

Victims and International Law: Remedies in the Courtroom?*

Yvonne McDermott**

This article examines the role of victims in both international and domestic criminal trials, analysing the value or otherwise of participatory and other procedural rights for victims, and particularly questioning some attempts which purported to ‘rebalance’ the system in recent years that had the effect of taking rights away from the accused. In conclusion it is argued that, while it might not be self-evident at the outset, the most imperative element for victims in the criminal justice system is granting the accused a fair trial, as opposed to the scope and volume of procedural rights which have been painted as necessary to give deference to the victim’s suffering in recent years. The author strongly advocates for ‘service rights’ for victims – this includes information, counselling, reparation, and being allowed to give their statements after a determination of guilt –as opposed to ‘procedural rights’, such as participation as a party to the trial and influencing prosecutorial decision-making.

1. VICTIMS’ AND DEFENDANTS’ RIGHTS UNDER INTERNATIONAL LAW

1.1. THE VICTIMS’ RIGHTS MOVEMENT

Victims’¹ rights, as procedural rights² have experienced a renaissance in international law over the past two decades. Advocates of the victims’ rights movement have perceived this as a reinstatement of victims to their original central

* This is the winning article in the inaugural Böhler Franken Koppe Wijngaarden advocaten/Hague Academic Coalition Award for Young Professionals. The author would like to express her thanks to the judging panel.

** LL.B. (National University of Ireland, Galway); LL.M. *cum laude* (Leiden University); Ph.D. Candidate, Irish Centre for Human Rights. The author would like to express her sincere thanks to Mr. David Leahy for comments on an earlier draft.

¹ I use the term ‘victims’ throughout this paper in the UN Basic Principles sense of the word, i.e. “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power”: Article 1, UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by UN General Assembly Resolution 40/34 of 29 November 1985, Annex (hereinafter, ‘Basic Principles’).

² A term coined by A. Ashworth in his article, *Victim Impact Statements and Sentencing*, Crim LR 498 at 499 (1993), according to H. Fenwick, *Procedural ‘Rights’ of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?*, 60(3) Mod LR 317 at 318 (1997).

role in the criminal justice process. In the Middle Ages, it was the victim who was responsible for the prosecution of the crime;³ that is, until political ideologies shifted to redefine the role of the state in criminal matters. From the 18th century onwards, political thought was heavily influenced by thinkers like Beccaria who perceived individual crimes as crimes against the state, and convictions were made in the public good as opposed to that of the victim.⁴

Neils Christie, writing in the 1970s, opined that “the one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing.”⁵ He went on to state that this ill-treatment rendered the victim a sort of ‘double loser’⁶ – first to the offender, but secondly by having been usurped as the victim in his own case by the state.

Starting with the UN Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985,⁷ and a Council of Europe Recommendation in the same year,⁸ international legal norms began to recognise that victims need to be treated with compassion and respect for their dignity, and that they are entitled to redress for their suffering in terms of access to justice, compensation and services to assist their recovery.⁹ The Basic Principles were followed in the 1990s by a raft of academic literature and studies on the rights of victims of crime, such as the Van Boven report on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.¹⁰ National jurisdictions, particularly European and common law countries began to develop domestic victims’ rights instruments in pursuance of these venerable aims.¹¹ The first ‘hard law’ international legal instrument was produced in 2001, the European Union Framework Decision on the Standing of Victims in Criminal Proceedings.¹²

³ R. Elias, *The Politics of Victimization: Victims, Victimology and Human Rights*, at 11 (1986).

⁴ W. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 Am Crim LR 649 at 655 (1976).

⁵ N. Christie, *Conflicts as Property*, Br J Crim 1, at 3 (1977); on the state’s appropriation of the crime from the hands of those directly affected, see further J. H. Langbein, *The Origins of Adversary Criminal Trials* (2003) and A.N. Young, *Two Scales of Justice: A Reply*, 35 Crim LQ, 355 at 365-6 (1993).

⁶ Christie, *supra* note 5.

⁷ *Supra* n. 1.

⁸ Recommendation (1985) II on the Position of the Victim in the Framework of Criminal Law and Procedure, 28 June 1985.

⁹ United Nations, *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. E/CN.15/1998/1, (1998).

¹⁰ T. van Boven, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN Doc. E/CN.4/SUB.2/1993/8, (1993).

¹¹ For a particularly conclusive account of such instruments, see M.S. Groenhuijsen & R.M. Letschert (eds.), *Compilation of International Victims’ Rights Instruments* (2006); see also, D. Nseroko, *Victims of Crime and their Rights in T.N. Mushanga* (ed.) *Criminology in Africa* (1992).

¹² Council Framework Decision on the Standing of Victims in Criminal Proceedings, 2001/220/JHA of 15 March 2001, OJ 2001 L 22/1.

1.2. THE RIGHT TO A FAIR TRIAL UNDER INTERNATIONAL LAW

In contrast to the relative novelty of victims' rights under international law, the right to a fair trial was recognised in the Universal Declaration of Human Rights in 1948,¹³ the European Convention on Human Rights in 1950¹⁴ and the International Convention on Civil and Political Rights in 1966.¹⁵ Even before it was enshrined in such documents, the right was recognised as a fundamental one,¹⁶ being the only means by which a polity could take away the freedom of one of its citizens.¹⁷ Indeed, the notion of holding a fair trial as a prerequisite would seem a logical one with regard to the granting of rights to victims as well— how can persons be defined as 'victims', if the crime they are victims to has not been proven in the first instance, and if the offender has not been adduced with ultimate certainty in the second instance?

