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Title of Thesis: An Effective Reparations Regime for the International Criminal Court

Degree: LL.M. Year: 2003/04

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The Statute of Rome for the International Criminal Court is the most significant advancement in international law since the formation of the United Nations. The International Criminal Court has been established primarily to administer criminal justice over those accused of committing war crimes, crimes against humanity and genocide. The court also has an alternative ancillary power to issue orders against a convicted person to pay reparations to their victims. This reparations regime must be effective if the court is going to have the capacity to help victims in a material way.

The best chance that the Court has to achieve an effective regime is to prevent suspects from hiding their assets. To do this, it is suggested that the Court must issue provisional measures at the pre-trial stage to ensure such assets are available for funding future reparation awards. However, it will be established that certain State Parties might object to the court interpreting its power so as to give itself this capacity. It is feared that a potential backlash from State Parties might compromise the court’s capacity to enforce any orders that depend upon domestic cooperation.

This dilemma creates the setting for the principal argument of this thesis, being that the Court should not only attempt to establish an effective reparations regime, but it must also do so in a way that will avoid damaging its relations with State Parties, which are central to the Court’s overall ability to administer justice.
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1

AN INTRODUCTION

I have been assured by a very knowing American of my acquaintance in London, that a young healthy child well nursed is at a year old a most delicious, nourishing, and wholesome food, whether stewed, roasted, baked, or boiled; and I make no doubt that it will equally serve in a fricassee or a ragout.

Jonathan Swift, A Modest Proposal
For Preventing The Children in Ireland
From Being A Burden to Their Parents
or Country, and For Making Them
Beneficial to The Public, 1729

INTRODUCTION

The above quotation is from one of a number of pamphlets addressed by Jonathan Swift to English policymakers in the eighteenth century, suggesting solutions to the economic crisis in Ireland at that time. The Irish were suffering from unendurable poverty and the English had the means, and arguably the duty, to help improve their economic condition. However, the English were seemingly indifferent to the plight of the Irish and reluctant to help. After a number of failed attempts to inspire the English to institute social change, Swift came to the conclusion that they were simply going to stand by and let the Irish suffer and die. He reacted to his realization by writing a Modest Proposal. His satire attacks the English apathy. It suggests that selling Irish babies as a delicacy for English consumption could improve the Irish situation. The irony of his proposal is that its economic reasoning is sound, and his solution is brilliant so long as
the reader accepts his underlying premise that it is acceptable to breed Irish children to be served as food at English tables.

Swift’s satirical attack implies that the English policymakers felt that the Irish were less human than the English. A belief that some groups of people are less human than others has been the source of some of modern history’s most gruesome tragedies. One example is the racial policy of German National Socialism in the 1930s and 1940s, which legislated the Jewish race from the definition of human as the first step towards extermination. Another is the hesitation of Western industrialized nations in the 1990s when they believed that their domestic voting populations would not accept their soldiers being killed during humanitarian interventions. This resulted in some nations refusing to endanger the lives of their soldiers to prevent human rights atrocities. The most horrific byproduct of this policy occurred when the international community did not intervene as the Hutus slaughtered approximately 800,000 of the Tutsis in 8 months during the Rwandan genocide. Geoffrey Robertson refers to this phenomenon as the Mogadishu Factor.¹

By comparison, some parallels can be drawn between the International Criminal Court (hereinafter ICC) and the English of Swift’s time. One is that the ICC has the potential capacity to vastly improve the living conditions of victims who have suffered

¹ Robertson, G., *Crimes Against Humanity: The Struggle for Global Justice* (New York: The New Press, 2002) at 75-76. In 1993, the UN intervened in Somalia and brought in peacekeeping forces. After complications with a mission being executed in the city of Mogadishu, the US sustained causalities, and the bodies of some soldiers appeared on international television being mutilated by rebels. The US forces responded by pulling out of the region, because they feared that domestic support for this humanitarian invention no longer existed. After this precedent, states intervening in such situations refused to risk the lives of their own soldiers to make such humanitarian intervention effective through the remainder of 1990’s.
from grievous criminal acts, as the English could have improved conditions for the Irish. Another is that many of these victims will be in dire need of help as were the Irish. And last, the ICC has the potential of being the best hope that many victims will have of recovery from their current conditions, much like the English were for the Irish.

However, although there are some parallels, there are also a number of differences that will limit the relevance of this comparison. First, it would be wrong to suggest that the ICC’s judiciary (hereinafter the Court) will be as apathetic to the needs of victims as the English might have been accused of being towards the needs of the Irish. Actually, the Court is predicted to be the champion of victims under their jurisdiction. That being said, the comparison can stand as a warning for the Court that there are evils hidden in apathy. Second, the English policymakers only had to win the consent of the few franchised with power to improve the Irish situation, while the ICC will have to seek the approval of a large majority of very diverse State Parties. It is still yet to be seen which task might be more difficult: convincing the English of the eighteenth century or convincing State Parties of modern day.

**General Concepts**

Generally speaking, the primary obligation of the ICC is to administer criminal justice over those accused of committing war crimes, crimes against humanity and genocide. It can be predicted that by punishing these acts, the ICC will deter many such crimes in the future. The value this deterrence will have for international community will
be, by its very nature, difficult to predict. That being said, the resulting effects of this
deterrence might include:

1. The promotion of peace and security in the world;
2. The prevention of further increases in the already unmanageable numbers
   of refugees and displaced people;
3. The securing of economic markets for natural resource development in
   politically unstable regions; and
4. The establishment of a forum for political groups within states to voice
   concerns to the international community, and consequently, provides such
   groups an alternative venue to communicating through committing acts of
   international and domestic terrorism.

However, even if the ICC deters most criminals from committing such acts, an exclusive
use of this form of criminal prosecution will do little to help those who fall victims to
these crimes. These victims will be suffering the effects of savage and often personal
violence, and often will have fled for refuge from their homes. In most cases, the places
in which they seek refuge will offer little to improve their situation. Hope for these
victims will often remain their only comfort.

The Court can provide hope to victims. Besides its punitive powers, the Court has
an alternative form that has the potential to offer a better justice to victims – it will be
able to issue orders against a convicted person to pay reparations to their victims
(hereinafter the Reparations Regime – the Regime compromises of the law, rules and
administration that the ICC uses to assess and award reparations). Beyond such a
Reparations Regime, the Court can do little to help feed, clothe, shelter, protect, heal and

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2 A detailed explanation of what the ICC must do to be able to help victims regain their pre-crime standard
of living will be provided later in this thesis, but for now the reader is asked to accept the following
summation.
counsel the victims of these heinous crimes under its jurisdiction. Therefore, the underlying premise of this thesis is that if the Court is to help victims in a tangible manner, it must attempt to ensure that the Reparations Regime is effective. The best chance that the Court has to do this will be to prevent the suspect from hiding his or her assets, by issuing provisional measures at the pre-trial stage to secure such assets for funding of potential reparation awards.

Unfortunately, there are obstacles to such prevention. As will be explained in this thesis, one obstacle is that a suspect can hide assets with ease and in a short period of time. For example, there are a number of international banking centers that are more than willing to assist such criminals and, even if unwittingly, undermine the Court’s work. Another obstacle is that some State Parties are opposed to such provisional measures. Such states might be angered if the ICC is not strategically sensitive in its attempt to use such provisional measures. This could be problematic for the Court. It is dependent on maintaining good relations with all states because without the cooperation of State Parties, it cannot execute its orders and therefore cannot enforce its jurisdiction. If states are angered, then they might retaliate by being less than fully cooperative in executing requests for provisional measures. The Vienna Convention on The Law of Treaties (hereinafter Vienna Convention) states the generally accepted position that nations generally cannot justify failing to meet their treaty obligations by asserting that their

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domestic law forbids it, or does not grant it the power to do so. However, as will be explained in this thesis, Part 9 of the Statute of Rome for the International Criminal Court (hereinafter Rome Statute) includes unusual provisions that permit what amounts to derogations from the treaty on the basis of domestic law.

At worst, a negative state reaction could compromise more than the enforcement of these provisional measures. States might compromise the enforcement of other requests for assistance as well. Some examples might include the ICC not being able to properly investigate cases, enforce arrest warrants, or protect witnesses; or any number of other essential powers the Court needs in order to effectively administer justice.

The reparations issue is a potential tinderbox for legal conflict. This was certainly the case during the negotiations preceding the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (hereinafter Rome Conference). State Parties attempted to agree upon the parameters of a Reparations Regime, but the negotiations were filled with long and heated debates. For a time, it seemed uncertain that there would even be provisions for a Reparations Regime. This might be why Article 75, which is the only article that directly contemplates the Reparations Regime in Rome Statute, addresses the issue of reparations in a somewhat cursory manner.

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5 Rome Statute, supra note 3, Article 75.
6 Rome Statute, ibid., Article 75.
After setting some basic boundaries for the Reparations Regime, Article 75 grants the Court discretion to adopt the establishing principles that will form the basis of its operations. Giving such authority to the Court may seem strange, but sometimes negotiators will gloss over more minor, but contentious, issues to help guarantee that an agreement on essential matters can be reached. This most frequently occurs when the negotiating parties view the contentious issue, like the Reparations Regime, as bearing little direct significance to central issues. The Regime is completely severable from the Court’s mandate to provide criminal justice.

Creating an Effective Reparations Regime

As will be explored, the Court cannot create an effective Reparations Regime without the potential for controversy. Consequently, the Court may be in a strange position where it will have to campaign for an effective Regime to win the support of certain State Parties. This situation leaves the Court in a dilemma. Bordering either end of the spectrum of rational choices that the Court can make is:

A. Unilaterally promote and establish a robust Reparations Regime that has the potential of being successful at the risk of compromising the effectiveness of cooperative measures that are essential to administering justice; or

B. Establish a Regime in compliance with all the demands of State Parties, which will pose no substantial risk to cooperative measures, but will probably have little real benefit for victims other than advancing the jurisprudence for future courts.

7 From my experience in track-two negotiating in South East Asia, I have witnessed diplomatic delegates avoid certain contentious issues to reach a resolution in drafting negotiation. I was Rapporteur to Fifth Meeting of the Technical Working Group Legal Matters in Cha Am, Thailand in October 2000; and Rapporteur, Eleventh Workshop on Managing Potential Conflicts in the South China Sea in Jakarta, Indonesia, in April 2001. Both track-two diplomatic conferences were hosted by the South China Sea Informal Working Group.
One weakness of option A is that whether or not State Parties retaliate, they have the power to significantly damage the Court’s ability to administer justice if provoked. Another weakness is that there is no guarantee that assets will be found even if the Court can order provisional measures, because the ease with which individuals can hide assets will make it impossible for the Court to ensure success. So option A is a potentially risky proposition without a guaranteed benefit for victims in some cases.

The benefit of option B is that it would help build relationships with State Parties who might to be opposed to a strong Reparations Regime. Considering that the United States is opposed to the ICC, the Court might need all the political support it can muster to be successful in administering its authority. Then again, putting emphasize on full political support of all State Parties might render the Reparations Regime ineffective. Without an effective Regime, there is less chance that resources will exist in the foreseeable future to fund transitional justice projects that have the potential to profoundly help refugees and displaced people return to their homes and rebuild their lives. Wisdom would suggest that the Court should choose a course of action that is somewhere between these two extremes.

Blind idealism in the face of political pragmatism will not help the plight of future victims either. The ICC should campaign for an effective Reparations Regime targeting State Parties and also their domestic populations. The Presidency should issue careful explanations in publications of how an effective Regime will not impose draconian measures, but will uphold the rights of suspects. Additionally, when the Court creates the
establishing principles of the Regime, it must render judgments that address any concerns that State Parties voice. The Court must use clear reasoning and offer compelling facts that create strong moral arguments to diffuse potential disputes that might occur if the Court chose to haphazardly implement such provisional measures. If such explanations are not made, and if as a result, the Court incites disputes with State Parties, then the victims that the Court is attempting to help may be worse off in the end than if the Court simply decided to abandon the option of endorsing an effective Regime. This should not occur.

METHODOLOGY

Objectives

To this point, this chapter has introduced the main focus of this thesis. It has explained that the Rome Statute has provided the Court with the opportunity to improve the lives of many by bestowing upon it the power to order convicted persons to make reparations to their victims. However, there is a danger that if the appropriate steps are not taken, then the suspect under investigation will have the time and the means to hide his or her assets before the reparations hearing. Therefore, without the ability to find and secure assets quickly, there will be no money available to fund future reparations orders. To complicate this matter, if the Court interprets its power broadly enough to give itself the capacity to prevent this from occurring, there could be a potential backlash from certain State Parties that might be against allowing such provisional measures. The
backlash might compromise the Court’s authority. Bearing in mind these facts, a central argument of this thesis is that the Court should not only incur the risk to establish an effective Regime, but also be politically astute in an effort to avoid damaging relations with State Parties.

The four main objectives of this thesis are then as follows:

1. Discuss the options available to the ICC as regards its obligation under the Rome Statute to establish the Reparations Regime (Chapter Two);

2. Explain the relationships that the Reparations Regime has with certain players, being the international community, victims, suspects, and State Parties. (Chapter Three);

3. Analyze how the Court might implement provisional measures to ensure an effective Reparations Regime (Chapter Four); and

4. Draw conclusions and propose a study strategy to create a prototype for a fully developed, practical and adoptable reparations prototype for the ICC that can ensure that appropriate protective measures are undertaken so that a suspect does not have the chance to hide assets that would otherwise be subject to confiscation (Chapter Five).

Chapter Two

Chapter Two will discuss the options available to the ICC as regards its obligation under the Rome Statute to establish the Reparations Regime. Article 75 is the primary focus of this study. The article outlines some basic principles for reparations, but does not constitute sufficient guidance to create a functioning Regime. The Rules of Procedure and Evidence\(^8\) (hereinafter Rules) provide some direction for the Court, however there are still many unanswered questions as to how this Regime will function.

Generally speaking, the purpose of the Reparations Regime is to grant the Court the power to order and compel convicted individuals to make the appropriate reparations to his or her victims. Procedurally, the Rome Statute permits the Court to commence an investigation to collect evidence and secure assets for the reparations hearing on its own motion. Those victims who are potentially eligible for such awards must submit an application to the Court to be included in the claim. The Court will then judge the application to determine whether the loss described in the application resulted from the crimes that the convicted person committed, and if it is satisfied that the victim’s loss is a consequence of the crime, then he or she will be awarded a form of reparations that the Court deems suitable.

In sum, when this chapter meets its objective, the reader will have an understanding of how the Reparations Regime might function and an appreciation of the potential importance that this Regime might have for the victims of individuals convicted under the Rome Statute. This understanding will reinforce the argument that the Reparations Regime holds a notable potential to empower the Court to help victims rebuild their lives.

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9 Rome Statute, supra note 3, Article 75(1) & (2). And also Rules, ibid., Rules 94-97.
10 Rules, ibid., Rule 99(1).
11 Rules, ibid., Rules 94(1) or 95.
12 Rome Statute, supra note 3, Article 75(1) & (2).
13 Rome Statute, ibid., Article 75(2). And also Rules, supra note 8, Rule 97(1).
Chapter Three

Chapter Three’s main objective is to contextualize the Reparations Regime within the international political environment in which it will function. This chapter will specifically explain aspects of the Court’s relationships with the international community, victims, suspects, and State Parties. To do this, it will first establish the potential importance of the Regime to the international community and victims by describing how it might play a major role in assisting the United Nations (and other international, regional and domestic bodies) with the unmanageable number of displaced people in the world as well as a number of other international problems. Then it will illustrate how easily the effectiveness of the Reparations Regime can be compromised, being an accused individual hiding assets. The chapter will then define what precautions the Court should take to prevent a suspect from compromising the Regime’s effectiveness. Lastly, it will be argued that if the Court attempts to take these precautions, at the expense of the concerns of State Parties about the consequences of imposing such measures upon a suspect at the pre-trial stage, then such states may fail to cooperate with the Court by refusing to enforce orders to take such precautions against suspects. Thus, a dilemma exists where whether or not the Court imposes such precautions, there is a threat to the Regime’s effectiveness.

Chapter Four

Chapter Four is an in-depth analysis of how the Court might implement provisional measures. The initial focus will be on Rule 99 and the relationship between Rule 99 and Articles 57(3)e, 75(4), and 93(1)k. Article 93(1)k allows the Court to
request State Parties to take the necessary measures to secure assets. The chapter wrestles with the significance of the seemingly contradictory directives that Articles 57(3)e and 75(4) give to the Court as regards its capacity to order such provisional measures. To elaborate, Article 75(4) forbids the Court to make requests for provisional measures until after conviction while Article 57(3)e grants the Pre-Trial Chambers the power beforehand. It will be argued that de jure no conflict between the directives exists. However, it will also be argued that if the Court is inconsiderate of the concerns of State Parties when justifying its use of provisional measures, it could suffer the serious consequences of such states being less than supportive in enforcing its requests for cooperative measures. These consequences are alluded to in Chapter One and discussed in Chapter Three and will be further detailed in this chapter as well. It will be concluded that simply asserting that de jure the Court has the right to request provisional measures would be an unwise approach. As an alternative, an approach that is more considerate to the concerns of states is suggested. This approach would offer a clear explanation of how the application of Article 57(3)e addresses the concerns of parties. It will be argued that this approach might be the best chance that the Court has to maintain healthy relations with State Parties and help ensure an effective Reparations Regime.

The majority of this chapter will be concerned with setting out this strategic approach. It will consist of a model argument of how the Court might justify its use of Article 57(3)e to satisfy concerned State Parties. The objective of this rational approach is to define what safeguards will restrain the Reparations Regime, and then explain how they address the specific concerns that State Parties expressed as regards this issue during
the Rome Conference. This list of concerns will represent a reasonable prediction of the ones that State Parties might raise in the future. It will be argued that this approach should ease the concerns of states and rally support for the Court’s position. This model argument’s structure will chronologically trace the process that the Prosecutor and the Pre-Trial Chambers will have to follow prior to finalizing a request under Article 93(1)k. As mentioned, this exercise will introduce the safeguards and then, in conclusion, will explain how these safeguards satisfy the aforementioned concerns.

In sum, when this chapter meets its objective, the reader should understand how Articles 75(4) and 57(3)e could function harmoniously under Rule 99. The reader should also be familiar with the sort of argument that the Court might create to appease concerned State Parties.

Chapter Five

Each chapter will have made conclusions about the thoughts expressed. This chapter will compile and summarize these conclusions. Based on this, the concluding chapter will then offer some additional insights. One of the key suggestions will be that more work should be completed on this topic. Taking this into consideration, there will be some general recommendations as to how the ICC might apply these conclusions. To end this thesis, Chapter Five will introduce a proposal for the creation of a fully developed prototype for the ICC Reparations Regime.
THE REPARATIONS REGIME

Peace, in the sense of the absence of war, is of little value to someone who is dying of hunger or cold. It will not remove the pain of torture inflicted on a prisoner of conscience. It does not comfort those who have lost their loved ones ... Peace can only last where human rights are respected, where the people are fed, and where individuals and nations are free.

The Dalai Lama, The Nobel Lecture (1989)

INTRODUCTION

Article 75(1) of the Rome Statute directs the Court to establish the principles, which will form the foundation of the Reparations Regime. This mandate is vitally important to the Regime because it will determine its competence. The language of the mandate is as follows:

... [E]stablish principles relating to reparations to, or in respect of, victims, including restitution, compensation and habilitation. On this basis, in its decision the Court may, either upon request or on its motion in exceptional circumstances, determine the scope and extent of any damages, loss and injury to, in respect of, victims and will state the principles on which it is acting.¹

To satisfy this mandate, the Court will have to establish principles in relation to four main issues. The first concerns the nature and purpose of the Reparations Regime. Second, since the definition of “victims”, which is provided in Rule 85,\(^2\) is too ambiguous to determine the exact class of individual eligible to receive reparations awards, the Court will have to clarify who they are. Third, the Court must determine “the scope and extent of any damages, loss and injury”.\(^3\) Implicit in this is that the Court must institute a burden of proof to establish and measure such damages. Fourth, it must determine the types of awards available to victims. Article 75(1) indicates that this scope must be at least broad enough to encompass awards for “restitution, compensation and habilitation”.\(^4\)

To accommodate an analysis of the Article 75(1) mandate, this chapter has been structured to address the above-mentioned issues in the following order:

a. What should be the nature and purpose of the reparations;

b. Who should be included in the class of victims able to make claims;

c. What should be the burden of proof to establish liability; and

d. What remedies should be available to victims.

