Victims' Reparations Claims and International Criminal Courts

Incompatible Values?

Liesbeth Zegveld*

Abstract

This article examines the emerging practice on victims' claims for reparation in the context of international criminal proceedings. International criminal courts have followed the model of domestic jurisdictions allowing criminal courts to order compensation by the convicted person to the victim. Yet, remedies for victims in domestic criminal courts function far from optimally. Domestic courts face various problems, relating to technical questions of civil law concerning applicable law, evidence and statute of limitation. These civil law problems often prevent domestic criminal courts from ordering compensation, referring victims to civil courts instead to obtain reparation. The question arises how international criminal courts handle the obstacles inherent in civil law claims that are examined during criminal proceedings.

1. Introduction

Reparation for victims of serious violations of international criminal law has always been treated as a subject of secondary importance in international law. While the punishment of individuals for international crimes has received much greater attention over the past decade, the position of the victims of

* Liesbeth Zegveld practices as a lawyer at Böhler Franken Koppe Wijngaarden in Amsterdam, the Netherlands, focusing on remedies for war victims. She is also professor of International Humanitarian Law, in particular the Rights of Women and Children during Armed Conflict, at Leiden University. I am grateful to Larissa van den Herik, associate professor at Leiden University, and Helen Hamzei, PhD candidate at Leiden University for their useful comments to drafts of this article. I would also like to thank Isabelle Swerissen for her excellent editing of the text. [lzegveld@bfkw.nl]

Journal of International Criminal Justice **8** (2010), 79–111 doi:10.1093/jicj/mqp088

these crimes has not been addressed to the same extent. Until recently, their rights and interests have largely been overlooked.[1]

This situation is now slowly changing, however. Some international criminal tribunals have opened their doors to victims, enabling them to obtain reparation from a convicted person. They have followed the criminal procedure in many domestic judicial systems that allow victims to join in criminal proceedings as a civil party to obtain reparation.[2] The considerations underlying the international reparations procedure are similar to those at the domestic level: efficiency and justice. Like the national criminal justice system, the international criminal justice system wishes to do justice to the interests of the victims by providing them with a cheap, quick and relatively simple procedure for getting compensation for their losses.

As components of a newly created branch of international law, international criminal courts may benefit from experiences in domestic jurisdictions. In particular, these courts should pay attention to the imperfect functioning of remedies for victims in domestic criminal courts.[3] Problems emanate from the parallel hearing of the criminal case and civil compensation case by a criminal court, each case being of a distinctly different nature, based on different branches of law. The fact that civil claims have a subordinate nature to the criminal proceedings, prohibiting the court from spending sufficient time on the civil claim, adds to the frustration of reparation for victims in domestic criminal courts. Incapable or unwilling to deal with complex issues relating

1 The relative indifference to the issue of reparations may be explained in part by the suspicion of governments towards the control of international relations and warfare in particular. In the past, this suspicion was cloaked in various technical legal shrouds by courts. So was the rule that international humanitarian law should not be enforceable in law by individuals; they could not themselves invoke these regulations before the courts. (See e.g. US District Court for the Central District of California, Judgment, *Leo Handel 'et al.' v. Andrija Artucovic*, 31 January 1985, under I, in M. Sassòli and A. Bouvier (eds), *How Does Law Protect in War: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva: International Committee of the Red Cross, 1999) at 713–719). Moreover, the view was taken that it would be undesirable for victims to start legal actions, because that could impair international relations. That, for example, is the reason why the 1951 Peace Treaty between the Allies and Japan was deemed to cover all individual claims. It was the wish of the United States and other countries that Japan should recover economically as soon as possible. The right of individual victims to claim compensation — outside the Treaty — was explicitly excluded from the Treaty for that reason. (See Art. 14(b) of the Treaty of Peace with Japan: 'Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation').

2 Germanic, romanistic and nordic jurisdictions allow victims to request compensation in a civil procedure parallel to the criminal trial. In common law jurisdictions, compensation from the offender to the victim(s) may be awarded in the course of the criminal proceedings in the form of a compensation order, which is a penal sanction. See M.E.I. Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Nijmegen: Wolf Legal Productions, 2000), at 27–28.

3 Generally on the problematic implementation of victims' rights in 22 European criminal justice systems, see Brienen and Hoegen, *supra* note 2.

to civil claims, these courts are inclined to refer victims to civil courts to submit their request for damage. While remedies for victims before international criminal courts are not an exact copy of domestic procedures, it is legitimate to ask what may be expected from international criminal courts in view of the problems encountered at the national level.

This article examines the emerging practice on victims' claims for reparation. I will focus on legal reparations adjudicated by international or internationalized courts that are guided by the concept of responsibility.[4] I will first analyse victims' rights to reparation under international law, before examining the international and internationalized criminal courts that are open to victims of international crimes to claim reparation pursuant to the establishment of responsibility for the harm produced.[5] Thereafter, I will address a number of issues pertinent to private claims not commonly associated with criminal proceedings and criminal courts, but some of which domestic criminal courts also face. In particular, I will address: the problem of mass claims, the law that is to be applied to reparations claims, questions of evidence, and statutes of limitations.

2. Right to Reparation

The principle of reparation is simple: a person or entity who by an act contrary to law damages the right of another, is obliged to provide redress for the resulting damage. This fundamental principle is established in virtually all domestic legal systems. This principle is equally applicable in international law.

The Permanent Court of International Justice, the predecessor of the International Court of Justice (ICJ), in its finding in the *Factory at Chorzów* case, laid down the essential forms of reparation in the following terms:

> The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences

4 This article does not cover non-judicial (international or national) arrangements, such as truth and reconciliation commissions. Also victims' participation in international criminal proceedings, which may be necessary to obtain reparations, falls outside the scope of this contribution and is addressed elsewhere in this issue.

5 Reparation may include compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 60/147, 16 December 2005 (Van Boven/Bassiouni Principles), at Principle 21. While monetary reparation may not be a satisfactory form of legal restoration in every single case, it is the most common form of reparation in court procedures (see D. Shelton, *Remedies in International Human Rights Law* (2nd edn., Oxford: Oxford University Press, 2005) at 1) and will therefore be the main focus of this article.

> of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.[6]

This ruling was long thought to apply to states only. However, in its advisory opinion on Israel's construction of the wall in the occupied Palestinian territories, the ICJ found this principle to be also applicable in principle to the relationship between states and individuals. The ICJ in its advisory opinion held that Israel must pay compensation directly to the victims for the damage it has caused by violating international humanitarian and human rights law.[7] The only state whose actions were assessed in this case was Israel, there was no other state in respect of which the obligation to pay compensation was considered. Israel's obligation to offer a judicial remedy applied therefore directly to the individual owners of the houses and businesses destroyed by the wall. The elementary principle of law that attributable, unlawfully inflicted damage must be compensated, is therefore also applicable to the relationship between states and individuals in cases of violations of international humanitarian and human rights law.

The International Law Commission (ILC) Articles on State Responsibility,[8] adopted in 2001, fail to mention rights of individuals in the regime of secondary rights. Article 33(2) of these Articles contains a saving clause, stipulating that the Articles are 'without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State'. This provision underlines that the Articles do not deal with the possibility of the invocation of responsibility by persons or entities other than states; they merely recognize the possibility that individuals may be entitled to claim reparation for violations of primary norms of international law by states.

A victim's right to reparation depends in the first place on his rights, as recognized under international law, having been breached. A victim's right to reparation therefore presupposes rights of victims in international law. Whether individuals possess rights under this regime depends on whether they are the beneficiaries of international law, or, in other words, whether the persons' interests are directly laid down in and protected by international law.[9] The right to reparation is a secondary right, deriving from a primary

6 Permanent Court of International Justice, *Case Concerning the Factory at Chorzów*, 1928 PCIJ Series A, No. 17, at 152.

7 International Court of Justice (hereafter ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ Reports (2004) 131, at 152. The Court further specified: 'Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, inter alia, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned'.

8 ILC Articles on Responsibility of States for Internationally Wrongful Acts, 31 May 2001, text adopted by the Commission at its Fifty-Third Session, annexed to GA Res 56/83, 12 December 2001, and corrected by GA Res 56/49(Vol. I)/Corr. 4.

9 C. Tomuschat (ed.), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague: Martinus Nijhoff, 1999), at 7.

substantive right that that has been breached. So if there is no primary right, there can be no secondary right.

It is therefore not surprising that human rights law is the primary field of law that entitles individuals to reparation if their human rights have been violated. Human rights treaties provide a remedy, both substantive and procedural, for individuals suffering injury from unlawful conduct by state authorities. For example, both the European Convention on Human Rights[10] and the American Convention on Human Rights[11] allow, respectively, the European Court of Human Rights and the Inter-American Court of Human Rights to afford just satisfaction to victims.[12] According to the Inter-American Court 'this provision constitutes a rule of customary law that enshrines one of the fundamental principles of contemporary international law on state responsibility'.[13] More than the European Court, the Inter-American Court has made broad use of its competence to award both monetary and non-monetary remedies.[14] Human rights treaties also provide for specific provisions on compensation, for example to victims of unlawful arrest or detention. The Convention against Torture[15] provides for an obligation to repair violations of the prohibition against torture.[16]

Under international humanitarian law, so far, states have been reluctant to recognize, explicitly and in general, a right for victims of violations of international humanitarian law to claim reparation. Humanitarian law norms have generally been understood as applicable to states vis-á-vis each other and are commonly worded in terms of prohibitions applicable to the parties to a conflict. An empirical investigation into these conventions shows, however, that a number of rules refer explicitly to concepts such as 'rights', 'entitlements' or 'benefits'.[17] It may be argued that individuals do have rights under at least

10 Art. 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), ETS No. 5.

11 Art. 63 of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123.

12 A similar provision is contained in Art. 41 of the European Convention on Human Rights and Fundamental Freedoms.

13 Inter-American Court of Human Rights, *Case of the Moiwana Community v. Suriname*, 15 June 2005, Series C, No. 124, at 169.

14 Shelton, *supra* note 5, at 194–200, 216–219.

15 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), 1465 UNTS 85.

