

Apreotesei Ioana-Alina<sup>1</sup>:

### The Victims of the Crimes under the Jurisdiction of the International Criminal Court – Some Aspects of Legal Responsibility

#### 1. A short introduction to the ICC

The International Criminal Court, seated in The Hague, the Netherlands, was established by the Rome Statute which was adopted on July the 17<sup>th</sup> 1998 and entered into force on July the 1<sup>st</sup> 2002. Currently<sup>2</sup>, 102 states have joined the Statute. Mexico was the 100<sup>th</sup> state which ratified the act on October the 28<sup>th</sup> 2005. ICC became a reality of the third millennium after more than 125 years of legal work. The process was long, hard, with a lot of obstacles. Most of them were political or psychological, but finally the need of an international justice defeated all of them.

Establishing the ICC was a great step in the history of international law. In the last century we faced the worst violence in the history of humanity. More than 250 conflicts were born and more than 86 million civilians, mostly children, women and old people have died in these conflicts. Over 170 million people were deprived of their own rights<sup>3</sup>. We had to punish the ones responsible for these actions. Until now the national systems have not reacted as they should have done, maybe because they could not or they were afraid to do it.

The goals of the ICC are to punish the ones responsible for the atrocities committed in the world, to make justice for the victims by repairing the damages, and to prevent the committing of such horrible crimes. The international justice has the highest importance for the international community and we need a permanent Court to make sure that the international peace and security are assured. The creation of the ICC is a historic victory for human rights and international justice.

ICC comes to eliminate very critical issues of our time, such as the recruitment and use of child soldiers, the widespread incidence of crimes of sexual violence, the commission of crimes motivated by racism, the proliferation and widespread use of small arms.

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<sup>1</sup> Apreotesei Ioana-Alina is a PhD Student at the Faculty of law of the Péter Pázmány Catholic University (Budapest)

<sup>2</sup> As the situation in October 2006.

<sup>3</sup> [www.iccnw.org](http://www.iccnw.org) The CICC is a global network of over 2000 civil society organizations supporting a fair, effective and independent International Criminal Court.

## **2. Jurisdiction of the ICC**

The Court has international legal personality<sup>4</sup>, as it is written in the 4<sup>th</sup> article of the Statute<sup>5</sup>. The jurisdiction of the Court is over the persons who commit the gravest crimes, as the genocide, crimes against humanity, war crimes, and, once defined, aggression<sup>6</sup>. The definitions of these crimes are very well explained in the Statute in order to show their gravity. For example, someone is guilty of genocide if he is killing members of one group, causing serious bodily or mental harm to members of one group, or if he is forcibly transferring children of one group to another.

The crimes against humanity means murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, apartheid, etc, all of these being committed in some conditions very well explained by the Statute. The war crimes are the ones explained in the Geneva Convention: wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement; taking of hostages, etc.<sup>7</sup>. The crime of aggression is not yet defined.

The Court has jurisdiction over the crimes committed only after the entry into force of the Rome Statute. What is very important and characteristic for the Court is the principle of complementarity to the national jurisdictions. This means that ICC can exercise its jurisdiction only if the national systems do not conduct proceedings, or they do not want or are not able to do it.

## **3. The status of victim under the Rome Statute**

ICC brought a lot of elements of novelty for the international justice system. In the history of international law, the victim was often seen as a witness. The ICC managed to change that fact and for the first time, the victim can participate in a criminal trial in his or her own name. The victim became more than a witness. The reparation regime is something completely new for an international court. Someone has to protect the victims, to offer them the possibility of participating in a trial in their own names in order to obtain compensation. Who are the victims under international law and how can they participate in a trial and most important, who is going to offer them compensation, who is responsible for that? The answers to these questions are taken into account next.

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<sup>4</sup> To see an analyze of the legal personality of the international courts and tribunals, see Péter Kovács: *Métamorphoses autour de la personnalité juridique et des sources dans le droit international*. Available on: [http://www.jak.ppke.hu/tanszek/doktori/tananyag/nemz\\_kozjog/erreurmjil.doc](http://www.jak.ppke.hu/tanszek/doktori/tananyag/nemz_kozjog/erreurmjil.doc)

<sup>5</sup> “The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes”.

