

CHAPTER 18

TRACING THE DEVELOPMENT OF VICTIMS' RIGHTS UNDER INTERNATIONAL LAW (AND AT THE INTERNATIONAL CRIMINAL COURT)

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I. INTRODUCTION

War and its accompanying atrocities have been part of the human experience since the earliest days of man. Although the eloquent, reassuring language of modernity and diplomacy may soften its harsh reality, as a practical matter, war's severity and toll on humankind have hardly relented. Indeed, since World War II there have been some two hundred fifty conflicts throughout the world, leading to an estimated 70–170 million victims.¹ Experts estimate that during the twentieth century, warlords and military leaders subjected approximately four times more civilians to crimes against humanity and war crimes than the combined total of soldiers killed in all international wars during the same time. Unlike diseases or natural disasters, the injuries and tragedies of war are largely self-inflicted.

With the advent of the modern media, however, the world has become increasingly sensitive to episodes of organized and methodical state-sponsored killing, maiming, mutilating, raping, and torturing of civilians. Such conduct, often broadcasted live, is now near-universally condemned as out of bounds, striking at the very heart of civilized society. In response to well-documented outrages committed openly and notoriously in now-familiar places like Rwanda, Cambodia, Bosnia, and Kosovo, the international community in the late 1990s joined together to establish the International Criminal Court (ICC).²

The ICC is the first permanent juridical body with the stated purpose of bringing to justice perpetrators of “atrocious crimes” such as genocide, war crimes, and crimes against

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¹ See generally M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUMAN RIGHTS L. REV. 203, 209–10 (2006) (“Despite the post-WWII human rights conventions, within 50 years of WWII conflicts of an international and non-international character resulted in casualties double those of the two World Wars. An estimated 70–170 million people have died since WWII in over 250 conflicts around the world.”); see also STÉPHANE COURTOIS, ET AL., *THE BLACK BOOK OF COMMUNISM: CRIMES, TERROR, REPRESSION* 4 (1999) (providing an exhaustive chronicle of crimes perpetrated to advance communist political ideology); RUDOLPH RUMMEL, *DEATH BY GOVERNMENT* 9 (1994) (examining some eight thousand reports of government-caused death—which Rummel terms “democide”—and estimating that during the approximately two hundred fifty post-World War II conflicts, governments killed some 169 million of their own people).

² The ICC is alternatively referred to herein as “the Court.”

humanity.³ The ICC, however, does not, as observers often assume, sit above all other courts as the world's supreme adjudicator of atrocity crimes. Instead, the ICC is designed to function more like an "international catch-all court," capturing those cases that fall through the cracks when domestic legal systems are unwilling or unable to investigate and prosecute them. The Court's mandate is, therefore, to deliver justice when no other avenues to justice exist, whether as a practical or legal matter.

Despite a slow and rocky start, the ICC's efforts to hold the perpetrators of atrocity crimes accountable have intensified in recent years. But beyond simply investigating and prosecuting humanity's most ruthless villains, the ICC has ambitiously sketched out a broader restorative mandate for itself.⁴ More specifically, the ICC, itself a first-of-its-kind institution, among its many innovative missions singularly enshrined the rights of atrocity crime victims to participate directly in the actual proceedings instituted against their alleged victimizers. The ICC empowers victims to participate in the proceedings of, and to seek recompense from, those who terrorized and abused them. This chapter focuses on these considerable efforts to stanch human suffering and piece together the lives of the victims of unspeakable affronts to human dignity.

Invoking its undoubtedly noble purpose, proponents of the ICC steadfastly demand that the world community take the Court seriously, both as a model of reform and as a crime-fighter. Why, ask Court supporters, would any country interested in justice and world peace not support the Court's mission by signing on as a state party?

One of the persistent challenges, however, is that the international community's track record for bringing to justice the world's most notorious atrocity-crime-perpetrators has at times not lived up to the Court's stated mission.⁵ From the skeptics' perspective, the ICC, for reasons discussed later, to some extent, continues to suffer from this perceived broader deficiency.

³ The term "atrocity crime" is an all-inclusive reference to the four so-called "core crimes" (war crimes, genocide, crimes against humanity, and the as of yet undefined crime of aggression) and, in this context, was coined by Ambassador David Scheffer. See generally David Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT'L L. REV. 389 (2002); see also David Scheffer, *The Merits of Unifying Terms: "Atrocity Crimes" and "Atrocity Law,"* 2 GENOCIDE STUD. & PREVENTION 91, 91–96 (2007); David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREVENTION 229, 229–50 (2006).

⁴ "Restorative justice" refers to a theory of criminology dating back centuries in which the crime and wrongdoing are considered acts against the individual rather than against the state or the collective (more on this later). Advocates of restorative justice posit that the person harmed must play the central role in the criminal justice process and that the person who culpably did the harming should be accountable and accept personal responsibility for his/her conduct. Although traditional criminal justice systems seek to determine what laws were broken, who broke those laws, and what sentence the lawbreaker should receive, restorative justice's aim is to determine who was harmed, what that person's needs are, and who should be obligated to meet those needs. Restitutive sanctions, intended to force the wrongdoer to "make whole" the person wronged, are therefore a traditional, and indeed ancient, restorative aspect of many criminal justice systems.

⁵ Consider, for example, the International Criminal Tribunal for the Former Yugoslavia (ICTY), with a broad jurisdiction covering four separate bloody conflicts (namely, Croatia, Bosnia and Herzegovina, Kosovo, and the Former Yugoslav Republic of Macedonia), and as of 2009 employing more than 1,100 persons. Since becoming operational some sixteen years ago, the ICTY has spent more than \$1.5 billion pursuing Balkan war criminals. To date, however, the ICTY has sentenced only sixty-one individuals (in rough numbers, this equates to a present total expenditure of some \$25 million per final sentence). Moreover, although convicted of genocide, war crimes, and crimes against humanity, more than a third of the sixty men (and one woman) with "completed cases" received prison sentences of *less* than ten years. Indeed, only *ten* received sentences in excess of 20 years. As such, some may argue that it is debatable to what extent the ICTY has truly lived up to its own motto of "[b]ringing war criminals to justice, bringing justice to victims." See www.icty.org.

Consider that the ICC has a present annual budget approaching \$200 million, with more than seven hundred employees (including 34 full-time judges). Despite its significant resources, and no shortage of worthy targets, in its first seven years of operation, the Court had not issued a single verdict, sentence, or victim reparations order. As of this writing, the Court publicly indicted thirty-six people and has issued arrest warrants for twenty-seven. Proceedings against ten have been completed, but to date only two (Thomas Lubanga Dyilo and Germain Katanga) have been convicted and sentenced. (Four have had the charges against them dismissed; one has had the charges against him withdrawn; one has had his case declared inadmissible before the Court; and three have died before trial.)

What is more, the relatively modest Dyilo and Katanga sentences have, in light of the magnitude of alleged misconduct, understandably left some in the international community disappointed. Rebels under Dyilo's command, after all, are accused of engaging in ethnic massacres, murder, torture, rape, and mutilation. Dyilo was convicted of forcibly conscripting child soldiers, but on July 10, 2012, was only sentenced to fourteen years' imprisonment. On March 7, 2014, in turn, Patriotic Resistance Force in Ituri Leader Katanga was convicted, as an accessory, of five counts of war crimes and crimes against humanity (including murder and the February 2003 massacre in the village of Bogoro in the Democratic Republic of the Congo). On May 23, 2014, Katanga was sentenced to twelve years' imprisonment. Sentences of fourteen and twelve years' imprisonment, respectively, after having been convicted of committing some of the most heinous crimes imaginable, are unlikely to have much of a deterrent effect (and will surely leave few victims feeling vindicated).⁶ Moreover, two convictions, after roughly a dozen years of the Court's existence and over a billion dollars in expenditures, is an average that, to the thinking of many, must be improved and lends some undeniable fodder to the skeptic's argument.

