

# Enhancing the protection of the rights of victims of international crimes: A model for East Africa

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## Summary

*Victims of international crimes have had little, if any, role and voice in international criminal proceedings. In fact, victims in such proceedings have mostly been mere observers and witnesses. This global practice reflects the status of victims of international crimes as it was until the emergence of the International Criminal Court. The Court has brought about an era where victims of international crimes will not only have a true voice in criminal proceedings, but they will also participate in such proceedings as victims. Of importance is the fact that they are now entitled, by right, to compensation and reparation. The article traces international legal developments relative to the protection of the rights of victims of international crimes. It briefly examines comparable domestic and regional legal frameworks and practices on victim rights protection. The principal aim of the study is to discuss lessons that can be replicated in East Africa as a possible model for the protection of the rights of victims of international crimes.*

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## 1 Introduction

The voices of victims of human rights abuses and their concerns have long been neglected in the criminal justice system. In fact, whereas international and national legal frameworks (including the African Charter on Human and Peoples' Rights (African Charter) and domestic constitutions' bills of rights) contain express provisions for safeguarding the rights of accused persons and perpetrators of crimes, none expressly exists for victims of those atrocities. Indeed, critics of the African Charter point to the absence of a specific provision on the right to an effective remedy, although over the years the African Commission on Human and Peoples' Rights (African Commission) has interpreted the right as a significant deficiency in the protection of human rights in Africa and perhaps a misplaced preoccupation with rights violators.<sup>1</sup>

In recent years, though, there have been marked advances as different legal instruments have acknowledged the place of victims in the criminal justice system. Buoyed by agitation and demands by victims and members of civil society for the recognition and protection of victims of human rights atrocities, the international legal framework has yielded significant normative gains. Indeed, increasingly victims' voices are heard in legal processes that are aimed at bringing an end to the crimes committed against them.<sup>2</sup>

Until the last decade, even where remedies for victims existed, measures tended to end with the indictment and punishment of offenders and perpetrators, on the erroneous assumption that punishing offenders would compensate for the harm or wrong suffered by victims and would restore a much broader international legal order.<sup>3</sup> Victims were also treated as mere witnesses in support of evidence adduced by the prosecution to prove its case. After World War II, the sufferings of victims were noted and prosecutions carried out but nothing substantial was done to alleviate the suffering of victims as they were not accorded any special right to protection, support or reparations and were assigned no other role in the proceedings in their own right as victims rather than just as witnesses.<sup>4</sup> The Nuremberg International Military Tribunal<sup>5</sup> and the Tokyo International Military Tribunal for

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1 G Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 442-464; F Viljoen *International human rights law in Africa* (2007) 236-259.

2 S Garkawe 'Victims and the International Criminal Court: Three major issues' (2003) 3 *International Criminal Law Review* 345-346.

3 JM Kamatali 'From ICTR to ICC: Learning from the ICTR experience in bringing justice to Rwandans' (2005) 12 *New England Journal of International and Comparative Law* 89-99.

4 Garkawe (n 2 above) 347.

5 Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 <http://avalon.law.yale.edu/imt/imtconst.asp> (accessed 29 September 2011).

the Far East<sup>6</sup> conducted trials generally seen as a way of deterring future atrocities. However, victims did not play a major role in those trials.<sup>7</sup>

The establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY),<sup>8</sup> the International Criminal Tribunal for Rwanda (ICTR)<sup>9</sup> and the Special Court for Sierra Leone (SCSL)<sup>10</sup> gave momentum to the promotion and protection of victims' rights. The entry into force of the Rome Statute of the International Criminal Court (ICC) on 1 July 2002<sup>11</sup> heralded a new dawn which is anticipated to improve the participation of victims in criminal proceedings.<sup>12</sup> Articles 5 to 8 of the Rome Statute define international crimes as genocide, crimes against humanity, war crimes and the crime of aggression. The ICC treaty provides for a Victims and Witnesses Unit,<sup>13</sup> and an opportunity for the victims to have legal representation, to participate in proceedings<sup>14</sup> and to receive compensations and reparations.<sup>15</sup>

The article examines the legal framework of victims' participation, their right to reparations, compensations and restitutions with a view to proffering a holistic approach towards the promotion of victims' rights by member states of the East African Community (EAC).<sup>16</sup> There

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6 International Military Tribunal for the Far East (IMTFE) Charter <http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml> (accessed 29 September 2011).

7 Garkawe (n 2 above) 347.

8 The Statute of the International Criminal Tribunal for Yugoslavia, Security Council Resolution 827 of 25 May 1993.

9 The Statute of the International Criminal Tribunal for Rwanda, Security Council Resolution 955 of 8 November 1994.

10 See Statute of the Special Court for Sierra Leone, established by an agreement between the United Nations and the government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000.

11 Rome Statute of the International Criminal Court UN Doc A/CONF.183/99 of 17 July 1998, entered into force 1 July 2002, <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> (accessed 26 September 2011) (Rome Statute).

12 W Schabas *An introduction to the International Criminal Court* (2007) 328; M Jouet 'Reconciling the conflicting rights of victims and defendants at the International Criminal Court' (2007) 26 *Saint Louis University Public Law Review* 249.

13 Art 43(6) Rome Statute.

14 Art 68(3) Rome Statute; M Cohen 'Victims participation rights within the International Criminal Court: A critical overview' (2009) 37 *Denver Journal of International Law and Policy* 351.

15 Art 75 Rome Statute.

16 The East Africa Community (EAC) is a regional inter-governmental organisation of the Republics of Kenya, Uganda, the United Republic of Tanzania, the Republic of Rwanda and the Republic of Burundi with its headquarters in Arusha, Tanzania. The treaty for the establishment of the EAC was signed on 30 November 1999 and entered into force on 7 July 2000. There is currently an East African Court. However, as provided in the treaty establishing the Court, it does not adjudicate on human rights issues at the moment. The treaty establishing the EAC makes a case for the adjudication of human rights issues in future through the adoption of a protocol

are interesting developments in the EAC that make this study imperative. Uganda and Kenya are currently ICC case and situation countries. The Ugandan government referred a case concerning the Lord's Resistance Army to the ICC in December 2003.<sup>17</sup> The Kenyan case<sup>18</sup> was referred to the ICC by the Prosecutor of the ICC using his *proprio motu* power as provided for in the Rome Statute.<sup>19</sup> Rwanda suffered a vicious genocide that claimed the lives of more than 800 000 Tutsis and moderate Hutus in a hundred days.<sup>20</sup> Burundi is currently setting up accountability mechanisms to deal with the civil wars that occurred in that country.<sup>21</sup> Tanzania is relatively peaceful but not immune to the victims' rights issues besieging its neighbours.

The focus on East Africa is also purely for pragmatic purposes. The authors are more familiar with the region with regard to the work of the ICC, being actively involved in transitional justice processes in the countries under study. However, the lessons emerging from the study should be applicable and indeed replicable in other countries in Africa.

The article begins with a brief survey of the kind of victims of international crimes envisaged. It examines international and regional norms and standards as well as the protection provided by legal frameworks for victims of international crimes. It also surveys *ad hoc* tribunals and

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to operationalise the extended jurisdiction. See art 27(2) of the EAC Treaty. See also EAC 'About the EAC' <http://www.eac.int/about-eac.html> (accessed 26 September 2011).

- 17 K Apuuli 'The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) insurgency in Northern Uganda' (2004) 15 *Criminal Law Forum* 391; P Akhayan 'The Lord's Resistance Army case: Uganda's submission of the first state referral to the International Criminal Court' (2005) 99 *American Journal of International Law* 403; H Moy 'International Criminal Court arrest warrants and Uganda's Lord's Resistance Army: Renewing the debate over amnesty and complementarity' (2006) 19 *Harvard Human Rights Journal* 267 271; El-Zeid 'The Ugandan government triggers the first test of the complementarity principle: An assessment of the first state's party referral to the ICC' (2005) 5 *International Criminal Law Review* 83.
- 18 Six Kenyans are currently before the ICC going through confirmation of charges hearings on crimes allegedly committed after the 2007 elections. See *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ICC-01/09-01/11 and *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC-01/09-02/11.
- 19 See art 15 of the Rome Statute. For a review of the *proprio motu* powers of the prosecutor, see A Danner 'Enhancing the legitimacy and accountability of the prosecutorial discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510 515.
- 20 K Nash 'A comparative analysis of justice in post-genocide Rwanda: Fostering a sense of peace and reconciliation' (2007) 1 *Africana Journal* 59 67 [http://www.africanajournal.org/PDF/vol1/vol1\\_4\\_Kaley%20Nash.pdf](http://www.africanajournal.org/PDF/vol1/vol1_4_Kaley%20Nash.pdf) (accessed 31 October 2011).
- 21 See UN General Assembly Human Rights Council 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Office of the United Nations High Commissioner for Human Rights analytical study on human rights and transitional justice' A/HRC/12/18/Add.1, 21 August 2009 [http://www.unrol.org/files/96199\\_A-HRC-12-18-Add1.pdf](http://www.unrol.org/files/96199_A-HRC-12-18-Add1.pdf) (accessed 26 September 2011).

specialised courts with a focus on the evolution of victims' rights. The role of victims in traditional justice mechanisms in Africa is examined, and a brief comparative survey is done of some comparable domestic legal frameworks. The study reflects on the promise of the ICC and the current participation of victims and their right to reparations within the Court's framework. Additionally, the study discusses some of the main challenges for victims' protection in Africa. The article concludes by making a case for an integrated model for victims' protection in the EAC. This is in consideration of the different stages of victims' participation in the criminal justice system. Although the focus of the research is on member states of the EAC, the ideas and suggestions discussed apply to the African continent and beyond.

