

# 1 Introduction

## A Introduction

Questions of redress<sup>1</sup> for victims of atrocities or other egregious conduct, whether occurring in an armed conflict or in the course of a campaign of violence waged against civilians, are matters that have traditionally fallen outside the scope of international criminal law and of the institutions that have been created at the international level to prosecute crimes within its ambit. International criminal law has been concerned solely with the prosecution and punishment of perpetrators, and not with how the harm caused by international crimes might be repaired. The creation of a regime for victim redress under the Rome Statute of the International Criminal Court (ICC),<sup>2</sup> however, establishes an international criminal justice institution with the power to provide redress in respect of the harm suffered by victims of crimes within the jurisdiction of the Court, including genocide,<sup>3</sup> crimes against humanity<sup>4</sup> and war crimes.<sup>5</sup> This regime encompasses the power of the ICC to award reparations<sup>6</sup> to victims of

<sup>1</sup> The *Oxford English Dictionary* defines ‘redress’ as ‘[t]he action of redressing; correction, reparation, or amendment of a situation, a grievance, etc.’. For present purposes ‘redress’ is used as an omnibus term to refer to the different forms of reparation, remedy or relief that may be awarded to, or in respect of, an injured party by legal regimes at the international and national levels. See *Oxford English Dictionary Online*, Revised Draft, December 2009, <http://dictionary.oed.com/cgi/entry/50200269?>

<sup>2</sup> Rome Statute of the International Criminal Court, 17 July 1998, entry into force 1 July 2002, 2187 UNTS 90 (hereafter RS).

<sup>3</sup> See Article 6, RS.

<sup>4</sup> See Article 7, RS.

<sup>5</sup> See Article 8, RS.

<sup>6</sup> In contrast to the terminology adopted in general international law, where the term ‘reparation’ is used, the word ‘reparations’ is generally, although not exclusively, used in the English language versions of the Rome Statute and the ICC’s

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the crimes within its jurisdiction and the capacity of the Trust Fund for Victims to provide support to such victims outside the context of Court-ordered reparations, assistance referred to in this book as ‘victim support’.<sup>7</sup>

The powers of the Court with regard to reparations are principally dealt with in Article 75 of the Statute. Article 75(1) empowers the Court to ‘establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation’. Based on such principles the Court may award reparations to victims. The Court’s power to order reparations is set out in Article 75(2) which stipulates that ‘[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims’. As well as deriving resources for reparations from a convicted person by way of a reparations order pursuant to Article 75(2), resources may also be derived from fines imposed pursuant to Article 77(2)(a) and from ‘[a] forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties’.

The Trust Fund created by Article 79 of the Statute is a further crucial element of the Rome Statute’s regime for victim redress. Money and other property collected through fines or forfeiture may be transferred to the Trust Fund by order of the Court.<sup>8</sup> In addition, the Trust Fund may receive voluntary contributions from a range of sources including ‘governments, international organizations, individuals, corporations

Rules of Procedure and Evidence. In contrast, the French and Spanish language versions of the Statute both use the same term as is used in the context of general international law, namely ‘réparation’ and ‘reparación’ respectively. The same point can be made of the authentic Russian and Chinese texts, although the Arabic version of the Statute uses the singular and plural inconsistently. According to Article 128 of the Statute, the English, French, Spanish, Russian, Arabic and Chinese versions of the Statute are all equally authentic. There does not therefore appear to be a particular significance to the use of the term ‘reparations’ rather than ‘reparation’ in the English language version of the Statute. In this book the term ‘reparations’ will, however, generally be used to refer to the redress provided under Article 75 of the Statute while ‘reparation’ is used in the context of general international law.

<sup>7</sup> Rule 98(5) of the Rules of Procedure and Evidence of the International Criminal Court (ICC RPE) provides the Trust Fund with the general power to use resources, other than those collected through fines, forfeiture or reparations, ‘for the benefit of victims’. See Rules of Procedure and Evidence of the International Criminal Court, ICC-ASP/1/3. See also, Chapters 1 and 2, Regulations of the Trust Fund for Victims (‘TFV Regulations’), ICC-ASP/4/Res.3.