<sup>6</sup> Rome Statute Article 5.

<sup>7</sup> Rome Statute Article 8.

The United Nations offered the definition of the **“victims of crime”**, back in 1985, when adopting the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>8</sup>:

*“Victims means persons who, individually or collectively, have suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.*

*A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term victim also includes, where appropriate, the immediate family or the dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”.*

ICC provides a definition of the victim in Rule no. 85<sup>9</sup>:

“(a) Victims mean natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes”.

### 3.1. Protective regime for the victims

ICC offers a protective regime for the victims and witnesses. Their help can be considerable for finding the truth and making justice. Almost always those persons are very frightened and they don't have the courage or the will to come forward to help the justice system. They are victims and witnesses of the most horrible crimes, the gravest ones. War crimes, crimes against humanity, genocide, are crimes that you never forget and their effects are marking you for the rest of your life.

That is why the justice system has to encourage these people to come and help finding the truth and punishing the responsible. ICC has the advantage of being established after ICTY<sup>10</sup> or ICTR<sup>11</sup>, so, the experience of the Tribunals<sup>12</sup> helped the Court in improving the system of justice. Article 43 (6) foresees the establishment of a Victims and Witness Unit<sup>13</sup> within the Registry. Article 68<sup>14</sup> of the Rome Statute contains the protective measures that the victims and

<sup>8</sup> UN Doc. A/RES/40/34, 29 November 1985.

<sup>9</sup> ICC Rules of Procedure and Evidence, Rule 85, “Definition of Victims”.

<sup>10</sup> The Criminal Tribunal for the Former Yugoslavia.

<sup>11</sup> The Criminal Tribunal for Rwanda.

<sup>12</sup> See also FIDH, “Rapport de Situation. Entre Illusions et desillusions: les victims devant Le Tribunal Pénal International pour le Rwanda “, no. 343, Octobre 2002.

<sup>13</sup> “The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.”

<sup>14</sup> “1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors,

witnesses can benefit from. The rules of procedure and evidence explain in detail how the Victims and Witness Unit will work (rules 16-19)<sup>15</sup> and also, provide some information regarding the protective measures (rules 87 and 88): camera proceedings, anonymity, electronic testimony, usability of means that enable the alteration of picture or voice, videoconferencing, etc.

The ICC is dealing with four situations: Democratic Republic of the Congo (DRC), Uganda, Darfur (Sudan) and Central African Republic. The situation in DRC offers already examples of using the protective measures with regard to the victims and witnesses. On 4 August 2006<sup>16</sup> the Pre-Trial Chamber I, presided by Single judge Sylvia Steiner ordered the Registrar to provide as soon as possible to the Prosecution and Defence Counsel a non-redacted copy of the Applications for participation, in which any information leading to the identification of the applicants had to be deleted. The judge also ordered all the organs of the Court not to contact the applicants directly and to do so only, if necessary, via the Victims Participation and Reparations Section<sup>17</sup>.

In order to make possible the disclosure meetings, it was created an E-Court Protocol for the Provision of Evidence, Material and Witness Information in Electronic Version<sup>18</sup>. In this way, if the Counsel of Defence request, the Prosecution can provide a CD containing the related information for the Defence at the occasion of disclosure meetings.

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including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

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

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counseling and assistance as referred to in article 43, paragraph 6. 5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.”

<sup>15</sup> See also “The International Criminal Court, The Victims and Witnesses Unit (art.43.6) of the Rome Statute, a Discussion Paper” by Thordis Ingadottir, Francoise Ngendahayo and Patricia Viseur Sellers, March 2000.

<sup>16</sup> Decision authorizing the Prosecutor and the Defence to file observations on the applications of applicants a/0004/06 to a/0009/06, a/0016/06 to a/0046/06 and a/0047/06 to a/0052/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo.

<sup>17</sup> Id 16, p.5

<sup>18</sup> Final Decision on the E-Court Protocol for the Provision of Evidence, Material and Witness Information in Electronic Version for their Presentation during the Confirmation Hearing, public, 28 August 2006.