## 2 Defining victims of international crimes

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 Law Victims define victims of crimes as<sup>22</sup>

... persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Bassiouni argues that the Basic Principles and Guidelines are an international bill of rights for victims.<sup>23</sup> The United Nations (UN) General Assembly in 1985 adopted the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>24</sup> The UN Principles define victims as<sup>25</sup>

... 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

22 UN General Assembly, 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 Law: Resolution adopted by the General Assembly, 21 March 2006, A/RES/60/147, <http://www.unhcr.org/refworld/docid/4721cb942.html> (accessed 26 September 2011) (Basic Principles and Guidelines) para 8.

23 MC Bassiouni 'International recognition of victims' rights' (2006) 6 *Human Rights Law Review* 203.

24 UN General Assembly A/RES/40/34 adopted 29 November 1985 at the 96th plenary meeting. (UN Principles).

25 Para 1 UN Principles.

are in violation of criminal laws operative within member states, including those laws proscribing criminal abuse of power.

In a resolution adopting the Principles, the UN called on member states to 'implement social, health, including mental health, educational, economic and specific crime prevention policies to reduce victimization and encourage assistance to victims in distress'.<sup>26</sup> The Declaration requires states to adopt legal and practical measures for effective integration of victims in the criminal justice system by granting them access to justice and fair treatment,<sup>27</sup> restitution,<sup>28</sup> compensation<sup>29</sup> and assistance<sup>30</sup> to the extent possible.

The Rome Statute does not define victims. However, the ICC Rules of Procedure and Evidence (RPE) define victims as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the ICC'.<sup>31</sup> The RPE further provides that 'victims may include organisations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes'.<sup>32</sup>

It is important to note that, while the trial chamber of the ICC in the case of *Prosecutor v Thomas Lubanga Dyilo*<sup>33</sup> had interpreted Rule 85 generously to include any person who had 'suffered harm as a result of the commission of a crime within the jurisdiction of the Court',<sup>34</sup> the Appeals Chamber reversed that ruling restricting victims who are entitled to participate at the Court's proceedings to those whose harm and personal interests in the case may be linked to the charges before the Court.<sup>35</sup>

While there are certainly other crimes which may be considered of international character, including piracy, drug and human trafficking and money laundering, the focus of the proposed model is on victims of the crime of genocide, crimes against humanity and war crimes. The

26 Para 4(a) of Resolution A/RES/4034 adopting the UN Principles.

27 Para 4 UN Principles.

28 Para 8 UN Principles.

29 Para 12 UN Principles.

30 Para 14 UN Principles.

31 See Rule 85 of Rules of Procedure and Evidence of the International Criminal Court adopted by the Assembly of States Parties 1st session in New York, 3-10 September 2002, ICC-ASP/1/3 [http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules\\_of\\_procedure\\_and\\_Evidence\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf) (accessed 26 September 2011).

32 Rule 85(b) of the RPE of the ICC.

33 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1119, decision on victims' participation, paras 90-92 (18 January 2008).

34 n 33 above, para 90.

35 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1432, judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, judgment of 11 July 2008, para 2.

principle motivation for focusing on victims of these international criminal acts is due to the fact that their definition and scope have achieved consensus and also the fact that these crimes have increasingly gained notoriety in several places around the world and also in Africa, where there are ICC investigations and prosecutions.<sup>36</sup> National jurisdictions are additionally adopting domestic legislation to implement the Rome Statute of the ICC. It is imperative to suggest appropriate guidelines or models on victims' rights at the domestic level that will complement the activities of the ICC.<sup>37</sup>

### 3 International protection of victims' rights

#### 3.1 Norms and standards

The Nuremberg and Tokyo Tribunals represent some of the earliest efforts to hold accountable those who committed mass atrocities during World War II against Jews, homosexuals, gypsies, and other religious and ethnic minorities.<sup>38</sup> The adoption of the Universal Declaration of Human Rights (Universal Declaration)<sup>39</sup> in 1948 marked a positive normative response to respect the fundamental human rights and freedoms of individuals. While the Universal Declaration does not contain specific provisions relating to the rights of victims, the instrument is the cornerstone of human rights protection.<sup>40</sup>

The adoption of the International Covenant on Civil and Political Rights (ICCPR),<sup>41</sup> which codified the civil and political rights of the Universal Declaration in a legally-binding instrument, is therefore seen as positive development in the protection of the rights of victims. For example, ICCPR provides that '[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'.<sup>42</sup>

Another important instrument that effectively protects the rights of victims is the Convention Against Torture and Other Cruel, Inhuman

36 The ICC is currently active in Central African Republic, Democratic Republic of the Congo, Kenya, Uganda, Sudan and Libya. ICC 'Situations and cases' <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/> (accessed 29 September 2011).

37 B Olugbuo 'Positive complementarity and the fight against impunity in Africa' in C Murungu & J Biegon (eds) *Prosecuting international crimes in Africa* (2011) 251.

38 R Aldana-Pindel 'In vindication of justitiable victims' rights to truth and justice for state-sponsored crimes' (2002) 35 *Vanderbilt Journal of Transnational Law* 1399 1402.

39 General Assembly Resolution 217 A(III) of 10 December 1948.

40 G Alfredsson & A Eide *The Universal Declaration of Human Rights: A common standard of achievement* (1999); J Morsink *The Universal Declaration of Human Rights: Origins, drafting and intent* (1999).

41 General Assembly Resolution 2200A (XXI) of 16 December 1966.

42 Art 9(5) ICCPR.

and Degrading Treatment or Punishment (CAT).<sup>43</sup> CAT provides that a victim of torture is entitled to an enforceable right to fair and adequate compensation and rehabilitation and in the case of the death of the victim, adequate compensation to the survivors of the victim.<sup>44</sup> CAT accords victims a right to compensation and provides for the survivors of victims as well.

UN member states have adopted other treaties and conventions which protect the rights of victims. These include the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>45</sup> the Convention on the Rights of the Child,<sup>46</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>47</sup> These conventions and treaties make provision for the protection of vulnerable members of society against discrimination, exploitation and abuse.

The UN Office on Drugs and Crime (UNODC) has also drafted a handbook on justice for victims detailing the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>48</sup> According to the UN Victims' Handbook, an effective way of addressing the needs of victims of crime is to establish programmes that provide social, psychological, emotional and financial support, and effectively help victims within the criminal justice and social institutions.<sup>49</sup> In addition, the UN, in recognition of the important need for effective mechanisms to protect victims, has stated:<sup>50</sup>

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victims' right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.

EAC member states have ratified most of the treaties and conventions mentioned above.<sup>51</sup> They have endorsed some of the resolutions and

43 General Assembly Resolution 39/46 of 10 December 1984, entered into force 26 June 1987 (CAT).

44 Art 14 (1) CAT.

45 Convention on the Prevention and Punishment of the Crime of Genocide General Assembly Resolution 260 A(III) of 9 December 1948 (Genocide Convention).

46 Convention of the Rights of the Child, General Assembly Resolution 44/25 of 20 November 1989.

47 Convention on the Elimination of All Forms of Discrimination Against Women adopted in New York, 18 December 1979.

48 UNODC *Handbook on justice for victims: On the use and application of the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999) 2 (UN victims handbook).

49 *UN victims handbook* (n 48 above) iv.

50 Art 11 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, UN A/Res/60/147, adopted 16 December 2005.

51 See the United Nations Treaty Collection Database for a comprehensive review of the status of ratification of international instruments by UN member states, <http://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en> (accessed 26 September 2011).



principles adopted under the auspices of the UN but, beyond ratification and endorsements, nothing much has been done to implement the instruments in national legislation. Several factors, ranging from a lack of political will to the technical manpower requisite to effect the needed changes, are often cited as the cause for the lack of implementation.<sup>52</sup>

## 4 Evolution of *ad hoc* international criminal tribunals and the protection of victims' rights

### 4.1 International Criminal Tribunal for the Former Yugoslavia

The ICTY was established through a UN Security Council Resolution<sup>53</sup> after the Balkan conflicts that left the former Yugoslavia completely devastated in the 1990s.<sup>54</sup> It became operational before the ICTR, but they share the same Appeals Chamber. The ICTY was established to punish those who had participated in the mass atrocities committed in the former Yugoslavia. The ICTY Statute does not provide for reparations for victims, but its Rules of Procedure make provisions for the protection of victims and witnesses.<sup>55</sup> Indeed, the ICTY victim's protection strategy, which provides for reparation provisions, is found in the Tribunal's Rules of Evidence and Procedure.<sup>56</sup> Among other things, the ICTY Rules provide for an order of restitution by the Court.<sup>57</sup> Furthermore, the Rules provide that '[p]ursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation'<sup>58</sup> from an accused person who has been found guilty of a crime by the ICTY.

It seems that victims appearing before ICTY have not yet used these provisions.<sup>59</sup> Van Boven argues that the provisions were 'included in the [ICTY] Rules as a symbolic afterthought rather than being expected

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52 C Odinkalu 'Back to the future: The imperative of prioritising for the protection of human rights in Africa' (2003) 47 *Journal of African Law* 1 24.

53 UN Security Council Resolution 827 of 1993.

54 ICTY 'About the ICTY' <http://www.icty.org/sections/AbouttheICTY> (accessed 1 October 2011); D Tolbert 'The International Criminal Tribunal for the Former Yugoslavia: Unforeseen successes and foreseeable shortcomings' (2002) 26 *Fletcher Forum of World Affairs* 5 7; L Barria & S Roper 'How effective are international criminal tribunals? An analysis of the ICTY and the ICTR' (2005) 9 *International Journal of Human Rights* 349 341.