Once these four issues have been addressed, the reader should begin to develop a more complete picture of how the Reparations Regime will function.

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\(^3\) *Rome Statute, supra* note 1, Article 75(1).

\(^4\) *Rome Statute, ibid.*, Article 75(1).
Initially, it was planned that this chapter would undertake an analysis of the procedural aspects of the Regime, but there is already an abundance of such information available. That being said, this chapter will first outline in a very brief and general manner what can be determined about the Regime strictly from a reading of Article 75 and its supporting Rules. It is important to note that this chapter will not address issues related to protective measures and the enforcement of awards. These issues will be dealt with in later chapters as is necessary.

THE BIGGER PICTURE

In this section, the discussion will consist only of an overview of the procedural aspects already cast by the Rome Statute and its Rules. By introducing what is certain about the structure of the Reparations Regime, this will set the context for further discussion concerning the Court's mandate to develop establishing principles. However, detailed explanations of the procedural aspects of the Reparations Regime as presented in the Statute and its Rules are available.5

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Initiating a Reparations Inquiry

The language of Rule 94(2) indicates that requests to initiate a reparations inquiry can be made prior to the decision to commence a trial proceeding. In most cases, the victims or their legal representatives will compose such a requests. This requests will be the trigger that may begin an investigation. The request for reparations must be made in writing and filed with the Registrar. Rule 94(1) outlines the information that the request must contain. It should also be noted that the Court has the power to initiate a hearing on its own motion.

Notification of Application to Commence Reparations Proceedings

After the Court has decided to commence a reparations action, it is under an obligation to notify the accused and other relevant parties of this decision. However, the release of this information, in whole or in part, is subject to any protective measures that may be compromised by this action.

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6 Rules, supra note 2, Rule 94(2).
7 Rome Statute, supra note 1, Article 75(1). See also Rules, ibid., Rules 94, 95(1), and 99(1).
8 Rules, ibid., Rule 94(1).
9 Rules, ibid., Rule 94(1).
10 Rome Statute, supra note 1, Article 75(1).
11 Rules, supra note 2, Rules 94(2) & 95(1).
12 Rules, ibid., Rule 94(2). See also Rome Statute, supra note 1, Article 68. See also Rules, ibid., Rule 87. Article 68 and Rule 87 generally discuss the protective measure the Court will use to protect the safety of victims.
Publication of Information and Options

The Registrar has a duty to take “all the necessary measures to give adequate publicity of the reparation proceedings before the Court, to the extent possible, to other victims, interested persons and interested States”. It may make requests for the help of States Parties and intergovernmental organizations to do this.

After a victim is informed of the reparations proceeding, he or she may apply to be added as a claimant. Alternatively, other victims from a community who may be eligible to receive awards may do the opposite and apply to be excluded as potential claimants.

The Hearing

The Court can only determine if a convicted person is to pay damages. Proceedings will be held subsequent to conviction to determine if this individual is liable to pay damages for his or her crimes. The size and scope of the hearing is within the Court’s discretion and most likely will be adaptable enough to meet the evidentiary needs of the particular case. The Court, as necessary, may invite a spectrum of interested parties and states to participate. The Court can use information provided by experts, the

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13 Rules, ibid., Rule 96(1).
14 Rules, ibid., Rule 96(2).
15 Rules, ibid., Rules 94 & 95(2)a.
16 Rules, ibid., Rule 95(2)b.
17 Rome Statute, supra note 1, Article 75(2). Rules, ibid., Rule 98(1).
18 Rome Statute, ibid., Article 75(1) & (2). Rules, ibid., Rule 97(1).
19 Rome Statute, ibid., Article 75(3).
20 Rome Statute, ibid., Article 75(3).
convicted person, the Prosecutor, the victims, and other interested parties.\textsuperscript{21} The last class of parties frequently could include the states that share jurisdiction with the Court over the case.\textsuperscript{22}

Assessing and Administering Awards

The Regime is primarily instituted to make awards to individuals, however, when the Court "deems it appropriate", it has the ability to order that reparations be made to a community.\textsuperscript{23} The Court has the authority to consult a variety of experts to help establish what the awards should be.\textsuperscript{24} For example, experts such might be used by the Court to have the cultural and historic understanding of a people in order to award the most effective form of damages. Logistics experts also may be used to determine the most effective manner to administer a case with a large number of claimants.

If the Court cannot make awards directly to the victims for whatever reason, it will order that the awards be placed in the Trust Fund.\textsuperscript{25} Article 79 establishes the Trust Fund.\textsuperscript{26} If it is an individual award, then it will be held in the Trust Fund until whatever impediment to transferring the award to the victim has been removed.\textsuperscript{27} If it is a collective award, after consultation with interested states and the Trust Fund, the Court

\textsuperscript{21} Rome Statute, \textit{ibid.}, Article 75(3).
\textsuperscript{22} Rome Statute, \textit{ibid.}, Article 75(3).
\textsuperscript{23} Rules, \textit{supra} note 2, Rule 97(1).
\textsuperscript{24} Rules, \textit{ibid.}, Rule 97(2).
\textsuperscript{25} Rules, \textit{ibid.}, Rule 98(2) & (3).
\textsuperscript{26} Rome Statute, \textit{supra} note 1, Article 79.
\textsuperscript{27} Rules, \textit{supra} note 2, Rule 98(2).
may allocate the responsibility to execute judgements to an intergovernmental, international or national organization.  

ESTABLISHING PRINCIPLES

Rules for Developing “Establishing Principles”

The boundaries that the Court must respect in developing the establishing principles will be addressed at the outset of this section. These boundaries will determine the limits upon this chapter’s rationale for its suggestion as to what steps the Court should take.

Article 75(1) indicates that the Court has a broad discretion to fashion the Reparations Regime in the manner it deems suitable. Nevertheless, this discretion is not unfettered. Professor Ian Brownlie, retired Chichele Professor of Public International Law at the University of Oxford, explains that there are generally accepted rules for the interpretation of any treaty. The Vienna Convention must be the starting point of this analysis. Article 31 reads:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

28 Rules, ibid., Rule 98(3) & (4).
29 Rome Statute, supra note 1, Article 75(1).
32 Vienna Convention, ibid., Article 31(1).
Brownlie calls this form of analysis the textual approach. In its application to the establishment of the Reparations Regime, the Court must attempt to find direction from a common, normal and predictable interpretation of Article 75(1) in light of the object and purpose of the Rome Statute. As we have seen above, this article does little more than direct the Court to establish principles. Nothing specific in the preamble relates to reparations. When the preamble is read as a whole, it generally states that the purpose and objective of the treaty is to bolster international efforts to prevent crimes under its jurisdiction by minimizing impunity. Therefore, the Rome Statute’s general purpose adds little to the ordinary meaning of the language in this article, and the textual approach offers the Court little direction to fulfill its mandate.

Article 21 directs the Court as to how it must continue. The Court must look to the Rules to clarify how it must proceed with the interpretation of any ambiguities or omissions in the treaty. Article 21 reflects the Vienna Convention’s principles for interpretation. Its Article 31(3)(a) states that “there shall be taken into account ...any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”. Brownlie also agrees with this form of analysis. He states that the context of the treaty must be taken into consideration. In his view; “the context of a treaty for purposes of interpretation [includes] ... any agreement or

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33 Brownlie, supra note 30 at 634.  
34 Rome Statute, supra note 1.  
35 Rome Statute, ibid.  
36 Rome Statute, ibid., Article 21(1)a.  
37 Vienna Convention, supra note 31, Article 31(3)a.
instrument related to the treaty and drawn up in connection with its conclusion". In the context of the Rome Statute, the Rules constitute such an agreement and the Court must take them into account when determining the establishing principles. Specifically, these Rules are 94 through 99.

Peter Lewis, Lecturer at Michigan State University, and Hakan Friman, from the Swedish Ministry of Justice, have written to the effect that the Preparatory Commission that drafted the Rules specifically avoided encroaching on the Court’s mandate to create the establishing principles. They asserted:

*The Preparatory Commission acknowledged the mandate given to the Court to establish principles and no proposal for rules to further define the scope and extent of reparations was submitted. Thus, a repetition of the long and sometimes contentious debate on these issues in Rome was avoided, and it will be up to the Court to determine, within its mandate, the principles for reparations.*

[emphasis added]

The Rules validate the Friman and Lewis’s recollection. The Court will have to look elsewhere to find direction on how they should develop the establishing principles.

The Court will then turn once more to Article 21 for direction. Article 21(1)b states that if there is no direction in the primary texts, “then the Court shall apply ... where appropriate, applicable treaties and the principles and rules of international law”. Once again, Article 21 reflects the approach of the Vienna Convention - Article 31(3)(c) states that “… there shall be taken into account … any relevant rules of

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38 Brownlie, supra note 30 at 634-35.  
39 Friman & Lewis, supra note 5 at 478-479.  
40 Rules, supra note 2, Rules 94-99.  
41 Rome Statute, supra note 1, Article 21(1)b.
international law applicable in relations between the parties". Thus, the Court will have to search further to find relevant applicable international law to attempt to satisfy omissions in the texts as regards reparations. Bearing in mind that States cannot enter into international agreements that contradict their existing obligations, this principle seems sensible. Otherwise, countries could find themselves in the awkward situation of inadvertently ratifying an international agreement that they de jure are not permitted to enter. And thus, since the former obligation would be paramount, the obligation under the latter arrangement would become void.

In many respects, the ICC is pioneering international criminal law, especially as regards criminal procedure and reparations. Since this is a fledgling legal field, the Court will have to rely on broader legal understandings currently in the process of maturing. There is a significant difference internationally between an understanding and a law. As a result, the Court will have to be prudent in selecting which legal understandings it chooses to adopt. For example, states are obliged to conduct their affairs in accordance with such international norms that are binding upon them. The same is not true when a state recognizes a legal understanding. If they adopt such an understanding, they are making a commitment to abide by its principles, but if they do not, there is generally little legal consequence. It is similar in nature to a gentlemen’s agreement.

Speaking in general terms, there are two essential elements in the formation of rules of customary international law. The first is that it must be established that the rule

42 Vienna Convention, supra note 31, Article 31(3)c.
is common practice among states. The second is that the states subjectively feel that they are conforming to what amounts to a legal obligation. This is called *opinio juris*. After both elements are established to be present, a principle can ascend in importance and be deemed to be a customary law. Prior to such acceptance, whether states have to comply with such understandings can be politically contentious. And if a state or a court attempts to pressure a state to respect the conditions of an understanding as if it were a law, the pressured state may view this as an encroachment upon its sovereignty. Thus, the Court should be careful to appreciate the difference and avoid allowing an existing international understanding to influence it to the same degree as if that understanding were law.

**The Footnote in the Draft Predecessor to Article 75**

The clear distinction between legal understandings and law being understood, some writers suggest that two particular legal understandings should be liberally relied upon by the Court to fulfill this mandate. These writers justify this position by making reference to a footnote that can be found in a draft predecessor of Article 75. This footnote reads that, for the purpose of interpretation of the terms "victims" and "reparations", the Court should refer to the revised draft *Basic Principles and Guidelines on the Right to Reparation for the Victims of Gross Violations of Human Rights and International Humanitarian Law* (hereinafter *van Boven Principles*) and the *Declaration of Basic Principles of Justice and Victims of Crime and Abuse of Power*.

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43 Triffterer, supra note 5 at 969. See also McKay, supra note 5 at 170. See also Friman & Lewis, supra note 5 at 478.
(hereinafter *Declaration*). One writer, David Donat-Cattin, Lecturer in Law at the University of Teramo, suggests that the Court should adopt the direction provided in this footnote, but provides little explanation as to why he holds this opinion. Other writers, such as Lewis and Friman, make the same suggestion, but again without justifying their position.

Analytically speaking, the form of analysis that these writers are suggesting is that the Court should use the preparatory work of the treaty to establish the intentions of the signatories. The *Vienna Convention* endorses this method. Brownlie also endorses the use of this method of analysis. He writes:

> When the textual approach ... leaves the meaning ... obscure, recourse may be had to further means of interpretation, including the preparatory work of the treaty ... Moreover, such recourse may be had to verify or confirm a meaning that emerges as a result of the textual approach.

What is being suggested here is that, when other alternative forms of analysis have failed, the preparatory work of the *Rome Statute* may be used to shed light upon the intentions of the treaty’s signatories. Thus, ambiguity and omissions in the treaty may be clarified from an understanding of their intentions. If this is so, then the footnote to the preceding draft of Article 75 can help clarify the Article 75(1) mandate given to the Court.

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45 Triffterer, supra note 5 at 969.
46 Friman & Lewis, supra note 5 at 478.
47 *Vienna Convention*, supra note 31, Article 32.
48 Brownlie, supra note 30 at 635.
Although the *Rome Conference*’s method of analysis is sound, there is an unsettling aspect of blindly adopting the position of the drafters without further explanation as to why it should be applied. The problem is that this footnote was merely presented to the delegates of the *Rome Conference*, but was not formally adopted by the signatories and does not exist in the finalized treaty document. Since this information was omitted during negotiations, it does not necessarily reflect the intentions of the State Parties. *Prima facie*, this observation should encourage the reader to demand further explanation, because the claim that this footnote reflects the intentions of the signatories is not substantiated by the facts. Intuitively it seems more likely that a successful argument could be established to the contrary. The basic structure of this counterargument is that, since the drafters of the article drew the attention of the delegates to this suggestion and since the delegates did not incorporate the suggestion into the final text of the article, the parties must not have intended for the Court to be bound by the suggestion in this footnote.

Fortunately, Fiona McKay, Director of the International Justice Program at the Lawyers Committee for Human Rights, has suggested a clarification of the connection between the footnote and the intentions of the delegates.49 She writes that, when finalizing the language of Article 75, the delegates intentionally adopted the language “*reparations ... including restitution, compensation and rehabilitation*” replacing the language drafted earlier, being simply “*compensation*”, to reflect their intention to draw the Court’s attention to the *van Boven Principles*.50 The *van Boven Principles* use this

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49 McKay, *supra* note 5 at 170-171
50 McKay, *ibid.* at 170-171.
language.\textsuperscript{51} And thus, if this explanation is accepted, then there is a bridge that connects the above-mentioned predecessor footnote with the intentions of the State Parties. As a result, although international laws are preferred to international understandings in the interpretation of treaties, the \textit{van Boven Principles} will become a primary source of information that this analysis shall use to draw conclusions, because the delegates intended the Court to use this understanding as a precedent for the development of the Reparations Regime. The argument in this thesis will be more wary of using the aforementioned \textit{Declaration}\textsuperscript{52} (also mentioned in this footnote), because the same connection between the language of it and Article 75(1) has not been established. Keeping this in mind, the \textit{Declaration} will be used as a guide as well, but to a lesser degree.

\textbf{Nature and Purpose of Reparations}

Although neither the \textit{Declaration} nor the \textit{van Boven Principles} offer a definition of reparations, both indicate what the nature and purpose of reparations should be. Both recognize an obligation to render justice to victims who have suffered because of crimes that have been committed in violation of human rights or international humanitarian law.\textsuperscript{53} More specifically, the \textit{van Boven Principles} suggest that the reparations awards

\begin{footnotes}
\footnotetext[53]{\textit{Declaration}, ibid., para. 4. And \textit{van Boven Principles}, supra note 50.}
\end{footnotes}
should be quantified by two measures: the severity of the violence, and the resulting damage. Van Boven writes:

Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.\textsuperscript{54} [emphasis added]

There are at least two potential interpretations of how to quantify awards based on the first measure suggested, which is the "gravity of the violations".\textsuperscript{55} One is that the Court should take into consideration exactly how far the convicted person has deviated from the norms of acceptable behaviour as dictated by the Rome Statute, because such analysis would offer a greater understanding of the victims' actual experience and therefore provide an appreciation of the resulting harm suffered. However, the Court would have to perform this analysis in any event because it must be conducted to accurately quantify the second measure, that being the resulting damage. As a result, this interpretation renders the first measure redundant. Unless van Boven only wished to emphasize the gravity of the violations, this interpretation should be dismissed because it offers no better measure to quantify damages.

The second interpretation of how to quantify awards based on the gravity of the violence is best explained through an analogy: the analogy is between using the gravity of the violence as a measure of damages and awarding punitive damages in civil actions. Punitive damages are awarded not to compensate the victim but to punish the guilty party. Likewise, if this second interpretation is accepted and the gravity of the violence

\textsuperscript{54} Van Boven Principles, supra note 51, para. 7.

\textsuperscript{55} Van Boven Principle, ibid., para. 7.
becomes a measure for quantifying damages, then reparations awards could become a tool of punishment.

The Reparations Regime may not be the ideal forum in which to order punitive measures. Dinah L. Shelton, a resource person from New York University for the Preparatory Commission of the ICC, has a clear vision of the purpose of reparations in the context of the Court. Her position is rooted in the principle that the primary function of reparations is for corrective or remedial justice. In other words, the purpose of reparations should be to correct the wrongs inflicted upon the victim(s).

To punish, the Court can impose fines under Article 77. It also has the discretion to determine whether these fines are payable to the Trust Fund. Since the victims are the only beneficiaries of the Trust Fund, whether the Court uses a fine or a reparations award to impose a punitive measure, the benefit is the same for victims. There is no need for the Court to impose punitive measures under the Reparations Regime. Therefore, since the Court has an alternative means of imposing such penal measures with the same benefits for victims, it should use those means. This will help ensure that the Reparations Regime maintains a reputation as a humanitarian tool.

In certain cases, it could be harmful to victims if the Court were to award punitive damages through the reparations mechanism. For example, in a politically unstable

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56 Shelton, supra note 5 at 137-138.
57 Rome Statute, supra note 1, Article 77(2)a.
59 Rome Statute, ibid., Article 79(1).
nation with tremendous ethnic tensions, the historical background of the conflict may be in contention between the post-war factions. Even the Court could have enemies since it may be seen as a threat to the political interests of certain groups. Their leaders may attempt to subvert the Court by turning portions of the populace against it. A propaganda campaign could tarnish the Regime's reputation and compromise the Court's authority. Depending on the culture in question, such populations may have a more difficult time discerning the truth of the situation. As a result, the Court may not be able to gain the support of a populace that has been poisoned by lies.

Although such potential backlash against the Court may or may not be preventable, the less politically contentious the reparations process is, the better the chances that transitional justice initiatives will be effective and the better it will be for the victims. If the Regime's award becomes an instrument of reprisal, the Court could order the guilty parties to pay large sums of money for punitive damages that are not related to the actual harm suffered by the victims. Spin-doctors then could claim that the reparations awarded to the victims are no more than the Court unjustly avenging the victims. Those inspired and outraged by such allegations could target and destroy transitional justice measures funded by the reparations awards. On the other hand, if the Regime's award is conceptually unrelated to punitive measures against the convicted person, this could help to safeguard it from such propaganda tactics.
The second quantification for determining awards suggested by van Boven is that such awards should be "proportionate to ... the resulting damage". Although its concept is theoretically clear, the application of the principle may prove to be difficult. The key will be to develop a variety of awards that can attempt to restore victims to their condition prior to suffering at the hands of the convicted party.