At the recommendation of the Victims and Witnesses Unit it was created a general framework concerning protective measures for Prosecution and Defence witnesses<sup>19</sup>.

### **3.2. Participation of the victims**

For the first time in the history of international law, ICC gives the victim the right to participate in a trial not only as a witness, but in his or her own name, too. The experience from ICTY showed that the persons who suffered because of an odious crime are afraid to come to testify, or if they come, they are not satisfied with the position of the witness. Yes, they want to come to help the system of justice in finding the truth, but they would be more interested to come if they could express their personal experiences, their own points of view, and most of all, their needs.

In the ICTY practice it was formed an assumption that if a person testified, then he or she was the witness of the Prosecution, therefore, the victims who testified for the Prosecution, were in a way protected by the prosecutor. In reality, it was not like this, and the victims were not protected at all. In Rwanda, which is a civil law country, they had the “*parte civile*” institution<sup>20</sup>, but the ICTR did not. As a consequence, the victims stopped cooperate. ICC learned from that.

The rules of procedure and evidence contain a whole subsection regarding the participation of victims in the proceedings. Rule 89 explains how to make an application in order to participate<sup>21</sup>. The application can be made by the victim him or herself, or by someone else on his or her behalf. The application has to be written and addressed to the Registrar, who will transmit it to the Chamber. A copy will be given to the Prosecutor and the defense.

The victim can choose a legal representative. Rule 90 foresees that a victim or a group of victims can request a common legal representative or more representatives. The legal adviser can also be chosen by the Court. If the victims don't have the financial means to pay the legal representative chosen by the Court, they may ask the Registry to offer them financial assistance<sup>22</sup>. On 19 September 2005 it was established The Office of Public Counsel for Victims (OPCV), which provides support and assistance to the legal representatives of victims and to victims participating in the proceedings as well as asking for reparations.

The Office provides legal research and advice to victims and their legal representatives at all stages of the proceedings in accordance with the Rome Statute, the Rules of Procedure and

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<sup>19</sup> Decision on a General Framework concerning Protective Measures for Prosecution and Defence Witnesses, 19 August 2006.

<sup>20</sup> A person who suffered a material loss as a consequence of the criminal act committed, can participate in the trial in his or her own name in order to get reparation.

<sup>21</sup> See also Victims Rights Working Group “Victim Participation at the International Criminal Court, Summary of Issues and Recommendations”, November 2003, p.7.

<sup>22</sup> See also Redress, “Ensuring the Effective Participation of Victims before the International Criminal Court, Comments and Recommendations Regarding Legal Representation for Victims”, May 2005, p.3.

Evidence, the Regulations of the Court and the Regulations of the Registry. The Office also appears before a Chamber in respect of specific issues, when required<sup>23</sup>.

The victims can ask to participate in every stage of the proceedings. This is a very interesting element of procedural law. In the national systems, a victim can ask to participate in his or her own name in a trial only until a certain stage. For example, in Romanian law there is a difference between the victim who wants to participate in a trial and the victim who doesn't want. They have different names. The one who wants to participate is called "parte vătămată"<sup>24</sup> and the one who does not want to participate is called "persoană vătămată"<sup>25</sup>. What is very interesting is that, unlike under the ICC, where a victim who participates in the trial can also be a witness, in the Romanian law, the victim who chooses to participate in his or her own trial, can not participate as a witness. Only the victim, who doesn't participate in the trial as a part, can participate as a witness. On the other hand, the victim, can become a part in the trial, only until a specific moment, which is the confirmation of charges. After this moment, the victim can participate only as a witness and not as a part, not in his or her own name.

ICC already confronted with some victims applications to participate in the proceedings. On 14 June 2005 six persons asked to participate in the proceedings<sup>26</sup> and on 17 January 2006 the Pre-Trial Chamber I<sup>27</sup> decided that in order to permit the victims to participate in the proceedings, first has to be recognized the quality of victims to those persons<sup>28</sup>. That is why on 28 March 2006, the Chamber gave the possibility to the Office of the Prosecutor and the Counsel of Defence to present their observations regarding the recognition of the quality of victim for the 6 persons<sup>29</sup>. On 7 April 2006 the prosecution requested the Pre-trial Chamber I to deny the applications of VPRS 1 to 6 to participate as victims in the case against *Mr. Thomas Lubanga Dyilo*<sup>30</sup>. The Prosecution's base was that the six persons did not provide sufficient evidence that they suffered losses directly linked to the crimes constituted against Mr. Lubanga Dyilo<sup>31</sup>. The Counsel of Defence pronounced in the same way<sup>32</sup>.