55 Art 15 ICTY Statute.

56 The ICTY Rules of Evidence and Procedure was adopted 11 February 1994 pursuant to art 15 of the Statute of the Tribunal and entered into force on 14 March 1994 (ICTY Rules).

57 Art 98(B) ICTY Rules.

58 Art 106(B) ICTY Rules.

59 G Boas 'Comparing the ICTY and the ICC: Some procedural and substantive issues' (2000) XLVII *Netherlands International Law Review* 267 284.

to produce concrete results'.<sup>60</sup> This is because victims faced several hurdles in the domestic judicial system in obtaining compensation from those indicted by the ICTY.

However, it seems the tide is changing to benefit victims, as the president of the ICTY in 2010 called on the UN Security Council to establish a trust fund for victims of crimes falling within the mandate of the ICTY, arguing that compensation to victims will 'complement the Tribunal's criminal trials, by providing victims with the necessary resources to rebuild their lives'.<sup>61</sup>

## 4.2 International Criminal Tribunal for Rwanda

The ICTR was established through a UN Resolution<sup>62</sup> after the genocide that occurred in Rwanda in 1994 when more than 800 000 Tutsis and moderate Hutus were killed in a 100-day mass killing unprecedented in the history of that country.<sup>63</sup> Roméo Dallaire, the Force Commander of the UN Assistance Mission for Rwanda (UNAMIR) from 1993 to 1994, argues that the international community failed Rwanda in the sense that the genocide was planned and executed while the UN was present but unwilling or unable to intervene and end the killings.<sup>64</sup> The ICTR was mainly set up to punish those who bear the greatest responsibility for crimes committed in Rwanda. The ICTR made express provisions in its founding Statute for the protection of victims and witnesses.<sup>65</sup> The ICTR Rules of Evidence and Procedure further provided for the establishment of a Victims and Witness Support Unit.<sup>66</sup>

The extent to which these provisions were adhered to leaves much to be desired as the ICTR has been criticised for the way it handled the protection of victims and witnesses.<sup>67</sup> Walsh stated that investigations by the ICTR of rape and sexual violence were inconsistent and unpro-

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60 T van Boven 'The position of the victim in the Statute of the ICC' in H von Hebel *et al* (eds) *Reflections on the ICC, Essays in honour of Adriaan Bos* (1999) 77-89.

61 ICTY Statement by Judge Patrick Robinson, President of the International Criminal Tribunal for the former Yugoslavia, to the Security Council on 18 June 2010, [http://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/100618\\_pdt\\_robinson\\_un\\_sc\\_en.pdf](http://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/100618_pdt_robinson_un_sc_en.pdf) (accessed 26 September 2011).

62 UN Resolution 955 of 1994 adopted by the Security Council at its 3453rd meeting on 8 November 1994.

63 P Clark *The Gacaca courts, Post-genocide justice and reconciliation in Rwanda* (2010) 14.

64 R Dallaire *Shake hands with the devil: The failure of humanity in Rwanda* (2005) 221-262.

65 Art 21 ICTR Statute.

66 Rule 34 ICTR Rules of Evidence and Procedure.

67 International Federation of Human Rights 'Victims in the balance: Challenges ahead the International Criminal Tribunal for Rwanda' (2004) 6 (FIDH Report).

fessional.<sup>68</sup> Research reveals that women will generally only speak comfortably, if at all, of sexual violence to women investigators. The ICTR, however, sent men to interview them which compounded their psychological problems.<sup>69</sup>

For example, one woman who testified in the *Paul Akayesu* trial about the violence against her family and the killing of her husband, was never questioned about sexual violence in Kigali.<sup>70</sup> The issue was first raised by the male prosecutor after her arrival in Arusha. She told him nothing, despite the fact that both her and her daughter had been raped during the genocide. She did not feel comfortable talking about her rape experience because he was a man.<sup>71</sup> Oosterveld believes that the ICTR has made a positive contribution in the prosecution of international sex crimes. She, however, argues that the ICTR has had a negative influence in promoting victims' rights because of the way they were treated by the Court in some instances.<sup>72</sup>

The ICTR argued that protection of victims in Rwanda is the responsibility of national authorities, while the Rwandan authorities responded by saying that they are not kept informed of the movement of witnesses between Rwanda and Arusha, Tanzania, the seat of the ICTR.<sup>73</sup> These allegations and counter-allegations have resulted in suspicion and mistrust of the ICTR and increased the vulnerability of victims who agree to become witnesses.<sup>74</sup>

There were also the logistical problems caused by the inability of the Rwandese government to co-operate with the ICTR when the Tribunal stated that it was going to investigate the soldiers of the Rwandese Patriotic Front for their role in the conflict. Acting on a letter from the Secretary-General of the UN, the Security Council appointed Hassan Bubacar Jallow as the prosecutor of the ICTR,<sup>75</sup> while retaining Del Ponte as the prosecutor for the ICTY.<sup>76</sup>

There were also problems with court proceedings relating to victims who were witnesses. According to a report by the International Federation of Human Rights (FIDH), most witnesses during the trial were upset by the cross-examination by defence lawyers.<sup>77</sup> Referring to

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68 C Walsh 'Witness protection, gender and the ICTR: A report of investigations in Rwanda June and July 1997' [http://www.womensrightscoalition.org/site/advocacy-Dossiers/rwanda/witnessProtection/report\\_en.php](http://www.womensrightscoalition.org/site/advocacy-Dossiers/rwanda/witnessProtection/report_en.php) (accessed 29 September 2011).

69 As above.

70 Walsh (n 68 above).

71 As above.

72 V Oosterveld 'Gender-sensitive justice and the International Criminal Tribunal for Rwanda: Lessons learned for the International Criminal Court' (2005) 12 *New England Journal of International and Comparative Law* 119 125.

73 FIDH Report (n 67 above) 10.

74 FIDH Report (n 67 above) 6.

75 UN Security Council Resolution 1505 of 5 September 2003 (SC/7864).

76 Del Ponte had initially acted as the prosecutor for both ICTY and ICTR.

77 FIDH Report (n 67 above) 8.

the content of questions in cross-examination, witnesses mainly commented on the very intimate questions about rape scenes and their involvement. The subject of sex is taboo in Rwanda and generally in Africa, and the fact that they had to describe sexual acts, organs and so on was disturbing in itself.<sup>78</sup>

The ICTR has no compensation packages for victims. The only option available to victims and survivors is to sue the convicted persons in a civil claim in the Rwandese judicial system.<sup>79</sup> In general, victims of crimes being heard by the ICTR are not entitled to claim compensation, notwithstanding their sacrifices and courage to testify in Arusha.<sup>80</sup>

### 4.3 Special Court for Sierra Leone

The SCSL was established by an agreement between the Sierra Leonean government and the UN.<sup>81</sup> The SCSL is known as a hybrid court in the sense that it benefits both from local and international expertise in its organisation, structure and functioning and operates specifically in the country where the crimes were committed.<sup>82</sup> The SCSL does not provide for reparation or compensation for victims. However, the SCSL Rules of Procedure and Evidence<sup>83</sup> include provisions for the protection of victims and witnesses. It provides that '[i]n exceptional circumstances, either parties may apply to a judge of the Trial Chamber or the Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the judge or Chamber decides otherwise'.<sup>84</sup>

The SCSL Rules also provide that judges may on their own, or at the request of either party of the victim or witness concerned, or the Witnesses and Victims Section, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that these measures are within the rights of the accused person.<sup>85</sup> In protecting victims of sexual assault, the SCSL Rules also provide that the '[c]redibility, character or predisposition to sexual availability of a victim or

78 As above.

79 Rule 106 of the ICTR Rules of Evidence and Procedure; S Vandeginste 'The International Criminal Tribunal for Rwanda: Justice and reconciliation' Issue 11 May 1998 <http://www.odihpn.org/report.asp?id=1088> (accessed 29 September 2011).

80 FIDH Report (n 67 above) 10.

81 Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court For Sierra Leone <http://www.sc-sl.org/LinkClick.aspx?fileticket=CLK1rMQtCHg%3d&tabid=176> (accessed 29 September 2011).

82 K Ambos & M Othman (eds) *New approaches in international criminal justice: Kosovo, East Timor, Sierra Leone and Cambodia* (2003) 2; E Skinnider 'Experiences and lessons from "hybrid" tribunals: Sierra Leone, East Timor and Cambodia' <http://www.icclr.law.ubc.ca/Site%20Map/ICC/ExperiencesfromInternationalSpecialCourts.pdf> (accessed 29 September 2011).

83 Art 14 SCSL Statute.

84 Rule 69 SCSL Rules.

85 Rule 75 SCSL Rules.

witness cannot be inferred by reason of sexual nature or the prior or subsequent conduct of a victim or witness'.<sup>86</sup> This provision protects victims of sexual violence from the undue investigation into their past which is unrelated to ongoing criminal trials. A lack of adequate funding for the Court has hampered its activities, including adequate protection for victims and witnesses.<sup>87</sup>

#### 4.4 Extraordinary Chambers in the Courts of Cambodia

The Communist Party of Kampuchea, also known as Khmer Rouge, in April 1975 took over the capital of Cambodia, Phnom Penh, thereby laying the foundation of a vicious dictatorship aimed at establishing a socialist, viable and homogenous Cambodia.<sup>88</sup> The Khmer Rouge regime was overthrown in January 1979.<sup>89</sup> Three million people perished during the Khmer Rouge reign of terror which lasted for less than four years.<sup>90</sup> The end of the Khmer Rouge period was followed by a civil war that ended in 1998, when the Khmer Rouge political and military structures were dismantled.<sup>91</sup>

In 1997, the government requested the UN to assist in establishing a trial to prosecute the senior leaders of the Khmer Rouge. In 2001, the Cambodian National Assembly passed a law to create a court to try serious crimes committed during the Khmer Rouge regime. This court is the Extraordinary Chambers in the Courts of Cambodia (ECCC) for the prosecution of crimes committed during the period Cambodia was called Democratic Kampuchea.<sup>92</sup> The ECCC makes provision for the participation of victims in the criminal justice process as civil parties.<sup>93</sup> The ECCC Rules of Evidence and Procedure set out the criteria for participation of victims as civil parties.<sup>94</sup> This enables them to seek

86 Rule 96 SCSL Rules of Procedure and Evidence <http://www.sc-sl.org/LinkClick.aspx?fileticket=1YNrqhd4L5s%3D&tabid=70> (accessed 29 September 2011).

