The Protection and Rights of Victims under International Criminal Law

MICHAEL BACHRACH*

I. Introduction

At its core, International Criminal Law exists for two purposes: to end impunity in order to prosecute the perpetrators of the world's most horrendous crimes and to bring some form of justice and solace to their victims. Domestic criminal law is the normal venue for egregious crimes. Over the past fifty years, however, international criminal law has slowly emerged as an alternative means of resolving conflicts so heinous that domestic law is either ineffective or unable to address.

World War II marked a new chapter in the history of war and conflict. The destruction was not merely in greater number, but coupled with crimes so instinctually repulsive that most had never even imagined such fate was possible. In 1945 and 1946, the International Military Tribunals in Nuremberg and Tokyo were established to prosecute war crimes, crimes against peace, and crimes against humanity. Emerging from these trials came a new understanding of the destructive power of man and the need for new law.

Shortly after the tribunals handed down their verdicts, the Four Geneva "Red Cross" Conventions,[1] the Genocide Convention,[2] and the Universal Declaration of Human Rights[3] were adopted in an effort to end the most destructive chapter of world history and to mark

*Michael Bachrach is a June 2000 candidate at Benjamin N. Cardozo School of Law, and a graduate of Sarah Lawrence College, B.A. 1996 (Wadham College, Oxford University, academic year 1995–1996). Mr. Bachrach represented the New York County Lawyers' Association at the August 1997 United National Preparatory Committee meeting (PrepCom) for the Establishment of a permanent International Criminal Court (ICC), and represented Redress Trust (UK) at the December 1997 and March–April 1998 PrepComs. He has also chaired conferences on the International Criminal Court in New York City and Vienna, and was a member of the nongovernmental organizations' Victims Working Group during the ICC PrepComs.

1. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Ship-Wrecked Members of Armed Forces at Sea, Aug. 12, 1949, 25 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

2. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1948).

3. *See Universal Declaration of Human Rights*, U.N. Doc. ARes/217 (1948).

the beginning of what would hopefully be a period of peace. Humankind proved, however, that it was still not ready for enlightenment. Only fifty years after the end of World War II, wars broke out in the Balkans and in Africa that showed that not even the effect of the Holocaust could eradicate our propensity towards destruction.

Ad hoc International Criminal Tribunals were established to bring an end to another period of mass destruction, but once again these tribunals have been unable to match the expectations for which they were created. In 1994, the International Law Commission issued a draft statute for the creation of the world's first permanent International Criminal Court (ICC).[4] Only four years later and after much negotiation, the Rome Statute for an International Criminal Court (Rome Statute) was adopted.[5] Hopefully, over the next several years the Rome Statute will be ratified by the nations of the world and brought into force.

Unfortunately, creating an international court by itself only accomplishes one of the two core goals behind creating such a court, which is prosecution. The justice and redress that must be given to victims can only come through a combination of the ICC with the co-operation of its Member States. This article examines the protections and rights that have been afforded to victims under international criminal law, protections and rights that will help guide the practice of the ICC.

II. Treaties and Conventions

Numerous treaties and other instruments adopted since the end of World War II have attempted to prevent a reemergence of worldwide destruction and have sought to curtail global victimization and protect victims from international crimes such as genocide, torture and terrorism. "However, due to the variety of mandates, frequent compartmentalization of efforts and other constraints, [the] benefits for victims and potential victims [of these instruments] have often been limited and their role circumscribed."[6] Furthermore, little effort has been made to discover the actual cause of victimization. According to Theo van Boven:

> Rapporteurs and Working Groups entrusted with a mandate from the United Nations Commission on Human Rights to examine practices or situations involving gross and consistent patterns of violations of human rights mainly concentrated their activities and recommendations on policies and on facts, but paid little attention to the persons behind these policies or facts, irrespective of whether such persons were perpetrators or victims.[7]

It was only in the area of crime prevention and criminal justice that victims were a primary concern. More recently, the conception and growth of international criminal law "has seen a convergence between crime prevention . . . and human rights."[8] The United Nations has

4. *See Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court*, U.N. Doc. A/49/355 (1994).

5. *See Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

6. Irene Melup, *The United Nations Declaration on Principles of Justice for Victims of Crime and Abuse of Power*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: FIFTY YEARS AND BEYOND 53, 54–5 (Yael Danieli et al. eds., 1999).

7. Theo van Boven, *The Perspective of the Victim*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: FIFTY YEARS AND BEYOND 13 (Yael Danieli et al. eds., 1999).