Neils Christie recognised this point in his above-mentioned seminal piece which lamented the 'stealing' of conflicts from victims by lawyers and the state.¹⁸ He developed a four-stage approach to granting rights to victims and reinstating their ownership of the conflict, so to speak. The first step involves a conclusive determination of the guilt of the accused. The victim has no part to play in this step. However, if the accused is found guilty of causing harm to the victim by way of breaching criminal laws, the next three steps apply. The second proposed step is the most victim-centric. At this stage, all elements of the victim's experience are examined, s/he is given an opportunity to tell their story and recount the harm suffered and what restitution could make up for this harm. The third stage is sentencing, taking into account the guilt of the accused as determined in the first stage and the victim's experience in the second. The last stage of the process involves a return to the victim to determine how the sentencing has been of service to him, aiding the rehabilitatory value of the entire process.

At least three of these four steps have been loosely followed in domestic criminal trials in some countries, which generally assess the guilt or innocence of the accused. If the accused is found guilty, the victims are offered an opportunity to present a victim impact statement, and then a sentence is imposed, taking the holistic set of circumstances into account. However, the purpose of the victim impact statement needs to be outlined with clarity and it needs to be explained to victims that their statement may have no bearing on the sentence imposed, so as to avoid later disappointment. This is illustrated by the example of the murder trial

¹³ Universal Declaration of Human Rights, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [UDHR].

¹⁴ European Convention on Human Rights, signed at Rome on 4 November 1950 [ECHR].

¹⁵ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [ICCPR].

¹⁶ *See, for example*, Ibrahim v. The King [1914] AC 599 at 615. Some even trace the right to due process or to a fair trial back to the Magna Carta of 1215: e.g., *SI v. KS* [2005] ACTSC 125.

¹⁷ *See, for example*, the 5th Amendment to the United States Constitution: "No person shall be... deprived of life, liberty, or property, without due process of law."

¹⁸ Christie, *supra*. n. 5.

of toddler James Bulger¹⁹ in the United Kingdom and his parents' outspokenness on the perceived futility of their victim impact statement, when the young men convicted were sentenced to a shorter prison sentence than the Bulger family thought appropriate.²⁰

2. THE 'REBALANCING' OF CRIMINAL JUSTICE IN DOMESTIC AND INTERNATIONAL SYSTEMS

2.1. DOMESTIC LEGAL SYSTEMS: FROM 'SERVICE RIGHTS' TO 'PROCEDURAL RIGHTS'

Initially, the reforms imposed in the interest of victims' rights, so-called 'service rights', included measures like obliging prosecutors to inform and keep victims updated; granting the victims the right to give victim impact statements; imposing fines and restitution provisions; counselling services and so on. While these measures may have had an effect on sentencing, their impact on the trial *per se* and particularly the effect on the accused's right to a fair trial, was minimal, although this was not always the view from the defence bench.²¹

In recent years, however, the changes demanded by the victims' reform movement have been more 'procedural' in nature and in turn have entered into the territory of being prejudicial to the rights of the accused. Take, for example, the victim's right to participate in the trial of "their" accused. The Basic Principles of 1985 gives a rather vague guideline that victims ought to be allowed to present their "views and concerns" at "appropriate stages of the proceedings."²² The EU Framework Decision, however, goes a step further by granting victims a right to present evidence and have their voices heard.²³ In terms of prosecutorial discretion, the goalposts have now been shifted to take the victim into account.²⁴

¹⁹ R. v. Secretary of State for the Home Department, *ex parte* Bulger, *The Times*, 16 February 2001, as cited in A. Ashworth, *Responsibilities, Rights and Restorative Justice*, 42 Br J Crim 578 at 583 (2002).

²⁰ See also the Irish trial of Wayne O'Donoghue in the murder trial of Robert Holohan. Mrs Holohan, the dead boy's mother, raised some accusations in her victim impact statement which were not part of the public prosecutor's case against the convicted man; it was felt that there was not sufficient evidence to raise the points in question. As a result, Irish law on victim impact statements has been changed to allow prohibition on the publication or broadcasting, in whole or in part, of victim impact statements in the interests of justice. (s. 4, *Criminal Procedure (Amendment) Act 2009*, as first introduced by s. 20, *Victims' Rights Bill*, 2008).

²¹ A.N. Young, *Two Scales of Justice: A Reply*, 35 Crim LQ 355 at 359 (1993). While the influencing of sentencing is outside the scope of the right to a fair trial, and thus of this paper, it too has been criticised as adding an uncertainty element to the treatment of the accused, depending on the particular character of the individual victim (i.e. the fact that sentencing could vary based on whether the individual victim is vengeful or sympathetic could only be seen as a failure of the state in carrying out its functions to protect all citizens equally, impartially and independently.) See A. Ashworth & M. Redmayne, *The Criminal Process* at 50 (2005).

²² Basic Principles, n. 1 above, Article 6(b).