87 Human Rights Watch 'Bringing justice: The Special Court for Sierra Leone' 7 September 2004 <http://www.hrw.org/en/node/11983/section/10> (accessed 29 September 2011).

88 N Jain 'Between the Scylla and Charybdis of prosecution and reconciliation: The Khmer Rouge trials and the promise of international justice' (2010) 20 *Duke Journal of International and Comparative Law* 247 250; N Jain 'The Khmer Rouge tribunal paves the way for additional investigations' (2009) 13 *American Society for International Law Insight* 1-7.

89 Extraordinary Chambers in the Courts of Cambodia 'Introduction of the ECCC' <http://www.eccc.gov.kh/en> (accessed 29 September 2011).

90 Jain (n 88 above) 250.

91 Jain (n 88 above) 252.

92 ECCC (n 89 above).

93 Rules of Evidence and Procedure of the ECCC providing for General Principles of Victims Participation as Civil Parties <http://www.eccc.gov.kh/sites/default/files/legal-documents/ECCC%20Internal%20Rules%20%28Rev.8%29%20English.pdf> (accessed 29 September 2011).

94 Rule 23 ECCC Rules of Evidence and Procedure.

reparations and appeal the Chambers' decisions.<sup>95</sup> The law establishing the ECCC is an improvement on what obtains at other *ad hoc* and hybrid tribunals. There are currently conflicting signals from the ECCC on the interpretation of who is a victim. This has led to the exclusion of some victims who are related to those killed by the Khmer Rouge regime.<sup>96</sup> It is hoped that the provisions of the law will lead to the participation of and benefit to victims in Cambodia.

## 5 Regional protection of victims' rights and the Great Lakes Pact

The entry into force of the Great Lakes Pact (GLP) in June 2008 reflects a desire by member states of the International Conference on the Great Lakes Region (ICGLR) to ensure the protection of victims of international crimes. The Great Lakes Region (GLR) of Africa is made up of 11 states, including all members of the EAC.<sup>97</sup> The first Summit of Heads of State and Government of the GLR adopted the Dar es Salaam Declaration of Peace, Security, Democracy and Development in the GLR in November 2004. The GLP was adopted by the second Summit of the Heads of States and Government in December 2006 to give effect to the Dar es Salaam Declaration.

The GLP is made up of ten protocols<sup>98</sup> and four programmes of action, including the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children and the Protocol for the

95 C Trumbull 'The victims of victims participation in international criminal proceedings' (2008) 29 *Michigan Journal of International Law* 777-779.

96 Open Society Justice Initiative 'Cambodia's Khmer Rouge court excludes victims' voices' 20 September 2011 [http://www.soros.org/initiatives/justice/news/cambodia-victims-20110916?utm\\_source=Open+Society+Institute&utm\\_campaign=3697e7aff3-justice-20110929&utm\\_medium=email](http://www.soros.org/initiatives/justice/news/cambodia-victims-20110916?utm_source=Open+Society+Institute&utm_campaign=3697e7aff3-justice-20110929&utm_medium=email) (accessed 29 September 2011).

97 Member states of the ICGLR are Angola, Burundi, Central African Republic, Congo Brazzaville, Democratic Republic of the Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia.

98 The ten protocols include (1) the Protocol on Non-aggression and Mutual Defence in the Great Lakes Region 2006; (2) the Protocol on Democracy and Good Governance 2006; (3) the Protocol on Judicial Co-operation 2006; (4) the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination 2006; (5) the Protocol Against the Illegal Exploitation of Natural Resources 2006; (6) the Protocol on the Specific Reconstruction and Development Zone 2006; (7) the Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children 2006; (8) the Protocol on the Protection and Assistance to Internally Displaced Persons; (9) the Protocol on Property Rights of Returning Persons 2006; and (10) the Protocol on the Management of Information and Communication 2006. London School of Economics International Humanitarian Law Project: International Conference on the Great Lakes Region <http://www.lse.ac.uk/collections/law/projects/greatlakes/ihl-greatlakes-summary-new-docmt.htm> (accessed 25 September 2011).

Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity. According to Beyani:<sup>99</sup>

The [Great Lakes] Pact was ... conceived and designed to provide the legal framework for implementing the Dar es Salaam Declaration. It transforms the commitments assumed under this Declaration and places them on a binding legal footing comprising of ten Protocols and four Programmes of Action identified by the Conference to be areas of priority.

The Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination complements several treaties and conventions aimed at preventing impunity.<sup>100</sup> It further provides that member states 'undertake to take the necessary measures to ensure the provisions of this Protocol are domesticated and enforced and in particular to provide effective penalties for persons guilty of genocide, war crimes and crimes against humanity'.<sup>101</sup>

Although the Protocol calls on member states to co-operate with the ICC,<sup>102</sup> it does not make any specific pronouncement on victims and their participation in the proceedings before national courts of member states. It is unfortunate that the Protocol failed to take into consideration the role of victims in the prosecution of those accused of international crimes as obtainable before the ICC. It is also surprising that the provisions of the Protocol do not seem to have been taken into account by either Kenya or Uganda in the process of implementing the Rome Statute.

The Protocol for the Prevention and Suppression of Sexual Violence against Women and Children (Sexual Violence Protocol)<sup>103</sup> is another important tool in the protection of the rights of victims. The Protocol provides for the establishment of a regional mechanism for providing legal, medical, material and social assistance that includes counselling and compensation to victims of sexual violence in the context of

99 C Beyani 'Introductory note on the Pact on Security, Stability and Development in the Great Lakes Region' (2007) 46 *International Legal Materials* 173.

100 Eg the Convention against Racial Discrimination: the Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly on 21 December 1965; the Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the UN General Assembly on 18 December 1979; the Geneva Conventions: the four conventions on humanitarian law adopted on 12 August 1949 by the diplomatic conference for drawing up international conventions and their additional protocols adopted on 8 June 1977; the Genocide Convention: the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948.

101 Art 9 Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination adopted 29 November 2006.

102 Art 21 Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination.

103 Protocol for the Prevention and Suppression of Sexual Violence against Women and Children adopted 30 November 2006.

international crimes.<sup>104</sup> A model legislation is annexed to the Protocol which member states are encouraged to adopt. It is hoped that the model legislation will assist member states to adopt national legislations that will meet the aspirations of the protocol and provide effective remedies to victims of sexual violence and international crimes.

## 6 Traditional justice systems and victims' protection in Africa

### 6.1 *Gacaca* justice system in Rwanda

The *Gacaca* justice system is an indigenous justice process adopted by Rwanda after the genocide.<sup>105</sup> Most of the public officials and other actors in the Rwandese legal system were either killed or had left the country, leading to a near total collapse of the criminal justice system. The mass atrocities that took place in Rwanda were so severe that the number of those involved in the crimes overwhelmed the criminal justice system.<sup>106</sup> Rwanda made a decision to explore the *Gacaca* justice system to resolve this difficult and complex problem.<sup>107</sup>

In terms of the *Gacaca* system, victims form part of the proceedings and have the right to question accused persons and seek for further information on what happened to their loved ones. However, there is no compensation for victims or survivors in general.<sup>108</sup> Accused persons are asked to confess their crimes by giving a detailed evidence of their participation and showing remorse for their actions. Confessions and signs of remorse are mitigating factors in the *Gacaca* system as they enable the victims to forgive the perpetrators for the atrocities committed against them. They are also seen as parts of a healing process in the sense that accused persons own up to the crimes and seek forgiveness in order to promote reconciliation.

*Gacaca* was also ingenious in ordering reparations from perpetrators in the form of the return of stolen and destroyed property to victims. Such reparations ranged from some form of monetary compensation

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104 Art 6 Sexual Violence Protocol (n 103 above).

105 Legal Notice 8 of 2001; see also I Gaparayi 'Justice and social reconstruction in the aftermath of the genocide in Rwanda: An evaluation of the possible role of *Gacaca* tribunals' (2001) 1 *African Human Rights Law Journal* 78 79.

106 A Algard 'Does the *Gacaca* system in Rwanda provide an effective remedy in compliance with international norms and standards?' (2005) LLM dissertation, University of Lund, <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1555566&fileId=1563699> (accessed 28 September 2011).

107 M Sosnov 'The adjudication of genocide: *Gacaca* and the road to reconciliation' (2008) 36 *Denver Journal of International Law and Policy* 125 243; C Morrill 'Reconciliation and the *Gacaca*: The perceptions and peace-building potential of Rwandan youth detainees' (2004) 6 *The Online Journal of Peace and Conflict Resolution* 1-66.