The first two of van Boven's recommended categories for reparations are "restitution" and "compensation". Shelton parallels and expands these suggestions. She explains that victims ideally deserve restitution to restore "precisely that which was taken". She argues that when this is not possible, a form of "substitute remedy" that offers "something equivalent in value to that which is lost" should be offered to the victims. She notes that money is the usual substitute. However, Friman and Lewis warn that, while the Rules were under discussion, a minority of delegates felt that some victims would consider financial compensation for their loss as "blood money". This is because certain cultures could view such compensation as profiting from the death and destruction in their societies instead of accepting it as compensation. As a result, the Court should have a Regime that is flexible enough to provide compensation to victims in a form that is culturally sensitive to the specific needs of victims. As mentioned earlier, social experts may and possibly should be consulted. For example, a collection of psychologists, anthropologists, and/or historical experts may advise the Court to award

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60 Van Boven Principle, supra note 51, para. 7.
62 Shelton, supra note 5, at 139-140.
63 Shelton, ibid., at 140.
64 Friman & Lewis, supra note 5 at 481.
65 Friman & Lewis, ibid. at 481. Thus, a provision was added to Rule 95 where victims can request that the Court not make an order for reparations on their behalf.
66 Rules, supra note 2, Rule 97(2).
culturally acceptable reparations. The options for reparations should only be limited by international law and the culture in question.

Van Boven further suggests that reparations could include "rehabilitation" and "satisfaction and guarantees of non-repetition".67 Shelton makes a similar suggestion. She writes that remedies should encompass the need for psychological and social healing.68 She explains that victims of abuse have been blamed for their victimization in some cases, however, more often the victims are simply avoided. Shelton suggests two reasons why this may be so. First, the victims and their stories represent a horrible history others are trying to forget.69 Second, there are usually bystanders who witnessed the torment of these victims, but did little to prevent them.70 The latter individuals may avoid the victim because they experience guilt when confronted with the reality of the situation. Shelton suggests that such reactions from the community pressure victims to remain silent about their experiences.71 Victims are thus forced to suppress the healing process. Compounding the problem, the victims also experience isolation and mistrust from their community. Shelton asserts that children of victims may adopt their parents' reactions toward the society and become victims themselves.72 This creates a problem of systemic victimization that resonates through a society years later. She concludes that it

68 Shelton, supra note 5, at 140.
69 Shelton, ibid., at 140.
70 Shelton, ibid., at 140.
71 Shelton, ibid., at 140.
72 Shelton, ibid., at 140.
is vital that reparations address the need for a community to "re-adapt to normal society and return to pre-victim ways of living" on an individual and group level.\textsuperscript{73}

The mental health of the individuals and the healing of the society may not be accomplished unless reparations address the "rehabilitation" and "satisfaction and guarantees of non-repetition" as suggested by van Boven.\textsuperscript{74} First, studies must be accomplished to determine how to heal the sick and educate the society in question. Generally speaking, such projects are in great need, but few organizations have the influence and the resources to implement them. In the future, the Court's ability to implement such programs will be a welcomed addition to international efforts that are and will be attempting to help rebuild communities.

The \textit{Rome Conference} states that the reparations proceedings must be "expeditious, fair, inexpensive and accessible".\textsuperscript{75} Van Boven agrees. He directly states that the proceedings must be "expeditious".\textsuperscript{76} He also implies that it must be fair, inexpensive and accessible by making reference to the fact that there must be a "fully effective" Reparations Regime.\textsuperscript{77} It is obvious that an \textit{effective} Regime would have to be \textit{fair}. The Regime must also be \textit{inexpensive} and \textit{accessible}, considering that most victims will be living in refugee-like conditions.

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\item[73] Shelton, \textit{ibid.}, at 140.
\item[74] \textit{Van Boven Principle, supra} note 51, paras. 14 & 15.
\item[75] Declaration, \textit{supra} note 52, para. 5.
\item[76] \textit{Van Boven Principle, supra} note 50, para. 7.
\item[77] \textit{Van Boven Principles, ibid.}, para. 7.
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**The Class of Victims That Can Make Claims**

Rule 85 defines victims for the purposes of the *Rome Statute* and its *Rules* as follows:

a. "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

b. Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.\(^{78}\)

*The International Criminal Court And Victims and Witnesses: A Practitioner’s Guide* expands on this definition to provide a good explanation of the class of victims that may be able to receive reparations. This manual suggests that the class of victims will include:

1. Actual persons who suffered direct physical or psychological harm;

2. The immediate family of victims (spouse, child, sibling, parent);

3. Those persons who live in close proximity to large numbers of victims and are affected economically or psychologically by the harm inflicted (possibly);

4. Those individuals who witnessed the infliction of harm to another person or group of persons;

5. Those organizations or institutions whose property was directly harmed and which was dedicated to religion, education, art or science or charitable purposes, and to its historic monuments, hospitals and other places and objects for humanitarian purposes; and

\(^{78}\) *Rules, supra* note 2, Rule 85.
6. Those persons who were directly physically or psychologically affected by the destruction of the property belonging to the aforementioned organizations or institutions (possibly).\textsuperscript{79}

The only inclusion that is to be made would be an extension of the second group of individuals. As will be expanded below, in addition to immediate family, those who may not \textit{de jure} be considered family, but are being cared for as members of the family unit, should also be included.

The key to understanding the class of individuals who should be included in this definition is identifying "\textit{who}" has "suffered harm". Van Boven suggests the class of victims should be broad. He writes that:

\textit{Reparation may be claimed individually and where appropriate collectively, by the direct victims, the immediate family, dependants or other persons or groups of persons connected with the direct victims.}\textsuperscript{80} [emphasis added]

The language of Article 75(1) could be interpreted as supporting van Boven's suggestion by directing the Court to establish "\textit{principles relating to reparations to, or in respect of, victims}" [emphasis added].\textsuperscript{81} The emphasized language indicates that the scope of this class should be broad enough to include more than what van Boven calls "\textit{direct victims}"\textsuperscript{82}. For if reparations can be claimed in respect of victims, then someone other than the victims can make a claim.\textsuperscript{83} However, the language is ambiguous. It could be

\begin{itemize}
  \item \textsuperscript{80} \textit{Van Boven Principles, supra} note 51, para. 6.
  \item \textsuperscript{81} \textit{Rome Statute, supra} note 1, Article 75(1).
  \item \textsuperscript{82} \textit{Van Boven Principles, supra}, note 51, para. 6.
  \item \textsuperscript{83} \textit{Rome Statute, supra} note 1, Article 75(1).
\end{itemize}
interpreted to mean that the class of victims should be defined as broadly as suggested by van Boven. Or it could mean that individuals can make claims on behalf of "direct victims" when the victims are incapable of making the claim themselves. It is likely that the Court will follow van Boven's suggestion and adopt the larger class of victims. This would be broad enough to encompass both interpretations.

Such a definition seems to be just. It is inclusive enough to cover all those who would be immediately affected by a given criminal act. For example, in many patriarchal societies, the male head of a household may be the only person who is able to earn enough income to support the family. He may also be the only person who can protect the family. This man's household may not only include his wife and children but also the wives and children of deceased friends or family. These sorts of family arrangements may be more prevalent in war torn or AIDS ravished societies. If this man is killed, then those under his care may be left without any possible sources of income or protection. They may also suffer deep emotional trauma if they witness his death. However, since the violence was not directly inflicted upon them, they could be barred from making claims if the Court adopts a narrower definition of victims.

The Rome Conference also adds support to van Boven's suggestion. It states; "The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim ..." [emphasis added]. Furthermore, both Donat-Cattin

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84 Van Boven Principles, supra note 51, para. 6.
85 Declaration, supra note 52, paras. 1 & 2.
and Shelton support the Court adopting this broader definition. Shelton elaborates that other international legal bodies use similar definitions. She offers two examples: the Inter-American Court of Human Rights and the former European Commission on Human Rights.

The Burden Of Proof To Establish Liability

Neither the Rome Statute nor its Rules offer any guidance in determining what the standard for the burden of proof should be for the Reparations Regime. Shelton addresses this issue. She argues that the critical standard of requiring proof beyond a reasonable doubt is not acceptable for this Regime. She supports this claim with the general assertion that although different legal systems use different terminology, most utilize a lower standard of proof for some legal proceedings.

Lewis and Friman write that the French, Canadian, and American delegations all made proposals to articulate what this lower standard of proof should be during preparatory committee meetings for the establishment of the Rules. Each delegation's proposal was founded upon a model similar to what exists in their national legal systems. The French asserted that conviction intime (the intimated conviction) should be an appropriate standard. This approach is based on persuasion; if an impartial court is persuaded by a version of the truth based upon an understanding of the facts, then it shall be deemed to be true. Shelton asserts that in practice the French standard of proof is

86 Shelton, supra note 5 at 141-142. Triffterer, supra note 5 at 969.
87 Shelton, ibid. at 141-142.
88 Shelton2, supra note 5.
89 Friman & Lewis, supra note 5 at 484-487.
similar to that of Common Law. Both the Canadian and American systems use the Common Law standard called balance of probabilities. A *balance of probabilities*, also known as a *preponderance of the evidence*, is understood to mean:

\[
\text{[T]he superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.}\]

Lewis and Friman write that all three delegations had little success convincing enough other delegations to accept their proposals. The problem was that some delegates were fearful of the ramifications upon the convicted party if they agreed to adopt a standard of proof that granted the Court such a broad and vaguely defined discretion. This is because some legal cultures have no comparable model to the *balance of probabilities*. For delegates from these countries, the introduction of such a foreign standard seemed to threaten the integrity of the justice system, mainly because they had difficulty understanding the suggested scope of the Court’s authority to determine liability. In the end, the negotiations deteriorated to the point where the delegates could not even find agreement on the meaning of the term "proof". They noted that, although they agreed that a standard lower than *beyond a reasonable doubt* should be applied, they could not agree on how to articulate it, since all attempts to do so were based on the concept of *balance of probabilities*. The semantics of establishing the standard of proof

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90 Shelton2, supra note 5.
92 ICC, Fourth Session of the Preparatory Commission of the International Criminal Court (13 - 31 March 2000) PCNICC/2000/WGRPE(6)/RT.1 at Footnote 1. Discussion paper proposed by the Coordinator regarding Part 6: Rule 6.30 - Rules relating to participation of victims in the proceedings. Also see Friman & Lewis, supra note 5 at 486.
may be a challenge for the Court. It should be carefully constructed to put to rest the fears of certain state parties.

In sum, both *conviction intime* and the *balance of probabilities* grant the Court a less restrictive discretion to determine liability. Such standards exist to lessen the evidentiary burden for some types of proceedings. The problem lies in the fact that the clarity of the more scientific standard of *beyond a reasonable doubt* must be abandoned to allow a court to have greater discretion to make educated opinions as to who is legally responsible for what actions and consequences. The ambiguity of this standard creates suspicion in those countries that are both unfamiliar with this lower standard and protective of the rights of the accused. It will take a Herculean effort to craft suitable language to describe this standard in a manner that rests the concerns of those State Parties that are uncomfortable with allowing a judicial system to have such a broad discretion to determine liability.

**What Remedies Should Be Available to Victims**

In their article, Laurel Fletcher, Lecturer in Law, and Harvey Weinstein, Associate Director of the Human Rights Center, both from the University of California (Berkeley) introduce important considerations related to the award of reparations.\(^93\) The authors critique the conventional theoretical underpinning that justifies placing the criminal trial process at the focal point of the *modus operandi* of social reconstruction. They compare these arguments to a study that was completed at the University of California (Berkeley).

\(^{93}\) Fletcher, L., and Weinstein, H., "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation" (2002) 24 Human Rights Quarterly 573 [*Social Repair*].
California regarding the contribution that the War Crimes Tribunal for the Former Yugoslavia made to bring about social rehabilitation to that region. They asserted that the supporters of the conventional position are short sighted, and if policymakers ignore the value of other tools for social repair, like reparations, then social repair will likely be compromised in the future. The authors suggest that courts should adopt a versatile approach, being mindful of the need to support a number of different social initiatives that directly address the concerns of victims. They conclude that such a multi-faceted approach can create a synergy that will more effectively initiate positive social change.

The Court's capacity through the Reparations Regime to fund a wide range of transitional justice initiatives is broad enough to create the sort of synergy described by Fletcher and Weinstein. This tool will allow the Court to reach beyond the traditional judicial limits of convicting the guilty. The authors would agree that the potential measures that reparations could provide would further promote healing in a post conflict society. In other words, this capacity to make awards empowers the Court to initiate and support a number of different projects that focus on directly helping to repair the society and its members.

Van Boven provides a comprehensive list of reparations awards that could help facilitate the sort of initiatives to which Fletcher and Weinstein allude. As mentioned, he divides his list into four main subsets of such awards: (1) restitution, (2) compensation,
(3) rehabilitation, and (4) satisfaction and guarantees of non-repetition. However, he adds that this list is not exhaustive.

The awards of restitution are designed to re-establish the conditions that existed prior to the crime including restoration of: liberty, family life, citizenship, place of residence, property and employment.

The awards of compensation are designed to make up for any economically assessable damage that cannot be restored through awards of restitution. These include:

- Physical or mental harm;
- Loss of opportunities;
- Material damages;
- Loss and potential loss of earnings;
- Harm to reputation; and
- Cost of legal and expert assistance.

The awards of rehabilitation are not monetary awards, but are forms of professional services that the victim establishes a need for in an attempt to regain her or his quality of life that existed prior to the commission of crime. These services include: medical care, psychological care, legal services and social services.

The awards for satisfaction and of guarantees of non-repetition are designed to help ensure peace between warring factions. If there are not closer ties between the

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96 Van Boven Principles, supra note 51, paras. 11-15.
97 Van Boven Principles, ibid., para. 12.
victims and those that committed the crimes then future peace may be compromised. This will be discussed in greater detail in the next chapter.

Below is a partial list of van Boven’s suggestions for possible awards for such satisfaction and guarantees. It is only a partial list because some of his suggestions are beyond the capacity of the Court to order since such directives would conflict with state sovereignty. For example, one of the omitted suggestions is “strengthening the independence of the judiciary”. Since the Court was not granted the authority to order a State Party to take such actions, an attempt to do so would be overstepping its authority. That being said, the Court can assist in actualizing a number of van Boven’s suggestions. They include:

- Verification of the facts and full and public disclosure of the truth;
- An official declaration or a judicial decision restoring the dignity, reputation and legal rights of the victim and/or of persons connected with the victim;
- Apology, including public acknowledgement of the facts and acceptance of responsibility;
- Commemorations and paying tribute to the victims; and
- Inclusion in human rights training and in history textbooks of an accurate account of the violations.\(^{100}\)

The Rome Conference generally agrees with the first three types of reparations awards suggested by van Boven but provides less detail.\(^{101}\) It is silent as regards reparations in relation to satisfaction and guarantees. However, it does add a class of awards that van Boven did not consider in his document and that the Court should be

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\(^{100}\) Van Boven Principles, ibid., para. 15.
\(^{101}\) Declaration, supra note 52, paras. 8 & 14.
mindful of. This class considers the substantial harm to the environment by the criminal acts. It states that reparations awards should include:

- Restoration of the environment;
- Replacement of community facilities; and
- Reconstruction of infrastructure;
- Reimbursement of relocation expenses, whenever such harm results in the dislocation of a community. 102

In summary, the most important element in determining the best combination of awards will be to understand both the nature of victims as well as the harm they have suffered at the individual and community levels. One formula for social restoration will not work in all cases. And if the Court blindly imposes help upon a community that it does not understand, it will likely result in a waste of resources. It will need to gain access to cultural and historical information that can shed light into what forms of help will assist the victims in rebuilding their community. As mentioned, the Court has the discretion to commission experts, and consult relevant parties such as states, the victims, or the accused to gain this knowledge. The importance of this fact finding process cannot be over-emphasized in determining what the best form of awards may be in any given case.

102 Declaration, ibid., para. 10.
CONCLUSION

This background should provide the reader with an understanding of what is meant by the words *reparations* and Reparations Regime from this point forward. The information supplied in Article 75 and its supporting *Rules* should allow the reader to sketch a mental picture of:

1. How a reparations inquiry is commenced;
2. How interested parties are informed about a hearing;
3. Who these interested parties are;
4. What information is circulated;
5. What options are available to additional victims after they become aware of the hearing;
6. How the hearing will be conducted;
7. How damages will be assessed; and
8. How the awards will be administered to victims.

The reader should also have an understanding of what principles the Court should adopt to create an effective Regime. He or she should be familiar with this chapter's rationale for what choices the Court should make in order to: (1) satisfy the requirements of the Article 75(1) mandate, and also (2) promote the effectiveness of the Reparations Regime. Generally speaking, these choices include that:

1. The Reparations Regime should be remedial, and not punitive, in nature;
2. Awards should reflect actual damages suffered from the commissions of the crime(s);

3. The class of victims should be broad enough to include the family and dependents of the direct victim;

4. The evidentiary burden to establish liability should be less restrictive than the common law criminal standard; and

5. The range of awards that the Court can issue should be broad enough to satisfy the needs of whatever the nature of the class of victims in question might be.

However, it must be stressed that this analysis of the establishing principles is only a prediction of how the Court will do this. The Court has the discretion to fashion the Regime in the manner it chooses within the boundaries discussed earlier. This chapter only suggests what the establishing principles should be, in light of the limitations placed on the Court’s ability to interpret the *Rome Statute*. That being said, if these suggestions are adopted, the Court will at least not compromise itself in its attempts to meet the needs of victims through the Reparations Regime.
The devil is very busy, and no one knows better than he, that 'nothing is stronger than its weakest part'.

Charles Kingsley,
Professor of Modern History at Cambridge
From a letter dated December 1, 1856.

INTRODUCTION

This chapter has four ancillary objectives. The first is to establish the potential importance of the ICC Reparations Regime to the international community. The second is to illustrate how easily an accused individual will be able to compromise the effectiveness of this Regime if the Court does not take proper precautions. The third is to define appropriate precautions. The fourth is to address the dangers the Court may encounter in attempting to endorse such precautions. If these four objectives are met, the reader should understand the relationship that the Court has with suspects, victims, State Parties and the international community as regards the Reparations Regime. This is the main objective of this chapter.

To meet the requirements of the first two objectives, the crisis the international community is facing as regards refugees and displaced people will be outlined briefly. This discussion will progress to explain how reparations could help such people repatriate
and reclaim their lives. Then the reader can expect elaborations on the following three assertions. First, in a given case, the ICC likely will not have the means to finance reparation orders without using the assets of the convicted individual. Second, criminals can transfer assets into safe havens with ease rendering their assets virtually untraceable. And third, if the accused evades justice, this could rekindle and stoke violence between parties compromising other non-monetary, yet essential, forms of reparations that are designed to help secure peace and human security in a region.

To meet the requirements of the last two objectives, it will be argued that the effectiveness of the Reparations Regime will be determined largely by its capacity to secure assets in a timely manner. In part, the potential danger inherent in the Court’s application of this theory will be explored. The threat lies with how the Court might interpret Article 75(4). This article limits the Court’s capacity to order protective measures to secure assets. As will be demonstrated below, some of the delegates at the Rome Conference intended to limit the Court from issuing any protective orders to secure assets for reparations until after conviction. By way of contrast, Rule 99 suggests that the Court should adopt a narrow interpretation of Article 75(4) and then use other articles to circumvent this limitation. Some State Parties may regard this as an obvious attempt to subvert the clear intention of the Rome Statute and may retaliate. The history of delegate relations on this issue reveals the crux of this threat; some states may refuse to cooperate in the enforcement of Court orders. As a result, the Court must clearly reconcile Rule 99 with Article 75(4) in a manner that satisfies the concerns of the State Parties that initially insisted on this limitation.
BACKGROUND

Refugees and Mass Violence

If one accepts that a central goal of humanity should be to be *thy brother's keeper*, then close to the top of the international community's 'to do' list should be to find a solution to the ever-growing number of displaced people in the world. The United Nations (hereinafter UN) reports that in 1951, the year that the UN High Commission for Refugees was established, there were a reported 1 million refugees in the world. Today that number has risen to over 20 million in addition to another 25 million people who are classified as "internally displaced persons". To put these numbers into perspective, the total population of Canada, being approximately 32 million people, is roughly equal to only 71% of the total population of displaced people in the world. The Office of the High Commissioner for Human Rights estimates that as many as 80% of these 45 million suffering people are women and children. Thus, according to these statistics, there is a population of women and children who have fled their homes that is larger than the total population of Canada.