<sup>8</sup> Article 79(2), RS.

and other entities'.<sup>9</sup> Resources derived from voluntary contributions to the Trust Fund may be used to supplement resources available for Court-ordered reparations, and the Trust Fund may also play a role in the design and implementation of reparations awards.<sup>10</sup> However, a further crucially important aspect of the Trust Fund's mandate is the provision of support to victims outside the context of Court-ordered reparations. Such support may be provided prior to the issuance of a reparations order by the Court against a convicted person in a given situation and may be provided to victims including those not eligible for reparations.<sup>11</sup>

As well as providing a systematic analysis of the elements of the Rome Statute's regime of victim redress, covering both reparations and victim support, the purpose of the present study is to explore two overarching questions to which the creation of a system of redress within the framework of an international criminal justice institution gives rise.

The first concerns the role of such a regime as part of the wider framework of victim redress at both the national and international levels. The International Criminal Court is far from being the only international institution concerned with matters of redress for victims of atrocities or egregious conduct. Numerous other international institutions and legal regimes have, for many years, provided a context within which harm caused by such conduct has been addressed. The international rules relating to the treatment of aliens, international humanitarian law and international human rights law all have a substantial bearing on questions of redress, as do the rules on state responsibility and diplomatic protection. At the institutional level, human rights courts and supervisory mechanisms and a multitude of ad hoc arbitral tribunals and claims commissions have dealt with questions of redress arising from the ill-treatment of foreign nationals, breaches of the laws and customs of war or violations of human rights guarantees. Equally, in the aftermath of war or mass violence national procedures may provide avenues for victim redress and ad hoc programmes may be established.

The Rome Statute's system of redress exists within this broader framework of legal regimes and a patchwork of procedures and

<sup>9</sup> Regulation 21(a), TFV Regulations annexed to Resolution ICC-ASP/4/Res.3, 3 December 2005.

<sup>10</sup> See Chapters 2–5, TFV Regulations. See below Chapter 8.

<sup>11</sup> See Regulation 50, TFV Regulations. See below Chapter 8.

institutions. But what role does a regime of victim redress established in the context of international criminal law occupy within this wider framework? Does it have a distinct contribution to make or is it ultimately superfluous? In exploring this issue the book will consider the role (and limitations) of those regimes for victim redress based on principles of state responsibility as well as the potential for matters of victim redress to be dealt with by national institutions and procedures. In light of the analysis of these different regimes and institutions, the book, in its conclusion, will consider whether, and in what ways, the creation of a regime for victim redress within the wider framework of international criminal justice, and specifically the Rome Statute, can make a contribution alongside other regimes or systems for redress at the international and national levels.

The second overarching matter that the present study seeks to address is of a somewhat more theoretical character. Incorporating a regime for dealing with questions of victim redress within the framework of an international criminal justice institution is not an obvious extension of ‘international criminal justice’, the traditional focus of which has been the prosecution and punishment of individuals and not addressing the consequences of their conduct. But does the creation of a regime of victim redress in the context of international criminal law have a role to play in an international criminal justice institution or does it serve a purpose fundamentally at odds with that of a criminal justice process, a key task of which is the prosecution and punishment of individual perpetrators?

## **B The book in outline**

In order to explore the overarching questions identified above, it will be necessary first to critically examine the key elements of the Rome Statute’s regime for victim redress itself. This task will be undertaken in the substantive chapters of the book, where the primary focus will be on the concepts and principles that underpin the regime, and the bodies and procedures through which it functions. The following section will outline the key ideas and issues explored in the substantive chapters of the book.

As earlier noted, a central issue explored in this book is whether the Rome Statute’s scheme for victim redress can play a worthwhile role alongside other regimes for victim redress at the national and international levels. In order to consider this question it is necessary first

to explore other processes by which victim redress can be obtained, including the strengths and limitations of such mechanisms. This is the work that is undertaken in Chapter 2.

