

Victims and international criminal justice: a vexed question?

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Abstract

Despite the growing attention being paid to “victims” in the framework of criminal proceedings, this attention does not seem to be meeting their needs under either national criminal justice systems or the international regime. In the latter, the difficulties encountered by the victims are aggravated by factors specifically arising from the prosecution and punishment of mass crimes at international level. This has prompted the authors to point out that the prime purpose of criminal law is to convict or acquit the accused, and to suggest that the task of attending to the victims should perhaps be left to other entities.

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Une société dans laquelle pour certaines personnes l'unique porte de sortie d'un état victimaire (celui qui a été fui par l'émigration) est l'entrée dans un statut de victime jette un éclairage cruel sur la vulgate psychologique prétendant que la reconnaissance du statut de victime est la condition sine qua non de l'évolution

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des personnes traumatisées vers la reconquête de l'autonomie. (...) S'il y a tant de victimes aujourd'hui, c'est qu'elles sont littéralement suscitées, aspirées par une offre de statuts agrémentés de bénéfices symboliques ou matériels divers. Ne jetons pas la pierre aux « victimes » ainsi façonnées et mises en concurrence parfois lamentable: c'est d'abord le jeu en lequel elles sont placées qui devrait être critiqué.

Jean-Michel Chaumont¹

After a long period of neglect, the victim is today the focal point of political concerns and is attracting ever greater interest both in the field of criminal justice and in debate on social issues.² However, although it has certain positive aspects, this interest is not without hazards and problems which are engendering discussion and even controversy among researchers and others involved in the world of criminal justice. The prominence of the victim appears to be rising, not only within the criminal justice system but also on the current socio-political scene. This is clearly noticeable in numerous Western countries, but also, as we shall see, at the level of international criminal justice and of international humanitarian law, as regards attending to the victims of armed conflicts and the status accorded to them when the fighting stops.

Victims are increasingly taken into account

This trend is the result of far-reaching political, social and legal developments, which began in the 1960s with the advent of government policies to compensate victims and the rise in the number of associations for the defence of victims, all prompted by social movements fighting for civil and political rights and women's rights. There has been a rapid increase in attention paid to victims in social and criminal policy. National and international victimization surveys have brought to light victims' dissatisfaction at their treatment under the criminal justice system. They feel that they have been victimized twice over, with the result that people are less likely to report criminal acts committed against them. The surveys also emphasized the diversity and above all the scale of the traumas sustained by victims, in particular those who had suffered personal violence such as rape or domestic violence. In addition, around 1950 a new discipline – victimology – branched out, first as part of criminology but swiftly becoming an independent field. This field of research deals with the study of the victim and his or her psychological and physical reactions to the trauma sustained, but also with the victim's experience regarding treatment and his personal experience of the

1 Jean-Michel Chaumont, "Celles qui ne voulaient plus être victimes", *Revue Suisse d'Histoire*, Vol. 57 (1) (2007), pp. 40–1.

2 Robert Cario, *Victimologie – De l'effraction du lien*, Paris, L'Harmattan, 2000; Robert Zauberger, "La victime, usager de la justice pénale", in Michel Chauvière and Jacques Godbout (eds.), *Les usagers entre marché et citoyenneté*, Paris, L'Harmattan, 1995; Sandra Walklate, *Imagining the Victim of Crime*, London, McGraw-Hill, 2007.

criminal justice system and society in general. These various findings gave rise to government victim-aid schemes which have spread more or less throughout the world. Thus the victim has become a political issue.³

The legal status of crime victims has also changed significantly under most national criminal law systems, but recently also in international criminal law. These trends have helped to create a veritable social status of *victim*, one reflecting the magnitude of society's recognition for his suffering. At national level, criminal law has for some decades been shifting significantly, from a traditional view of the victim as someone who is owed compensation towards the current perception of the victim as one who suffers and whose suffering must be taken into account.⁴ Criminal proceedings are no longer concerned solely with punishing those found guilty and with upholding public order, but must now also put an end to the victims' suffering and help them to rebuild their lives. This rebuilding process is often regarded as requiring not only recognition of the wrong committed and the consequent guilt of the perpetrator, but also the acknowledgement by judicial institutions and society as a whole of the victims' suffering.⁵ However, the criminal law system cannot serve therapeutic purposes, since it does not have the resources needed and was not designed to attend to the victims.⁶ At the international level, increased recognition of victims and their rights is noticeable as much at the political and humanitarian level as at the level of criminal justice.

The first milestone in obtaining recognition of victimhood by the international community was without question the 1985 United Nations Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power. Following this declaration, a number of decisions and recommendations were drawn up both at international⁷ and European level,⁸ which helped to place the victims at the centre of the international community's deliberations and

3 Sebastian Roché, "Les victimes: de la communauté à l'assurance en passant par l'Etat", *Déviance et Société*, Vol. 19 (4) (1995), pp. 357–70.

4 Xavier Pin, "Les victimes d'infractions – Définitions et enjeux", *Archives de politique criminelle*, Vol. 28 (2006), pp. 49–72.

5 See Cario, above note 2.

6 Maria Louisa Cesoni and Richard Rechtman, "La réparation psychologique de la victime: une nouvelle fonction de la peine?", *Revue de droit pénal et de criminologie*, Vol. 2 (2005), pp. 158–78.

7 For example, the UN Office on Drugs and Crime published the *Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999) in order to promote and guide the implementation of victims' rights in national criminal justice systems. See also the *Handbook on Justice for Victims on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999). The Commission on Crime Prevention and Criminal Justice was set up to implement the 1985 UN declaration. Resolution 2003/30 of 22 July 2003 of the Economic and Social Council set up an Intergovernmental Expert Group to develop an information-gathering instrument on UN standards and norms related primarily to victimhood issues. The results of their work may be seen in document E/CN.15/2007/3.

