Christoph Safferling
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Victims Before the International Criminal Court

Definition, Participation, Reparation

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Preface

This book is based on DFG-funded research (DFG-Projekt SA 2269 4-1). The research was carried out between 2016 and 2019 and includes developments related to victims' participation. The research was drafted in 2014 and approved in 2015.

The participation of victims of genocide, crimes against humanity, war crimes, and the crime of aggression in international criminal trials have received growing attention since the foundation of the International Criminal Court (ICC). The participation of victims challenges the classical-liberal concept of criminal procedure and the recognition of the rights of the accused in criminal trials. Likewise, the question of which victim qualifies to participate in the prosecution of individual perpetrators bears considerable difficulties and poses the danger of producing injustices on the side of victims and victims' groups by a highly selective process. The ICC furthermore foresees a specific procedure to compensate the victims. The book first addresses the definition of the victim of international crimes and looks into the criteria relevant for the admission to participate in the criminal trial. The book will secondly question the implementation of the participation of victims in the criminal trial itself. The separate stages of the criminal process will be scrutinized to identify those parts of the trial, in which participation of the victim is possible. Furthermore, the structure of the process will be discussed and which influence victim participation has thereon. A comparative approach is necessary in this regard. Even if the Rome Statute created an autonomous procedural order in an international compromise, the most influential traditions of criminal procedure, namely the Anglo-American and the Continental European approach, need to be looked at in detail and how they relate to the participation of victims in the criminal process.

Thirdly, the issue will be taken with compensation of victims for the harm suffered. As before the question of inclusion and exclusion of victims' groups need to be looked at and how this is effectuated by the linking of the compensation issue with the criminal trial. The few cases in which the international courts addressed compensation will be analyzed.

We are very grateful for the support of Dr. Michaela Lissowsky in her contribution to this project. We are especially very thankful to Dr. Kevin Pike for his support.

Without the help of Dr. Pike, this research would probably be linguistically unintelligible. We are also deeply thankful for the student support from Johannes Lechler, Kenan Bejtic, Georg Bugsch, Melanie Rosa, Martin Prokopek, and Deborah Weber.

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Abbreviations

ABA	Amercian Bar Association
AHC	Ad hoc Committee
Art.	Article
ASP	Assembly of States Parties
B.C.E.	Before Common Era
CAR	Central African Republic
CCP	Code of Criminal Procedure
CETS	Council of Europe Treaty Series
Cf.	Compare
CICC	Coalition for an International Criminal Court
CLRV	Common Legal Representative of Victims
DER	Division for External Relations
DoJ	Department of Justice
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
ELSA	European Law Students' Association
FCO	Foreign and Commonwealth Office of UK
IACHR	Inter-American Convention on Human Rights
IACPPT	Inter-American Convention to Prevent and Punish Torture
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Commission of Jurists
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia

ILC	International Law Commission
IMT	International Military Tribunal
IRR	Internal Rules and Regulations
LRV	Legal Representative of Victims
N.	Number
NGO	Non-governmental Organisation
OAS	Organisation of American States
OAU	Organization of African Unity
OLG	Oberlandesgericht
OPCD	Office of Public Counsel for the Defence
OPCV	Office of Public Counsel for Victims
OTP	Office of the Prosecutor
OVC	Office of Victims of Crime
PIDS	Public Information and Documentation Section
PoW	Prisoner of War
PrepCom	Preparatory Committee
PTC	Pre-Trial Chamber
RoC	Regulations of the Court
RoP	Regulations of the Office of the Prosecutor
RoR	Regulations of the Registry
RoTFV	Regulations of the Trust Fund
RPE	Rules of Procedure and Evidence
RS	Rome Statute
SAARC	South Asian Association for Regional Cooperation
SADC	Southern African Development Community
SC	Security Council
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCAT	International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCRC	UN Convention on the Rights of the Child
UNGA	United Nations General Assembly
US	United States
VPRS	Victims Participation and Reparation Section
VWS	Victims and Witnesses Section; Victims and Witnesses Unit/Victims and Witnesses Section

Chapter 1
Victims Before International Justice

1.1 Introduction

Both natural disasters and those created by humans provoke mass victimisation in the states affected. In comparison to human disasters, natural disasters are not attributable to any perpetrator[1] who could be held responsible for the damage caused. In the aftermath of the brutalities of World War II, the international community was forced to create new international rules for the protection of human rights and to attribute criminal responsibility for the damage caused by human beings. As Justice Robert H. Jackson, the US Chief Prosecutor, stated with regard to the alleged offences in his opening address for the United States prior to the International Military Tribunal in Nuremberg (IMT): "Civilisation cannot tolerate their being ignored because it cannot survive their being repeated".[2] Following a general trend in national criminal justice systems, as well as in international human rights law, and further developing from the experiences of Nuremberg, Tokyo, the UN ad hoc tribunals and the International Criminal Court (ICC), the aim is now to integrate victims into the criminal proceedings. Activating and empowering those persons who have suffered most from the atrocities is nowadays one of the principal aims of the criminal process.[3]

The relatively new system of victim participation at the ICC may be politically problematic under the legal framework of the Rome Statute. The problems are further intensified by the fact that a participation and compensation claim is open to registered victims only. Victim participation consists of the possibility of the victims exercising certain procedural rights during the judicial proceedings before the Court. These must be conducted in a manner that "is not prejudicial to or

[1] See Clark (1995), p. 184.