The Legal Representative of the Victims answered to these observations and on 31 May 2006 provided more arguments in favour of the status of victims for the six applicants<sup>33</sup>. As a consequence, with some exceptions, the Prosecution recognized the status of victims for the

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<sup>23</sup> <http://www.icc-cpi.int/victimissues/victimscounsel/OPCV.html>

<sup>24</sup> Injured part

<sup>25</sup> Injured person

<sup>26</sup> ICC-01/04-75-Conf.

<sup>27</sup> ICC-01/04-101.

<sup>28</sup> « aussi longtemps que toute personne physique ou juridique demandant la qualité de victime en relation avec une situation demande également de se voir accorder la qualité de victime dans toute affaire découlant de l'enquête d'une telle situation, la Chambre, dès qu'une telle affaire existe, prend automatiquement en compte cette seconde demande sans qu'il soit nécessaire de présenter un second formulaire », ICC-01/04-101, par 67.

<sup>29</sup> Décision autorisant Procureur et la Défense à déposer des observations au sujet du statut de victime des Demandeurs VPRS1 à VPRS 6 dans le cadre de l'affaire le Procureur c. Thomas Lubanga Dyilo.

<sup>30</sup> Prosecution's Observations concerning the Status of Applicants VPRS 1 to 6 and their Participation in the Case of The Prosecutor vs Thomas Lubanga Dyilo, par 23.

<sup>31</sup> Id 27, par 21.

<sup>32</sup> Observations du conseil de permanence au sujet du statut de victime des demandeurs VPRS 1 à VPRS 6 conformément à la décision du 28 mars 2006.

<sup>33</sup> Observations du Représentant legal des victims VPRS 1 à 6 suite aux observations du Procureur et du Conseil de la defense, au sujet du statut de victime des demandeurs VPRS 1 à VPRS 6 dans le cadre de l'affaire "Le Procureur c. Thomas Lubanga Dyilo".

applicants and requested the Chamber to grant it to them<sup>34</sup>. Even if the Chamber did not allow them to participate<sup>35</sup>, it reminded the victims their right to apply again in another stage of the trial, as the Rule 89 (2) provides<sup>36</sup>. Only one month later, the Chamber recognised the status of victim for three persons<sup>37</sup>. The victims asked to be present at the hearings when the confirmation of charges would take place and the Chamber invited their Legal Representative to present the legal methods which they intend to use<sup>38</sup>.

As we can see the participation of victims became a reality within ICC. The Victims' Representatives "have requested that they participate in the confirmation hearing, specifically by being entitled to make oral interventions, in particular opening and closing statements, and by being permitted to question the accused. The Victims' Representatives have also stated that they propose submitting documents in response to those filed by the Prosecution and the Defence"<sup>39</sup>. The Chamber decided on this matter on 22 September 2006<sup>40</sup>.

Victims' requests to participate in the proceedings were also made by persons who suffered harm in Darfur, Sudan. Raymond M. Brown and Wanda M. Akin-Brown, in conjunction with Darfur Rehabilitation Project, Inc. (DRP), a not-for-profit organization formed by Darfurians in response to the human rights violations in their homeland, submitted the first applications on behalf of victims of the Darfur Crisis to participate in the criminal proceedings before the ICC<sup>41</sup>.

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<sup>34</sup> Prosecution's Observations on the Applications for Participation of Applicants a/0001/06 to a/0003/06, par 23, 6 June 2006.

<sup>35</sup> Décision sur les demandes de participation à la procédure présentées par les Demandeurs VPRS 1 à VPRS 6 dans l'affaire "Le Procureur c. Thomas Lubanga Dyilo, p.9, 29 June 2006.

