the right to reparation is part of the State's core obligation to respect, ensure respect and implement international human rights law and international humanitarian law.[223] They enshrine three basic rights for victims of international crimes: the right of access to justice, the right to reparation for harm suffered and the right to truth.[224] With respect to reparation, any measures provided should be "proportional to the gravity of the violations and the harms suffered" and should be derived from the perpetrator, if possible, with the State providing monetary

[218] This encouragement was qualified as the *Basic Principles of Justice* seek to ensure such participation is in line with the rights of the accused and relevant national criminal law and procedure, *Basic Principles of Justice*, Annex, A, 6 (b).
[219] Ferstman C, "NGOs and the Role of Victims in International Criminal Justice" Seminar organised by the Forum for International Criminal Justice and Conflict, Monday 2 October 2006
[220] Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res., UNGAOR, 60th Sess., UN Doc. A/Res/60/147 (16 December 2005) [hereinafter Basic Principles and Guidelines]
[221] Rombouts et al, in De Feyter, 362.
[222] Van Boven, in Ferstman et al, 32.
[223] Basic Principles and Guidelines, *supra* note 220, Principle I, (1); II (3) (d).
[224] Basic Principles and Guidelines, *supra* note 220; Bassiouni, *supra* note 198, 28-34.

compensation when this is not possible.[225] Reparations judgments should be enforceable domestically and reparation is deemed to include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[226]

Restitution should seek to "restore the victim to the original situation before the gross violations" occurred.[227] Compensation should be provided for any economically assessable damage including, among other things, physical and mental harm, lost economic opportunities, material damages (loss of earnings or earnings potential), moral damages and costs (medical, psychological, and the like).[228] Rehabilitation includes medical, psychological care and legal and social services.[229] Satisfaction measures include the cessation of a continuing violation, verification of facts and public disclosure of the truth, the location of the disappeared, assistance with the recovery, identification and reburial of bodies in accordance with the victim's family's wishes and cultural practices.[230] Moreover, satisfaction also includes various symbolic reparations such as official declarations or judicial decisions restoring the dignity of the victim or their family, public apologies or commemorations and tributes to the victims.[231] Satisfaction also entails longer term goals, such as the creation and promotion of mechanisms for preventing and monitoring social conflicts and their resolution.[232] Lastly, guarantees of non-repetition include, among other things, ensuring that the military is under civilian control, that all judicial proceedings accord with due process and that judicial independence is ensured.[233]

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[225] Basic Principles and Guidelines, *supra* note 220, Principle, IX, (15).
[226] Basic Principles and Guidelines, *supra* note 220, Principle, IX, (17-18).
[227] Basic Principles and Guidelines, *supra* note 220, Principle IX, (19).
[228] Basic Principles and Guidelines, *supra* note 220, Principle IX, (20)
[229] Basic Principles and Guidelines, *supra* note 220, Principle, IX, (21)
[230] Basic Principles and Guidelines, *supra* note 220, Principle, IX, (22) (a)-(c).
[231] Basic Principles and Guidelines, *supra* note 220, Principle IX, (22) (d), (e), (g).
[232] Basic Principles and Guidelines, *supra* note 220, Principle, IX, (23) (g).
[233] Basic Principles and Guidelines, *supra* note 220, Principle IX, (23), (a)-(c).

3.3.2.4 Remedies under international humanitarian law (IHL)

Though strongly debated, IHL contains elements of a right to a remedy. The 1907 Hague Convention requires that a State which violates its terms pay compensation.[234] The Geneva Conventions furthered this protection by formally prohibiting agreements between States which would absolve liability for 'grave breaches' of IHL.[235] Furthermore, Additional Protocol I reaffirmed that a party to an international armed conflict which violates its IHL obligations shall, if the case demands, be liable to pay compensation and bear responsibility for the actions of individuals in its armed forces.[236]

However, despite the seemingly explicit provisions in the IHL treaties above, the existence of an individual right to reparation for violations is IHL is contested.[237] Some argue that under IHL, individuals are limited to asking the State of their nationality to espouse a claim for diplomatic protection and assert claims for compensation from the violating State in question. Others, including the International Committee of the Red Cross, argue that the trend of international law is towards the recognition of the individual's right to a remedy and specifically reparations in the context of IHL violations.[238] For the purposes of this paper, it is enough to note that reparations of some kind (whether requested by a State or an individual) are due to victims of international crimes.

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[234] Article 3, 1907 Hague Convention.
[235] Article 148, Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.
[236] Art. 91, Additional Protocol I.
[237] See contra, Bassiouni, *supra* note 198, 9; ICRC Customary IHL Study Rules, 537, 541-546.
[238] ICRC CUSTOMARY IHL Study Rules, 537 and discussion of State practice at 541-546.

3.3.2.5 Reparations in practice at the international level

Practice at the international level with regard to giving effect to the right to reparations has, in general, been disappointing. There have been some individual successes, but there has been little actual compensation to victims for violations.[239] The UNHRC generally issues general or declaratory decisions and affords States a large margin of appreciation on specific reparation awards.[240] Nevertheless, in cases pertaining to the right to life and the prohibition of torture, the UNHRC has expressed the view that States are under a legal obligation to investigate, take actions thereon, bring to justice the persons found responsible and extend treatment to the victims.[241] The UNHRC has also recommended the payment of "adequate" or "appropriate compensation" in recent cases.[242] Though underwhelming, the UNHRC's decisions can be conceived as providing victims of human rights abuses a measure of satisfaction and a guarantee against non-repetition.

States have also provided reparations to victims by means of inter-State negotiation. For example, as a result of international negotiation and lobbying, Holocaust victims have been compensated by Germany through a variety of means. Under the German *weidergutmachung* law, individual compensation was given to victims or the State of Israel (if no living survivors). In total, Germany has provided $104 billion to victims of Nazi crimes. It has also provided apologies, restitution of lost property,

[239] Sarkin, in De Feyter, 155.
[240] Oette, in Ferstman et al, 219.
[241] Van Boven, in Ferstman et al, 23.
[242] Rombouts et al, in De Feyter, 377 referring to the UNHRC decisions Sminova v. Russia; Perterer v. Austria; Kankanamge v. Sri Lanka. The preference for general recommendations to pay compensation is echoed in the practice of the UN Committee Against Torture. See Oette, in Ferstman et al, 238.

compensatory pensions and other measures aimed to supplement the material compensation provided by legal measures.[243]

Claims Commissions provide another method for victims to obtain reparations from States for violations of international law. Through institutions such as the UN Claims Commission and the Ethiopia-Eritrea Claims Commission, victims have been able to gain some measure of reparations.[244] Lastly, several international reparations funds, such as the Voluntary Fund for Victims of Torture, have been established to provide compensation to victims. This fund is supported by voluntary donations from States, organizations and individuals and provides funding to non-governmental organizations which assist torture victims and their families. It is one of the largest United Nations humanitarian funds with a budget of $13 million.[245] Other examples of international reparations funds include the UN Voluntary Trust Fund on Contemporary Forms of Slavery, the UN Development Program Trust Fund for Rwanda and the Court's Trust Fund for Victims ("TFV").