8 See the European Convention on Compensation of Victims of Violent Crime, adopted on 24 November 1983. See also the recommendations of the Council of Europe R (85) 11 of 25 June 1985 on the "position of the victim in the framework of criminal law" and R (87) 21 of 17 September 1987 on "assistance to victims and the prevention of victimisation". See also "Framework Decision of the Council of the European Union", *Official Journal of the European Communities*, 15 March 2001. See also R (2006)8 of the Committee of Ministers to the Member States adopted on 14 June 2006 at the 967th meeting of Members/Ministers.

concerns. A draft convention on victims' rights is currently being studied by the United Nations. However, victims have only recently gained access to the mechanisms of international penal law. The position of the victim in this context was determined by the Statute of the International Criminal Court, adopted on 17 July 1998. Until then victims were recognized only in their capacity as witnesses and the only compensation possible was acknowledgement that an international crime had been committed which was therefore punishable.

The crucial issue is what status should be accorded to victims in order to guarantee them optimum reparation while respecting the rights of the accused. Therefore, if the intention is to grant adequate reparation to the victim, we need to know the nature and extent of the victims' real expectations and needs as regards the criminal justice system.

Victims' expectations of and needs in terms of criminal proceedings

Victims expect from the system not only an outcome (a sentence and compensation for damages), but also the substance of the process itself (respect, information, participation).⁹ More precisely, Strang¹⁰ has identified the following fundamental needs expressed by victims regarding criminal proceedings:

1. making their voice heard;
2. participating in the handling of the case that concerns them;
3. being treated with respect and fairness;
4. obtaining information on the progress and outcome of the case concerning them; and
5. obtaining economic and emotional redress.

Victims are often represented as demanding retribution (the imposition of a sentence) and the restoration of their status in the community as well as neutralization of the perpetrator. However, retribution might not be as important to victims as is generally thought,¹¹ since they seek above all restitution or compensation,¹² plus the opportunity to make a fresh start, to recover and to be protected from further victimization.

As regards criminal proceedings, victims seem more satisfied when they are kept informed of developments¹³ or when they have the opportunity to play an active part, for example by giving their opinion on the proceedings.¹⁴ Research

9 Marijke Malsch and Raphaela Carriere, "Victims' wishes for compensation: the immaterial aspect", *Journal of Criminal Justice*, Vol. 3 (1999), pp. 239–49.

10 Heather Strang, *Repair and Revenge: Victims and Restorative Justice*, Oxford University Press, Oxford, 2002.

11 Edna Erez and Pamela Tontodonato, "The effect of victim participation in sentencing on sentence outcome", *Criminology*, Vol. 28 (1990), pp. 451–74.

12 John Braithwaite and Stephen Mugford, "Conditions of successful reintegration ceremonies: dealing with juvenile offenders", *British Journal of Criminology*, Vol. 2 (1994), pp. 139–71.

13 Jo-Anne Wemmers, *Victims in the Criminal Justice System*, Amsterdam, Kugler Publications, 1996.

14 Edna Erez and Eva Bienkowska, "Victim participation in proceedings and satisfaction with justice in the continental systems: the case of Poland", *Journal of Criminal Justice*, Vol. 21 (1993), pp. 47–60.

carried out within European legal systems shows that the majority of victims are not satisfied with their experience of the criminal justice system and feel that their needs are not met.¹⁵ Victims expect the participation afforded them by some criminal justice systems to have a restorative power for them,¹⁶ and most current criminal justice systems, national as well as international, do allow victims participation in one form or another, to a greater or lesser degree. In some common-law countries, victim participation has taken the form of “victim impact statements” or “victim statements of opinion”. They are able to make their voices heard throughout the proceedings, describing the consequences that the criminal act has had for them and saying what they wish to see happen. In Belgium and in Canada there is even an extreme form of “victim statements of opinion” which allows victims to have an influence on the carrying out of the sentence (decision regarding release on parole).

But this trend towards taking into account the victims’ needs does not seem to have satisfied all their expectations.¹⁷ Increased victim participation in the case concerning them does not always improve their experience of the criminal justice system and does not appear to bring them the emotional, psychological and financial benefits desired.¹⁸ Victims often prefer not to be obliged to take part, but rather to leave it to the judges to decide on sentencing¹⁹ – they are content to express their point of view during the trial.²⁰ This clearly indicates that too great an involvement in the criminal justice system might not be the most judicious path towards the recovery and reparation desired by the victim.

Some say that the victim experiences a profoundly healing effect from the right to take part in a fair trial and to be heard. However, according to Cario,²¹ victims who have not had access to psychological and social assistance outside the legal system are the ones who focus on the sentence, demanding that it should match their suffering. The very real risk of secondary victimization can be the result of arbitrary, cynical and non-empathic treatment of a case in criminal court, something well known and well documented. Taking part in judicial proceedings frequently causes victims to relive traumatic experiences and to suffer anew as a result of evidence given and the questioning to which they are subjected. Indeed, it

15 Matti Joutsen, “Victim Participation in Proceedings and Sentencing in Europe”, *International Review of Victimology*, Vol. 3 (1994), pp. 57–67; Jan Van Dijk, “Who is afraid of the crime victim? Criminal victimisation, fear of crime and opinions on crime control in an international perspective”, keynote lecture at the VII Symposium of the World Society of Victimology, Adelaide, 21–26 August 1994; Joanna Shapland, Jonathan Willmore and Peter Duff, *Victims and the Criminal Justice System*, Aldershot, Gower, 1985.

16 Walklate, above note 2.

17 Marion Brienen, Ernestine Hoegen and Marc Groenhuijsen, “Evaluation and meta-evaluation of the effectiveness of victim-oriented legal reform in Europe”, *Criminologie*, Vol. 33 (2000), pp. 121–44.

18 Basia Spalek, *Crime Victims: Theory, Policy and Practice*, London, Palgrave, 2006.

19 Jo-Anne Wemmers, “Victim policy transfer: learning from each other”, *European Journal on Criminal Policy and Research*, Vol. 11 (1) (2005), pp. 121–33.

20 Tom Tyler, “What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures”, *Law and Society Review*, Vol. 22 (1) (1988), pp. 103–35.