16 See Art. 14 which stipulates the following: 'Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation'.

17 In 1929, the principle of rights was more clearly defined, the word 'right' appearing in several provisions of international humanitarian law. See e.g. Arts 42 and 62 of the Convention Relative to the Treatment of Prisoners of War (adopted 27 July 1929, entered into force 21 October 1950), 75 UNTS 135. In the 1949 Geneva Conventions, the existence of rights conferred on protected persons was explicitly affirmed. See, in particular, Arts 7 and 8 common to the four Geneva Conventions (adopted 12 August 1949, entered into force 21 October 1950),

some provisions of international humanitarian law, a supposition that finds support in the longstanding cross-fertilization of international humanitarian law and human rights law.[18]

A question different from, albeit related to, the notion of 'rights' is whether these rights enshrined in international humanitarian law can also provide the basis for individual claims brought by victims of violations in relation to them. Support for the assertion that international humanitarian law provides the basis for claims brought by victims of violations of this law could arguably be found in Article 3 of the 1907 Hague Convention IV respecting the Laws and Customs of War,[19] which reads:

> a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.[20]

The liability of parties to a conflict to pay compensation for violations of international humanitarian law committed by persons forming part of their armed forces could entail an obligation to compensate not only states but also individual victims.[21] The obligations of states and other warring parties under international humanitarian law could thus be construed as being mirrored by victims' rights for which international humanitarian law envisages a cause of action if they are violated. Several experts have taken the view that the very purpose of Article 3 of the 1907 Convention has been to confer rights directly on individuals. According to Kalshoven, the word 'compensation' instead of, for example, 'reparation' should be understood as referring especially to individuals as beneficiaries of the rule.[22] National courts have however so far not accepted that this article can be applied in the relation between states and individuals.[23]

The UN General Assembly (GA) has recognized the interests of victims of violations of both human rights law and international humanitarian law.[24]

---

available online at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions (visited 17 June 2009).

18 L. Zegveld, 'Remedies for victims of violations of international humanitarian law', 85 *International Review of the Red Cross* (September 2003) 497–528, at 497.

19 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910), 3 Martens Nouveau Recueil (ser. 3) 461, 187 Consol. TS 227.

20 Art. 91 of Additional Protocol I contains a rule very similar to Art. 3 of the Convention (IV) respecting the Laws and Customs of War, the substance of which is generally accepted as customary international law. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 609.

21 Van Boven/Bassiouni Principles, *supra* note 5, at Principle 15.

22 See F. Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of the Hague Convention IV of 1907 to Article 91 of Additional Protocol of 1977 and Beyond', 40 *International and Comparative Law Quarterly* (1991) 827–858.

23 Zegveld, *supra* note 18, at 507.

24 The principal legal developments in this regard have been in GA resolutions and the work of the Commission of Human Rights. For example, the GA created the United Nations Voluntary

On 16 December 2005, the GA adopted the 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.[25] The content of this right to a remedy and reparations includes: access to justice, reparation for harm suffered, and access to factual information concerning the violations. These principles do not create a right to reparation, but merely acknowledge possible existing rights to reparation.[26]

A right to reparation for victims of violations of international law is thus recognized in international law. While international treaties and practice have generally applied this right in the relation: individual-state, it is submitted it now also applies between individuals. With the emergence of international criminal law, responsibility for violations of international law has shifted from the state to the individual perpetrator. Grave breaches and other war crimes, torture, crimes against humanity, and genocide can be committed by individuals. The individual perpetrator is not only criminally responsible for the crimes he has committed towards the international community, but also liable for the harm he has caused towards the victims being the object of protection of the criminal norms.

The principle that individuals are obliged to pay compensation for harm they have caused is now introduced into international criminal courts as a general principle of law.[27] This obligation of individuals has been adopted from private law. In civil jurisdictions, serious violations of (international) criminal law

Fund for Victims of Torture. See GA Res. 36/151, 16 December 1981. In 1985, the Assembly adopted a 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power'. See GA Res. 40/34, 29 November 1985. The principles are addressed to states. See ECOSOC Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, at Principles 33-34.

25 Principle 2 of the Van Boven/Bassiouni Principles stipulates: 'The obligation to respect and to ensure respect for human rights and international humanitarian law includes the duty: … [t]o afford remedies and reparation to victims …'. The discussions and negotiations of these Principles started in 1989, when Professor Theo van Boven was appointed Special Rapporteur for the United Nations Commission on Human Rights charged with this file. In 1998, Professor M. Cherif Bassiouni took over from Van Boven as Special Rapporteur. For more information on the Van Boven/Bassiouni Principles, see Th. van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines', in C.F. Ferstman, M.G. Goetz, and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (The Hague: Martinus Nijhoff Publishers, 2009), at 19–40.

26 The preamble of the Van Boven/Bassiouni Principles recognizes the following: 'Emphasizing that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms'.

27 General principles of law are recognized as a source of law in Art. 38(3) of the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945), TS No. 993. The commentary on Art. 58 of the Articles on State Responsibility reads as follows: 'The principle that individuals, including state officials, may be responsible under international law was established in the aftermath of the Second World War. It was included in the London Charter of 1945 which established the Nuremberg Tribunal and was subsequently endorsed by the General Assembly. It underpins more recent developments in the field of international criminal law, including the two ad hoc tribunals and the Rome Statute of the International

constitute not only a crime, but also a tort under domestic law against those who have suffered damage as a result of this crime. A tort claim brought in national criminal courts will generally not directly be based on (international) criminal law, but on private law. But (international) criminal law will constitute the substantive tort as the crime is — under civil law — a wrongful act towards the victims.

While reparation procedures as applied by international criminal courts may not be described as a tort action but rather as an action *sui generis*, entailing both private and public law elements, the principle of reparations by individuals for crimes they have committed is similar to reparations in domestic criminal courts.

Providing for the paying of reparation to victims by individual perpetrators through criminal procedures circumvents the thorny issue of individual rights under international law. That individuals have rights towards other individuals is recognized as a general principle of private law, which has set the example for international law. In the context of international criminal proceedings and in front of such jurisdictions, the conviction of the defendant for a crime is sufficient legal basis for a claim for reparation. The fact that claims submitted in such proceedings are to be addressed to convicted persons rather than to states, has undoubtedly made victims' reparations more acceptable to states.[28]

There follows an examination of access by victims to international and internationalized courts and tribunals for the purpose of claiming reparation in the text below.

3. Criminal Courts Open to Victims Claiming Reparation

While the first international prosecutions date back to the post Second World War era, those prosecutions largely ignored victims. Victims were virtually absent at the Nuremberg International Military Tribunal (IMT); hardly any victims were called to testify, and none of them could join as a civil party to receive reparation. Various reasons have been given for the exclusion of victims from the Nuremberg trials. One is that the Nuremberg trials were dominated by American prosecutors, acting in the Anglo-American common law

Criminal Court. So far this principle has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of individual civil responsibility.'

28 The International Criminal Court may only make orders against convicted persons and therefore does not deal with any kind of state responsibility. It should be noted that Art. 75(6) ICCSt. provides that its provisions on victims' reparations shall not 'be interpreted as prejudicing the rights of victims under national or international law'. Thus their claims can be pursued in national and other fora.

tradition.[29] Common law countries generally do not provide for victim participation and compensation in connection with criminal cases, and any compensation claim must consequently be pursued via a civil law suit.[30]

Reparation for victims through an international court was discussed during the drafting of the Genocide Convention in 1948.[31] Reparation for victims of genocide was included in a draft of this convention.[32] At the end of the day, the proposed article was left out,[33] as it was believed that redress and compensation should be part of the jurisdiction of an eventual genocide court.[34] It was agreed in 1947 that such a court 'shall also be authorized to assess damages on behalf of persons found to have sustained losses or injuries as a result of the violation of this Convention by any High Contracting Party'.[35] Despite this agreement, the International Law Commission decided to delete from its 1994 draft statute an article on reparations (introduced in the 1993 draft) on the basis of the argument that a criminal court was not an appropriate forum in which to order reparations.[36]

In line with the International Law Commission's view, the International Criminal Tribunal for the former Yugoslavia (ICTY)[37] and the International Criminal Tribunal for Rwanda (ICTR),[38] lack jurisdiction to deal with compensation for victims. Both the ICTY and ICTR Statutes and Rules provide for the restitution of property or the proceeds thereof to victims, and in this context a Trial Chamber may determine the rightful owner of the property at issue. Thus there is a mechanism in place which provides a remedy for minor

29 Another reason is that at the time of the IMT 'there was a general lack of awareness/or disbelief of the full extent of the Nazi crimes, including the holocaust'. See S. Garkawe, 'The Role and Rights of Victims at the Nuremberg International Military Tribunal', in H.R. Reginbogin and C.J.M. Safferling (eds), *The Nuremberg Trials: International Criminal Law Since 1945/Die Nuremberg Prozesse: Völkerstrafrecht seit 1945: Internationale Konferenz zum 60 Jahrestag/60th Anniversary International Conference* (München: K.G. Saur, 2006) 86–93.

30 Ch.P. Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings', 29 *Michigan Journal of International Law* (2008) 777, at 781.

31 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 1 January 1948, entered into force 12 January 1951), 78 UNTS 277.

32 W.A. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), at 400. The draft article read: 'When genocide is committed in a country by the government in power or by sections of the population, and if the government fails to resist it successfully, the State shall grant to the survivors of the human group that is a victim of genocide redress of a nature and in an amount to be determined by the United Nations'. See ECOSOC Doc. E/447, 26 June 1947, 5–13, Art. XIII. The Netherlands agreed: 'The principle of awarding an indemnity in cases where this can be done, seems reasonable'. See ECOSOC Doc. E/623/Add.3, 22 April 1948.

33 Schabas, *supra* note 32, at 400.

34 *Ibid*.

35 GA Doc. A/401, 18 October 1947, at Art. VII.

36 Draft Statute for an International Criminal Court with commentaries, 22 July 1994, at Art. 47 (3–4), available online at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7.4.1994.pdf (visited 17 June 2009). For the 1993 draft, see GA Doc. A/48/10, 3 May to 23 July 1993, at Art. 53(4).

37 SC Res. 808, 22 February 1993 (ICTY), at § 1.

38 SC Res. 955, 8 November 1994 (ICTR), at § 1.

crimes. However, for more serious forms of damage — harm to life or person — there is no remedy under the said Statutes. In its Resolution 827 (1993) of 25 May 1993 adopting the Statute of the ICTY, the Security Council decided that 'the work of the International Tribunal shall be carried out without prejudice to the right of victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law'.[39] Rule 106 of the Rules of both Tribunals stipulates that victims seeking compensation must apply to a national court or other competent body. In these domestic proceedings the victims may avail themselves of judgments of the ICTY or the ICTR.[40]

Those tribunals did use the lessons learnt from their inability to deal with victims, to successfully advocate for a victims compensation scheme during the negotiations leading to the adoption of a statute for the International Criminal Court (ICC).[41] With the establishment of the ICC, for the first time in history, individuals can submit claims of a private law nature to an international court. In contrast to the ICTY and ICTR, the ICC may award reparations for the benefit of individual victims.[42] It may do so directly against a convicted person.[43] This reparation may take the form of restitution, compensation and rehabilitation.[44] The ICC can act on an application of a victim or exceptionally on its own motion.[45] The Court's competence to act on its own motion, is intended to address situations where victims are unable to participate due to geographical distance or lack of financial means.[46] As no criminal trial before the ICC has yet ended, let alone resulted in a conviction, the ICC has not been able to decide on victims' requests for reparations.