<sup>36</sup> "RAPPELLE que tout Demandeur dont la demande a été rejetée peut en déposer une nouvelle à une phase ultérieure de la procédure, en vertu de la règle 89-2 du Règlement", id 32, p.10.

<sup>37</sup> Décision sur les demandes de participation à la procédure a/0001/06, a/0002/06 et a/0003/06 dans le cadre de l'affaire le Procureur c. Thomas Lubanga Dyilo et de l'enquête en République démocratique du Congo, p16, 28 July 2006.

<sup>38</sup> Id 34, p.17.

<sup>39</sup> Prosecution's Response to "Observations concernant les modalités de la participation des Victimes", p.8, 25 August 2006.

<sup>40</sup> Décision sur les modalités de participation des victimes a/0001/06, a/0002/06 et a/0003/06 à l'audience de confirmation des charges.

<sup>41</sup> See Sudan Tribune, 24 October 2006 available at <http://www.sudantribune.com/spip.php?article18196>

### **3.3. The reparation regime for the victims**

ICC is the first international court which can oblige an individual to pay reparation to another individual, as until now this fact was left into the concern of the states and not individuals. As article 75<sup>42</sup> provides, reparation can be provided including restitution, compensation and rehabilitation. Rules 94-99 contain dispositions concerning the reparation to the victims. The reparation can be paid through the Victims' Fund and can be individual or collective. In this latter case, the reparation can be paid to an inter-governmental, national or international organization.

The Trust Fund was established by the Assembly of States parties and its aim is to get money for victims. A person found guilty may be in an impossibility of compensating the victims, and that's why the Trust Fund can help. The funds can come from grants from different governments, individuals or organizations<sup>43</sup>. One of the Court basic principles is the one of the complementarity. In order to succeed, ICC needs the help of the states parties. Rule 217<sup>44</sup> refers to the cooperation and measures for enforcement of fines, forfeiture or reparation orders and rule 219 foresees that national authorities do not have the ability to modify the reparations specified by the Court, the scope or extent of any damage, loss or injury determined by the Court or the principles stated in the order. By establishing such rules, ICC is trying not only to make justice by punishing the criminals, but also by helping victims to get justice for themselves<sup>45</sup>.

The situation in DRC is the first one to offer examples of such measures which can help in restitution, compensation or rehabilitation. After the Pre-Trial Chamber I issued a warrant of arrest for Mr. Thomas Lubanga Dyilo on February 2006, it was taken the decision of

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<sup>42</sup>“1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

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

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law”.

<sup>43</sup> Situation of Contributions and Pledges to the Trust Fund for Victims as of 29 August 2006: Amount received: EURO 1 630 237.20 Amount pledged: EURO 275 000.00  
Source: <http://www.icc-cpi.int/vtf.html>

<sup>44</sup>“... the Presidency shall, as appropriate, seek cooperation and measures for enforcement [...] as well as transmit copies of relevant orders to any State with which the sentenced person appears to have direct connection by reason of either nationality, domicile or habitual residence or by virtue of the location of the sentenced person's assets and property or with which the victim has such connection...”.

<sup>45</sup> Still, some aspects still require improvement, e.g. issues regarding the provisional measures or enforcement of reparation orders. See “The Reparation Regime of the International Criminal Court: Practical Considerations”, Carla Ferstman in 15 *Leiden Journal of International Law* 667–686 (2002).



identification, tracing and freezing or seizure of his property and assets<sup>46</sup>. This decision was made by taking also into account the paragraph 15 of United Nations Security Council resolution 1596<sup>47</sup>, which states that “[...] all States shall, [...] immediately freeze the funds, other financial assets and economic resources which are on their territories from the date of adoption of this resolution, which are owned or controlled, directly or indirectly, by persons designated by the [Sanctions] Committee pursuant to paragraph 13 above, or that are held by entities owned or controlled, directly or indirectly, by any persons acting on their behalf or at their direction [...]”.

For this purpose, the Chamber requested the States Parties to the Statute “to take all necessary measures, in accordance with the procedures provided in their national law, in order to identify, trace, freeze and seize the property and assets of Mr. Thomas Lubanga Dyilo on their territory, including his movable and immovable property, bank accounts or shares, without prejudice to the rights of bona fide third parties”. Mr. Thomas Lubanga Dyilo is charged with enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. Child soldiers is a very sensible issue because most of the times the children are not only victims but perpetrators also<sup>48</sup>.