21 Robert Cario, “La reconnaissance de la victime: instrumentalisation ou restauration”, *Journal des accidents et des catastrophes*, 53 (2005).

frequently happens that the victim is confronted with a perpetrator who shows neither remorse for his acts nor acknowledgement of the harm inflicted; and may even go so far as to deny his actions and accuse in his turn the victim of wrongdoing.

That being the case, one might wonder what role could be assigned to victims in a system which was not designed to take account of their suffering and which therefore cannot have the healing power often wrongly attributed to it. To answer that question we must first determine a number of things: the real needs expressed by victims vis-à-vis the criminal justice system, their actual experience of the judicial handling of the cases concerning them, and the factors tending to influence that experience in either a positive or negative way (including which factors might improve their situation).

Difficulties in attending to victims in national criminal law

A study is currently being carried out by the *Centre d'étude, de technique et d'évaluation* at the University of Geneva to ascertain the views of crime victims and persons working in the legal and social fields who have contact with them.²² The study is focusing on the point of view of the victims, their experience of the criminal justice system, their needs and their expectations. The victims, questioned during semi-controlled interviews, were selected from three categories of crime – sexual assaults, physical assaults and domestic violence – in a manner that reflects Swiss crime statistics.

The initial results of the survey indicate a gap between what victims expect from the handling of their case in the criminal courts and what the courts are actually able to offer them.

Criminal law and how the victims experience it

Different victims have different viewpoints on their victimhood. Most of them mention a major need for recognition by the criminal justice system, which amounts to the need to have a place in that system, to be taken into consideration by the system, to be heard and to have a voice, but also to have a certain “control” over the case pertaining to them and to play an active part in it. They need to be believed, to be taken seriously and to be understood. In addition, they criticize the disproportionate attention paid to the perpetrator and suffer from a corresponding lack of attention paid to themselves. Victims complain of incompetence, inefficiency and slowness in the system, but also of the tendency to concern itself with appearances and a failure to take account of the facts in a consistent and objective manner. The victims questioned have spoken of disillusionment and the gap between their expectations and their actual experience of criminal

²² The results referred to here are of a study entitled “Law and emotions” being carried out by the Centre d'étude, de technique et d'évaluation under the aegis of the Centre Interfacultaire en Sciences Affectives.

proceedings. This is reflected by their disenchantment, perplexity and disappointment regarding the way the cases were handled. Finally, some victims expressed practical needs: to be kept informed and to receive advice and general assistance in the matter.

The victims' statements reveal dissatisfaction with the verdict and the sentence. They consider that the sentence imposed was not severe enough or was inadequate in nature (e.g. a suspended sentence). Retribution is also mentioned by a number of victims, who express their wish and need to see a sentence in proportion to the suffering and violence they experienced. The desired sentence might be viewed as the victim's need for recognition of the fact that he has suffered as an individual and been the victim of injustice. It is obvious that victims feel disenchantment based on their ideals of justice.

The initial results indicate that the statements of the victims questioned vary according to their experience of criminal proceedings and that more bitter views have been expressed by those who have experienced advanced criminal proceedings as compared with those whose complaint did not lead to substantial measures being taken by the investigating judge or who did not lodge a complaint in the first place. Victims whose complaints have been acted upon and those whose complaints have resulted in advanced criminal proceedings frequently express a need for recognition from the criminal justice system. They are more critical of the way it works and seem to regard the response to their practical need for information and advice as unsatisfactory. Those whose complaints have not been acted upon and who have therefore not experienced complete criminal proceedings make no criticism. Going through the actual experience of the proceedings therefore seems to affect the way in which the victims view the result of the proceedings and the outcome of their case. Thus victims who have been through criminal proceedings state a clear need for retribution and for recognition regarding the sentence desired for the perpetrator, whereas the victims who have not been through criminal proceedings express no vindictive sentiments; very few think that the sentence imposed on the perpetrator has reflected recognition of their suffering.

A more detailed analysis, concentrating solely on the emotions expressed regarding the acts committed against them, shows that social support has a positive effect on victims. Victims who consider that they have obtained support from their immediate circle – whether or not they found this satisfactory – made statements that were on the whole much more positive than those made by victims who considered that they had not received such support. The first group see their victimhood rather as an opportunity and a source of strength, expressing the need to get on with life, whereas the others tend to emphasize what is irreparable and the punishment that should result from their victimhood, and have the impression that they are living in hell and feel like they are “about to explode”. At the same time, an analysis of the emotions according to the victims' experience of criminal proceedings and support from their immediate circle also shows that social support seems to have a more positive impact than criminal proceedings. Victims who have experienced criminal proceedings and received from their immediate

circle support which they regard as unsatisfactory express more negative feelings than those who have not experienced criminal proceedings and who had received support which they regard as satisfactory. The first group has a marked tendency to highlight the injustice and their own rage and need for recognition, whereas the second group stresses far more the need for understanding, putting the clock back and returning to normal.

These results clearly indicate that experiencing criminal proceedings does not appear to satisfy the victims' needs and address their dissatisfaction in terms of recognition, involvement and retribution. On the contrary, it appears to aggravate them. Victims who have experienced criminal proceedings are the very ones expressing feelings of hatred, guilt and injustice. Conversely, those who have received support from their immediate circle report a more positive experience. Support from the immediate circle is thus an essential factor in helping victims to overcome their confusion and suffering. It can therefore be concluded that the victims' healing process can be promoted if they receive satisfactory support from their immediate circle and do not go through criminal proceedings. Finally, mention must be made of a general feeling that the criminal justice system is unfair. This was noted throughout the statements of all the victims questioned, which perhaps indicates that the victims, whether or not they have specific experience of that system, perceive it as somewhat negative on the whole. That conclusion finds support in the fact that most victims, whatever their experience of the criminal proceedings, seem disillusioned about the criminal justice system and the reality of their personal experience, and regard the sentences as inadequate given the degree of suffering caused by the criminal act that prompted the trial.

