The Status of Victims at the Prospective International Criminal Law Section of the African Court of Justice and Human and Peoples' Rights: Comparative Analysis, Challenges and Perspectives Ahead

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Abstract

The introduction of an International Criminal Law Section (ICLS) to the prospective African Union (AU) African Court of Justice and Human and Peoples' Rights (ACJHR) has sparked academic debate. However, discussion of victims' status at the ACJHR-ICLS has been neglected. Victims' status as participants and reparation claimants, as provided for in the ACJHR Statute, is critically analysed. There are important gaps and limitations, especially concerning the victim participant status, and implementation challenges, particularly regarding the reparation claimant status. Recommendations to address normative problems and face future challenges are provided. The amended ACJHR-ICLS Statute is comparatively tested against *inter alia* the legal framework and practice of the International Criminal Court (ICC). The ICC Statute is relevant because the ACJHR Statute provisions on victims largely borrow from it. Additionally, despite some deficits, the ICC Statute and practice arguably

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constitute guiding standards to tackle complex victim-related issues at international/hybrid criminal tribunals (IHCTs).

Keywords

International criminal procedure; victim participation; reparations.

1. Introduction

Victims' status at IHCTs has traditionally been guided by retributive/deterrent justice in predominantly adversarial (common-law) proceedings.[1] This explains why victims had been relegated to the role of witnesses at the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). However, the ICC meant a pivotal change in victims' status at IHCTs. Guided by some elements of restorative justice to complement the retributive/deterrent justice paradigm and with the inclusion of inquisitorial (civil-law) features,[2] victims can also participate and claim reparations. This expansion of victims' status has been adopted at IHCTs created after the ICC. These include the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Extraordinary African Chambers in the Senegalese Courts (EAC) at which victims can be civil parties, and the Special Tribunal for Lebanon (STL) where victims can be participants. Specifically, the ACJHR-ICLS belongs to this trend in international criminal justice as victims can be not only witnesses but also victim

[1] Mark Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', 99 *Northwestern University Law Review* (2005) 600; Antonio Cassese, *International Criminal Law* (2nd edn, OUP, Oxford, 2008) pp. 366-377; Brianne McGonigle-Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, Amsterdam, 2011) pp. 33-165.

[2] Carolyn Hoyle and Leila Ullrich, 'New Court, New Justice? The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court', 12(4) *Journal of International Criminal Justice* (*JICJ*) (2014) 685-692; Anne-Marie de Brouwer and Mikaela Heikkilä, 'Victim Issues: Participation, Protection, Reparation, and Assistance', in Goran Sluiter et al., (eds.), *International Criminal Procedure. Principles and Rules* (OUP, Oxford, 2013) pp. 1337-1350 and 1366-1372.

participants and reparation claimants. Thus, victims' status at IHCTs arguably consists of up to three main dimensions: witnesses, participants (or civil parties), and reparation claimants.[3]

The present article discusses the status of victims as participants and reparation claimants at the ACJHR-ICLS because the incorporation of these two dimensions at the ACJHR-ICLS reflects the expansion of victims' status at IHCTs. As the practice of IHCTs evidences and relevant literature discusses, this process has been both positive and problematic. Whereas victim witnesses are "virtually indispensable"[4] as trials would be impossible without them,[5] whether and to what extent victim participation and reparations at IHCTs are necessary or advisable is open to debate. The focus on the status of victims as participants and reparation claimants helps to deepen critical analysis and better engage with relevant literature that has mainly discussed victim participation and reparations at IHCTs.

The expansion of victims' status in international criminal justice via the introduction of the victim participant status and reparation claimant status at IHCTs corresponds to a number of factors. As discussed by academic literature, responsiveness to victims' needs and concerns; international recognition of victims' rights in cases of mass atrocities, particularly rights to access to justice, protection, participation, reparations and truth; and pursuit of procedural justice (fairness) and substantive justice (outcomes) for victims underlie victims' status as participants and reparation claimants at IHCTs.[6] Restorative justice approaches and international human rights law have supported the importance of victim participation and

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[3] Mikaela Heikkilä, *International Criminal Tribunals and Victims of Crime* (Åbo Akademi, Åbo, 2004); De Brouwer and Heikkilä, *supra* note 2, pp. 1299-1374; Juan-Pablo Perez-Leon-Acevedo, *Victims' Status at International and Hybrid Criminal Courts* (Åbo Akademi, Åbo, 2014).

[4] William Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP, Cambridge, 2011) p. 358.

[5] Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence* (Intersentia, Amsterdam, 2005) p. 235.

[6] *See e.g.,* M. Cherif Bassiouni, 'International Recognition of Victims' Rights', 6(2) *Human Rights Law Review* (2006) 203-279; Brianne McGonigle-Leyh, 'Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls', 12(3) *International Criminal Law Review* (2012) 375-378, 381-385; De Brouwer and Heikkilä, *supra* note 2, pp. 1337-1350 and 1366-1372; Luke Moffett, 'Elaborating Justice for Victims at the International Criminal Court', 13(2) *JICJ* (2015) 284-288; Anni Pues, 'A Victim's Right to a Fair Trial at the International Criminal Court? Reflections on Article 68(3)', 13(5) *JICJ* (2015) 951-972.

reparations in (international) criminal justice.[7] Thus, victims' status as participants and reparation claimants has progressively become part and parcel of victims' status at IHCTs.

However, there have been increasingly more cautious or sceptical approaches that point out the limits and counter-productive effects of an enhanced victims' status at IHCTs. These critiques are not only theoretical but also address problems of the legal framework and practice of IHCTs. Relevant literature has examined the said legal sources and is illustrative to identify the contours of victims' status at the ACJHR-ICLS and whether victims' status as participants and reparation claimants should exist at the ACJHR-ICLS. These two dimensions of victims' status at IHCTs have faced a series of objections and/or challenges. Important deficits to meet both victims' expectations and victim-oriented goals have been identified.[8] Moreover, concerns about the negative impact of an expanded victims' status on both the accused's right to a fair, public, impartial and expeditious trial as well as efficient and effective proceedings have arguably taken centre stage.[9] Additionally, some inconsistent or heterogeneous ICC/IHCTs practices have led to legal uncertainty or unpredictability.[10] Furthermore, the need to better place IHCTs alongside other mechanisms, which require state cooperation and involvement, has been highlighted as essential to provide meaningful justice to victims considering the intrinsic limits of IHCTs.[11] As the prospective ACJHR-ICLS is

[7] *See* McGonigle-Leyh, *supra* note 1, pp. 33-64 and 93-130; Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge, Milton Park, 2014) pp. 41-53.

[8] *See e.g.*, Eric Stover et al., 'Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of the Cambodia', 93 *International Review of the Red Cross* (2011) 503-546; Mariana Pena and Gaelle Carayon, 'Is the ICC Making the Most of Victim Participation?', 7(3) *International Journal of Transitional Justice* (2013) 518-535.

[9] *See e.g.*, Salvatore Zappalà, 'The Rights of Victims v. the Rights of the Accused', 8(1) *JICJ* (2010) 137-164; Christine Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', 44(1) *Case Western Reserve Journal of International Law* (2011) 475-496; McGonigle-Leyh, *supra* note 6, 394-407; Sergey Vasiliev, Victim Participation Revisited—What the ICC is Learning about Itself?, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP, Oxford, 2015) pp. 1133-1202.

[10] Hoyle and Ullrich, *supra* note 2, 688; Vasiliev, *supra* note 9, pp. 1200-1202.

[11] *See e.g.*, Moffett, *supra* note 7, pp. 143-195; Conor McCarthy, 'The Rome Statute's Regime of Victim Redress', in Stahn, *supra* note 9, pp. 1211-1222; Lorna McGregor, 'An Integrated System of National and International Remedies for Crimes under International Law', 14(1) *JICJ* (2016) 239-251.

part of IHCTs and the international legal order, victims' status at the ACJHR-ICLS needs to be examined bearing in mind the above-mentioned considerations.

This article first critically discusses justice for victims at IHCTs, the ACJHR-ICLS and the use of a comparative approach. Then, sections 3 and 4, respectively, examine victims' status as participants and reparation claimants at the ACJHR-ICLS as provided for in the amended ACJHR Protocol/Statute. A comparative analysis is used by critically considering *inter alia* the ICC Statute, Rules of Procedure and Evidence (RPE) and practice.

2. Justice for Victims at IHCTs, the ACJHR-ICLS, and Use of a Comparative Approach

2.1. *Justice for Victims*

Whether victim participation at IHCTs to voice victims' views and concerns actually constitutes restorative justice may be questioned. Restorative justice is "a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of that offence and its implications for the future".[12] Restorative justice includes out-of-court practices such as family group conferencing, victim-offender mediation and peace-making circles.[13] In turn, retributive justice focuses on the relationship between culpability and proportional punishment,[14] and deterrent justice prioritizes utilitarian benefits of criminal

[12] Tony Marshall, 'Restorative Justice: An Overview', Report by the Home Office Research and Development Statistics Directorate (1999) p. 5.
[13] *See* Elmar Weitekamp, 'Reparative Justice: Towards a Victim Oriented System', 1 *European Journal of Criminal Policy Research* (1993) 81-84; McGonigle-Leyh, *supra* note 1, p. 54.
[14] Loretta Stalans and Julian Roberts, 'Retribution', in Richard Wright and J. Mitchell Miller (eds.), *Encyclopedia of Criminology, Vol 3*. (Routledge, New York, 2005) p. 1431.

justice.[15] Unlike these justice paradigms, restorative justice recognises victims and their needs as key elements and procures to redress the harm inflicted on victims.[16]

Diverging from traditional approaches, some have proposed that retributive and restorative justice are not necessarily incompatible and may be reconciled.[17] Although there is no consensus on such integration, court proceedings can incorporate some restorative justice elements.[18] However, IHCTs are predominantly led by retributive/deterrent justice and are focused on the offender.[19] Thus, even though victim participation at IHCTs is not as such restorative justice, it may be conceivably guided by some adapted elements of restorative justice or restorative-oriented justice.