8. *Id.*

now proffered two sets of basic principles that have attempted to redefine and expand the scope of protections and venues for redress that victims can seek under international law: the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims Declaration)[9] and the Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Humanitarian Law (van Boven Principles).[10]

A. The Victims Declaration

The United Nations Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power has been called "a Magna Carta for victims."[11] The Victims Declaration begins by offering a succinct definition of what it means to be a victim and then proposes four avenues of redress for victims: access to justice and fair treatment, restitution, compensation, and assistance.[12] The Victims Declaration defines victims of crime as:

> 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. . . . The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[13]

What is equally significant to this definition is the four avenues of redress subscribed by the Victims Declaration. Access to justice and fair treatment means that victims should be treated with "compassion and respect for their dignity" and furthermore, that they be entitled to "access to the mechanisms of justice and to prompt redress" for the harm that they have undergone.[14]

Restitution is defined as the "return of property or payment for the harm or loss suffered."[15] Moreover, it is based on the idea that those responsible for victimization should make fair restitution to their victims, including the victims' families and dependents.[16] The concept of compensation essentially takes off where restitution fails and looks toward the potential, though rare, altruism of States. "When compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation" to victims, their families and dependents, and to other venues when appropriate, such as trust funds.[17]

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9. *See* Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. Doc. ARes/40/34 (1985) [hereinafter Declaration of Basic Principles].

10. *The Administration of Justice and the Human Rights of Detainees, Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law Prepared by Mr. Theo van Boven Pursuant to Sub-Commission Decision 1995/117*, U.N. ESCOR Comm'n on Human Rights, 48th Sess., Agenda Item 10, U.N. Doc. E/CN.4/Sub.2/1996/17 (1996) [hereinafter van Boven Principles].

11. Melup, *supra* note 6, at 53. *See generally* Roger S. Clark, The United Nations Crime Prevention and Criminal Justice Program 180–98 (1994).

12. *See* Declaration of Basic Principles, *supra* note 9, at Annex.

13. *Id.* at Agenda Item 1.

14. *Id.* at Agenda Item 4.

15. *Id.* at Agenda Item 8.

16. *Id.*

17. *Id.* at Agenda Item 12.

Finally, the theory of assistance is proffered to exhort that "victims should receive the necessary material, medical, psychological and social assistance" that can be provided through "governmental, voluntary, community-based and indigenous means,"[18] and that such assistance should be made readily available and with special attention paid to individual concerns.[19]

Although the Victims Declaration is by no means binding, its goal of promoting the victims' needs under international law has begun to be effective. As will be discussed, many steps, however limited, have been taken towards advancing victims' rights under international criminal law—all of which might never have occurred had the ground not first been broken by the Victims Declaration.

B. The van Boven Principles

Building from the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, requested its Special Rapporteur, Theo van Boven, to provide a set of proposed basic principles relating to reparations for victims under international law.[20] The van Boven Principles were continuously referred to during the numerous meetings that led to creating the permanent ICC and primarily concerned the duty of every state under international law "to respect and to ensure respect for human rights and humanitarian law."[21]

There are two major differences between the Victims Declaration and the van Boven Principles. First, the van Boven Principles emphasized state, as opposed to individual, responsibility.[22] This shift accounts for the realistic understanding that restitution as a general rule is easier to procure from states, as opposed to the limited resources of individuals. Second, the van Boven Principles introduced the term "reparations" into the vernacular of international criminal jurisprudence. Reparations, which as a term did not appear in the Victims Declaration, is used as a general term to describe all forms of redress, including but not limited to, restitution, compensation, rehabilitation, and satisfaction and guarantees of nonrepetition.[23] The van Boven Principles then proceeded to examine each form of reparations.

First, van Boven explained that restitution should be utilized to "re-establish the situation that existed prior to the violations of human rights and humanitarian law."[24] Namely, restitution requires restoration of liberty, family life, and citizenship, among other examples.[25] Interestingly, van Boven summarizes compensation in a manner "close to the sense of the word 'restitution' as the term [was] used in the Victims Declaration."[26] Thus, compensation should be provided for "any economically assessable damage resulting from violations of human rights and humanitarian law."[27]

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18. *Id.* at Agenda Item 14.
19. *See id.* at Agenda Item 18.
20. M. Cherif Bassiouni has since taken over from Theo van Boven as the Special Rapporteur.
21. Van Boven Principles, *supra* note 10.
22. *See id.*
23. *See id.*
24. *Id.*
25. *See id.*
26. Roger S. Clark & David Tolbert, *Toward an International Criminal Court, in* The Universal Declaration of Human Rights: Fifty Years and Beyond 99, 103 (Yael Danieli et al. eds., 1999).
27. Van Boven Principles, *supra* note 10.