For the benefit of victims of crimes falling within the jurisdiction of the ICC and their families a Trust Fund was set up by the Assembly of States Parties in 2002.[47] The Trust Fund has both a function in the legal reparations scheme of the ICC as well as a humanitarian role, each of which tasks should be well distinguished.[48] In its judicial function it implements particular

39 SC Res. 827, 25 May 1993 (ICTY), at § 7.

40 Zegveld, *supra* note 18, at 523.

41 ICTR, 'Paper by Elisie Effange-Mbella (Gender Adviser, Office of the Registrar, ICTR) on Support Measures to Victims and Witnesses Summoned to Appear Before the Tribunal' (7–9 November 2006), at § 27, available online at http://www.ictr.org/ENGLISH/challenging.impunity/support.-measures.pdf (visited 15 June 2009).

42 Art. 75(1) ICCSt. See on reparation claims before the ICC, J.B. Jeangène Vilmer, *Réparer l'irréparable: Les réparations aux victimes devant la Cour Pénale Internationale* (Paris: Press Universitaires de France, 2009).

43 Art. 75(2) ICCSt.

44 Art. 75(1) ICCSt.

45 Where the Court acts on its own initiative, notice will be given to the relevant accused as well as to the victims and other interested parties. See Rules of Procedure and Evidence, adopted by the First Session of the Assembly of States Parties, 9 September 2002, Official Records ICC – ASP/1/3, Rule 95(1) (hereafter ICC RPE).

46 SC Doc. S/2000/1063, 3 November 2000 (ICTY), at § 17 and accompanying fn.

47 Art. 79 ICCSt.

48 E. Kristjánsdóttir, 'International Mass Claims Processes and the ICC Trust Fund for Victims', in Ferstman, Goetz and Stephens (eds), *supra* note 25, at 174–175.

awards of reparation to victims ordered by the Court against convicted persons in line with criteria specified by the Court. The Court may order that the award for reparations be made through the Trust Fund 'where at the time of making the order it is impossible or impractical to make individual awards directly to each victim'.[49] The Trust Fund may also be the appropriate body where the ICC makes a collective award due to the large number of victims.[50] The Trust Fund may also use its 'other resources' to complement the resources collected through awards for reparations.[51] Regardless of any order for reparation by the ICC and prior to any such legal determination, the Trust Fund, in its humanitarian function, may use its 'other resources' for the benefit of victims of crimes within the jurisdiction of the Court. The Trust Fund's projects can thus also assist victims whose injuries have no causal link to the crimes tried by the Court and long before a trial has resulted in a conviction or the discharge of the defendant.[52] It is in this non-judicial capacity that the Trust Fund has already started its first projects.

Victims can take part in the criminal proceedings before the Extraordinary Chambers in the Courts of Cambodia (ECCC) and can claim reparation, provided they are victim of a crime within the jurisdiction of the Court. The Extraordinary Chambers are domestic Cambodian courts with international features, in particular in terms of the composition and applicable law.[53] Neither the Law on the

49 Rule 98(2) ICC RPE. See also C. Ferstman and M. Goetz, 'Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings', in Ferstman, Goetz, and Stephens (eds), *supra* note 25, at 343–346.

50 Rule 98(3) ICC RPE. See below on the issue of large numbers of victims claiming reparations. In implementing the ICC's orders, the Trust Fund has a large margin of appreciation in determining the nature and size of the awards granted by the court. (See Regulations of the Trust Fund for Victims, 3 December 2005, annexed to Resolution ICC-ASP/4/Res.3 at Regulations 42, 46, 48, 61 [hereafter TFR]). The Trust Fund examines the 'nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries, as well as the size and location of the beneficiary group' (Regulation 55 TFR). In cases where the ICC awards individual reparation but does not identify each beneficiary, the Trust Fund verifies that the persons who identify themselves to the Trust Fund are in fact members of the beneficiary group, and will determine the standard of proof for the verification exercise, subject to the order of the ICC (Regulations 62, 63 TFR). The Trust Fund has started to function with 34 approved projects in the Democratic Republic of Congo and Northern Uganda. These projects are estimated to reach at least 380,000 (direct and indirect) potential victims. (See ICC, 'Current Projects', available online at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Trust+Fund+for+Victims/Current+Projects/ (visited 24 June 2009)). As the ICC has not made any order for reparation so far, these projects all deal with victims who the Trust Fund believes should receive support. (A distinction must be made between the activities of the Trust Fund aimed at the implementation of reparations awards by the ICC against convicted persons and other activities that benefit victims of crimes under the jurisdiction of the ICC who have not (yet) been granted reparation.)

51 Regulation 56 TFR.

52 Kristjánsdóttir, *supra* note 48, at 173–174.

53 The ECCC's Statute and Rules of Procedure combine domestic and international law. See Art. 33 (new) of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Persecution of Crimes Committed During the Period of Democratic Kampuchea (27 October 2004), NS/RKM/1004/006 (hereafter the ECCC Law); Art. 12 of the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the

Establishment of Extraordinary Chambers[54] nor the Agreement between the United Nations and the Royal Government of Cambodia[55] contain provisions in respect of reparation, but the Internal Rules of the Extraordinary Chambers, which are in turn based on the Cambodian Criminal Code that also provides for reparation for victims, and relevant international standards, do.[56] The legal possibilities for victims to obtain reparation in the ECCC reflects the openness of Cambodian law, which follows the French model of criminal procedure, to victims' involvement in criminal cases.

Article 25 of the Statute of the Lebanon Tribunal stipulates that '[t]he Special Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal'.[57] Subsequently, when the Tribunal has found the accused guilty, a victim may bring an action in a Lebanese or other national court or other competent body to obtain compensation, based on the judgment of the Lebanon Tribunal which shall be final and binding as to the criminal responsibility of the convicted person.[58]

This is yet another form of handling the question of reparation for victims in an international criminal court in combination or together with domestic courts.[59] The Lebanon Tribunal will recognize victims who have suffered harm, and will establish the causal link between their harm and the crimes that it tries. The Tribunal will however not assess the nature and quantum of damages to be awarded, leaving these matters to national courts.[60] While national legal action will not be dependent on the Tribunal's recognition of the victims,[61] such recognition during the international criminal proceedings will of course be of great help to victims bringing claims before domestic courts.

Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (2003) (hereafter, the ECCC Agreement). See further below under 'Applicable Law'.

54 The Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

55 Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea.

56 Rules 23, 100(2), 110(3) and 113(1) of the Internal Rules of Extraordinary Chambers in the Courts of Cambodia (Rev. 3), as revised on 6 March 2009 (hereafter ECCC Internal Rules).

57 SC Res. 1757, 30 May 2007, Attachment: Statute of the Special Tribunal for Lebanon (hereafter STLSt.).

58 Art. 17 STLSt. provides that victims may present their views and concerns under certain conditions.

59 The Lebanon Tribunal, which was established pursuant to Chapter VII of the United Nations Security Council subject to an agreement between the United Nations and Lebanon, operates partly as an international and partly as a domestic court. There is an international prosecutor and the seat of the Special Tribunal is located outside Lebanon, in the Netherlands. The law to be applied is domestic Lebanese law and the Chambers of the Tribunal are composed of international as well as national judges.

60 Rules of Procedure and Evidence, Explanatory Memorandum by the Tribunal's President, 10 June 2009 (hereafter, Explanatory Memorandum), at § 14.

61 Art. 25(3) STLSt.

The legal principle that harm inflicted by one person on another person requires redress and compensation has now been translated into private causes of action to claim compensation at a few international criminal fora. International criminal courts open to victims of international crimes are still limited in number. Among international or internationalized criminal tribunals, only the ICC and the ECCC provide a full legal remedy for victims of international crimes. The Lebanon Tribunal identifies the victims of the crimes within its jurisdiction, but refers them to national courts for the purpose of compensation claims. Other international(ized) criminal courts (the ICTY and the ICTR, and also for example the Special Court for Sierra Leone) fully rely on national systems for the compensation of victims.[62] The small number of international criminal courts competent to examine the claims of victims may be a consequence of the fact that criminal justice systems around the world handle the question of victims' compensation in different way. We have already seen that systems of common law do not consider victims' claims during criminal trials while civil law systems generally permit victims to submit claims for reparation in parallel proceedings.

While there is a recent trend in international criminal law to implement victims' rights to reparation,[63] reparation therefore still very much relies on national systems. National courts are theoretically the preferable venue, as they are closer to and more familiar with the facts relevant to reparation and victims. Reparation through the national judicial system may however be

62 The Special Court for Sierra Leone refers to domestic courts as instances where victims can submit reparations claims based on successful prosecutions. The Rules of Procedure and Evidence of the Special Court for Sierra Leone stipulate: 'The Registrar shall transmit to the competent authorities of the States concerned the judgment finding the accused guilty of a crime which has caused injury to a victim. Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation. For the purposes of a claim made under Sub-Rule (B) the judgment of the Special Court shall be final and binding as to the criminal responsibility of the convicted person for such injury.' (Rule 105 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended at Sixth Plenary, 14 May 2005.) The Lomé Peace Agreement of 7 July 1999 (Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé, Togo, 7 July 1999) (hereafter, Lomé Peace Agreement)) provided for a Special Fund for War Victims (Art. XXIX Lomé Peace Agreement). The reparations programme only started in 2009, lack of sufficient Sierra Leonean political will and financial resources appearing to be the main problems (see J. King, *Gender and Reparations in Sierra Leone: The Wounds of War Remain Open* (2006), available online at http://www.ictj.org/en/research/projects/gender/country-cases/1824.html (visited 15 June 2009)). Reparations come in the form of services, not in the form of money. The first benefits are not expected to be awarded until at least 2010 (see UNHCR, *Sierra Leone: Lack of Aid Funds for Amputees, Rape Survivors, War Widows* (23 February 2009), available online at http://www.unhcr.org/refworld/publisher,IRIN,,SLE,49a660d01a,0.html (visited 18 August 2009)).