Victims' status as reparation claimants at IHCTs arguably presents a higher level of restorative justice than victim participation. When victims claim reparations at IHCTs, they are authentic parties and not mere participants.[20] Victims' status as reparation claimants at IHCTs may to an important extent adapt and implement key premises of restorative justice,[21] namely placing victims at the centre stage and aiming to redress the harm caused to them.[22]

A second question is whether IHCTs should even attempt to deliver (some) restorative justice. Powerful arguments caution against it. These include: disruption of efficient and

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[15] Aleksandar Fatić, *Punishment and Restorative Crime-Handling*, (Avebury Publishers, Aldershot, 1995) p. 1.
[16] Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice*, (1st edn, Herald Press, Scottsdale, 1990) pp. 212-214.
[17] Lucia Zedner, 'Reparation and Retribution: Are They Reconcilable?' 57(2) *Modern Law Review* (1994) 228-250; Antony Duff, 'Restorative Punishment and Punitive Restoration' in Lode Walgrave (ed.), *Restorative Justice and the Law* (Willan Publishing, Portland, 2002) pp. 82, 97.
[18] Hoyle and Ullrich, *supra* note 2, 688.
[19] *Ibid.*; Valentina Spiga, 'No Redress without Justice-Victims and International Criminal Law', 10(5) *JICJ* (2012) 1389.
[20] Zappalà, *supra* note 9, 154; Pena and Carayon, *supra* note 8, 525, footnote 43; *Prosecutor v. Lubanga*, Decision on the Admissibility of the Appeals Against Trial Chamber I's "Decision Establishing the Principles and Procedures to be Applied to Reparations" and Directions on the Further Conduct of Proceedings, Appeals Chamber, No. ICC-01/04-01/06-2953, 14 December 2012, para. 67.
[21] *See* Eva Dwertmann, *The Reparation System of the International Criminal Court. Its Implementation, Possibilities and Limitations* (Martinus Nijhoff, Leiden, 2010) pp. 37-44; Vasiliev, *supra* note 9, pp. 1136-1137, 1176.
[22] Randy Barnett, 'Restitution: A New Paradigm of Criminal Justice', 87(4) *Ethics* (1977) 287-291; Zehr, *supra* note 16, pp. 212-214.

effective proceedings,[23] presence of uncertain and inconsistent judicial practices and interpretation,[24] negative impact on the accused's right to a fair and impartial trial,[25] and counter-productive effects by not meeting victims' expectations and victim-oriented goals.[26]

Thus, adoption of victim-oriented measures guided by restorative justice at IHCTs is subject to limitations and the IHCTs must be aware thereof and adopt appropriate and timely safeguards. Effectiveness, understood as attainment of goals, of IHCTs may be enhanced if victim-related goals are met.[27] However, this should neither compromise the overall effectiveness of IHCTs concerning achievement of other goals nor affect their efficiency, i.e., realising goals but without incurring considerable costs.[28] IHCTs must increasingly consider victims' interests vis-à-vis other competing interests and rights, mainly accused's rights, efficiency and effectiveness.[29] Before the post-conviction reparation stage, the accused's rights should prevail in case of conflicts with victims' rights and interests.[30]

Nevertheless, IHCTs cannot arguably be based exclusively on retributive/deterrent justice but should be also guided by some elements of restorative justice.[31] Indeed, harsh criticism on the absence of provisions on victim participation and reparations at the ICTY/ICTR, where victims as witnesses lacked independence, prompted the introduction of victim participation and reparations at the ICC.[32] IHCTs normally claim that the pursuit of justice for victims constitutes one of their purposes.[33] Although some ambiguity about who are the beneficiaries remains, victims may be considered as the most prominent beneficiaries

[23] Van Den Wyngaert, *supra* note 9, 493.
[24] Hoyle and Ullrich, *supra* note 2, 688; Vasiliev, *supra* note 9, pp. 1200-1202.
[25] *Ibid*., p. 1140.
[26] De Brouwer and Heikkilä, *supra* note 2, pp. 1346-1347.
[27] Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP, Oxford, 2014) pp. 1-30 and 232-233.
[28] *Ibid*., pp. 27-29 and 223-237.
[29] De Brouwer and Heikkilä, *supra* note 2, pp. 1337-1341 and 1349.
[30] Zappalà, *supra* note 9, 137; McGonigle-Leyh, *supra* note 1, pp. 360-362.
[31] *Ibid*., pp. 1349-1350; Pena and Carayon, *supra* note 8, 519-527.
[32] David Donat-Cattin, 'Article 68–Protection of Victims and Witnesses and Their Participation in the Proceedings', in Otto Triffterer and Kai Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (3rd edn, C.H.Beck/Nomos/Hart, Munich/Oxford/Baden-Baden, 2016) pp. 1684-1686.
[33] *E.g*., ICC Prosecutor, Statement following an application seeking an adjournment of the provisional trial date in *Kenyatta*, 19 December 2013.

due to the harm inflicted on them.[34] IHCTs are expected to step in only when national justice has not been rendered and may actually constitute the last resource for victims to effectively exercise their rights to justice and reparations.[35] By doing so, victims may importantly and additionally assist IHCTs in truth finding.[36]

Normatively, victim participation and reparations at IHCTs are consistent with robust national and international developments. Victims' rights to access to justice, protection, participation, reparations and the truth in criminal proceedings have been recognised to a greater or lesser extent under international human rights law sources, particularly international instruments,[37] and case-law of human rights courts.[38] These sources, however, need to be adapted to the particularities of IHCTs.[39]

In any event, the IHCTs should be aware of their intrinsic limited mandate as they are not reparations programmes or truth commissions.[40] Related to restorative justice, transitional justice may be useful to address some limitations of retributive/deterrent justice as it involves international and domestic judicial and non-judicial mechanisms such as prosecutions, reparations and truth seeking to deal with serious abuses to 'ensure accountability, serve justice and achieve reconciliation'.[41] There is thus a need for state action to punish

[34] Moffett, *supra* note 7, p. 40.
[35] Cécile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy', 10(5) *JICJ* (2012), 1357-1375; McCarthy-2015, *supra* note 11, pp. 1211-1216.
[36] Pena and Carayon, *supra* note 8, 523-525; Vasiliev, *supra* note 9, p. 1202; *Prosecutor v. Katanga and Chui*, Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Pre-Trial Chamber I (Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, para. 104.
[37] *E.g.*, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/Res/40/34/Annex (1985) (Victims' Declaration); *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*, adopted by UN General Assembly resolution 60/147 of 16 December 2005 (UN Reparation Principles); Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. .
[38] E.g., *Kelly and Others v. United Kingdom*, 4 August 2001, European Court of Human Rights (ECtHR), App. No. 30054/96; *Blake v. Guatemala*, 24 January 1998, Inter-American Court of Human Rights (IACtHR), Series C No. 36.
[39] McGonigle-Leyh, *supra* note 1, p. 20.
[40] McGonigle-Leyh, *supra* note 6, 407.
[41] UN Security Council, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary General, S/2004/616, 23 August 2004, para. 8.

perpetrators, give voice to victims, and redress harm under international responsibility.[42] IHCTs cover only violence which meets legal definitions of victims and crimes and, therefore, much mass violence and many victims fall short of the realm of IHCTs.[43]

Ensuring a feasible legal framework to victims' status at the ACJHR-ICLS and subsequent related case-law may be pivotal for the success of the ACJHR-ICLS and among victims. Victims and their communities are arguably among the most important constituencies of international criminal justice.[44]

2.2. *The ACJHR-ICLS*

The Protocol on the ACJHR Statute, not yet in force, is subject to amendments under the Protocol on Amendments to the Protocol on the ACJHR Statute, which adds an ICLS to the ACJHR.[45] The ACJHR also has General Affairs and Human Rights Sections.[46] Whether the ACJHR Protocol and annexed ACJHR Statute will enter into force is unclear, as 15 ratifications are required.[47] As of 31 March 2017, nine states have signed it; however, no ratification has been filed.[48] References herein correspond to the amended ACJHR Protocol/Statute.

The ACJHR-ICLS presents Pre-Trial, Trial and Appeals Chambers and jurisdiction over international, transnational and some serious domestic crimes.[49] Sources on victims' status largely stem from contexts of war crimes, crimes against humanity and genocide.

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[42] Moffett, *supra* note 6, 296-309; McCarthy, *supra* note 11, pp. 1203-1222.
[43] Moffett, *supra* note 7, p. 54.
[44] *Ibid*., p. 40; Aptel, *supra* note 35, 1373-1375.
[45] *See respectively* Protocol on the Statute of the African Court of Justice and Human Rights, AU Assembly, AU doc. Assembly/AU/Dec.196(XI), 1 July 2008; Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, AU Assembly, AU doc. Assembly/AU/Dec.529(XXIII), 27 June 2014.
[46] *See* ACJHR Protocol, Art. 3; ICC Statute, Art. 1.
[47] ACJHR Protocol, Art. 11.
[48] *See* <www.au.int/en/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_19.pdf>.
[49] ACJHR Statute, Arts. 19*Bis*, 28A-28M.

However, the analysis herein applies to victims' status relating to any crime under the ACJHR-ICLS's jurisdiction.