Next, van Boven proffered that rehabilitation should be provided to victims and should include medical and psychological care as well as legal and social services.[28] Finally, to provide satisfaction and guarantees of nonrepetition, victims should be provided with, among other suggestions: cessation of continuing violations; full and public disclosure of the truth; an official declaration restoring the dignity, reputation and legal rights of the victim; and measures that would help prevent the recurrence of victimization.[29]

In devising strategies of justice it must be borne in mind that *lack of reparation* for victims and *impunity* of perpetrators are two sides of the same coin. Therefore, all efforts and strategies aimed at strengthening the normative framework in the quest for peace and justice must reveal the clear nexus that exists between impunity of perpetrators and the failure to provide just and adequate reparation for the victims.[30]

III. The Role of the ad hoc International Criminal Tribunals

According to Chapter VII of the United Nations Charter, the United Nations Security Council has the discretion to "determine the existence of any threat to the peace, breach of the peace, or act of aggression."[31] Furthermore, the Security Council may call upon members of the United Nations to apply measures involving the use of force[32] or economic sanctions and other measures not involving the use of force.[33]

In 1993 and 1994, acting under its Chapter VII powers, the Security Council created two ad hoc International Criminal Tribunals (ICTs) to adjudicate the horrendous crimes of the wars in Rwanda and the Former Yugoslavia: the International Criminal Tribunal for the Former Yugoslavia (ICTY)[34] and the International Criminal Tribunal for Rwanda (ICTR).[35] There was no language in the U.N. Charter that specifically stated that tribunals of this sort could be created. In *Prosecutor v. Dusko Tadic*[36] and in *Prosecutor v. Kanyabashi*,[37] however, the courts' competence withstood legal challenge much in the same way that the United States Supreme Court withstood a challenge to its fundamental power of judicial review nearly 200 years ago in *Marbury v. Madison*.[38] The question that now remains is not whether the tribunals have competence, but whether they have the ability to be effective in playing their roles.

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28. *See id.*

29. *See id.*

30. Van Boven, *supra* note 7, at 16.

31. U.N. Charter, art. 39, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (1945).

32. *See id.* art. 42.

33. *See id.* art. 41.

34. *See Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, 32 I.L.M. 1159 (1993).

35. *See Security Council Resolution 955 (1994) Establishing the International Tribunal for Rwanda*, 33 I.L.M. 1598 (1994).

36. *See* Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (*Appeal re Jurisdiction*) (Oct. 2, 1995) *available at* <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.

37. *See* Prosector v. Kanyabashi, Case No. ICTR-96-15-T, International Criminal Tribunal for Rwanda (June 18, 1997).

38. *See* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

A. Victims and Witnesses Protection Units

The Nuremberg and Tokyo tribunals were the first international courts to prosecute war criminals. Unfortunately, neither court addressed the protection and rights of victims. However, "[t]he question of the treatment of persons who have come to be designated 'victims and witnesses' (though, in many cases, witnesses have themselves been victims) has been an issue from the creation of the Tribunals for the Former Yugoslavia and Rwanda."[39]

The ICTs were created with the Victims Declaration partly in mind. Instead of creating ad hoc courts that would once again only concern themselves with prosecution, the ICTY and ICTR were expected to fulfill their mandate while, to some extent, bearing in mind the victims' rights and concerns during the arduous judicial process. Although there are only limited references to victims throughout the statutes of the ICTR and ICTY, the presence of these references are still significant.

Article 20 of the Statute of the ICTY (ICTY Statute) concerns the commencement and conduct of trial proceedings and affirms that "[t]he Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused *and due regard for the protection of victims and witnesses.*"[40] Another unique provision of the ICTY Statute that distinguishes it from other documents governing the conduct of criminal prosecutions was the inclusion of article 22. Article 22 provided that the ICTY include "in its rules of procedure and evidence for the protection of victims and witnesses."[41] Article 22 went on to explain that "[s]uch protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity."[42]

In accordance with article 22, the Rules of Procedure and Evidence (the Rules) for the International Criminal Tribunal for the Former Yugoslavia, included several more provisions intended to protect victims and witnesses. Rule 34 provides for the creation of a Victims and Witnesses Unit to: "(i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and (ii) provide counseling and support for them, in particular in cases of rape and sexual assault."[43] Rule 34 also states that, in the

39. Roger S. Clark & Madeleine Sann, *Coping with Ultimate Evil Through the Criminal Law*, 7 Crim. L.F. 1, 9 (1996).

40. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 20(1), 32 I.L.M. 1159 (1993) (emphasis added) [hereinafter Statute of ICTY].