²³ Framework Decision on the Standing of Victims in Criminal Proceedings, *supra* n. 12, Article 3.

²⁴ For example, U.N. Guidelines on the Role of Prosecutors, Eighth United Nations Congress

2.2. VICTIMS' RIGHTS AND INTERNATIONAL CRIMINAL JUSTICE

The most obvious shift on the issue of victim participation can be seen in the area of international criminal justice. When the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established, no provision was made for victims outside of their protection as witnesses. The exclusion of victim participation in the practice of these courts was subject to much criticism²⁵ and in drafting the Rome Statute of the International Criminal Court (ICC) there was clear political will to give victims a role in the Court's practice.²⁶ Similarly, when the Extraordinary Chambers in the Courts of Cambodia (ECCC) were established, a new and unprecedented role for victims was moulded which granted victims standing as a party in the tribunal, on a par with the prosecution and defence.

2.2.1. *The International Criminal Court*

The reception to such participation in the ICC has been rather tepid. The Rome Statute follows the Basic Principles model of participation by saying that victims may present their views and concerns at an appropriate stage in proceedings, in a manner which must be consistent with the right of the accused to a fair and impartial trial. In theory, this appears to be a well-balanced formulation. In practice, however, it has been something of a procedural nightmare.

In contrast to the supporting role to the prosecutor which victim participation could reasonably be expected to play, both prosecution and defence submissions have vociferously spoken out against the ICC's liberal interpretation of participatory rights. For example, the Appeals Chamber has upheld a Trial Chamber ruling that presenting 'views and concerns' could include the introduction of evidence by victims, and a right of access to the Prosecutor's documents.²⁷ Both the defence and prosecution were in agreement that this was a step too far as it could interfere with prosecutorial discretion and could effectively mean that the accused faces

on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990), Guideline 13(d); Council of Europe Recommendation (2000) 19 on the Role of Public Prosecution in the Criminal Justice System, Item 33.

²⁵ See, e.g., D. Donat-Cattin, *Article 68- Protection of Victims and Witnesses and Their Participation in the Proceedings* in O. Triffterer, (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, at 869-888 (1999).

²⁶ At the Preparatory Commission for the International Criminal Court on 10 August 1999, the Colombian delegation opined that, "the victim ... was an uninvited guest, a spectator, and this exacerbated the conflict.": *Comments on the Report on the International Seminar on Victims' Access to the International Criminal Court: Protection of the Identity of Victims and Witnesses; Reparations: Proposal by Colombia*, UN Doc. PNCICC/1999/WGRPE/DP.37 (1999).

²⁷ *Situation in the Democratic Republic of the Congo, Case of Prosecutor v. Thomas Lubanga Dyilo, Judgement on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, Case No. ICC-01/04-01/06-1432, 11 July 2008; See further, Y. McDermott, *Some are more equal than others: Victim Participation in the International Criminal Court*, 5 *Eyes on the ICC* 23 (2008-2009/1), and by the same author, *Victims' Rights Must Not Jeopardise Fair Trial*, case commentary, available online at <www.lubangatrial.org>.

more than one accuser, contrary to the equality of arms principle.²⁸ An earlier decision granted victims a role in the investigative stage of proceedings, before an accused is even identified.²⁹ These decisions imbue victims with powers well beyond that of the *partie civile* in most inquisitorial systems,³⁰ which could be particularly problematic given the large number of potential victims falling under the rubric of ICC situations.

Saying that, there has been something of a step back from the original untrammelled nature of victims' participation in the ICC in more recent judgements,³¹ presumably because participation was becoming too unwieldy a burden on the Court.³²

It is submitted that the Court ought to defer to the definition of participation in Article 68(3) of the Rome Statute, which makes it clear that victim participation cannot be prejudicial to the rights of the accused.³³ In other words, the rights of the accused are not to be balanced with the rights of victims, but rather the presentation and consideration of victims' views and concerns simply cannot be inconsistent with the rights of the accused.

Furthermore, a lack of clarity persists as to the interplay between the victims and witnesses unit, victims' representatives and the Outreach programme, as well as how far victims' rights can stretch, who can be considered a 'victim' for the purposes of participation, and whether the participation of a small number of victims in the cases actually aids post-conflict rebuilding and confidence in the ICC's work in the areas affected.³⁴ The issuance of some guidelines on the modalities of participation would be a welcome move, so that both victims and the parties to a case know what to expect from the process in advance.

²⁸ On the wide prosecutorial discretion in international tribunals, see K. Howarth, *Special Court for Sierra Leone – Fair Trials and Justice for the Accused* 8 ICLR 399 at 403-409 (2008/3).

²⁹ Situation in Democratic Republic of Congo, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, Case No. ICC-01/04-101, 17 January 2006.

³⁰ See generally, M. Joutsen, *Listening to the Victim: the Victim's Role in European Criminal Justice Systems*, 34 Wayne Law Review 95 (1987).

³¹ See, for example, Situation in Darfur, Judgement on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007, Case No. ICC-02/05 OA OA2 OA3, 2 February 2009 and Situation in the Democratic Republic of the Congo, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Case No. ICC-01/04-01/07-474, 13 May 2008.

³² A perfunctory browse of the decisions issued to date in all ICC Situations shows a disproportionate amount of rulings relating to victims' participation; applications for participation; guidelines on identification of victims, and so on.