The incorporation of the ACJHR-ICLS to the ACJHR corresponds to the particular legal and political context experienced in the AU and Africa in recent years. The creation of the ACJHR-ICLS took place in a scenario in which African leaders and the AU have shown opposition to the ICC. This has been portrayed or justified as a reaction to the focus of the ICC on Africa understood as alleged neo-colonialism, and/or the need for African solutions to African problems.[50] Perception of the ICC prosecution as selective and the need to have an AU organ to prosecute high-level perpetrators for *inter alia* serious crimes outside the ICC jurisdiction illustrate so.[51]

However, only after the ICC started targeting the sitting heads of states and/or high state officials of Sudan and Kenya, did the AU member states backlash against the ICC, ignored their obligations (as parties to the ICC Statute) to cooperate with the ICC to *inter alia* arrest Sudanese President Al-Bashir when visiting African states, and even some AU member states withdrew or threatened to withdraw from the ICC.[52] In this context, the AU introduced the ACJHR-ICLS to *inter alia* counter the ICC. This is demonstrated by the provision on immunities for sitting heads of states and high state officials (ACJHR Statute, Article 46A*Bis*),[53] and no references to the ICC and the principle of complementarity in the ACJHR Protocol/Statute.[54] This casts serious doubts on the AU's undertaking to fight against

[50] Theresa Reinold, 'Constitutionalization? Whose constitutionalization? Africa's ambivalent engagement with the International Criminal Court', 10(4) *International Journal of Constitutional Law* (2012), 1076, 1092-1093; Matiangai Sirleaf, 'Regionalism, Regime Complexes, and the Crisis in International Criminal Justice', 54(3) *Columbia Journal of Transnational Law* (2016) 772.

[51] Manisuli Ssenyonjo and Saidat Nakitto, 'The African Court of Justice and Human and Peoples' Rights 'International Criminal Law Section': Promoting Impunity for African Union Heads of State and Senior State Officials?' 16(1) *International Criminal Law Review* (2016) 78-85.

[52] Amnesty International (AI), *Malabo Protocol. Legal and Institutional Implications of the Merged and Expanded African Court* (AI, London, 2016) pp. 9-12; Max du Plessis, *Implications of the AU Decision to Give the African Court Jurisdiction over International crimes* (Institute for Security Studies, Pretoria, 2012) pp. 9-10.

[53] Dire Tladi, 'The Immunity Provisions in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff', 13(1) *JICJ* (2015) 3-17.

[54] Du Plessis, *supra* note 52, p. 10; AI, *supra* note 52, pp. 22-23.

impunity.[55] The broad jurisdiction and limited resources of the ACJHR-ICLS further complicate its situation.[56]

These are crucial legal and policy issues. Nevertheless, victims' status at the ACJHR-ICLS has been ignored in literature. That the ACJHR Statute is not yet in force does not diminish the need for discussing it because analysis of prospective IHCTs has taken place prior to the beginning of their activities. Discussion on the ACJHR-ICLS has become necessary considering the actual or potential withdrawal from the ICC by some African states. The ACJHR-ICLS may fill the vacuum which the ICC would potentially leave. Discussion on victims' status at the ACJHR is necessary to identify gaps to suggest proposals. Doing so timely is relevant because infra-statutory instruments are to be adopted at the ACJHR-ICLS.

The ACJHR-ICLS presents positive aspects as it brings criminal jurisdiction at international level closer to victims and may immediately access crime locations,[57] which "could increase its legitimacy and credibility with Africans".[58] Consideration of regional/local traditions on victims should be welcomed.[59] Indeed, the AU-backed EAC, which convicted the former Chadian dictator Hissène Habré,[60] is a promising example of the AU's initiatives. Nevertheless, important gaps in and limitations to victims' status in the ACJHR Statute exist in light of IHCTs sources.

Under the ACJHR Protocol's Preamble, AU member states are committed to protect human rights under regional and international instruments; accept the AU's right to intervene in international crimes contexts; and reiterate their respect for human rights, the "sanctity of

[55] Ssenyonjo and Nakitto, *supra* note 51, 100
[56] *Ibid*., 86-90.
[57] Chacha-Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' 9(5) *JICJ* (2011) 1085.
[58] Sirleaf, *supra* note 50, 770.
[59] Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (CUP, Cambridge, 2009).
[60] *Prosecutor v. Habré*, Judgment, EAC, 30 May 2016.

human life", the "condemnation and rejection of impunity", and the "commitment to fighting impunity".[61] The Preamble refers to complementing national and regional institutions in the prevention of and accountability for serious human rights violations.[62]

However, the ACJHR Protocol's Preamble includes no reference to victims of international crimes. This sharply contrasts with the explicit recognition of victims under the ICC Statute's Preamble. The said omission may cast doubts on whether justice for victims is central to the ACJHR Protocol/Statute. Research on the ACJHR has not yet examined whether restorative justice for victims is a ground for regional prosecution in Africa, as retributive/deterrent justice attracts most attention.[63] Nevertheless, considering the ACJHR Statute provisions on victims, the future ACJHR-ICLS arguably belongs to the above-mentioned trend of an enhanced victims' status.

Like the situation of the ICC demonstrates,[64] the ACJHR-ICLS should not be regarded as a panacea to solve victim problems as it is only a mechanism among others to deliver some quota of justice to victims of crimes under its jurisdiction. Active involvement of AU member states is required to implement other transitional justice initiatives.

2.3. *Using a Comparative Approach*

In principle, the use of the ICC legal framework and practice as guidelines and standards, as complemented by references to other IHCTs where relevant may be justified for the following. First, as evidenced throughout this article, the drafters of the ACJHR Statute transplanted or 'drew inspiration from' several ICC Statute provisions on victim participation and reparations at the ACJHR-ICLS.

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[61] ACJHR Protocol, Preamble, paras. 5, 9-12.
[62] *Ibid*., para. 17.
[63] Ademola Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', 24(3) *EJIL* (2013) 936; Sirleaf, *supra* note 50, 770.
[64] Moffett, *supra* note 7, pp. 281-286.

Second, the list of sources applicable by the ACJHR (ACJHR-ICLS included) incorporates "legal instrument[s] relating to human rights" and "international law".[65] The ICC applies international human rights law sources,[66] and the interpretation and application of the ICC law "must be consistent with internationally recognized human rights".[67] International human rights law has been a driving force for victim participation and reparations at IHCTs/ICC.[68] Moreover, the ICC instruments belong to 'international law'.

Third, by applying the ICC sources on victims' status, the ACJHR-ICLS would arguably contribute towards interpretative coherence across IHCTs.[69] These legal sources have been developed for a number of years and arguably constitute international criminal procedure principles and rules.[70] Neglecting these sources would demand the ACJHR-ICLS to spend its limited resources in legally crafting victim participation and reparations. Since an important number of African states are parties to the ICC Statute, the adapted use of ICC sources on victims' status by the ACJHR-ICLS may be a catalyst for domestic implementation of the ICC Statute across Africa. Indeed, that the AU-backed EAC's legal framework and practice in *Habré* considered ICC sources on victims and international criminal (procedural) law speaks volumes of the standing of these sources at the AU justice initiatives. Victim participation in *Habré* strongly suggests the need to consider IHCTs sources when the ACJHR-ICLS Rules are drafted and the ACJHR-ICLS decides on victim-related issues.

Fourth, following certain ICC/IHCTs sources on victims' status may help to enhance sociological legitimacy, i.e., whether the court is perceived (or believed) to be legitimate, and normative legitimacy, i.e., whether the court objectively meets normative criteria or

[65] ACJHR Statute, Art. 28(c), (e).
[66] ICC Statute, Art. 21(1)(b).
[67] *Ibid*., Art. 21(3).
[68] Pena and Carayon, *supra* note 8, 519.
[69] *See* Philippa Webb, *International Judicial Integration and Fragmentation* (OUP, Oxford, 2010) pp. 5-6.
[70] *See* De Brouwer and Heikkilä, *supra* note 2, pp. 1350-1352 and 1370-1373.

standards,[71] of the ACJHR-ICLS. Concerning sociological legitimacy, empirical studies show how important is for victims and their communities to participate and receive reparations at IHCTs.[72] As for normative legitimacy, doing justice for victims has become an important goal of IHCTs and, furthermore, victim standards from restorative justice, transitional justice, and international human rights law have increasingly influenced IHCTs.[73] Albeit conceptually distinct, these types of legitimacy are interrelated.[74]

Nevertheless, the use of ICC/IHCTs sources as standards by the ACJHR-ICLS must be accompanied with some cautionary notes. First, the use of case-law or instruments of one international court by another one should not be automatic as attention must be paid to differences determined by factors such as the respective legal frameworks.[75] ICC Statute provisions in the ACJHR Statute do not mean that the ACJHR "will necessarily build upon their existence".[76] Mechanical transplantation of international sources on victims should be avoided as the ACJHR-ICLS has specific proceedings,[77] and operates within a particular context. Second, institutionally the ICC and the ACJHR-ICLS are different: an independent criminal court *vis-à-vis* a criminal chamber imbedded in a regional court with the broadest mandate in the international judiciary. Third, the ACJHR-ICLS has a considerably wider subject-matter jurisdiction (international, transnational and some serious domestic crimes) than that of the ICC (international crimes). This is likely to impact on several matters such as the number of victims and resources needed. Fourth, the differences in institutional scope

[71] Silje Langvatn and Theresa Squatrito, 'Conceptualizing and Measuring the Legitimacy of International Criminal Tribunals', in Nobuo Hayashi and Cecilia Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (CUP, Cambridge, 2017) p. 43.
[72] *E.g.*, Stover et al., *supra* note 8; Human Rights Center, *The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court* (Berkeley Law School. Berkeley, 2015); Rachel Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia', 16(1) *International Criminal Law Review* (2016) 1-38; Stephen Smith-Cody, 'Procedural Justice, Legitimacy, and Victim Participation in Uganda', in Hayashi and Bailliet, *supra* note 71, pp. 376-397.
[73] Moffett, *supra* note 7, pp. 39-50.
[74] Langvatn and Squatrito, *supra* note 71, p. 44.
[75] *See Prosecutor v. Lubanga*, Decision Regarding the Practices used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Pre-Trial Chamber I, No. ICC-01/04-01/06-1049, 30 November 2007, para. 44.
[76] AI, *supra* note 52, p. 15.
[77] *Ibid*.