41. *Id.* art. 22; *see id.* art. 15 ("The judges of the International Tribunal shall adopt rules of procedure and evidence for . . . *the protection of victims and witnesses* and other appropriate matters.") (emphasis added); Statute of the International Criminal Tribunal for Rwanda, art. 14, 33 I.L.M. 1598 (1994) [hereinafter Statute of ICTR]. ("The judges of the International Tribunal . . . shall adopt . . . rules of procedure and evidence for . . . *the protection of victims and witnesses* and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary.") (emphasis added).

42. Statute of ICTY, *supra* note 40, art. 22. *See also* Douglas Stringer, *International Criminal Law: International Criminal Tribunal for the Former Yugoslavia*, 31 Int'l Law. 611, 613 (1997) ("The concern for the protection of witnesses and victims shown in Article 22 reflects the Security Council's intent that the Prosecutor may include rape and sexual assault as predicate offenses to prosecute serious violations of international humanitarian law . . . ").

43. International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.6 (as amended July 9 & 10, 1998) [hereinafter Rules of ICTY] *available at* Rev. 14 <http://www.un.org/icty/basic/rpe/IT32_rev14.htm>.

appointment of staff, due consideration should be given to employing qualified women, a provision that is particularly helpful to cases concerning gender-based crimes.[44]

The statutes of the ICTs are predominately uniform. For example, the ICTR Statute includes identical provisions to articles 20 and 22 of the ICTY Statute.[45] Furthermore, the Rules of Procedure and Evidence are also similar, but at times one or the other is expanded. In the Rules for the ICTR, the role of the Victims and Witnesses Support Unit is similar to that of the ICTY's Victims and Witnesses Unit; however, recent amendments to the Rules show how the role of the Victim and Witness Support Unit has been expanded and how the understanding of the nature of some of the ICC's core crimes have changed.

Like rule 34 of the ICTY Rules, rule 34 of the ICTR Rules provided that a Victims and Witnesses Support Unit be created to "recommend the adoption of protective measures for victims and witnesses" and to ensure that victims and witnesses receive relevant counseling and support.[46] Rule 34 of the ICTR Rules, however, also provided that the relevant support included "*physical and psychological rehabilitation*" and that the staff should also "*develop short and long term plans for the protection of witnesses* who have testified before the Tribunal and who fear a threat to their life, property or family."[47] Finally, the ICTR approach to rule 34 concludes that a "*gender sensitive approach to victims and witnesses protective and support measures* should be adopted and due consideration given, in the appointment of staff within this Unit, to the employment of qualified women."[48]

Over the past few years, the ICTs have examined their Statutes and Rules of Procedure and Evidence and have handed down several decisions that have changed the interpretation of the systematized language. As shown by the ICTR approach to rule 34, the protections given to victims of such crimes have been expanded since they were first adopted, but so too has the gravity associated with the crimes themselves. Recently, the ICTR ruled in *Prosecutor v. Jean-Paul Akayesu*[49] that rape and other crimes of sexual violence were not merely crimes against humanity, but in some instances could be considered acts of genocide. Moreover, regardless of the crime that has befallen the victim, the limited role of the victim in ICT proceedings is still greatly expanded compared to the weight given to victims' rights under other documents governing the conduct of criminal prosecutions.[50]

Furthermore, the victim's protection under the ICTR and ICTY does not end with rule 34. Rules 69, 75 and 79 (of both Tribunal's Rules) address the procedural and structural framework for such protection. Under these rules the ICTR or ICTY may "*proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused,"[51] and provided that the ICTR or ICTY determines that the victim or witness "may be in danger or at risk."[52] The measures specifically mentioned that could be

44. *See id.*

45. *See* Statute of ICTR, *supra* note 41, arts. 19(1) & 21.

46. International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, rule 34, U.N. Doc. ICTR/3/Rev.1 (as amended on June 8, 1998) [hereinafter Rules of ICTR], *available at* <http.//www.ictr.org/rules.html>.

47. *Id.* (emphasis added).

48. *Id.* (emphasis added).

49. *See* Prosecutor v. Jean-Paul Akayesn, Case No. ICTR-96-4-T (Sept. 2, 1998).

50. *See* Stringer, *supra* note 42, at 611.