[2] Jackson RH (1946) Opening statement for the prosecution of the major war criminals case. IMT Trial http://avalon.law.yale.edu/imt/11-21-45.asp.

[3] Safferling (2011), p. 183.

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inconsistent with the rights of the accused and a fair and impartial trial".[4] The compensation claim is a separate process against the convicted offender, in which the victim requests compensation for the damage suffered. Article 68 (3) RS in conjunction with Rule 85 of the ICC Rules of Procedure and Evidence (RPE) define those persons who might generally be recognised by the Court as a "victim".

Taking into consideration the possible victimisation of a large number of persons as a result of the macro-criminal context of international criminal law, and also taking into account the increasing number of victims interested in participating in ICC proceedings,[5] it is important to determine the particular crime that relates to the victims in order to be able to secure expeditious and objective criminal justice. At the same time, the broad definition of a victim, provided for in the RPE, enables the participation of hundreds of people who have directly or indirectly been victimised due to the macro-criminal context of the acts of the accused. In some cases, hundreds of victims' applications are submitted.[6] So many victims exercising their procedural rights[7] may lead to delays and protracted judicial proceedings which, in turn, could, from the accused's standpoint, undermine the principle of a fair trial in its classical perception.[8]

The victims' participation mechanism at the ICC provides a completely new system, one which had not been part of previous international tribunals which were responsible for prosecuting mass atrocities. This mechanism includes the active participation of the victims during both the truth-finding and the reparation processes. Neither the IMT, the ICTY nor the ICTR employed a similar mechanism during their procedures. The codification of the new mechanism in the Rome Statute attracted a great deal of criticism amongst practitioners as well as from academics. It is supposedly a politically *symbolic* mechanism[9] however, on the other hand, victim

[4]Olásolo (2008), p. 158; see ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-320, Fourth Decision on Victims' Participation (12 December 2008) paras. 87–94.

[5]ICC, Assembly of States Parties, Report on the Review of the System for Victims to Apply to Participate in Proceedings, ICC-ASP/11/22, 2012, Panel Report, Convened by REDRESS and Amnesty International, "Independent Panel of Experts Report on Victim Participation at the International Criminal Court", 22, and ASP Resolution ICCASP/ 11/Res.7, Victims and Reparations, Adopted at the 8th plenary meeting on 21 November 2012, by consensus, OP 5. Data as of April 2013, Registry Report to Diplomatic Briefing April 2013. The rate at which the Court receives applications has increased by 300%, from 187 applications received on average per month in 2010, to 564 in 2011. See ICC Assembly of States Parties, Report on the Review of the System for Victims to Apply to Participate in Proceedings, ICC-ASP/11/22, 2012, para. 5. *Prosecutor v. Lubanga*—120 victims, *Prosecutor v. Katanga*—365 victims, *Prosecutor v. Ruto and Sang*—628 victims, *Prosecutor v. Kenyatta*—725 victims, *Prosecutor v. Gbagbo and Blé Goudé*—728 victims, *Prosecutor v. Ntaganda*—2131 victims, *Prosecutor v. Bemba*—5229 victims, *Prosecutor v. Ongwen*—4100 victims.

[6]Van den Wyngaert (2011), p. 481.

[7]Albeit predominantly through legal representatives.

[8]Kuijer (2013), pp. 777–780.

[9]See van den Wyngaert (2011), p. 495; Kendall and Nouwen (2014), p. 255; Bottigliero (2004), pp. 2–3.

participation offers judicial possibilities within the truth-finding procedure. Through this, the victims may also claim compensation to help them recover from the harm[10] that was inflicted upon them.

The participation of the victim in the justice process is predominantly motivated by the fact that the victims want to see justice being done (*retributive justice*) whilst, at the same time, being compensated for the harm they have suffered (*restorative justice*). From other perspectives, the participation of the victim also plays a consultative role and is of great assistance during the truth-finding process. In many aspects, participation means objectivity and balance.