Following directly on from this Chapter 3 considers victim redress in the context of international criminal law. It need hardly be recalled that historically questions of victim redress have not been dealt with in the context of processes concerned with international criminal justice and that, more generally, victims have also had a very limited role in such processes. Rather international criminal law has been primarily concerned with the criminal responsibility of individual perpetrators, their prosecution and punishment. In light of this it is argued that the incorporation of a regime of victim redress within the framework of an international criminal tribunal, a central (perhaps *the* central) task of which is, and will remain, the prosecution and punishment of individuals, is not an obvious extension of the role of international criminal law, raising the question as to whether such a novel departure can be justified in principled terms. Chapter 3 therefore critically examines whether the creation of a regime of victim redress in the context of international criminal law has a principled place in an international criminal justice institution or whether it serves a purpose fundamentally at odds with that of a criminal justice process, a key task of which is the prosecution and punishment of individual perpetrators. The chapter provides an opportunity to examine the most important principled objections to the regime. It concludes by considering the most important of these objections, enabling reflection in the course of the book and ultimately in its concluding chapter as to whether these objections are so serious as to call into question the fundamental worth of the regime.

Given that the idea of an obligation to provide reparation in respect of crimes under international law is a novel development brought into being by the Rome Statute, it is necessary at the outset to explore the concept of reparations within the meaning of the Statute and specifically to ask whether such reparations have a punitive rationale or perform some broader function. The Trust Fund's power to use its resources for the benefit of victims,<sup>12</sup> referred to here as 'victim support', equally poses questions, namely whether such support constitutes 'reparations' or some other kind of redress and, indeed, whether

<sup>12</sup> See Rule 98(5), ICC RPE.

such support is even redress at all. These fundamental issues are addressed in Chapter 4.

Reparations and victim support under the Rome Statute can be provided only to ‘victims’, a term defined in turn by reference to the concept of ‘harm’.<sup>13</sup> The notion of ‘harm’ is therefore central to the Statute’s regime for victim redress. Chapter 5 explores this concept, identifying those forms of harm that have generally been recognised by international jurisprudence and examining how, in different instances, courts, tribunals and claims processes have quantified and assessed them.

Legal regimes concerned with liability or responsibility require a body of principles according to which they operate. Such principles breathe life into a regime, setting out its parameters and giving it meaning and effect. The Rome Statute’s reparations regime is no different. The focus of Chapter 6 is therefore the framework of reparations principles to be established by the ICC. Article 75(1) of the Rome Statute stipulates that the ICC ‘shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation’. A key set of such principles will be those relating to whether the harm suffered by the victim has been caused by the criminal conduct of the accused. Causation, examined in detail in the chapter, is a particularly complex problem in respect of crimes under international law, where it is often the case that numerous individuals will, to differing degrees, have contributed to the harm inflicted on the victim or victims, raising questions as to the assessment of harm in the context of, for example, aiding and abetting or common criminal purpose. Chapter 6 also explores the important question of the forms of reparations that the Court may award. In this regard, in addition to restitution, compensation and rehabilitation, the chapter considers declarations of wrongfulness, factual disclosure, contrition and acts of atonement, and commemoration and memorialisation, drawing, where appropriate, on the wealth of comparative experience that exists.

Chapter 7 examines proceedings and Court orders relevant to reparations. In light of the complexity of the issues to which the Court will have to have regard when making reparations orders, the proceedings in which such issues are considered are likely to have an important

<sup>13</sup> See Rule 85, ICC RPE.

bearing on their eventual effectiveness. These proceedings will be examined in the course of Chapter 7. In addition to exploring the conduct of proceedings, the chapter also considers the reparations orders the Court may make and the scope of its power to order the forfeiture of proceeds, property and assets ‘derived directly or indirectly’ from the crime of which the accused is convicted. The related question of whether the forfeiture of the property of third parties complies with international human rights standards, as required by Article 21(3) of the Rome Statute, is also canvassed.

The focus of Chapter 8 is the Trust Fund for Victims established by the Rome Statute. The chapter begins by providing a brief overview of the organisation and mandate of the Trust Fund by way of essential background for the subsequent discussion. The chapter then goes on to explore the two central roles of the Fund, namely that of an institution through which the Court may make a reparations award and that of an institution mandated with the independent provision of victim support. The chapter also considers the relationship between the Fund and the Court before outlining the different procedures and principles relied on by the Fund to discharge its mandate.