51. Rules of ICTR, *supra* note 46, rule 75; Rules of ICTY, *supra* note 43, rule 75.

52. Rules of ICTR, *supra* note 46, rule 69; Rules of ICTY, *supra* note 43, rule 69.

used to protect the victims or witnesses include: in camera proceedings, nondisclosure to the public of any records that might identify the victim, image or voice altering devices, closed circuit television, or the use of pseudonyms.[53] Furthermore, according to the Rules, the Trial Chamber may order that all or part of the proceedings occur during closed sessions for reasons of: "(i) public order or morality; (ii) safety, security or non-disclosure . . . ; or (iii) the protection of the interests of justice."[54]

In practice, the ICT provisions relating to victims were much easier to read than to see implemented. Even when applied, the provisions required lengthy interlocutory appeals. Despite the struggles, however, jurisprudence has brought forth some significant, albeit overdue, advances.

B. The Tadic Ruling on Protective Measures

The ruling of the ICTY Appeals Chamber in *Prosecutor v. Dusko Tadic*[55] is widely known for legitimizing the jurisdiction and competence of the ad hoc tribunals. In *Tadic*, the ICTY determined that it had been established in accordance with the Chapter VII powers of the United Nations Charter, essentially bringing sentience to ICTs.[56] The *Tadic* case, however, is not known solely for its jurisdictional precedent. In *Tadic*, the ICTY Trial Chamber also made an important ruling concerning the prosecution's right, under limited circumstances, to hide some witnesses' identities.[57]

In the *Tadic* ruling on protective measures, the ICTY Appeals Chamber had to weigh the accused's right to a fair trial versus the witnesses' and victims' rights to anonymity. The ICTY Rules of Procedure and Evidence provide that "the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence [sic]."[58] This clause, however, is subject to the ICTY Appeal Chamber's discretion. Among other things, the decision is required by the interests of justice.[59]

In *Tadic*, the prosecutor requested that the identity of four of its witnesses remain anonymous and, therefore, never be revealed to the defense. Their contentions were that the protective measures were necessary to the witnesses' privacy and that

> the protective measures sought [were] necessary to allay the fears of the victims and witnesses that they or members of their family [would] suffer retribution, including death or physical injury, if they testify before the International Tribunal and that unless they receive the protection sought, the witnesses [would] not testify.[60]

Tadic argued that the right to a fair trial, granted to the defense by article 20 of the statute, afforded the accused minimum standards of protection and that the measures sought by the

53. *See* Rules of ICTR, *supra* note 46, rule 75; *see also* Rules of ICTY, *supra* note 43, rule 75.

54. Rules of ICTR, *supra* note 46, rule 79; Rules of ICTY, *supra* note 43, rule 79.

55. *See* Prosecutor v. Dusko Tadic, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (Aug. 10, 1995) *available at* <http://www.un.org/icty/tadic/trials2/decision-e/100895pm.htm>.

56. *See* Theodore Meron, *Editorial Comment: The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 Am. J. Int'l L. 238 (April 1996).

57. *See* Tadic, *supra* note 55.

58. Rules of ICTY, *supra* note 43, rule 69.

59. *See* Rules of ICTY, *supra* note 43, rules 69, 75, 79, & 89.

60. Tadic, *supra* note 55.

prosecutor fell below those minimum standards.[61] One of the minimum standards, Tadic contended, was the right of the accused "to examine, or have examined, the witness under the same conditions as witnesses against him."[62] Tadic contended that this means that "the accused must be in a position to understand what the witness is saying and be able to assess and challenge that evidence."[63] Furthermore, Tadic concluded that these minimum standards could only be met if the accused is allowed to properly prepare for the examination of the witness and to do that "the identity of the witness must be disclosed to the accused in advance of the trial."[64]

The Trial Chamber disagreed with Tadic's contentions and granted the prosecution's motion for anonymity. The Trial Chamber concluded that a fair trial must not only protect the accused, but must also protect the victims and witnesses. The tribunal relied heavily on a leading opinion of the English Court of Appeal, *R. v. Taylor*,[65] which held that "[a]lthough a defendant had a fundamental right to see and know the identity of any prosecution witnesses, there could be circumstances, although these would be rare or exceptional, when this could be denied."[66]

In *Taylor*, the defendant had been acquitted of a murder charge, but convicted on a subsequent charge of "perverting the course of justice."[67] In order to convince one witness to come forward, her identity was made completely anonymous, save for the pseudonym, "Miss A."[68] The English Court of Appeal concluded that the matter of anonymity was primarily within the trial court's discretion, subject to a five-part test that the ICTY Trial Chamber applied and enumerated in *Tadic* as follows:

> First and foremost, there must be a real fear for the safety of the witness or her or his family. . . . Judicial concern motivating a non-disclosure order may be based on fears expressed by persons other than the witness, e.g., the family of the witness, the Prosecutor, the Victims and Witnesses Unit, as well as by the witness himself. . . .
>
> Secondly, the testimony of the particular witness must be important to the Prosecutor's case . . . sufficiently relevant and important to make it unfair to the prosecution to compel the prosecutor to proceed without it. . . . In this respect it should be noted that the International Tribunal is heavily dependent on eyewitness testimony and the willingness of individuals to appear before the Trial Chamber and testify. . . .
>
> Thirdly, the Trial Chamber must be satisfied that there is no *prima facie* evidence that the witness is untrustworthy. . . . Nor can non-disclosure of the identity of a witness with an extensive criminal background or of an accomplice be allowed. . . .
>
> Fourthly, the ineffectiveness or non-existence of a witness protection program is another point that has been considered in domestic law and has considerable bearing on any decision to grant anonymity. . . .

61. *See id.*

62. *Id.*; *see* Statute of ICTY, *supra* note 40, art. 21.

63. Tadic, Case No. IT-94-1-A, (Decision re Protective Measures).

64. *Id.*; *see generally* Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT'L L. 235 (1996).

65. *See* [1995] CRIM. L. REV. 253.

66. *Id.*

67. The charge of perverting the course of justice "arose out of a gruesome and, indeed, horrific account" of what happened to the decedent's body after he was murdered. *Id.* In short, the decedent had been "dismembered in the most brutal and bestial fashion." *Id.*

68. *Id.*

> Finally, any measures taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied.[69]

In the end, the Trial Chamber acknowledged that under these exceptional circumstances the rights of the victims of crimes against humanity, war crimes and genocide trumped the rights of those accused of those horrendous crimes. "The International Tribunal must be satisfied that the accused suffers no undue avoidable prejudice, [but] some prejudice is inevitable."[70]

C. Reparations and Compensation for Victims under the ICTs

During the conferences that led to the ICC's creation, much debate ensued over the proper restitution that should be granted to victims. To a great extent, this debate ensued because similar provisions of the Statutes and Rules of the ICTY and the ICTR were ineffective. The Statutes of the ICTs provide that "the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."[71] Likewise, the Rules of Procedure and Evidence of the ICTs provide for the restitution of property and state that "the judgment finding the accused guilty of a crime which has caused injury to a victim" must be transmitted to the competent authorities of the states concerned so that the victims can "bring an action in a national court or other competent body" to attempt to obtain economic compensation.[72]

Unfortunately, neither International Criminal Tribunal has addressed or ordered either form of reparation. "In any event, these rules fall well short of providing reparations or establishing a compensation scheme."[73] They provide an opening for future movement, but nothing more. Luckily, this slight opening was sufficient to help create tremendous debate over such schemes during the ICC debates.

Furthermore, the ICTR Registry has begun to explore the idea of establishing a trust fund "to provide financial support to programs, primarily operated by non-governmental organizations and other institutions, which would assist victims."[74] This concept was further explored during the creation of the ICC.

IV. The ICC

The permanent ICC was created as a deterrent to impunity, as a means towards eliminating the world's most horrendous crimes and as a instrumentality to redress the victims of genocide, war crimes and crimes against humanity.[75] The ICC is expected to function as an independent, impartial, just and effective, permanent judicial institution and to stand as

69. Tadic, *supra* note 55.

70. *Id.*

71. Statute of ICTR, *supra* note 41, art. 23(3), Statute of ICTY, *supra* note 40, art. 24(3).

72. Rules of ICTR, *supra* note 46, rule 106; Rules of ICTY, *supra* note 43; rule 106; *cf.* Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748 (2d Cir. 1998) (affirming subject matter jurisdiction to bring a civil action in New York seeking damages against those allegedly responsible for the bombing of Pan Am Flight 103, which exploded over Lockerbie, Scotland on Dec. 21, 1988).

73. Clark, *supra* note 26, at 106.

74. *Id.*

75. *See* M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 Harv. Hum. Rts. J. 11 (1997).

a monument to the struggles of the past. Admittedly, these are lofty goals. Particularly since the wars in Rwanda and the Former Yugoslavia and the recent events in Sierra Leone and Kosovo underscore that "genocide has become a growth industry."[76] Yet in what surely is a testament to the fortitude of human nature, the world's nations have banded together to embrace these goals and create the "last great legal edifice of the 20th Century."[77]

A. References to Victims in the Rome Statute

Unlike the Statutes and Rules of the ICTs, the Rome Statute for an International Criminal Court consistently underscores the fact that one of the ICC's primary purposes is to protect and vindicate the victims of the world's most heinous crimes. For example, discussing the functions and powers of the Trial Chamber, the Rome Statute states that trials must be "conducted with full respect for the rights of the accused *and due regard for the protection of victims and witnesses.*"[78]