The penal system – a source of dissatisfaction for the victims

The results of the study support the idea that experiencing the criminal justice system can be a further source of suffering for victims rather than an opportunity for them to overcome their trauma, and that the symbolic restorative powers attributed to the system might be questioned as not being sufficiently well founded. The study appears to indicate that part of the healing process can be initiated by support from individuals, both personal and professional, surrounding the victim.

That being the case, should we rebuild totally the criminal justice system? Some authors²³ consider that the system in its present form could be harmful for both victims and perpetrators, since it places the entire emphasis on punishment and does not allow for the constructive and healing settlement of conflicts. It is undeniable that a system mainly based on retribution can only lead to intensification of conflict.²⁴

23 Jacques Faget, *La médiation: Essai de politique pénale*, Erès, Ramonville-Saint-Agne, 1997; Ezzat A. Fattah, "Toward a victim policy aimed at healing, not suffering", in Robert C. Davis, Arthur J. Lurigio and Wesley G. Skogan (eds.), *Victims of Crime*, Thousand Oaks, CA, Sage, 1997, pp. 257–72.

24 Fattah, above note 23.

However, since a radical reform of the criminal justice system is not very a realistic prospect, one solution might be to encourage innovations such as restorative justice. This allows the victims, the perpetrators and the communities affected to recognize that a specific criminal act has caused injury and suffering and to find ways to restore the social fabric destroyed by that act. Such restorative processes also have the advantage of affording greater participation for perpetrators and their victims and of making all parties aware of the consequences of their actions.²⁵ These practices also offer the perpetrator an opportunity to express sorrow and regret and the victim an opportunity to forgive, which can reduce the victim's desire for punishment and retribution²⁶ and contribute to his emotional recovery.²⁷

Although it has been fairly clearly established that the criminal justice system has difficulty in taking account of suffering and in helping victims overcome the trauma they have suffered, we might wonder whether it is possible for the international legal system to take adequate restorative action in the cases of the thousands of victims of war and armed conflict. This is provided for under the statute of the International Criminal Court and other international instruments of criminal justice. We must therefore study how international criminal justice can meet the needs of individual victims and entire communities who have been affected, often very seriously and irreparably, by an armed conflict.

This prompts us to examine the relevance and adequacy of international criminal justice for victims of war crimes, crimes against humanity and genocide. The question is how the attention given to victims under international criminal justice differs from or is similar to looking after them in national criminal justice systems.

The difficulties in attending to victims under international criminal law

Although the suffering and damage sustained by victims are indisputably real and must be recognized, we should nevertheless bear in mind that the role of the criminal justice system is above all to maintain law and order. It is not an instrument to ensure that the severity of sentences reflects the suffering of individuals, although it is on this suffering that the victims' demands are based. The system punishes people for the fact that they have breached the law, not for the fact that they have inflicted trauma as perceived subjectively.²⁸ The increasing importance attached to the victim in criminal proceedings might hamper the achievement of the aims of those proceedings and in some cases impede the

25 David Miers, *An International Review of Restorative Justice*, Home Office Research, Development and Statistics Directorate, London, 2001.

26 Hannah Arendt, *The Human Condition*, University of Chicago Press, Chicago, 1958.

27 Strang, above note 10.

28 Denis Salas, "L'inquietant avènement de la victime", *Sciences humaines*, Vol. 47 (2004), pp. 90–3.

accused in exercising his/her right to defence. And increased victim participation in the proceedings might not be as beneficial for the victims as some people seem to think.²⁹ In any case, whether the trial helps to relieve the victims' suffering and helps them rebuild their lives remains very much open to debate.³⁰

The difficulties now known to be faced by the victims of crimes under national law may be extrapolated, in certain respects, and applied to the victims of international crimes. The needs of victims of human rights violations and breaches of international humanitarian law might prove even more urgent and compelling, given the high degree of violence involved, the scale of harm done and the political nature of those crimes,³¹ but also for reasons of a cultural and social nature. This factor makes the manner in which victims of international crimes are looked after even more complicated and pitfall-prone than the question of how best to look after victims of crimes under national law. The reasons for this will be presented in more detail later.

The specific nature of harm done to victims of international crimes

The victims of crimes committed in the context of internal armed conflict have for the most part suffered particularly serious violence affecting not just one individual in particular but thousands of members of a community or of an ethnic, religious or national group. This has various consequences. First, the probability of trauma grows in proportion to the scale of the violence.³² In the case of human rights violations, it is often entire communities that are the target of violence and genocide on ethnic, political, ideological or economic grounds. Like the victims of crime under national law, the victims of international crimes seek to understand why they were the target and what their aggressors' motives were, in an attempt to regain control of their lives and give meaning to their experience. Above all they feel a need to understand why the social group to which they belong was the target of these crimes. The quest for truth is not therefore confined to the individual and his personal identity, but concerns also the community.

The wrong suffered by the victim also has an effect on his identity as a member of a given group. This fact increases still further the risk of psychological trauma.³³ Victims in the context of international conflict are affected not only as regards their perception of self, of others and of their conception of justice. They are also affected in their relationship with their community. Moreover, the purpose of attacking a population or social group as part of an armed conflict by means of large-scale violence and collective massacres is often to destabilize and

29 Cesoni and Rechtman, above note 6.

30 Jamie O'Connell, "Gambling with the psyche: does prosecuting human rights violators console their victims?" *Harvard International Law Journal*, Vol. 46 (2005), pp. 295–345.

31 Wemmers, above note 19.

32 Spalek, above note 18.

33 Yael Danieli, "Essential elements of healing after massive trauma: complex needs voiced by victims/survivors", in Dennis Sullivan and Larry Tiftt (eds.), *Handbook of Restorative Justice: A Global Perspective*, Routledge, London, 2006, pp. 387–400.

gradually bring about the disintegration of the community, both physically and in terms of identity. This explains why, following a collective trauma caused by armed conflict and affecting an entire community or country, the victims must not only overcome their individual suffering but also take part in a process of social healing involving all those involved in the conflict. Violence with racial or ethnic motives that targets a given social group can cause generalized fear among the members of the community and be the cause of post-traumatic stress reactions such as denial, anger, sadness or other distress.³⁴ It also appears that this type of trauma generally affects not only the direct victims of violence and their immediate circle, but is often passed down through subsequent generations. This has been observed, for example, in the children of survivors of the Holocaust,³⁵ who seem to have absorbed, more or less unconsciously, the victimization by which their parents were marked.