Doubters may, as a consequence, be tempted to reject out of hand the ICC's victim-centric efforts as yet another example of the international community's perceived much-talk-little-action routine. Well-intentioned rhetoric, deployed by diplomats, is, after all, not a substitute for professionally conducted investigation and prosecution leading to the imprisonment of the world's premier wrongdoers. Indeed, threats and promises not followed up by concrete action can, in the long run, become justice's most devastating enemy. To the skeptic, the significant, and often quite obvious, institutional flaws discussed in this chapter reveal a Court still struggling to handle the monumental task it is facing. The Court, the skeptic's argument goes, is, therefore, in a particularly weak position to demand the world community's respect and dutiful adherence.

But, whatever the Court's present deficiencies (and, as we will discuss, there certainly are some), the near universal view is not to give up on it, or, even worse, to chop it down. In fact, there is no indication that the relatively young Court, despite its admittedly mixed record to date, will not continue on as international justice's focal point. Put simply, the Court is here to stay.

Instead of focusing purely on the more lackluster aspects of the Court's performance vindicating the interest of victims and punishing perpetrators, the solution the second edition of Mr. Funk's book *Stemming the Suffering: Victims' Rights and Responsibilities at the International Criminal Court* (Oxford University Press, 2d ed. 2015) proposes is real and meaningful reform, which, if applied in a targeted manner, can help catapult the ICC

⁶ See generally T. Markus Funk, The ICC Investigates—But Should Gadhafi Worry?, NAT'L L.J., Mar. 7, 2011, available at www.nationallawjournal.com/id=1202484174659.

toward its full restorative potential. This is, in part, because at its core, the ICC offers something unique and unavailable anywhere else for millions of victims, namely, the opportunity for victim participation in the trials of their victimizers. The ICC, for all of its arguable shortfalls, seeks to break a new path by promising victim-centric restorative justice to those who traditionally have remained voiceless outsiders to the legal process and by providing the legal framework and tools necessary for this undertaking.

And with millions massacred in the many post–World War II conflicts, and considering the increased visibility of such unspeakable crimes, the need for internationally coordinated victim redress indeed presses. In order to meet its restorative objectives, the ICC announced a host of ambitious and laudable victim-oriented goals. One need not look further for instances of this forward-looking agenda than the ICC’s mission statement, set forth in the Rome Statute’s Preamble, which describes the ICC’s goal as “guarantee[ing] lasting respect for and the enforcement of international justice” by “put[ting] an end to impunity for the perpetrators of [international] crimes and thus . . . contribut[ing] to the prevention of such crimes. . . .”

The Preamble leaves little room for doubt: The primary purpose of the ICC is to end cruelty and to bring those responsible for atrocities “to justice”—the same desires as those of the victims, of course. To effectuate the expansive aim of providing a more fulsome measure of restorative justice, and to reflect the recognition that “during this century millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,”⁷ the Assembly of States Parties of the ICC enacted a host of provisions addressing the protection and restoration of atrocity crime victims. So a foundation question is whether protecting – and vindicating – of victims’ rights is a new concept?

II. HISTORICAL DEVELOPMENT

Although some may think of victims’ rights as a fairly recent and enlightened legal innovation, in truth, the principle that individuals who have suffered personal harm or material injury as a result of another’s conduct are entitled to be “made whole” is in fact quite an ancient one. Whether through a tribe, religious order, or the state, the collective traditionally provided a forum offering victim-centric dispute resolution, as well as enforcement mechanisms for judgments. In earlier cultures, however, the victim, his family, or the collective (such as his tribe or village) predominantly visited such punishment directly on the wrongdoer or his kin. Early European communities as far back as the fifth century A.D., for example, resolved interpersonal conflicts between individuals, families, and clans through slayings and blood feuds.⁸ These direct enforcement mechanisms were, indeed, part of the natural order for societies in which the family or tribe occupied a position of centrality within the political and administrative systems.

For example, following the collapse of the Roman Empire, and in the general absence of powerful central governments throughout Europe and in England, blood feuds

⁷ Preamble, Rome Statute. See also George P. Fletcher, *Justice and Fairness in the Protection of Crime Victims*, 9 LEWIS & CLARK L. REV. 547, 551 (2005) (“The purpose of the Rome Statute is to vindicate the interests of these victims.”).

⁸ See James R. Acker & Jeanna Mastrocinque, *Causing Death and Sustaining Life: The Law, Capital Punishment, and Criminal Homicide Victims’ Survivors*, in WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY 141, 142–45 (James R. Acker & David R. Karp eds., 2006).

and self-help constituted the “justice system” of the day.⁹ “Public law,” in the sense of centralized and state-provided justice, gave way to the private resolution of legal disputes. People of the time viewed lawbreakers as having gone to war against the victim and the victim’s community and, in so doing, subjected themselves and their property to communal responses, such as banishment, destruction of their property and houses, or death. In pre-modern societies, therefore, offenders faced both a private right of action, as well as a public one.

The earliest recorded legal systems and religious traditions—from the eighteenth-century B.C. Babylonian Code of Hammurabi to the Visigothic Law Codes of the fifth century A.D.—in fact reflect the near-universal belief that those wronged *must* have a right to redress. Indeed, no justice system has refused to recognize the general principle that the system must accord the victim a right to private redress of wrongs. Providing a forum for personal and direct redress has, thus, traditionally formed the very heart of the social contract between the individual and the collective.

Tribal societies and their heirs relied on notions of social responsibility as their organizing principle, providing not only for restorative, but also for punitive, damages.¹⁰ As such, dispute resolution between the accused and the victim was a matter to be addressed by the collective, rather than a matter left for the two parties to resolve. This, in turn, provided for individualized vindication, while at the same time cabining additional escalating violence and disturbances of the peace.¹¹

Ancient customary laws worldwide, as a consequence, were almost exclusively victim-centric. A searching examination of such codes, though interesting, is, however, beyond the scope of this chapter. But, in order to flesh out how domestic customary laws enshrined the victim’s primacy, we will examine one set of customary laws in some detail immediately below.

A. VICTIM-CENTRIC JUSTICE OF THE 1400S—CUSTOMARY LAW AS EXEMPLIFIED BY THE *CODE OF LEKE DUKAGJINI*

The *Code of Leke Dukagjini* stands as a proxy for similar ancient victim-centric codes found around the world, in that it placed the personal interests of wronged victim at the very center of the legal framework. Individual victim redress and, relatedly, the punishment of the wrongdoer, were the *Code’s* overriding concerns. In fact, those concerns were so supreme that they operated to the exclusion of any collectivist or utilitarian tendency to elevate the “communal good” over the interests of particular victims.

⁹ See generally Lynne N. Henderson, *The Wrongs of Victims’ Rights*, 37 STANFORD L. REV. 937, 938–40 (1985) (“The available historical work in the field of the criminal law reveals a steady evolution away from the ‘private,’ or individual, sphere to the ‘public’ or societal one.”).

¹⁰ See generally HENRY MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS (1861).

¹¹ In later years, Italian criminal groups, collectively and popularly known as the “Mafia,” similarly established their own polycentric legal systems to resolve disputes in the absence of real, or accepted, state power and control and to, in theory at least, vindicate the rights of victims. With time, however, these groups moved from dispute resolution to the exploitation of their fellow citizens as evidenced by the many convictions of mob figures throughout the world, including in the United States.