³³ Article 68(3) says that: "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence."

³⁴ On the effectiveness of the ICC Registry's Outreach Programme, see the International Bar

2.2.2. *The Extraordinary Chambers in the Courts of Cambodia*

The first trial of Kaing Guek Eav (alias Duch) in the ECCC has permitted the participation of 94 civil parties, divided into four groups, 22 of whom were given the opportunity to testify throughout the trial. As parties to the case, on a par with the prosecution and defence, the scope of the victims' rights is extremely broad, and includes access to the case file, questioning witnesses, and suggesting forms of reparation. The administrative efficiency of the Victims' Unit in processing applications and grouping victims has been admirable, and is something the ICC could learn from.

Nonetheless, the participation of victims as civil parties to the inaugural case has not been without discontent. On August 31 2009, the victims who were participating in the case boycotted the trial on the grounds that they were not permitted to question the witnesses or the accused on matters pertaining to the accused's character.³⁵ The victims recommenced attendance on September 14, 2009.³⁶ This author submits that this incident, like the reaction of the toddler's parents in the James Bolger murder trial, as discussed in section 1.2 above, shows that a precise delineation of the scope and limits of the victims' participation is needed at the outset of a trial, and the victims need to be informed accordingly. This is further illustrated by the judges' need to remind victims' representatives to remain within the parameters of Rule 23 of the Internal Rules,³⁷ which says that the purpose of participation is to support the prosecution and to allow victims to seek collective and moral reparations.

A further suggestion for how best practice could be implemented in the ECCC moving forward is inspired by the closing statement of the Group 2 victims on 24 November.³⁸ The representative expressed the view that the judges of the Tribunal had been insensitive towards her clients and had not been sufficiently reverent to their suffering. For example, victims were told to suppress their emotions, and one victim was asked to reveal his scars to the courtroom, before his lawyer intervened. The judges' actions in this regard were probably aimed at avoiding prejudice against the accused, and the latter presumably was in the interest of having no unfounded accusations levelled against the defendant. Regardless, it has to be recognised that these victims have been through incredibly traumatic

Association's report, *The Quest for a Public Face: the public debate on the ICC and its efforts to develop a vision and coherent strategy on external communications* (2009), available online at <http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx>.

³⁵ See Prosecutor v. Kaing Guek Eav "Duch", Transcript of Trial Proceedings, Case No. 001/18-07-2007-ECCC/TC, 26 August 2009. The civil parties to the President of the Trial Chamber sent a letter dated 30 August 2009, noting "unbalanced treatments between the accused and victims" is available online at <http://www.eccc.gov.kh/english/cabinet/courtDoc/428/E166.1_FR.pdf>.

³⁶ M. Saliba, *Experts Testify About Democratic Kampuchea and Importance of Accepting Guilt in International Tribunals*, Cambodia Trial Monitor, 14 September 2009. Available online at <<http://www.cambodiatribunal.org/blog/2009/09/experts-testify-about-democratic.html>>.

³⁷ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev.4), adopted June 12 2007, last revised 11 September 2009.

³⁸ Prosecutor v. Kaing Guek Eav "Duch", Transcript of Trial Proceedings, Case No. 001/18-07-2007-ECCC/TC, 24 November 2009.

events and this fact must be treated with deference, particularly bearing in mind that giving evidence in a packed courtroom can be an intimidating experience. Perhaps one way to allow victims to give their statement in the courtroom uninterrupted and without prejudicing the accused's rights would be to allow them to give statements after the judgement is passed. These statements could then be added to the case file and posted on the website of the Tribunal, and could be given in private if the victim so desired.

The Sixth Plenary Session of the Extraordinary Chambers which concluded on 11 September 2009 made several important changes to the modalities of civil party participation in the future.³⁹ Firstly, all civil parties will comprise a single, consolidated group which will be represented by lead co-lawyers, supported by civil party lawyers. Secondly, "other supplementary forms of victim participation, which will occur outside of formalized court proceedings", will be adopted.⁴⁰ Lastly, applications to participate as a civil party in a case must now be received in advance of the trial's commencement.

3. A THEORY OF 'BALANCE'

Outside of the shift of victims' rights from 'service rights', such as counselling, information and support to 'procedural rights' like participation in both domestic and international systems, a more worrying trend emerges in terms of the notion of 'balance' in criminal law which has come to the forefront of domestic policy-making in recent years.

For example, in Ireland, a "Balance in the Criminal Law Review Group" was established in 2006. The Group's final report, which was produced in March 2007, suggested, *inter alia*, changes on the rules to allow inferences to be drawn on the exercise of the right to silence, allowing the admission of evidence obtained in deliberate and conscious breach of the defendant's constitutional rights, the abolition of double jeopardy, and allowing 'bad character' evidence to be admitted. Similar moves have been made in the United Kingdom and elsewhere, based on a conception of criminal justice as a two-sided scales wherein "being 'for' victims automatically means being tough on offenders."⁴¹ The Labour government in the U.K. in the late 1990s and early 2000s was particularly fond of the misconception that limiting the rights of the accused could in some way bolster the 'case' of the victim.⁴² Former Prime Minister Tony Blair is on record as saying: "The system

³⁹ M. Saliba, *Sixth Plenary Session Outlines Changes to Future of Civil Party Participation*, Cambodia Trial Monitor, 14 September 2009. Available online at <<http://www.cambodiatribunal.org/blog/2009/09/sixth-plenary-session-outlines-changes.html>>.