108 C Kirkby 'Rwanda's *Gacaca* courts: A preliminary critique' (2006) 50 *Journal of African Law* 94 107.



to rebuilding and repairing of houses as well as community service. The ability of victims and perpetrators to directly engage with and have a conversation on what would remedy or help heal the past was unique and commendable. However, *Gacaca* has been decried by critics for an absence and/or limitation of the rights of accused persons in the processes at the expense of seeking to extract a confession.<sup>109</sup>

## 6.2 *Mato Oput* in Uganda

*Mato Oput* is a traditional cleansing ritual performed by the Acholi ethnic group in Northern Uganda for the purposes of bringing reconciliation and justice after a conflict. It involves the perpetrator acknowledging responsibility, repenting, asking for forgiveness and paying compensation to the victim.<sup>110</sup> It is aimed at achieving a non-violent reconciliation. It is a cleansing ceremony intended to restore social harmony by ending bitter relationships between warring parties.<sup>111</sup> Perpetrators are forgiven their wrongdoings if they accept responsibility for their transgressions, ask for forgiveness and offer compensation to victims.

During the most important part of the ritual, two clans bring together the perpetrators and the victim's family and the two parties share an acrid root drink concocted from the root of a vegetable and served in a calabash.<sup>112</sup> The drink symbolises the two sides putting aside their bitterness and differences by sharing a drink together.<sup>113</sup> Through the process, victims are reconciled with the perpetrators who pay compensation for the crime committed against the victim.

A study carried out by a civil society organisation in Uganda reported that traditional methods of justice varied amongst different ethnic nationalities.<sup>114</sup> However, one cannot rule out the possibility of using traditional means of dispute resolution to deal with some of the crimes that do not

109 Amnesty International Report, Rwanda, unfair trials: Justice denied AFR 47/08/97 (8 April 1997). D Haile 'Rwanda's experiment in people's courts (*Gacaca*) and the tragedy of unexamined humanitarianism: A normative/ethical perspective' (2008) *Institute for Development, Policy and Management Discussion Paper* 29.

110 See P Bako 'Does traditional conflict resolution lead to justice? – The *Mato Oput* in Northern Uganda' (2009) 3 *Pretoria Student Law Review* 103; C Mbazira 'Prosecuting international crimes committed by the Lord Resistance Army' in Murungu & Biegon (n 37 above) 211.

111 K Clarke *Fictions of justice: The International Criminal Court and the challenge of legal pluralism in sub-Saharan Africa* (2009) 127.

112 C Rose 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth-telling and reparations' (2008) 28 *Boston College Third World Law Journal* 345 354.

113 B Afoko 'Reconciliation and justice: "Mato oput" and the Amnesty Act' (2002) <http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php> (accessed 29 September 2011).

114 Uganda Coalition for the ICC 'Approaching national reconciliation in Uganda: Perspectives on applicable justice systems' (2006) *Uganda Coalition for the International Criminal Court Working Paper* 76 [http://www.iccnw.org/documents/Approaching-NationalReconciliationInUganda\\_07aug13.pdf](http://www.iccnw.org/documents/Approaching-NationalReconciliationInUganda_07aug13.pdf) (accessed 26 September 2011).

fall within the mandate of the ICC. This could apply to children who were kidnapped from villages and forcefully recruited into the LRA.

## 7 Truth and reconciliation commissions and victims' rights

Some countries have adopted a policy of truth telling and, where appropriate, reconciliation commissions to confront the legacies of the past.<sup>115</sup> In Africa, truth commissions in various forms have been established in Nigeria, Morocco, Ghana, South Africa, Liberia, Sierra Leone, Kenya and Togo, and there are discussions underway for their establishment in Burundi, Madagascar, Sudan<sup>116</sup> and Uganda.<sup>117</sup> It can be argued that truth and reconciliation commissions may play a role in helping rebuild a society by facilitating some form of accountability, acknowledgment of crimes and roles, truth telling and reparations. It offers society the opportunity to confront its past while creating opportunities for forgiveness and reconciliation. This must, however, be done with serious caution to avoid impunity for perpetrators of human rights abuses against the defenceless and vulnerable citizens of society.

Truth commissions have generally allowed the participation of victims both as witnesses and as part of the truth-telling process. Truth commissions are generally less adversarial than courts of law and flexible in their procedures while seeking to establish the truth, which makes them a suitable vehicle for protecting the rights of victims. A quick survey of the practice of the South African and Sierra Leonean Truth Commissions in that regard is therefore useful at this juncture.

### 7.1 South African Truth and Reconciliation Commission

The South African Truth and Reconciliation Commission (TRC) was established by the Promotion of National Unity and Reconciliation Act of 1995.<sup>118</sup> While much has been written and commented upon about the successes and failures of the South African TRC,<sup>119</sup> the focus of this section

115 UN General Assembly Human Rights Council (n 21 above).

116 Para 320 of the Report of African Union High-Level Panel on Darfur [http://www.darfurcentre.ch/images/00\\_DRDC\\_documents/Landmarks/Report\\_of\\_the\\_AU\\_High\\_Level\\_Panel\\_on\\_Darfur\\_English\\_Nov\\_07.pdf](http://www.darfurcentre.ch/images/00_DRDC_documents/Landmarks/Report_of_the_AU_High_Level_Panel_on_Darfur_English_Nov_07.pdf) (accessed 27 September 2011).

117 The Uganda National Reconciliation Bill which proposes a National Reconciliation Commission with a truth-telling component is a civil society initiative.

118 The Promotion of National Unity and Reconciliation Act 35 of 1995 (TRC Act).

119 See eg R Shaw 'Rethinking truth and reconciliation commissions: Lessons from Sierra Leone' *United States Institute of Peace*, 2005; J Gibson 'The contributions of truth to reconciliation: Lessons from South Africa' (2004) 50 *Journal of Conflict Resolution* 409–432; P Hayner 'Same species, different animal: How South Africa compares to truth commissions worldwide' in C Villa-Vicencio & W Verwoerd *Looking back, reaching forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000) 34–65; G Simpson 'A brief evaluation of South Africa's Truth

is limited to a brief survey of its protection of victims' rights, especially their participation and its pronouncement on reparations.<sup>120</sup>

The principal object of the South African TRC was to 'promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past'.<sup>121</sup> To achieve its objectives, the TRC established committees on human rights violations,<sup>122</sup> amnesty<sup>123</sup> and reparations and rehabilitation.<sup>124</sup> The South African TRC was quite ingenious and fortunately well-resourced, which gave it some leverage and an ability to establish additional specialised units such as the investigations unit, which worked closely with victims to, among others, establish identity, receive evidence and determine violations.<sup>125</sup>

Relevant to victims' rights issues is the fact that the South African TRC had the power to grant amnesty, to seek and establish the truth of past atrocities during apartheid, and to recommend reparations.<sup>126</sup> Those who committed crimes during apartheid had to appear before the TRC's hearing for a full disclosure of the crimes and thereafter apply for amnesty. However, although the TRC recommended reparations to victims, it has been decried for the fact they were not adequate and, importantly, given the fact they were individual in nature, they did not redress the legacy of apartheid and its effects on South African society.<sup>127</sup> The funds available to the TRC may have determined its ability to award reparations to victims.

The South African TRC could grant urgent interim reparations to restore and rehabilitate the human and civil dignity of victims.<sup>128</sup> The TRC further established a President Fund<sup>129</sup> from which reparations to victims could be disbursed, but which to this day has yet to disburse such funds. The final reparations recommended by the South African TRC included interim reparation in monetary terms, individual reparation grants (financial and symbolic), community rehabilitation and institutional reform.<sup>130</sup>

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and Reconciliation Commission: Some lessons for societies' Centre for the Study of Violence and Reconciliation 1998.

120 See the Truth and Reconciliation Commission of South Africa Report, 21 March 2003 <http://www.info.gov.za/otherdocs/2003/trc/> (accessed 27 September 2011).

121 Sec 2 TRC Act.

122 Sec 3(3)(a) TRC Act.

123 Sec 3(3)(b) TRC Act.

124 Sec 3(3)(c) TRC Act.

125 Sec 4(b) TRC Act.

126 Sec 3 TRC Act.

127 The government gave a final lump sum to various individuals of R6 000, a figure far less than the R23 000 that had been recommended by the TRC. M Mandani 'Amnesty or impunity? A preliminary critique of the report of the Truth and Reconciliation Commission of South Africa (TRC)' (2002) 32 *Diacritics* 33-59.

128 Sec 4(f) TRC Act.

129 Sec 42 TRC Act.

130 Final TRC Report, Volume Five, Chapter Five, paras 25-32.

## 7.2 Sierra Leone Truth and Reconciliation Commission

The end of the civil war in Sierra Leone was sealed by the Lomé Peace Agreement of 7 July 1999. One of the key agreements in the peace deal was the establishment of a truth and reconciliation commission. Among the principle aims and objectives of the Sierra Leone Truth and Reconciliation Commission was to address the needs of victims, which would include their rehabilitation.<sup>131</sup>

Against all odds, the Sierra Leone TRC sought to facilitate dialogue between perpetrators and victims.<sup>132</sup> One of the highlights of the Sierra Leone TRC was its unequivocal reaffirmation of the close nexus between truth telling and reparations in order to achieve societal and national reconciliation.<sup>133</sup> According to the Commission, both must go hand in hand and neither element can be excluded, since truth telling without reparations is devoid of its healing purpose and reparations without truth telling is akin to being offered blood money.<sup>134</sup>

The Sierra Leone TRC was therefore deliberate in making substantive findings on the truth and, importantly, it made recommendations for a reparations programme.<sup>135</sup> The reparations programme was to address the following key areas of support to victims: mental and physical health care; education; skills training; micro credit; and community and symbolic reparations.<sup>136</sup> The beneficiaries of the reparations programme would include the following categories of victims:<sup>137</sup>

- victims of sexual abuse;
- children who had suffered psychological harm, had been forcibly conscripted or lost a parent;
- war-wounded;
- amputees; and
- war widows.

The TRC further recommended the establishment of the National Commission on Social Action to co-ordinate and facilitate the implementation of the reparations programme.<sup>138</sup> However, the implementation of the proposed reparations in Sierra Leone is yet to start.