3.3.2.6 Reparations in practice at the regional level

[243] Bassiouni, *supra* note 198, 10; Shelton, *supra* note 199, 841-844; It should be noted that Germany's practice with respect to the international crimes committed during WWII has not been adopted universally. Japan, for example, has taken a markedly different path. It has staunchly refused to pay individual claims arising out of its WWII actions. It has compensated some States for WWII-related activities (roughly $3.9 billion to the Philippines, Vietnam, Burma and Indonesia). It has also created a 'consolation fund' for former 'comfort women' of the Japanese Army. However, compensation claims in the Japanese courts and in the United States' court system have failed due to, among other reasons, statutes of limitations and the waivers found in the peace treaties signed after WWII.

[244] As of July 2004, the overall amount of compensation made available by the UN Claims Commission was $18 billion; See also Shelton, *supra* note 199, 852; ICRC, CUSTOMARY IHL Study Rules, 542. For information on the Ethiopia-Eritrea Claims Commission, see ICRC, CUSTOMARY IHL Study Rules, 542.

[245] See also Bassiouni, *supra* note 198, 34; Roht-Arriaza, *supra* note 191, 175.

As noted above, almost every regional human rights treaty guarantees a right to a remedy (in one form or another). The practice of these regional systems has been very instructive in fleshing out the contours of the right to reparations under international law.

The IACtHR has, arguably, generated the most important jurisprudence on forms of reparations other than, or in addition to, compensation. It has stated consistently that the obligation to provide reparations reflects a rule of customary law[246] and has ordered a wide range of innovative measures[247] within the traditional categories: restitution,[248] compensation,[249] rehabilitation,[250] and satisfaction[251] and guarantees of non-repetition.[252] Furthermore, the IACtHR has set up trust funds, appointed experts and kept cases open in order to monitor the implementation of the ordered remedies.[253]

In contrast, the European Court on Human Rights ("ECtHR") has been very conservative when ordering reparations, limiting its exercise for the most part to

[246] Shelton, *supra* note 199, 841.
[247] Faúndez Ledesma, The Inter-American System for the Protection of Human Rights: Institutional and procedural aspects / Héctor Faúndez Ledesma. –- 3 ed. -- San José, C.R. :Instituto Interamericano de Derechos Humanos, 2008.
[248] The IACtHR has determined that the ideal outcome of a guarantee of "fair and adequate compensation" is full restitution, i.e. the restoration of the status quo ante. However, where this is not possible, compensation is often required. De Greiff, Handbook, 455.
[249] Examples of this category of reparation measures include reimbursement of cost and expenses.
[250] Examples of this category of reparation measures include medical and psychological treatment.
[251] Examples of this category of reparation measures include public apologies or symbolic memorials.
[252] In general, reparations measures only benefit the direct victims of the human rights violation that have been recognized as such in the first stages of the procedure before the Inter-American Commission on Human Rights and their next of kin. However, in some cases, with the aim to address the causes of violations in order to prevent recurrence the IACtHR, has also specified a range of measures including investigation, prosecution and punishment of those responsible, legislative and institutional reforms, as well as training as "guarantees of non-repetition". As a result of the compliance of these measures, such judgments have had a wide effect, reaching individuals that have not appeared as applicants before the Court but were suffering the same human rights violation. In this respect, what is noteworthy about these types of measures are that at the same time of addressing the problem of the limited access to the international system, have also secured in some aspects the effective domestication of the American Convention. See: IACtHR, Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73
[253] Shelton, *supra* note 199, 841.

monetary reparation. Furthermore, the President of the Court has indicated that just satisfaction[254] does not automatically flow from the finding of a violation of the ECHR or its Protocols. Furthermore, the President stated that compensation will be granted only in default of the domestic judicial system to guarantee a full reparation and only "if necessary".[255]

Finally, the case-law of the African Commission on Human and Peoples' Rights shows a hesitation in making specific recommendations on awards for compensation or other forms of reparations. Instead, the Commission has preferred to declare a violation and grant the State Party a measure of discretion in terms of the implementation of the remedy.[256]

3.3.3 The right to reparations under the Rome Statute

As previously mentioned, one of the fundamental contributions of the Rome Statute to the body of international criminal law is the provision of the right to reparations to victims of crimes covered by the Statute.[257] There are two key provisions in the Rome Statute pertaining to this right to reparation. Article 75 relating to the right of reparations to victims and Article 79 which establishes the Trust Fund for Victims (TFV) for the benefit of victims of crimes within the jurisdiction of the Court and for families of such victims. In relevant portion Article 75 provides that:

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[254] Article 41, ECHR.
[255] President of the ECHR, Practice Direction, Just Satisfaction Claims. 28 March 2007, Available at: http://www.echr.coe.int/NR/rdonlyres/8227A775-CD37-4F51-A4AA-1797004BE394/0/PracticeDirectionsJustSatifactionClaims2007.pdf
[256] Oette, in Ferstman et al, 219.
[257] Haslam E, 'Victim Participation at the International Criminal Court: A triumph of hope over experience?' in D. McGoldrick, P Rowe & E Donnely, The Permanent International Criminal Court: Legal and Policies Issues (2004) 315-334.

> The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation… determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. [258]

After making a determination as to the award, the Court is empowered to make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims. The Court may order that such an award is made through the TFV. Rules 94 to 96 RPE set out the procedures for reparations to victims. These rules direct that the Court may invite to the reparations' hearings not only the victims and the convicted person, but also interested persons or interested States whose properties could be affected by the rulings on reparations. Nevertheless, neither the Rome Statute nor the RPE prescribe how these provisions regarding reparations will be implemented.[259]

3.3.3.1 Decision establishing principles and procedures to be applied to reparations

[258] Article 75(1) Rome Statute; *See* Donat-Cattin D, 'Article 68' in Triffterer *Commentary on the Rome Statute of the International Criminal Court: Observer's notes article by article* (1999) 965-1014 for a history of the provision relating to the right to reparations.

[259] Henzelin M, Heiskanen V & Mettraux G, 'Reparations to Victims Before the International Criminal Court: Lessons from international mass claims processes' (2006) 17 *Criminal Law Forum* 317-344, at 338 noting that the 'Statute and Rules do not provide…any predetermined mechanisms or procedures for processing reparations claims and implementation of awards'.