63 J. Iontcheva Turner, 'Decision on Civil Party Participation in Provisional Detention Appeals. Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), 20 March 2008', 103 *American Journal of International Law* (2009) 116, at 121.

problematic. National courts may not always be impartial, especially when they have to rule on reparation claims against their own state and state agents. Further, only a few states have the means and willingness to adjudicate damages claims. The collapse of the national judicial system may be another reason prohibiting recourse to national courts.[64] In view of the inability of many domestic courts of the state where the crimes have been committed to deal with victims of crimes, addressing victims' claims at the international level is therefore legitimate. While the ICC has complementary jurisdiction with states parties, for many victims the ICC will be the only option for reparation.

Below I will examine the prospects and limitations of adjudication of reparation claims in international criminal courts, bearing in mind the practice of civil claims in domestic criminal courts.

64 National courts in the former Yugoslavia and Rwanda have not provided the forum for victims to obtain compensation. As the ICTY put it: '[t]his approach [compensation awarded in domestic jurisdictions] appears unlikely to produce substantial results in the near future'. (See SC Doc. S/2000/1063, 3 November 2000 (ICTY), at § 45). Under Rwandan domestic law, survivors of genocide crimes are entitled to register as civil parties in criminal cases. (See Art. 29 of the Organic Law No. 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990. The Government has drafted a second law on reparation for survivors of genocide. The revised Gacaca Law of 2004 provided that *gacaca* courts have the jurisdiction to award compensation for purely material damages and that other losses and reparation issues would be dealt with by the Indemnification Fund, which has yet to be established. See African Rights and Redress, 'Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes' (November 2008), at 101, available online at http://www.redress.org/reports/Rwanda%20Survivors%2031%20Oct%2008.pdf (visited 10 August 2009)). However, Rwandan civil parties faced numerous obstacles in lodging these claims, lacking information about the procedures and their position therein. While about half of the civil parties were awarded damages, almost no claimants in fact received compensation, as convicted persons lacked the means to pay and no judgments against the Rwandan state had been enforced when it has been held civilly responsible (*ibid.*, at 100). Also the victims of crimes tried by the Sierra Leone Court are referred to national remedies to obtain compensation. The right to seek redress laid down in Sierra Leone's domestic law Section 28(1) of the 1991 Constitution of Sierra Leone allows victims of fundamental human rights abuses to seek 'redress' before the Supreme Court of Sierra Leone. See Truth and Reconciliation Commission of Sierra Leone (hereafter, TRC), 'Truth to Witness: Volume 2' (2004), at 230, available online at http://www.trcsierraleone.org/pdf/FINAL%20VOLUME%20TWO/VOLUME%202.pdf (visited 15 June 2009). However, the Truth and Reconciliation Commission in its final report on national remedies wrote 'in Sierra Leone, effective redress is simply not available through the courts. The justice system currently does not have the capacity to deal with the massive violations committed during the conflict. Large parts of the country do not have functioning courts and access to formal justice is difficult to obtain. … Therefore the possibility for victims to seek redress through the civil courts for the violations committed against them is not a reality in Sierra Leone' (*ibid.*, at 229). See also the TRC, which, in its final report states the following on reparations: 'In designing a reparations programme for the victims of the Sierra Leonean conflict, the Commission had to take into account a number of factors. It would have been gratifying if all victims of the conflict could benefit from a reparations programme but such a programme would be totally impossible for the country to implement' (*ibid.*, at 229).

4. Issues Pertinent to Adjudication of Compensation Claims in International Criminal Courts

In granting access to victims, the architects of the ICC, ECCC and the Lebanon Tribunal have been inspired by national models.[65] When evaluating the development of this new area of international law, it is therefore legitimate to have recourse to national courts' experiences with victims' claims alongside criminal proceedings. As a matter of fact, these experiences are not entirely positive. Facing various obstacles, some of which relate to technical questions of private law, there is a general preference in domestic criminal courts to refer victims' claims to civil courts.[66] National judges have been hesitant or even outright reluctant to examine complex civil law matters related to victims' claims. These judges are not specialists in this area of law, and their primary concern is trying the accused. The question arises whether the drafters of the ICC and ECCC fully examined the limitations domestic criminal courts face when handling victims' civil claims.

I will discuss some issues that international criminal courts have encountered or are likely to encounter when ruling on private compensation claims. No request for reparations has yet been ruled on by the ICC or ECCC, since these courts have not convicted anyone. Also the Lebanon Tribunal is still to begin its first trials. In the absence of relevant practice, it is therefore difficult to assess the application of the rules on reparations by international criminal courts. Still, the rules to be applied by these courts as well as the ongoing cases offer some insight into the main legal problems that international criminal courts may face or are facing today related to reparation cases. I will discuss the following issues: the mass nature of the victims' claims and the need to have speedy trials, the need to create a body of law applicable to compensation claimsas distinguished from the law recognizing the right to reparation, questions of evidence, and statutes of limitations.

A. Mass Claims and Expeditious Trials

International criminal courts allowing some form of victim participation for the purpose of reparation will have to deal with large numbers of victims. These courts will try the most serious crimes, which are likely to have caused a great many victims and thereby give rise to a great many potential claimants before these courts. Since the start of the proceedings at the ICC, victims have systematically filed applications for participation. So far 1,200 applications have been received.[67] Potentially, the group of victims will be even larger.

65 However, the international compensation procedure is not necessarily an exact copy of the procedures known in national civil law jurisdictions. For example, the ICC can order compensation on its own accord, thereby taking away the purely civil character of the claim.

66 Brienen and Hoegen, *supra* note 2, at 1069.

67 700 applications for participation were received in the situation of the Democratic Republic of Congo. 400 victims applied in the *Katanga* case. It is difficult to foresee how many of these

Indeed, it is a stated aim of the ICC to reach as many victims as possible. Under Rule 96, the Registrar has an obligation to give publicity 'as widely as possible and by all possible means' to the reparation proceedings before the ICC 'to other victims, interested persons and interested states'. At the end of February 2009, the ECCC had received 1,409 civil party applications.[68] In view of the total number of victims of the Khmer Rouge regime, 1,7 million,[69] many of whom have died, this is a small number. But in view of the possibilities of a sole court, it is a huge number. The number of civil parties in a single case could mount to hundreds.[70]

Criminal courts are in the first place set up to try accused, not to provide reparations. Fears that victims' compensation claims can seriously delay criminal trials are strongly felt by domestic criminal courts, where civil claims are for that reason subordinate to the criminal proceedings.[71] Similar concerns prompted the ICTY and ICTR to reject the possibility of amending their Statutes to encompass compensation for victims of crimes under their jurisdiction.[72] These tribunals specifically pointed in this regard to the number of potential claimants.[73] They feared for a resultant additional workload and a significant impact on the conduct of the proceedings and the length of the trials. The judges argued that the aim of these tribunals has consistently been

victims will be able to get into the ICC's redress mechanisms. In the *Lubanga* case so far 93 victims have been recognized. Remarkably, the ICC does not make known the victims whose applications it has rejected.

68 D. Gillison, 'ECCC Concludes Plenary, Again Changes Civil Party Role', in *The Cambodian Daily* (7–8 March 2009) at 11.

69 Isabelle Roughol, 'Discuss Reparations for Victims', in *The Cambodian Daily* (27 November 2008) at 32.

70 The Lebanon Tribunal is likely to face fewer victims since its mandate concerns the attack of 14 February 2005, which claimed the life of former Lebanese Prime Minister Rafiq Hariri and 22 others. However, the mandate of the Tribunal may be extended over other crimes 'connected' and of 'similar nature and gravity' to the Hariri attack, thereby enlarging the potential group of private claimants (Art. 1 STLAgr.).

71 Brienen and Hoegen, *supra* note 2, at 1069.

72 In letters dated 12 October and 9 November 2000 from the Presidents of the ICTY (SC Doc. S/2000/1063, 3 November 2000 (ICTY), Annex: Letter dated 12 October 2000 from the President of the International Criminal Tribunal for the Former Yugoslavia addressed to the Secretary-General) and the ICTR (SC Doc. S/2000/1198, 15 December 2000 (ICTR), Annex: Letter dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General) respectively addressed to the Secretary-General, the Tribunals addressed the question whether compensation for victims of crimes under their jurisdiction should be the responsibility of the Tribunals. The judges conclude that victims have a right to compensation. The judges also 'wholeheartedly empathize with the principle of compensation for victims, but, for the reasons set out below, believe that the responsibility for processing and assessing claims for such compensation should not rest with the Tribunal'. Also see SC Doc. S/2000/1063, 3 November 2000 (ICTY), at § 46.

73 The ICTR noted that 'applying the breadth of the definition of a victim to Rwanda, while it is impossible to establish the exact figure of the number of persons eligible for compensation, it must comprise a substantial part of the population of Rwanda, both within and outside of the present borders of the country'. See SC Doc. S/2000/1198, 15 December 2000 (ICTR), at § 9.

to minimize the length of preventive detention, pursuant to the fundamental rights of the accused, by shortening trials.[74]

It was for this reason that the ICTY proposed that a mechanism modelled on that of an international mass claim procedure should be created. In its view this would be a much faster way to ensure that the rights of the victims of the conflict in the former Yugoslavia are satisfied. It would also be fairer as it would, theoretically, cover all victims.[75] Until recently, the answer to the massive character of compensation claims of victims has been the establishment of the so-called mass claims procedures.[76] Mass claims procedures offer a temporary forum to a clearly defined group of victims who have all suffered losses in the same event, generally an armed conflict.[77] The fundamental

74 It would in their view not be wise to implement a new system which would counter these efforts. Expanding the ICTR's mandate with compensation claims would in the ICTR's view 'not be efficacious, would severely hamper the everyday work of the Tribunal and would be highly destructive to the principal mandate of the Tribunal'. See SC Doc. S/2000/1198, 15 December 2000 (ICTR), at § 4. The reasons against amending the ICTR Statute to cover compensation for victims are similar to those expressed by the ICTY. Paragraph 12 reads: 'The work of the Tribunal has been considerably complicated by the uniqueness of its mandate, the ground-breaking nature of its considerations, the necessity of developing new models of criminal procedure and the development of new organizational structures'. See also C. Jorda and J. de Hemptinne, 'The Status and Role of the Victim', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (Oxford: Oxford University Press, 2002) 1387, at 1389.