It should be noted that the ad hoc international criminal tribunals mention victims merely in terms of the protection to which they are entitled. Since the principal aim of the international criminal tribunals is to prosecute individuals presumed guilty of serious violations of international humanitarian law, victims are not assigned an active role. The prosecutor in the ad hoc tribunals is in charge of the way the case is conducted. Victims cannot set out their own objectives, which sometimes differ from the prosecutor's.³⁶ Their role in the proceedings is only that of witness.³⁷ Moreover, there is no provision for any compensation for victims for the harm suffered. This has been regarded as an injustice towards the victims and many NGOs have protested against it.³⁸ As Walleyn writes, "the ICTR [International Criminal Tribunal for Rwanda] itself recognized the problem and tried to compensate by allowing the participation, as *amicus curiae*, of the representatives of certain victims' associations and experts closely associated with them ... On 12 October 2000 the president of the ICTR sent to the secretary-general of the United Nations a detailed report on the problem of compensating victims and their participation in proceedings. The report advocated the setting up

34 Thema Bryant-Davis and Carlota Ocampo, "Racist incident-based trauma", *Counselling Psychologist*, Vol. 33 (4), 2005, pp. 479–500.

35 Yael Danieli, *International Handbook of Multigenerational Legacies of Trauma*, Plenum Press, New York, 1998.

36 Claude Jorda and Jérôme de Hemptinne, "The status and role of victims", in Antonio Cassese, *The Rome Statute of International Criminal Court*, Oxford University Press, Oxford, 2002, Vol. II, pp. 1389 ff.

37 Carsten Stahn, Hector Olásolo and Kate Gibson, "Participation of victims in the pre-trial proceedings of the ICC", *Journal of International Criminal Justice*, Vol. 3 (2005); Jorda and de Hemptinne, above note 36.

38 See in particular the various reports on victim participation published by Human Rights Watch (in particular *Memorandum to the International Criminal Court*, March 2004), the International Federation for Human Rights (in particular *Garantir l'effectivité des droits des victimes*, October 2004), Redress (in particular "Ensuring the effective participation of victims before the International Criminal Court comments and recommendations regarding legal representation for victims", March 2005). All these documents plus other reports may be consulted at www.vrwg.org/Publications/1.html (consulted in February 2007). See also G. Ndobu, "Les victimes face à la justice. Rwanda, deux ans après le génocide: quelles juridictions pour quels criminels?", in A. Destexhe, and M. Foret (eds.), *De Nuremberg à La Haye et Arusha*, Bruylant, Brussels, 1997.

of a compensation fund with explicit reference to the United Nations Compensation Commission.³⁹ (our translation).

The failure of international criminal proceedings vis-à-vis victims

The pace of the action taken by the international criminal justice system is also very important, for the healing and restoration of the victims of large-scale violence is a complex and dynamic process. Their needs may vary according to their strategies for adapting and coming to terms with their suffering. This also depends on the people who surround them and the types of help they receive.⁴⁰ The sheer length of the entire procedure often poses a problem for the victims of crimes under national law: the various pre-trial stages sometimes spread themselves over several years after the act that prompted them, and are often ill-timed in terms of the victims' personal healing.⁴¹ This is even more the case for the victims of international crimes, since international judicial mechanisms are very slow and dependent on economic and political factors.⁴² The end of an internal conflict is generally synonymous with rebuilding political and other institutions, holding free elections, legislative reforms, setting up an independent judicial apparatus and police force, stabilizing the national currency, rebuilding the economic infrastructure and so forth. The time-scale for the judicial process is therefore not necessarily in tune with victims' needs or with the process of tapping and developing personal and collective restorative resources.

At the same time we know that few of the accused found guilty by the ad hoc tribunals pleaded guilty (for example, of twenty-two cases completed before the ICTR in which the accused was found guilty, only about a third of the accused pleaded guilty). Even among those who pleaded guilty, the purpose was sometimes not an to acknowledge guilt but rather to obtain a reduced sentence.⁴³ In fact, international legal systems have regarded an acknowledgement of guilt as proof of honesty on the part of the perpetrator.⁴⁴ Here we might recall that the judges found that "weight and importance" should be ascribed to a guilty plea.⁴⁵ This paucity of guilty pleas means that the victim often faces denial, which poses a further setback to healing.

Moreover at the international level, victims have a right to reparation. While there is no need to go into the details of this process, a number of questions arise:

39 Luc Walleyn, "Victimes et témoins de crimes internationaux: du droit à une protection au droit à la parole", *Revue Internationale de la Croix-Rouge*, Vol. 84, No. 845 (2002).

40 Spalek, above note 18.

41 Noëlle Languin and Christian-Nils Robert, *Criminalisation et décriminalisation. Victimes: rôles, attentes et déceptions*, Bruxelles – Fondation universitaire presentation at a conference, 20–21 avril 2007.

42 David Bloomfield, Teresa Barnes and Luc Huyse, *Reconciliation after a Violent Conflict. A Handbook*, International Institute for Democracy and Electoral Assistance (IDEA), Stockholm, 2003.

43 Thierry Cruvellier, *Le tribunal des vaincus, un Nuremberg pour le Rwanda?* Paris, Calmann-Lévy, 2006.

44 ICTY, *Prosecutor v. Erdemovic*, Case no. IT-96-22, Judgement of the Appeal Chamber, 7 October 1997, Separate and Dissenting Opinion of Judge Cassese.