Within the framework mentioned, this book aims at understanding the victim participation system by analyzing three essential pillars thereof:

1. The first pillar is the recognition of the victims of a mass atrocity. This requirement means that the persons who are claiming to be victims enter the participation system. The authors of the Rome Statute have established standards by which those claiming victimhood can be recognised as such. The most difficult issue arises when attempting to establish a connection between the mass crime in question and the selection of the victims who participate. Participation as a victim depends not only upon the person who is accused, but also upon the charges preferred against this particular individual. This can lead to the exclusion of a considerable number of victims. Those victims who cannot prove that they have been harmed by the accused for the exact circumstances covered by the charges will not be invited to participate in the procedure. This book will address possibilities of widening the definition of the term 'victim' thereby proposing a more collective approach in order to include a larger number of affected persons within the class of victims in any given case.
2. The second pillar is the victims' actual participation. From the first reading of Article 68 (3) RS it appears that victims may directly participate in the proceedings at the ICC, however, this is not the case. Although they may be directly involved in the cases, their participation is in fact exercised vicariously through legal representatives. Another important feature of the participation system is the existence of different ranges of procedural rights. Although there is an international agreement and also established jurisprudence from the Court regarding judicial practice, there are still differences at the practical level which depend upon various matters which are subject to interpretation.
3. The third pillar is the outcome of the participation. This is the stage where victims are compensated for the suffering, injuries or damage that were caused. The reparation system at the ICC is another essential part of the Rome Statute. At the time of writing this book, only three reparation orders had been made by the ICC, one each in the cases of *Lubanga*, *Katanga* and *Al-Mahdi*. During this stage, the question arises with regard to the inclusion and exclusion of victims' groups

[10]Taylor (2014), p. 14; de Hemptinne (2010), p. 165.

as well as the link between the compensation stage and the procedural requirements that exist as part of a criminal trial.

The following text consists of three general parts. The first part of analyses the historical development in dealing with victims in civil society. It then proceeds to examine the existing international practice in judicial proceedings with regard to the recognition and participation of the victims of particular crimes. Furthermore, this part of the text compares how different national systems deal with victims' rights within their individual criminal justice systems, predominantly with regard to common law and civil law systems. The various types of participation victims have within criminal justice systems will be analysed accordingly and compared to the practice of international instruments.

The second part of this work delves deeper into the jurisprudence of the ICC in relation to the participating victims. It begins by dealing with the negotiations pertaining to the Rome Statute, with specific regard to victims, and analyses the cases heard and decisions made to date. Furthermore, this part aims at understanding and interpreting the definition of a 'victim' pursuant to the Rules of the Court and the established principles during both the application and participation stages and concludes by examining the different approaches to the victims by various stakeholders at the ICC.

The book concludes with a comprehensive analysis of the reparation process in comparison to the international practices of the ICC.

1.2 Methodology

The focus of this research rests primarily on the practices of the International Criminal Court. The methodology used at the research level is a historical and legal-doctrinal comparative review. It is based on a comparison of national and international approaches to victims' rights within judicial systems.

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Chapter 2
International Practice of Victims' Rights

2.1 Short Historical Overview of the Victims' Role in Criminal Procedure

Due to the surge in victim-oriented movements around the world in the mid-1980s,[1] the Declaration of Basic Principles of Justice for Victims and Abuse of Power, hereinafter 'the Declaration', became known as the Magna Carta for the victims of crimes.[2] The Declaration began to change the offender-centric conception and to redress the victim-offender balance in criminal justice[3] and allowed victims to be internationally and effectively recognised for the loss, suffering, injury and trauma caused by crime. At the same time, the Declaration opened the doors for the victims to be involved in a criminal justice process. Prior to this, the main interaction in criminal proceedings had been between the accused and the state prosecutor, and the victims remained largely ignored, although this has not always been the case as victims have played a fundamental role in the formation of criminal law and criminal justice at both a procedural and a substantive level.[4]

The Code of Hammurabi, which is one of the oldest pieces of writing (dating from approx. 1700 B.C.E.) and was a compilation of almost three hundred laws on every aspect of life,[5] articulated the importance of state-administrated punishment for wrongdoings. Additionally, it highlighted the importance of the victims' role, and even considered appropriate compensation for the victims of crimes. Special

[1] See Garkawe (2007), pp. 54–55.

[2] Fernández de Casadevante Romani (2012), pp. 9–10; Waller (2010), pp. 45–46.

[3] Safferling (2011a, b), p. 299.

[4] Bottigliero (2004), p. 3.

[5] See the note of historian Christopher Oldstone-Moore and the Code of Hammurabi in http://www.wright.edu/~christopher.oldstone-moore/Hamm.htm, last visited on 14 December 2020.

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attention was also paid to potential victims, such as widows, elderly parents and lesser officials, who were protected from those who may potentially disown them.[6]

§ 195 Code of Hammurabi: "*If a son strikes his father, they shall cut off his hand*".

With regard to aspects of retributive justice, the Code of Hammurabi considered the death penalty for those victims who brought an accusation against another man but were unable to prove it.

§ 1 Code of Hammurabi: "*If a man brings an accusation against another man, charging him with murder, but cannot prove it, the accuser shall be put to death*".

From the restorative perspectives, the Code considered special reparation processes for different situations: in cases of robbery, the city and the governor had to compensate the victim for the loss. Financial compensation was also considered for the heirs of the murdered man, or to the women who lost an unborn child as a consequence of the man's strike.