between the ACJHR (regional) and the ICC (international) may be reflected on funding. Fifth, the ACJHR Statute contains a sort of list of applicable legal sources (relevant to all ACJHR sections) that differs from the ICC's albeit some similarities.[78]

Importantly, although the ICC instruments and practice on victim participation and reparations can provide principles and standards concerning victims' status at the ACJHR-ICLS, attention must be paid to the flaws and limitations of the said ICC sources. Whether the ICC practices should and can effectively deliver certain degree of restorative justice to victims has been put into question due to *inter alia* intrinsic legal framework and institutional constraints, limited available resources, and the nature of international criminal proceedings.[79] The scope of victims' status, particularly victim participation, at the ICC remains subject to judicial discretion.[80] This relates to ICC case-by-case heterogeneous approaches that lead to uncertainly and legal unpredictability due to the absence of more coherent and global principles and practices.[81] This has translated into frustration among victims for unfulfilled promises of justice and could cause secondary victimization,[82] i.e., further victimisation stemming from "arbitrary, cynical and non-empathic treatment of a case in criminal court".[83]

ICC practice that has excessively enhanced victims' status, particularly as participants, has come under criticism. Not only can such practice arguably affect to a greater or lesser extent the accused's right to a fair and impartial trial,[84] but it has become a challenge to the efficient work of the ICC.[85] Concerning reparations, ICC practice aiming to go beyond

[78] ACJHR Statute, Art. 28; ICC Statute, Art. 21.
[79] *See* Hoyle and Ullrich, *supra* note 2, 685-699; Pena and Carayon, *supra* note 8, 518-535.
[80] *See* Spiga, *supra* note 19, 1389; Pues, *supra* note 6.
[81] Vasiliev, *supra* note 9, pp. 1200-1202.
[82] De Brouwer and Heikkilä, *supra* note 2, pp. 1346-1347, 1370.
[83] Mina Rauschenbach and Damien Scalia, 'Victims and International Criminal Justice: A Vexed Question?', 90 *International Review of the Red Cross* (2008) 445.
[84] McGonigle-Leyh, *supra* note 6, 394-404; Vasiliev, *supra* note 9, p. 1140.
[85] Van Den Wyngaert, *supra* note 9, 493; McGonigle-Leyh, *supra* note 6, 404-407.

restorative justice to achieve transformative justice,[86] namely transforming social structures that led to crimes, is also problematic because this exceeds the mandate of the IHCTs, would be quite hard to achieve, and may be counter-productive.[87]

Therefore, ICC sources should not be considered as the 'holy grail' when used to inform the prospective ACJHR-ICLS. ICC/IHCTs provisions and case-law that better integrate victims' status with competing rights and interest such as certainty, accused' rights and efficiency should be preferred.[88] In any event, as guiding standards and/or as a cautionary tale, the ICC/IHCTs sources on victims should be considered to shed light on what to do and not to do when the ACJHR-ICLS crafts victims' status and faces related-challenges.

3. Victims as Participants at the ACJHR-ICLS

3.1. *Victim Participation at Stake*

Victim participants (ICC, STL) and civil parties (ECCC, EAC) constitute the participatory dimension of victims' status at IHCTs. While victim participants present their views and concerns, civil parties support the prosecution and seek reparations.[89] To be participants or civil parties, victims must apply for and be granted it. Once admitted, civil parties, unlike victim participants, are not subject to judicial authorization to participate.[90] This relates to the difference in status between participants and parties. Nevertheless, procedural rights/participation modalities are similar.

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[86] *E.g.*, *Prosecutor v. Lubanga*, Order for Reparations, Appeals Chamber, No. ICC-01/04-01/06-3129-AnxA, 3 March 2015, paras. 34, 43.
[87] Hoyle and Ullrich, *supra* note 2, 692-699.
[88] *See* De Brouwer and Heikkilä, *supra* note 2, pp. 1337-1354, 1365-1375.
[89] ICC Statute, Art. 68(3); ECCC Rules, Rule 23(1).
[90] *Prosecutor v. Nuon Chea*, Decision on Civil Party Participation in Provisional Detention Appeals, Pre-Trial Chamber, No. 002/19-09-2007-ECCC/OCIJ, 20 March 2008, para. 49.

Unlike the ICC and STL Statutes, the ACJHR Statute lacks a general, explicit provision enabling victim participation to voice the views and concerns of victims at the ACJHR-ICLS. Under Article 68(3) of the ICC Statute, when victims' personal interests 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".[91]

The absence of a provision on general victim participation in the ACJHR Statute prompts to question about the existence and scope thereof at the ACJHR-ICLS. Notwithstanding the said absence, some ACJHR Statute provisions explicitly state or suggest the existence of a limited victim participant status at the ACJHR-ICLS. Under Article 46G(3) of the ACJHR Statute (ICC Statute, Article 15(3)), the Prosecutor can request the Pre-Trial Chamber to authorize an investigation and "victims may make representations to the Pre-Trial Chamber". Therefore, Article 46G(3) provides for victim participation before the Pre-Trial Chamber, but only limited to the above-mentioned proceeding.

Under the ICC Statute, there are two victim participation regimes.[92] First, Articles 15(3) and 19(3) allow victim participation without application, but limited to jurisdiction and admissibility proceedings.[93] Second, under Article 68(3), there is a general victim participation regime, conditioned to a successful application for the 'official' victim participant status.[94] This regime has led to broad victim participation across procedural stages.

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[91] *See* also STL Statute, Art. 17.

[92] Elisabeth Baumgartner, 'Aspects of Victim Participation in the Proceedings of the International Criminal Court', 90 *International Review of the Red Cross* (2008) 412-413.

[93] *E.g.*, *Situation in Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, No. ICC-01/09-19, 31 March 2010.

[94] In the Kenyan trials, registration was sufficient unless appearing before the ICC.

Victim participation at the ACJHR is only explicitly present in Article 46G(3) proceedings. However, Article 22B(9)(a) prescribes protective measures for "victims who appear before the Court". This clause is absent from the ICTY/ICTR instruments under which victims can be only witnesses. Indeed, it was taken from the ICC Statute (Article 43(6)) under which a general victim participation regime exists. Moreover, Article 22B(9)(a) suggests the need to equip the ACJHR-ICLS with specialized organs to represent victims when participating. The ICC Statute makes no mention of these organs as these were established later by infra-statutory provisions.[95] Therefore, on a systematic and comparative reading of Article 22B(9)(a), the above-mentioned clause would imply the dormant, potential existence of a general victim participation regime to be activated.

Additionally, victims under Article 45(3) of the ACJHR Statute (ICC Statute, Article 75(4)) can claim reparations at the ACJHR-ICLS. As reparations are conditioned to conviction, reparation proceedings take place after it. Nevertheless, under the ICC sources, for procedural economy, victim participants can present evidence on reparations during trial before conviction.[96] The ICC allows for this but accused's rights, particularly the presumption of innocence, should be respected.[97] Such victim participation corresponds to victims' personal interest in seeking reparations.

However, under the ICC case-law, victim participants' personal interests are not limited to reparations but include the rights to justice and the truth.[98] Because of the lack of a general victim participation provision in the ACJHR Statute, victims' underlying personal interests and rights may be affected. As drafted, the ACJHR Statute only authorises victim participation in the above-mentioned proceedings.

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[95] RC, Regulations 81, 86(9).
[96] Regulation 56; *Prosecutor v. Bemba*, Corrigendum to Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings, Trial Chamber III, No. ICC-01/05-01/08-807-Corr, 12 July 2010, paras. 30-40.
[97] *Ibid.*, para. 28.
[98] *Katanga and Chui*, *supra* note 36, paras. 32-38.

3.2. *Introducing a General Victim Participation Regime*

The value and goal of victim participation underlies the need for a general victim participation regime at the ACJHR-ICLS. An important point is the objective to provide some quota of restorative justice to victims via participation and, thus, recognize victims and help them to heal as opposed to an exclusive focus on retributive justice, i.e., conviction.[99] Empirical studies evidence the importance given by victims to participation at IHCTs, especially when their respective states are unwilling or unable to prosecute and punish those responsible.[100] However, the unique features of IHCTs require a necessary adaptation of restorative justice to criminal proceedings predominantly driven by retributive/deterrent justice.[101]

Thus, the introduction of a general victim participation regime must pay attention to the accused's rights and the need for efficient proceedings. Notwithstanding concerns about victim participation at IHCTs, it is not victim participation as such but an over-extensive victim participation regime that may breach the accused's rights or affect efficient proceedings.[102] In turn, equipping the ACJHR-ICLS with a general victim participation regime is consistent with and important to implement victims' right to justice in cases of mass atrocities.[103] Exclusion of victim participation from IHCTs would be problematic under a human rights-based approach.[104] Furthermore, cases at IHCTs stem from national contexts in which victims' access to justice has been generally non-existent or quite limited.[105]

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[99] Gilbert Bitti and Håkan Friman, 'Participation of Victims in the Proceedings,' in Roy Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Ardsley, 2001) pp. 456-459; War Crimes Research Office, *Victim Participation at the Case Stage of Proceedings*, (American University, Washington DC, 2009) p. 3; Pena and Carayon, *supra* note 8, 522-523.
[100] *See* empirical studies referred to in *supra* note 72.
[101] *See* Vasiliev, *supra* note 9, p. 1176.
[102] De Brouwer and Heikkilä, *supra* note 2, p. 1340.
[103] Bassiouni, *supra* note 6, 239; Donat-Cattin, *supra* note 32, p. 1686; Moffett-2015, *supra* note 6, 288.
[104] De Brouwer and Heikkilä, *supra* note 2, p. 1340.
[105] Aptel, *supra* note 35.