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131 Art 6(1) of the Sierra Leone Truth and Reconciliation Commission Act, 2000; see also art XXVI of the Lomé Peace Agreement of 1999.

132 Sierra Leone Truth Commission Final Report Vol 1, Chapter 3, paras 28-29.

133 Sierra Leone Truth Commission Final Report (n 132 above) para 33.

134 As above.

135 Sierra Leone Truth Commission Final Report (n 132 above) Vol II Chapter 4 Reparations.

136 Sierra Leone Truth Commission Final Report (n 132 above) Vol II, Chapter 1, para 85.

137 Sierra Leone Truth Commission Final Report (n 132 above) para 84.

138 Sierra Leone Truth Commission Final Report (n 132 above) para 87.

## 8 Comparable domestic legal frameworks and practices on victims' rights

For purposes of this article, it is useful to discuss, albeit briefly, some of the domestic legal frameworks and practices that include the protection to victims of crimes. Generally, within common law jurisdictions victims' rights are virtually non-existent. Victims are used to advance the prosecutor's case. Civil law traditions, led by France, are more advanced when compared to the common law systems.<sup>139</sup> For instance, obtaining in civil law systems, victims generally have a right to participate and to be heard as parties in the criminal justice system and, importantly, to have the right to claim civil damages in tandem with a criminal prosecution, and the right to be informed of the processes.<sup>140</sup>

Although the United States of America follows a common law tradition, it has nevertheless made some commendable advances with regard to victim protection and restitution. At a legislative level, these advances are reflected in the Federal Victims and Witness Protection Act of 1982,<sup>141</sup> the Victims of Crime Act of 1984,<sup>142</sup> the Victims' Rights and Restitution Act of 1990,<sup>143</sup> and the Victim Rights Clarification Act of 1997.<sup>144</sup> The objective of the legislation is to 'ensure that innocent victims of all crime have their rights upheld, have their dignity and privacy respected, and are treated with fairness'.<sup>145</sup> To ensure consistency and to provide clear direction of these laws, the US Attorney-General promulgated Guidelines for Victim and Witness Assistance on 9 July 1983.<sup>146</sup> The Guidelines stipulate the procedures and processes that government officials should follow in responding to the needs of victims and witnesses.

Relevant to the issue of reparations, the US Victims of Crime Act of 1984 establishes a Crime Victims Fund which is employed to pay restitution to victims of federal crimes in the US. The fund is maintained by fines from convicts, penalty assessments, proceeds of forfeited appearance bonds, bail bonds, and collateral collected, as well as gifts, bequests and donations from private entities.

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139 P Campbell 'A comparative study of victim compensation in France and the United States: A modest proposal' (1980) 3 *Hastings International and Comparative Law Review* 321 323.

140 As above.

141 Federal Victims and Witness Protection Act of 1982 (18 USC).

142 Victims of Crime Act of 1984.

143 Victims Rights and Restitution Act of 1990.

144 Victim Rights Clarification Act of 1997.

145 Law Enforcement Co-ordinating Committee/Victim-Witness [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title3/7musa.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title3/7musa.htm) (accessed 29 September 2011).

146 Attorney-General Guidelines for Victim and Witness Assistance 2000 (42 USC sec 10603(c) (3)(A)). See USC S10601 Crimes Victims Fund [http://www.law.cornell.edu/uscode/42/usc\\_sec\\_42\\_00010601----000-.html](http://www.law.cornell.edu/uscode/42/usc_sec_42_00010601----000-.html) (accessed 29 September 2011).

## 9 International Criminal Court and the new model of victims' rights

The Rome Statute of the ICC provides for victims' rights and a robust protection regime for victims and witnesses.<sup>147</sup> The Statute requires the Court to 'take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'.<sup>148</sup> The ICC gives attention to specific vulnerable victims such as the aged, child victims and victims of sexual and gender violence.<sup>149</sup> The Rome Statute establishes a Victims and Witnesses Unit (VWU) located in the Registry to provide 'protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the ICC and others who are at risk on account of testimony given by such witnesses'.<sup>150</sup> The Statute further provides that VWU 'shall include staff with expertise in trauma, including trauma related to crimes of sexual violence'.<sup>151</sup>

The Court is a permanent institution established to hold accountable those who bear the greatest responsibility for genocide,<sup>152</sup> crimes against humanity,<sup>153</sup> war crimes<sup>154</sup> and the crime of aggression.<sup>155</sup> The Rome Statute operates on a principle of complementarity which provides that it is the primary responsibility of states to hold their citi-

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147 The Statute makes provision for the establishment of a Victims and Witnesses Unit by the Registrar (art 43 (6)), the protection of victims and witnesses and their participation in the proceedings (art 68) and the establishment of a Victims Trust Fund by the Assembly of State Parties (art 79).

148 See art 68(1) of the Rome Statute.

149 As above.

150 Art 43(6) Rome Statute.

151 Art 46(6) Rome Statute.

152 Art 6 of the Rome Statute provides that 'genocide' involves specific acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. W Schabas *Genocide in international law* (2000) 102–257.

153 Art 7 of the Rome Statute provides that 'crimes against humanity' involves acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. P Wald 'Genocide and crimes against humanity' (2007) 6 *Washington University Global Studies Law Review* 621.

154 Art 8 of the Rome Statute provides that the Court shall have jurisdiction in respect of war crimes, in particular when committed as part of a plan or policy or as part of the large-scale commission of such crimes. K Dormann 'War crimes under the Rome Statute of the International Criminal Court with special focus on the negotiations on the elements of crimes' in A von Bogdandy & R Wolfrum (eds) *Max Planck yearbook of United Nations law* 341.

155 Assembly of State Parties of the International Criminal Court Resolution RC/Res 6 adopted at the 13th plenary meeting on 11 June 2010 in Kampala, Uganda, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf) (accessed 29 September 2011).

zens accountable for international crimes.<sup>156</sup> It is only when states are 'unwilling and genuinely unable'<sup>157</sup> or there are no legitimate proceedings<sup>158</sup> that the ICC steps in to prosecute those responsible for these crimes to ensure that there is no impunity for mass atrocities.<sup>159</sup> As recognised by the ICC's strategy in relation to victims:<sup>160</sup>

[A] key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but [also] a restorative function. It reflects growing international consensus that participation and reparations play an important role in achieving justice for victims.

The ICC will enable victims to do more than only participate in the proceedings. They will have a right to present their views and observations before the Court.<sup>161</sup> Participation before the Court may occur at various stages of proceedings and may take different forms. For example, proceedings may be held *in camera* or the presentation of evidence may be by electronic or other means in cases of sexual violence or a child victim or witness.<sup>162</sup> However, it will be up to the judges to give directions as to the timing and manner of participation.<sup>163</sup>

Victim-based provisions within the Rome Statute<sup>164</sup> provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering.<sup>165</sup> The award of reparations to or in respect of victims, including restitution, compensation and rehabilitation, is seen as a balancing process involving retributive and restorative justice that will enable the ICC not only to

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156 Art 1 Rome Statute; M Newton 'Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the International Criminal Law' (2001) 167 *Military Law Review* 20 26.

157 Art 17 Rome Statute; D Robinson 'The mysterious mysteriousness of complementarity' (2010) 21 *Criminal Law Forum* 67 70.

158 Office of the Prosecutor 'Paper on some policy issues before the Office of the Prosecutor' September 2003 5 [http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf) (accessed 20 April 2010).

159 M du Plessis 'Complementarity: A working relationship between African states and the International Criminal Court' in M du Plessis (ed) *African guide to international criminal justice* (2008) 129.

160 ICC Report of the Court on the strategy in relation to victims, ICC-ASP/8/45, 10 November 2009, Introduction, para 3; [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/ICC-ASP-8-45-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf). (accessed 5 April 2010).

161 S Zappala 'The rights of victims v the rights of the accused' (2010) 8 *Journal of International Criminal Justice* 137 138.

162 Art 68(2) Rome Statute.

163 E Baumgarte 'Aspects of victim participation in the proceedings of the International Criminal Court' (2008) 90 *International Review of the Red Cross* 409 415.

164 Arts 68 & 79 Rome Statute.

165 Art 75 Rome Statute.

bring criminals to justice, but also to help the victims themselves obtain justice.<sup>166</sup>

In furtherance of providing adequate representation for the victims participating at the trials, the ICC established the Office of Public Counsel for Victims (OPCV) in accordance with the Regulations of the Court.<sup>167</sup> The establishment of the OPCV, the ICC argues, is a new step in the international criminal justice system which seeks to ensure effective participation of victims in the proceedings before the Court.<sup>168</sup> Furthermore, the Court also believes that it is an important precedent which should enhance the system of representation for victims who, pursuant to Rule 90(1) of the Rules of Procedure and Evidence of the Court, are free to choose their legal representatives.

Another important development regarding the ICC is reparation for victims of mass atrocities. Pursuant to article 75 of the Rome Statute, the Court may lay down the principles for reparation for victims, which may include restitution, indemnification and rehabilitation. The Court must also enter an order against a convicted person stating the appropriate reparation for the victims or their beneficiaries. This reparation may also take the form of restitution, indemnification or rehabilitation. The Court may order this reparation to be paid through the Victims Trust Fund (VTF), which was set up by the Assembly of States Parties in September 2002.<sup>169</sup>

The Court has the option of granting individual or collective reparation, concerning a whole group of victims or a community, or both. If the Court decides to order collective reparations, it may order that reparation be made through the VTF and the reparation may then also be paid to an inter-governmental, international or national organisation.<sup>170</sup>

The Rome Statute also established the VTF in accordance with article 79 of the Rome Statute.<sup>171</sup> With the unique roles of implementing both Court-ordered and general assistance to victims of crimes under the ICC's jurisdiction, the VTF offers key advantages for promoting lasting peace, reconciliation and wellbeing in war-torn societies. That

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166 ICC 'Victims and witnesses' <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims> (accessed 29 September 2011); ICC 'Legal representatives of victims' <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Legal+Representation/> (accessed 29 September 2011).