Furthermore, "[w]here the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, *particularly in the interests of the victims*, the Trial Chamber may . . . request the Prosecutor present additional evidence . . . [and may order] that the trial be continued" even after an admission of guilt by the accused.[79] These procedures might offer the satisfaction and guarantees of nonrepetition required by the van Boven Principles by providing a "public acknowledgment of the facts and acceptance of responsibility."[80]

References to victims' interests can also be seen in less obvious contexts. Article 36 of the Rome Statute, which deals with the qualifications, nomination and election of judges, stresses that states "shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women and children."[81] This reference to women and children emphasizes the growing understanding of the various types of sensitivities that must be addressed when examining victimization. Finally, as will next be discussed, the Rome Statute's incorporation of the Victims Declaration and the van Boven Principles into its explanation of the methods and manners of applicable compensation and reparations could potentially become its greatest advance.[82]

B. Reparations and Compensation for Victims under the Rome Statute

Thanks to both the success and failures of the ICTs, the Rome Statute handled the issue of compensation by incorporating theories from the Victims Declaration and the van Boven Principles. Building from the emerging idea of utilizing trust funds to assist victims, the Rome Statute also provides for a trust fund to be established "for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims."[83] Furthermore,

76. David J. Scheffer, *International Judicial Intervention*, 102 Foreign Pol'y 34, 34 (1996).

77. Richard C. Hottelet, *A Forum for International Justice*, Christian Sci. Monitor, Aug. 26, 1997, at 18.

78. Rome Statute, *supra* note 5, art. 64.

79. *Id.* (emphasis added).

80. Van Boven Principles, *supra* note 10.

81. Rome Statute, *supra* note 5, art. 36.

82. *See* Proceedings of the Preparatory Commission at its First Session (February 16–26, 1999), U.N. Doc. PCNICC/1999/L.3/Rev.1 (1999) (beyond the Rome Statute itself, the Court's Rules of Procedure and Evidence—which are currently under development—will also make reference to the protection and rights of victims).

under the Rome Statute, the ICC has the discretion to order money and other property collected by the ICC through fines or forfeiture to be transferred to that trust fund.[84] The Rome Statute does not detail how the trust fund should be managed, but instead leaves that determination to the states that are parties to the Rome Statute.[85] This shift of burden allows more research to be undertaken to determine the best manner to incorporate the needs of victims and the cooperation of states into such compensatory schemes.

Besides a trust fund, the Rome Statute also authorizes the ICC to award reparations to, or in respect of, the victims of these horrendous crimes.[86] The ICC defines the term reparations in light of the Victims Declaration and the van Boven Principles, using the language "restitution, compensation and rehabilitation."[87] There was great debate concerning whether the ICC would be empowered to order states to award reparations to victims and in the end it was unfortunately agreed that the ICC would not have such power.[88] The ICC may, however, make the order "directly against a convicted person" and states that are parties to the Rome Statute are required to cooperate in collecting such awards.[89] Furthermore, when appropriate, the ICC can order that the reparations are made through the trust fund discussed above.[90] Moreover, "[b]efore 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."[91]

It is unfortunate that the ICC will not be empowered with the ability to order that the states themselves make reparations to victims, since states could be in a much better position than individuals to make such offers. It became evident during the U.N. Preparatory Committee Meetings, however, that this ICC was meant solely to prosecute individuals and, thus, any power to enforce awards of reparations against states would threaten not only the sovereignty of the concerned states, but also their support for the creation of the ICC. The fact, however, that reparations were accepted into the Rome Statute of the ICC at all and that language relating to victims was laced throughout the statute, was still a major advancement for the consideration of the plight of victims in the international arena.

C. Obstacles to Be Overcome and Requisites for Success

There are still many practical obstacles that stand in the way of sufficiently protecting victims under international criminal law. For all the expectations that the ICC will work more effectively than the ICTs, the reality will not be known until the ICC is effective. In Rwanda, the ICTR is now paying more attention to the needs of victims, particularly victims of sexual crimes. The tribunal now has female investigators and an escort for rape victims. "But the Tribunal still offers no counseling to rape victims."[92]

83. Rome Statute, *supra* note 5, art. 79.
84. *See id.*
85. *See id.*
86. *See id.* art. 75.
87. *Id.*
88. *See, e.g., Proposal by France and the United Kingdom of Great Britain and Northern Ireland*, art. 66 [45 bis], Compensation to Victims, U.N. Doc. A/AC.249/1998/WG.4/DP.19 (1998).
89. Rome Statute, *supra* note 5, art. 75 .
90. *See id.*
91. *Id.*
92. Tina Rosenberg, *New Punishment for an Ancient War Crime*, N.Y. Times, Apr. 5, 1998, at 14.