In Greek, the word *Kanun* means “rule,” “measure,” or “standard of excellence.” By Byzantine times, the Ottoman Turks had introduced this word into the Albanian language. Albanians soon relied on the word as common reference to the then-prevailing code of law.

The *Code of Leke Dukagjini* (the “*Kanun*”)¹² deeply marked Albanian cultural and legal history. For centuries, the *Kanun* dominated economic and interpersonal relationships, providing clear (and at times somewhat unorthodox) guidelines for everyday life among the ethnic Albanian populations of what is now Albania, Kosovo, Montenegro, Macedonia, and Serbia.¹³ Often referenced only in the context of legitimizing, and in fact encouraging, uncompromising blood feuds, the *Kanun* in fact was a far more nuanced code of conduct. The *Kanun* reflected the rural and anti-statist views prevalent to this day in Albania’s countryside, and particularly in the mountains of northern Albania. What follows is a brief discussion highlighting some of the *Kanun*’s victim-centric provisions.

Protecting the victim’s honor—considered a person’s most important possession—was a central and reoccurring theme in the *Kanun*. Dishonor could be brought upon the victim in a variety of ways, including by the victim being threatened, pushed, spit on,¹⁴ having his wife insulted or having her “run off with someone,”¹⁵ having his hospitality violated,¹⁶ or by virtue of the offender taking his weapon.¹⁷ The *Kanun*, indeed, treated honor as such a fragile possession that a visitor could insult the victim-homeowner by “remove[ing] the cover of a cooking pot on [the owner’s] hearth.”¹⁸ According to the *Kanun*, any victim who was so dishonored was “considered dead”¹⁹ until the “spilling of blood”²⁰ or “magnanimous pardon (through the mediation of good friends)”²¹ removed the stain. As to the former method, which sanctioned the price of blood for dishonor, the *Kanun* clearly envisaged some form of self-help:

The [dishonored victim] has every right to avenge his honor: no pledge is given, no appeal is made to the Elders, no judgment is needed, no fine is taken. The strong man collects the fine himself.²²

In addition to restoring honor, the *Kanun* provided extensive guidance on criminal matters.²³ In theft cases, for example, liability followed the principal or accomplice’s

¹² THE CODE OF LEKE DUKAGJINI (Leonard Fox Translation, 1989). Although the *Kanun* is commonly viewed as the product of prominent and wealthy aristocrat Leke Dukagjini’s (1410–1481) efforts, in reality, the *Kanun* has evolved over centuries, developing long before Dukagjini was born, and continuing on after his death. Nevertheless, it was Dukagjini who collected and published what we today consider Albanian customary law.

¹³ The *Kanun* addresses subject matters in the following order: offenses relating to the church, the cemetery, and church employees including the priest, *id.* at §§ 1–17; structure of the family, *id.* at §§ 18–27; the wedding and marriage, *id.* at §§ 28–55; familial rights and obligations, *id.* at §§ 56–63; property division/inheritance, *id.* at §§ 64–117; relationship between master and servant, *id.* at §§ 117–31; offenses against house, livestock, and other property, *id.* at §§ 132–212; property rights, *id.* at §§ 213–88; work/employment, *id.* at §§ 289–395; hunting and fishing, *id.* at §§ 396–451; trades, *id.* at §§ 452–98; transfer of property, *id.* at §§ 499–508; promises and gifts, *id.* at §§ 511–19; oaths, *id.* at §§ 520–92; personal and social honor/hospitality, *id.* at §§ 593–694; blood and kinship, *id.* at §§ 695–734; damages, *id.* at §§ 735–65; crimes, *id.* at §§ 766–990; and judicial law, *id.* at §§ 991–1220.

¹⁴ *Id.* at § 601(b).

¹⁵ *Id.* at § 601(d).

¹⁶ *Id.* at § 601(f).

¹⁷ *Id.* at § 601(e).

¹⁸ *Id.* at § 601(i).

¹⁹ *Id.* at § 600.

²⁰ *Id.* at § 598.

²¹ *Id.*

²² *Id.* at § 599.

“participation in the crime,” but, “if the theft is discovered, [those involved] must make restitution [to the victim] for the stolen object.”²⁴ In fact, the *Kanun* provided not only for restitution but also required punitive damages in the form of a fine. Theft of livestock, for example, required the offender to “restore” the victim’s animals, as well as to pay a fine of 500 *grosh* (which was the price of a building site for a house or the price of a “good rifle”²⁵).²⁶ Moreover, the *Kanun* proclaimed that “every stolen object is subject to double compensation.”²⁷ Similarly, a person who stole a “bellwether” goat or ram, “wishing to cause affront or because of some hatred towards the herdsman, and is not killed on the spot, must pay a fine of 500 *grosh* and double compensation.”²⁸ The *Kanun*, therefore, provided to the victim both restitution for the harm suffered, as well as a fine designed to punish the offender and deter similar future conduct.

In terms of enforcing the punishment, if a particular accused failed to submit to the judgment, the village could place the individual “under ban” (that is, ostracize him) and could even withdraw all legal protection from the accused who committed the act, “leaving those whom he has offended free to do whatever they like to him.”²⁹ Moreover, in those cases in which the offender’s house was ordered burned as punishment, and other property, such as vineyards, were ordered destroyed, the offender himself (or, if he was not available, someone from, or close to, the offender’s family)³⁰ had to give the signal to begin the burning and destruction, saying, “May the evils of the village and the Banner fall upon me!”³¹ The offender, in the spirit of restorative justice and acceptance of personal responsibility for the harm he caused the victim, therefore, had to personally commence his own punishment.

An even deeper act symbolizing the restorative aspects of the *Kanun* occurred once “the hearts of the members of the family of the murderer and the family of the victim [had] been reconciled.”³² Upon reaching this level of forgiveness and healing, the former adversaries took two half-full glasses of *raki* (a high-proof grape alcohol), tied their little fingers together, and pricked them with a needle.³³ The two men then dropped blood from their fingers into the two half-full glasses of *raki* and mixed the *raki* and the blood.³⁴ Thereafter, “the two men exchange glasses and, with arms linked, they [held] the glasses to each other’s lips, drinking each other’s blood.”³⁵ This symbolic act signaled true reconciliation between the offender and the victim, as well as an end to the impending, or ongoing, cycle of violence. “Guns are fired in celebration and they become like new brothers, born of the same mother and father.”³⁶ Even the most cynical critic of restorative justice would consider such an outcome—the creation of such a “blood brotherhood”—if sincere, to

²³ See generally *id.* at §§ 766–990.

²⁴ *Id.* at § 768.

²⁵ The *Kanun* even provided a noninflationary price schedule to reflect the value of a *grosh*: a building site or a rifle cost 500 *grosh*, a donkey cost 300 *grosh*, a “good olive grove” cost 100 *grosh*, a beehive with bees cost 50 *grosh*, and a pair of sandals cost a mere 5 *grosh*. See *id.* at § 484.

²⁶ *Id.* at § 790.

²⁷ *Id.* at § 804. Note that the killing of a rooster, on the other hand, carried a fixed (and rather high, by most standards) penalty of “500 *grosh* to the owner” because the rooster was said to be “the poor man’s clock.” See *id.* at § 808.

²⁸ *Id.* at § 154.

²⁹ *Id.* at § 1183.

³⁰ *Id.* at § 1199.

³¹ *Id.* at § 1198.

³² See *id.* at §§ 988–90.

³³ *Id.* at § 989.

³⁴ *Id.*

³⁵ *Id.* at § 990.

³⁶ *Id.*

be the pinnacle of justice-system success. Righting the social equilibrium was, thus, one of the customary law's goals; but making the victim whole was primary.