75 SC Doc. S/2000/1063, 3 November 2000 (ICTY), at § 48. The Presidents of the ICTY and ICTR have called upon the Security Council to establish a compensation scheme for victims of the Yugoslav conflict and the Rwanda genocide, which would be quicker and simpler. The ICTY proposed that a mechanism modelled on that of an international compensation commission could be created. (See SC Doc. S/2000/1063, 3 November 2000 (ICTY), at § 48). The ICTR proposed that victims' claims may be assessed and processed by a specialized agency set up by the United Nations, or some other agency to administer a compensation scheme or trust fund that can be based upon individual application, or community need or some group-based qualification. The ICTR could be involved in this by empowering it to order payments from a trust fund for victims actually appearing before it as witnesses in a case. (See SC Doc. S/2000/1198, 15 December 2000 (ICTR), at § 15). These proposals have not produced any results.

76 Another method is via lump sum agreements. These agreements have been repeatedly concluded following international armed conflicts, to deal once with large numbers of claims. However, as liability under international law does not necessarily need to be established in these agreements, the legal relevance is limited.

77 The mechanisms stand alone and are simple to access by the victims. The outcome is binding. The 'Kosovo Housing and Property Claims Commission' (HPCC) described the basic characteristics of a mass claim mechanism as follows: '[T]he Commission … note[s] that … a mass claims process can be broadly understood as a process designed to deal with a high number of claims that arise out of the same extraordinary situation or event and are filed with a decision--making body within a limited period of time, thus claimants in a mass claims process are generally in the same situation, having suffered the same or similar losses within the same period of time'. See HPCC Res. 7/2003, 11 April 2003. An example of a mass claim mechanism is the Eritrea-Ethiopia Claims Commission (EECC), which was established in 2000 following a peace treaty between Eritrea and Ethiopia. Note however that the Parties before the EECC decided not to use the possibility of mass claims proceedings and their claims were limited to inter-state claims and claims on behalf of named individuals. See, e.g., Final Award of 17 August 2009, Eritrea's Damages Claims, § 53.

difference between mass claims procedures and ordinary court procedures is the large number of victims that mass claims procedures deal with and the way in which reparation is organized. The number of cases under the United Nations Compensation Commission umbrella for example, is 2.8 million.[78] Several international mass claims programmes have come to recognize that the traditional method of individualized adjudication, when applied to mass claims, would result in unacceptable delays and substantially increased costs for both claimants and respondents. The massive character of the claims has strongly determined the actual procedures applied by mass claims procedures. They simultaneously deal with large groups of comparable claims and do not therefore employ the same individual approach used in the courts.[79] The mass claims procedures have an administrative character. Although there are at times individual claimants who submit their own claims,[80] they are not leading in the procedure.

The question is therefore legitimate: how do international criminal courts handle the (potentially) large number of claimants appearing before it? It is often claimed that the sheer numbers of victims leave no choice but to adopt a collective approach.[81]

The approach of those international criminal courts that allow victims' claims for reparation towards large numbers of victims is mixed. In principle the ICC, the ECCC and the Lebanon Tribunal take an individualistic approach. Their rules refer to victims as individuals rather than groups or members of groups.[82] The rules do not provide for class actions. The ECCC Internal Rules allow victims to organise their civil party action by becoming member of a

78 The United Nations Compensation Commission (UNCC) was established to decide on all the claims against Iraq which resulted from its invasion and occupation of Kuwait in 1990/91. See SC Res. 687, 3 April 1991. See also V. Heiskanen, 'Virtue Out of Necessity: International Mass Claims and New Uses of Information Technology', in Permanent Court of Arbitration (ed.), *Redressing Injustice Through Mass Claims Procedures* (Oxford: Oxford University Press, 2006), at 37: 'If the number of documents one is dealing with reaches a critical mass, the application of mass claims processes cannot be excluded *a priori*. After all, it is the numbers that tend to make the difference between arbitration and mass claims.'

79 The EECC can accept, to promote the speedy settlement of the claims, 'such methods of efficient case management and mass claims processing as it deems appropriate, such as expedited procedures for processing claims and checking claims on a sample basis for further verification only if circumstances warrant'. See Art. 5 of the Agreement Between Eritrea and Ethiopia (Algiers, 12 December 2000), available online at http://www.pca-cpa.org/upload/files/Algiers%20Agreement.pdf (visited 16 June 2009).

80 In some cases through their governments, such as with the EECC and UNCC.

81 See also M. Henzelin, V. Heiskanen, and G. Mettraux, 'Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claims Processes', 17 *Criminal Law Forum* (2006) 317–344.

82 Rule 85(a) ICC RPE states that a victim is a natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the Court. The Rules thus address victims as individuals, though the violations may have been committed against them as members of a group. The Practice Direction 02/2007/Rev. 1 on Victim Participation stipulates that, under the ECCC legal system, a victim may either be a natural person or a legal entity. Rule 2(a) STL RPE states that a victim is a natural person who has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal's jurisdiction.

'Victims' Association'.[83] However, these Victims' Associations are not themselves civil parties to the proceedings, merely representing their members who are civil parties.[84] This procedural possibility is different from the very specific and clearly defined possibility of class action under, among others, American private law.[85] A class action so understood is a civil lawsuit of a large group of people, with similar legal claims, collectively bringing a case to court. A large, unnamed group of plaintiffs is represented by a smaller, named group of plaintiffs, or even one plaintiff. The link between the named plaintiff(s) and the unnamed plaintiffs is a shared legal grievance. The group must be approved, or 'certified' by the judge before the class action can proceed.[86] It should be noted that unnamed plaintiffs are not obligated to be part of the class. They may opt to litigate their legal claims themselves, or not at all.[87]

A solution that international criminal courts may wish to consider, by borrowing from American private law, is to allow a form of class actions, providing a practical avenue to numerous victims of international crimes wishing to bring claims for reparation that would be too costly and time consuming to litigate individually. The court — in the interests of efficiency — can declare the outcome of proceedings relating to one or several victims applicable to all victims who are able to present a like claim. Such group litigation would limit the choices and options of individual victims, lessening the degree of their of control over the proceedings in international criminal courts, but it may fit better into the concept of adjudication of civil cases along side the criminal trial by an international criminal court. Also it would enable international criminal courts to award damages to victims not before them; meeting their wishes to cover all the victims.[88]

Whether class action will be an appropriate means for international criminal courts to solve the problem of too many victims will depend on whether the victims' reparations claims are sufficiently similar in law and fact to make these claims a class. Questions of damages and liability may affect victims of

83 According to Rule 9 ECCC Internal Rules, the Victims Unit may draw up a list of 'approved Victims Associations' under the supervision of the Co-Investigating Judge and the Trial Chamber.

84 Art. 5 Practice Direction 02/2007/Rev. 1 on Victim Participation.

85 In the United States, class actions may be brought in federal or state court. The Federal Rules of Civil Procedure (FRCP), in Rule 23, sets forth the requirements for a class action in federal court. Each state in the United States has its own rules for class actions. Other states that have adopted class action, in varying forms, are for example Canada, Switzerland, and Israel.

86 See Justia, 'Class Actions Overview', available online at http://www.justia.com/trials-litigation/class-actions/ (visited 16 October 2009), at 'The Basics of Class Actions'.

87 After certification of a class, notification is sent to the unnamed plaintiffs to inform them of the lawsuit and they are given the opportunity to opt out of the class. Individuals who so choose are not members of the class, and the class action litigation will not impact their legal rights. Therefore, the final resolution of the class action, whether by settlement or judgment, is not binding upon persons who opted out of the class. Likewise, non-members of the class are not entitled to any recovery which may be awarded to the class; however, they may bring their own separate lawsuits asserting their own legal claims.

88 SC Doc. S/2000/1063, 3 November 2000 (ICTY), at § 27.

international crimes in different ways, leading in practice to a 'degeneration' of the class 'into multiple lawsuits litigated separately'.[89] Whether victims' claims before international criminal courts fulfil these criteria depends on the circumstances of each case. Also it should be borne in mind that class action cases are complex. They are not easy to litigate. Although they put together the victims, they still require time and resources of the attorneys and the court. It is questionable whether a criminal court is up to this, or whether this complex kind of litigation should be left to civil courts.

The ICC and Lebanon Tribunal, like the ECCC, also offer mechanisms meant to assist them handling large numbers of victims. One of these mechanisms is collective reparations.[90] The ICC has the option of granting individual or collective reparation, concerning a whole group of victims or a community, or both. [91] If the Court decides to order collective reparation, it may order that reparation to be made through the Trust Fund and the reparation may then also be paid to an inter-governmental, international or national organization.[92] The Trust Fund may also depart from the individualized approach of the Court. The Trust Fund may then function not so much as a reparations fund, but as a fund providing humanitarian assistance to victims. As the Trust Fund may be more flexible, not bound by narrowly defined legal principles, it is likely to be better equipped to deal with large numbers of victims.

89 FRCP advisory committee's note, subdivision (b)(3), 39 FRD 69, at 103 (1966). For example in *Steering Committee v. Exxon Mobil Corp.* the Court considered that 'where individual damages cannot be determined by reference to a mathematical or formulaic calculation, the damages issue may predominate over any common issue shared by the class', *Steering Committee v. Exxon Mobil Corp.*, No. 05-30781 (5th Cir. 18 August 2006).

90 Principles 8 and 13 of the Van Boven/Bassiouni Principles indicate a comprehensive approach towards mass victimization, as it includes both individual and collective victims. Another mechanism is collective representation. Large numbers of victims can also be dealt with by the ICC through rules that are drafted in a way which leaves a wide margin of appreciation to the Court. During the drafting of the Statute and the Rules, many delegations were concerned that the potential numbers of victims might make their participation practically impossible, and thus, the modalities for exercising their rights to participate in a given case were left in the hands of the Court. See G. Ditti and H. Friman, 'Participation of Victims in the Proceedings', in R.S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (New York: Transnational Publishers, 2001) at 456. Thus, if the ICC judges share the fear of large numbers of victims invading the Court, they may interpret the articles in a way so as to narrow down the participation of the victims. Similarly, see Rule 86(b)(iv) STL RPE, stating that in deciding whether victims may participate, the pre-trial judge may consider 'whether the proposed participation would cause unnecessary delay and inefficiency in the proceedings'.

91 Rule 97 ICC RPE provides: 'The Court may award reparations on an individualized basis or, when it deems it appropriate, on a collective basis or both'.

92 Rule 97(2) ICC RPE provides: 'The Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations'. Also see G. Bitti and G. Gonzáles Rivas, 'The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court', in Permanent Court of Arbitration, *supra* note 78, at 314–315.