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1 The Bible, Genesis 4:1. In the Judeo-Christian story of Cain and Abel, Cain murdered his younger brother Abel. After death, Abel informs God of his brother's evil deed. God then summoned Cain to question him. God asked Cain where his brother was. Cain responded with a lie: "I know not: Am I my brother's keeper?" This is the first question that humanity ever asked the Judeo-Christian God. The question, steeped with irony, becomes one of the central questions that this religious text attempts to answer.

2 UN OHCHR, Human Rights and Refugees, Fact Sheet Number 20, online: Office of the High Commission for Human Rights Homepage <http://www.unhchr.ch/htm/> [UN Fact Sheet].

3 UN Fact Sheet, ibid.
These victims, many of whom were expecting to find a safe haven in refugee camps, live in dire conditions, which include having little food, only basic medical assistance (if any), poor shelter, and rags for clothing. Many of these women and children live with the constant fear of rape. And in some cases, child refugees have been abducted and forced to become child soldiers. The 25 million displaced people who do not qualify to be classified as refugees live often in even worse conditions, because they have little or no access to humanitarian aid.

The ICC will be a welcomed contribution to the international efforts that attempt to curtail acts that result in refugee crises. Refugee camps worldwide are overflowing. The capacity of the UN, and other organizations, to cope with the needs of these displaced people is dwarfed by the demand for help. The UN hopes to develop effective strategies to better manage this problem. It has studied its main causes and has identified human rights violations as one of the major contributing factors. Some of the most extreme cases of human rights violations occur during incidents of mass violence. Intra-state conflict is the most common form of mass violence since World War II. Therefore,

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6 UN Fact Sheet, supra note 2.

one can safely conclude that the growth in the numbers of refugees and displaced people would slow dramatically if the international community could, optimistically, prevent intra-state conflicts from occurring, or at least, perhaps more practically, minimize the frequency of human rights violations during them.

During the Cold War, the international community did little to prevent human rights atrocities within intra-state conflicts. Human rights standards were evolving during this time, but even if the UN Security Council and other concerned states wanted to enforce them, the political deadlock created by the two super powers and desire to establish spheres of influence prevented this. The resulting impunity arguably propagated many of the contemporary problems the international community is now facing, including a blatant disregard for human rights in intra-state conflict, a critical mass of refugees, and backlash from oppressed minority groups in the form of international and domestic terrorism. The international community is now supporting many initiatives to try to rebalance its capacity to act. The ICC is a leading example.

**Reparations, Transitional Justice and Preventing Impunity**

Key to those who created the ICC was establishing a supra-national body that had the ability to enforce international criminal law worldwide. This capacity could prove to be critical in breaking the cycles of violence against civilian populations by deterring others who have the means and intent to commit such acts. However, one could easily focus too greatly on the ICC's effectiveness with criminal enforcement as a deterrent to

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8 There is a long list of examples of intra-state conflict. Some that have captured the media's attention include Cambodia, Rwanda, Congo, Sierra Leone, and Bosnia.
such crimes. For example, in the specific case of refugees and displaced persons, such a narrow standpoint is dangerous, because it could shadow other tools that the Court has to remedy this problem. A central, yet sometimes forgotten element of the Court's ability to assist, is the awarding of reparations to victims. Such awards could help those who have fled their homes repatriate more easily through financing transitional justice initiatives. In other words, such compensation would help finance the rebuilding of societies so that those affected by the violence can attempt to regain their pre-conflict standard of living.

On the other hand, money usually cannot buy trust and forgiveness for political groups who have been divided by mass violence. This is where the broader initiatives of reparations and restitution play a role to create stability and social reconstruction in a war-torn region. Compensation is necessary to help fund the rebuilding of infrastructure, but money may prove to be inadequate in achieving the goal of reconstructing a society if other measures are not taken to ensure peace.

Chapter Two discussed at length Mr. Theo van Boven's suggestion that "satisfaction and guarantees of non-repetition" as a form of reparations can assist in the healing process. The importance of van Boven's recommendation should not be underestimated. To elaborate, the relationship between the oppressors and their victims will often be volatile. In many cases, parties to a conflict must reach resolution as regards their history of violence before peace can be sustained. Thus, the convicted

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individual, and the segment of society that he or she symbolizes, must acknowledge that the acts of mass violence did occur, that this individual or group bears responsibility for their part in it, and that such acts were wrong. This gesture must be followed by a sincere apology and an assurance that such acts will not reoccur. If the victims do not perceive the convicted person as repenting sincerely, then other restitution measures to achieve peace between warring groups may fail. If war erupts again, all could be lost, including newly built infrastructure, fledgling trust, and repatriation initiatives.

THE CHALLENGE FACING A SUCCESSFUL REPARATIONS REGIME

A Danger

Once the ICC notifies an individual that he or she is being investigated for criminal activity within the jurisdiction of the Court, the suspect likely will become concerned that his or her personal holdings are in jeopardy. Although this person may be in jail for the majority of his or her life, if convicted, the suspect may have an interest in preserving these assets for family members, or some hope for clemency during his or her confinement. This could inspire the individual to hide assets to preserve them for future needs. Regardless of the precise hypothetic, it can be assured that the mere possibility of future conviction itself could create a temptation to protect one’s assets. Compounding

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10 The convicted individual may represent a political group in the conflict to many members of the society. Usually such leaders consolidate support and then motivate the groups that carry out the atrocities. It is on their authority that the subordinates act. They are the authors of the crime. Furthermore, even after conviction, these individuals may still have strong support within their political group and sustain great influence over the people in it. They may be regarded as heroes. In many cases it is for this reason that victims will identify the actions and views of the convicted person with those of the group that he or she controlled.
this simple motivation is the idea that when the Court holds a reasonable suspicion that a person might be guilty of one of the worst crimes known to humanity, his or her history most likely demonstrate a doubtful moral make-up. These two premises alone create a high probability that an individual such as this might attempt to hide assets from the Court. Even if innocent of all charges, the accused may still be frightened of a wrongful conviction or an endless draw on personal wealth for legal and other costs. To put it in plain words, if no assets are found, this would prompt the Court to finance his or her defence and no assets means no direct financial source for awards. All suggestions considered, the individual’s desire to preserve his or her assets is likely to be an overwhelming temptation.

Many of those subject to reparations proceedings will be fallen leaders. They will be symbols or figureheads of powerful and oppressive groups. If, at the commencement of the reparations hearing, the convicted individual has hid his or her assets from the victims, then the victims may distrust all other measures to make restitution that the convicted individual agrees to take. Consider the following example of a convicted individual. He or she:

- Acknowledges the atrocities of which he or she was the author,
- Admits mistake for inciting such horrific acts,
- Apologizes to the people he or she has terrorized, and
- Assures within his or her capacity that the oppressive group that he or she was guiding will not inflict such violence in the future, but then
- Undermines these gestures of restitution by relocating the majority of his or her assets to avoid payment of financial compensation for the deeds that he or she admitted to committing.
As a result, the convicted individual's last actions directly contradict his or her gestures toward restitution. Such contradictions might build resentment that becomes the source of further violence. It is reasonable that victims may become highly suspicious of the sincerity of other such acts of restitution. Such contradictions could also send mixed messages to the followers of this convicted leader. Therefore, even if the compensation could be secured through other means available in the Trust Fund, transitional justice may be compromised. If the parties to the conflict do not believe that the convicted person sincerely repented for what he or she had done, then the hatred may continue to exist between the groups, the potential for understanding may be lost, and peace and security may be compromised. In other words, the act of the convicted person avoiding the payment of reparations may be enough to destabilize the future security of the region in question. It follows that, if a convicted person is financially capable of being a primary source of payment for reparations, the Court should do all it can within its power to ensure that this individual does indeed pay.

**Fundamental Financial Reality**

Article 75(2) states that the Court shall make reparation orders "directly against the convicted person". Implicit in this is that he or she will fulfill the financial obligation to pay his or her victims. The reality is that not all individuals will be capable of making such payments. Fortunately, Rule 98(5) foresees this. It permits the Court to use three alternative options to finance the convicted person's obligation to pay a

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reparations order. Article 79(2) defines two of them - fines and forfeitures. Articles 79(1) and (3) permit the third - donations.\textsuperscript{12}

The Court's assessment of total damages in a given case could range from millions to hundreds of millions of dollars.\textsuperscript{13} Some experts predict that it is unlikely that enough money would be donated by private or public entities to satisfy such judgements.\textsuperscript{14} For many victims, receiving a so-called "dry" judgement might prove to be a difficult reality to accept. It will be even more difficult when a wealthy criminal is liable for damages, but the Court simply could not enforce its order. If this occurs frequently, victims and other observers of the ICC could and maybe should question the Court's capacity to provide redress. Furthermore, the feeling of mistrust and betrayal, which victims might have held as a result of the criminal hiding his or her assets, might be exacerbated by a "dry" judgement. This could further increase the chances of renewed conflict in the future.

\textsuperscript{12} Rome Statute, ibid., Article 79(1) & (3). These sections delegate to the Assembly of State Parties the authority to manage the Trust Fund. The existence of the donation campaign for the Trust Fund reflects that the Assembly of State Parties has used this delegated authority to establish the third funding option. See especially ICC, Victims Trust Fund, online: Victims Trust Fund Homepage <http://www.victimstrustfund.org/>.


Safe Havens

The ease with which criminals can move assets across borders to safe havens has hampered the efforts of judicial bodies worldwide. Authorities attempting to prevent money laundering, tax fraud, and other financial crimes know all too well how easy it is to hide money in certain countries. The development of computer technology and telecommunications has greatly exacerbated the problem. Law enforcement agencies are continuing to develop multi-national cooperation networks for financial surveillance in response to this, but such authorities are far from alleviating the problem.

The most significant challenge to those attempting to trace assets is that certain states allow their financial institutions to hinder the efforts of enforcement bodies. Such institutions provide assistance to those attempting to subvert justice. Dr. Guy Stessens, Administrator of General Secretariat of the Council of the European Union and Lecturer


Antoine, *ibid.* at 3-12. The author provides a brief history on the development of offshore financial centres.


FATF, *Money Laundering*, online: Financial Action Task Force on Money Laundering Homepage <http://www1.oecd.org/fatf/index.htm> [FATF]. FATF states that “the International Monetary Fund, for example, has stated that the aggregate size of money laundering in the world could be somewhere between two and five percent of the world’s gross domestic product”.

in Law at University of Antwerp, acknowledges this conduct in his book *Money Laundering: A New International Law Enforcement Model*. He writes:

> Many offshore financial systems offer not only an excellent conduit for money laundering, but also a 'tool kit' for the perpetration of certain types of financial crime.  

The result is there are jurisdictions where money can be hidden and transferred into the possession of corporations and individuals, thereby hiding the funds' true origin. Then the money can be reintroduced into world markets, possibly without any trace for forensic accountants to follow. As a result, the criminal may be able to later liberate his or her assets at will.

Financial gain motivates countries to facilitate such unconscionable transactions. Many such states have weak economies with a limited number of alternatives to generate national revenue. Lamberto Dini, currently Deputy Speaker of the Senate and President of Rinnovamento Italiano, writes in his work as regards the problems associated with responding to money laundering that:

> In general the countries of the Third World and Eastern Europe have a strong need to attract resources from abroad in order to finance growth and develop programmes, while their systems and institutions for checking criminal activities are often limited and insufficient. Both of these factors are at odds with the need to prevent money laundering. The fight against crime is therefore closely linked with the objective of promoting economic development and combating poverty.

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20 *Stessens*, supra note 15 at 311. He refers to the international report on offshore jurisdictions that was commissioned by the United Nations as the source of this opinion.

21 *Savona & Feo*, supra note 17 at 9.

The most economically powerful countries are placing increased pressure on such states to improve their banking regulations. The suggested revisions will allow for more financial transparency and accountability. However, certain states are resistant because of their need to attract money into their economies. The banking services available in these states may be a primary source of domestic income, and adopting the suggested revisions could devastate this revenue stream. As a result, the demand for such services will ensure that full international cooperation will not occur. Therefore, enforcement bodies need the legal mandate to take measures that will prevent assets from being transferred to these domains.

CONFRONTING THE CHALLENGE

A Possible Solution

The Court must order provisional measures to secure assets at the appropriate time. To do so, it is fundamental that such a provisional measure is executed before the suspect has time to hide his or her assets. This will not be a simple task. It is safe to assume that after a few high profile human rights abusers are convicted, other such abusers will become aware that they are also susceptible to such criminal investigation by the ICC. It would also be fair to assume that such individuals would be conscious that a

23 See Hartman, R.B., “Coercing Cooperation From Offshore Financial Centers: Identity and Coincidence of International Obligations Against Money Laundering and Harmful Tax Competition” (2001) 24 Boston College International and Comparative Law Review 253. The writer discusses how the G7 states have begun a campaign that uses coercive measures such as the threat of sanctions to force cooperation from offshore financial centres in the areas of money laundering and tax competition. See also FATF, supra note 18.
conviction could lead to a large reparation order. In the worst-case scenario for the ICC, the suspect, with the help of a financial institution located in any number of safe havens worldwide, could take steps to electronically transfer his or her assets into numbered bank accounts. This process could be initiated only hours after the suspect received notification from the ICC. As the days pass, an enforcement agency’s window of opportunity to secure assets could be closing, because the money trail for forensic accountants to follow could be quickly concealed as the money is being re-transferred, dispersed and laundered through any number of well-established techniques.

Therefore, solely based on these considerations, the time for enforcement officers to commence the appropriate protective measures is at the earliest possible stage of the investigation. To be most effective, the enforcement agency would provide no notice to the suspect that there is an investigation commencing prior to enforcing an order to secure assets. Unfortunately, the reality is that even if enforcement officers have the grounds to take such aggressive measures, the suspect may already have hidden his or her financial holdings, because he or she foresaw the potential investigation. In other words, even such extreme measures cannot guarantee the success of enforcement officers in their attempts to secure assets for the Court’s reparations proceedings.

The Complication

As argued, the timing of protective measures is central to the issue of how to help ensure that the Reparations Regime is effective. However, aggressive and early measures could cause potential violations to the rights of a suspect. This is obviously a significant
concern and one that will be reserved for the next chapter. That issue aside, the most serious obstacle to the Court ordering such aggressive measures may be the Article 75(4) limitation. The language used by this article is as follows:

*In exercising its power under [Article 75], the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under [Article 75], it is necessary to seek measures under article 93, paragraph 1.*^24 [emphasis added]

To explain the significance of this limitation, Article 75 is the only article in the *Rome Statute* that directly addresses the issue of reparations and Article 93 is the only article that grants the Court the power to order the necessary protective measures to secure the assets of the suspect. Therefore, a deduction solely based on a reading of Article 75(4) is that an accused individual has until *after conviction* to take measures to move his or her assets out of the reach of enforcement officers. In some cases, the period from the commencement of the investigation until conviction will extend over years. Obviously, if an accused person is given a number of years to contemplate his or her position, this individual will be able to anticipate that his or her assets may be seized. Thus, the suspect who wishes to exercise the option of subverting justice will have ample opportunity to do so. This could have a disastrous effects on the Court’s capacity to enforce reparations orders. Article 75(4) *prima facie* seems to ensure that reparations proceedings will be ineffectual in providing any actual justice to victims and, as explored earlier in this chapter, may actually compromise other peace and security initiatives that may be attempted in the region in question.

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^24 *Rome Statute, supra* note 11, Article 75(4).
Why would such a limitation against provisional measures exist? Dr. David Donat-Cattin finds the answer in the negotiations leading to the creation of the Rome Statute. He reports that several delegates from a number of states, France possibly being the strongest proponent, urged other delegations to accept empowering the Court with very broad pre-trial protective measures to secure assets. He does not elaborate on the presentations of the proponents much further than to say that there were “compelling arguments.” He also adds that other delegations were extremely cautious in response. They had serious reservations as regards granting the Court such broad powers. These delegates believed that such measures could violate the suspect's right to a presumption of innocence, as well as his or her rights under the domestic law of certain states that forbid the seizure of non-crime related property. These delegates were also concerned with the ramifications of the use of the suggested powers when the accused is found to be innocent. Specifically, they were concerned about the ICC’s potential liability to pay compensation to the vindicated person for wrongly imposing such measures. These concerns inspired a group of delegates to agree to allow provisional measures under

26 Triffterer, ibid. at 975.
27 Triffterer, ibid. at 975.
28 The ICC’s potential liability can be illustrated by an example from the Common Law. During a civil action in certain jurisdictions, such as Canada, and England and Wales, a party to the action may petition the Court to have the assets of another party secured to prevent dissipation prior to judgment. The court may freeze assets based on the information provided in the petition. If the petition is accepted, then the petitioning party is required to pay into court money to pay damages to the party subject to the order if that party wins the action. Such damages would be equal to the loss of potential earning that the party subject to the order can establish that he or she would have actualized if the order had not been in place. If the petitioner wins, his or her money is returned. Similarly, if the ICC’s accused is found to be innocent and his or her asset have been subject to provisional measures, then he or she may suffer damages as in the above example. Furthermore, the vindicated party should be entitled to an award for damages. The problem is who is to pay such damages? The victims will not have the resources and it is arguable the Court should not have to incur such risk when issuing orders. These concerns will be addressed in greater detail in Chapter 4.
Article 93, but only after conviction. For the remainder of the negotiation, the states opposed to this limitation were unsuccessful in attempting to weaken the support for this position. In the end, this position was incorporated into Article 75(4).

**Pandora’s Box**

This would not be the death knell for the Reparations Regime. Its fate took an interesting twist - Rule 99. This rule in a sense liberated the Court’s power from the limitation imposed by Article 75(4) by allowing the Court to derive authority to secure assets for reparations from Article 57(3)(e). Like Article 75, Article 57 allows the Court to issue protective measures under Article 93, and it directs that the assets that the Court collects through these orders will be reserved “for the ultimate benefit of victims”. One difference between the powers bestowed through these articles is that Article 57 only allows for the confiscation of assets related to the crime, while Article 75 is a much broader power potentially allowing for a general confiscation of any assets of the convicted for reparations. This distinction will be explored further in Chapter 4.

The major discrepancy between the articles is that Article 75 forbids the use of Article 93 to secure assets for reparations until after conviction, while Article 57 allows its use at the pre-trial stage. Rule 99 ignores the discrepancy by interpreting Article 75(4) as not affecting the powers granted to the Court under Article 57, while also interpreting this article as being directly applicable to reparations. Since there were separate delegation groups working on Articles 57 and 75 prior to the *Rome Conference*, it could

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29 *Rome Statute, supra* note 11, Article 57(3)e.
be assumed that the discrepancy might not have been noticed by certain states until after the *Rome Statute* was finalized. As will be explored in the next chapter, there is a legal argument that clarifies how both articles can co-exist as described under Rule 99.

Surely, the delegates who added Article 75(4) did not intend that this limitation would restrict the Court’s power under Article 57. As mentioned, the delegates had three main concerns that justified imposing the limitation. Only one is *prima facie* satisfied, namely that Article 93 only allows such provisional measures to be imposed upon assets related to the crimes under investigation. However, the other two concerns are not satisfied. To reiterate, they are (1) that such protective measures would violate the right of suspects to a presumption of innocence, and (2) that the Court could be liable for damages for the use of such measures when such individuals are found to be innocent of the charges. However Rule 99 fails to acknowledge any of this. It simply indicates that if the Court cannot use Article 75, then it can use Article 57 without further comment.