§ 23 Code of Hammurabi: "*If the robber is not caught, then shall he who was robbed claim under oath the amount of his loss; then shall the community, and . . . on whose ground and territory and in whose domain it was compensate him for the goods stolen*".[7]

A particular role was also given to the victims of crimes within the Roman legal system. The Laws of XII Tables from around 450 B.C.E. were designed by the commissioners to protect both societies in ancient Rome—patrician and plebeian—from different wrongdoings. The Laws of XII Tables foresaw retributive as well as restorative justice for wrongdoings. In particular, Table VIII considered material compensation for the victims. In some cases, the victims themselves were granted the right to sanction the "lawbreaker":

§ 14 VIII Table of XII Tables: "*In the case of all other . . . thieves caught in the act freemen shall be scourged and shall be adjudged as bondsmen to the person against whom the theft has been committed provided that they have done this by daylight and have not defended themselves with a weapon [. . .]*".

Another important reference to victims' issues is found in the Code of Justinian, also known as the *Corpus Iuris Civilis*, issued from 529 to 534 in the Byzantine Empire. The Code of Justinian is the digest of XV books divided into public law and private law and contains elements which are still being employed by numerous legal

[6]Derene et al. (2007), p. 3.

[7]King (2017), p. 8.

systems today. Book IV makes an important remark concerning both the protection of victims from wrongdoings and restorative justice.

In the middle Ages, under the common law, the victim played a central role as a "private prosecutor" in criminal matters. The victim was mostly responsible for the allegations and the charges against the offender.[8] During the formation of the common law, crimes were mostly considered as personal wrongs rather than a violation of the state's interest. As a result, victims had to find their own solution for the personal wrongdoings. The exception to this was if the wrongdoing "disturbed" the King's peace or the interests of the Crown were somehow related to the case. The absence of restitution on the part of the wrongdoer sometimes culminated in a blood feud.[9] However, this state of affairs did not last long and the institution of the private prosecutor was abolished. This was due to the fact that vengeance exacted by the victims led, in numerous cases, to mayhem. In the twelfth and thirteenth centuries, the victims of crimes were slowly removed to the peripheries of criminal justice.

Firstly, a jury system known as the assize procedure was introduced. This meant that the noble personalities of the localities were responsible for charging the criminals; they gathered information and evidence, which was then presented to the Royal Justice.[10] The outcome of the proceedings led to the wrongdoer being compelled to pay compensation to the King, to the church or to the county. The victim was, however, not able to receive any compensation from this process. Secondly, with the centralisation of the administration of justice, the victims of crime were separated from penal law and the institution of the public prosecutor was developed. In continental Europe, this developed fast in the seventeenth century, in particular in the centralised kingdoms nurturing the absolute monarch's power. However, allegedly under Dutch influence, the US colonies followed this process which was cultivated not least by the highly influential writing of Cesare Beccaria.[11] Meanwhile, the victims were able to demand compensation from the wrongdoer in civil proceedings.

If there was a tendency under common law to minimise the role of the victim in criminal proceedings, French law, a civil law rather than a common law system, granted the victims far-reaching rights. With regard to the victims' status in criminal cases, the difference between the common law and the civil law systems lay in the fact that the common law system distinguished a crime as concerning the public interest, while a tort pertained to a personal interest.[12] In this regard, common law criminal procedure aimed to protect the public interest; civil law, in contrast, combined the protection of the public interest and redress for the victim.

[8]Kirchengast (2006), pp. 26–29.

[9]Hostettler (2009), pp. 16–17; Braun (2019), pp. 37 et seq.

[10]Kirchengast (2006), p. 39; Watkin (2012), 5–90 citation; Hostettler (2004), p. 17.

[11]A "prosecutor office" was established by statute in Connecticut in 1704, Virginia followed in 1711, Cardenas (1986), p. 369.

[12]Simons (2008), p. 720; Doak (2008), p. 7; Ochoa (2013), p. 134.

The *L'Ordonnance* from 1670, which was one of the first legal sources of French codified criminal procedural law,[13] granted victims the right to participate in criminal proceedings as a "*partie civile*". Accordingly, the victims had the opportunity to lodge a complaint (Article 1 titre III, Article 8 titre III *L'Ordonnance*). This would be at the expense of the victims if the accused were later acquitted (Article 6 titre première *L'Ordonnance*).[14] The participation of victims was limited to assisting the judicial authorities in the truth-finding process. Their role consisted of giving testimony (Article 18 titre XIV, Article 3 titre XI *L'Ordonnance*) as well as presenting evidence and witnesses (Article 22 titre XVI *L'Ordonnance*). However, the victims were not granted the right to examine the files compiled by the public prosecutor or to intervene in the trial in any other way.[15] During sentencing at the end of the trial, the victims were granted reparation for all the costs and any damage they had incurred (Article 16 titre XXV *L'Ordonnance*).

Parallel to the surge in humanist ideas and the French Revolution, the Napoleonic code of criminal procedure from 1808 (*Code d'instruction criminelle*) was confirmed and replaced the unsuccessful Code of 1791[16] in which victims' issues were considered far less. The Code from 1808, based upon *L'Ordonnance* from 1670, granted extensive rights to the victims of crime.[17]

Generally, it is safe to conclude that the role of the victims has always been unique, irrespective of all the social and cultural approaches towards them. Underlining the above-mentioned legal systems and comparing them with one other under the current social-cultural circumstances, it is possible to conclude that the Code of Hammurabi, as a sign of established society, stood for the protection of victims of wrongdoings.[18] During the feudal regime and in the dark ages, wrongdoings were considered to be related purely to personal interests and the victims were left without the monarch's protection. With this in mind, the victims themselves generally had to deal with their own "troubles".