Under current ECCC rules, reparations would not go to individual victims. The ECCC can award only collective and moral reparations.[93] The ECCC's rules state that these can include ordering a convicted perpetrator to 'publish the judgment in any appropriate news or other media', or to 'fund any non-profit activity or service that is intended for the benefit of victims' or 'other appropriate and comparable forms of reparation'.[94] These examples suggest some room for the ECCC to design certain collective and symbolic forms of reparations.[95]

Another reason to grant collective awards is that there are likely to be few resources available. The ICTY judges raised the concern of how such victim compensation would be funded given the fact that the accused generally do not have any resources. The judges found a system aimed at compensating the victims, but failing actual compensation due to lack of funding, 'unacceptable'.[96]

It is too early to assess the responses of the ICC and the ECCC to tackle the problem of the potential large number of civil claimants, although worries about their lack of awareness of this problem have already been expressed.[97] Fears of large numbers of victims hampering the criminal proceedings are to be taken seriously. A reason for granting victims access to criminal courts to obtain reparation is efficiency. The criminal court trying the crimes is already fully acquainted with the file. To demand victims to address a (civil) court or other (national or international) body after a successful criminal trial

93 Rule 23(1) ECCC Internal Rules: 'The purpose of Civil Party action before the ECCC is to: … (b) Allow Victims to seek collective and moral reparations, as provided in this Rule'. In this context, 'collective' means that the ECCC is only able to order reparations that benefit Civil Parties as a group or that benefit groups of Victims or Cambodian society. The term 'moral' reparations in this context refers to reparations that are more symbolic than they are material or economic.

94 Rule 23(12) ECCC Internal Rules.

95 R. Carranza, *Imagining the Possibilities for Reparations in Cambodia*, at 2, available online at http://www.ictj.org/images/content/9/5/950.pdf (visited 16 June 2009).

96 SC Doc. S/2000/1063, 3 November 2000 (ICTY), at § 37. In cases where reparation is not available from the individual perpetrators, Principle 16 of the Van Boven/Bassiouni Principles calls on states to 'endeavor to establish national programmes for reparation and other assistance to victims …'. Moreover, when compensation is not fully available from the offender or other sources, states should endeavour to provide financial compensation to (a) victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; (b) the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization. See GA Res. 40/34, 29 November 1985, *supra* note 24, Principle 12. Therefore, also in cases where the state has no responsibility under international or national law to pay compensation as the criminal was no state agent, the state may still be obliged to pay compensation. Also see SC Doc. S/2000/1063, 3 November 2000 (ICTY), at § 8.

97 See with regard to the ECCC, Iontcheva Turner, *supra* note 63, at 122. With regard to the Lebanon Tribunal, see Explanatory Memorandum, *supra* note 60, at §§ 17–18, in which the Special Tribunal for Lebanon dealt with the question of 'how to prevent victims from being too numerous and thereby "flooding" the Tribunal, making its proceedings cumbersome and slow …'. Subsequently, 'it was decided that, first, the notion of "victim" must be defined rather narrowly so as to include only those natural persons who have suffered material, physical or mental harm as a direct result of an attack within the jurisdiction of the Tribunal. Legal persons, as well as individuals who may have suffered indirect harm, are thus excluded.'

would unnecessarily burden the legal system. In view of the large number of victims likely to present claims in the international courts, it is doubtful, however, whether the expectations of efficiency will be met.[98]

B. Law to be Applied to Compensation Claims

Another difficulty faced by international(ized) criminal courts dealing with victims' reparation claims is the absence of an established body of law applicable to such claims (other than the law recognizing the right to reparation). As compensation proceedings before international criminal courts did not exist until recently, a body of law, both substantive and procedural, to assess the claims does not exist.[99] Where will these international criminal tribunals find the rules to apply to reparation claims? Will these tribunals work in isolation or will they refer to domestic law or international sources, such as human rights treaties?

When determining the applicable law, a preliminary question that should be addressed is: are victims' compensation claims of a private law character or rather of a public law character or do they have elements of both? Under domestic law, these claims are considered to be of a private law nature, notwithstanding the fact that they are examined by a criminal court. As a consequence, domestic criminal courts strictly adhere to the law on civil liability.[100] This leads these courts to apply foreign law to victims' claims.[101] Domestic criminal courts consider interpretation and application of foreign law to be a complex matter of civil law. Lacking the necessary private law experience, they take the position that these tasks should not be assigned to them but rather to civil courts.[102]

98 Trumbull IV, *supra* note 30, at 804–819.

99 The ICTY and ICTR expressed the fear that a new legal system would have to be created. The ICTR indicated that if it would add to its responsibilities a whole new area of law relating to compensation, then the Tribunal will not only have to develop a new jurisprudence; it will also have to establish new rules and procedures for assessing claims. The reasons against amending the ICTR Statute to cover compensation for victims are similar to those expressed by the ICTY. 'The work of the Tribunal has been considerably complicated by the uniqueness of its mandate, the ground-breaking nature of its considerations, the necessity of developing new models of criminal procedure and the development of new organizational structures.' See SC Doc. S/2000/1198, 15 December 2000 (ICTR), at § 12. The ICTY took into consideration in this regard that the compensation proceedings had not been applied before an international tribunal that primarily follow the adversarial model. See SC Doc. S/2000/1063, 3 November 2000 (ICTY), at § 34.

100 Brienen and Hoegen, *supra* note 2, at 1069–1070.

101 For instance, in member states of the European Union, the choice of law principles determine that the applicable law is the law of the country in which the damage occurs. Article 4 of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), 11 July 2007, L199/40, 31 July 2007.

102 Judgment Van Anraat *('Uitspraak Van Anraat')*, Court of Appeal of The Hague *('Gerechtshof's-Gravenhage')*, 9 May 2007, at § 18; Judgment Van Anraat *('Uitspraak Van Anraat')*, Supreme Court of the Netherlands *('Hoge Raad der Nederlanden')*, 30 June 2009, at § 13.

Under international law, victims' compensation claims are not treated as purely private law matters but rather as claims of a mixed private-public law character. Inter-individual claims are of a private law nature in so far only private persons are involved. The public law character of these claims arises from the fact that they are adjudicated by an international court applying (also) public international law.

The statutes and practice of the ICC, ECCC and Lebanon Tribunal confirm that on the matter of the applicable law, compensation claims are not regarded as pure tort actions, but rather as actions of a mixed private and public law character. These claims are determined by rules of public international law and domestic private law.

The ICC Statute merely provides a framework for this Court conferring power on the judges to identify the applicable law.[103] The Rules of Procedure and Evidence do not determine the applicable law. Pursuant to Article 21 of the ICC Statute the Court shall apply (if the Statute and Rules of Procedure offer no answer, which they do not) 'applicable treaties and the principles and rules of international law'. In its decisions in relation to victims, the ICC has referred to the case-law of human rights courts, such as the European Court for Human Rights[104] and the Inter-American Court for Human Rights.[105] The ICC has also drawn on the UN Convention on the Rights of the Child[106] the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[107] and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[108] The ICC has thus widely drawn on treaties in dealing with victims' issues. These

103 Pursuant to Art. 75 ICCSt., the Court may lay down the principles for reparation for victims, including the principles underlying its determination of the scope and extent of any damage, loss and injury. According to Ferstman and Goetz, 'reparations to victims was one of the most complicated issues in the negotiations at Rome and many of the details were left out in order to secure agreement. The reference in Article 75(1) of the ICC Statute to the development of principles relation to reparations is therefore not accidental.' See Ferstman and Goetz, *supra* note 49, at 349. To date, the ICC has not issued general principles on reparations. *Ibid.*, at 316.

104 Decision on the Applications for the Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the Democratic Republic of the Congo* (ICC-01/04-101-tENG-CORR), Pre-Trial Chamber I, 17 January 2006, at §§ 51–52, 116, 131, 146, 161, 172, 182.

105 *Ibid.*, at §§ 53, 116, 131, 146, 161, 172, 182.

106 Decision on Victim's Participation, *Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber, 18 January 2008, at §§ 36-37.

107 *Ibid.*, at §§ 115, 131, 145, 161, 172, 182.

108 *Ibid.* It is not clear whether the treaties and other instruments were applied by the Court as recognized sources of law (treaties or custom) or that their application is rather based on Art. 21(3) ICCSt. that stipulates that the application and interpretation of the law must be consistent with 'internationally recognized human rights'. According to this provision, 'internationally recognized human rights' take priority over all other applicable rules. The article does not define the human rights to be applied by the ICC, save that they must be widely ratified or recognized. It significantly broadens the competence of the ICC. See A. Pellet, 'Applicable Law', in Cassese et al. (eds), *Commentary*, *supra* note 74, at 1080.

treaties, like international public law in general, are well capable of solving private compensation claims.[109] Many areas of international public law originate from national private law, developed primarily to solve private disputes. Indeed, general principles of law adopted by customary and conventional international law 'are for the most part identical with generally recognised principles of private law'.[110] The reason is that 'international law is not always developed enough to supply a solution'. This is certainly true for the field of law we are concerned with here, dealing with victims' compensation claims. While so far some rules and principles of private law have operated in the field of inter-state claims and claims between individuals and states, there is no good reason why these rules and principles would not also be relevant to disputes between individuals as such before international criminal courts. Questions on responsibility, causality, evidence and reparation relevant to victims' compensation claims may therefore be solved by public international law.

The ICC can also apply private law to the extent it emerges as 'general principles of law from national laws of legal systems of the world'. This rule of the ICC Statute does not allow the Court to apply the law of individual states, for example the law of the state that would normally exercise jurisdiction over the victims' claims. General principles of law must, as a matter of law, be incorporated in the major legal systems of the world, and not relate to any particular state. Accordingly, so far the ICC has referred to civil law systems that allow victims to participate in criminal proceedings,[111] which seems to be in line with Article 21 of the Statute. It has not applied rules of specific countries.

The ECCC and the Lebanon Tribunal primarily apply domestic law as such. The ECCC applies in the first place domestic Cambodian law.[112] It is only when Cambodian law is ambiguous or deficient that the ECCC is to seek guidance from international law.[113] Accordingly, the ECCC pre-trial chamber[114] has reviewed the text of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, as well as the rules of the ICC and UN sponsored mixed courts for Kosovo and East Timor.[115] Similarly, the co-investigating Judges have referred to the jurisprudence of the European Court of Human Rights and the UN Human Rights Committee.[116]

The Statute of the Lebanon Tribunal leaves open the question of applicable law. According to the Explanatory Memorandum by the Tribunal's President,

109 For example the law on state responsibility. See, in general, H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green and Co. Ltd, 1927).

110 *Ibid.*, at viii.

111 *Situation in the Democratic Republic of the Congo*, *supra* note 104, at § 52 and fn 51.

112 ECCC, Decision on Civil Party Participation in Provisional Detention Appeals, Pre-Trial Chamber, 20 March 2008, at § 27.