⁴⁰ The Press Release on the outcomes of the Plenary Session gives no further information on the nature of these 'supplementary forms of victim participation', save to say that the ECCC had received many constructive suggestions in this area from the Victims Unit and civil society. The Press Release is available online at: <http://www.eccc.gov.kh/english/news.view.aspx?doc_id=311>.

⁴¹ D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* 11 (2001).

⁴² On the Government's "Justice for All" White Paper of 2002, see J. Jackson, *Justice for All:*

has to protect innocent people, but protecting law-abiding citizens has to come first.⁴³ This perspective presumes that accused persons are not themselves ‘law-abiding’ and moreover, appears to fall short of the Dworkian theory that “any political decision must treat all citizens as equals, that is, as equally entitled to concern and respect.”⁴⁴

Such an extreme political push to undermine the rights of the accused, purportedly in the interest of victims, is somewhat baffling to the criminal lawyer. The first question which could be asked is: ‘Who asked for this?’ As Andrew Saunders has pointed out, victims of crimes often have little more in common than the very fact of being victims of crimes, and even that much is rarely enough to bind them together as a lobby group.⁴⁵ Therefore, measures taken in the interest of victims are generally taken as a result of pressure placed *for* them as opposed to *by* them. Even in terms of the ‘victim’s right to participate’, which has been the crux of victim/accused balancing in an international context, one of the only contexts where victims are numerous enough to form a lobby group, one wonders if most victims will really have a strong desire to relive their experiences in a court full of strangers.⁴⁶

In explaining the centrality of the victim to contemporary penal discourse, David Garland reaches the conclusion that, in terms of crime control at least, the criminal justice system could be seen to have failed victims as a whole.⁴⁷ Rather than examining the reasons behind this failure, attempting to find the underlying factors, and thus the solution, to the high recidivism rates and investigating alternatives to current penal policy, it is quicker, easier, and arguably more politically rewarding to introduce draconian measures limiting the rights of the accused to increase the perception of “doing something”, even though that “something” may not in fact be in the best interests of victims of crime, past or future.

International practice has not been as explicit as the above-mentioned systems, where rights of the accused were *explicitly* taken away in the interest of ‘balance’ with the victims’ rights. However, one of the major innovations of the ICC which set it apart from the ICTY, ICTR and Special Court for Sierra Leone (SCSL) was the introduction of a broad catalogue of victims’ rights, as discussed in section 2.1 above. Applying David Garland’s theory, it could be argued that increasing victims’ procedural rights to the extent that the accused’s right to a fair trial is

Putting Victims at the Heart of Criminal Justice?, 30 *Journal of Law and Society* 309 (2003).

⁴³ *Blair takes on judges over crime*, BBC News, 11 October 2005. Available at: http://news.bbc.co.uk/2/hi/uk_news/politics/4332704.stm.

⁴⁴ R. Dworkin, *A Matter of Principle* at 84-85 (1985).

⁴⁵ A. Saunders, *Victim Participation in an Exclusionary Criminal Justice System* in C. Hoyle and R. Young (eds.), *New Visions of Crime Victims* at 198 (2002). The obvious exception to this is the international criminal context, where thousands, and even millions, of victims are affected by the same crimes in times of conflict. Paradoxically, in situations where there are enough victims to form a concerted lobby group, the feasibility of granting procedural rights to all concerned is weakened for that very reason: there are too many victims to meet the resources of a criminal trial.

⁴⁶ On secondary victimization, see A. Saunders and I. Jones, *The Victim in Court*, pp. 282-208 in S. Walkate (ed.) *Handbook of Victims and Victimology* at 284 (2007).

⁴⁷ Garland, *supra* n. 41 at 133.

under threat is a perceived means to deal with the relative failures of the criminal justice system. The fact that the massacres in Srebrenica took place after the ICTY was established is often-cited in academic circles when contextualising the successes of international criminal justice.⁴⁸

Moving forward, whether the ICC can or does have a genuinely deterrent effect, or can build lasting reconciliation in the affected areas, remains the elephant in the corner, so to speak, which academics and policy-makers alike need to examine in greater detail.⁴⁹ To this end, the granting of participatory rights to victims may have been borne of, amongst other reasons, a desire to find a speedy answer to a much broader question on the utility of the tools of international criminal justice. Diplomats at the Assembly of State Parties were probably also influenced by the shift towards victims' rights in their own domestic legal systems, as discussed in section 1.1 above.⁵⁰

In his 2009 address before the United Nations General Assembly, President of the ICTY Patrick Robinson reported on the Tribunal's ongoing efforts to strengthen the capacity of local jurisdictions and cement its legacy across the region of the former Yugoslavia thereby contributing to the maintenance of peace and security in the region. President Robinson also acknowledged that "the international community has forgotten [the victims]" and called for an effective mechanism for their compensation.⁵¹ This combination of capacity-building and compensation appears to be an approach which would not impinge on any other party's rights, but would also build a strong legacy for the Tribunal, in spite of its failure to deter the perpetrators of the Srebrenica massacre at the outset.