**B. CENTRALIZED STATE POWER IN THE 1700S AND 1800S,
THE “SCIENTIFICATION” OF CRIMINAL LAW, AND THE DECLINE OF
VICTIMS’ RIGHTS UNDER DOMESTIC LAW**

Customary law, as exemplified by the *Code of Leke Dukagjini*, has, as we have seen, long put the victim at the center of the proceeding. Making the victim whole was, indeed, ancient law's paramount purpose.

Beginning in the 1700s, however, Western customary law's focus on protecting the interests of victims gave way to broader societal objectives, namely, reducing crime and consolidating state power. Regional leaders increasingly viewed customary law's private “dispute resolution” approaches as tearing at the societal fabric.

Centralized authority, accompanied by community judicial control, accelerated the influence of the state on the administration of criminal justice. Medieval kings and feudal lords restricted blood feuds by introducing tariff systems. The tariff systems required victims to petition for pecuniary compensation from offenders, instead of resorting to private vengeance. As societies became more consolidated, fines payable to the victims—and then to the king—took the place of the collective's grant of permission that victims seize or destroy the offender's property.

As kings and lords consolidated power, compensation to victims gradually became the exception to the rule. Significantly, legal systems began to view lawbreakers as having committed offenses against the “crown,” the “king's peace,” or “society,” rather than against the particular victim. The king and his representatives punished minor crimes with fines and relied on more serious corporal punishments for graver offenses.³⁷ Victims, in turn, were left to “seek justice” by testifying for the prosecution.

As the law began to embark on this slow transformation from mediator to punisher, victims became increasingly restricted in their ability to dispense punishment and collect compensation. The victim, once the central figure, now was little more than a source of evidence against the accused. As the criminal justice system's purpose shifted in this manner, the importance of restitution to victims waned to the point that restitution morphed into a fine payable to the state. The focus, unmistakably, moved from the victim's welfare to the welfare of the community at large.³⁸ (Private citizens, of course, retained the right to bring a private cause of action in tort against those who had injured them.) By cleaving individual claims for restitution from the perpetrator from those brought against the perpetrator by the “government,” the law relegated the victim to a distinctly secondary role.³⁹

³⁷ Although customary law, as noted above, continued to play a dominant role in rural stretches of Albania, as a general matter it disappeared in the rest of western and central Europe.

³⁸ See generally STEPHEN SCHAFER, *VICTIMOLOGY: THE VICTIM AND HIS CRIMINAL* 12–14 (1977) (discussing this collectivist trend in Germany and England).

³⁹ See generally ROBERT REIFF, *THE INVISIBLE VICTIM: THE CRIMINAL JUSTICE SYSTEM'S FORGOTTEN RESPONSIBILITY* xi (1979) (“Society—sensitive to the issues of social justice for the offender—spends millions of dollars on programs for offender-oriented court reform and rehabilitation. On the other hand, society fails to protect crime victims, degrades them socially, and refuses them aid.”); MARGARET O. HYDE, *THE RIGHT OF THE VICTIM* 4 (1983) (“[F]or the most part, victims are the innocent and neglected element in the criminal justice system.”).

By the early 1700s, governments went beyond simply consolidating the justice system's authority. Increasingly, they began elevating the study of law and the process of lawmaking to a "legal science." Under this re-conception of the justice system's purpose, the idea of victims' rights and victims' centrality to the justice system represented little more than an antiquated vestige of a bygone era. European thinkers started to develop widely divergent theories on the origins of crime and the optimal methods of crime prevention. As discussed below, the one common thread running through these new modes of thinking was that none of them contemplated a meaningful role for victims.

C. THE CLASSICAL SCHOOL OF CRIMINOLOGY

The "Classical School of Criminology" was a criminological movement that emerged during the late 1700s and the early 1800s. Scholars called this school of thought "classical" because of the similarity in thinking between those scholars and early Greek philosophers such as Aristotle, Euripides, and Plato, all of whom placed great emphasis on the centrality and importance of free will. Proponents of the Classical School considered deterring crime through carefully calibrated punishment a great humanitarian reform, superior in many ways to the medieval practices it replaced. Some of the defining features of the Classical School included the idea that people acted on the basis of free will; that behavior was guided by hedonism (pleasure/pain calculation); that crime was the result of free will and hedonism; that punishment should fit the offense; and that wrongdoers were little more than the products of bad laws.

The Italian thinker and abolitionist Cesare Beccaria was one of the father's of the Classical School. In 1767, Beccaria wrote the book *On Crimes and Punishment*, which argued that the social contract forms the basis of society, in that a violation of another's liberties equates to a violation of the social contract binding all civilized people. The criminal law, the theory went, must necessarily have a restricted scope, presuming people innocent until proven guilty. The law must also be codified, and crimes must be made widely known and understood, so that all citizens are "on notice" of what conduct is proscribed. Moreover, adherents of the Classical School contended that the justice system must limit the severity of punishment so that it never exceeds that required to deter people from committing the crime (explaining why the Classical School rejected capital punishment). That said, punishment must be certain and swift and must be popularly viewed as such. At bottom, the justice system had to accurately calculate the citizen's pleasure/pain threshold in order to incentivize "good" conduct and deter "bad" behavior.

By synthesizing and applying revolutionary Enlightenment notions of universal and self-evident rights⁴⁰ to the problems of crime, Beccaria shifted the focus from criminals and retribution-based punishment to crime control, reform of the criminal justice system, and the "science" of making good laws. Englishman Jeremy Bentham then took this approach to

⁴⁰ Conceptions of rights during the Enlightenment of course were not uniform; the differences between German and French Enlightenment thinkers, for example, were significant, as were the differences between Thomas Hobbes', Jean-Jacques Rousseau's, and John Locke's conceptions of liberty and freedom. Compare THOMAS HOBBS, *LEVIATHAN* (1651) (arguing that powerful central government is the only way to bring man out of the chaotic state of nature, which is characterized by the "war of all against all") and JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (1689) (developing a theory of political and civil society based on natural rights and contract theory) with JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT, OR PRINCIPLES OF POLITICAL RIGHT* (1762) (arguing for direct, not representative, democracy and contending that government can only be legitimate if it has been sanctioned by the people in the role of the sovereign). However, for our purposes it is sufficient to recognize that Enlightenment thinkers did share certain common central themes.

a new level in his book, *An Introduction to the Principles of Morals and Legislation*, which developed utilitarianism (Bentham's version of hedonism) as the basis for sound social governance. In this epoch of emerging socio-legal engineering, the victim's role, like the offender's role, became secondary, and achieving the broader societal objective of crime control emerged as the justice system's reason for being.

D. THE POSITIVIST SCHOOL OF CRIMINOLOGY AND BEYOND

During the mid 1800s and early 1900s, a social movement most closely associated with Cesare Lombroso, known as the "Positivist School," began gaining popularity. The Positivist School adopted forward-looking attitudes toward social and personal betterment and extolled the (perhaps overoptimistic) belief in the perfectibility of both society and human nature. The aim was to explain and, more important, predict human behavior, much like a natural scientist observes, and then predicts, uniform patterns in the natural world. The Classical School's reliance on hedonism and utilitarianism, in contrast, fell from favor as justice officials began to view it as an oversimplified philosophy that did not adequately account for the full range of factors driving human conduct. The new focus was thus away from the Classical School's belief in the promise of legal science as a means of effective crime control, and on the inner workings of the "criminal mind." Punishment now was supposed to fit the individual and not the crime. A scientific elite/technocracy, devoted to treating, correcting, and rehabilitating criminals, was to guide the justice system down this complex path toward a fuller understanding of what makes criminals "tick."