A related and important ground to consider is the right to truth, i.e., victims' right to know the truth about crimes.[106] This right is recognized in international law sources,[107] and is coherent with restorative-oriented justice and transitional justice.[108] The ICC Chambers have grounded victim participation on the assistance that victim participants may provide to the role of the ICC/IHCTs to determine the truth.[109] As victims experienced and have knowledge of the specific circumstances of the case, a participation regime may result in helpful assistance to judges by providing insights. Thus, victims can also contribute to the fight against impunity relating to mass atrocities pursued by IHCTs.

Concerning the feasibility of introducing general victim participation at the ACJHR-ICLS, the ACJHR Statute *travaux préparatoires* would serve to determine why the drafters included no explicit provision. Nevertheless, unlike the drafting history of the ICC Statute, that of the ACJHR Statute lacked transparency as there was limited consultation with legal experts in AU member states and civil society.[110] This arguably undermines the legitimacy of the ACJHR Statute provisions on victims. Had victims and organisations such as human rights NGOs representing them been actively consulted to know and consider their perspectives, a more victim-friendly instrument would most likely have been drafted. Victim participation would have been *lex lata* better safeguarded.

The 2014 Draft Protocol on Amendments to the ACJHR Statute adopted by the AU Specialized Technical Committee on Justice and Legal Affairs contained no general victim

[106] Bassiouni, *supra* note 6, 260.
[107] UN Reparation Principles, *supra* note 37, principle 22(b); *Barrios Altos v. Peru*, 14 March 2001, IACtHR, Series C No. 75, paras. 47-49; *Cyprus v. Turkey*, 10 May 2001, ECtHR, App. No. 25781/94, para. 156.
[108] Dermot Groom, 'The Right to Truth in the Fight Against Impunity', 29(1) *Berkeley Journal of International Law* (2011) 189; International Center for Transitional Justice (ICTJ), *What is Transitional justice?* (ICTJ, New York, 2009).
[109] *Prosecutor v. Lubanga*, Judgment on the Appeals of the Prosecutor and The Defense against Trial Chamber I's Decision, on Victims' Participation of 18 January 2008, Appeals Chamber, No. ICC-01/04-01/06-1432, 11 July 2008, paras. 95-96.
[110] Du Plessis, *supra* note 52, p. 1.

participation provision.[111] The Assembly of the AU Heads of State and Government (AU Assembly) adopted the Draft Protocol in June 2014, calling on member states to sign and ratify the Malabo Protocol "as expeditiously as possible so as to enable them to enter into force".[112] To the author's knowledge, there is no public, official record on the absence of a general provision on victim participation. However, the intention of the drafters to bring in the victim participant status beyond Article 46G(3) participation might partially be inferred from Article 22B(9)(a), which mentions "protective measures", "counselling" and "other appropriate assistance" to "victims who appear before the Court".

In any event, for certainty and a meaningful participation regime, it is necessary to introduce a general victim participation provision through an amendment to the ACJHR Statute by the AU Assembly.[113] Such provision should consider Article 68(3) of the ICC Statute for content since this article acknowledges victims' needs to voice their views and concerns when their personal interests are affected, but subject to appropriateness, accused's rights, and a fair and impartial trial. Additionally, the ACJHR-ICLS may build on the ICC case-law developed over ten years. Article 68(3) has actually transcended the ICC. Article 17 of the STL Statute largely mirrors it and the STL has benefited from the ICC jurisprudence for interpretation.[114]

An alternative is the adapted inclusion of the contents of Article 68(3) in the future ACJHR Rules. Under Article 27 of the ACJHR Statute, the ACJHR "shall adopt rules for carrying out its functions and the implementation of the present Statute". A comparative analysis of the ICC, STL (victim participants) and EAC (civil parties) Statutes suggests that a general victim participation provision should be included in the ACJHR Statute. The legal

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[111] *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, STC/Legal/Min/7(I) Rev.1, 15 May 2014.
[112] *Decision on the Draft Legal Instruments*, Doc. Assembly/AU/8(XXIII), Assembly/AU/Dec.529(XXIII), AU Assembly, Twenty-Third Ordinary Session, 26-27 June 2014, para. 3.
[113] ACJHR Statute, Arts. 58-60.
[114] *See Prosecutor v. Ayyash et al.*, Decision on the VPU's Access to Materials and the Modalities of Victims' Participation in Proceedings before the Pre-Trial Judge, Pre-Trial Judge, No. STL-11-01/PT/PTJ, 18 May 2012.

ground for such regime normally corresponds to statutory-level provisions and infra-statutory rules implement rather than incorporate it.

Nevertheless, the ECCC may be invoked to justify the inclusion of a general victim participation provision via the ACJHR Rules. The ECCC constitutive instruments make no explicit reference to victim participation.[115] However, the ECCC Rules later clarified that victims' status include a participatory dimension as civil parties. A similar legislative path could be followed to incorporate a general victim participation provision into the ACJHR Rules and, thus, expand the currently quite limited participation regime under the ACJHR Statute. This is consistent with the trend among IHCTs.

Introducing the victim participant rather than the civil party status is justified because the drafters of the ACJHR Statute followed the ICC Statute (participants) and not the ECCC or EAC instruments (civil parties). Additionally, the victim participant status better suits the ACJHR since a number of AU states and judicial actors belong to the common-law/adversarial tradition in which civil parties are unknown. Also, victim participants' procedural rights/participation modalities at the ICC and STL resemble those of the civil parties at the ECCC and EAC. Therefore, judicial actors from the civil-law/inquisitorial tradition would feel acquainted enough with the victim participant status.

3.3. *Shaping a Consistent Victim Participant Status*

The future ACJHR Rules and practice must provide contents to the victim participant status. The ACJHR may consider the ICC sources developed over 10 years. However, attention should also be paid to the deficits of the ICC practice so that the ACJHR can shape a consistent victim participant status.

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[115] *See particularly* Law on the Establishment of the Extraordinary Chambers, amended on 27 October 2004, NS/RKM/1004/006.

Rule 85(a) of the ICC RPE may be considered when defining 'victims' at the ACJHR: "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court". To be granted victim participant status,[116] the applicant must provide identifying information; crimes must fall under the court's jurisdiction; there must be physical, material or mental personal harm and a causal link between the crime and harm.[117] Not only direct but also indirect victims (those affected by harm on direct victims) can participate.[118] To be allowed to participate, victim participants must also demonstrate that their personal interests have been affected, and participation must be consistent with the accused's rights.[119]

Besides their coherence with similar approaches adopted at the ICC and STL,[120] these victim definition-related matters are important and required as they remain consistent with diverse international human rights law sources.[121] Furthermore, they are crucial to define a predictable and workable universe of victimhood for participation at the ACJHR-ICLS. Nevertheless, the ACJHR-ICLS should aim to achieve more consistency than the ICC. Different ICC Chambers have adopted heterogeneous approaches when deciding on victim participation admissibility, leading to diverse outcomes concerning the scope of victimhood.[122] Additionally, for efficiency, the ACJHR-ICLS should disregard excessively resource-intensive approaches adopted by some ICC Chambers when processing victim participation applications.[123]

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[116] *See also* ICC RPE, Rule 89.
[117] *Prosecutor v. Lubanga*, Decision on Victims' Participation, Trial Chamber I, No. ICC-01/04-01/06-1119, 18 January 2008, paras. 86-92.
[118] *Prosecutor v. Lubanga*, Redacted version of 'Decision on "indirect victims"', Trial Chamber I, No. ICC-01/04-01/06-1813, 8 April 2009, paras. 41-52.
[119] *Prosecutor v.* Gbagbo, Decision on Victim Participation, Trial Chamber I, No. ICC-02/11-01/11-800, 6 March 2015, para. 26.
[120] STL RPE, Rules 2(A), 86; *Prosecutor v. Ayyash et al.*, Decision on Victims' Participation in the Proceedings, Pre-Trial Judge, No. STL-11-01/PT/PTJ, 8 May 2012, paras. 27-102.
[121] *E.g.*, Victims' Declaration, *supra* note 37; UN Reparation Principles, *supra* note 37.
[122] *See* McGonigle-Leyh, *supra* note 1, pp. 240-261.
[123] Vasiliev, *supra* note 9, p. 1141.

Concerning whether victim participants should be precluded from participating in certain procedural stages, the ACJHR should carefully approach the largely permissive ICC practice. Unlike the ICC,[124] the ACJHR should exclude victim participation during investigation since this may cause unrealistic victim expectations, trigger backlogs, and jeopardize the Prosecutor's independence and his/her duty to establish the truth.[125] Indeed, the STL precludes victim participation during investigation.[126]

At the ICC, victim participation during pre-trial, trial, sentencing, and (interlocutory) appeals has been based on Article 68(3) of the ICC Statute.[127] Allowing victim participation in these procedural stages at the ACJHR-ICLS is important and required not only because of similar approaches at IHCTs. Basically, such victim participation is consistent with victims' rights to be heard, access to justice, the truth, and general fairness as identified in international human rights law sources,[128] and recognized by legal scholars.[129] Furthermore, allowing victim participation in those procedural stages is compatible with the fulfilment of important goals of international criminal justice such as fairness of trials and establishment of facts provided that safeguards are adopted.[130]

What is critical is to determine the procedural rights that victim participants should be equipped with. The ACJHR-ICLS may consider procedural rights/participation modalities under the ICC sources,[131] which have also influenced the STL.[132] These participation modalities, to an important extent, seek to implement international human rights as applied at

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[124] *Situation in DRC*, Judgment 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 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, Appeals Chamber, No. ICC-01/04-556, 19 December 2008, para. 45.
[125] War Crimes Research Office, *Victim Participation before the International Criminal Court* (American University, Washington DC, 2007) pp. 44-49.
[126] STL RPE, Rule 86(A).
[127] Donat-Cattin, *supra* note 32, pp. 1686-1687; De Brouwer and Heikkilä, *supra* note 2, pp. 1319-1333.
[128] *E.g.*, Victims' Declaration, *supra* note 37; UN Reparation Principles, *supra* note 37; *Kelly and Others*, *supra* note 38; *Blake*, *supra* note 38.
[129] Bassiouni, *supra* note 6; Juan-Carlos Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (Martinus Nijhoff, Leiden, 2013) pp. 37-206; Pues, *supra* note 6.
[130] De Brouwer and Heikkilä, *supra* note 2, pp. 1344-1345.
[131] Particularly Rules 89-93.
[132] STL RPE, Rule 87; *Ayyash et al*., *supra* note 114, paras. 17-95.