4. VICTIMS' RIGHTS IN THE CONTEXT OF THE RIGHT TO A FAIR TRIAL

4.1. THE ROLE OF THE CRIMINAL TRIAL

In order to examine the interplay between victims' and defendants' rights, a normative conception of the role of the criminal trial is necessary. The classical account, of course, is that the sole purpose of the trial is to determine the guilt or innocence of the accused.⁵² This theoretical basis falls short in a number of respects. First, it oversimplifies the actors in the criminal justice system by

⁴⁸ C. Stahn, *The Future of International Criminal Justice*, 4 Hague Justice Journal 3 (2009), at 259-268.

⁴⁹ Stahn, *op. cit.*, 263-264.

⁵⁰ The trend towards victims' rights is not a purely Western phenomenon, but has also been witnessed to some extent worldwide. See M. Rayejian Asli, *Iranian Criminal Justice System in Light of International Standards Relating to Victims*, 14 Eur. J. Crime Crim. L. & Crim. Just. 185 (2006).

⁵¹ Press Release: Address of Judge Patrick Robinson, President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations General Assembly, The Hague, 8 October 2009. Available online at: <http://www.icty.org/x/file/press/pr_attachments/pr1335a.pdf>.

⁵² See, for example, Ashworth and Redmayne, *supra* n. 21, at ch. 2; P. Roberts, *Subjects, Objects and Values in Criminal Adjudication in Duff et. al.*, *The Trial on Trial* (2): Judgment and Calling into Account, 37 at 53 (2006) states that the primary aims of the trial are: accurate fact-finding; effective law-application and application of a just punishment.

reducing the trial to a bi-polar contest between offender and state. Second, it fails to explain why the system insists on a full-scale contested trial in circumstances where it would appear that the guilt of the accused is undeniable on the weight of evidence against him. Indeed, it would question the need to give participatory standing to the defendant- if the only function of the trial is to determine the guilt or innocence of an individual, surely it would make more sense to take a surgical analysis of the entire situation, and not give a voice to anyone outside of what is necessary to determine the truth, particularly those who had a vested interest in interfering with the truth, particularly those who had a vested interest in interfering with that truth. Third, criticisms on recent restrictions on the right to silence, abolition of jury trial, and so on, lack grounding if it can be proven that these restrictions in fact help prove the truth.

Thus, we can conclude that the purpose of the trial must go beyond a simple fact-finding mission. Many legal philosophers base their conceptions on the purpose of the trial on a broader construction of law as a regulator of relationships between individuals in a polity.⁵³ For example, Mireille Hildebrandt constructs the trial as an exercise in “democracy on a case-by-case basis, holding together the meanings of legal norms in the light of past cases, and in anticipation of future ones.”⁵⁴ While tempting, there is a sense with this line of thinking that the jurist is granting policy-makers too much credit for their foresight and ability to see the bigger picture. In view of some of the band-aid approaches taken to ‘rebalance’ the criminal justice system explained above, and the apparent lack of foresight therein, one must question whether the trial process needs to be given such a deep epistemic construction. Indeed, Hildebrandt herself questions whether in the long-term, the reduced centrality of the criminal trial will break down the normative significance of criminal intervention as a whole.⁵⁵

Having recognised that the trial plays a role going beyond a pure determination of fact, yet falling short of an entire norm-creating or affirming exercise in each instance, we must find a space along the spectrum which fits both the trial’s individualistic nature and the broader societal part it plays. Anthony Duff probably came closest in striking this conceptual balance in 1986, when he said that the aim of the criminal trial is not just to reach judgment on the accused individual’s past conduct, but also to communicate and justify that judgment to himself and others.⁵⁶ The same author, with some esteemed colleagues, reiterated this sentiment in the conclusion of their ‘The Trial on Trial’ project earlier this year, when they concluded that the trial is a communicative process through which citizens are publicly called to answer for their wrongdoing and to account for

⁵³ L.L. Fuller, *Human Interaction and the Law*, 14 Am. J. Juris.1 (1969).

⁵⁴ M. Hildebrandt, *Trial and ‘Fair Trial’: From Peer to Subject to Citizen in Duff et. al. (eds.) The Trial on Trial (2): Judgment and Calling into Account*, 15 at 26 (2006).

⁵⁵ *Op. cit.* at 26

⁵⁶ R.A. Duff, *Trials and Punishments* 116 (1986).

their wrongful conduct.⁵⁷ The conception of the trial as a public process realises that a trial is not just a contest between the state and the accused, but includes concern for the victim.⁵⁸

Two points can be made at this juncture. First, understanding the trial in this way undermines further the distinction drawn between adversarial and inquisitorial systems in victims' rights literature, with the latter being more amenable to the views and concerns of the victim.⁵⁹ This distinction is fallacious in modern trial processes, where a purely inquisitorial or adversarial system is hard to come by, and becomes unnecessary in any event when the trial as a whole is viewed as a system of calling into account.⁶⁰ This understanding of the trial as a communicative process also explains the significance and role of international criminal trials- the wrongs committed therein render the perpetrators answerable to the international community as a whole for their conduct. Second, those who prefer to perceive the trial as a public communicative process of calling into account have raised concerns- and rightly so- on recent attacks, not just on defence rights, but on the system as a whole.⁶¹ For example, many jurisdictions have witnessed a proliferation in the amount of plea bargains⁶² and streamlined administrative processes to deal with alleged offenders, without full due process of the law.⁶³ This could further explain why plea bargains in international criminal procedure have been met with academic discontent.⁶⁴

4.2. THE BENEFIT FOR VICTIMS IN GRANTING A FAIR TRIAL TO THE ACCUSED

The move away from full, public and procedurally fair trials, while sometimes purportedly taken in the interest of victims, can affect them in a number of ways.