Trial Chamber I in the case of the *Prosecutor v. Thomas Lubanga Dyilo* established the principles and procedures to be applied to reparations in August 2012.[260] This decision followed the Judgment Pursuant to Article 74 of the Rome Statute in the same case where the accused *Thomas Lubanga Dyilo* was found guilty of the war crimes that he was charged – including conscripting or enlisting children under the age of fifteen years into armed forces or groups and using them to participate on the hostilities. This is the first decision by the Court interpreting the right to reparations and sets important benchmarks and foundations in the reparations regime and victimology in international criminal justice.

In terms of the procedure that was followed in the determination of the Court's principles and procedures to be applied to reparations in line with the RPE, the Trial Chamber granted leave for submissions from the following parties before making its final determination on the matter: the Office of the Prosecutor; The Defence of the convicted person; Legal Representatives of Victims; the Registry; Office of Public Counsel for Victims; Trust Fund for Victims; and Other parties: Women's Initiatives for Gender Justice; International Centre for Transitional Justice, UNICEF, Fondation Congolaise pour la Promotion des Droits humains et la Paix, Avocats sans Frontières and certain other Non-Governmental Organisations.[261]

In establishing the principles relating to reparations pursuant to Article 75 (1) of the Rome Statute, the Chamber recognized that the 'Statute and the Rules reflect a growing recognition in international criminal law that there is a need to go beyond the

[260] See Decision establishing the principles and procedures to be applied to reparations in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, 7 August 2012, ICC-01/04-01/6 [hereinafter Reparations Decision].
[261] Requests to appear before the Chamber and make submissions are made pursuant to Regulation 81(4) (b) of the Regulations of the Court on issues related to reparations.

notion of punitive justice, towards a solution which is more inclusive.'[262] This recognition is in keeping with established standards of international human rights law and particularly the 2005 UN Basic Principles. The Chamber took note of the 2004 Report of the United Nations Secretary General on The rule of law and transitional justice in conflict and post-conflict societies.[263] The two main purposes for reparations according to the Chamber are that they oblige those responsible for crimes to repair the harm that they have caused and to enable the Chamber to ensure that offenders account for their acts.[264]

Within the context of transitional justice, the Chamber also recognized that reparations have the added advantage of promoting reconciliation between the convicted person, the victims of the crimes and the affected communities. This statement has received conflicting reactions amongst transitional justice practitioners who are intimately aware of the situation in Ituri where the convicted person *Thomas Lubanga Dyilo* comes from. The conflict in Ituri, which the convicted person was a central part of, was one between the *Hema* and the *Lendu* communities. It is alleged that some of the children who joined the convicted person's rebellion, did so out of their own volition or were 'volunteered' by their parents and communities to fight the opposing group. Since the crimes that *Thomas Lubanga Dyilo* was convicted of involved the recruitment and use of children from his own community, the direct victims of the case in point and possibly direct beneficiaries of reparations are the child soldiers and their immediate families, from the convicted person's *Hema*

[262] Reparations Decision, *supra* note 260, para 177.
[263] Reparations Decision, *supra* note 260, footnote 367; See also The rule of law and transitional justice in conflict and post-conflict societies, Report of the United Nations Secretary-General s/2004/616, 23 August 2004; Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Report of the independent expert Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005
[264] Reparations Decision, *supra* note 260, para 179;

community. The question is asked by the victims of the crimes committed by the child soldiers from the *Lendu* community as to how the reparations process would promote reconciliation between the two communities if the direct beneficiaries of the reparations will be the *Hema* community. These are some difficult situations presented in a post-conflict community and exacerbate the tension between the objectives of peace and justice.[265] The Chamber has however noted that, for purposes of application of principles of reparations under the Rome Statute, the Court will adopt a *broad and flexible* interpretation to give the *widest possible remedies* available to victims and evaluations on a case-by-case basis.[266]

The Chamber established the following principles:

a) **Principle of Dignity, non-discrimination and non-stigmatisation** – all victims regardless of their participation in the trial proceedings or not, will be treated fairly and equally.[267] This principle may have the desired effect of curbing the increasing volumes of applications from victims to participate in proceedings at the Court discussed in an earlier section. This is the case where the principles are publicised effectively to victims and affected communities that reparations will take a non-discriminatory application.[268]

[265] ICC Press Release, ICC-CPU-20121121-PR856 of 21 November 2012 'Katanga and Ngudjolo Chui case: ICC Trial Chamber II Severs Charges'…announces that the verdict in the case against Mathieu Ngudjolo will be issued on December 18, 2012. If he is found guilty of the crimes with which he is charged, there will be the possibility of reparation proceedings for purposes of addressing the harm caused to victims of his crimes. There is a wider
[266] Reparations Decision, *supra* note 260, paras 180-181.
[267] Reparations Decision, *supra* note 260, para 187
[268] Reparations Decision, *supra* note 260, paras 258 and 259 where the Chamber pronounced that the responsibility of the publicity of the principles lies with the Registry and that its outreach activities with national authorities and local communities is encouraged.

b) **Principles on Beneficiaries –** the beneficiaries of reparations are both direct and indirect victims pursuant to Rule 85 RPE. As a direct victim may be clear, an indirect victim status may not be as clear. The Chamber will determine an indirect victim as for example the parents of a child soldier.[269] Legal entities may also benefit as victims but priority may be given to certain victims in vulnerable situations such as victims of sexual and gender-based violence.[270]

c) **Principle on Accessibility and consultation with victims** – the Chamber endorsed a gender-inclusive approach to all principles with sufficient consultations with victims *in situ* paying particular attention to their priorities.[271]

d) **Principle on Victims of sexual violenc**e – victims include women and girls, and boys and men alike. Reparations awards for this group of victims require a specialist, integrated and multidisciplinary approach particularly to meet obstacles faced by women and girls when seeking access to justice.[272]

e) **Principle on Child victims** – reparations decisions will be guided by the fundamental principle of the "best interests of the child" enshrined in the Convention on the Rights of the Child. Where child soldiers are victims,

[269] Reparations Decision, *supra* note 260, paras 194-195
[270] Reparations Decision, *supra* note 260, paras 197-200.
[271] Reparations Decision, *supra* note 260, paras 202-206.
[272] Reparations Decision, *supra* note 260, paras. 207-209.

reparations programs must include their re-integration into society and rehabilitation to promote reconciliation within society.[273]

f) **Principle on the Scope of reparations** – the Chamber recognized the uncertainty in the number of victims in the case and despite the volumes of applications from victims, these numbers are not representatives of the totality of victims. The Chamber endorsed the use of both individual and collective reparations noting that the two are not mutually exclusive and may be awarded concurrently.[274] When collective reparations are awarded, they should address the harm suffered by victims on an individual and collective basis.[275]

g) **Principle on the Modalities of reparations** – a comprehensive approach to reparations was adopted, including restitution, compensation (requires broad application consistent with international human rights law assessments of harm and damage), rehabilitation. The Chamber reserved a non-exhaustive list of the forms of reparations not excluding those with symbolic, preventative and transformative value.[276]