Furthermore, "[m]easures to protect witnesses—several of whom have been killed before testifying—remain inadequate."[93] Witnesses testifying before the ICTR are "routinely offered anonymity and other protective measures in case of reprisals against them,"[94] but such protection is usually only offered after their identities and whereabouts have been given to the Victims and Witnesses Unit, a point that some consider too late. The ICTR has pointed out, however, that the Victims and Witnesses Unit has successfully provided protection in many cases and, although not perfect, it is the best available source of protection.[95]

Unfortunately, the largest obstacle to the success of the ICC has nothing to do with principles or theories, but only with cold hard cash. Professor Roger S. Clark stated quite realistically:

> There is no need to belabor the point: does the international community have the will to make a serious allocation of resources here? Do not forget that the provision of resources to the Tribunals for Former Yugoslavia and Rwanda has been decidedly hand to mouth. Money is doled out grudgingly in uncertain six-monthly increments that must make the prosecutor's staff feel that it is lurching from financial crisis to financial crisis. The way the Commission of Experts Investigating Violations in Former Yugoslavia was treated suggests that someone was wielding a fiscal sandbag . . . will the ICC be any different?[96]

Luckily, there is hope that the ICC will be different. Although the United States has refused to sign the Rome Statute, other wealthy nations such as France, Germany and the United Kingdom have all signed and offered their support for the ICC. Like the tribunals, resources may be short at first, but greater support will come as the ICC's successes mount.

Of course, success is easier to call for than to see in practice. Besides money, the ICC will need the cooperation of states, nongovernmental organizations and civil society, particularly in the realm of protecting victims. On both local and international landscapes, institution and capacity building is key to the success of the ICC. One manner to aid such transformation is the use of "strong governance institutions which promote equity and representation accompanied by effective conflict transforming mechanisms."[97] To reach this goal "requires developing institutional capacity for managing and mitigating conflict at the local, national, regional, and international levels by creating structures, enhancing professional skills and increasing awareness, both in the public service and in civil society."[98]

Furthermore, to strengthen the role of civil society in aiding the development of democratization and human rights—two outcomes of the successful implementation of international criminal law—capacity building at regional and national levels has been shown to be highly effective.[99] Capacity building of governance aims at developing and strengthening structures, mechanisms and skills in negotiation, mediation, arbitration, judicial process, and alternative forms of peaceful dispute resolution. By bridging state and nonstate

93. *Id.*

94. *Rwanda War Crimes Court Grapples Again with Witness Protection Issue*, AGENCE FR. PRESSE, May 28, 1998, *available in* LEXIS, News Library, Agence France Presse File.

95. *See id.*

96. Roger S. Clark, *The Proposed International Criminal Court: Its Establishment and Its Relationship with the United Nations*, 8 CRIM. L.F. 411 (1997) (citations omitted).

97. *Governance in Diverse Societies*, AIDE MEMOIRE, Governance & Pub. Admin. Branch, Div. of Econ. & Pub. Admin., U.N. Dep't of Econ. & Soc. Affairs (1998).

98. *Id.*

99. *See id.*

actors, civil society can aid in the strengthening of both institutions, thereby facilitating the protection and rights of victims through the development of international criminal law.

V. Conclusion

Each of the steps forward taken by the ICTs for the protection and rights of victims were, despite all their apparent luster, only baby steps. The protections of anonymity, in camera and closed proceedings, the emphasis on the sanctity of the victim's primacy, due respect to a gender sensitive approach, and the possibility for some form of reparation are all important precedent setting steps in the potential application of international criminal law. These provisions, however, would be much greater advances if they were more effectively applied.

One of the strongest criticisms of both tribunals was how they treated rape victims, who are interviewed *en mass* and sometimes in front of their tormentor. Although such procedures have begun to stop, the fight for protection itself shows how far victims' rights must still progress. Comfort can be taken in the Rome Statute for an ICC.

Although the statute will take some time to become effective, the abundance of references in the Rome Statute to the protection and rights of victims indicates that their concerns may finally be taken seriously on an international plane. The road will not be easy, but it is at last upon us. Although we remain immersed in a culture of bias, we still have hope. Although we remain immersed in a culture of perversion, we still have hope. Although we remain immersed in a culture of destruction, we still have hope.