167 Regulation 81 of ICC adopted by the judges of the Court on 26 May 2004 at the 5th Plenary Session, The Hague, 17-28 May 2004, [http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations\\_of\\_the\\_Court\\_170604EN.pdf](http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf) (accessed 29 September 2011).

168 ICC 'Office of Public Counsel for Victims' <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Office+of+Public+Counsel+for+Victims/> (accessed 29 September 2011).

169 ICC 'Reparation for victims' <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Reparation/> (accessed 29 September 2011).

170 As above.

171 Art 79 Rome Statute.



is possible through implementing Court-ordered reparation awards against a convicted person when directed by the Court to do so and general assistance using voluntary contributions from donors to provide victims and their families in situations where the Court is active, along with physical rehabilitation, material support and psychological rehabilitation, as the case may.<sup>172</sup>

The VTF considers its assistance to victims of sexual and/or gender-based violence (SGBV) a key step towards ending impunity for perpetrators, and establishing durable peace and reconciliation in conflict settings. The VTF is currently mainstreaming a gender-based perspective across all programming and specifically targeting the crimes of rape, enslavement, forced pregnancy, and other forms of sexual and gender-based violence.<sup>173</sup> The VTF benefits from the leadership and guidance of a five-member board of directors elected by the ASP for three-year terms. The five seats are distributed according to the five major world regions. Each member serves in an individual capacity on a *pro bono* basis.<sup>174</sup>

## 10 Challenges of victims' rights protection in East Africa

### 10.1 Legal challenges

One of the problems militating against victims' protection in the EAC is the lack of effective implementation of laws adopted to protect and promote the rights of victims.<sup>175</sup> There have also been some flaws in the implementation procedures of victim-based legislation in some states as political office holders are allowed to hold sensitive positions and may be influenced by the government in power.<sup>176</sup> Even when these laws are passed, there is also a lack of implementation as there is no sensitisation of the public regarding the provisions of the law and how

172 ICC 'Reparations and general assistance' <http://www.trustfundforvictims.org/two-roles-tfv> (accessed 29 September 2011).

173 As above.

174 The TFV's current board is composed of the following five members: Bulгаа Altangerel (Mongolia, representing the Asian states); Betty Kaari Murungi (Kenya, representing African states); Eduardo Pizarro Leongómez (Colombia, representing the Americas and Caribbean state); Elisabeth Rehn (Finland, representing Western European and other states); and Her Excellency Vaira V e-Freiberga (Latvia, representing Eastern European states).

175 None of the EAC countries has specific laws on victim protection including on reparations. In addition, apart from Kenya, none of the other East African countries has specific laws on witness protection which is critical for victims and witnesses participating in international criminal proceedings..

176 International Commission of Jurists 'Could Kenya's witness protection programme work' (2010) 1 *Jurist E-Bulletin* 3 <http://www.icj-kenya.org/dmdocuments/newsletters/JuristIssue1.pdf> (accessed 29 September 2011).

it should be implemented.<sup>177</sup> These have impacted negatively on victims' rights on the continent.

## 10.2 Cultural and religious challenges

Certain cultural and religious challenges also affect the protection of victims' rights on the continent. EAC member states, like other African countries, hold to traditional cultural and religious values.<sup>178</sup> Sexually-related offences have also been seen to be on the increase in situations where it is alleged that sleeping with young virgins could cure HIV/AIDS or enhance business prospects.<sup>179</sup> Women who are victims of domestic or sexual violence find it difficult to relate their experiences for fear of being rejected, especially where it results in HIV infection and its attendant social and public stigma.<sup>180</sup> Some cultures also do not allow women to say things without the consent of their husbands and this means that where a woman is willing to testify about what has happened, she may be confronted with the anger of her husband or kinsmen who object to such an open confession.<sup>181</sup>

## 10.3 Economic and social challenges

Poverty, ignorance and illiteracy, all virtually endemic in Africa, are some of the challenges seriously affecting the rights of victims.<sup>182</sup> Economic dislocation and attendant corruption, rife on the continent, mean that those at the lowest rung of the economic ladder continue to live in abject poverty and squalor. Most victims are ignorant of their rights and those who know have little or no means to pursue them. Additionally, bureaucracy and incessant delays have led to the loss of

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177 There is currently a dossier submitted to the South African government by NGOs in relation to Zimbabwean officials accused of acts of torture in Zimbabwe but who regularly visit South Africa. The South African National Prosecutor has refused to prosecute the Zimbabwean officials on the South Africa International Criminal Court Implementation Act 2002.

178 L Igwe 'Freedom of conscience and religious persecution in Africa' statement presented at the 47th session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia on 13 May 2010, <http://www.iheu.org/freedom-conscience-and-religious-persecution-africa> (accessed 1 October 2011).

179 S Maoulidi 'Zanzibar GBV advocacy: Important lessons for future legal reform strategies' in D Moshenberg (ed) 'Sexual and gender-based violence in Africa' Bulletin 83 2009, <http://concernedafricascholars.org/docs/Bulletin83.pdf> (accessed 1 October 2011).

180 Amnesty International "'I can't afford justice": Violence against women in Uganda continues unchecked and unpunished', April 2010 <http://www.amnesty.org/en/library/asset/AFR59/001/2010/en/f3688aa0-b771-464b-aa88-850bcbf5a152/afr590012010en.pdf> (accessed 1 October 2011).

181 As above.

182 M Kimani 'Taking on violence against women in Africa: International norms, local activism start to alter laws, attitudes' (2007) 21 *Africa Renewal* 4 <http://www.un.org/ecosocdev/geninfo/afrec/vol21no2/212-violence-against-women.html> (accessed 1 October 2011).

faith in the administration of justice because of corruption and public perceptions of miscarriages of justice.

## 11 Possible model for effective victims' rights protection in East Africa

### 11.1 Domestic implementation of the Rome Statute

All EAC members are parties to the Rome Statute except Rwanda. As of September 2011, there are 118 state parties to the Rome Statute of which 32 are from Africa.<sup>183</sup> South Africa,<sup>184</sup> Senegal,<sup>185</sup> Uganda,<sup>186</sup> Kenya<sup>187</sup> and Burkina Faso<sup>188</sup> are African states that have implemented the Rome Statute in their domestic legislation. Other African countries are still grappling with the process of domesticating the Rome Statute. While Kenya adopted the International Crimes Act in 2009, Uganda adopted the International Criminal Court Act in 2010 shortly before the commencement of the Review Conference that took place in Kampala.

Regarding victims' rights, the Uganda ICC Act does not provide for victims' participation in proceedings. Rather, provisions relating to victims deal with enforcement of orders for victim reparation made by the ICC.<sup>189</sup> Similarly, in Kenya the provision relating to 'protecting victims

183 The African countries include Benin, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Comoros Island, Congo Brazzaville, DRC, Djibouti, Gabon, The Gambia, Ghana, Guinea, Kenya, Lesotho, Madagascar, Mali, Malawi, Mauritius, Namibia, Niger, Nigeria, Senegal, Seychelles, Sierra Leone, South Africa, Tanzania, Tunisia, Uganda and Zambia. See ICC 'African states' <http://www.icc-cpi.int/Menus/ASP/States+Parties/African%20States> (accessed 24 September 2011).

184 See Implementation of the South African Rome Statute of the International Criminal Court Act 27 of 18 July 2002, <http://www.info.gov.za/gazette/acts/2002/a27-02.pdf> (accessed 24 September 2011). C Powell & F Jessberger 'Prosecuting Pinochets in South Africa' (2001) 14 *South African Journal of Criminal Justice* 344.

185 See Loi n 8 2007-02 du 12 fevrier 2007 modifiant le Code penal, in *Journal Officiel de la Republique du Senegal*, [http://www.iccnw.org/documents/Loi\\_2007\\_02\\_du\\_12\\_Fev\\_2007\\_modifiant\\_le\\_Code\\_penal\\_senegal\\_fr.pdf](http://www.iccnw.org/documents/Loi_2007_02_du_12_Fev_2007_modifiant_le_Code_penal_senegal_fr.pdf) (accessed 24 September 2011). See M Niang 'The Senegalese legal framework for the prosecution of international crimes' (2009) 7 *Journal of International Criminal Justice* 1047.

186 The International Criminal Court Act 2010, the *Uganda Gazette* 39 Vol CIII dated 25 June 2010, assented on 25 May 2010, [http://www.beyondjuba.org/policy\\_documents/ICC\\_Act.pdf](http://www.beyondjuba.org/policy_documents/ICC_Act.pdf) (accessed 24 September 2011).

187 The International Crimes Act, 2008 [http://www.coalitionfortheicc.org/documents/The\\_International\\_Crimes\\_Act\\_2008.pdf](http://www.coalitionfortheicc.org/documents/The_International_Crimes_Act_2008.pdf) (accessed 24 September 2011). See also A Okuta 'National legislation for prosecution of international crimes in Kenya' (2009) 7 *Journal of International Criminal Justice* 1063.

188 Decret 2009-894-PRES promulguant la loi No 052-2009-AN du 03 December 2009, [http://www.iccnw.org/documents/Decret\\_n2009-894-PRES\\_promulguant\\_la\\_loi\\_n052-2009-AN.pdf](http://www.iccnw.org/documents/Decret_n2009-894-PRES_promulguant_la_loi_n052-2009-AN.pdf) (accessed 24 September 2011).