[273] Reparations Decision, *supra* note 260, paras. 210-216.
[274] Reparations Decision, *supra* note 260, paras. 217-220; See also Appeals Chamber Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 36.
[275] Reparations Decision, *supra* note 260, para. 221.
[276] Reparations Decision, *supra* note 260, paras. 222-241.

h) **Principle on Proportional and adequate reparations** – reparations should support programmes that are self-sustaining and benefits paid by periodic instalments rather than by way of lump-sum.[277]

i) **Principle on Causation** – the Court should not be limited to "direct" harm or the "immediate effects" of the crime, particularly in this case involving child soldiers, but instead the Court should apply the standard of "proximate cause". The Court must be satisfied that there exists a "but/for" relationship between the crime and the harm.[278]

j) **Principle on the Standard and Burden of Proof** – as the trial stage is concluded when an order of reparations is considered, the appropriate standard of a balance of probabilities is sufficient. Where the reparations award emanates from the TFV a more flexible approach is to be taken.[279] These kinds of awards are akin to what has become known as the second mandate operations and assistance of the TFV in situation countries of the Court outside of a judicial determination of guilt or innocence of an accused person.

In conclusion, the Chamber asserted the principle respecting the rights of the defence in that nothing in the abovementioned principles will prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial.[280]

[277] Reparations Decision, *supra* note 260, paras. 242-246.
[278] Reparations Decision, *supra* note 260, paras 247-250.
[279] Reparations Decision, *supra* note 260, paras. 251-254.
[280] Reparations Decision, *supra* note 260, para. 255

Chapter IV

Enforcement Mechanisms to Secure International Cooperation

The need to continue codifying international law is apparent . . . But an even greater challenge for us now--and, in many respects an even greater opportunity--is enforcement. Although international law is often caricatured as elusive and abstract, there is nothing abstract about its enforcement . . . .

--Madeleine Albright[281]

4.1 INTRODUCTION

This chapter interrogates the enforcement mechanisms under the Rome Statute. Unlike States, the Court does not have an enforcement entity such as a Police Force

[281] Albright MK, 'International Law Approaches the Twenty-First Century: A U.S. Perspective on Enforcement', (1995) *18 Fordham International Law Journal,* 1595, 1596

that would arrest persons accused of committing crimes within its jurisdiction, conduct searches and seizures or compel witnesses to appear before the Court. Yet, the Court must critically assess its practice of enforcing sentences that it imposes on convicted persons and in its contribution to restorative justice, the enforcement of reparations orders in collaboration with other Rome Statute entities such as the TFV.

The enforcement of sentences is an indispensable part of international criminal justice. In fact it may be called the backbone of the system of international criminal justice.[282] Even against this background, Kress and Sluiter note that doctrinal writings on the enforcement of international criminal sentences are few yet critically needed to prepare for the enforcement regime of the Court.[283] As with many other topics in international criminal law – including those discussed earlier in this thesis on state cooperation in Chapter I, complementarity in Chapter II, the rights of persons at various stages of Court proceedings and processes in Chapter III – enforcement as governed by Part X of the Rome Statute read together with the relevant provisions of the RPE is the first elaborated codification and documentation of enforcement of international criminal sentences. At the time of this writing, the Court has rendered its first Judgment and Sentence against *Thomas Lubanga Dyilo*.[284] In the same case, the Court has established the first ever set of principles and procedures for the application of the reparations regime etched in the Rome Statute.[285] It is beneficial at this stage to reflect on the provisions on enforcement of sentences as well as of reparations orders by the Court with a view to contributing to the strengthening of the enforcement

[282] Kress C & Sluiter G 'Preliminary Remarks' in the Rome Statute of the International Criminal Court: A Commentary Volume II (Cassese A, Gaeta P and Jones JRW eds) (Oxford: Oxford University Press, 2002), 1751-1756 [hereinafter Kress and Sluiter Preliminary Remarks], 1752
[283] Kress and Sluiter Preliminary Remarks, *supra* note 282, 1755
[284] Refer to the footnote in Chapter III on this decision
[285] See Chapter III which analyses the principles and practices on the application of reparations under the Rome Statute

regime of the Court and setting the point of departure for future Court determined sentences and reparations orders.

4.2 ENFORCEMENT OF SENTENCES UNDER THE ROME STATUTE

Part X of the Rome Statute clarifies that the enforcement relates to the regulations concerning the sentence that the Court has ordered for a convicted person as well as the enforcement of fines and forfeiture measures of the assets of a person who has been sentenced. There is an immediate connection between the enforcement of sentences with Part IX of the Rome Statute dealing with the cooperation of States with the Court. Article 103 elucidates the role of States in the enforcement of sentences of imprisonment. As mentioned previously, the Court does not have an enforcement agency and relies entirely on States to enforce sentences of imprisonment. States Parties are therefore acting in concert or in cooperation with the Court, in the enforcement regime under the Statute. Rule 199 RPE provides that 'the functions of the Court under Part 10 shall be exercised by the Presidency'.[286] The Presidency[287] shall designate a State drawn from a list of states maintained by the Registry[288] in which a convicted person shall serve a sentence of imprisonment.[289] In indicating their willingness and acceptance to enforce the sentences of imprisonment, States 'may attach conditions to its acceptance'[290], which the Presidency is not obliged to accept but may request for additional clarity before making a decision to

[286] Rule 199 RPE

[287] The Presidency is one of four Organs of the Court established under Article 34 Rome Statute. According to Article 38 (3) '…the Presidency…shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred upon it in accordance with this Statute.'

[288] According to Rule 200 (1) RPE, the Registry of the Court shall maintain a list of states which indicate their willingness to enforce a sentence of imprisonment for persons convicted by the Court.

[289] Article 103 (1) (a) Rome Statute, *supra* note 1.

[290] Article 103 (1) (b) Rome Statute, *supra* note 1.

include or exclude such a State from the list of states which will enforce sentences issued by the Court.[291]

The drafters of the Rome Statute in this Part maintained the sovereignty of states to determine what conditions in accordance with their national laws and procedures they would maintain in the enforcement of sentences. In the same breath, the drafters also wanted the Court to maintain a measure of control in the enforcement regime under the Statute. Every state has its unique laws and procedures of enforcement. Kress and Sluiter make this distinct point that states '…distinguish the enforcement rules governing the question of *whether to enforce* from those governing the question of *how to enforce*'.[292] For some states the question of whether and how to enforce is governed by national criminal procedure legislation, while in others the two are treated separately and governed by different legislation.[293] In an effort to harmonise the enforcement regime, the Court must then be seen as the ultimate overseer while maintaining state autonomy to determine conditions for enforcement. Article 106 (1) Rome Statute supports this position. It provides that,

> "The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing the treatment of prisoners."