In dealing with questions of victim redress there is little the ICC can do without the cooperation of others. The cooperation of States Parties is of course crucial in many different circumstances ranging from the enforcement of a fine or forfeiture to identifying the location of victim-beneficiaries or implementing a reparations award. But the entities from which cooperation for victim redress may be desirable are not limited to States Parties. The cooperation of third states, international organisations such as the United Nations High Commission for Refugees (UNHCR) or the Office for Coordination of Humanitarian Affairs (OCHA), non-governmental organisations (NGOs) and even armed opposition groups may also be desirable when implementing a reparations award or providing victim support. Chapter 9 considers the limited extent to which different entities may be asked (or obliged) to cooperate with the Court or the Trust Fund in connection with matters of victim redress. It explores the substantial challenges that the Court’s (at times very limited) powers in this regard pose for the effective functioning of the Statute’s regime of victim redress.

Chapter 10 concludes the monograph by seeking to answer the central questions raised by the establishment of the Rome Statute’s regime

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of victim redress, drawing in the process on the analysis, arguments and ideas developed in the preceding chapters. Through exploration of these ideas it is to be hoped that this work will make a contribution to understanding the possibilities and limitations of a regime of victim redress located within the system of international criminal justice.



## 2 The wider legal framework of victim redress

### A Introduction

The Rome Statute's regime of victim redress does not exist in isolation. Many other institutions and legal regimes have, for many years, provided a context within which harm caused to victims of atrocities or other egregious conduct has been addressed. The international rules relating to the treatment of aliens, international humanitarian law and international human rights law all provide a framework within which the harm suffered by individuals may be remedied. These bodies of law may be invoked by states and, on occasion, individuals in accordance with rules of state responsibility and the international law of diplomatic protection. At the institutional level, human rights courts and supervisory mechanisms and a plethora of ad hoc arbitral tribunals and claims commissions have, on innumerable occasions, dealt with questions of redress arising from the ill-treatment of foreign nationals, breaches of the laws and customs of war or violations of human rights guarantees. Equally, in the aftermath of war or mass violence national procedures may provide avenues for victim redress and, in addition, ad hoc reparations programmes are, at times, established on a national or transnational basis.

To the extent that those harmed by atrocities or egregious conduct have received redress at all, this has traditionally occurred, therefore, either in the context of various international legal regimes primarily based on principles of state responsibility or as part of a national process in those countries where the latter is established. The creation of a regime of victim redress within the framework of international criminal law is a much more recent development. But its creation raises a systemic question, which is whether such a regime has a distinct

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contribution to make or whether it is merely an additional or, even, superfluous means by which victims of atrocities may be able to obtain redress. This question will be considered in detail in the concluding chapter of the book, in light of the critical examination of the elements of the Rome Statute's regime of victim redress developed in its substantive chapters. However, to enable this matter to be explored it is first necessary to consider the role and limitations of the wider framework of victim redress, at both the national and international levels.

## **B The invocation of responsibility**

Before examining the main substantive areas of international law that have a bearing on the redress that individuals may receive in respect of harm caused by an atrocity or other forms of egregious conduct, it is necessary, as a preliminary matter, to note the position of individuals with regard to the invocation of the responsibility of a state in respect of such conduct. As is well known, although individuals may receive protection under the rules of international law, in general<sup>1</sup> only a state may invoke the responsibility of another state that has violated such rules.<sup>2</sup> Moreover, under the law of diplomatic protection, a state has no right to take up claims on behalf of persons other than its own nationals and perhaps stateless persons and refugees in certain instances.<sup>3</sup> Where a state does decide to espouse the claim of a national, it is asserting its own rights on the international plane and not those of the natural or legal person in question.<sup>4</sup> Thus, although the injury sustained is, in a literal sense, that of the individual or corporate entity, under principles of diplomatic protection the injury is that of the state. That state has no international legal obligation to invoke the responsibility of another state for injury caused to its nationals by an internationally wrongful act, nor does it have an obligation under international law to

<sup>1</sup> Note, however, Article 33(2), International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts annexed to General Assembly Resolution 56/83, 22 January 2002, A/Res/56/83 ('Articles on Responsibility of States'). A *lex specialis* legal regime may confer upon an individual a right to invoke the responsibility of a state and claim reparation.

<sup>2</sup> See Article 1, Draft Articles on Diplomatic Protection annexed to General Assembly Resolution 62/67, 6 December 2007 ('Articles on Diplomatic Protection'). See further Article 42, Articles on Responsibility of States.

<sup>3</sup> Articles 1 and 8, Articles on Diplomatic Protection.

<sup>4</sup> *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Jurisdiction, 1924 PCIJ Series A, No. 2, p. 12.