The victims were usually deemed to be poor and weak and unable to defend themselves. At a political level, only the person who was "strong" and violent, was glorified. Such attention was not paid to the thousands of victims of colonial regimes or to the victims of mass destruction perpetrated during World War I.[19] However, this approach changed after World War II, and although the victims of Nazi-crimes did not directly participate in the Nuremberg Trials as victims, they were involved as

[13]See Andrews (1994), pp. 417–418; Delmas-Marty (2008), pp. 9–10.

[14]See Esmein et al. (1913), pp. 219–220.

[15]Monballyu (2014), p. 410.

[16]The new code was mostly oriented on the English law, see Esmein et al. (1913), pp. 408–410.

[17]E.g. The possibility of opposing the release orders of the accused, the presentation of a submission to the indictment, the request for referral of the case to a another judge in case of bias, requesting hearing of witnesses, requesting to accuse witness in case of false testimony etc., see more in Halpérin (2015), pp. 59 et seq.

[18]However, today it is not possible to argue how successful the law functioned in practice.

[19]Petrossian (2019), pp. 83–85.

witnesses. As a consequence, international attention increased and turned to focus on aspects appertaining to the protection and compensation of victims.

In order to analyse modern national approaches to victim participation within criminal justice systems, and to be able to compare them with the ICC victims' participation mechanism, it is necessary to examine the body of international documents relating to victims' issues which were drafted after World War II.

2.2 Historical Background of Victims' Rights[20]

The development of international law treaties is a political process involving numerous different actors. International law in general, and human rights law in particular, are both primarily addressed to states.[21] Although, at first glance, it might seem logical that states are responsible for the further development of international law, different international, transnational, national and non-governmental actors have had a huge impact on its development since the United Nations was founded in 1945 an all sovereign states have to agree to ratify international treaties, such as the Charter of the United Nations. However, before the eventual signing and ratification of such treaties, governments are actively involved in the drafting stage via their representatives. States are traditionally the most important actors in the norm-building process as well as for the subsequent implementation of these norms, both at the international and the national level.

The Rome Statute was adopted as an intergovernmental treaty on 17 July 1998, and it entered into force on 1 July 2002 following 60 state ratifications. This was the result of a number of years of developments and negotiations within the field of international criminal law. States participated in the drafting process both before and during the conference in Rome.[22] They submitted proposals on specific legal issues or took over the leading role in different working groups represented by diplomats or national experts. International actors, such as the International Law Commission, the UN Special Rapporteur on Drafting a Code of Offences against the Peace and Security of Mankind, the UN Legal Counsel and state representatives were involved in the political process of developing a treaty for an international criminal court.[23]

The lobbying efforts towards the norm-building processes by non-governmental organizations (NGOs) have increased during the time of the United Nations. The approach of these NGOs has shifted from a general demand for the enforcement of human rights and a role in monitoring human rights abuses, to more progressive action in further developing international (criminal) law norms.[24] It is hardly

[20]The authors would like to express their gratitude to Dr Michaela Lissowsky for her support in drafting this subsection.

[21]Egede and Sutch (2013), pp. 48–49.

[22]Kirsch (2002), pp. 451 et seq.; Cryer et al. (2014), pp. 121–127.

[23]Cryer (2008), pp. 118 et seq.

[24]Human Rights First, 'The Role of Human Rights NGOs in Relation to ICC Investigations: Discussion Paper' 2004 p. 11.

surprising that NGOs participated in the Rome Conference in 1998 after the international community had failed to prevent acts of genocide in Srebrenica and Rwanda. Many observers at the Rome Conference reported that the NGOs subsequently played an important role in the development of gender and victims' rights.[25]

The negotiations towards the inclusion of victims' rights within the Rome Statute can be considered a single political process, and several international, transnational, national and non-governmental actors played different roles at various stages of that process. As is the case in many political processes, individuals are responsible for propelling the dynamics. Too little attention is given to the research on the role of individuals in the norm-building processes, since individuals are not treated as actors at an international level and often act as representatives or as part of an international organisation. Through this section of the book, the key influences and developments in international law will be identified chronologically in order to provide a foundation from which victims' rights within the ICC emerged. Once this has been established, it will be possible to delve more deeply into the negotiations themselves and the influential actors involved in promoting victims' rights at the ICC with regard to both participation and reparation. In order to be able to fully understand the negotiations which led to the creation of the ICC, it is important to know how the rights of victims had previously been represented and developed prior to the Rome Statute, and the influence different actors had within this process. This establishes the platform from which the drafters were starting from. There will be a clear identification of the influential parties thereto, including states, NGOs, as well as individuals functioning within delegations or representing persuasive opinions relating to victims' rights within the Rome Statute.