Article 106(1) introduces the concept of 'international treaty standards governing the treatment of prisoners' to the enforcement regime under the Rome Statute. These standards are traced to the Standard Minimum Rules for the Treatment of Prisoners

[291] Rule 200 (2) RPE
[292] Kress and Sluiter Preliminary Remarks, *supra* note 282, 1751
[293] Kress and Sluiter Preliminary Remarks *supra* note 282, 1751 give the example of the United States where the law of corrections, which relates to *how to enforce*, are governed by the law of corrections, which is entirely separate from the law of criminal procedure in the United States.

adopted by the United Nations on 31 July 1957.[294] These standard rules may be said to reflect customary international law.[295] They were adopted at a time when the enforcement of prison sentences for convicted persons by the International Military Tribunal (IMT) at Nuremberg faced a measure of criticism. On 1 October 1946, the IMT at Nuremberg rendered its judgment in twenty-two major German war criminals. Three of the accused were acquitted.[296] Of those convicted, the IMT at Nuremberg imposed twelve death sentences[297], three terms of life imprisonment[298], two terms of twenty years' imprisonment[299], one term of fifteen years' imprisonment[300], and one term ten years' imprisonment.[301] The London Charter that established the IMT at Nuremberg did not provide for appellate proceedings following the trial stage. Once the judgment was issued, the enforcement stage followed. Article 29(1) of the London Charter provided the framework for enforcement. It states:

> "In the case of guilt, sentences shall be carried out in accordance with the orders of the Allied Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof."[302]

The Allied Control Council for Germany (ACCG) operated less on legal considerations than it did on the political. The Council enforced prison sentences at the allied military prison at Berlin Spandau from 18 July 1947. The conditions of the

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[294] Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations on 31 July 1957 ECOSOC Res. 663 C (XXIV), amended by ECOSOC Res. 2076 (LXII), 13 May 1977
[295] Rodley, N.S., *The Treatment of Prisoners under International Law* (1999) 278-279;
[296] Fritzcshe, von Papen, and Schacht.
[297] For Göring, Ribbentrop, Keitel, Kaltenbrunner, Rosenburg, Frank, Frick, Streicher, Sauckel, Johl, Seyß-Inquart and Bormann.
[298] For Heß, Funk and Raeder.
[299] For Schirach and Speer.
[300] For Neurath.
[301] For Dönitz.
[302] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishment of the Charter of the International Military Tribunal (IMT), 82 U.N.T.S. (1951) 279[hereinafter London Charter], Article 29(1).

imprisonment were said to be particularly hostile to the seven convicted persons. Although the rules at Spandau were eventually relaxed, it was clear that the objective of the allied powers in enforcing the sentences of the seven had very little to do with their rehabilitation.

The situation was not very different at the IMT at Tokyo. Section V of the Charter of the IMT for the Far East (IMTFE) set out the applicable penalties, as well as the method of enforcement. Article 17 on sentences reads

> "…will be carried out in accordance with the Order of the Supreme Commander for the Allied Powers (SCAP), who may at any time reduce or otherwise alter the sentence, except to increase its severity."

Of the twenty-five accused, seven were sentenced to death[303], sixteen to life imprisonment[304], one to twenty years[305] and one to seven years.[306] Sentences were served at the Japanese prison of Sugamo in Tokyo.[307] Unlike the enforcement regime of the IMT at Nuremberg, which was enforced by the four allied countries that of the IMTFE at Tokyo was enforced by Japan. In this sense, the IMT at Nuremberg represents a precedent for a multi-national enforcement regime. The conditions of imprisonment however were not very favourable to the prisoners, although there was a measure of grace accorded to the prisoners at Sugamo compared to those in Spandau.

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[303] Doihara, Hirota, Itagaki, Kimura, Matsui, Muto and Tojo.
[304] Araki, Hashimoto, Hata, Hiranuma, Hoshino, Kaya, Kido, Koiso, Minami, Oka, Oshima, Sato, Shimada, Shiratori, Suzuki, and Umezu.
[305] Togo.
[306] Shigemitsu.
[307] Kress C & Sluiter G 'Imprisonment' in the Rome Statute of the International Criminal Court: A Commentary Volume II (Cassese A, Gaeta P and Jones JRW eds) (Oxford: Oxford University Press, 2002), 1757-1821 [hereinafter Kress and Sluiter Imprisonment], 1762-4.

The striking similarity in both enforcement regimes however is the political considerations that went into decision making at both ACCG and SCAP. Political sensitivities and considerations did not fade away in the debates at the UNSC following the genocide that took place in Rwanda in 1994, as did the IMT, IMFTE and the enforcement institutions created thereunder. Rwanda, then a member of the UNSC voted against the Security Council Resolution 995 that established the ICTR, *inter alia*, on the ground that sentences of accused persons would be enforced in other countries but Rwanda and that the countries that will enforce the sentences would determine the nature of how the sentences will be carried out. Rwanda, dissatisfied with this position, argued that this must be 'for the International Tribunal or at least the Rwandese people to decide'.[308]

The designation of a State of enforcement following a conviction at the ICTR is governed by Article 26 ICTR Statute and Rule 103 ICTR RPE. The place of imprisonment from these provisions includes Rwanda.[309] Article 27 of the ICTY Statute on the other hand does not specify what country the prison sentence shall be served save that a list of willing States will guide the relevant Chamber.

4.3 HORIZONTAL COOPERATION AMONG STATES ON ENFORCEMENT

[308] UN Doc. S/PV.3453, 15 (1994)

[309] Rule 103 (A) of the ICTR Rules of Procedure and Evidence reads as follows:

> (A) Imprisonment shall be served in Rwanda or any State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons for the serving of sentences. Prior to the decision on placement of imprisonment, the Chamber shall notify the Government of Rwanda.

From a completely utilitarian perspective, states have the common objective of preventing and suppressing criminality.[310] There exists international cooperation among states on the enforcement of sentences of imprisonment. States are in the practice of concluding bilateral and multilateral agreements with each other to ensure that the objective of preventing and suppressing criminality is achieved.[311] Abdul-Aziz posits that in these agreements, a State may wish that its nationals convicted abroad complete their sentences in their national state.[312] The views of the convicted person are weighed in the decision to transfer enforcement of prison term.