IHCTs, and adapt procedural rights from national criminal proceedings, particularly the inquisitorial/civil-law tradition. The ICC has made important efforts to improve its practices and standards on victim participation.[133] Ignoring all of this would demand the ACJHR-ICLS to start from scratch.

Nevertheless, as certain deficits of the ICC practice show, attention should be drawn to achieve a fine balance under which victim participation is not so inflated to affect effective and efficient proceedings and/or the accused's rights. Under empirical studies,[134] treating victims in (international) criminal proceedings as if they were (quasi) civil parties neither guarantees their satisfaction nor fulfils restorative-oriented justice. Less contested participation modalities such as notification or attendance to hearings may be favoured over excessively victim-oriented participation modalities which seemingly place the defendant before two 'accusers' or largely delay the proceedings. This could arguably decrease the risk of breaching the accused's rights and likely increase efficient proceedings.

Under the ICC sources, victim participants can access the case-record, participate in hearings, file written motions and examine evidence and witnesses during pre-trial; however, they can neither investigative nor file evidence and *ex-parte* materials are beyond their reach.[135] In turn, victim participants at trial *inter alia* can: access documents and other materials, participate orally and in writing, call and question witnesses, testify, benefit from disclosure, and tender and challenge evidence on the accused's guilt or innocence as judicially requested.[136]

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[133] Vasiliev, *supra* note 9, pp. 1159, 1200.
[134] *See* Rauschenbach and Scalia, *supra* note 83, 444-447; Edna Erez, 'Victim Voice, Impact Statements and Sentence: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings', 40(5) *Criminal Law Bulletin* (2004) 483. *See* also studies referred to in *supra* note 72.
[135] *Katanga and Chui*, *supra* note 36, paras. 80-84, 90-164.
[136] *Lubanga*, *supra* note 117, paras. 101-118; *Lubanga*, *supra* note 109, paras. 3-4, 67-105; *Prosecutor v. Muthaura and Kenyatta*, Decision on Victims' Representation and Participations, Trial Chamber V, No. ICC-01/09-02/11-498, 3 October 2012, paras. 62-76.

However, how certain ICC Chambers have implemented some of these participation modalities may be questioned. Issues related to permissively allowing evidence against the accused,[137] modality not included in the ICC instruments but judicially developed, and far-reaching witnesses questioning support this criticism.[138] This broad victim participation regime arguably increases tension with and may potentially affect the accused's rights. A necessary and fine balance is required; however, as ICC Judge Van den Wyngaert warned, this is not easy because "victims are not neutral and forcing them to act as if they were risks alienating them from the proceedings".[139] To further complicate things, *ex-parte* hearing attendance has been allowed.[140]

Overall, IHCTs endeavour to respect the accused's rights.[141] Thus, at the ICC when victims intervene as anonymous participants, such participation has been limited.[142] Additionally, concerning dual status victim participants/witnesses, non-admissibility of anonymous witnesses, and differentiated intervention as witnesses (evidence) and intervention as participants (victim views and concerns are not evidence) have remained.[143] However, certain ICC trends such as increasing victim access to confidential materials,[144] or leniency in allowing anonymous victim participants should be avoided.

To safeguard the defendant's rights, the ACJHR may narrow down victims' procedural rights during trial and 'compensate' it with more victim participation during post-conviction proceedings, namely sentencing and appeals, provided that this participation is directly related to affected victim interests.

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[137] *E.g.*, in *Lubanga* and *Bemba*.
[138] McGonigle-Leyh, *supra* note 1, pp. 315-325; Vasiliev, *supra* note 9, pp. 1168-1180.
[139] Van den Wyngaert, *supra* note 9, 488.
[140] *Lubanga*, *supra* note 117, para. 108.
[141] *E.g.*, *Prosecutor v. Katanga and Chui*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial', Appeals Chamber, No. ICC-01/04-01/07-2288, 16 July 2010, paras. 43-48.
[142] *Lubanga*, *supra* note 117, paras. 132-134.
[143] *Prosecutor v. Bemba*, Decision on the Presentation of Views and Concerns by Victims a/0542/08, a/0394/08 and a/0511/08, Trial Chamber III, No. ICC-01/05-01/08-2220, 24 May 2012, paras. 7-12.
[144] Spiga, *supra* note 19, 1389-1390.

Additionally, an excessively enhanced victim participation regime at the ACJHR-ICLS may compromise its efficiency and effectiveness. For example, unlike the ICC practice,[145] victim participation during interlocutory appeals should be limited as it diminishes procedural efficiency, consumes limited resources, and threatens the defendant's right to be tried expeditiously. Furthermore, increase in victim participation must be balanced against key stakeholders such as non-participating victims.[146] Equal access to justice for victims and its impact on reconciliation should be considered as victims of uncharged crimes are unable to participate. An efficiency-related matter concerns legal representation. Considering the high numbers of victims at IHCTs, participation is generally exercised via common legal representatives. Legal representation is necessary in cases involving large numbers of victims and complex legal issues but should be conducted in such a manner as not to reduce victim participation to a mere formality or a symbolic proceeding.

For legal certainty and predictability, the ACJHR Chambers should avoid the diverse and case-by-case approach predominantly followed by the ICC Chambers, which derives from the absence of overall principles or uniform standards at the ICC Chambers.[147] As a consequence, criteria for victim participation admissibility and procedural rights have changed according to the competent ICC Chamber.[148] Although certain judicial discretion for exceptional rights may be necessary,[149] similar victim matters must in general follow similar approaches within the same institution. Thus, the prospective ACJHR-ICLS could save time and resources, and participants and parties would not be exposed to uncertain heterogeneous approaches.

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[145] *Prosecutor v. Lubanga*, Decision on the Participation of Victims in the Appeal, Appeals Chamber, No. ICC-01/04-01/06-1452, 6 August 2008.
[146] Charles Trumbull, 'The Victims of Victim Participation in International Criminal Proceedings', 29(4) *Michigan Journal of International Law* (2008) 822.
[147] De Brouwer and Heikkilä, *supra* note 2, p. 1352; Hoyle and Ullrich, *supra* note 2, 701.
[148] *Ibid.*; War Crimes Research Office, *supra* note 99, pp. 1-2.
[149] Moffett, *supra* note 6, 292.

4. Victims as Reparation Claimants at the ACJHR-ICLS

4.1. *Claiming Reparations*

At the international level, victims' right to reparations has traditionally been exercised against states. However, obtaining reparations from individuals at IHCTs has increasingly gained acceptance in national and international practice.[150] Thus, at IHCTs (ICC, EAC, ECCC included) victims can claim reparations against the convicted for the harm inflicted on them out of the crimes for which the accused was found guilty. Academic literature has been generally more receptive to reparations than victim participation at IHCTs,[151] and has found them compatible with IHCTs based on *inter alia* restorative justice,[152] legal principles,[153] and victims' right to reparations.[154]

Article 45 of the ACJHR Statute constitutes the legal ground for victims to claim reparations at the ACJHR-ICLS and largely reproduces Article 75 of the ICC Statute.[155] Excepted for its second paragraph, Article 45 applies beyond the ACJHR-ICLS as the other ACJHR Sections—General Affairs and Human Rights—can also apply it under their jurisdictions. However, this analysis focuses on the ACJHR-ICLS.

Victims as reparation claimants in criminal proceedings are authentic parties, not participants, to the reparation proceedings.[156] The ACJHR Statute, following the ICC model does not require victims to participate in trial to claim reparations, which favours victims.

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[150] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, *Vol. I* (International Committee of the Red Cross/CUP, Cambridge, 2005) pp. 554-555.
[151] *E.g.*, Zappalà, *supra* note 9, 143.
[152] Conor McCarthy, 'Victim Redress and International Criminal Justice-Competing Paradigms, or Compatible Forms of Justice?', 10(2) *JICJ* (2012) 351-372.
[153] Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts', 8(1) *JICJ* (2010) 85.
[154] Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (CUP, Cambridge, 2012) pp. 86-124.
[155] *See also* EAC Statute, Art. 27.
[156] *Lubanga*, *supra* note 20, para. 67; *Prosecutor v. Lubanga*, Decision Establishing the Principles and Procedures to be Applied to Reparations, Trial Chamber I, No. ICC-01/04-01/06-2904, 7 August 2012, para. 267.

Because of various factors beyond their control, victims may be unable to participate in trial and, thus, they would be prevented unfairly from claiming reparations.