In the 1960s, mainstream criminologists, expanding the positivist position, began to look away from the individual and toward society for answers to the question of what makes criminals criminal. Robert Merton's "Strain Theory," part of the Chicago School of Criminology, exemplifies this surging progressive criminological philosophy. Adherents hypothesized that the "lower socio-economic classes" were most vulnerable to social pressure, or "strain," resulting from the purported gap, imbalance, or disjunction between culturally induced aspirations for economic success ("I want a nice car and designer clothes"), and limited structurally distributed possibilities of ever achieving that success ("But I don't have the high school or college education, or steady job, that will permit me to legitimately obtain the nice car and designer clothes.").

The lower socio-economic classes, theorists contended, would maintain their unfulfilled economic aspirations in spite of frustration and failure. Although providing rewards for noneconomic pursuits (such as public service, family, sport, and entertainment) could stabilize the system, the stress, or "strain toward anomie," would continue. Imperfect coordination of means and ends ultimately would fatally undermine the regularity and predictability of the social structure, so the theory continues.

This focus on societal culpability, rather than individual responsibility, made followers of the positivist position view both perpetrators and persons they wronged as victims of society. For it was society, the argument went, that left the perpetrator with no choice but to commit crime in order to bridge the gap between what modern commercial culture told him he should have and what his meager legitimate means permitted him to acquire.

Followers of "Conflict Theory" and "Radical Criminology" later adopted this societal-blame philosophy, championing the neo-Marxist view that the criminal justice system and criminal law was, indeed, deliberately rigged to operate on behalf of rich and powerful

social elites, with resulting crime control policies put into place solely as a means of controlling the poor. The criminal justice establishment's goal, their theory went, was to impose standards of morality and good behavior, as dictated by the powerful minority who directly benefited from a permanently subjugated underclass.

Once again, the ideology of the day considered the victim of a particular crime, committed by a particular perpetrator, to be, in reality, a victim of the collective. Only this time the "collective" was made up of the rich and powerful "ruling elite," rather than capitalist society generally. Academics and sympathetic lawmakers pushed this position beyond its natural breaking point, resulting in a public law-and-order backlash against what the citizenry viewed as an unacceptable ideological trend away from crime control and toward blanket excuses for criminal conduct.

III. TWENTIETH-CENTURY RESURGENCE OF VICTIMS' RIGHTS UNDER DOMESTIC LAW

As we have seen, the dominant criminological theory of the 1960s was rehabilitation, the central tenet of which was "fixing" perpetrators by fixing society. The rehabilitative model, with its reliance on penological experts who examined and tried to explain the offender's criminal pathology, left little room for the involvement of victims. The reason was because under this view of punishment, victims added nothing to the quasi-clinical "diagnosis" and "treatment" of offenders.

In the United States, where adherence to the philosophy of rehabilitation by the late 1960s began to give way to policies favoring retribution, the majority of states began to institute pro-victim compensation programs and the like.⁴¹ The "victimology" movement viewed such government-paid compensation to victims as an effective way to increase victim participation in criminal prosecutions, helping victims feel that the state and society has taken an active interest in their plight.⁴² Those who viewed retribution and deterrence as the true purposes of the criminal law, moreover, felt victims had been unfairly neglected by a justice system concerned chiefly with the accused's rights. They considered the victim a much more sympathetic figure than the accused and, in support of their position, pointed to the failure of the environmental and sociologically-based crime control models to meaningfully predict or deter criminality.

⁴¹ For example, Wisconsin adopted its first compensation statute in 1975. *See* 1975 Wis. Laws ch. 344, § 3. Minnesota enacted its victim's compensation statute in 1974. *See* 1974 Minn. Laws ch. 463, § 3. New Jersey adopted victim compensation in 1971, Alaska in 1972. *See* 1971 N.J. Laws ch. 317, § 1; 1972 Alaska Sess. Laws ch. 203, § 1. Indeed, even victims' rights amendments to state constitutions became common. *See, e.g.*, Alaska Const. Article I, § 24; Ariz. Const. Article II, § 2.1; Cal. Const. Article I, §§ 12, 28; Colo. Const. Article II, § 16(a); Conn. Const. Article I, § 8(b); Fla. Const. Article I, § 16(b); Idaho Const. Article I, § 22; Ill. Const. Article I, § 8.1; Ind. Const. Article I, § 13(b); Kan. Const. Article 15, § 15; La. Const. Article 1, § 25; Md. Decl. of Rights Article 47; Mich. Const. Article I, § 24; Miss. Const. Article 3, § 26(A); Mo. Const. Article I, § 32; Neb. Const. Article I, § 28; Nev. Const. Article I, § 8(2); N.J. Const. Article I, § 22; N.M. Const. Article 2, § 24; N.C. Const. Article I, § 37; Ohio Const. Article I, § 10(a); Okla. Const. Article II, § 34; Or. Const. Article I, §§ 42–43; R.I. Const. Article I, § 23; S.C. Const. Article I, § 24; Tenn. Const. Article 1, § 35; Tex. Const. Article I, § 30; Utah Const. Article I, § 28; Va. Const. Article I, § 8-A; Wash. Const. Article 1, § 35; and Wis. Const. Article I, § 9(m).

⁴² *See generally* Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 64–77 (1982) (explaining use of restitution at different stages of criminal proceedings); Richard E. Laster, *Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness*, 5 U. RICH. L. REV. 71, 71–80 (1970) (discussing history of restitution).

One possible, but underexamined, explanation for the revival in concern for victims and victims' rights during the 1960s–1980s is that ordinary citizens gained a greater understanding of, and level of empathy with, victims of crime. Crime rates during this time were on the rise.⁴³ Moreover, television news reports and shows graphically depicted victims' suffering, rendering their plight more tangible. Put simply, victims no longer existed in the abstract. Rather, citizens sitting in their living rooms could see, and empathize with, victims in a direct manner previously impossible. As a result, the average citizen became more worried about crime and victimization than he would have been in the late 1800s or early 1900s. These factors, in turn, translated into increased pressure on the criminal justice system to better protect and treat victims.

International comparisons, however, reveal that the United States' recognition of victims' rights in the 1960s lagged behind Western Europe. In most civil-law countries, victims ("injured persons") long possessed the right to participate at various stages of the criminal process, from the pre-trial phase to the appeal. Such participatory rights included the qualified right to cross-examine witnesses, introduce evidence, brief motions, and seek additional investigation.⁴⁴

For example, Italian victims, through their attorneys, traditionally participated on an equal basis with the *Publico Ministero* (the prosecutor) and defense counsel.⁴⁵ Natural or legal persons, as well as their heirs, who were injured could join the proceedings the public prosecutor initiated as *partecivile*. Victims injured as a result of an offense (*persona offesa dal reato*) were permitted to put forward supporting evidence and to present to the court a statement of their case. Once the trial opened, the victim was given the right to preview for the court the evidence the victim intended to present in support of establishing certain facts. The victim also had the right under certain criminal codes, as well as civil tort law, to obtain restitution and/or reparations for injuries suffered at the hands of the offender.

⁴³ For example, violent crime in England started to rise in the mid-1950s; England's contemporary violent crime rates for every type of crime, except murder and rape, have in fact surpassed the United States' rates, and the English and American murder rates are now converging, with the U.S. murder rate declining over the past decade, and the English murder rate increasing during the same time. See generally Joyce Lee Malcolm, *Lessons of History: Firearms Regulation and the Reduction of Crime*, 8 TEX. REV. L. & POL. 175, 177–79 (2003); see also Michael Tonry, *Preface*, CRIME & JUSTICE (2007) ("Crime rates everywhere in Europe rose steeply from the late 1960s through the early to mid 1990s."); Tapio Lappi-Seppälä, *Trust, Welfare, and Political Culture: Explaining the Differences in National Penal Policies*, 37 CRIME & JUSTICE 313, 341 n. 14 (2008) (noting that crime rates in Scandinavian countries increased between the 1960s and 1990s); Cheryl Marie Webster & Anthony N. Doob, *Punitive Trends and Stable Imprisonment Rates in Canada*, 36 CRIME & JUSTICE 297, 302–303 (2007) (noting steadily increasing crime rates in Canada and the United States between the 1960s and 1990s). Moreover, although Asian countries have dramatically lower crime rates relative to their level of income development, industrialization, and urbanization, they have followed the trend of increasing levels of criminality from the 1950s to the 1990s. With a worldwide increase in social and cultural mobility and diversity, then, came a decrease in social control, civic republicanism, communal solidarity, and interpersonal accountability; the result has been a documented worldwide rise in crime rates.