189 Art 64 Uganda ICC Act.

and witnesses and preserving evidence' relates to requests from the ICC.<sup>190</sup>

Kenya has also adopted amended legislation to protect witnesses.<sup>191</sup> The amended Act provides for the establishment of a Witness Protection Agency that is independent and not under the control of the Attorney-General.<sup>192</sup> Despite the adoption of the law and its promises, it appears that there is little or no political will to implement the provisions of the Act.<sup>193</sup> The participation of victims as witnesses and parties to the proceedings is not provided as obtainable before ICC trials.

This situation should be understood in the context of the common law systems found in Uganda and Kenya. These systems of law are generally characterised as adversarial and leave little or no room for victims' participation in criminal proceedings except as witnesses.<sup>194</sup> The ratification and domestic implementation of the Rome Statute offer states the opportunity to develop criminal justice systems that recognise the role of victims and the need for their voices to be heard.<sup>195</sup> Despite Africa's support for international justice and the establishment of the ICC, there is a lull in the accession and domestic implementation of the Rome Statute in Africa, probably because of the stance of the AU on the investigations of the ICC on the continent.<sup>196</sup>

It is encouraging that several member states of the EAC have ratified the Rome statute of the ICC.<sup>197</sup> However, they need to go beyond ratification. It is also important to observe that the Rome Statute has been domesticated in Kenya and Uganda. However, beyond the adoption of national laws, there is a need for enforcement mechanisms for the provisions of the law.

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190 Art 105 Kenya ICC Act.

191 See The Witness Protection (Amendment) Act, 2010 <http://www.kenyalaw.org/Downloads/ammendmentacts/THE%20WITNESS%20PROTECTION%20%28AMENDMENT%29%20ACT%202010.pdf> (accessed 24 September 2011). This act amended the Kenya Witness Protection Act 2006.

192 See 3A of the Witness Amendment Act 2010.

193 N Sibalukhulu 'Lack of political will undermines witness protection in Kenya' 30 March 2011, [http://www.iss.co.za/iss\\_today.php?ID=1257](http://www.iss.co.za/iss_today.php?ID=1257) (accessed 24 September 2011).

194 A Zammit Borda 'The role of victims in the first trial of the International Criminal Court' (2010) 9 *Trinity College Dublin Journal of Postgraduate Studies* 20.

195 B Olugbuo 'Implementing the International Criminal Court Treaty in Africa The role of non-governmental organisations and government agencies in constitutional reform' in K Clarke & M Goodale (eds) *Mirrors of justice: Law and power in the post-Cold War era* (2009) 130.

196 The AU had requested the UN Security Council to defer the indictment of President Al-Bashir for one year using art 16 of the Rome Statute. The AU further passed a resolution of non-co-operation with the ICC. C Jalloh *et al* 'Assessing the African Union concerns about article 16 of the Rome Statute of the International Criminal Court' (2011) 4 *African Journal of Legal Studies* 5 8.

197 Burundi, Kenya, Tanzania and Uganda.

The UN Victims Handbook has provided a starting point for states in developing synergies of co-operation in protecting the rights of victims. International and regional treaties protecting victims will have an impact on local populations if governments go beyond the enactment of victim and witness protection laws and participation in criminal justice processes. There must be political will for implementation at the local level. Any victims' assistance programme should be aimed at dealing with emotional trauma, participating in the criminal justice process, obtaining reparations and coping with problems associated with victimisation.<sup>198</sup>

National initiatives to assist victims should meet international standards and norms that provide social, psychological, emotional and financial support, and effectively help victims within the criminal justice and social institutions.<sup>199</sup> EAC member states should show commitment in dealing with the plight of victims to reduce their suffering. The cessation of hostilities should be of paramount concern to government agencies and the international community. Those who bear responsibility for international crimes should be held accountable. This is to ensure that there is no impunity for perpetrators.<sup>200</sup>

It is necessary to expand the victims' opportunities to participate in all critical stages of the criminal justice process and to ensure consideration of the impact of the victimisation upon the victim in all criminal justice systems and international tribunals. To this end, victims should voluntarily elect to participate in proceedings and adequate security should be provided.

An increase in co-ordination and networking of all agencies, organisations, groups and families, and kinship and community support systems providing services to victims or affecting the treatment of victims is encouraged. This will help develop an integrated system of victim assistance.<sup>201</sup> EAC member states should be willing to partner with non-governmental and intergovernmental agencies to ensure the effective promotion and protection of the rights of the victims.

The improvement of the quality of outreach programmes for victims and victims' treatment should be paramount. Most victims are neglected by the criminal justice system and at times are only used as pawns to secure the conviction of accused persons without efforts to ensure that the rights and privileges of the victims are not abused.<sup>202</sup> This should not be the case and victims should be accorded every respect during the criminal justice process and should be allowed to participate in all the stages of trials.

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198 *UN victims handbook* (n 48 above) 11.

199 *UN victims handbook* iv.

200 *UN victims handbook* 11.

201 As above.

202 As above.

## 11.2 Victim reparations in domestic legal systems

A good model for victim rights protection in the EAC should provide for a Victims Reparations Fund (VRF). The United States of America Crimes Victims' Rights Act of 1984,<sup>203</sup> discussed earlier, provides a comparable framework for setting up such a fund.<sup>204</sup> The GLP that is applicable to EAC member states will be helpful regarding the specific circumstances of each member state. The proposed VRF should award compensation, reparation and restitution on the basis of the awards and recommendations of adjudicating courts.

Immediate reparation or compensation to victims should be considered and there is no need to wait for the conclusion of cases before this can occur. The support and assistance deemed necessary to restore the dignity of victims and attend to their urgent medical and related needs, such as transportation costs for participation in judicial proceedings, emergency accommodation, crisis intervention, and other services necessary to effectively respond to emergency needs of victims, should be of the utmost concern to governments.

The law establishing the fund should provide for the seizure of assets of convicted persons and this should be used to compensate victims. Alternative provisions should be made to enhance victims' rights and their ability to lodge civil proceedings alongside criminal proceedings against a convicted person for damages for injury and loss suffered as a result of the victimisation.

The practice of the civil law jurisdictions and the Extraordinary Chambers in the Courts of Cambodia, discussed earlier, should be examined further for lessons and best practices.<sup>205</sup> The proposed VRF should receive contributions from the general public and donors who may want to help in the rehabilitation of victims of sexual violence and international crimes. The United States of America's model of financing the fund through fines, penalties and confiscated proceeds of crime may be considered as sources of income.

## 12 Conclusion

Enhancing the protection of the rights of victims should be a priority of EAC member states. At the international level, the ICC presents unique opportunities since at the moment all its cases are from Africa. For EAC member states, the GLP and its Protocols offer good tools

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203 Crime Victims' Rights Act of 1984 (42 USC 10601) [http://www.law.cornell.edu/uscode/42/usc\\_sup\\_01\\_42\\_10\\_112.html](http://www.law.cornell.edu/uscode/42/usc_sup_01_42_10_112.html) (accessed 29 September 2011).

204 n 204 above, sec 10601.

205 International Bar Association 'Safeguarding judicial independence in mixed tribunals: Lessons from the ECCC and best practices for the future' September 2011, [http://www.cambodiatribunal.org/sites/default/files/reports/Cambodia%20report%20\(Sept%202011\).pdf](http://www.cambodiatribunal.org/sites/default/files/reports/Cambodia%20report%20(Sept%202011).pdf) (accessed 1 October 2011).

for protecting the rights of victims. These instruments need domestic implementation to have the force of law. Political will to bring about the needed changes is necessary.<sup>206</sup>

It should be reiterated that the ICC will only try those who bear the greatest responsibility for war crimes, crimes against humanity and genocide.<sup>207</sup> The bulk of the trials for international crimes will be conducted by national judicial systems. It is therefore necessary for EAC member states to have procedures in their judicial systems to complement the work of the ICC.<sup>208</sup>

It also important that those who have ratified the Rome Statute but are yet to implement it should do so as a matter of urgency, bearing in mind the need to bring the provisions of the criminal justice legislation in consonance with emerging trends in international criminal justice.<sup>209</sup>

For Uganda and Kenya, there are laws that are in place that could be helpful in this regard. Burundi should increase its pace in setting up a truth and reconciliation commission and a special tribunal to ensure that there is no impunity for those accused of international crimes.<sup>210</sup> The Rwandese government should accede to the Rome Statute and should have effective national legislation to provide for the rights of victims. Tanzania should implement the Rome Statute in its domestic law and also develop victims' rights protection mechanisms.

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206 T Mnuh 'Women in Africa's development: Overcoming obstacles, pushing for progress' (2008) 11 *Africa Recovery Briefing Paper*, <http://www.un.org/ecosocdev/geninfo/afrec/bpaper/maineng.htm> (accessed 1 October 2011).

207 L Moreno-Ocampo 'Keynote address: Integrating the work of the ICC into local justice initiatives' (2006) 21 *American University International Law Review* 497 503.

208 Citizens For Global Solutions 'In uncharted waters: Seeking justice before the atrocities have ended: The International Criminal Court in Uganda and the Democratic Republic of the Congo' June 2004 11 [http://archive1.globalsolutions.org/programs/law\\_justice/icc/resources/uncharted\\_waters.pdf](http://archive1.globalsolutions.org/programs/law_justice/icc/resources/uncharted_waters.pdf) (accessed 1 October 2011).

209 B Olugbuo 'Implementation of the Rome Statute of the International Criminal Court in Africa: An analysis of the South African legislation' (2004) 1 *Eyes on ICC* 191 203.

210 A Triponel & S Pearson 'What do you think should happen? Public perception in transitional justice' (2010) 22 *Pace International Law Review* 103 105.