2.2.1 The Geneva Conventions for the Protection of War Victims, 1949

A critical cornerstone for victims' rights in international criminal law was established by the four Geneva Conventions of 12 August 1949,[26] which aimed at protecting victims in armed conflicts. The Conventions' understanding of victims focused on persons who were not directly involved in hostilities anymore, but who were, for example, wounded or sick. The Conventions were developed by the International Committee of the Red Cross (ICRC) and government experts. The ICRC had a unique role in the adoption of the Geneva Conventions, which are intergovernmental treaties, despite its being an international NGO under the Swiss

[25]See Lohne (2018), pp. 109–127.

[26]See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

Civil Code. Firstly, the ICRC describes its humanitarian mission as being "to protect the lives and dignity of victims of armed conflicts and other situations of violence [. . .]". Secondly, in its own words, the ICRC wants "to provide assistance" to the victims of armed conflicts. These are clear indications that the ICRC has always promoted the right to protection and has continued to this end. This emphasises the important role of NGOs in the development of victims' rights from the very outset.[27] In 1977, the additional protocols to the Geneva Conventions[28] broadened the concept of victims to "any persons affected by an armed conflict." Civilians and the civil population were thus integrated under the aegis of these additional protocols. As a consequence, strong legal norms were specifically established for the protection of victims.

2.2.2 *First Draft Code of Offences Against the Peace and Security of Mankind, 1954*

A year after the adoption of the Geneva Conventions in 1950, the UN General Assembly (UNGA), which at that time consisted of 60 Member States, agreed to work on the establishment of an international criminal court. In order to draft proposals and conventions, the UNGA decided to set up a committee, "composed of the representatives of seventeen Member States, namely, Australia, Brazil, China, Cuba, Denmark, Egypt, France, India, Iran, Israel, the Netherlands, Pakistan, Peru, Syria, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Uruguay [. . .]." The first draft code of a statute for an international criminal court was developed by the committee and finally adopted by the International Law Commission (ILC) and submitted to the UNGA in 1954. That draft merely listed offences in four articles. In terms of the victims' rights, there was no further visible elaboration compared to other international criminal law documents such as the Nuremberg Principles. All seven Nuremberg Principles stand for fundamental international criminal law norms, rather than for an overall political aim such as "justice for victims". In fact, neither the Nuremberg Principles from 1950, the first Draft Code from 1954 nor the Genocide Convention from 1948 used the term "victims". Looking back at the first Draft Code of Offences against the Peace and Security of Mankind of 1954, a representative of the Soviet Union emphasised its close link to the London Charter of the Nuremberg Tribunal and the judgments of the Nuremberg Trials.[29] Nevertheless, while there appears to be no direct link to

[27] See Help of German war criminals after 1945 by Red Cross in Lewis (2014), pp. 238–241.

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

[29] Schabas (2010), p. 145.

victims' rights, this first draft code did provide the basis for the future discussions of the International Law Commission.

2.2.3 *UNGA Resolution on the Prosecution of War Crimes and Crimes Against Humanity, 1970*

The UNGA and the International Law Commission became the main proponents for the establishment of a permanent international criminal court. The punishment of perpetrators was still of major concern during the Cold War, however, this dominant paradigm of punishment began to change very slowly towards a new understanding of justice for victims. Several UN Resolutions reminded the international community of the need to clarify the question of punishments for war criminals and persons who committed crimes against humanity. A small development can be seen at the UNGA meeting on 15 December 1970[30] when a Resolution endorsing the idea of a deterrent effect on future possible crimes through the prosecution of war crimes and crimes against humanity was adopted:

> Convinced that a thorough investigation of war crimes and crimes against humanity, as well as the arrest, extradition and punishment of persons guilty of such crimes—wherever they may have been committed—and the establishment of criteria for determining compensation to the victims of such crimes, are important elements in the prevention of similar crimes now and in the future, and also in the protection of human rights and fundamental freedoms, the strengthening of confidence and the development of cooperation between peoples and the safeguarding of international peace and security.[31]

For the first time in an official UN document, the UNGA had linked the principles of international criminal justice with a request for compensation for the victims.

2.2.4 *Mandate for the International Law Commission, 1981*

On 10 December 1981, the ILC received a mandate from the UNGA to continue its work on drafting a code of offences against the Peace and Security of Mankind.[32]

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[30]See also Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Adopted and opened for signature, ratification and accession by GA resolution 2391 (XXIII) of 26 November 1968, entry into force 11 November 1970, in accordance with Article VIII.

[31]UNGA A/RES/2712, Question of the Punishment of War Criminals and Persons who have committed Crimes against Humanity, 15 December 1970.

[32]UNGA A/RES/36/106, Draft Code of Offences against the Peace and Security of Mankind, 10 December 1981.

Hereby, the UNGA drew upon its Resolution from 21 November 1947 (Resolution 177)[33] and referred to the first draft of the ILC from 1954.