When one explores the literature on the Reparations Regime, one finds that there is scant discussion of the discrepancy between Rule 99 and Article 75(4). Rule 99 and those writing on the topic seem to adopt the position that there is no discrepancy at all. Peter Lewis and Ahkan Friman do not mention the limitation on the provisional measures in Article 75(4) in their analysis of Rule 99, nor does this issue arise in the articles of Dinah Shelton or Christopher Muttukumaru. Birte Timm mentions the Court’s ability

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31 *Shelton, supra* note 13 at 137.
to use Article 93 powers to identify, trace, and freeze or seize assets but does not mention the limitations on this power. He actually states that the power is the same as that for fines and forfeitures.\textsuperscript{33} Although the literal meaning of this statement is correct (given that the powers are the same), his language could lead one to be suspicious as to whether he had contemplated the Article 75(4) limitations. Donat-Cattin simply notes "the only statutory norm that could make it possible to take protective measures before conviction [as regards reparations] is the one of article 57 para. 3 (e) ...".\textsuperscript{34} And Fiona Mckay states that:

\textbf{While Article 75 itself only provides provisional measures after conviction, Article 57.3(e) provides for protective measures pursuant to Article 93.1 where a warrant for arrest or summons has been issued, "and having due regard to the strength of the evidence and the rights of the parties concerned". This gives the Court an all important power to make such orders early in the process, in order to preempt so far as possible any steps by an accused person aimed at placing assets beyond reach of victims.}\textsuperscript{35}

Again all of the writers seem to adopt the position that there is no discrepancy. The unarticulated assumption on which this position rests is that Article 75 is only one of at least two provisions that the Court can derive authority from to order protective measures for reparations. The rationale for this observation will be established in the next chapter.

It is sufficient to note at this point that no justification for the use of Rule 99 has been given that would satisfy the underlying concerns of the State Parties that had the Article 75(4) limitation added to the provisions for the Reparations Regime. Without express

\textsuperscript{34} Triffterer, supra, note 25 at 975.
consideration of their concerns, certain State Parties may be angered when the Court uses Rule 99 and undermines their intentions for establishing Article 75(4). Thus, the application of this Rule may become a Pandora's Box filled with the unsettled disagreement between those State Parties for and against provisional measures to secure assets of the suspect.

The narrow interpretation of Article 75(4) and a robust application of Article 57 may place stress on the relationship between certain State Parties and the Court. Signs of this potential conflict flared during a Preparatory Committee meeting for the establishment of the Rules. Claus Kress, international criminal law specialist for the German government, and Goran Sluiter, Lecturer in Law at Utrecht University, suggest that the French delegation pressed others to accept their proposal that the Rules should grant the Presidency the power to order a provisional attachment to any of the sentenced person's assets.\(^{36}\) Many delegates were not only unsupportive, but they "denied the existence of an obligation for State Parties to cooperate with the ICC for the purpose of adopting protective measures in the field of reparations".\(^ {37}\) Unfortunately, the authors do not comment further on the validity of the positions of delegates.

The response to the French proposal demonstrates that these delegates were ignoring, or simply unaware of, the treaty obligation imposed upon their states by the Rome Statute. Such states are committed to adopting protective measures in the field of

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\(^{37}\) Kress & Sluiter, ibid. at 1834.
reparations. To elaborate, Articles 86 and 88 oblige State Parties to ensure that their national law has procedures available to execute all measures ordered under Part 9 of the Rome Statute. This would include Article 93(1)(k). Article 93 obliges State Parties to comply with requests by the Court to provide:

The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.\(^{38}\)

Earlier in Kress and Sluiter’s work, they write about the possibility of states attempting to avoid their obligations under Article 93.\(^{39}\) Kress and Sluiter make a reference to the fact that some provisions, such as Article 93, state that the Court’s orders are to be carried out in accordance with the national law of requested State Parties. They predicted that some countries might attempt to argue that the reference to national procedure may limit their obligation to enforce the ICC’s orders. They called this an “argumentum e contrario” (an argument to the contrary). Basically, what the authors suggest is that State Parties might argue that references that give a degree of discretion to State Parties, as for example when Article 93 states that any requests that are made under this article shall “be executed in accordance with the relevant procedure under the law of the requested State”,\(^{40}\) provides such states with the discretion as to whether or not they will enforce such requests for cooperation.\(^{41}\) They disregard such arguments by contending:

... [Such references] have not been included to leave it to the discretion of State Parties whether or not to execute the ICC’s requests. They only clarify that the State Parties will use their national procedures to fulfill their respective obligations. A different interpretation would lead to the odd result that State

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38 Rome Statute, supra note 11, Article 93(1)k.
39 Kress & Sluiter, supra note 37 at 1832.
40 Rome Statute, supra note 11, Article 93(3).
41 Kress & Sluiter, supra note 37 at 1829.
Parties must create the procedures necessary to adopt provisional measures under Article 93(1)(k), but can refuse the enforcement of the eventual measure for want of an available national procedure.\textsuperscript{42}

However, even if the authors, the Court, and the majority of other State Parties are not convinced by the argumentum e contrario, such states could refuse to enact the necessary domestic law to enforce Court orders and use this reasoning as a justification. It would not be the first time that a state has used weak legal reasoning to justify a political decision.

Furthermore, this author is unsatisfied by the lack of serious concern that Kress and Sluiter seem to have for this issue. Part 9 of the Rome Statute has a number of exceptions to State Party’s obligations under Article 86 and 88 that should be focused on more carefully, because their existence grants State Parties the power to pose a potentially critical threat to the Court’s capacity to enforce not only provisional measures but any orders that depend upon domestic cooperation. This issue will be explored in detail in the next chapter.

\textsuperscript{42} Kress & Sluiter, \textit{ibid.} at 1829.
CONCLUSION

In sum, this chapter has asserted that the world community should be gravely concerned about the growing problem of refugees and displaced people in the world, and that the ICC Reparations Regime has the potential to help solve this problem in a number of ways. Specifically, this chapter has emphasized how reparations could assist in the repatriation of these people. In doing this, it was hoped to contextualize how an effective Reparations Regime could be used to help remedy at least one of the serious problems facing humanity and thereby demonstrating its value not only to victims but to the international community itself.

The effectiveness of this Regime will be decided in part by how the Court will interpret its power to secure the assets of suspects. If the Court is not aggressive, then the suspect will have the option to shield his or her assets from its jurisdiction. If the Court is too aggressive, then it may alienate those parties who established Article 75(4) to protect the rights of the accused individual against what they may see as a potential draconian abuse of power. The ramifications of either choice could compromise the effectiveness of the Regime.

It is fair to say that the Court should not circumvent Article 75(4) without adequate explanation to satisfy the concerns of certain State Parties. For if this is not done, such states may react to the Court in a similar manner to how they reacted to the French proposal to bolster post-trial protective measures. This sort of potential reaction
is a threat to the effectiveness of the Reparations Regime. The seriousness of such threats will be explored in the next chapter, however it is sufficient to say that the Court will have to be politically astute to ensure that the operation of Rule 99 satisfies the need of the Reparations Regime. To do this, the Court must find a balance between satisfying the concerns of State Parties and ensuring the effectiveness of the Reparations Regime. This will be the main focus of the next chapter.
Washing one's hands of the conflict between the powerful and the powerless means to side with the powerful, not to be neutral.

Paulo Freire
The Brazilian educationalist,
From Pedagogy of the Oppressed (1970)

INTRODUCTION

This chapter will introduce a rational approach to understanding the Court's powers to secure assets under Rule 99. Central to this analysis is the relationship that exists between Rule 99 and Articles 57(3)e, 75(4), and 93(1)k. Article 93(1)k allows the Court to request State Parties to take provisional measures to secure assets for eventual forfeiture. Articles 57(3)e and 75(4) seem to give the Court contradictory directives as regards its use of Article 93(1)k. One forbids the Court to make requests under Article 93(1) until after conviction while the other grants it the power to make such requests under this article even before the charges have been confirmed. However, this difference can be reconciled. Article 75(4) limits the action of the Trial Chambers and not the Pre-Trial Chambers. Since Article 57(3)e is granting the power to initialize the securing of

assets to the Pre-Trial Chambers, and since Article 75(4) does not speak to the Pre-Trial Chambers, there is no conflict.

However, it will be argued that for the Court to simply justify the use of Article 93(1)k at the pre-trial stage using only the above rationale could prove to be a mistake. The potential reaction of certain State Parties to this could jeopardize the effectiveness of Article 93(1)k requests [hereinafter Requests for Provisional Measures]. To elaborate, during the Rome Conference negotiations, some State Parties did not support bestowing broad powers upon the Court to secure assets for the eventual payment of reparations awards. These states had a number of underlying concerns that they believed the Article 75(4) limitation would resolve. They may see the use of Article 57(3)e as undermining the motivation for establishing Article 75(4). It will be argued that the aforementioned legal justification for the use of Article 57(3)e would not likely be accepted as fully addressing this issue. To avoid conflict with State Parties on the Article 93(1)k issue, the Court would be prudent to explain how Article 57(3)e and Article 93(1)k will safeguard the concerns of these states and protect the underlying motivation for adding the Article 75(4) limitation.

In developing a rational approach to resolve the apparent conflicts, this chapter will offer a clear explanation of Rule 99's application. By adopting a similar explanation to what will be provided, the Court should have a good chance of maintaining healthy relations with State Parties. This approach should help reassure potentially concerned states. This could prove to be important, because whether or not sovereign states have
the political will to cooperate with the Court will play a major role in determining how effective the Requests for Provisional Measures will be, and consequently, how successful the Reparations Regime will be in providing assistance to victims. If states simply refuse to execute Requests for Provisional Measures, such requests will have no effect.

In continuing the development of a rational approach, the argument in this chapter will build on the assumption that there is a strategic advantage for the Court in avoiding a potential conflict with State Parties. To avoid such conflict, the Court could assure concerned states that the steps that must be taken before it issues a Request for Provisional Measures satisfy the underlying concerns that motivated the addition of the Article 75(4) limitation to the Rome Statute. One way to do this is to trace chronologically the process that the Prosecutor and the Pre-Trial Chambers will have to follow prior to finalizing a Request for Provisional Measures. The main focus of such an analysis should be to explain what requirements are necessary to satisfy each of the safeguards in this process. This will be a central element of this chapter.

After reading this chapter, one should understand how both articles could function harmoniously under Rule 99, and what steps the Court should take to ensure that State Parties understand this relationship to avoid political conflicts with the Court.
SECURING ASSETS BEFORE CONVICTION

Rule 99, and the Articles it considers, will play a key role in determining the effectiveness of the Reparations Regime. This Rule offers the Court the authority to secure a suspect's assets to help guarantee that they are available for potential forfeiture after conviction. Such measures can offer hope that money will exist to pay reparation awards. Unfortunately, the application of the rule could easily create a controversy between the Court and State Parties, because some of these states oppose measures to secure assets for reparations before conviction. This is why some delegates to the Rome Conference pressed to have Article 75(4) added to the Rome Statute. This article states:

In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.3 [emphasis added]

Rule 99 emphasizes a strange relationship that exists between the directives of Article 75(4) and 57(3)e to make Requests for Provisional Measures. Article 93(1)k directs State Parties to cooperate with a non-exhaustive list of twelve possible Court requests in relation to investigations and prosecutions. Article 75(4) forbids the Court from requesting any of them prior to conviction. In contrast, Article 57(3)e permits the Pre-Trial Chambers to make one of the requests from the list. This request is numbered Article 93(1)k.4 It states:

3 Rome Statute, ibid., Article 75(4).
4 UN, Corrections To The Rome Statute of The International Criminal Court – Authentic English Text”, online: United Nations Homepage <http://www.un.org/law/icc/statute/99_corr/english/rom2en.htm>. It is interesting to note that in the original text of this Article there was a significant typographical error. The English text of the Rome Statute now reads, that the Pre-Trial Chambers may “seek the cooperation of
State Parties shall comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions ... the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crime for the purpose of eventual forfeiture ...⁵

At first glance, there seems to be a direct contradiction between the Article 75(4) limitation and the Pre-Trial Chamber’s power described in Article 57(3)e. Rule 99 makes a distinction between the articles, but does not acknowledge any potential contradiction.

It states:

The Pre-Trial Chamber, pursuant to article 57, paragraph 3 (e), or the Trial Chamber, pursuant to article 75, paragraph 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be requested.⁶

[emphasis added]

The distinction is that Article 57 speaks to the Pre-Trial Chamber while Article 75 directs the Trial Chamber. To put it in other words, the limitation on requests is placed upon the Trial Chamber and not the Pre-Trial Chamber, and therefore the power under Article 57 that only instructs the Pre-Trial Chamber is not in conflict with the Article 75(4) limitation.

It would be unwise for the Court to end its analysis at this point and thus ignore the potential political ramifications of accepting the distinction suggested in Rule 99.

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⁵ Rome Statute, supra note 2, Article 93(1)k.
⁶ Rules, supra note 1, Rule 99.
without elaboration. This is because the legal distinction that Rule 99 makes does not address the underlying fears that inspired the Article 75(4) limitation to be added to the *Rome Statute*.

David Donat-Cattin describes the three main reasons why the "after conviction" limitation was added to Article 75. Addressing these concerns in a successful manner will be key to the Court establishing an effective Reparations Regime. First, some delegations held the opinion that bestowing the Court with the power to order provisional measures could violate the right to presumption of innocence. Second, they were concerned that such measures could violate the legal protections granted in certain domestic jurisdictions that prohibit the seizure of non-crime related property. And third, some also expressed apprehension about the potential implication of the use of such powers if the accused is held to be innocent. These concerns indicate that much of the delegates' focus centered around the potential use of Article 93(l)k specifically. This is why some states might react poorly to the pre-trial use of this article.

It is important to win the support of State Parties, because the only way that the Court can enforce its Requests for Provisional Measures is with state cooperation. If State Parties are angered by the Court's application of Article 57(3)e, then they may be uncooperative. If this occurs, then the Court may not be able to properly enforce protective orders, and the reparations procedure may become politically compromised. In the worst-case scenario, a reaction could compromise other requests for assistance as

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well. For examples, a State Party may delay executing an order related to the investigation or \textit{de facto} refuse to execute an arrest warrant. This could affect the Court's ability to effectively administer justice.

In sum, when the Court justifies allowing the Pre-Trial Chambers to exercise its Article 57(3)e power, it should also be careful to address the underlying concerns of those who instituted the Article 75(4) limitation. To do this, the Court should emphasize how the safeguards in Article 57(3)e and 93(1)k will respect these concerns. This will be the topic of the next section. This explanation could be of critical importance to maintaining healthy relations between the Court and State Parties, which will be necessary to have an effective Reparations Regime.

\textbf{THE SAFEGUARDS OF ARTICLES 57(3)e AND 93(1)k}

The Court should attempt to assure concerned State Parties that the safeguards in place under Article 57(3)e and Article 93(1)k will insist that the procedure that the Pre-Trial Chambers must follow is in compliance with the underlying considerations that motivated the establishment of the Article 75(4) limitation. As Donat-Cattin describes, these underlying considerations are that:

1. The accused person's rights, and specifically the presumption of innocence, must be protected;

2. If the accused is found innocent and has suffered damages as a result of a provisional measure, there are problematic consequences in the area of compensation for damages; and
3. Certain seizures of non-crime related property are prohibited within certain domestic jurisdictions.\(^8\)

The rest of this section will highlight the safeguards found in Article 57(3)e and Article 93(1)k and then explain how these safeguards will satisfy the concerns listed above.

**Article 57(3)e – The Safeguards**

There are three safeguards found in Article 57(3)e that must be satisfied before the Pre-Trial Chambers can advance to consider Article 93(1)k. After this, an additional safeguard is found in Article 91(3)k. The requirements for all four of these precautions must be satisfied before a Request for Provisional Measures can be issued. The text of Article 57(3)e describes the first three Safeguards. It reads:

... *The Pre-Trial Chambers may ... where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in the Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1(k), to take proactive measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.*\(^9\) [emphasis added]

The three requirements found in this article are as follows:

1. A warrant of arrest or a summons must first be issued;

2. The strength of the evidence must justify this request; and

3. No request can be made without due regard for the rights of the parties concerned.

The discussion will now turn to an explanation of each of these safeguards.

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\(^8\) *Triffterer, ibid. at 975.*

\(^9\) *Rome Statute, supra note 2, Article 57(3)e.*
Article 57(3)e – A Summons to Appear

The first requirement demands that a warrant of arrest or a summons be issued. The evidentiary burden to successfully petition the Pre-Trial Chambers to issue a summons will be lower than the burden to issue an arrest warrant. For a summons, the Pre-Trial Chambers must have a reasonable belief. For a warrant of arrest, the Court must not only hold this reasonable belief that the suspect committed the crime, but must also be satisfied that the evidence establishes that the suspect must be arrested. Therefore, the summons will be explored, because it represents the easiest manner to satisfy the requirements of the safeguard.

It is important to note before continuing that the Prosecutor, currently Mr. Moreno Ocampo, is under an obligation to conduct his investigation in a neutral and impartial manner. His duties are not like those of the adversarial prosecuting attorney in some common law systems. Article 54(1)a explains the Prosecutor’s duty:

To cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.10

Hakan Friman, a Swedish delegate who negotiated on matters of ICC procedure at the Rome Conference, and William Schabas, Professor of Law at the National University of Ireland and Director of the Irish Centre for Human Rights, both note that the role of the ICC’s Prosecutor is much different from that which one might expect of a prosecutor in a Common Law system.11

10 Rome Statute, ibid., Article 54(1)a.
What this means is that Mr. Ocampo is required to collect evidence in an impartial manner that may or may not favour the individual who is subject to investigation. He must not present evidence that only supports a one-sided argument that a summons should be issued. Instead, he obligated is to present all of the evidence collected. However, he will only present this evidence if he is objectively satisfied in a neutral and impartial manner that:

1. The case is admissible;¹²
2. A prosecution is in the interest of justice;¹³ and
3. There is a reasonable belief that criminal responsibility exists.¹⁴

Article 17 determines whether a case is admissible. In short, a case is inadmissible if a competent national court is taking or has taken jurisdiction. If the case is deemed admissible, then Article 53(1) and (2) grant the Prosecutor a broad power to determine if this case is in the *interest of justice* and should be pursued. Hakan Friman explains that this discretionary power allows the Prosecutor to select appropriate cases. In his view, these cases would be the "*most serious*” ones that focus on the "*most responsible perpetrators*”. He suggests that this allows for the "*less important or clearly politically motivated cases*” to be "sifted out".¹⁵

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¹² *Rome Statute*, supra note 2, Articles 17 and 53.
¹³ *Rome Statute*, ibid., Article 53.
¹⁴ *Rome Statute*, ibid., Article 53.
¹⁵ Friman, supra note 11 at 201.
Only after Mr. Ocampo has completed this process would he request the Pre-Trial Chamber to issue a summons. He would have to persuade the Court that “there are reasonable grounds to believe that the person committed the crime alleged”. Article 58 does not specify the information that is to be provided for in the application for a summons, but it can be assumed that it will probably incorporate the following requirements that are needed to petition the Court for a warrant of arrest:

1. The name of the person and other relevant identifying information;
2. A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;
3. A concise statement of the facts which are alleged to constitute these crimes; and
4. A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes.

After all of these requirements have been met, the Pre-Trial Chamber may issue a summons. If this is done, then the first safeguard of Article 57(3)e will have been satisfied.

Article 57(3)e – The Strength of the Evidence

The next safeguard under Article 57(3)e is that the Court must have “due regard” for the “strength of the evidence”. The Article is ambiguous as to what the evidence is and also what this evidence is attempting to substantiate. Article 93(1)k helps to clarify this. This Article only permits assets that can be linked to crimes under Article 5(1) to be

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16 Rome Statute, supra note 2, Article 58(7).
17 Rome Statute, ibid., Articles 58(2).
18 Rome Statute, ibid., Articles 58(3)e.
subject to Requests for Provisional Measures. The parameters of this class of assets will be discussed later in this chapter. With this additional insight, it can be deduced that the Court must satisfy requirements that would be comparable to the requirements that states must abide by to issue provisional measures to secure assets for confiscation under international conventions that make provision for this. The details of this reasoning will be explained later in this chapter as well. For now, the reader is asked to accept the following model for such requirements. The Court must be satisfied that:

1. The person committed the offence; **and**
2. The person benefited from the offence; **or**
3. The property is of a criminal nature, **as well as possibly that**
4. The freezing of the property is necessary in order to ensure that it will be available if a confiscation order is made.\(^{19}\)

The first factor will be established by the summons. The second factor is concerned with whether the Court is convinced that the person financially benefited from the crime. If one and two are established, then the safeguard has been satisfied.