⁴⁴ See generally William Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 14 (1992). Note, however, that in most civil-law jurisdictions, witnesses, following a short preamble, are asked to describe what occurred in an unconstructed narrative fashion (following the epistemological premise that evidence should be presented in a manner most closely approximating its "original" form). See, e.g., *Strafprozessordnung* § 69(1) (F.R.G.).

⁴⁵ *Codice di Procedura Penale* Articles 410, 493, 496, 498, and 523.

In France, the justice system likewise permitted victim participation in the proceedings⁴⁶ and allowed the victim, in some instances, to substitute for the public prosecutor. Although the French system accorded victims no participatory or other rights during the investigative stage, it provided that a victim who had suffered harm as a result of the offense could come before the court as a *partie civile* and could opt to either join the ongoing prosecution or initiate his own prosecution.⁴⁷ If the victim joined an ongoing case (before the *juge d'instruction*), then he was permitted to demand compensation. Alternatively, the victim could bypass the public prosecutor's decision not to prosecute, or could directly accuse the defendant before the *tribunal correctionnel* or the *tribunal de police*.⁴⁸ Once at trial, the victim was permitted to produce evidence (and, interestingly, the exclusionary rules did not pertain to him, since he was not a state actor). This system of relatively broad victim participation was part of the French Code of Criminal Procedure, which stated that any

[c]ivil action aimed at the reparation of the damage suffered because of a felony, a misdemeanor or a petty offence is open to all those who have personally suffered damage directly caused by the offence.⁴⁹

Under the German system, certain minor offences directly impacting the privacy of the victim (*Verletzte*) required the victim first to file a complaint. The German *Privatklæger* (private accuser) was traditionally permitted to exercise significant quasi-prosecutorial powers (in such cases, the victim, or *Verletzte*, conducted the prosecution⁵⁰). Victims were also permitted to nominate themselves as accessory complainants through a legal process called *Nebenklage*.⁵¹ Those authorized to lodge such an accessory complaint included victims of bodily injury, victims of white-collar crimes, and relatives of homicide victims. These victims were permitted to join the proceedings at any time, provided they first filed a request for compensation (*Anschlussklægerung*).

Although, according to some, the United States may have been playing catch-up with European countries in matters of victims' rights,⁵² by the late 1970s a somewhat watered-down version of victim participation (providing for, among other things, the filing of victim impact statements) had become accepted. International law, however, at that point had not yet come to fully recognize victims' rights.

IV. VICTIMS' RIGHTS RECOGNIZED AS PART OF INTERNATIONAL LAW

The gradual movement toward "internationalized victims' rights," extending beyond private actors and individual responsibility to public actors and state responsibility, can be traced to the international community's growing focus on transnational criminal culpability following the tragic victimization and destruction of human life during the two world wars. States, after all, bore the responsibility for the large-scale human rights violations

⁴⁶ Mario Chiavario, *Private Parties: The Rights of the Defendant and the Victim*, in MIREILLE DELMAS-MARTY & J. R. SPENCER, EUROPEAN CRIMINAL PROCEDURES 543 (2002).

⁴⁷ See generally Proc. Code Articles 183, 197, and 217 (right to notice of rulings and hearings); *id.* Articles 198, 281, 315, 316, 346, 454, and 460 (right to be heard); and *id.* Articles 186, 186-1, and 497 (appeal rights).

⁴⁸ See generally Valerie Dervieux, *The French System*, in MIREILLE DELMAS-MARTY & J. R. SPENCER, EUROPEAN CRIMINAL PROCEDURES 226-27 (2002).

⁴⁹ C. PR. P EN. Article 2, available at www.legislationline.org/legislations.php?jid=19<id=15.

⁵⁰ *Strafprozessordnung* §§ 374-94.

⁵¹ *Id.* at §§ 395-402.

⁵² For a thorough review of the role of victims in U.S. domestic courts, see Markus Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3 (1999).

occurring during World War I and World War II. Recognizing the state and state actors as directly responsible for human atrocities provided the necessary push for a broader notion of responsibility and obligation extending beyond the traditional municipal law boundaries. No longer were individual rights and obligations solely a matter between the individual and the state, governed by local law.⁵³

A. INTERNATIONAL LAW'S RECOGNITION OF INDIVIDUAL RIGHTS

The rights of the individual that the Nuremberg Tribunal and the International Military Tribunal for the Far East, also known as the "Tokyo Trials" or the "Tokyo War Crimes Tribunal," sought to uphold were calculated to safeguard the most basic conditions of human life and human decency. The drafters of the tribunals criminal charges considered the crimes to be violations of bedrock preconditions to a "normal" life, and thus termed them "crimes against humanity." Breaches of these fundamental standards included extermination, enslavement, and forced deportation, as well as other "inhumane acts" committed against civilian populations.⁵⁴

Following the Allied tribunal's trials of Nazi leaders on such charges of crimes against humanity, the 1945 Charter of the newly formed United Nations incorporated the notion of human rights. The U.N. Charter provided, *inter alia*, that all signatory governments would promote the expansive objectives of "universal respect for, and observance of, human rights and fundamental freedoms."⁵⁵

The 1948 Universal Declaration of Human Rights,⁵⁶ in contrast, was more of an aspirational document. The Universal Declaration promised the world's citizens various "rights," including the right to "rest and leisure" and "periodic holidays with pay";⁵⁷ the right to "free choice of employment";⁵⁸ the right to a "standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, and medical care";⁵⁹ and the right to "enjoy the arts and to share in scientific advancement."⁶⁰ These social, political, economic, and cultural self-actualization rights amounted to a conception of the good and as such were fundamentally different from the Nuremberg trials' protection of rights that were basic preconditions to human life and civilized society.⁶¹

⁵³ See generally *Chorzow Factory Case*, PCIJ Reports 1927, Series A No. 8, 21 (July 26, 1927) (Permanent Court for International Justice finding that "[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparations in an adequate form. Reparations therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself"); *Selmouni v. France*, 29 EHRR 403 (1999) (European Court of Human Rights ruling that an effective remedy requires that the state conduct a thorough and effective investigation making it possible for the investigators to identify and punish those responsible for the alleged violations); *Velasquez Rodriguez* IACtHR Series C, No. 4 (1988) (Inter-American Court of Human Rights ruling in case of unresolved disappearance of individual in Honduras that states are required to "effectively ensure . . . human rights" and must investigate alleged human rights violations "in a serious manner and not as a mere formality preordained to be ineffective").

⁵⁴ Charter of the International Military Tribunal, August 8, 1945, Article 6(c), 59 Stat. 1544, 82 U.N.T.S. 279.

⁵⁵ U.N. Charter Article 55(c).

⁵⁶ G.A. Res. 217 (December 10, 1948).

⁵⁷ See *id.* at Article 24.

⁵⁸ See *id.* at Article 23.

⁵⁹ *Id.* at Article 25(1).

⁶⁰ *Id.* at Article 27.