#### **4. Legal Responsibility, State Responsibility**

Reparation is as much about the restoration of dignity and the acknowledgement of the harm suffered, as it is about monetary compensation or restitution<sup>49</sup>. While the right has been clearly acknowledged, its practical application has been fraught with difficulties and uncertainties<sup>50</sup>. There are many issues that may still require clarification.

For example, who is responsible for providing redress – the perpetrator in his or her personal capacity, the state, non-state actors, or some combination of these? What principles should be used in determining the nature and scope of an award for reparation? How would domestic courts deal with cases of mass victimization? How is the measure of damages and compensation to be established in view of significant differences in legal systems and economic standards? Which body would be responsible for the provision of reparation in the form of social or medical services? Would states be required to assume any shortfall if perpetrators are insolvent<sup>51</sup>? How will the reparations provisions play out in practical terms<sup>52</sup>?

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<sup>46</sup> Request to States Parties to the Rome Statute for the identification, tracing and freezing or seizure of the property and assets of Mr. Thomas Lubanga Dyilo, 31 March 2006.

<sup>47</sup> UN document S/RES/1596 (2005)

<sup>48</sup> See e.g. Redress “Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court”, September 2006.

<sup>49</sup> See, generally, REDRESS, “Torture Survivors’ Perceptions of Reparation, A Preliminary Survey” (2001) available at <http://www.redress.org/publications/TSPR.pdf>.

<sup>50</sup> See also “State Responsibility and the Individual. Reparation in Instances of Grave Violations of Human Rights”, edited by Albert Randelzhofer and Christian Tomuschat, 1999

<sup>51</sup> All of these issues were raised by M. Cherif Bassiouni in his Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, UN Doc. E/CN.4/1999/65 (8 February 1999).

<sup>52</sup> Carla Ferstman, “The Reparation Regime of the International Criminal Court: Practical Considerations”, 15 *Leiden Journal of International Law*, 2002, p.669.

If we also analyze the definition of the victim, it suggests that we have to wait until the end of the trial, for the Court to pronounce a decision. If we have to wait, then we still deal with a “victim” or only with a “witness”? If we do accept that we deal with a victim, than what about the presumption of innocence for the accused?

Can the state responsibility be taken into account? Generally, the states responsibility refers to the liability of states for conduct in violation of the rules of international law and resulting in injury to other states. Infringement or denial of a right owed to another state creates a duty to redress the violation or to make reparation. So, the right has to be owed to another state, not to an individual. The subjects of law are in this case states and not individuals.

There are three main conceptions in the international public law doctrine regarding the state responsibility. The first is the theory of the “State act”, which denies state’s responsibility because the state is an entity, a fiction<sup>53</sup>. Another theory sustains that a state can be responsible because it has its own will, different from the will of its members<sup>54</sup>. Vespasian Pella called the state criminality “collective criminality”<sup>55</sup>. The third theory denies the states’ responsibility because the criminal responsibility is an attribute of the human beings<sup>56</sup>. The International Law Commission (ILC) draft articles on state responsibility<sup>57</sup> make the difference between the criminal and the civil responsibility. All unlawful violations of international law are considered to be international delicts or torts. According to the ILC Draft “any internationally wrongful act which is not an international crime...constitutes an international delict”<sup>58</sup>. Article 19(2) of the Draft Articles defines an international crime as “an international wrongful act which results from the breach by a state of an international obligation so essential for the protection of the fundamental interests of the international community that its breach is recognized as a crime by that community as a whole...”.

It is a little bit unclear if the international crimes are perpetrated by individuals or by states. Brownlie claimed that “the state is only liable for delicts (while)...the individual directly responsible for a crime against peace is liable to trial and punishment”<sup>59</sup>. The actions of a number of states organs, agencies and representatives must be attributed to the state for the purposes of determining international responsibility. So, the state is responsible for the acts of the executive, legislative and judicial branches of the government<sup>60</sup>, for any action of the political sub-division of the state<sup>61</sup> or for any action of an organ, state employee or other agent of the government functioning within their official capacity<sup>62</sup>.