Alternatively, third factor indicates that if the Court is convinced that the property is of a criminal nature, then the safeguard will also be satisfied. At this point, it is enough to note that this alternative exists. This issue also will be addressed later in this chapter.

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\(^{19}\) FATF, *Evaluation of Laws and Systems in FAFT Members Dealing With Asset Confiscation and Provisional Measures*, online: Financial Action Task Force on Money Laundering Homepage <http://www1.oecd.org/fatf/evaluati.htm>, paras. 14 and 15 [FAFT Members Report]. As well be explained in the latter portion of this paper, this report suggests the listed standards described above as the accepted requirements that the FAFT’s member states agree to fulfill before issuing an order. It will be argued that this is an acceptable domestic model for the State Parties of the ICC.
Last factor could be an extra requirement added to either or both of the two options above. For example, it is possible that the Court may not only want the evidence to establish a reasonable belief that:

1. The property is linked to a crime; and
2. The property will be subject to confiscation; but also
3. The suspect may attempt to defy the authority of the Court and hide his or her assets outside of the jurisdiction.

Thus, the evidence will have to convince the Pre-Trial Chamber that all of the above requirements are satisfied before it issues a Request for Provisional Measures. To meet the third requirement, the evidence would have to persuade the Court that the suspect might attempt to subvert the Court’s authority, because it is reasonable to believe that such a suspect may attempt to hide or dissipate his or her assets. An example of such evidence might be that the suspect has refused to recognize the authority of the Court.

It is important to note that the exact parameters of the evidentiary burden for all four of these factors will have to be established by the Court.

**Article 57(3)e – Due Regard For The Rights of The Parties**

*Scope of the Term Parties*

Article 57(3)e states that the Pre-Trial Chamber must have “due regard” for “the rights of the parties concerned”. The words “parties concerned” should be interpreted as meaning the parties that will be affected by the application of Article 57(3)e. The first

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20 Rome Statute, supra note 2, Articles 58(3)e.
two parties that come to mind are the person under investigation and the victim(s). A Request for Provisional Measures will most intimately affect the lives of these two parties.

An argument could be made that a possible third party should be the State Parties, because sovereign rights of these states are affected when they are compelled to comply with Requests for Provisional Measures. These rights will be considered in the latter stage of this analysis, because Article 93(1) is under Part 9, which in part, safeguards the sovereign rights of the requested State Parties. Therefore, when the Court considers Article 93(1) it will have to address these state rights. That being said, the Court may include the rights of state parties as part of this analysis as well.

Another potential class of parties is the bona fide third parties who may have a legal interest in the property subject to a Request for Provisional Measures. The Court is instructed to protect their rights as well. However, their rights will not be explored in this chapter, because they are of little relevance in meeting the ends of this analysis of the Court’s power.

Accordingly, this analysis will consider only two parties at this point: the suspect and the victim(s). A suspect should not to be mistaken for the accused. A suspect becomes the accused only after the charges have been confirmed. This is an important distinction, because an accused individual is allotted a set of rights under Articles 67 that

21 Rome Statute, ibid., Articles 93(1)k.
is not extended to the suspect. The second party is the victim(s). Victims have been
defined earlier in Chapter 2. As noted there, the definition will likely be broad enough to
include not only direct victim(s), but also his or her dependents. Rule 85 also determines
that victims may include:

> Organizations or institutions that have sustained direct harm to any
of their property which is dedicated to religion, education, art or
science or charitable purposes, and to their historic monuments,
hospitals and other places and objects for humanitarian purposes.\(^{22}\)

*The Suspect*

Article 55 specifies the rights that are available to a person during an
investigation. None offer protection against a Request for Provisional Measures. Article
66 reads that:

1. *Everyone shall be presumed innocent until proved guilty before the Court in accordance with applicable law.*

2. *The onus is on the prosecutor to prove the guilt of the accused* [emphasis added].\(^{23}\)

It is arguable whether Article 66 applies to the suspect. Two observations indicate that
Article 66 might not apply to suspects. The first is that Article 66 is under Part 6 of the
*Rome Statute* entitled *The Trial*. If Article 66 is to be considered at the Pre-Trial Stage,
technically it should be under Part 5 entitled *Investigation and Prosecution*. The second
is that Article 66(2) specifies that the Prosecutor must “*prove the guilt of the accused*”
[emphasis added].\(^{24}\)

\(^{22}\) *Rules, supra* note 1, Rule 85.

\(^{23}\) *Rome Statute, supra* note 2, Articles 66.

\(^{24}\) *Rome Statute, ibid.*, Articles 66(2).
On the other hand, there are also two other observations that indicate that Article 66 might apply to suspects. The first is that the presumption of innocence was not included in Article 67, which specifically lists the rights of the accused. This distinction indicates that the drafters were motivated to isolate this right from Article 67 for some reason. The second observation is that Article 66(1) states that "everyone" has a right to the presumption of innocence. When all of these observations are balanced, a stronger argument can be made that a suspect is entitled to the Article 66 protection. This assumption will be adopted for the discussion below.

Article 82 does not grant a suspect the right to appeal the Pre-Trial Chamber's decision for a Request for Provisional Measures. However, Rule 99 grants the suspect a forum to express concerns about a provisional measure issued against him or her.

Article 21 requires the Court to search for additional rights that may protect the suspect. This article also provides the methodology for this search. After the Court finds an ambiguity or an omission in the Rome Statute that it cannot determine by using the primary texts, Article 21(2)b directs it to "apply ... applicable treaties and the principles and rules of international law". A key word that the Court will have to determine the meaning of is "applicable". It is difficult to determine the precise boundaries that this subset of international law will have. However, it is safe to assume that the international law that most State Parties are generally bound to comply with when conducting their

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25 Rome Statute, ibid., Articles 66(1).
26 Rome Statute, ibid., Articles 21(2)b.
international affairs should be included in this subset. This will be the law that this analysis uses.

Article 21(3) is the safeguard to this process. It determines that the "application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights". The language "internationally recognized human rights" is overly broad. The Court will have to determine the scope of this safeguard. For the purpose of this paper, a detailed discussion of the possible interpretations of this language is unnecessary. It is sufficient to observe that "internationally recognized human rights" is clearly a subset of the international law of human rights. Thus, a degree of prudence will have to be used to assess which human rights laws are "internationally recognized".

As regards additional rights for the suspect, if the law is deemed to be applicable under Article 21(1)b, then it will likely satisfy the Article 21(3) safeguards as well. This seems to be a sound conclusion, because even if the Court finds difference between "applicable" international human rights law and "internationally recognized human rights", it should be marginal. Therefore, so long as applicable international human rights law is interpreted narrowly in this analysis (so that for the law to be applicable, it must be widely endorsed by the international community), it can be assumed that it would pass the "internationally recognized human rights" threshold as well.

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27 Rome Statute, ibid., Articles 21(3).
28 Rome Statute, ibid., Articles 21(3).
Article 21 would endorse the following example of human rights law. First is the \textit{Universal Declaration of Human Rights}\textsuperscript{29} [hereinafter \textit{Universal Declaration}]. It could be asserted with confidence that the \textit{Universal Declaration} would be adopted in both subsets without knowledge of the exact parameters of either. Henry Steiner, Junior Professor of Law and Director of the Law School Human Rights Program at Harvard University, and Philip Alston, Professor of Law at New York University Law School, argued that the \textit{Universal Declaration} represents either customary international law, or alternatively an authoritative interpretation of the references to \textit{"human rights"} in Article 55 of the \textit{UN Charter}. The \textit{UN Charter} is applicable to all its members.\textsuperscript{30} Human rights law that is accepted by all of the members of the UN must qualify as being part of the \textit{"applicable treaties and the principles and the rules of international law"} as well as \textit{"internationally recognized human rights"}.\textsuperscript{31}

Two other examples are the 1966 Covenants - the \textit{International Covenant on Civil and Political Rights}\textsuperscript{32} [hereinafter \textit{ICCPR}] and the \textit{International Covenant on Economic, Social and Cultural Rights}.\textsuperscript{33} [hereinafter \textit{ICESCR}]. 148 countries adhere to the \textit{ICCPR} either through ratification or accession while the \textit{ICESCR} has 145 State Parties. In brief,


\textsuperscript{30} For more, see Steiner, H., and Alston, P., \textit{International Human Rights in Context: Law, Politics, Morals} (Oxford: Oxford University Press,1996) at 118-148. Some argue that \textit{Universal Declaration} has only the status of a resolution, as distinct from a binding treaty. If this is so, then it may be contested by State Parties as being applicable to the aforementioned subsets of Article 21(1)b or Article 21(3). However, others, including Steiner and Alston contest this viewpoint. The article above provides two sound arguments as to why the \textit{Universal Declaration} is international law binding upon all of the members of the UN. Either of their arguments is stronger than the assertion to the contrary.

\textsuperscript{31} \textit{Rome Statute}, supra note 2, Article 21.

\textsuperscript{32} \textit{International Covenant on Civil and Political Rights}, 16 December 1966, 999 UNTS 171, 6ILM 368 (entered into force March 23, 1976) [\textit{ICCPR}].


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it is sufficient to assert that Article 21 also would endorse these two examples, because these covenants have attracted such wide adherence.

This chapter will continue the analysis of safeguards based on the assumption that the following examples of international law would be acceptable under Article 21. Continuing forward, Article 17 of *Universal Declaration* protects a suspect's existing property from unjustified seizure. It states:

1. *Everyone has the right to own property alone as well as in association with others.*

2. *No one shall be arbitrarily deprived of his [sic] property.*

The 1966 Covenants were modeled after the *Universal Declaration*, but neither adopted private property rights. Hans Christian Bugge, Lecturer in Law at the University of Oslo, argues that this omission occurred because of the Soviet Union, whose international influence was great enough by 1966 that the right to private property was excluded. He reflects:

> When looking at the two covenants on human rights, one searches in vain for articles stating the right to private property. One may assume that this issue was too controversial to be adopted by the UN at a time when nearly half the world's population lived in communist-ruled societies where private property to means of production had been formally abolished.

Thus, after searching the most applicable international human rights instruments, only Article 17 of the *Universal Declaration* offers additional protection against Requests for Provisional Measures for suspects.

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34 *Universal Declaration, supra* note 29, Article 17.
In sum, it can be assumed that the person under investigation should be able to rely on two rights that will serve as a shield against Requests for Provisional Measures. The first is that the Court is obliged not to arbitrarily deprive anyone of his or her property. The second is that everyone is entitled to the presumption of innocence and that the onus rests with the Prosecutor to prove otherwise. Thus, the Court would have to justify restricting a suspect's right to property based on a rational and fair determination of the evidence. Later in this chapter, it will be established that the evidentiary standard the Court shall use will likely be a reasonable belief. Additionally, Rule 99 suggests that after the Court provides a suspect notice of a Request for Provisional Measures, he or she will have an opportunity to determine the fairness of the measures and make “observations as to whether the order should be revoked or otherwise modified”.  

The Victims

The Court is also required to consider the rights of the victims. Victims’ rights are mentioned throughout the Rome Statute. None oblige the Court as regards Requests for Provisional Measures. Claude Jorda, Judge of the ICC and former President of the ICTY, and Jérôme de Hemptinne, Legal Assistant at the Office of the Presidency of the ICTY, offer an extensive overview of victims’ rights before the ICC. They argue that:

36 A fair reading of Rule 99 establishes that the suspect has a right to be invited by the Court to make observations. Although Rule 99(3) instructs the Court to invite the suspect to make observations about the seizure, or like measures, this Rule only applies when the Court does not provide notice to the suspect prior to taking just measures. However, the distinction that only suspects who have not been notified should be invited to make observations seems arbitrary, unless it is interpreted that it is implicit in the text that suspects also have the right to make observations otherwise. This author assumes that the Court will grant the suspect the right to make observations on the measures regardless of the timing of the notice.

37 Rome Statute, supra note 2. Articles include: 15(3), 19(3), 43(6), 53(1)c, 53(2)c, 54(1)b, 57(3)c, 64(2), 64(6)e. 65(4), 68, 75(3), 79, & 87(4).
[The victims] may not participate in the investigation undertaken by the Prosecutor, have access to the evidence gathered by the parties, nor [have a] right to appeal ...  

They also add that the Court has "sole discretion in deciding whether or not the victim is to receive reparations". The authors footnote Article 75(2) as justification for this latter assertion. It states "the Court may make an order" for reparations. The authors must have based their assertion on the word "may". Thus, a victim does not have an enforceable right to reparations.

Rule 99 does offer victims the right to petition the Court to make a Request for Provisional Measures. However, as mentioned in the above quotation, victims may not have access to the evidence, beyond of course what they themselves hold or know, that would be necessary to justify the petition. In such circumstances, the Court may request this information from the Prosecutor. Victims also have a right to be informed as to the outcomes of a petition. Such notification of this information is subject to the Court’s capacity to contact the victim(s). After notification, victims also have a right to make "observations as to whether the order should be revoked or otherwise modified".

In this case, the Court’s Article 21 search for other applicable international law to bolster the rights of victims will prove to be fruitless. Mr. Theo van Boven, Professor of

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39 Jorda & Hemptinne, supra note 38 at 1407.
40 Rules, supra note 1, Rule 99(1).
41 Rules, ibid., Rule 99(3).
42 Rules, ibid., Rule 99(3).
43 Rules, ibid., Rule 99(3).
International Law at the University of Maastricht and author of the *van Boven Principles*, center to discussions in Chapter 2, writes:

*The position of the victim in the ICC Statute, in particular the victim’s scope to pursue her or his own rights, claims and interests in relation to the international criminal justice procedure, constitutes a substantial advance compared with the position occupied by victims in [such] proceedings [prior to this]...*44

Françoise Bouchet-Saulnier, legal counsel of Médecins Sans Frontières, would agree with van Boven’s position. She writes that:

*International law does not provide mechanisms for victims of human rights and humanitarian law violations to receive reparation or compensation, except for the Inter-American Court of Human Rights which has a relatively narrow jurisdiction, and the ICC ...*45

Thus, the ICC represents the high-water mark for victims’ rights as they relate to reparations and more advanced protections for victims do not exist.

**Article 93(1)k – The Safeguard**

The next and last safeguard is found in Article 93(1)k. It is the most substantial limitation on the Court’s power examined to this point. The article only allows for assets that are “proceeds, property and assets and instrumentalities of crimes” to be subject to Requests for Provisional Measures.46 This means that only the assets of a suspect that are linked to the crimes described under Article 5(1) are applicable. This dramatically reduces the pre-conviction power that the Court has to make Requests for Provisional

46 *Rome Statute, supra note 2, Article 93(1)k.*
Measures. Exactly what assets that can be subject to provisional measures will be addressed in the section “Basic Principles for Confiscation”, below.

The limitation that this safeguard insists upon is very significant. The limitation found in Article 75(4) aside, this limitation marks a distinctive difference between a request to seek cooperation using Article 75(4) and one using Article 57(3)e. While Article 57(3)e is limited to seizure of property linked to the crime(s), Article 75(4) grants the Court the authority to seek cooperation from a state to seize any property. Article 75(4) does this by allowing the Court to seek any of the measures listed under Article 93(1). One of these measures grants the Court the authority to seek “any other type of assistance which is not prohibited by the law of the requested State”\(^\text{47}\). This is the broad discretion that will allow the Court to make such requests to secure any and all of the assets of the convicted person subject to restriction imposed by the domestic jurisdiction of the requested State Party. The restrictions that requested states might impose upon Article 93(1) will be discussed later.

Observations and Summation

At minimum, a summons must be issued before Article 57(3)e can be considered. For this to occur, the case must be admissible.\(^\text{48}\) Also, the Prosecutor must determine whether the evidence indicates a reasonable belief of guilt. He must also determine if the case is in the interest of justice to pursue.\(^\text{49}\) This last requirement allows the Court to pursue cases that are “most serious” to the international community and that focus on

\(^{47}\)  \textit{Rome Statute, ibid.}, Article 93(1)l.
\(^{48}\)  \textit{Rome Statute, ibid.}, Articles 17 & 53.
\(^{49}\)  \textit{Rome Statute, ibid.}, Article 53.
the "most responsible perpetrators".50 Only then will the Prosecutor request a summons. The evidence must also convince the Pre-Trial Chamber that "there are reasonable grounds to believe that the person committed those crimes".51 If this is so, then a summons will be issued.

After the summons as been issued, the Pre-Trial Chamber may consider a petition to request cooperation under Article 57(3)e and Article 93(1)k. The Court must take into consideration the rights of the parties to determine whether to proceed.52 The two parties considered in this analysis thus far have been the suspect and the victim. Generally speaking, the Court only has one substantial obligation to the victim. This obligation is to consider the opinions of the victim during this process.53 The Court has discretion as to whether it will pursue reparations. The suspect has two rights that the Court must defend. One is the presumption of innocence54 and the other is that the suspect is not to be arbitrarily deprived of his or her property.55

Additionally, the only property that is subject to Requests for Provisional Measures is assets linked to crimes listed under Article 5(1).56 Before issuing such an order, the Pre-Trial Chambers also must consider the strength of the evidence to justify such provisional measures.57 The evidence must establish that the assets are linked to the crimes and possibly that the Request for Provisional Measures is necessary to ensure that

50 Friman, supra note 11 at 201.
51 Rome Statute, supra note 2, Article 58(2).
52 Rome Statute, ibid., Article 57(3)e.
53 Rules, supra note 1, Rule 99.
54 Rome Statute, supra note 1, Article 66.
55 Universal Declaration, supra note 29, Article 17.
56 Rome Statute, supra note 1, Article 93(1)k.
57 Rome Statute, ibid., Article 57(3)e.
assets will not dissipate prior to the Court’s judgment upon confiscation.\textsuperscript{58} This is the procedure that the Court must follow before issuing a Request for Provisional Measures.

**THE INTERNATIONAL NORMS FOR CONFISCATION**

This section will explain the outstanding issues that the earlier portions of this chapter promised to address before conclusions are offered. There are three outstanding issues from the previous analysis of the safeguards. These are:

1. Explaining the basic principles of confiscation, including what assets are subject to confiscation;

2. Establishing that the burden of proof for a Request for Provisional Measures is a reasonable belief; and

3. Defining the scope of state cooperation as regards Requests for Provisional Measures.

**Basic Principles For Confiscation**

Confiscation orders are legal means that judicial or quasi-judicial bodies use to seize assets. *The Convention of Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990\textsuperscript{59} (hereinafter the 1990 Convention)* defines confiscation as “a penalty or a measure, ordered by a court following proceedings in

\begin{footnotesize}
\textsuperscript{58} FAFT Members Report, supra note 19, paras. 14 & 15.
\end{footnotesize}
There are basically two ways that confiscation can be enforced. The first is enforced against a legal person who can hold property. This is called an *in personam* procedure. The second is enforced *in rem*. For such procedures, an order is issued against the property itself, because the nature or use of the asset forfeits the owner’s right to possess it. In the *in rem* procedure, there is no criminal sanction against the owner and thus the owner has no right to safeguards that exist when the criminal proceedings are brought against him or her. Because the *in personam* procedure is brought against a legal person, this allows for the offender to defend against the seizure. Only if the natural or legal person cannot defeat the petition for confiscation can the court make such an order. Therefore, rights are granted to legal persons in an *in personam* procedure while no rights are granted to property owners when the property is confiscated *in rem*.

There are three types of assets that are subject to confiscation. They are:

1. The instruments of the crime (*instrumentum sceleri*);
2. The subject of crime (*objectum sceleris*); and
3. The profits of crime (*fructum sceleris*).