The motivation to continue the work on a draft code was clearly a result of the insecure times: the apartheid regime in South Africa, the war in Lebanon in 1982, as well as other potential conflicts and a general nuclear threat from both the superpowers, the USSR and the US. The representative from Afghanistan noted that "the peace and security of thousands of human beings had been disrupted and their most basic human rights had been violated through policies of colonialism, genocide, apartheid, racism and oppression."[34] However, there were positive motives for developing a draft for the establishment of an international criminal court too. The "work would have a positive effect on the rule of law in international relations by contributing to a greater respect for the norms of international law", as the representative from Trinidad and Tobago concluded.[35]

At its thirty-fourth session in July 1982, the ILC appointed Mr Doudou Thiam as the first UN Special Rapporteur on Drafting a Code of Offences against the Peace and Security of Mankind. The Special Rapporteur led the Working Group, which published several reports on the Draft Codes between 1982 and 1994. In those reports, victims are mentioned only in connection with charges. Regularly, victims are placed upon the same level as witnesses and their right to be protected by the courts' organs. The idea of broad victims' rights, in terms of the right to participate in international criminal trials and the right to reparation at a permanent international criminal court, had not been expressed by any UN body at this point.[36]

The Draft Code of Crimes against Peace and the Security of Mankind[37] was adopted by the UNGA on 23 March 1983. This version gave an overview of the different national arguments for and against a new code. The whole Draft Code is less a catalogue with articles for a statute, but rather a report of the governmental views on different legal questions. The states considered, for example, whether they should integrate the crime of aggression which was adopted by the UNGA in 1974.[38] Of further interest was the discussion surrounding the use of nuclear weapons as "the gravest crime against humanity." The representative of Algeria also felt that among the acts which should be defined as offences against the peace and security of mankind "the use of nuclear weapons in general and their use against non-nuclear-weapon states in particular" should be included.[39] The states also elaborated upon

[33]UNGA, A/RES/177 (II) Formulation of the Principles Recognised in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, 21 November 1947.

[34]UNGA A/C.6/36/SR.62, 23 March 1983, para. 30.

[35]UNGA A/C.6/37/SR.54, 23 March 1983.

[36]See, Reports by UN Special Rapporteur on Drafting a Code of offences against the Peace and Security of Mankind.

[37]UNGA A/CN.4/365, 23 March 1983.

[38]UNGA A/RES/3314 (XXIX) Definition of Aggression, 14 December 1974.

[39]UNGA A/CN.4/365, 23 March 1983, para. 83.

how to extend the charges and how to integrate existing human rights conventions into a new draft code.

Though the major concern of states can only be determined implicitly, they were clearly afraid of ceding their sovereignty. They even discussed a proposal by Syria for a so called "safeguard clause" which should protect the sovereignty of states and would emphasise the "right to self-determination and their struggle against occupation and all forms of colonialism".[40] Here, the clear primacy in the role of the states prevented the strengthening of victims' rights, particularly due to the focus on ensuring their right to sovereignty.

2.2.5 *Further Developments Towards Victims' Rights, 1992*

On 9 February 1992, the UNGA issued a statement in which it said it "[r]equests the International Law Commission to continue its work on this question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session [. . .]."[41] While the Working Group was drafting a statute, a major step towards the victims' rights was made with the study "Concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms" which was written by Theo Van Boven, the UN Special Rapporteur on the right to reparation to victims of gross violations of human rights. The study was published in 1993 and founded 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 violation of international humanitarian law". In its final report, the study recommended that "[t]he question of reparation for victims of gross violations of human rights and fundamental freedoms has received insufficient attention and should be addressed more consistently and more thoroughly both in the United Nations and other international organisations [. . .]".[42] In this case, it was clearly an individual functioning within an international role who was actively propelling the notion of victims' rights forward.[43]

Firstly, the idea that states or international organisations may act as civil parties had already been proposed in 1992 by the UN Special Rapporteur Doudou Thiam in order "[. . .] to obtain compensation for injury sustained as a result of a crime referred to the Court."[44] Secondly, it was discussed whether a state could bring a lawsuit on behalf of its nationals. The difficulties involved in integrating the right to reparation into international criminal law were evident within the Sixth Committee of the

[40]UNGA A/CN.4/365, 23 March 1983, para. 108.

[41]UNGA A/RES/47/33, 9 February 1992.

[42]E/CN.4/Sub.2/1993/8, 2 July 1993.

[43]van Boven (2013), pp. 18 et seq.

[44]A/CN.4/442,1992.

UNGA in 1993.[45] A number of representatives of delegations rejected the notion, while others emphasised the necessity to include reparation "as repression only cannot make justice when damage caused by the crime is not repaired."[46] Once again, these discussions were prompted by an individual, however, there is still clear reliance on the states themselves to further develop the right to reparation and participation for victims.