45 ICTR, *Prosecutor v. Ruggiu*, Case IT-97-10, Judgement of the Chamber of First Instance, 1 June 2000, para. 55.

- Will it be necessary to wait for the end of a trial and a guilty verdict against the accused before reparation for the victims can be decided?
- Could the victims receive reparation, as soon as their status as victims has been recognized, by means of a fund created for that purpose? In other words, could the stage of the judicial process at which victimhood is established (i.e. that ascertains what acts were committed against whom) be sufficient to serve as a legal basis for reparation?
- If reparation can be paid only when a verdict has been delivered in a criminal trial, what will happen to individuals who are recognized as victims but then regarding whom no one is convicted.
- Is it fair that certain victims who manage to present their cases before a court receive reparations while thousands of other victims receive nothing?
- What about victims who “come too late” – that is, after the perpetrator of the crimes from which they suffered has been convicted?
- What form will the reparation take? If the reparation is financial, will there be enough resources to compensate all the victims?
- It is important to note, along with Wemmers, that the application form for reparations that the victims must fill out seems to allow them broad scope for expressing different claims. There seems little likelihood that those claims will be granted given the possibilities (in particular the financial means) available to the International Criminal Court.⁴⁶ This could also cause a second victimization.

Collective social and cultural factors

This leads us to consider the impact of the socio-political situation on the way in which victims are looked after by the international criminal justice system. In the immediate aftermath of a conflict between several subgroups of a given population or country, social peace and national reconciliation require not only the healing of individuals but also the healing of society as a whole. The recovery of individuals requires the restoration of the socio-political fabric. Consequently society as a whole, including its institutions, must acknowledge the events of the past and assume responsibility for any acts or omissions vis-à-vis the civilian population. Social recovery presupposes coming to terms with the events and an effort to create collective memory – that is, official recognition of a truth.

Setting up an instrument of international criminal justice also presupposes an appropriate approach in cultural terms, taking account of local customs and sensitivities as regards justice and the reaction to victimization. The example of the *gacaca* courts in Rwanda clearly shows the need for entities suited to the specific context of the conflict and the communities affected it. The *gacaca* courts are based on a traditional dispute-settlement method in which respected male elders of the community pass judgment on disputes concerning private

46 Wemmers, above note 19.

property, inheritance, physical assault or marital relations. The sentence imposed by these tribunals is not aimed only at the individual who committed the act, but also at the members of his family and clan, and typically involves providing beer for the community as a token of reconciliation.⁴⁷ This method allows swift justice, requires scant financial and human resources and is not too harsh towards those found guilty. It is accepted and understood by everyone and entails a high degree of participation by the public. However, these courts have been modernized with a view to trying those accused of genocide, and a law to that effect was adopted in 2001 and subsequently amended in 2004. The formal, modernized version of these courts is quite different from the traditional *gacaca*, with the new version allowing imprisonment and consisting of judges elected by local officials. And it should not be forgotten that the very concept of “victim” is a cultural construct. In African and Asian societies, for example, “victim” is understood in a broader sense and encompasses the person’s immediate family and community. Consequently, in cases brought under the international system of criminal justice in such contexts, account must also be taken of indirect victims if that system wishes to provide a remedy that actually meets the expectations of the victims of human rights violations.

These victims find themselves confronted with a further destabilizing event, since we know that a person recognized as a victim in the early stages of the proceedings can, depending on the accusations on the final charge sheet, later lose this status as the proceedings progress.⁴⁸ How can these victims be expected to accept being abandoned in this way by international justice? It probably amounts

47 Alice Karekesi, “Juridictions gacaca: lutte contre l’impunité et promotion de la réconciliation nationale”, *Cahiers du Centre de Gestion des Conflits*, Vol. 3 (2001), pp. 9–96.

48 The first phase is the “situation phase”. Directed principally by the prosecutor, it involves investigating the acts committed in the context of a given situation, at present the Democratic Republic of the Congo, Uganda, Darfur in Sudan and the Central African Republic. The victims may take part in this stage of the proceedings under a decision taken by Pre-Trial Chamber I on 17 January 2006 (ICC Decision on applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 [public redacted version], ICC-01/04-101, 17 January 2006, hereafter referred to as the “Decision of 17 January 2006”) and confirmed by a decision of Pre-Trial Chamber II on 10 August 2006 (ICC Public Redacted Version of the Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02-04-101, 7 August 2007). At this stage they are recognized as “victims of a situation”. Thus they may give their opinion on the work of the Prosecutor, may be consulted on numerous specific procedures and are kept informed about the progress of criminal proceedings. They have the right to request specific measures, to have access to confidential documents, and to take part, under the supervision of the Pre-Trial Chamber, in all procedural acts connected with the case. Large numbers of victims might therefore be involved, since a “situation” generally concerns an entire state or at least a very large area. The only restriction on recognizing someone as having the status of victim is that he must meet the conditions set out in the definition contained in the Statute. As we shall see, those conditions are fairly broad. The second phase begins following the issuing of an arrest warrant or a summons to appear (Decision of 17 January 2006, para. 65). This is the phase dealing with the specific case, as opposed to the “situation”, in which a specific person is concerned on whom the investigation will focus. Recognition of victim status in “the situation phase” automatically involves verification of that status in this next phase. However, not all victims of a “situation” are necessarily victims of a “case”. So it has been possible to recognize an individual as having suffered harm in the Democratic Republic of the Congo and therefore include that

to a second “victimization”, and the justice system thus fails to achieve its goal (illusory though it may be) of helping the victims by means of criminal trials.

International justice faces one further problem – it is, as Hazan⁴⁹ says, justice divorced from local realities. Clearly justice must be rooted in a society and a culture, a need the international criminal tribunals do not appear to meet. This also entails a number of problems regarding victim protection. In the case of the ad hoc tribunals it was not possible to give adequate protection to some witnesses and “witness-victims” – some were threatened and even killed.⁵⁰ Therefore victims who take part in criminal proceedings run a greater risk under international criminal law than under national law.

Conclusion: a need for various types of justice?