The *instrumentum sceleris* are the items that are used to perpetrate the crime. Examples could be the gun that was used to commit a robbery, or the knife that was used to commit a murder. The *objectum sceleris* are assets that are inherently illegal. Examples could be

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61 For an example of this form of confiscation see: *US v. 92 Buena Vista Avenue, Rumson, NY et al.*, 507 U.S. 111, 113 S.Ct. 1126,122 L.Ed.2d 469 (1993) [*Buena Vista*].
a forged cheque, or illegal drugs. *Fructum sceleris* are the profits earned from illegal activities. Examples of this could be profits from illegal drug sales or black market trade of body parts.

There are two possible ways that law enforcement can impose confiscation orders. They are object confiscation and value confiscation. Object confiscation is the seizure of a specific item. Examples are the confiscation of illegal drugs (*objectum sceleris*) or the boat that transported the drugs into the country (*instrumentum sceleris*). Value confiscation is the seizure of the estimated value of the assets related to the crime in lieu of these actual assets. For example, law enforcement officials may have difficulty establishing where the exact proceeds that were gained from a crime were spent, saved, hidden, laundered or invested, so value confiscation makes tracing and seizing the specific *fructum sceleris* unnecessary. This judicial power makes it easier to confiscate assets.

**Evidentiary Standard for Provisional Measures**

*Applicable Law*

The Court will have to use Article 21 to find the appropriate sources of legal guidance to adopt an evidentiary standard. Article 21 has been explained a number of times through this thesis, but to summarize, there is a hierarchy of applicable law as follows:

1. *Rome Statute*,\(^{62}\)

\(^{62}\) *Rome Statute, supra* note 1, Article 21(1)a.
2. Its Rules,

3. Applicable treaties, principles and rules of international law;

4. National law that would normally exercise jurisdiction over the specific crime.

The *Rome Statute* and its *Rules* do not mention the evidentiary burden for Requests for Provisional Measures. Next, the Court will have to look to applicable international law. Dr. Claus Kress, German participant in two expert groups that facilitated the working start of the ICC, and Goran Sluiter, Professor of International Law at Ultrecht University, address the question of the applicable international law. These authors are writing on the topic of confiscation as regards the ICC’s enforcement of fine and forfeiture orders. They write that the Military Tribunals of Nuremberg and Tokyo and the two *Ad Hoc* Tribunals are not comparable to the ICC as regards confiscation, because none of these bodies have (nor had) a Regime to impose fines or forfeitures.

As a consequence, this chapter must agree with the conclusion of Kress and Sluiter that:

*Failing any extensive practice of enforcing international fines and forfeiture measures, it is basically the inter-State practice on the enforcement of fines and forfeiture measures which could serve as a precedent of the ICC enforcement Regime.*

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63 *Rome Statute, ibid.*, Article 21(1)a.
64 *Rome Statute, ibid.*, Article 21(1)b.
65 *Rome Statute, ibid.*, Article 21(1)c.
67 That being said, two technical exceptions exist. The first is Article 28 of the Nuremberg Charter that provided its tribunal the power to deprive a convicted individual of stolen property. And the other exception has been demonstrated by the ICTY. This tribunal has issued fines for contempt of court, however such orders related to its ancillary jurisdiction. I agree with the authors that neither exception constitutes a fine or forfeiture Regime.
68 *Kress & Sluiter, supra* note 66 at 1824. That being said, the authors also mention later in their work that the ICTY has the ability to return property as a penalty under its statute (see Article 24(3) of the *ICTY Statute*). However, again there is little to be gained in attempting to make a comparison with ICC’s enforcement measures.
Kress and Sluiter only contemplate reparations as an afterthought in their article, however the same logic would apply. In application, since none of the comparable international criminal tribunals have (nor had) the power to order reparations, none could be considered as having a Reparations Regime. Thus, no comparable international judicial model exists that could have been used as a guide to predict how Requests for Provisional Measures should be developed. As the authors suggest, the next step would be to see what law exists as regards inter-state practice.

Dr. Guy Stessens, the Administrator for the General Secretariat of the Council of the European Union, describes the four most important legal instruments of the international anti-money laundering Regime. These instruments are also the four most important instruments for inter-State confiscation.69 These instruments are:

1. *The 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*70 (hereinafter *UN Drug Convention*);

2. *The 1990 Convention*;

3. *The forty recommendations of the Financial Action Task Force on Money Laundering*71 (hereinafter *FATF Recommendations*); and


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Three of the four legal instruments either request or suggest that member states have the capacity to order provisional measures similar to those of Article 93(1)k. The EC Directive is the only one that does not address this issue. Article 5(2) of the UN Drug Convention, which is the least applicable to the ICC, reads:

*Each Party shall also adopt such measures as may be necessary to enable its competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things related to criminal acts under this article, for the purpose of eventual confiscation.*

Similarly, Article 11(1) of the 1990 Convention reads:

*At the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, a Party shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request.*

Recommendation 3 of the FATF Recommendations suggests that state members should adopt similar measures to those stated above. That recommendation is more comprehensive than the other two legal instruments. It is more explicit as regards what Requests for Provisional Measures state members should be able to execute. It states that such measures should include:

a. Identifying, tracing and evaluating property which is subject to confiscation;

b. Carrying out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property;

c. Taking steps that will prevent or avoid actions that prejudice the State's ability to recover property that is subject to confiscation; and

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73 UN Drug Convention, supra note 70, Article 5(2).
74 1990 Convention, supra note 59, Article 11(1).
d. Taking any appropriate investigative measures.\textsuperscript{75}

Recommendation 3 also makes suggestions as to the burden of proof for actual confiscation of assets. It reads that:

\textit{Countries may consider adopting measures that allow such proceeds or instruments to be confiscated without requiring a criminal conviction; or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.}\textsuperscript{76} [emphasis added]

The last portion of the recommendation is very carefully worded so as to not offend state sovereignty. The language “may consider” and “to the extent that such a requirement is consistent with the principles of their domestic law” indicates that not all members of the international community accept permitting confiscation without conviction or imposing a reverse onus upon the owner of the property in question to establish lawful possession. But, the analysis thus far has not addressed what the specific evidentiary burden should be.

\textit{Domestic Models}

The \textit{Financial Action Task Force on Money Laundering} [hereinafter \textit{FATF}] has 33 state members.\textsuperscript{77} The state members of \textit{FATF} include the most politically powerful and economically developed countries in the world. With the exception of the United States, FAFT’s member states are also State Parties of the ICC. The FAFT’s report,
entitled "Evaluation of Laws and Systems in FAFT Members Dealing With Asset Confiscation and Provisional Measures", includes a review of what confiscation orders and provisional measures existing among member states. The following is a portion of the report’s summary as regards the status of state member’s provisional measures:

14. ... All members are able to take provisional measures, either to seize or freeze, from the time that a person is arrested and charged with a relevant criminal offence until such time as the proceedings are concluded. Such powers can also be exercised prior to the person being arrested and charged in most members, though the seizure or freezing of the property can usually only be maintained for limited periods of time if no charges are laid.

15. ... The power to freeze, retain or secure property is a judicial power which is normally reserved to the relevant court. To obtain such an order it is normally necessary to have sufficient evidence to satisfy the court that the person committed the offence and the person benefited from the offence or that the property is the proceeds of that offence. In a significant number of members it is also necessary to show that the freezing of the property is necessary in order to ensure that it will be available if a confiscation order is made i.e. a need to show a risk of dissipation.78 [emphasis added]

The report indicates that all members are able to take provisional measures, and all agree that such measures should be taken from the time that a person is arrested and charged until such time as the proceedings are concluded. However not all members unanimously agree that such measures should be taken from a time prior to the person being arrested and charged. This point is important, because the latter time frame will be the time in which the Pre-Trial Chamber will be making Requests for Provisional Measures. Some arrangements will have to be made for State Parties that refuse to acknowledge such requests before the charges are confirmed. State Parties ability to do this will be discussed in detail later. It is interesting to note that the Measures can only be

78 FAFT Members Report, supra note 19, paras. 14 & 15.
maintained for a limited period of time if no charges are laid. The Pre-Trial Chamber will likely adopt this policy as well.

The report also indicates what evidence will be necessary to successfully petition a court to order such provisional measures. It states that the petitioner normally has to provide evidence to satisfy the Court that:

1. The person committed the offence; and
2. The person benefited from the offence; or
3. The property is the proceeds of that offence, as well as possible that
4. The freezing of the property is necessary in order to ensure that it will be available if a confiscation order is made.\footnote{FAFT Members Report, \textit{ibid.}, paras. 14 \& 15.}

This language should be familiar to the reader. When this chapter determined what the "weight of the evidence"\footnote{Rome Statute, \textit{supra} note 2, Article 57(3)e. Also see the section of this chapter entitled,"The Strength of the Evidence".} was to establish, the suggestion was based on this model. The only difference is that number factor was changed from "the property is the proceeds of that offence" to "the property is linked to that offence". This is because the FAFT is only concerned with the \textit{fructum sceleris} and the language was modified to encompass all three forms of assets that are subject to Requests for Provisional Measures.

The evidence must establish a reasonable belief that the aforementioned requirements have been satisfied. The standard of burden of proof for provisional measures should not be the criminal standard of \textit{beyond a reasonable doubt}, because, in many cases, this burden could not be satisfied until after conviction. This would render

\footnote{FAFT Members Report, \textit{ibid.}, paras. 14 \& 15.}

\footnote{Rome Statute, \textit{supra} note 2, Article 57(3)e. Also see the section of this chapter entitled,"The Strength of the Evidence".}
such provisional measures pointless, because they would not be able to be issued until the same time the confiscation could occur. Among the examples of jurisdictions that use the reasonable belief standard for provisional measures are Canada\(^81\) and the United Kingdom.\(^82\)

In sum, the FAFT report offers a satisfactory model of interstate practice to serve as an explanation of state practice for Requests for Provisional Measures. These FAFT countries are arguably some of the most respected countries as regards applying the rule of law and conducting their affairs in accordance with internationally recognized human rights.\(^83\) Some of these countries’ legal systems are models for developing countries. Also, they are some of the wealthiest and most politically powerful countries and therefore have the most resources and greatest capacity to trace and secure assets internationally. For these reasons, this chapter submits that the FAFT’s standards will strongly influence how the Pre-Trial Chamber will conduct Requests for Provisional Measures. However, national standards vary and this makes it difficult to predict exactly

\(^81\) Criminal Code R.S.C. 1985, c. C-46, s. 462.32. Section 462.32 (1) states that: “[S]ubject to subsection (3), where a judge, on application of the Attorney General, is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is... any property in respect of which an order of forfeiture... the judge may issue a warrant authorizing a person named in the warrant or a peace officer to search the building, receptacle or place for that property and to seize that property and any other property in respect of which that person or peace officer believes, on reasonable grounds, that an order of forfeiture may be made under that subsection”. [emphasis added]

\(^82\) Proceeds of Crime Act 2002 (U.K.). 2002, c. 29, s. 40 & 41. Sections 40 & 41 state: “40 (1) The Crown Court may exercise the powers conferred by section 41 if any of the following conditions is satisfied. (2) The first condition is that—(a) a criminal investigation has been started in England and Wales with regard to an offence, and (b) there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct. ... 41 (1) If any condition set out in section 40 is satisfied the Crown Court may make an order (a restraint order) prohibiting any specified person from dealing with any realisable property held by him.” [emphasis added]

\(^83\) List of Members, supra note 77.
which provisional measures will be used, or how often. This will be elaborated upon in the next section.

State Party Cooperation In Fulfilling Article 93(1)k Requests

Article 93(1)k is in Part 9 of the *Rome Statute* entitled International Cooperation and Judicial Assistance. The first article in this section is Article 86. It states that

*States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.*

Article 88 states that:

*States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.*

Therefore, states are under an obligation to have the national legislation available to be able to cooperate fully with any request that the Pre-Trial Chamber makes under Article 93(1)k.

The *Vienna Convention* states the generally accepted position that: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Thus, states generally cannot justify failing to meet their treaty obligations by asserting that their domestic law forbids it, or that domestic law does not grant it the power to do so. However, presumably in an effort to make the *Rome Statute* more acceptable to a greater number of states, its drafters included unusual provisions that

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84 *Rome Statute*, supra note 2, Article 86.

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permit what amount to derogations on the basis of domestic law. For example, there are a number of provisions that protect the sovereign right of states to reject certain Article 93 requests. Specifically, Article 93(3) envisions that a request under paragraph (1), including (1)k, could be prohibited by the requested State “on the basis of an existing fundamental legal principle of general application”. For instance, one such principle could be a constitutional constraint that forbids the requested State from fulfilling an order. Under such circumstances, Article 93(3) states that the requested State shall “promptly consult with the Court to try to resolve the matter”. It directs the parties to consider “whether the assistance can be rendered in another manner or subject to conditions”. Article 93(3) directs the Court to “modify the request as necessary”.

Another example of safeguards for states is provided in Article 96. Article 96(2)e requires that Requests for Provisional Measures must include information “as required under the law of the requested State in order to execute the request”. Article 96(3) states that the Court may oblige a State Party to undertake consultation as regards their national law in order to fulfill the requirement under paragraph (2)e.

This analysis is exposing a pattern in Part 9. The existing state law seems to be paramount to the Article 86 and 88 obligations to cooperate. The last example of this is Article 99(1). It also affirms a requested State Party’s right to require the Pre-Trial Chamber to make requests in accordance with their national law. It states that any

87 Rome Statute, supra note 2, Article 93(3).
88 Rome Statute, ibid., Article 93(3).
89 Rome Statute, ibid., Article 93(3).
90 Rome Statute, ibid., Article 93(3).
91 Rome Statute, ibid., Article 93(2)e.
requests that are made under Article 93 shall "be executed in accordance with the relevant procedure under the law of the requested State".\textsuperscript{92}

Upon reflection, there are some conclusions that can be drawn from Part 9. One is that, after a country ratifies the \textit{Rome Statute}, it is under an obligation to try to develop national laws that will assist in facilitating cooperative measures with the Court. At a bare minimum, a State Party is not permitted \textit{de jure} to enact legislation that would compromise cooperation. What this means is that only legal obligations that existed prior to a country's ratification of the \textit{Rome Statute} can justify a refusal to cooperate with a request made under Article 93(1)e. In other words, a State Party cannot \textit{de jure} adopt new legislation to escape complying with requests that it would prefer not to cooperate with. That being said, some state parties may have pre-existing legal restraints forbidding compliance with some, or maybe all, of the Requests for Provisional Measures.

\textbf{CONCLUSIONS}

A general conclusion that can be drawn from the cooperation procedure in Part 9 is that the State Parties have the power to determine the Court's effectiveness to secure assets because the State Parties are the only tool that the Court has to fulfill its orders. If a requested State refuses to cooperate \textit{de facto}, what remedy does the Court have? Or

\textsuperscript{92} \textit{Rome Statute}, \textit{ibid.}, Article 93(3).
alternatively, what if states do not develop legal procedures to fulfill orders and ignore the Court's pressure for them to do so? Or what if they creatively interpret existing legislation in a manner that forbids Article 93(1)e requests? Or what if they simply create new legislation even if this is in violation of Article 86 and 88? The answer to all these questions is that the Court may protest but it has no enforcement mechanism through which to compel state compliance. Other states may apply political pressure upon such states to fulfill their international obligations, but would another State Party take serious economic or military sanction against a country that was not complying with Requests for Provisional Measures? This author does not think so.

Therefore, the Court should as a first and continuing order of business attempt to maintain good relations with State Parties. Obviously, it would be best to avoid conflicts on matters of cooperation whenever possible. And thus, the Court should not attempt to impose Requests for Provisional Measures without explaining that the safeguards in place under Article 57(3)e and Article 93(1)k will satisfy the underlying considerations of concerned states that originally motivated the establishment of the Article 75(4) limitation. Once again, these considerations were:

1. That the accused persons rights, and specifically the presumption of innocence, must be protected;

2. If the accused is found innocent and has suffered damages as a result of the seizure, there are problematic consequences in the area of compensation for damages; and

3. Certain seizures of non-crime related property are prohibited within certain domestic jurisdictions.
The analysis of how these safeguards address each of these concerns will be addressed below.

**The Rights of the Persons Under Investigation**

The Court must take into consideration the rights of the suspect. These include the right to property and the presumption of innocence. To protect these rights, the Court will have to be satisfied that a number of safeguards have been respected. To do this, the Court would have to hold a reasonable belief that the assets are linked to the crime as well as possibly that such an order is necessary to preserve assets. Furthermore, if a requested state has existing law that forbids Requests for Provisional Measures, then the Court's request must be modified to respect their national law. This will ensure the suspects' rights will not only be respected, but that any specific standards that may be established in the domestic law of the requested states will be respected as well.

**Damages If Innocent**

The multiple safeguards that are in place as well as the evidentiary burden should ensure that a careful evaluation of potential guilt is conducted before a Request for Provisional Measures is issued. Thus, when such measures are issued, there should be a significant likelihood that the suspects subjected to the provisional measures will be found guilty.

There is always the potential for a miscarriage of justice. Considering that the Court has a broad discretion to order a number of different Requests for Provisional
Measures, it should ensure that it restricts the suspects’ right to his or her property only to the degree necessary to avoid dissipation. For example, the Court should only request an order that could assure that the asset would not dissipate or be hidden and yet attempt at the same time to allow the suspect to have the greatest freedom possible to enjoy his or her assets. Before a more aggressive measure is ordered, the Court should be satisfied that there is a need to do so. Thus, since the suspect’s right to property is only infringed to the degree necessary, the assets could be invested, managed or enjoyed in a manner similar to that before the provisional order was taken. In such cases, damages that the suspect might suffer should be minimal.

Another suggestion is that the Trust Fund might set aside a portion of funds to be saved in a special account. Such an account could exist to pay compensation when the accused is found to be innocent and suffers losses because of a Request for Provisional Measures. If the Court deemed that such financial assurances would need to exist before it could order provisional measures, then this special account would facilitate the Court’s ability to make a Request for Provisional Measures, and should be interpreted as being for the benefit of victims. Thus, having such an account in the Trust Fund would not violate Article 79. That being said, this suggestion should be researched further.

Seizures of Non-Crime Related Property

Article 93(1) only allows for provisional measures to be taken upon assets that the Pre-Trial Chamber has reasonable grounds to believe are related to crimes under Article
5(1). Assets unrelated to such crimes cannot be seized before conviction. There is no issue here.

Thus, if the Court adopts a rational approach to explain its powers under Rule 99, then State Parties will understand that, when analyzed, the application of Article 57(3)e is not in conflict with Article 75(4). And furthermore, for those who lobbied to have the Article 75(4) limitation written into the *Rome Statute*, the Court should have special consideration for their concerns. This will help prevent any potential dispute that could occur if the Court chooses to impose an interpretation of Rule 99 upon State Parties instead of attempting to persuade them with clear and considerate explanations of its application.
CONCLUSIONS AND RECOMMENDATIONS

I think the issue is, in order to win a war should you kill 100,000 people in one night, by firebombing or any other way? LeMay’s answer would be clearly “Yes.” ... McNamara, do you mean to say that instead of killing 100,000, burning to death 100,000 Japanese civilians in that one night, we should have burned to death a lesser number or none? And then had our soldiers cross the beaches in Tokyo and been slaughtered in the tens of thousands? Is that what you’re proposing? Is that moral? Is that wise?

LeMay said, “If we’d lost the war, we’d all have been prosecuted as war criminals.” And I think he’s right. He, and I’d say I, were behaving as war criminals. LeMay recognized that what he was doing would be thought immoral if his side had lost. But what makes it immoral if you lose and not immoral if you win?