113 See Art. 33 (new) ECCC Law and Art. 12 ECCC Agreement.

114 Decision on Civil Party Participation in Provisional Detention Appeals, *supra* note 112, at § 36.

115 *Ibid.*, at §§ 30–34.

116 ECCC, Order on Civil Party Lawyer's Request for Designation of Interpreter, Pre-Trial Chamber, 2 February 2009, at § 12.

however, the Lebanon Tribunal will derive the relevant rules from national law; it will apply Lebanese private law in order to take into account the rights of victims.[117]

In contrast to the ICC, the ECCC and Lebanon Tribunal thus primarily rely on domestic law. This can be explained by the mixed character of these courts. They operate partly as domestic and partly as international courts. Their reliance on domestic law will require these courts to address the question whether domestic Cambodian and Lebanese law is transposable to the damages procedures in the international-level courts.[118] As victims' compensations claims before the ECCC and Lebanon Tribunal are not genuine tort actions, they may not allow for the mechanical application of domestic rules. This is not to say that either system, public international law or private Cambodian or Lebanese law, should be treated as isolated areas of law which do not influence each other. After all, the victims' claims model applied by the ECCC and Lebanon Tribunal has been derived from national law notions. To make reference to or even apply domestic Cambodian and Lebanese law when implementing these models is therefore no more than logical. But the national law notions may need to be transformed 'so as to adjust [them] to the exigencies and basic principles of international law'.[119]

More generally, drawing on a great variety of international as well as domestic rules, international criminal courts face the problem of combining different legal systems. Integrating domestic private law and international public law on aspects relevant to compensation claims demands experts in both fields and requires considerable time and energy being given to the matter of interpretation of the law on compensation claims. There are no ready-made constructions to which courts can fall back. What is required are patient and skilful courts able to develop a uniform body of law that can be used by both courts and victims in the peculiar context of victims' compensations claims parallel to mass atrocities trials.

C. Evidence of the Damage Suffered

An issue related to applicable law is the question what set of rules international criminal courts are to apply to determine the evidence required to substantiate victims' claims for reparation. Also here a coherent body of law, specifying the standard of proof that must be met in order for a claim to be accepted, is not readily available to these courts.[120]

117 Explanatory Memorandum, *supra* note 60, at §§ 2–3.

118 Separate and Dissenting Opinion of Judge Cassese, Judgment, *Erdemović* (IT-06-22-A), Appeals Chamber, 7 October 1997.

119 *Ibid.*, at § 3.

120 Other questions that I will not address now, but that deserve attention, are the definition of harm and the causal link required between the harm suffered and the crimes for which the individual has been convicted.

A benefit for victims of compensation cases that are linked to criminal proceedings is a reduced burden in bringing their claims. The facts proving the crimes, which caused the harm suffered by the victims, are to be provided through the criminal proceedings. The case of the victim or victims is built on the indictment and it is for the prosecutor to prove the allegations in the indictment. Of course, the prosecutor faces his or her own problems in establishing the facts. This will in turn affect the victims' claims because, if the prosecution is not successful, the victims will lose the opportunity to have their requests for reparations dealt with by the court.[121] In criminal cases that result in a conviction, letting victims benefit directly from the evidence produced during the trial was a clear improvement of the position of victims in the domestic criminal proceedings. They do not have to go to a civil court after the criminal proceedings based on the same facts and the same wrongful act.

While the facts proving the criminal behaviour are for the prosecutor to prove, this is different for the harm suffered by the victims. In principle, it is for the victims to prove the scope of their injuries and losses. In some cases, victims might have difficulties gathering the necessary evidence to proof that they have suffered harm. Accurate and reliable information, for example that a relative died or that their property was destroyed or stolen, is often difficult to obtain. Victims who flee a war zone do not, in general, first gather proof before they leave.

The amount of damages awarded by domestic courts is determined on the basis of civil law rules of evidence. Where decisive evidence of damage, its scope and nature, is lacking, domestic courts often refer the claim to the civil court. This approach of domestic criminal courts towards victims' compensation claims have been criticized as being 'an exact copy of the civil court procedure', instead of offering the victim an easy alternative to claiming (full) compensation in a civil court.[122]

International criminal courts will have to develop their own rules on evidence, including the necessary link between the harm and the crimes perpetrated. It seems however that, compared to certain domestic courts, international courts have taken a more flexible approach towards the required evidence of the harm suffered by victims. The legal framework to be applied by the international courts as well as their case law produced so far, suggest that the burden of proof resting on victims may turn out not to be that heavy. The ICC applies a relaxed standard of proof for reparations claims. ICC Rule 94, which sets out the particulars that applicants must provide to substantiate their reparations claims, requires victims to provide 'relevant supporting documentation' for their reparation claim only 'to the extent possible'.[123] The ECCC Rules provide that all civil party applications must 'attach any evidence of the

121 Bitti and Gonzáles Rivas, *supra* note 92, at 314.
122 Brienen and Hoegen, *supra* note 2, at 1069–1070.
123 Rule 94(1)(g) ICC RPE.

injury suffered'.[124] The Rules state that 'all evidence is admissible'.[125] The Lebanon Tribunal, in deciding whether a victim may participate in the proceedings, shall consider in particular whether the applicant has provided 'prima facie evidence' that he is a victim who has suffered harm as a direct result of an attack within the Tribunal's jurisdiction.[126]

For the purpose of determining whether a person can qualify as a victim within the meaning of Rule 85 of the ICC, the pre-trial chamber reflected on the standard of proof required. It determined that, as a general principle of law, the burden of proof of elements supporting a claim lies on the party making the claim,[127] a principle that is also applied by domestic criminal courts. At the same time, the pre-trial chamber recognized that 'victims will not necessarily or always be in a position to fully substantiate their claim. Hence, it is also accepted as a general principle of law that 'indirect proof' (i.e. inferences of fact and circumstantial evidence) is admissible if it can be shown that the party bearing the burden of proof is hampered by objective obstacles from gathering direct proof of a relevant element supporting his of her claim'.[128] The pre-trial chamber, citing the International Court of Justice in the *Corfu Channel* case, found that this is 'the more so when such indirect evidence appears to be based "on a series of facts linked together and leading logically to a single conclusion" '.[129]

As regards the method of examination, the ICC pre-trial chamber noted that the Statute does not set forth general rules on the basis of which the reliability of relevant elements is to be assessed. It found that it 'has a broad discretion in assessing the soundness of a given statement or other piece of evidence'.[130] The appeals chamber confirmed the pre-trial chamber's decisions on evidence and considered that '[w]hat evidence may be sufficient to establish the elements of rule 85 (a) of the Rules of Procedure and Evidence in this context cannot be determined in the abstract but must be assessed on a case-by-case basis taking into account all relevant circumstances'.[131] The appeals chamber found that 'the Pre-Trial Chamber is in the best position to determine the nature and quantum of evidence that it deems necessary and adequate at that stage of the proceedings to establish the elements of rule 85'.[132]

124 Rules 23(5) ECCC Internal Rules.

125 Rule 87 ECCC Internal Rules. While the Rule's primary focus is on evidence proving of guilt of the accused, it seems also to be applicable to evidentiary issues related to victims' claims.

126 Rule 86(B)(i) STL RPE.

127 Decision on victims applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, *Situation in Uganda* (ICC-02/04-101), Pre-Trial Chamber II, 10 August 2007, at § 13.

128 *Ibid.*, § 15.

129 *Ibid.*, referring to the ICJ, *Corfu Channel* Case, ICJ Reports (1949) 4, at 18.

130 *Ibid.*, at § 13.

131 Judgment on the appeal of the defence against the decisions entitled 'Decisions on the victims' applications for participation … and a/0123/06 to a/0127/06' of Pre-Trial Chamber II, *Situation in Uganda* (ICC-02/04-OA and ICC-02/04-01/05-OA2), Appeals Chamber, 23 February 2009, at § 2.

132 *Ibid.*, at § 38.

The ICC thus seems to deviate from the road taken by some domestic criminal courts and awards the claims on the basis of equity, reducing the burden of proof for the victims to bring their claims. On this matter too international criminal courts may want to draw inspiration from mass claims procedures. These procedures are, generally speaking, flexible in the matter of obtaining evidence and with regard to the burden of proof.[133] An example of how these procedures have dealt with the issue of evidence is provided by the Claims Resolution Tribunal for Dormant Accounts in Switzerland. Article 22 of its Rules of Procedure, named 'Relaxed Standard of Proof', provides:

> The claimant must show that it is plausible in the light of all the circumstances that he or she is entitled, on whole or in part, to the dormant account. The Sole Arbitrators or the Claims Panel shall assess all information submitted by the parties or otherwise available to them. They shall at all times bear in mind difficulties of proving a claim after the destruction of the Second World War and the Holocaust and the long time that has elapsed since the opening of these dormant accounts.[134]

Reason for flexible demands of these mass claims procedures with respect to evidence are the circumstances under which the losses have occurred, usually armed conflict, and the long period of time since they took place, reasons that are similarly relevant to international criminal courts. Another reason for international criminal courts to apply the requirement of evidence of victims' claims with some flexibility may be the kind of reparations granted by them. As the ECCC, for example, may not award monetary and individual reparation but only moral and collective reparations, the ICC may wish to take a less strict approach towards the burden of proof.

D. Statutes of Limitations

As crimes and damages claims meet in international courts for the first time in history, another pertinent issue will concern time bars. While for a long time international crimes faced time bars, since the establishment of the ICC, most states parties to the ICC that still had domestic provisions on statutes of limitation to crimes within the jurisdiction of the ICC, have abolished or amended them.[135] As a consequence, prosecution of these crimes can be delayed endlessly. The ECCC provides an example of the irrelevance of the passing of time for prosecuting alleged perpetrators of international crimes. Former leaders of Pol Pot's Khmer Rouge Regime are tried for crimes committed in Cambodia

133 J.J. Van Haersolte-van Hof, 'Relaxed Standard of Proof', in Permanent Court of Arbitration, *supra* note 78, at 17.

134 Art. 22 ('Relaxed Standard of Proof') of the Claims Resolution Tribunal for Dormant Accounts in Switzerland Rules, available online at http://www.crt-ii.org/_crt-i/frame.html (visited 10 August 2009). Also cf. Section 22 ('Evidentiary Standard') of the International Organization for Migration (IOM) in relation to the German Forced Labour Programme, available online at http://www.compensation-for-forced-labour.org/english.home.html (visited 10 August 2009).