Kress and Sluiter discuss two techniques employed by states in the enforcement of sentences. The first is the 'conversion' technique where a requesting state[313] enforces the sentence and has the advantage of assuring itself that the trial resulting in the conviction was fair and that the penalty inflicted is not disproportionate. The second technique is one of 'continued enforcement' where the requesting state directly enforces and implements the sentence within the legal order of the requested state.[314]

4.4 VERTICAL COOPERATION AMONG STATES ON ENFORCEMENT

Vertical cooperation among states on the enforcement of prison sentences refers to the relationship and/or obligations of states with respect to the sentences ordered by the

[310] Abdul-Aziz M, "Transfer of Prisoners: International Perspective", in M.C. Bassiouni (ed.), *International Criminal Law*, Vol. II. *Procedural and Enforcement Mechanisms* (2nd edn., 1999), 488 *et seq*. [hereinafter Abdul-Aziz]
[311] Plachta M, *Transfer of Prisoners under International Instruments and Domestic Legislation* (1993) 143[hereinafter Plachta], identifies the agreement between Lebanon and Syria in 1951 as the first inter-state treaty on this point.
[312] Abdul-Aziz, *supra* note 310, 250.
[313] A requesting state is one where the convicted person will serve the sentence in imprisonment, often the state of nationality. The requested state is the state that conducts the trial of an accused and convicts.
[314] Kress and Sluiter Imprisonment, *supra* note 307, 1767.

ICTY and ICTR. As previously mentioned, Article 27 ICTY Statute provides for the designation of a State that will enforce prison sentences. Rule 103 ICTY RPE and Practice Directions on the Procedure for the International Tribunal's Designation (Practice Directions) of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment guide the ICTY in this regard.[315] Tolbert notes that in practice, there is no obligation on States to provide this form of cooperation with the ICTY or even the ICTR. States would have to be persuaded to provide the *ad hoc* Tribunals with assistance in this regard.[316] Persuasion would take the form of requiring States to ensure that the domestic legislation meets the Tribunals satisfaction of guarantees for the regulation of enforcement modalities. The *ad hoc* Tribunals would then sign an enforcement agreement with the particular State.[317] Such agreements are guided by two principles that were established in the Sentence Judgment in the case of the *Prosecutor v. Drazen Erdemović*: respect for the duration of the penalty as imposed by the Chamber and respect for international rules governing the conditions of imprisonment.[318] Kress and Sluiter emphasize that unlike the bialteral agreements between States that allows the concerns of the convicted person to be considered in the decision to effect transfer of enforcement of sentence, the ICTR and ICTY Statutes, RPE, Practice Directions and case law do not indicate

[315] Practice Directions on the Procedure for the International Tribunal's Designation were issued by the ICTY President on 9 July 1998.
[316] Tolbert D, 'The International Tribunal for the former Yugoslavia and the Enforcement of Sentences', 11 *Leiden Journal of International Law* (1998) 655, 658.
[317] Such agreements have been concluded between the ICTY and Austria, Bosnia and Herzegovina, Croatia, Denmark, Finland, France, Germany, Iran, Italy, Norway, Pakistan, Spain and Sweden. Benin, Mali and Swaziland are the three African countries that have such an agreement with the ICTR. For the ICTR, the challenge and criticism has been that the convicted persons should not serve their terms of imprisonment in the 'comfortable' prisons in Western countries. Many of the convicted persons by the ICTR remain in the UN Detention Facility at Arusha for long period of time before being transferred to a State to serve their terms of imprisonment. Some of the convicted persons would complete their sentences at the UN Detention Facility.
[318] Sentencing Judgment, *Prosecutor v. Drazen Erdemovič*, IT-96-22-T, 29 November 1996, para 34.

any duty for the President of the ICTY or ICTR to obtain the views of the convicted person on the designation of the State of enforcement.[319]

In as much as the *ad hoc* Tribunals provide a framework for vertical cooperation among states for enforcement of sentencing, there are some outstanding issues that remain unresolved to-date. Since the first convictions and sentencing in both *ad hoc* Tribunals, some of the convicted persons have since completed their terms of imprisonment but there has not been a standard mechanism to deal with their release into society. Some of the reasons for this include the unwillingness on the part of States to accept these individuals into their countries. It is often the case that the State of nationality of the individual may not be safe or even willing to receive the individual. The Completion Strategies of the *ad hoc* Tribunals also do not pronounce much on enforcement of sentences save for isolated cases.[320] Nevertheless, the experiences of the *ad hoc* Tribunals will be of great persuasive value to the Court's Presidency with respect to the enforcement of sentences.

4.5 COOPERATION OF STATES IN ENFORCEMENT OF SENTENCES UNDER THE ROME STATUTE

The ILC Draft Statute provided for a general obligation on the part of States to recognize and enforce judgments of the Court.[321] This obligation to recognize would have meant that States parties to the Rome Statute had a direct obligation to cooperate

[319] Kress & Sluiter Imprisonment, *supra* note 307, 1775

[320] Articles 12 of the Enforcement Agreements between the UN, Mali and Benin concerning ICTR Sentences provide that, 'in the event that the Tribunal is to be wound up; the Registrar will inform the Security Council of any sentences whose enforcement remains to be completed pursuant to this agreement.'

[321] Draft Statute of the International Law Commission UN Doc. A/49/10 [hereinafter ILC Draft Statute], Article 93(1)

with the Court to enforce sentences. The drafters of the Rome Statute had explicitly made room for the obligation to cooperate with the Court in its investigation and prosecution of crimes.[322] Such an obligation to recognize and enforce Court judgments would possibly have dispensed with the Court's requirement to conclude specific agreements with States on enforcement, at least to the details of consent from the State as this is presumed from signature and ratification of the Rome Statute as a whole and concomitantly with the obligation of States Parties to cooperate in this enforcement. There was no consensus among States in Rome concerning the provision on recognition and thus it was deleted from the final draft in Rome. States found a solution to the 'questions of how to determine the State of enforcement[323], and how to ensure the supervision of the enforcement by the ICC[324] and once it was decided how to deal with the issue of enforcement of fines and forfeiture orders[325] exhaustively'[326], which in their opinion dispensed with the need for a general clause obliging States to recognize the enforcement mechanism. There is therefore no general obligation on States Parties to cooperate with the Court in enforcement of sentences of imprisonment in the Rome Statute. The same however cannot be said of enforcement of fines and forfeiture measures, which shall be discussed below.