According to Villa-Vilencio,⁵¹ the social reconstruction needed for the transition from a situation of internal conflict to a stably restored, durable socio-political framework often requires a range of varying types of justice, including punishment-based justice but also schemes intended to resolve the conflict by means of reparation. Democracy and lasting peace in a society emerging from conflict requires also reconciliation between victims, perpetrators and the community at large by means of restorative justice.⁵² Restoring the judicial process is essential for victims, perpetrators and the entire community to lay a new foundation for the society in which they live.

In any case, it is not possible to implement a viable, lasting peace within a society and the rule of law without a reasonable degree of co-operation between victims, perpetrators and the rest of the community. This requires restoration of social ties. The goals of punishment and reparation must be fixed within the context of transitional justice. The wrongs, the crimes of the past must be condemned in order to reaffirm morality and human dignity and to deal with feelings aroused by victimization.⁵³ This requires a punishment paradigm to meet

individual as a victim of that “situation” without his being a victim of the crimes allegedly committed by the person apprehended or named on the arrest warrant. This was the case for the persons recognized as victims by the Decision of 17 January 2006 who were nevertheless not victims of the crimes allegedly committed by Thomas Lubanga Dyilo, the only accused currently on trial at the ICC in the context of that “situation” (ICC, *Decision on the applications for participation in the proceedings of VPRS 1 to VPRS 6 in the Case Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-172, 29 June 2006). This fact alone brings the risk of great frustration among those initially attributed victim status at the “situation” stage and then who, from one day to the next, find themselves barred from participation in the process. How might they react if, in addition, the crimes of which they were the victims were not prosecuted for lack of proof, lack of an accused or simply lack of time?

49 Pierre Hazan, *La justice face à la guerre, De Nuremberg à La Haye*, Stock, Paris, 2007.

50 Laetitia Bonnet, “La protection des témoins par le TPIY”, *Droits fondamentaux*, no. 5 (2005); Cruvellier, above note 43.

51 Charles Villa-Vilencio, “Transitional justice and prosecution”, in Sullivan and Tifft, above note 33, pp. 343–54.

52 Howard Zehr, *Changing Lenses*, Herald Press, Scottsdale, PA, 1995.

53 Jeffrie G. Murph and Jean Hampton, *Forgiveness and Mercy*, Cambridge University Press, Cambridge, 1994.

the need for retributive justice, but also restorative justice to make it possible to identify the wrong done to the victim and the perpetrator's responsibility for this. In addition, improving the lot of the victims – by means of various remedies such as restitution, compensation and assistance – is also necessary. The victim's entitlement to these remedies is clearly established in the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. But the adoption in 2005 by the UN General Assembly of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law⁵⁴ opened the door for the introduction of more restorative responses than those typical of the traditional legal mechanisms, namely restitution, compensation and rehabilitation.

In addition to these traditional types of reparation, these principles also recommend measures more focused on restoring social ties, remedies such as “satisfaction” (which includes the search for the truth, an end to violence, verification of the facts and complete and public revelation of all the facts, public apologies and commemoration ceremonies, official recognition of the facts, and establishment of days and places dedicated to the memory of victims) and guarantees that there will be no repetition (for example, effective control of the armed and security forces, strengthening of judicial power and reform of laws which encouraged violations in the past, and instruction on human rights and international humanitarian law for all sectors of society, particularly members of the police force, the army and the security services).

Criminal prosecution of the perpetrators of serious international crimes is increasingly regarded as an obligation under international law.⁵⁵ However, although the punishment-based justice of the ad hoc tribunals and the International Criminal Court exists to aid transitional justice in the wake of conflict, criminal proceedings are not always without risk⁵⁶ and are not always politically feasible in highly unstable situations. They can compromise or even destabilize a fragile peace process, create tension within a society – fragmenting it rather than uniting it – and even endanger a country's very government apparatus by purging its administrative and executive officials. In such situations the legal apparatus is often hindered and its human and financial resources affected. A society being rebuilt following internal conflict must often take crucial decisions regarding the priority to be given to certain reforms and developments vital to its basic functioning. Often it must engage not only in the material reconstruction of infrastructure but also in the rebuilding of various bodies, both private and public, that can contribute to the socio-economic and political stability indispensable to lasting peace. That was the case in South Africa, for example, which quite simply, both for political reasons and for lack of resources within the legal system, could

54 Resolution 60/147, adopted by the General Assembly on 16 December 2005.

55 Diane Orentlicher, “Settling accounts: the duty to prosecute human rights violations of a prior regime”, *Yale Law Journal*, Vol. 100 (1991), pp. 2537–615.

56 Bloomfield et al., above note 42.

not have sustained lengthy proceedings.⁵⁷ A Truth and Reconciliation Commission was set up to help to seek the truth about human rights violations during the apartheid years, launch a process of reconciliation and achieve real national unity.⁵⁸

It is worth pointing out that many aspects of the South African Truth and Reconciliation Commission are in keeping with the principles of restorative justice. One clear illustration is the fact that the Commission stressed, as a central pillar of the quest for truth, the public acknowledgement of past violations. This recognition was perceived as a way of restoring the victims' dignity.⁵⁹ The Commission also recommended measures for material reparation in the form of victim-rehabilitation programmes as well as symbolic measures such as a national remembrance day, monuments in memory of victims and museums on the theme of past violence. Such measures are very much in keeping with the principles of restorative justice, placing the emphasis as they do on reconciliation between victims and perpetrators, the various communities concerned and the society as a whole. Nevertheless, a number of authors have expressed reservations about memorial legislation, commemorations and the erection of monuments.⁶⁰

There are many definitions of restorative justice, but despite the lack of consensus this concept seems to be increasingly accepted at the international level as a "process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future".⁶¹ Along the same lines, Parmentier⁶² explains that the truth and reconciliation commissions may be comparable to restorative justice for several reasons. They regard crime above all as a violation of human rights and aim to heal and restore those affected by the crime. They encourage all parties involved to take part in resolving the conflicts, stress the responsibilities of those who committed the crimes and, in so doing, not only encourage expression by the victims of their personal experience and acknowledgement of their victimization, but also help to restore dignity to the perpetrators. They provide a better understanding of why the perpetrators did what they did and also the nature of the socio-political structures that allowed those acts to be committed in the first place. Such practices may lead to the rebuilding of the collective memory of a country and to an understanding shared by all parties concerned, but also to recommendations as to how to improve the functioning of the society as a whole

57 D. Tutu, *No Future without Forgiveness*, Rider, London, 1999.

58 R. Lyster, "Why a truth and reconciliation commission?", *Current Issues in Criminal Justice*, 12 (1), 2000, pp. 114–22.