135 R.A. Kok, *Statutory Limitations in International Criminal Law* (The Hague: T.M.C. Asser Press, 2001) 31–86, and 141–237.

between 1975 and 1979. The legal framework of the ECCC stipulates that the statute of limitations set forth in the 1956 domestic Penal Code shall be extended for an additional 30 years.[136]

Delayed prosecution has a direct bearing on the ability of war victims to obtain justice. Time may pass until they have the opportunity to bring a claim for legal redress. By the time they are able to do so, their claims may have become time barred.

The legal framework of the ECCC does not provide for statutory limitations for victims claims. The ICC Statute is also silent on time bars. General international law does not contain rules on statutory limitations for civil claims of victims of violations of international law. As prescription can only be invoked pursuant to an explicit rule, to the extent international courts apply international law,[137] it would seem that victims' claims before the ICC and the ECCC should not be questioned because of time limitations.

To the extent international courts rely on domestic law when examining damage claims, these courts will have to enter into domestic civil law systems to deal with the question of statutes of limitations. Under national law, civil claims are generally limited to a certain number of years. In Germany the statutory limitation is only three years. In the Netherlands and in Sweden this is five years.[138] Although exceptions to these rules are allowed,[139] the private law rule is a limited period of time in which compensation claims based on (international) crimes must be presented.

In view of the passage of time before prosecution of the crimes is undertaken, most domestic limited periods for victims' claims are too short a period to be able to submit a well-founded claim for compensation. It is proposed that international criminal courts should not question claims of victims of international crimes because of time limitations. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law stipulate that national time limits for civil claims must not be unreasonably limited.[140] This guideline could be used as a lead for international criminal courts. For victims' compensation claims, I would argue, the same limitations rules should apply as those applied to the

136 Art. 3 ECCC Law. No statutes of limitations apply to genocide or crimes against humanity.

137 As explained above, the law to be applied by international criminal courts to reparation claims is derived from both international law and domestic law.

138 Wilmerhale, 'New German Statute of Limitations Will Bar Certain Claims After December 31, 2004' (7 December 2004), available online at http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=276 (visited 24 June 2009).

139 For example, when minors are involved, when the perpetrator is not known to the victims or if damages become known only after a certain amount of time. When continuing violations are concerned, like enforced disappearances, limitation periods will only start running when the prohibited situation/the crime has stopped to exist.

140 Principle 7 of the Van Boven/Bassiouni Principles stipulates that 'domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive'.

crimes on which they are based. One justification is that also international crimes can be prosecuted endlessly. Another justification is that one of the reasons for the doctrine of prescription, namely the principle of 'forgive and forget' does not apply.[141] Damages claims related to international crimes are concerned with such seriousness that they cannot be forgiven or forgotten. An additional justification for flexible application of the limitation rules to victims' claims linked to international crimes is that criminal procedures generally produce new evidence. In cases in which international criminal courts have been established, evidence is likely to become more ample a long time after the crimes were committed, as archives are revealed and witnesses come forward. In these cases, vanishing of evidence does not provide a good reason to deny compensation claims after a long period of time.[142]

To the extent the ICC and ECCC will apply domestic law to compensation claims, and if the defence raises time bars, these courts will have to delve into private law on statutory limitations. As time bars involve complex questions of civil law, this will seriously reduce the practicability of victims' claims that are joined into these international criminal procedures. Although much will depend on the will of the judges, this is yet another complex question relating to the compensation claims that will demand considerable time and attention.

5. Conclusions

As is true for national criminal judges, the primary concern of international criminal judges should be guaranteeing a fair and expeditious trial for the accused. These judges are not specialized in the complex matters relating to victims' reparations claims. Unlike national criminal courts, international criminal courts cannot refer victims of crimes to a civil court operating at the same level to deal with their claims, as no international civil court exists. In some cases, trust funds may provide a solution. The ICC's Trust Fund may assist victims independently of an order for reparations by the ICC. However, victims at the ECCC can not receive money from a trust fund.[143] Moreover, humanitarian aid through a trust fund is obviously distinct from legal reparations proceedings based on rights and responsibility. This is also true for mass claims procedures. While these procedures might be an answer for victims of international crimes, the individual can neither start nor control these procedures. The establishment of such procedures is a decision of governments that, on a case-by-case basis, determine whether to do something for the victims or not. There is usually no political consensus to support the creation

141 Kok, *supra* note 135, at 1.

142 *Ibid.*, at 243–245.

143 The awarded reparations shall be borne by convicted persons (Rule 23(11) ECCC Internal Rules: 'Subject to Article 39 [ECCC Law], the Chambers may award only collective and moral reparations to Civil Parties. These shall be awarded against, and be borne by convicted persons'.) The ECCC is the first forum for Cambodian victims to claim reparations. There has never been a national reparations programme.

of mass claims procedures. This means that for many victims, international criminal courts are still an important vehicle to settle their disputes.

A solution that may be considered to address the obstacles international criminal courts are facing and will face in the future when dealing with victims' compensation claims is fully to separate the compensation proceedings from the criminal trial. Belgium law may be taken as an example. Under Belgium law victims' reparations claims may be dealt with exclusively in a separate hearing.[144] International criminal courts may decide to hold reparations hearings as a separate post-trial procedure.

The ICC reparation proceedings take place after the person prosecuted has been declared guilty of the alleged facts.[145] The Trial Chamber of the ICC has spoken in this context of the 'reparations stage' of the proceedings.[146] However, this does not mean that the judges cannot deal with possible reparations at all prior to the establishment of the suspect's guilt. According to Regulation 56 '[t]he Trial Chamber may hear the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial'. According to this rule, while the Court cannot make any rulings on reparations before a conviction, it can start assessing the scope of the damage suffered and reparations to be made in case of a guilty verdict, before that verdict is actually handed down.[147]

144 Brienen and Hoegen, *supra* note 2, at 151.

145 Art. 76(3) ICCSt. states: 'Where paragraph 2 applies, any representations under article 75 [on reparations] shall be heard during the further hearing referred to in paragraph 2 or, if necessary, during any additional hearing.' In Rule 97 of the ICC RPE, that deals with the examination of reparations, mention is made of the 'convicted person', instead of the suspect.

146 Decision on victims' participation, *Lubanga*, *supra* note 106, at § 121.

147 The meaning of Regulation 56 has so far been discussed only once by the Chambers of the ICC, in Trial Chamber I's 'Decision on victims' participation' of 18 January 2008 (*supra* note 106). In this decision, the Trial Chamber gave some general guidelines on the extent of victim participation in proceedings before the ICC. The issue of discussing matters related to the assessment of reparations in the trial phase of the proceedings came to the fore because the counsel for the victims had contended that the extent and the form of victim participation would largely depend on whether the Chamber decided to hold reparation hearings as part of the trial or as a separate post-trial procedure (*ibid.*, at § 40). This is because victims have broader procedural rights where reparations are concerned than in the rest of the trial. The Trial chamber accepted this argument and then stated that, contrary to what the defence had argued, Regulation 56 does not undermine the rights of the defence (*ibid.*, at §§ 119–120). The Chamber stated: 'The Trial Chamber may allow such evidence to be given during the trial if it is in the interests of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination' (*ibid.*, at § 122). Evidence that solely relates to reparations will not be assessed on its merits until the reparations stage of the proceedings. Evidence that relates both to reparations and to the charges may be assessed right away (*ibid.*, at § 121). However, not all evidence may be given in the trial phase. The Chamber states: 'there will be some areas of evidence concerning reparations which it would be inappropriate, unfair or inefficient to consider as part of the trial process. The extent to which reparations issues are considered during the trial will follow fact-sensitive decisions involving careful scrutiny of the proposed areas of evidence and the implications of introducing this material at any particular stage.' (*Ibid.*, at § 122).

In its 'Direction on proceedings relevant to reparations and on the filing of final written submissions' of 27 August 2009, the Trial Chamber of the ECCC asked the legal representatives of the victims to hand in written submissions stipulating the form or forms of the award of collective and moral reparations they contend should be awarded against the accused, if convicted.[148] This was to be done before the 'hearing of closing statements' and therefore still in the trial phase of the proceedings. The Trial Chamber gave this direction 'in light of … the obligation to conduct the trial expeditiously as laid down in Article 33 of the ECCC Law as well as in order to ensure the adversarial character of the reparation proceedings'.[149] The ECCC thus already examines aspects of reparations claims during the trial phase of the proceedings.

It is proposed that these courts divide more strictly the criminal and civil part of the proceedings. This would provide judges with the time needed to pay full attention to the victims' claims without risking delaying the criminal trial and harming fairness and impartiality thereof. Another advantage of separation of the compensation claims from the criminal trial is that compensation matters will be examined only when the accused has been actually convicted. The testimony of victims, often emotional and accusing, when made during the trial seriously risks affecting the judges' objectivity towards the accused.[150] By splitting the compensation part from the trial, the presumption of innocence can be fully upheld during the criminal proceedings.

Victims' expectations of international criminal courts are high. Some of them have already been disappointed by the limitations inherent in criminal proceedings and the restraints posed by the rights of the accused to a fair trial without undue delay.[151] In order to make a well-intentioned experiment succeed, and to avoid international criminal courts adopting the 'evasive tactics'[152] we see in domestic criminal courts, experiences of domestic criminal courts should be taken into account by international criminal courts. Ultimately, this may even lead us to thinking beyond a criminal court and make us start thinking about creating an international civil court.

148 ECCC, Direction on proceedings relevant to reparations and on the filing of final written submissions in the case against KAING Guek Eav alias 'DUCH' (Case File No. 001/18-07-2007-ECCC/TC), Trial Chamber, 27 August 2009.

149 In the Direction the Trial Chamber referred explicitly to Internal Rule 92, which states: 'The parties may, up until the closing statements, make written submissions as provided in the Practice Direction on filing of documents.' In response to this Direction, the victims' representatives filed their 19-page 'Civil parties' co-lawyers' joint submissions on reparations' on 14 September 2009.

150 Jorda and Hemptinne, *supra* note 74, at 1413.

151 P. Falby, 'Cambodia KRouge court leaves victims disappointed', in *Agence France Presse*, 12 September 2009, available online at http://www.google.com/hostednews/afp/article/ALeqM5jKYJRZyyH-Ms2gmwZnammZ-9qypA (visited 16 October 2009).

152 Brienen and Hoegen, *supra* note 2, at 1070.

As domestic practice teaches us that victims have more to expect from civil than from criminal courts, an international civil court may turn out to be a better alternative and provide greater redress for victims of international crimes.[153]

153 J.O. Newman, 'Toward an international civil war claims tribunal', 12 *Connecticut Journal of International Law* (1998) 245–254.