⁶¹ The Universal Declaration, unsurprisingly, contained no enforcement mechanisms, describing itself simply as a "common standard of achievement." *Id.* at Preamble.

As a practical matter, of course, guaranteeing such expansive rights to every person in the world—including to those where such soft rights are elusive, if not, as a practical matter, impossible to obtain, including people languishing in abject poverty simply because they had the misfortune of being born in areas of the world where industrialization is in its infancy—threatens to deprecate the goals of those seeking “international justice.” Fortunately, the pursuit of more achievable rights, such as the right to vote, the right to equal pay, the right to due process, and the right to be free from cruel and unusual punishment and torture, has occupied international bodies more than the right to “rest and leisure,” “periodic holidays with pay,” “free choice of employment,” and the enjoyment of the arts.

As international law began to subject individuals—and not just states—to criminal sanctions, it also began to vest individuals with personal rights and to view accountability as a component of victim redress. Various post–World War II international instruments and corresponding monitoring bodies, such as the 1948 Universal Declaration on Human Rights,⁶² the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms,⁶³ and the 1966 International Covenant on Civil and Political Rights,⁶⁴ reflected the emergence of these rights. These documents went beyond traditional notions of simple state responsibility to other states and increasingly provided individuals with mechanisms to press their claims against states. Individuals no longer had to go to their states of nationality to submit claims through either diplomatic channels or judicial means. The traditional (that is, pre–Nuremberg trials) notion that harm of a state citizen was solely injury to the state, in short, had begun to erode.⁶⁵

B. VICTIMS’ RIGHTS UNDER INTERNATIONAL LAW

Beyond according individuals a general right to redress, the United Nations by the 1960s sought to enforce the personal rights described in the 1948 Universal Declaration (labeled an “International Bill of Human Rights”) through the 1966 Optional Protocols⁶⁶ of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) (seeking to protect “economic” rights, such as shelter, food, employment, education, and health care), as well as through the International Covenant on Civil and Political Rights (ICCPR) (seeking to protect “political” rights, such as physical integrity of the person, legal proceedings, free speech, and free thought rights).⁶⁷ Although the ICCPR provided a mechanism for

⁶² GA Res. 217A (December 10, 1948).

⁶³ ETS No. 5 “ECHR.”

⁶⁴ G.A. Res. 2200A (December 16, 1966).

⁶⁵ Under the Hague Conventions of 1899 and 1907, for example, noncombatants physically or materially harmed as a result of a state engaging in armed conflict could petition their state of nationality to request compensation on their behalf from the state that is alleged to have committed these violations. Similar provisions are contained in, *inter alia*, the Geneva Convention Relative to the Treatment of Prisoners of War, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, the American Convention on Human Rights, and the International Covenant on Civil and Political Rights. These conventions require states to provide a remedy/reparations for human rights violations. *See also* Universal Declaration of Human Rights (“[E]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”).

⁶⁶ *See* Optional Protocol to the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 302; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, adopted December 15, 1989, G.A. Res. 44/128, U.N. GAOR Supp. No. 49, U.N. Doc A/RES/44/128 (1989).

⁶⁷ Adopted December 19, 1966, Sen. Exec. Doc. E, 95–2, at 23 (1978), 999 U.N.T.S. 171.

submitting and processing complaints and was written in mandatory language, the ICESCR did and was not.⁶⁸

Significantly, the ICCPR's Article 2.3 provided that states must generally accord an effective remedy to any person whose rights are violated. The U.N. Human Rights Committee, a body of independent experts monitoring the implementation of the ICCPR, in turn interpreted Article 2.3 as requiring states to conduct an effective prosecution to remedy the harm caused to victims in cases involving arbitrary detentions, forced disappearances, torture, and extrajudicial executions.⁶⁹

On June 23, 1983, the Committee of Ministers of the Council of Europe issued a regional recommendation titled "Participation of the Public in Crime Policy."⁷⁰ The bulk of the recommendation covered topics of "social prevention," including encouraging architects and town planners to "give cities a more humane layout aimed at crime prevention."⁷¹ Other matters of accommodation included alternatives to custodial sentences,⁷² nondiscrimination against offenders,⁷³ and publicity campaigns to increase public understanding of the penal and social consequences of criminality.⁷⁴ The recommendations suggested that the member states' justice systems take into consideration the victims' interests. The recommendations also proposed that victims have "access to justice at all times,"⁷⁵ and that member states establish systems of legal aid to help victims gain access to justice.⁷⁶

The Inter-American Court of Human Rights,⁷⁷ an autonomous judicial institution based in Costa Rica and established in 1979, similarly in the 1990s began interpreting various articles of the American Convention on Human Rights as guaranteeing victims the right to the effective prosecution of their victimizers, the right to access and to be heard, the right to procedural fairness, and the right to effective recourse and reparations. The American Convention in accords a comprehensive catalogue of due process, fair trial, freedom of expression, personal liberty, and other rights. Although the Convention does not expressly have much to say on the topic of victims' rights, the Inter-American Court has held that family members have the right to know what happened to their loved ones and

⁶⁸ A discussion of this two-tier notion of human rights is beyond the scope of this chapter, but suffice it to say, that some of the most prominent/activist human rights nongovernmental organizations, such as Human Rights Watch and Amnesty International, the World Bank, and the European Bank, structure their institutional priorities in this same fashion, reflecting the belief that respecting political rights merely requires states to abstain from violating the rights, whereas meeting a population's economic needs is a practical matter impossible without huge (and unavailable) cash outlays.

⁶⁹ See, e.g., *Chonwe v. Zambia*, No. 821/1998, at 7 (2000), available at www.unhchr.ch/tbs/doc.nsf (attempted murder); *Vicente v. Colombia*, No. 612/1995, at 10 (1997), available at www.unhchr.ch/tbs/doc.nsf (arbitrary detention, torture, and forced disappearance); and *Tshiongo v. Zaire*, No. 366/1989, at 7 (1993), available at www.unhchr.ch/tbs/doc.nsf (arbitrary detention and torture).

⁷⁰ Recommendation of the Committee of Ministers, Doc. No. R(83) 7 (June 23, 1983).

⁷¹ *Id.* at III(B).

⁷² *Id.* at III(6).

⁷³ *Id.* at III(2).

⁷⁴ *Id.* at III(14).

⁷⁵ *Id.* at III(29).

⁷⁶ *Id.*

⁷⁷ The Court both interprets and enforces provisions of the American Convention on Human Rights. Cases are brought to the Court by member states of the Organization of American States, and its functions are both advisory and adjudicatory (if the accused is a state party accused of human rights violations that has accepted jurisdiction). Cases are referred either by the Inter-American Commission on Human Rights or a state party. Citizens, unlike in the European human rights system, are not permitted to bring cases directly to the Court.

that a denial of this right to the truth is the equivalent of a state's denial of victim access to effective justice and to procedural fairness.⁷⁸

The European Court of Human Rights, established as a regional judicial body by the 1950 European Convention on Human Rights, and operational as of March 1, 1998, similarly accorded victims various procedural and substantive rights.⁷⁹ Not only can the forty-seven member states of the Council of Europe bring Applications against the state parties for alleged human rights violations, but so also can individuals and other parties. The European Court of Human Rights, for example, faulted the British criminal justice system for not informing victims of the reasons the prosecutors decided to decline a case and for failing to subject the declination decision to judicial review.⁸⁰

The Council of the European Union has similarly adopted a Council Framework Decision meant to improve victims' standing in criminal proceedings. This Decision urged member states to ensure that victims have a "real and appropriate role in its criminal legal system."⁸¹ These international courts and conventions laid the groundwork for the ICC's more aggressive victims' rights agenda.