To exercise their status as reparation claimants at the ACJHR-ICLS, victims need procedural rights corresponding to their nature as parties to the reparation proceedings. First, under Article 45(1) (ICC Statute, Article 75(1)), victims may request the ACJHR to "determine the scope and extent of any damage, loss or injury to, or in respect of, victims and [the ACJHR] will state the principles on which it is acting". Article 45(1) also states that: "[t]he Court shall establish in the Rules of Court principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation". Unlike the ICC Statute which delegates to the ICC case-law the development of reparation principles, the ACJHR Statute foresees their codification. Such difference may benefit victims, defendants and their lawyers as they will beforehand know the principles leading the reparation proceedings, fostering legal predictability. The ACJHR-ICLS should avoid certain ICC tendency to establish reparation principles based on a case-by-case approach as it is inconsistent with the goal of coherent and global principles.[157] This does not preclude the ACJHR-ICLS from adapting or expanding principles if new cases merit so.

Besides the convicted, the ACJHR-ICLS could include other addressees of its reparation principles. As the challenging implementation of ICC reparation orders evidences, the convicted normally lack funds to implement reparations. That the ACJHR-ICLS can only issue reparation orders against the convicted should not preclude it from elaborating non-binding reparation principles that address *inter alia* states.[158] The ACJHR-ICLS subject-matter jurisdiction includes environmental offences, normally associated to corporations.[159] Furthermore, the ACJHR-ICLS belongs to the ACJHR which, via its General Affairs and

[157] Hoyle and Ullrich, *supra* note 2, 702; ICC-ASP/10/Res.3, Adopted by the Assembly of States Parties to the ICC Statute on 20 December 2011.
[158] Dwertmann, *supra* note 21, pp. 51-62.
[159] ACJHR-ICLS Statute, article 28A1(12)(13).

Human Rights Sections, can determine state responsibility. These recommendatory principles would highlight the complementarity between criminal liability and responsibility of other entities, particularly states, for the same or overlapping facts and the need to jointly redress the harm inflicted on victims.[160] Thus, the ACJHR-ICLS reparation principles would approach reparation-related challenges better than the ICC's as the latter vaguely refers to states.

In any event, the ICC Appeals and Trial Chambers have identified principles such as dignity, non-discrimination, convicted's liability, special consideration of vulnerable victims (children, sexual violence), accessibility and consultation with victims, and proportional and adequate reparations.[161] The ACJHR Rules should consider these principles as the ICC Chambers based them on international human rights law sources, mainly the UN Reparation Principles and case-law of human rights courts, as adapted to IHCTs.

Second, under Article 45(3) of the ACJHR Statute (ICC Statute, Article 75(4)): "[b]efore making an order the Court may invite and take account of representations from or on behalf of the (…) victims (…)". Upon request of the ICC Trial Chambers, victims' legal representatives filed written submissions on reparation principles and procedures regarding: harm, and reparation types and modalities; feasibility or appropriateness of reparation orders against the accused; appropriateness of awards through the Trust Fund for Victims (TFV); and whether the parties or participants may call expert evidence.[162] Additionally, at the ICC, victims may participate in and request the postponement of reparation hearings,[163] ask the ICC to appoint reparation experts, and submit observations on expert reports.[164]

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[160] *See* Antonio Cançado-Trindade, *International Law for Humankind-Towards a New Jus Gentium* (Brill/Nijhoff, Leiden, 2010) pp. 367-379; Moffett-2014, *supra* note 7, pp. 143-195.
[161] *Lubanga*, *supra* note 86, paras. 6-52; *Prosecutor v. Katanga*, Ordonnance de réparation en vertu de l'article 75 du Statut, Trial Chamber II, No. ICC-01/04-01/07-3728, 24 March 2017, paras. 29-30; *Lubanga*, *supra* note 156, paras. 182-259.
[162] *E.g.*, *ibid*., paras. 2 and 20-175.
[163] ICC Statute, Art. 76(3); ICC RPE, Rule 143.
[164] ICC RPE, Rule 97(2).

Third, under Article 45(2) of the ACJHR Statute (ICC Statute, Article 75(2)), should the ACJHR-ICLS render a reparation order directly against a convicted, victims are expected to receive "appropriate reparations (…) including restitution, compensation and rehabilitation". Additionally, victims at the ACJHR-ICLS may arguably expect to receive satisfaction and guarantees of non-repetition. These modalities have been claimed at the ICC,[165] ECCC,[166] and EAC,[167] excepted for compensation at the ECCC due to normative limitations.[168] The IACtHR case-law and UN Reparation Principles have been invoked at IHCTs.[169] The presence of various reparation modalities in the ACJHR Statute is welcomed because a combination of material, rehabilitative and symbolic elements is necessary to redress the harm inflicted. However, implementing these modalities involves important challenges, discussed in the following sub-section.

Under international sources, reparation modalities should be claimed and granted as individual (ICC, EAC) and/or collective (ICC, ECCC, EAC) awards at the ACJHR-ICLS.[170] Nevertheless, the ACJHR-ICLS should re-visit the IHCTs approach of focusing on collective reparations excessively (ICC (*Lubanga* but not *Katanga*)) or exclusively (ECCC). Collective and individual reparations are not mutually exclusive,[171] victims normally claim both,[172] and downplaying/excluding individual awards may undermine the recognition of victims as individual holders of the right to reparations.[173] A focus on collective awards may be advisable and necessary to redress collective harm, benefit more victims, and handle

[165] *Lubanga*, *supra* note 86, paras. 67-70; *Katanga*, *supra* note 161, paras. 296-306.
[166] *Prosecutor v. Nuon Chea and Khieu Samphan*, Judgment, Trial Chamber, No. 002/19-09-2007/ECCC/TC, 7 August 2014, paras. 1114-1164; *Prosecutor v. Kaing Guek Eav*, Appeals Judgment, Supreme Court Chamber, No. 001/18-07-2007-ECCC/SC, 3 February 2012, paras. 633-717.
[167] *Prosecutor v. Habré*, Décision Civil, EAC, 29 July 2016.
[168] ECCC Rules, Rule 23(1)(b).
[169] *E.g.*, *Lubanga*, *supra* note 156; *Kaing Guek Eav*, *supra* note 166.
[170] ICC RPE, Rules 97(1), 98; ECCC Rules, Rules 23-23*bis*, 23*quinquies*; *Lubanga*, *supra* note 86, paras. 33, 53; *Chea and Samphan*, *supra* note 166, paras. 1151-1164; *Habré*, *supra* note 167, paras. 69-72.
[171] Bassiouni, *supra* note 6, 261-262.
[172] *E.g.*, *Lubanga*.
[173] Lisa Magarell, *Reparations in Theory and Practice* (ICTJ, New York, 2007) pp. 5-6.

limitations at IHCTs;[174] however, individual awards should not be downplayed or excluded. Under the ICC case-law, to benefit from collective awards to attacked communities, community members must have suffered harm resulting from the crimes of which the accused was convicted.[175] Those eligible to receive reparations must be identified. Conversely, the IACtHR has under a flexible community-based approach ordered awards for entire communities in cases of mass atrocities.[176] As the ACJHR-ICLS has criminal jurisdiction, it should mainly adopt the ICC's harm-oriented approach.

Fourth, unlike the ICC Statute (Article 82(4)), the ACJHR Statute contains no reference to the right to appeal reparations orders. The future ACJHR Rules must address this gap since the said right strongly evidences and realises the status of victims as parties to reparation proceedings. Such right is exercised by victims' legal representative(s) at the ICC and ECCC.[177] In *Lubanga*, victims' lawyers appealed the reparation order and filed responses to the defence. Victims can via their lawyers appeal reparation orders even if they did not participate in the trial.[178]

Unlike the victim participant status, the ACJHR Statute, to an important extent, provides normative foundations for a meaningful victims' status as reparation claimants which must be fleshed out in rules.

4.2. *Implementing Reparations*

In adapting Article 79 of the ICC Statute,[179] Article 46M of the ACJHR Statute provides for a TFV. Under Article 46M(1), (3), the AU Assembly shall establish the TFV within the

[174] *Ibid.*; Dwertmann, *supra* note 21, p. 121.
[175] *Prosecutor v. Lubanga*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, Appeals Chamber, No. ICC-01/04-01/06-3129, 3 March 2015, para. 214.
[176] *Plan de Sánchez Massacre v. Guatemala*, 19 November 2004, IACtHR, Series C No. 116, para. 86.
[177] ICC Statute, Art. 82(4); ECCC Rules, Rule 23*ter*.
[178] *Lubanga*, *supra* note 20, para. 69.
[179] *See also* EAC Statute, Art. 28.

ACJHR's jurisdiction "for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims", and "shall be managed according to criteria to be determined by the Assembly". Under Article 46M(2), the ACJHR "may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund".