Most equivocally, it takes away the cathartic effect that comes from the trial recognising victims suffering and calling offenders into account. Jenny McEwan recognised this in her analysis of the trial of 'The Yorkshire Ripper', Peter Sutcliffe.⁶⁵ The accused pleaded guilty to manslaughter, but the judge insisted on

⁵⁷ A. Duff, *et. al.*, *The Trial on Trial (3): Towards a Normative Theory of the Criminal Trial* at 13 (2008).

⁵⁸ S. Marshall and R.A. Duff, *Criminalization and Sharing Wrongs*, 11 CJLJ 7 (1998).

⁵⁹ E.g. J. Doak, *Victims' Rights, Human Rights and Criminal Justice* 265 (2008)

⁶⁰ J.F. Nijboer, *Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective*, 41 *American Journal of Comparative Law* 299 (1993), cited in Duff *et. al.*, *The Trial on Trial (3): Towards a Normative Theory of the Criminal Trial*, *supra* n. 57, at 9; On the move away from "pure" inquisitorial system in France, see J. Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France*, ch. 2 (2005).

⁶¹ See T. Weigend, *Why Have a Trial when You Can Have a Bargain?* in Duff *et. al.*, *The Trial on Trial (2)*, at 207 (2006).

⁶² See Ashworth and Redmayne, *supra* n. 21, 266-268: on the frequency of guilty pleas.

⁶³ Such as those introduced in the U.K. by the Anti-Social Behaviour Act, 2003.

⁶⁴ S. Dana, *Genocide, Sentencing and Reconciliation in the Jurisprudence of the ICTY* in R. Henham & P. Behrens (eds.) *The Criminal Law of Genocide*, 259-274 (2007), available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463088>.

⁶⁵ J. McEwan in *The Trial on Trial (1): Truth and Due Process*, 51 at 53 (2004).

a full murder trial, presumably because “the cathartic effect of a contested trial would not have been produced by the short sentencing hearing that follows the acceptance of a plea for guilty.”⁶⁶

Unfortunately, in the current criminal justice system concerned with efficiency and reduction of costs, guilty pleas are often welcomed as a lesser burden for the system to carry. This takes away from the victim the full acknowledgement of his experience.⁶⁷ To this end, as Richard Goldstone has noted, “public exposure of the truth is the only effective way of ensuring that history is recorded more accurately and more faithfully than otherwise would have been the case.”⁶⁸ A full trial means a full public exposure of the truth, and the acknowledgement of the victim’s suffering in this way facilitates the start of their healing process. This is particularly germane in the context of international tribunals, where a full trial adds to the historical account of the events and thus a basis for post-conflict reconstruction.

Furthermore, victims and society have a legitimate expectation that offenders will be punished for the crimes committed and not some lesser charge on the grounds that this would make the system cheaper or quicker.⁶⁹ This falls under the scope of the right to an effective remedy under international human rights law.⁷⁰ In *Kaya v. Turkey*, the European Court of Human Rights held that an “effective remedy” would encompass an investigation capable of identifying and prosecuting the offender.⁷¹ Similarly, in its judgment in the case of *Velasquez Rodriguez*, the Inter-American Court of Human Rights held that the state is obliged to investigate every violation of the rights protected by the Convention. Moreover, “[i]f the state apparatus acts in such a way that the violation goes unpunished... the state has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.”⁷² Thus, the state is obliged to investigate, try and punish every single violator of Convention rights.⁷³

Following the *Velasquez Rodriguez* ruling, we can conclude that by taking rights away from the accused, the state (albeit inadvertently) finds itself in breach of human rights, including of victims, even though paradoxically such measures were taken in the perceived interest of victims. Derogating from fair trial rights increases the possibility of convicting the wrong person⁷⁴, which in turn raises

⁶⁶ *Op. cit.*

⁶⁷ J. O’Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 Harv. Int’l LJ 295 (2005).

⁶⁸ R. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 NYUJ Int’l L & Pol. 485 at 489 (1995-1996).

⁶⁹ J. Miles *The Role of the Victim in the Criminal Process: Fairness to the Victim and Fairness to the Accused*, 19 Aust. Crim LJ 193 at 196 (1995).

⁷⁰ Article 8, UDHR; Article 13, ECHR

⁷¹ *Kaya v. Turkey*, Judgment of 19 February 1998, Reports of. Judgments and Decisions 1998-I, p. 329.

⁷² *Velasquez Rodriguez* case, Judgment of 21 July 1989, Series C, No. 4 (Honduras), para. 176.

⁷³ T. Antkowiak, *Truth as Right and Remedy in International Human Rights Experience*, 23 Mich. JIL 977 at 986 (2002).