2.2.6 Victims' Rights at the ICTY and the ICTR, 1993 and 1994

In both corresponding statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda, the term "victims" was not defined, although victims were recognised as witnesses.[47] Article 22 of the ICTY Statute and Article 21 of the ICTR Statute state: "The International Tribunal [. . .] shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victims' identity."[48]

Both the ICTY and the ICTR did not, however, allow victims to participate in the proceedings as civil parties[49] and were merely retributive tribunals. Hence, victims could not apply for compensation before these tribunals and restitution was treated as a penalty and victims were forced to then complain before the domestic courts "[. . .] or other competent body to obtain compensation."[50] Rule 106 (C) of the ICTY's Rules of Procedure and Evidence (RPE) bound national courts to the judgments of the tribunals regarding the criminal responsibility of the convicted person. Although both ad hoc tribunals were established by the UNSC, their jurisdiction did not recognise the "right to a judicial remedy". The decision not to include the right to remedy in the statutes of these ad hoc tribunals is somewhat surprising, given that a fund had previously been established as the UN Compensation Commission for Iraq. This fund was created by UNSC Resolution 687 in 1991 in order "[. . .] to pay compensation for claims [. . .]" to any "[. . .] direct loss, damage, including environmental damage, and the depletion of natural resources,

[45]Bonneau et al. (2014), p. 154.

[46]A/CN.4/446, §104–105, 25 January 1993.

[47]Safferling (2003), p. 365.

[48]ICTY Statute, Article 22; ICTR Statute, Article 21.

[49]David Donat-Cattin, a key commentator on the Rome Statute as a main supporter of victims' rights, criticised comments which defended the common law system and argued that there would be only space for the prosecution case and the defence case in the trial. For more information see Donat-Cattin (2001), p. 191.

[50]See, ICTY Rules of Procedure and Evidence, Rule 106 (B).

or injury to foreign nationals and corporations [...]" after Iraq's invasion of Kuwait.[51]

Despite its legal deficiencies in terms of the victims' rights in the statutes, Benedetti, Bonneau and Washburn came to the conclusion during the Preparatory Committee's negotiations in 1996 that Rule 106 of the ICTY's and the ICTR's Rules of Procedure and Evidence laid the foundation for a right to restitution and compensation for victims.[52] It has also been noted that both the ICTY and the ICTR, despite being averse to compensation claims being dealt with at their own tribunals due to efficiency issues, actually advocated the adoption of such claims by the ICC.[53]

2.3 Developed International Sources of Law for Victims' Issues

Victims of crime cannot be described in a broad sense; they are related to a specific wrongful act, which victimised the person and occasioned injury or damage. With regard to this matter, international multilateral treaties related to victims' rights cover contrasting territorial ranges[54] and are very different in nature. Therefore, the law pertaining to victims' rights can be subsumed under several headings with regard to international law:

- Victims of crime
- Victims of abuse of power
- Victims of gross violations of international human rights law
- Victims of serious violations of international humanitarian law
- Victims of enforced disappearance
- Victims of international criminal law
- Victims of trafficking
- Victims of terrorism

Victims' issues can be discussed on a multilateral/universal platform with a view to the European Union and the Council of Europe, the Inter-American Community and also the African Community.

[51]UN S/RES/687 (1991), 3 April 1991.

[52]Bonneau et al. (2014), p. 155.

[53]Zegveld (2019), p. 328.

[54]Universal or regional.

2.3.1 International Multilateral Treaties

There is still no international consensus between the states regarding victims' rights and their protection. It is left to regional and national regulations to define the victims' participation type within the domestic systems. Even where the states have agreed on declarations at the universal level, they are still not binding for the Member States.[55] The only binding instrument mentioned is the Rome Statute, which recognises the participation of the victims of certain crimes under its own jurisdiction. However, recognition at the ICC level triggers the Member States of the Rome Statute directly or indirectly to respect the victims' issues and to deal with them.

2.3.1.1 The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UNGA Resolution 40/34 [1985])

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was deemed to be the Magna Carta for victims, as it declared changes in the field of victimology. Due to this declaration, the person who was injured or suffered harm or damage was recognised as a victim, irrespective of whether the perpetrator was unknown or had been prosecuted or convicted. The Declaration recognised the need for victims to access justice, to be fairly treated and to be heard and informed before the judicial and administrative organs, so that they would not be victimised for a second time. The Declaration also underlined the forms of reparation for the victims. In the event of a lack of possibilities, it highlighted the need for state compensation in order to restitute the families of the victim.[56]

2.3.1.2 The Declaration on the Protection of All Persons from Enforced Disappearance (UNGA A/RES/47/133 (1992)) and International Convention for the Protection of All Persons from Enforced Disappearance (2006)

Acts of enforced disappearance are widely practiced in different parts of the world and are often accompanied by torture and unlawful detention.[57] Due to this fact, Member States of the UN afforded protection with regard to enforced disappearance by means of a declaration. Subsequently, this was transformed into a convention in

[55]Cf. Masol (2020), p. 12.

[56]Jaishankar (2014), p. 67.

[57]Human Rights Watch, 'Thailand: "it was like suddenly my son no longer existed": enforced disappearances in Thailand's southern border provinces' 2007, pp. 55–56, Human Rights Watch, 'Recurring Nightmare: State Responsibility for "Disappearances" and Abductions in Sri Lanka' 2008, p. 28.