4.5.1 Ensuring the cooperation of States in the enforcement of sentences of imprisonment

[322] Article 86 Rome Statute, *supra* note 1; See also Chapter I which discusses the general obligation of States Parties to fully cooperate with the Court in its investigation and prosecution of crimes within its jurisdiction.
[323] Articles 103 and 104 Rome Statute, *supra* note 1.
[324] Articles 105 and 106 Rome Statute, *supra* note 1.
[325] Article 109 Rome Statute, *supra* note 1.
[326] Kress and Sluiter Imprisonment, *supra* note 307, 1786.

As explained above, a majority of the delegates at the Rome conference rejected an obligatory enforcement regime in the ILC Draft Statute in favour of the opt-in mechanism espoused in Article 103. Once a State on its own volition accepts to enforce the sentences of imprisonment and has been listed as such by the Court's Registry[327], the Rome Statute gives the Court a measure of control over the enforcement mechanisms. Article 104 (1) reads that the 'Court may, at any time, decide to transfer a sentenced person to a prison of another State.' Article 105 also ensures that 'the Court alone shall have the right to decide and application for appeal and revision'. The supervisory power of the Court over the enforcement of sentences and conditions of imprisonment is made possible because of the permanent stature of the Court, unlike the *ad hoc* Tribunals. It is therefore possible for the Presidency to set up a mechanism to monitor and promote cooperation with States that opt to enforce prison sentences.

4.5.2 Ensuring the cooperation of States in the enforcement of fines and forfeitures

This form of enforcement is in comparison more sensitive to deal with that that of prison sentences. For starters, in current Court practice the enforcement is not applicable. Article 109 Rome Statute regulates enforcement if fines and forfeiture measures. It reads

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law

[327] Rule 200 (1) RPE

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.
3. Property, or proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgment of the Court shall be transferred to the Court.

This article limits the enforcement of fines and forfeiture to those ordered by the Court under Article 77 (2) Rome Statute. The relevant portion provides that:

"…the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties."

Article 109 does not cover the fines imposed by the Court related to an offence against the administration of justice[328] or provisional measures to secure evidentiary forfeiture.[329] There is however a close relation between the cooperation regime under Part IX of the Rome Statute and the enforcement of fines and forfeiture. From the language of the provision, States Parties are obliged to enforce fines and forfeiture orders. Rule 217 RPE elucidates that this obligation however does not automatically apply to States Parties, but rather that the Presidency must make a request to a State Party in accordance with Part IX of the Rome Statute dealing with cooperation.[330] It

[328] Article 70 (2) Rome Statute, *supra* note 1.
[329] Article 93 (1) (k) Rome Statute, *supra* note 1.
[330] Rule 271 RPE reads

remains however the prerogative of States Parties to give effect to fines or forfeiture orders in accordance with their national legislation governing such orders as expressed in Article 93 (1) (k) Rome Statute.

The Court has yet to enforce fines or forfeitures in the context of convicted persons. To date only one person has been convicted by the Court, *Thomas Lubanga Dyilo*. At the commencement of the pre-trial phase, *Thomas Lubanga Dyilo* was declared indigent. In addition, the forfeiture of property relates to property that a convicted person acquired in the commission of the crimes s/he is convicted. It is not immediately clear that the rebel group that *Thomas Lubanga Dyilo* led acquired property in the course of the conflict in Ituri, although it is not so far removed an idea considering the mineral-rich eastern DRC. The challenge for the Court in this regard would be the identification of the assets of accused persons and here cooperation from States would support the process.

4.5.3 Ensuring the cooperation of States in the enforcement of reparations orders

Article 75(5) of the Rome Statute provides that 'a State Party shall give effect to a decision under this article as if the provision of article 109 were applicable to this article.' This reference suggests that there is a separate enforcement of fines and forfeitures to the enforcement of reparations orders. In addition the mandatory

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For the enforcement of fines, forfeitures or reparation orders, the Presidency shall, as appropriate, seek compensation and measures for enforcement in accordance with Part 9, as well as transmit copies of relevant orders to an State with the sentences person appear to have direct connection by reason of wither nationality, domicile or habitual residence or by virtue of the location of the sentenced person's assets and property or with which the victim has such a connection. The Presidency shall, as appropriate, inform the State of any third-party claims or the fact that no claim was presented by a person who received notification of any proceedings conducted pursuant to article 75.

language used in Article 75(5) places an obligatory enforcement regime on States Parties over reparations orders.

Kress and Sluiter advance that there is no practice of horizontal cooperation of states on enforcement of reparations for victims of international crimes.[331] The development of the reparations regime in international criminal justice has not been as fast as other components of international criminal law. The practice at the *ad hoc* Tribunals is limited in terms of enforcement of reparations orders. The enforcement of orders by the *ad hoc* Tribunals is limited to the return of stolen property or proceeds from the sale of such property.[332] The obligation by States to enforce the orders of the *ad hoc* Tribunals is expressed in terms of the general duty to cooperate with the *ad hoc* Tribunals.[333] In the case of the *Prosecutor v. Milošević et al*., the ICTY ordered the provisional freezing of the assets of the accused following the Prosecutor's application under Rule 105 ICTY RPE for purposes of granting restitution.[334] This order was transmitted to the UN Member States although there is no evidence of how vertical cooperation as described in Chapter I would have been executed by States in fulfilment of the ICTY's order.

4.6 CONCLUDING REMARKS

The Court has now established principles and practices for the application of reparations as discussed in Chapter III following the reparations order in the

[331] Kress C & Sluiter G 'Fines and Forfeiture Orders' in the Rome Statute of the International Criminal Court: A Commentary Volume II (Cassese A, Gaeta P and Jones JRW eds) (Oxford: Oxford University Press, 2002), 1823-1848 [hereinafter Kress and Sluiter Fines and Forfeiture Orders], 1833
[332] For example in Article 24(3) ICTY Statute
[333] Article 29(1) ICTY Statute and
[334] Decision on Review of Indictment and Application for Consequential Orders, *Prosecutor v. Slobodan Milošević et al*., 24 May 1999, IT-99-37, para. 27.

Prosecutor v. Thomas Lubanga case. The practice of awarding reparations for victims of international crimes has only just began, while the debate on the national reparations programmes for victims and affected communities of international crimes is steadily gaining traction. It will probably take some more time for inter-State practice on the enforcement of criminal law reparations orders to develop. The only precedent that exists for the enforcement of reparations orders is the case law of the ICTY. In the course of the negotiations on the enforcement of reparations orders under the Rome Statute, there was a proposal from the French delegation to include the attachment of an accused's property, assets or money once an order under Article 75 Rome Statute had been made. This proposal was rejected on the grounds that delegations denied the existence of an obligation for States Parties to cooperate with the Court for purposes of adopting protective measures in the field of reparations.[335]

[335] Kress and Sluiter Fines and Forfeiture Orders, *supra* note 49, 1834

CHAPTER V

Concluding Remarks

The Court is a permanent institution. In comparison to international law norms regulating the conduct of parties in hostilities and armed conflict, or those norms which govern the inalienable and 'non-derogable' rights of an individual, the Rome Statutes establishes new values and norms that have been in practice for a long period of time. Some of these norms have been assessed in this thesis under the general rubric of cooperation of States generally[336] and specifically in relation to complementary national jurisdictions,[337] the rights of certain persons who appear before the Court[338] and the enforcement of sentences and orders of the Court.[339] The Rome Statute also codifies for the first time in a multilateral treaty, the prosecution of serious violations of the rules governing the conduct of parties in armed conflict considered as a part of customary international law. The origins of these relatively new norms of international criminal justice are therefore embedded in the 'tried and tested' norms in international humanitarian law and international human rights law.