Victims' rights under international law received a significant boost in 1985 with the drafting of the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.⁸² Although the Basic Principles did not provide victims with any new rights, they embody the first formal recognition by the United Nations that, in order to comply with emerging norms of international justice, states had to "adequately recognize" victims' rights⁸³ by providing victims with "access to the mechanisms of justice and to prompt redress, as provided for by domestic legislation, for the harm that they have suffered."⁸⁴ The Basic Principles, moreover, defined "victims,"⁸⁵ stated that victims are entitled to access to justice and "prompt redress,"⁸⁶ emphasized the importance of keeping victims informed of case-related activities and of providing victims with assistance throughout the legal process,⁸⁷ and advised that domestic justice systems should permit victims to present their "views and concerns" at "appropriate stages of the proceedings where their personal interest are affected, without prejudice to the accused. . . ."⁸⁸ The Basic Principles, in short, sought to internationalize victim-centric rights that by the mid-1980s had received broad acceptance in many domestic justice systems.

Commenting on the December 11, 1985, adoption of the Basic Principles, Professor Bassiouni wrote:

⁷⁸ *Velasquez Rodriguez*, Inter-Am. C.H.R., Ser. C, No. 4 (1988).

⁷⁹ See May 4, 2001, decisions in *Jordan*, 1020 Eur. Ct. H.R. 300, P 123; *McKerr*, 34 Eur. H.R. Rep. 20, P 131; *Kelly*, 2004 Eur. Ct. H.R. 240, at 117; *Shanaghan*, 1814 Eur. Ct. H.R. 400, P 107.

⁸⁰ See *id.*

⁸¹ Council Framework Decision 2001/220/JHA, 2001 O.J. (L 82) 1–4 (2001), Article 2. Indeed, the decision also urged member states to ensure that victims may be heard during the proceedings, can supply evidence, and are informed of the status of the case. *Id.* at Articles 3, 4, and 7.

⁸² G.A. Res. 40/34 (November 29, 1985). See www.un.org/documents/ga/res/40/a40r034.htm.

⁸³ *Id.* at Preamble.

⁸⁴ *Id.* at Article 4.

⁸⁵ *Id.* at Article 1.

⁸⁶ *Id.* at Article 4.

⁸⁷ *Id.* at Articles 6(a) and 6(c).

⁸⁸ *Id.* at Article 6(b).

Victims of crime and abuse of power are by the very fact of their victimization persons whose basic human rights have been violated. . . . Throughout history, in the so-called primitive societies, victims of aggression have usually found support and assistance from their tribe, family, or village. But in modern societies, which pride themselves on their heightened levels of development and civilization, this is seldom the case. In these societies, the incidence of crime and state sponsored abuses of human rights have dramatically increased. At the same time traditional patterns of social solidarity and dependency have significantly decreased and, frequently, victims become relegated to a worse social and human position than those who have victimized them. Thus, the time has come for the world community to take a position on the rights of victims in modern society.⁸⁹

Judges at the International Criminal Tribunal for the Former Yugoslavia (ICTY), commenting on the significance of the Basic Principles, similarly observed:

While issues relating to what might generally be referred to as “victims’ rights” have been addressed in many domestic law systems for long periods of time, consideration of these issues under international law is of relatively recent vintage. In 1985, the General Assembly adopted a Declaration of Basic Principles for Victims of Crime and Abuse of Power, which has served as the cornerstone for establishing legal rights for victims under international law and has led to a number of developments relating to victims.⁹⁰

The Basic Principles, thus, for the first time recognized a victim’s right to receive information and to present his views and concerns to a domestic judicial body, as well as other rights that collectively can be described as “access to justice rights.”⁹¹

On March 21, 2006, following a series of revisions and political compromises, the U.N. General Assembly adopted by consensus the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. These “2006 Basic Principles” were intended to provide something akin to an international bill of rights, whereas the 1985 Basic Principles had focused on the rights of crimes victims under national justice systems.⁹²

The 2006 Basic Principles, which make explicit reference to the Rome Statute’s victims’ rights provisions,⁹³ seek to provide “mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human

⁸⁹ M. CHERIF BASSIOUNI, INTERNATIONAL PROTECTION OF VICTIMS 9 (1988).

⁹⁰ International Criminal Tribunal for the Former Yugoslavia, Judges’ Report, Victims’ Compensation and Participation, 1, CC/P.I.S./528-E (September 13, 2000), available at www.un.org/icty/pressreal/tolb-e.htm.

⁹¹ See Susana SáCouto & Katherine Cleary, *Victims’ Participation in the Investigations of the International Criminal Court*, 17 TRANSNAT’L L. & CONTEMP. PROBS. 73, 79 (2008) (“[A]mong the rights promoted by the Victims Declaration are the right of victims to be treated with respect, the right to receive information regarding relevant judicial proceedings, and the right to present their views and concerns to a court. Although some national jurisdictions involve victims to an even greater extent in criminal proceedings, these principles—being treated with respect, receipt of information, and the opportunity to present views and concerns—are seen as fundamental to providing victims ‘access to justice.’”).

⁹² G.A. Res. 60/147 (March 21, 2006).

⁹³ *Id.* at Preamble.

rights law and international humanitarian law. . . .”⁹⁴ Under the 2006 Basic Principles, “victims” can include the immediate family or dependents of the direct victim who have suffered harm while intervening to assist victims or to prevent victimization.⁹⁵

The General Assembly explicitly adopted the 2006 Basic Principles so that states:

[T]ake the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general. . .

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International law once considered victims to be little more than the *objects* of rights and obligations. Today, in stark contrast, both domestic justice systems and international law increasingly view victims as the *subjects* of such rights and obligations.⁹⁷ This shift in thinking is critical, and the ICC follows—and expands upon—this developing legal trend.

Meaningful victims participation at the ICC is a significant step forward in the international community’s continuing pursuit of its collective restorative ambitions. Changes in the ICC’s jurisprudence and rules reflect an emerging sense of how best to accommodate the victims’ interests within the existing legal framework, but they also point to the ICC’s developing institutional needs. Ensuring that this laudable, and potentially cathartic, process translates into substantive, constructive participation is the victim representatives’ most fundamental obligation.

Whether the ICC will accord victims of atrocity crimes the full promised measure of substantive rights, or whether “victims’ rights” instead will translate into little more than notional aspirations showing the international community’s good will, remains to be seen. Robust victim participation, when properly conducted, represents sound public policy, and confirms to the world a genuine institutional desire to create a complete historic record of victim abuse, while not diminishing the fairness or efficiency of the proceedings. The history books will one day judge whether the international legal establishment enhanced—and lived up to—the ICC’s noble mission. The international legal and political community’s handling of this opportunity will, indeed, stand as a profound testament to the authenticity of the world’s concern for accountability and for those exposed to the worst of humanity.

⁹⁴ *Id.*

⁹⁵ *Id.* at V(8).

⁹⁶ *Id.* at 2.

⁹⁷ Consider the Geneva Convention Relative to the Treatment of Prisoners of War, the European Convention on Human Rights, the American Convention on Human Rights, the International Covenant on Civil and Political Rights 1966, the International Convention on the Elimination of All Forms of Racial Discrimination 1965, and the Universal Declaration of Human Rights. State practice has similarly increasingly begun to provide reparations to victims. *See, e.g.*, Germany’s *Wieder Gut Machung* law (providing over \$104 billion in compensation to victims of Nazi crimes and continuing to provide some \$624 million annually to 100,000 pensioners) and the United States’ “1988 Civil Liberties Act” (providing \$20,000 to each citizen of Japanese ancestry interned during World War II). That said, state practice of providing compensation to non-state actors is at best an emerging norm. *See generally* M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 HUMAN RIGHTS L. Rev. 223 (2006).