59 Ibid.

60 N. Loraux, *La cité divisée, l'oubli dans la mémoire d'Athènes*, Payot & Rivages, Paris, 1997; P. Ricoeur, *La mémoire, l'histoire et l'oubli*, Ed. du Seuil, Paris, 2003.

61 T. Marshall, "The Evolution of Restorative Justice in Britain", *European Journal of Criminal Policy and Research*, 4 (4), pp. 21–43, 1996.

62 S. Parmentier, "La Commission "vérité et réconciliation" en Afrique du Sud: possibilités et limites de "justice restaurative" après conflits politiques majeurs", in D. Salas (ed.), *Victimes de guerre en quête de justice*, Collection Sciences criminelles, L'Harmattan, Paris, pp. 55–88, 2004.

so that such serious violations of human rights and generalized violence do not recur.

Certain aspects of truth and reconciliation commissions differ markedly from the practices of restorative justice. The South African Commission's principal aim was to facilitate communication between the different parties rather than actually to mediate between them. It might also be added that the final aim was not to ensure that the parties involved agreed on the details of adequate reparations to compensate the victims. This is the traditional role of a mediator. The purpose of the Commission in South Africa was rather to devise moral reparations, such as the nurturing of a collective memory and the putting forward of recommendations for the future.

The many facets of restorative justice are intended to encourage dialogue and reconciliation between victims, perpetrators and the community.⁶³ It offers an opportunity for the perpetrators to accept responsibility for their deeds and scope for repairing the wrongs done, strengthening social ties between victims and perpetrators and building more stable and more peaceful communities. These principles correspond closely to the needs of a society in political transition, rebuilding itself after an internal conflict.⁶⁴ Some authors⁶⁵ believe that restorative justice can play an important role in dealing with the aftermath of armed conflict at judicial level, such as in criminal cases brought before the ad hoc tribunals for crimes perpetrated in Rwanda and in Yugoslavia as well as the International Criminal Court. Community restorative-justice programmes in Northern Ireland have been an important part of the process of maintaining peace there.⁶⁶ These methods appear to have helped to reduce violence and change attitudes towards violence while encouraging dispute-settlement mechanisms at community level. The development of these methods for other internal disputes, such as in South Africa,⁶⁷ shows that it is essential to involve the community in implementing this type of justice and to ensure that the conflict-resolution models take account of the needs and cultural norms specific to the community concerned. Despite the many benefits offered by methods of conflict resolution and reconciliation, such as truth and reconciliation commissions and other “restorative justice” practices, the international community still largely prefers to deal with the aftermath of internal conflicts in terms of criminal law. There are many arguments in favour of this approach.⁶⁸ Prosecution under criminal law, it is said, prevents private revenge, summary executions and the resulting disturbances in society. It also prevents any return to power of those responsible, directly or indirectly, for instigating the

63 J. Braithwaite, *Restorative Justice and Responsive Regulation*, Oxford University Press, Oxford, 2002.

64 R. G. Teitel, *Transitional Justice*, Oxford University Press, New York, 2000.

65 P. Roberts, “Restoration and retribution in international criminal justice: an exploratory analysis”, in A. Von Hirsch, J. Roberts, A. E. Bottoms, K. Roach and M. Schiff (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* Hart Publishing, Oxford, 2003.

66 K. McEvoy and A. Eriksson, “Restorative justice in transition – ownership, leadership and “bottom-up” human rights”, in Sullivan and Tiftt, above note 33, pp. 321–35.

67 Roche, D., “Restorative justice and the regulatory state in South African townships”, *British Journal of Criminology*, 42, (2002), pp. 514–33.

68 Bloomfield et al., above note 42.

conflict. Some also consider that only proceedings in a court of law provide clear recognition of the value and the dignity of the victims of past crimes and that a society recovering from an internal conflict has a moral obligation to prosecute and punish those who perpetrated violent acts. Some feel that court proceedings are needed to establish individual responsibility and thus to avoid the perception that an entire community (“the Serbs”, “the Muslims”, “the Hutus”, “the Tutsis”, etc.) is responsible for the acts committed. As Semelin explains when discussing memory of victimhood,⁶⁹ it is important to avoid stigmatizing a particular social group in such situations, for this brings the risk of provoking even more violence and rekindling the conflict. It must nevertheless be pointed out that it is easier to single out scapegoats⁷⁰ and bring cases against a limited number of individuals than to take into consideration the overall geopolitical situation in a given region. Some feel that dealing with the aftermath of conflict through the international criminal justice system serves to strengthen the legitimacy and process of democratization in a given country or region, because it boosts public confidence in the new regime’s capacity for democratic governance. Criminal proceedings are now part of the international scene but, as we have observed, they do not give the victims what they need. Helping the victims requires a restorative approach oriented towards the rebuilding of their lives and of their societies. Examples of this type of restorative justice are given above.

Finally, we should not forget that criminal prosecution is often regarded as the best way of countering impunity. But, although this idea is very widespread, it is not necessarily true, because only a very small percentage of the criminals are ever brought to trial under the international criminal justice system – one of the design features of the international criminal tribunals for the former Yugoslavia and Rwanda, as well as of the International Criminal Court itself.

69 Jacques Sémelin, *Purifier et détruire: usages politiques des massacres et génocides*, Ed. du Seuil, Paris, 2005.

70 Christian-Nils Robert, *L’impératif sacrificiel: justice pénale: au-delà de l’innocence et de la culpabilité*, Ed. d’en bas, Lausanne, 1986.