When a critical reflection and assessment of the cooperation regime under the Rome Statute is done, it is clear that there are several challenges that threaten to render the regime ineffective. It may be useful to provide some recommendations that identify opportunities to strengthen the cooperation regime established under Part IX of the Rome Statute.

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[336] See Chapter I on International Cooperation with the International Criminal Court.
[337] See Chapter II on The Principle of Complementarity: Kenya's challenge of cooperating with the Court.
[338] See Chapter III on The Rights of the Accused, Victims of International Crimes and Witnesses Appearing Before the Court.
[339] See Chapter IV on Enforcement Mechanisms to Secure International Cooperation.

The structural weaknesses that characterise the system have been identified more so in the tenuous relationship between the Court, the AU and the UNSC. As the two latter bodies function mostly form a political perspective, it may be important for the Court to assert its judicial functions by making pronouncements that regulate what seem to be contentious issues around cooperation. These pronouncements should buttress not only the general obligation of States Parties to cooperate fully with the Court, but the specific aspects that would strengthen the domestic criminal jurisdictions to fulfil its treaty-based obligations. Perhaps there also is a need for a shift in focus from perceived neo-imperialist arguments advanced against the Court to the engine room of the Court to evaluate what does work and what does not work. In this connection, there should be a greater emphasis on the part of both the States Parties to the Rome Statute and the Court on the domestication of implementing legislation at State –level to facilitate a robust and fully functional international cooperation regime.

The UNSC plays an important role as one of the trigger mechanisms for investigation and prosecution by the Court in terms of Articles 13(b), 15 *ter* and 16 of the Rome Statute. As the Court is still in its infancy stage and in need of legitimacy especially in States that are aggrieved by its *modus operandi* in the first ten years since the Court began its work, it will need the institutional support of the UNSC. Whereas reform of the UN is outside the scope of this thesis, the UNSC as it is currently constituted must exercise its Chapter VII powers given to it by the Charter of the UN to maintain regional peace and security to the exclusion of political considerations that undermine the Courts functions. As non-permanent members of the UNSC as it is currently constituted are selected from the different regions of the world, the UNSC may want to pay particular emphasis on a consultative process with regional representatives where a situation merits the attention of the Court. It may also be beneficial to invite

representatives of a situation under UNSC consideration to the deliberations of UNSC action relating to the Court. Coincidentally, Rwanda was a non-permanent member of the UNSC from 1994 to 1995 when deliberations concerning the establishment of the ICTR took place following the genocide in that country in 1994. The views and concerns of the concerned State, whether a Party or non-State Party of the Rome Statute, and other actors such as civil society organisations working in the situation under UNSC consideration may positively influence UNSC decision making relating to its Rome Statute powers. These consultative processes have the capacity to promote effective cooperation between States and the Court, when the jurisdiction of the Court is invoked in a country that has been referred by the UNSC.

Regional integration bodies *inter alia*: the AU, the European Union ("EU") and the Organisation of American States ("OAS") have a role to play to strengthen the Court. There already exists an international mechanism to deal with the investigations and prosecutions of war crimes, crimes against humanity and genocide through the auspices of the Rome Statute, specifically created as a treaty entity by the community of States. It is counter-productive to the suppression of these crimes and the objects of justice for victims when regional integration bodies embark on the creation of new supranational courts akin to the existing Court, whatever the reasons may be. More than 160 governments participated in the conference that adopted the Rome Statute. This number represents more than two-thirds of the nations on earth. In the negotiations for a permanent international criminal court, not once is it recorded that States preferred to establish or endow regional courts with international criminal jurisdiction. Rather, States were interested in enhancing national as well as the Court's capacity to deal with these heinous crimes. Regional bodies may however

support the Court's cooperation regime by advocating for the universalization of the Rome Statute and focus energies on accession to the Rome Statute for their member States who are not Party to the Rome Statute. In addition, regional bodies, especially the AU should conclude cooperation agreements with the Court that would delineate specific roles and responsibilities of both the Court and the regional body under the shared objective of fighting against impunity.

The enhancement of national criminal jurisdictions to deal with international crimes is key process that States should embark on. The real intention of the 160 governments represented in Rome prior to the adoption of the Rome Statute was that their sovereignty to deal with their nationals who are alleged to have committed war crimes, crimes against humanity and genocide remains intact. As discussed in Chapter II, it is in the interests of all States, whether Party or non-Party to the Rome Statute to have criminal justice systems that would address these crimes in a genuine fashion. Where any given State finds a lacunae in its national legislation incapacitating it from dealing with international crimes, it must seek to immediately remedy such a situation. The responsibility to build the capacity of such states is however not the sole responsibility of the individual State. The principle of positive complementarity envisages that other States as well as the Court can build the capacity of States to investigate and prosecute international crimes. The Court, its staff and growing jurisprudence has thematic expertise that would be useful in strengthening national criminal justice systems. This form of cooperation only serves to strengthen States to fight against impunity for international crimes as well as deal with specific thematic issues such as the protection of witnesses and victims that are key for the work of national criminal justice systems.

National criminal justice systems that are strengthened would be able to respond to requests for the enforcement of Court sentences and orders. As it is clear that there is no general obligation on States Parties to enforce the Court's sentences, the Court relies on States for the enforcement. In fact, the solution of many of the Court's challenges lie in the strengthening of national criminal justice systems. The Court remains the last resort to deal with international crimes and to redress victims of these crimes. The concept of localised trials should be extended the reparations regime. Although this was not addressed in detail in this thesis, strengthened national criminal justice systems includes the extension of States' capacity to deal with the right to reparations at the national level. Ideally, such capacity would also assist in the enforcement of Court ordered reparations.

A relationship of cooperation between the Court and States Parties is the lifeline of the Court and more importantly the legitimization of the international criminal justice system. It will take the concerted efforts of States to develop the international justice system and put into practice the theory behind the system – the enforcement of a rules-based system that protects children, women and men from atrocities that deeply shock the conscience of humanity.

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