⁷⁴ A. Ashworth, *Victims’ Rights, Defendants’ Rights and Criminal Procedure* in A. Crawford and

the other side of miscarriages of justice, which goes beyond a civil libertarian concern for the wrongly convicted individual, but also affects the victims: the individuals who actually committed the crime walk free.⁷⁵

5. MEETING VICTIMS NEEDS IN DOMESTIC AND INTERNATIONAL CRIMINAL PROCEDURE WITHOUT PREJUDICING THE RIGHTS OF THE ACCUSED

5.1. A RETURN TO 'SERVICE RIGHTS': INFORMATION, COUNSELLING AND VICTIM IMPACT STATEMENTS

Given the value to victims of a full and fair trial, and the impact that certain decisions taken in the interest of victims can have, we must attempt to find a way forward in criminal procedure which respects the dignity of individual victims without impacting on the fairness of the trial. Logically, it does not follow that victims' rights entail a trade-off between the rights of the accused and the rights of victims. Research has shown that, so long as they are treated with dignity and respect and kept fully informed as to what is going on, victims are content to leave decision control in the hands of authorities.⁷⁶

This suggests a return to service-based, as opposed to rights-based approaches to victims of criminal law⁷⁷ including keeping victims informed of developments in 'their' case, counselling and giving victim impact statements if the guilt of the accused has been proven.⁷⁸ Victims might then find that the system adequately serves them but without interfering with due process rights of the accused.⁷⁹

There is also a real need for education in the public sphere on the scope and purpose of victims' rights, so that those who are unfortunate enough to find themselves in the position of victim to a crime know what to expect. In an international context, this could be rolled out as part of the ICC's Outreach

J. Goodey (eds.), *Integrating a Victim Perspective within Criminal Justice: International Debates Says that Procedural Rights can corrupt Substantive and Procedural Justice Goals* (2000).

⁷⁵ R. Hogg, *Law and Order and the Fallibility of the Justice System* in D.B. Brown *et. al.*, *Criminal Laws*, 309 at 314 (1996), as cited in C. Walker and K. Starmer, *Miscarriages of Justice: A Review of Justice in Error* 79 (1999).

⁷⁶ J. Wemmers and K. Cyr, *Victims' Perspectives on Restorative Justice: How Much Involvement are Victims Looking For?*, 11 *International Review of Victimology* 259 (2003/2-3); U.N. Handbook, *supra* n. 9, p. 36; L. Henderson, *The Wrongs of Victims' Rights*, 37 *Stan. L. Rev.* 937 at 1010 (1985).

⁷⁷ See further, R. Zaubermen, *Victims as Consumers of the Criminal Justice System?* in A. Crawford and J. Goodey (eds.), *Integrating a Victim Perspective within Criminal Justice: International Debates* 37 (2000), and A. Ashworth, *The Criminal Process* 33-37 (1998) as cited in Saunders, *supra* n. 45 at 204.

⁷⁸ Though the *Bulger* case, *supra* n. 19, shows the need for information on the purpose and impact of the victim impact statement.

⁷⁹ Ashworth, *supra* n. 77, 37.

programme and the Victims Unit of the ECCC. This would serve to negate some of the angry reactions experienced to date, and mentioned in section 2.2 above, when victims' expectations are not met.

5.2. A RETURN TO 'SERVICE RIGHTS': COMPENSATION

In both domestic and international contexts, further acknowledgement of the victims' suffering after trial and sentencing could be provided by means of compensation, as envisaged by the UN Basic Principles.⁸⁰

The Rome Statute of the International Criminal Court established a Trust Fund for Victims, a body independent from the Court which is still in its infancy. The Trust Fund is to work with local communities falling under ICC jurisdiction to help the victims rebuild their lives.

In the trial proceedings of individual trials, if an accused person is convicted, victims may ask the Court to make an order of reparations for the harm they have suffered. The judges may order individual or collective reparations, which can be paid out of the Trust Fund. The type of reparations will also be decided by the judges and may include compensation, restitution, rehabilitation and symbolic measures such as public apology or a commemoration or memorial.

In the closing statements of the ECCC's first trial, a number of interesting suggestions were made, including the preservation of the historical site and documents, establishing a trust fund for victims, and that the accused should write an autobiography in prison and give the royalties to the civil parties.⁸¹

Granting compensation after the fact is beneficial in that it does not interfere with the presumption of innocence, or any other rights of the accused, and also insofar as it gives victims the chance to voice what they think appropriate restitution for the harm suffered. In the case of international tribunals, where there are usually many victims, not all of whom can be heard individually victims should also be asked for their opinions on forms of community reparations.

6. CONCLUSION

I hope to have illustrated in this article that a common-sense, respectful and 'service-based' approach to victims' rights is what is needed, both in domestic and international criminal justice systems. Such an approach ought to recognise the benefit to victims in granting the accused a fair trial and the dangers of derogating from age-old due process concepts, in the interests of 'rebalancing' the system or otherwise. It should equally pay deference to the victims' experiences and treat them with dignity and respect, without overburdening the trial process.

⁸⁰ *Supra* n. 1, Basic Principles 12 and 13.

⁸¹ *Prosecutor v. Kaing Guek Eav "Duch"*, Transcript of Trial Proceedings, Case No. 001/18-07-2007-ECCC/TC, 24 November 2009.