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<sup>53</sup> See H. Kelsen “Collective and individual responsibility in international law with particular regard to the punishment of the war criminals” in *Californian Law Review*, 1943, p.540.

<sup>54</sup> See J. Dumas, “Responsabilité internationale des Etats” or Donnadieu de Vabres “Traite de droit criminel et de la legislation penale”, 1947.

<sup>55</sup> See Vespasian V. Pella, “La criminalité colective des Etats et le droit de l’avenir”, Geneva 1946.

<sup>56</sup> See Bassiouni M. Cherif, “A Draft International Criminal Code and Draft Statute of an International Criminal Tribunal”, 1987.

<sup>57</sup> Yearbook of the ILC, 1979, II, p.90.

<sup>58</sup> Draft Article 19 (4).

<sup>59</sup> “International Law and Use of Force by States”, 1963, p.15.

<sup>60</sup> Draft Article 6.

<sup>61</sup> Draft Article 5.

<sup>62</sup> Draft Article 8.

Therefore the state is responsible only if an individual acts in his official capacity. Generally the crimes under the jurisdiction of the ICC are crimes of leadership. So if a crime is committed by a person in his or her official capacity, then the state should be responsible for the crime, and in this case, should compensate the victims. But if that person does not act in his or her official capacity, then the state can not be liable for the crimes committed by that person. Giving the current situations which ICC is dealing with, no state is responsible because the accused acted in their personal capacity. So only the accused should pay the victims, should offer them compensation. But what happens if the criminal does not have funds to offer to the victims? There is always the possibility of the Trust Fund, but what if this is not enough? Should then the state whose national committed the crime compensate the victim?

The crimes under the jurisdiction of the ICC are the gravest crimes: genocide, crimes against humanity, war crimes and once defined aggression. A universally accepted definition of aggression is very hard to find. A lot of factors are to be taken into account. Who is going to be responsible for aggression? A state, an individual or both? Who is responsible for genocide? A person or a state? Currently the international law is confronting with a very interesting direction. The International Court of Justice<sup>63</sup> is dealing with two pending cases: 1) Bosnia and Herzegovina vs. Serbia and Montenegro and 2) Croatia vs. Serbia and Montenegro. Both have the same dispute: application of the Convention on the Prevention and Punishment of the Crime of Genocide. It will be very interesting to see the solution will ICJ bring in these two cases and its impact on victims.

## **Conclusions**

The establishment of the ICC was an important step forward for the history of international law. It brings more elements of novelty compared with the International Tribunals. The participation of the victims and their compensation is one of these elements. Still a lot of questions need to be answered:

What effects would have an amnesty for the victims? Currently in Uganda the authorities are negotiating a conditional amnesty for the five LRA leaders for whom ICC issued warrants of arrest. If there will be an amnesty, who is going to compensate the victims? The five LRA leaders? The Ugandan Government?

Who is going to compensate the persons who are victims of a "situation" but who are not victims of a "case"? For example, at the beginning, ICC was seized with the situation in Congo. A lot of victims were considered for participation or compensation. After the situation became a case, and Mr. Thomas Lubanga Dyilo was accused, the number of victims to fulfill the criteria requested by the Rome Statute suddenly became lower. Only the persons who suffered harm or loss as a consequence of one or more of the three accusations can submit for participation and compensation. What about the others victims? The ones who suffered harm because of a crime committed by someone else in Congo? What about the persons who suffered harm after a crime committed by Mr. Thomas Lubanga Dyilo, crime which is not

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<sup>63</sup> From now on ICJ.

under the jurisdiction of the ICC, or even if it would be, there is not enough proof for the Prosecution to charge with? What about these victims? Who is going to offer them reparations?

The victims are going to be compensated from the Trust Fund, but only at the end of trial. What happens with the victims who need help during the trial? Most of them lost their homes, their family; they need a place to stay. Most of them are ill. They need treatment. Will be the Trust Fund enough? What happens with the indirect victims? The ones who remained on a territory marked by the terrible crimes? The victims of hunger and disease?