An important factor in the sustainability of the ACJHR-TFV will be continuous funding enabling the implementation of reparation orders. The future ACJHR and its TFV should consider the funding-related challenges faced by the ICC-TFV. Reparation orders are issued against individuals under Article 45(2) of the ACJHR Statute. However, convicted are normally indigent at IHCTs. This caused the ECCC to rely on external donations to fund and implement collective reparations.[180] At the ICC, funds for collective reparations have come from donations and contributions by state parties, institutions and individuals, totalling EUR five million as ICC-TFV's reparations preparation reserve.[181]

The AU depends on donors to finance most of its budget.[182] Out of its 2017 budget of USD 782.1 million, member states only contribute 205.1.[183] As for the African Court on Human and Peoples' Rights (ACtHPR), partner funds amounted to USD 2.3 million out of its 11.9 million budget for 2014.[184] However, considering the strong criticism of the ACJHR Statute, important donors may be reluctant to fund the ACHJR, including its reparation system. As a representative of the European Union (EU) stated, "[t]he EU is not in a position to support the Malabo Protocol creating the additional Criminal Chamber as it includes the

[180] ECCC Rules, Rule 23*quinquies*.
[181] *Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2015 to 30 June 2016*, (ICC-ASP/15/14), 16 August 2016, para. 10.
[182] AI, *supra* note 52, p. 31.
[183] *Decision on the Budget of the African Union for the 2016 Financial Year*, Doc. EX.CL/Dec.919(XXIX), AU Executive Council, Twenty-Ninth Ordinary Session, 13-15 July 2016, p. 1.
[184] Executive Council, *Report on the Activities of the African Court on Human and Peoples' Rights*, (EX.CL/783(XXII)), Twenty-Second Ordinary Session, 21-25 January 2013, para. 32.

provision of immunity for sitting Heads of State and Senior state officials and lack complementarity with the ICC".[185]

Furthermore, financing IHCTs is expensive.[186] Obtaining funds to make sections that handle or support victim participation and reparation claims operative will constitute an important challenge at the ACJHR-ICLS. For example, the 2017 budgets of the ICC TFV and Victims Participation and Reparations Section are EUR 2.502 million and EUR 1.691 million respectively.[187]

Without proper funding, the provision and implementation of reparations for victims of crimes under the ACJHR-ICLS jurisdiction will be hardly achievable. This will negatively impact the overall victims' status at the ACJHR to the point of making it largely symbolic. Funding limitations lie at the heart of the collective reparation approach adopted in the ICC practice that has excluded or limited individual reparations and compensation in *Lubanga*. In turn, funding constraints have determined modest compensation awards in *Habré* and *Katanga*. These outcomes generally speaking are detrimental to victims' explicit requests and expectations in reparation proceedings and, more generally, victims' right to receive effective and proportional reparations.[188] This scenario may potentially lead to secondary victimisation, is not fully consistent with restorative justice goals, and may mean new legitimacy challenges to the international judiciary.

An institution with the expertise of the ICC-TFV is necessary for preparing and executing plans to implement reparation orders, particularly collective awards issued by the

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[185] *EU Statement at the African Judicial Dialogue*, 6 November 2015, Arusha, Tanzania, http://eeas.europa.eu/delegations/african_union/documents/press_corner/eu-statement-judicial-dialogue-06-11-2015_en.pdf, 15 March 2017, p. 3.
[186] AI, *supra* note 52, pp. 30-32.
[187] *Proposed Programme Budget for 2017 of the International Criminal Court*, (ICC-ASP/15/10), 17 August 2016, paras. 699, 787.
[188] UN Reparation Principles, *supra* note 37, principle 15.

ACJHR-ICLS, as the ICC practice evidences.[189] At the ECCC, the Victims Support Section has participated in planning and implementing collective awards.[190] As the ICC, ECCC and EAC practice shows, when planning and implementing reparations, attention must be paid to reparation claimants' demands. Thus, that Article 45(2) of the ACJHR Statute omits Article 75(2) *in fine* of the ICC Statute, which states that "[w]here appropriate, the Court may order that the award for reparations be made through the Trust Fund", is criticized and must be addressed in the ACJHR Rules.

Like the ICC reparation system, that of the ACHJR-ICLS is based upon the principle of ensuring that the perpetrators account for their acts.[191] Since the ACJHR-ICLS and ICC determine and base findings on individual criminal responsibility, the convicted are the subjects of reparation orders rendered by these courts.[192] Upon clarification in the future ACJHR Rules, the ACJHR-TFV should be able to advance resources where necessary, but the convicted remains responsible and must refund the ACJHR-TFV.[193]

Reparation implementation at the ACJHR-ICLS may be affected by the absence, in the ACJHR Statute, of (adapted) contents of Article 75(4) of the ICC Statute. This establishes that, upon conviction, the ICC may to give effect to reparation orders seek state cooperation. Under Article 93(1) of the ICC Statute, the ICC can ask states parties the "identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture". The ACJHR Statute (Article 46L(2)(f)) includes this provision. To secure reparations, the identification and freezing of the convicted's assets are pivotal.[194] The ICC has ordered 'protective measures' to secure funds

[189] *Lubanga*, *supra* note 86, paras. 75-81; *Prosecutor v. Lubanga*, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, Trial Chamber II, No. ICC-01/04-01/06-3198-tENG, 9 February 2016.
[190] *Chea and Samphan*, *supra* note 166, paras. 1126-1164.
[191] *Lubanga*, *supra* note 86, para. 65.
[192] *Ibid*., paras. 65, 76; ACJHR Statute, Art. 45(2); ICC Statute, Art. 75(2).
[193] *Lubanga*, *supra* note 86, para. 115.
[194] *Lubanga*, *supra* note 156, para. 277.

for reparations for "the ultimate benefit of the victims", and to prevent that those funds are placed outside the ICC's reach.[195] In *Bemba*, property and assets, including bank accounts, real estate and aircrafts were frozen or seized.[196] Funding of reparations increases when assets and/or properties of the convicted have been timely seized, which requires state cooperation.

Under Article 75(5) of the ICC Statute, the states parties to the Statute are obligated to give effect to reparation decisions. Article 45 of the ACJHR Statute contains no similar provision. That reparation orders by the ACJHR-ICLS against the convicted must be given effect by the AU member states is implicit. However, it may have been better to include an explicit provision to avoid 'misunderstandings'.

Certain reparation modalities, particularly guarantees of non-repetition, such as the amendment of legislation, and some satisfaction measures, such as establishing a national remembrance day, require state implementation. To obtain realistic outcomes, the adaptation of modalities originally conceived for state implementation into IHCTs is necessary. Like the ICC and ECCC, the ACJHR-ICLS cannot issue reparation orders against states, limiting implementation mechanisms. For example, the EAC found collective requests for some of the above-mentioned modalities in *Habré* unfeasible as Chad's cooperation for reparation implementation was missing.[197] Collective reparations that involve guarantees of non-repetition and satisfaction require, in certain cases, the participation of the state involved as complemented by other international and national actors. The ICC and ECCC emerging practice on reparation implementation evidences this need. If sufficient funding and state cooperation become available, the ACJHR-ICLS should avoid the practice of the ICC and ECCC of undermining or excluding compensation respectively. In cases of mass atrocities,

[195] *Prosecutor v. Lubanga*, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, Pre-Trial Chamber I, No. ICC-01/04-01/06-8-US-Corr, 24 February 2006, para. 137.
[196] *Prosecutor v. Bemba*, Décision et Demande en Vue d'obtenir l'identification, la Localisation, le Gel et la Saisie des Biens et Avoirs Adressées à la République Portugaise, Pre-Trial Chamber III, No. ICC-01/05-01/08-8, 27 May 2008.
[197] *Ibid*., paras. 71-72.

compensation has been granted, alongside other modalities, to redress the harm inflicted in an adequate, appropriate and prompt manner.[198]

In any event, Article 45(4) of the ACJHR Statute copies Article 75(6) of the ICC Statute when states that: "Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law". Such provision poses no interference with state responsibility to grant reparations to victims under international treaties or domestic law.[199] The ICC should flesh out the scope of this provision considering that funding for reparations is limited and reparation implementation requires state cooperation and involvement. To prevent similar difficulties and related delays in reparation implementation, the ACJHR-ICLS will need to reach out to ACJHR member states. State complementarity in terms of funding and involvement in the implementation of reparation orders as well as the establishment of national reparation programmes is crucial so that ACJHR-ICLS reparations are not merely symbolic and harm is substantially redressed.[200] Additionally, the ACJHR-ICLS must coordinate with the ACJHR-Human Rights Section. Victims can potentially claim reparations at the ACJHR-ICLS (individual criminal responsibility) and the ACJHR-Human Rights Section (international state responsibility) for the same facts. Crimes committed by (former) state agents should trigger both proceedings. This may also be the case when perpetrators are non-state actors and the relevant state breaches its obligations to investigate or prosecute crimes. The ACtHPR has ordered the defendant state to provide reparations to victims.[201]

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[198] Bassiouni, *supra* note 6, 265-275; *Plan de Sánchez Massacre*, *supra* note 176, para. 125.
[199] *Lubanga*, *supra* note 156, para. 257.
[200] Moffett, *supra* note 6, 296-309; McCarthy, *supra* note 11, pp. 1203-1222.
[201] *Mtikila v. Tanzania*, 14 June 2013, ACtHPR, No. 011/2011, paras. 27-46; *Beneficiaries of Late Norbert Zongo et al. & the Movement on Human and Peoples' Rights v. Burkina Faso*, 28 March 2014, ACtHPR, No. 013/2011, paras. 20-30; *Lohe Issa Konate v. Burkina Faso*, 3 June 2016, ACtHPR, No. 004/2013, paras. 15-57.

5. Conclusion

In light of a comparative analysis, the ACJHR Statute presents important gaps in the dimensions of victims' status, especially the participatory dimension, and implementation challenges, particularly those related to reparations. These deficits should be corrected in the future ACJHR Rules and/or through amendments to the ACJHR Statute to better face future challenges. Whereas some ICC Statute provisions on victims' status have been incorporated entirely into the ACJHR Statute, others have been neglected or incorporated with changes. Nonetheless, there is no clear or consistent pattern or approach.

ICC/IHCTs sources on victim participation and reparations should overall speaking be considered by the ACJHR-ICLS. This applies particularly to ACJHR Statute provisions taken (almost) literally from the ICC Statute. Where necessary, adaptations to the specific ACJHR procedural and institutional framework must be conducted. However, caution is needed to avoid the deficits of the ICC/IHCTs practice, particularly to achieve certainty, effectiveness and efficiency and without jeopardising the defendant's rights or causing secondary victimisation.

The drafters of the ACJHR Statute and Rules and the ACJHR-ICLS itself can benefit from IHCTs sources to address challenges to and gaps and limitations in victim participation and reparations as fundamental dimensions of victims' status at IHCTs. The consolidation of these dimensions at the ACJHR-ICLS will also help to realise victims' rights to access to justice, and reparations recognised in international human rights law sources, as adapted to IHCTs.