Robert McNamara, The Fog of War (2003)¹

A RECAPITULATION

The Rome Statute, through its Reparations Regime, has provided the Court with an opportunity to improve the lives of many. However, the effectiveness of this Regime is vulnerable. One threat is that suspects under investigation will have the means to hide their assets before the reparations hearing. To prevent this from happening, the Court

¹ General Curtis LeMay directed the gasoline-jelled fire bombing of Japan. Robert McNamara at that time was an Air force Captain and bombing efficiency specialist for LeMay. On the night of 9-10 March 1945, the great firestorm raid of Tokyo killed 72,489 people and injured over 40,000, according to the official record of the Japanese War History Office. By war’s end, this incendiary campaign killed some half million people and left millions more homeless.
will have to use provisional measures, which can help to ensure that suspects do not have
the opportunity to do this. Such measures are essential because if the Court cannot secure
assets quickly, there might not be sufficient money available to fund reparations orders
after conviction. Another threat is that certain State Parties might object to the Court
interpreting its power so that it has the ability to manage the first threat. The danger is
that a backlash might compromise the Court’s capacity to enforce any orders that depend
upon state cooperation. This vicious circle creates the backdrop for the central argument
of this thesis, being that the Court should not only attempt to establish an effective
Reparations Regime, but it also must do so in a politically astute manner to avoid
damaging its relations with State Parties, which are of central importance to the Court’s
overall ability to administer justice.

The introductory chapter set out four main objectives for this thesis to meet. They
were as follows:

1. Discuss the options available to the ICC as regards its obligation under the
   Rome Statute to establish the Reparations Regime (Chapter Two);

2. Explain the relationships that the Reparations Regime has with certain
   players, being the international community, victims, suspects, and State
   Parties. (Chapter Three);

3. Analyze how the Court might implement provisional measures to ensure
   an effective Reparations Regime (Chapter Four); and

4. Draw conclusions and propose a study strategy to create a prototype for a
   fully developed, practical and adoptable reparations prototype for the ICC
   that can ensure that appropriate protective measures are undertaken so that
   a suspect does not have the chance to hide assets that would otherwise be
   subject to confiscation (Chapter Five).
Chapter 5 would compile and summarize the thoughts and conclusions of the earlier chapters and then offer some additional insights. It was predicted that the central recommendation would be that more work should be completed on issues related to the creation of an effective Reparations Regime. In response to this central recommendation, it was anticipated that Chapter Five would include a proposal that would plot a research methodology for the future work. In return, the following three sections will summarize the arguments and conclusions of Chapters Two, Three, and Four. After this, some additional conclusions will be made and finally a proposal for further study will be presented to conclude this work.

Chapter Two

Chapter Two analyzed the options available to the ICC to develop establishing principles for the Reparations Regime. Before this analysis commenced, the chapter first outlined the procedural aspects of the Regime that have been already established in the Rome Statute and its Rules. These procedural rules can be found in Article 75 and Rules 94 through 99. The areas outlined included:

1. How a reparations inquiry is commenced;
2. How interested parties are informed about a hearing;
3. Who these interested parties are;
4. What information is circulated;
5. What options are available to additional victims after they become aware of the hearing;
6. How the hearing will be conducted;
7. How damages will be assessed; and
8. How the awards will be administered to victims.

After this outline was completed, it was explained that neither the Rome Statute nor its Rules provided much guidance in helping the Court to satisfy its obligation to finish the task of creating a functioning Regime. It was established that some experts have suggested that the Court must look beyond the ICC’s primary texts for direction, and furthermore that it should in part rely on the van Boven Principles to fill the void and address the unanswered questions. After adopting this suggestion, this analysis attempted to answer the four main questions that will be key to the functioning of the Regime. They are:

a. What should be the nature and purpose of the reparations;
b. Who should be included in the class of victims able to make claims;
c. What should be the burden of proof to establish liability; and
d. What remedies should be available to victims.

The chapter answered the first question by concluding that in the ICC’s case, the nature and purpose of reparations should be corrective and remedial, not punitive. It was suggested that in the event that the Court deemed that imposing punitive financial measures was appropriate, it has the capacity to do so by issuing fines. It was argued that this is a better option than using the Reparations Regime for punitive measure, because it will be easier to defend the integrity of the Reparations Regime from potential attacks if it is exclusively used for humanitarian ends.
The chapter argued that, if this advice is accepted, the Court will only use the Regime to attempt to restore precisely what had been taken from victims. It was further suggested that when this is not possible, substitute remedies should be provided. To do so, it was emphasized that the Court should rely on experts to help it tailor the most suitable remedial options to fit the needs of victims. Considering that the needs of victims in different cultures will vary, it was suggested that one formula will not be appropriate for all victims. This commits the Court to detailed, but important, case-by-case consideration of reparations taking into account a wide variety of social, economic and cultural factors.

In addressing the second question, it was argued that the definition of "victims" should be broader than the definition provided in Rule 85. It was argued specifically that the Court should follow van Boven's recommendation that suggested that "victims" should not only include "direct victims", but also others including family members and dependents. It was argued that this would be just, because if for example, a victim was the financial provider for his or her family and he or she died as a result of the criminal acts, then these dependants should not be barred from claiming the damages they suffered from this, because such acts would have the power to devastate their lives even if they were not, as van Boven puts it, "direct victims".

Next, the chapter addressed the issue of what standard of proof the Court should use in order to make determinations about the evidence presented during a reparations hearing. It was established that the delegates at the preparation meetings for the
development of the *Rules* agreed that the evidentiary standard should be less than the standard of *Beyond a Reasonable Doubt*. That being said, they could not agree on much more. Attempts by the American, French and Canadian delegations failed to articulate what this standard should be, because all of these proposals used language similar to what would be used to explain the *Balance of Probabilities* standard. The problem was that certain State Parties, which were unfamiliar with such evidentiary standards, were wary of the seemingly ambiguous explanations of this standard and refused to grant the Court such broad power without a more precise definition. As a result, it was suggested that the largest challenge that the Court might face could be how to articulate this standard in a manner that would satisfy these apprehensive State Parties.

Lastly, the chapter explained the range of options that the Court could use to craft reparations awards. A large and unexhausted list of examples of remedial options was suggested that hopefully convinces the reader of the immense potential such a Regime could have to help victims.

Chapter Two concluded with a disclaimer that stated that this analysis is only a prediction of how the Court might choose to craft the Regime. Considering the fact that it has a broad discretion to fashion the Regime, it is difficult to accurately determine what it will be like. That being said, it was also suggested that the true value of this analysis is that it demonstrates how the establishing principles could be created in order to help optimize its potential benefit to victims. Therefore, this chapter might help the reader better understand not only how the Reparations Regime might function, but also better
appreciate the potential importance this Regime might have for victims in helping them rebuild their lives.

Chapter Three

Chapter Three had four ancillary objectives. When these objectives were met, the main objective of this chapter was also satisfied, being to contextualize the Reparations Regime within the international political environment in which it will function. To do this, the chapter explained the Court’s relationships with the international community, victims, suspects, and State Parties as regards the issue of reparations.

This chapter first addressed the Regime’s relationship with the international community and victims. It was suggested that with an effective Reparations Regime the Court might, for example, play a significant role in helping the United Nations (and other international, regional and domestic bodies) cope with the unmanageable number of displaced people in the world. The conclusion was that such potential capabilities as this example could greatly benefit both of these groups. On the other hand, the suspects and some State Parties posed the two main threats to an effective Regime. The first threat is that suspects can hide their assets before the reparations hearing and the second is that if the Court haphazardly interprets its power to give itself the ability prevent this first threat, State Parties may refuse to enforce orders of the Court. This could compromise the Regime, or even worse, compromise other orders that are essential to the Court’s ability to administer justice. Thus, this dilemma creates the backdrop for Chapter Four that argues the Court should attempt to establish an effective Reparations Regime in a
considerate and strategically sensitive fashion to ensure that its relations with potentially threatening State Parties remain congenial.

Chapter Four

Chapter Four conducted a detailed analysis of how the Court should implement provisional measures in a manner that not only helps ensure the Reparations Regime will be effective, but also helps avoid confrontation with State Parties. The explanation of this analysis can be divided into four parts. The first part explained the relationship between Rule 99 and Articles 57(3)e, 75(4), and 93(1)k. It was argued that Article 75(4) does not de jure forbid the Pre-Trial Chamber’s use of Article 57(3)e to make Requests for Provisional Measures to secure the assets of suspects. The second part defined the main concerns of the State Parties that might be opposed to such an application of Rule 99. These concerns were as follows:

1. The accused persons rights, and specifically the presumption of innocence, must be protected;

2. If the accused is found innocent and has suffered damages as a result of the seizure, there are problematic consequences in the area of compensation for damages; and

3. Certain seizures of non-crime related property are prohibited within certain domestic jurisdictions.

The third part explained the safeguards that the Court must abide by in its pre-trial application of Rule 99. And the fourth argued how these safeguards could satisfy the concerns of such opposing states. This chapter concluded that an argument based on this approach might be the best chance that the Court would have to ensure the Regime’s effectiveness.
The third part, explaining the safeguards that must be satisfied prior to a pre-trial application of Rule 99, comprised the majority of this chapter's work. In sum, it was determined that, at minimum, a summons needed to be issued before the Court could consider Article 57(3)e. For the Court to grant a summons, it was explained that the case must be admissible and in the interest of justice to pursue, and furthermore, the evidence must persuade the Court that there is a reasonable belief of guilt. After a summons is issued, it was established that the Pre-Trial Chamber must consider the rights of the parties to determine whether to proceed. This analysis considered two parties: the suspects and the victims. It was determined that the Court had one obligation to victims, that being to consider their opinions during the reparations procedure, while the suspects have two rights that the Court must defend, those being the presumption of innocence and the right to not be arbitrarily deprived of one's property. Another safeguard is that a suspect can also rely on the fact that the evidence must persuade the Court that his or her property is linked to acts under investigation. Therefore before issuing any such order, the Pre-Trial Chambers must consider the strength of the evidence, and determine that an order is in accordance with all of these considerations.

The conclusions of this chapter centered on how these safeguards address the three major concerns that State Parties might have as regards the pre-trial application of Rule 99. Again, the three main concerns were that:

1. The rights of the suspect would be protected;
2. Compensation would be available for a suspect if he or she is found to be innocent; and
3. Non-crime related property would not be subject to such orders.

It was argued that the Court must adequately protect the rights of the suspect. It was explained that the Court must provide the suspect with all rights provided for by recognized international human rights norms. It was concluded that these safeguards will ensure that the rights of suspects will be upheld to a high standard. Further, it was emphasized that the suspect could also rely upon any right that a domestic legal system of the requested State Party possesses so long as the state in question has a right under Part 9 of the *Rome Statute* to insist upon its application and chooses to enforce it.

It was acknowledged that the multiple safeguards that are in place should ensure that a careful evaluation of potential guilt is conducted prior to any infringement upon a suspect’s enjoyment of his or her property. That being said, it was also conceded that there is always a chance that accused will be found to be innocent regardless of how damning the initial evidence appears to be. Therefore it was argued that the Court should restrict a suspect’s rights only to the degree necessary to avoid dissipation of the assets. In doing so, it was suggested that the damages that the suspect would suffer should be minimized. To compensate for any remaining losses, it was suggested that the Trust Fund might set aside a portion of funds to be saved in a special account to pay compensation to the innocent party in such cases. It was argued that such an account should be interpreted as being for the benefit of victim(s), because it would facilitate the Court’s ability to make a Request for Provisional Measures. Therefore, having such an
account in the Trust Fund would not violate Article 79. In the end, it was suggested that further research should be conducted on the precise nature and status of such an account.

Finally, since Article 93(1) only allows for provisional measures to be taken upon assets related to crimes under Article 5(1), the third issue is satisfied, because assets unrelated to crime are protected from provisional measures.

Overall, from a reading of this chapter, the reader should be able understand how Articles 75(4) and 57(3)e could function harmoniously under Rule 99 and what sort of arguments that the Court might create to appease concerned State Parties.

Additional Conclusions and Recommendations

The main conclusion, which was alluded to in Chapter One, is that more thought must be invested on the broad challenge of creating an effective Reparations Regime before one should attempt to make more concrete recommendations on the specific steps that the Court should take. This is because this thesis only addresses a single, but crucial, issue. Other issues should be considered before the Court attempts to create an effective Regime, and few published works address these issues in detail.

That being said, some general recommendations can be made that will help the Court avoid compromising its Regime from the outset. For example, the suggestions of Chapter Two that promote the Court using the *van Boven Principles* for guidance in developing the establishing principles would appear to be prudent. Another example is
the warnings of Chapter Three and Four that expose some potential pitfalls along the way for developing an effective Regime and then provide options for avoiding these hazards.

However, the best recommendation that can be made is that further research should be conducted. Procedurally, if the Court was to entertain the idea of canvassing support and attempt to create a synergy for promoting an effective Regime, it should determine what are the most effective ways of disseminating this information and who should be targeted to receive it. The Court should be well informed as to what viewpoints states have on this issue, and for what reasons. This might be critical to developing a strategy that is customized for success in this political environment.

If the Court determines that it should campaign for an effective Reparations Regime, then as mentioned in Chapter One, the Presidency should disseminate the information as determined by the aforementioned process. The information must assure states that an effective Regime will not impose draconian measures, but uphold the rights of suspects, and also address any specific concerns that states may have. It will be essential for the Court to be articulate, compelling, and considerate in presenting its arguments to win support for its position. Ultimately however, these sorts of recommendations are academic and it is sufficient to say that the Court must take whatever measures are appropriate to ensure to its actions will be accepted by State Parties.
There is a slight possibility that the opposition of State Parties will be so strong that having truly effective provisional measures to secure assets for reparations will be politically unacceptable. In this case, other alternatives exist that have not been addressed in this thesis. For example, all of the Court’s requests for confiscation can be for the ultimate benefits of victims regardless of whether they are for the satisfaction of a fine, forfeiture or reparation order. In other words, the assets collected through all of these orders might eventually be used to pay reparations awards even if they are not made in the name of reparations. Thus, benefit of this situation is that the issue of reparations can be avoided and it just so happens that assets will still be available to fund reparations orders. Moreover, the Court uses the same enforcement framework for all of the orders and the coordination of these powers could benefit the Reparations Regime greatly. This might create further options to expand the Court’s ability to secure assets, but without proper investigation of this suggestion and others, this author will not comment further, beyond suggesting guidance for further study.

THE PROTOTYPE

As a result of this study, it has become clear that there is more work to be done on this topic. The recommendation of this author is to create a fully developed, practical and adoptable reparations prototype for the ICC that can ensure that appropriate provisional measures are undertaken so that an accused does not have the chance to hide assets that would otherwise be subject to confiscation. Supportive objectives of this study would
include:

1. To understand compensatory and restorative remedies available to victims that are used in a variety of domestic criminal procedures, and to assess whether the reparative nature of such measures diminishes the rights of offenders as regards confiscation of assets;

2. To clarify the relationships between fines, forfeitures, and reparations under the *Rome Statute* as regards the identification, tracing, freezing, or seizure of the property and assets of alleged offenders;

3. To develop an enforcement prototype that utilizes all enforcement tools available to ensure that the offender’s assets are available for payment of reparation orders by the Court;

4. To suggest legal standards that the Member States should implement to maximize the ICC’s capacity to use the devised enforcement element in the reparations prototype;

5. To determine how Member States could employ other inter-state cooperative arrangements that have the potential of complementing the reparations enforcement model by further enhancing its capacity to secure assets.

These five objectives represent the five steps towards developing a prototype for the ICC that enables the Court to make the most of its potential influence to ensure an effective Reparations Regime might exist.

**Step One**

First, a selected spectrum of theories as regards reparations to victims in domestic and international law should be evaluated using divergent and contrasting examples. In part, an understanding of how and why reparations have been incorporated or excluded in this collection of jurisdictions should be explained. Consequently, an understanding of the nature of reparations from a comprehensive study of international and domestic norms would lay the foundation for the work that would follow.
Step Two

Second would be to explore the relationship between reparations and the criminal sanctions of fines and forfeitures under the Rome Statute. Article 79 read in accordance with Rule 221(2) places an onus upon the Court to use proceeds gained from fines and forfeitures to fund reparations orders. Article 79 provides the Court with the authority to transfer assets collected through such measures to the Trust Fund. As a result of this transfer, these assets will be for the benefit of victims and their families. Rule 221(2) directs that:

In all cases, when the Presidency decides on the disposition or allocation of property or assets belonging to the sentenced person, it shall give priority to the enforcement of measures concerning reparations to victims.2

Thus, a windfall of the enforcement of fine and forfeiture orders is that such acts become a powerful tool that the Court can use to secure the assets of the (alleged) offender.

Another important element of this relationship is that Article 75(5) states that State Parties must give effect to any order to facilitate the enforcement of reparations as if the “provisions of Article 109 were applicable to this article.” Article 109 regulates orders for fines and forfeitures. The same enforcement procedures used for these orders also will be used for the enforcement of reparations orders. However, the differences between fines, forfeitures, and reparations will ensure that the same procedures are applied with varying degrees of rigour. Thus the relationship that the reparations procedure has with

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the others may be more mutually dependent than one might assume *prima facie*.

It is at this stage that this thesis work becomes directly applicable. As has been established, Rule 99 allows the Court to use its Article 57(3)(e) power for securing assets for reparations at the pre-trial stage. Article 57(3)(e) is basically a provisional measure for securing forfeiture orders, not reparations orders. This fact may have a peripheral benefit of securing funding for reparations orders.

**Step Three**

It should be possible to adopt an enforcement prototype for reparations from the theoretical foundation created in steps one and two. It is key that there is a clear understanding of the relationships between reparations, fines and forfeitures. Specifically, the relationships between Articles 57, 93 and 109 can be clearly mapped and exploited. Formulating such a model, one must always be mindful of how the Court might respect the rights of the suspect without significantly compromising its capability to enforce reparations orders.

**Step Four**

This model should also include suggested standards that State Parties could adopt to create an effective international mechanism, or network, to complement the enforcement prototype. The brief explanation of the Court's ability to demand cooperation of states in this thesis would have to be expanded. What would have to be
defined is the scope of the positive onus that the *Rome Statute* places upon states to develop domestic law to facilitate certain requests of the Court.

As a reminder, Article 88 is the key to developing this network. It imposes the obligation upon state parties of the ICC to “ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.” 3 Article 75 is not included in “this Part”, 4 being Part 9, however Article 93 is. This Article empowers the Court to request the cooperation of State Parties to execute a wide range of orders to locate and secure assets.

Claus Kress and Goran Sluiter mention that the position of a number of State Parties reflects that they are not mindful of their treaty obligations under Article 88 to ensure that there are procedures available under national law to execute all orders requested under Article 93. 5 The authors write that since Article 88 is directly applicable only within Part 9, certain states may attempt to create an “*argumentum e contrario*” (an argument to the contrary). 6 The significance of this must be explored.

This thesis has argued that if the Court aggressively attempts to exploit Article 93(1) through Rule 99 and Article 57(3)(e) in an attempt to ignore Article 75(4), some

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6 Kress and Sluiter, *ibid.* at 1829.
State Parties may react to the Court by declaring that such measures are in direct opposition to the clear intentions of Article 75. As a result, they may take counter measures, detailed in this thesis, to compromise the Court's authority. The capacity of State Parties to do this and the actual chance of such measures being taken should be further explored in this step as well.

**Step Five**

Lastly, the proposed network for the ICC could be enhanced through integration with a range of other international cooperative measures that attempt to prevent tax evasion or the financing of terrorism and organized crime. Examples of such international understandings are the *Convention of Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990*,[^7] *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*,[^8] *The forty recommendations of the Financial Action Task Force on Money Laundering*,[^9] and *The EC Council Directive of 10 June 1991 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering*.[^10] From a study of such international legal understandings, the Court should be able to determine if and how State Parties could become an interface between such international enforcement networks and the ICC. Conclusions about how these states, as potential interfaces, could be utilized to strengthen the prototype as well as the existing

international enforcement network might be of great importance, because they could assist in placing the Regime into the broader system of extant inter-state and international jurisprudence that is a potential key contributor to peace and security in the world.

**Summary**

It is imperative that the ICC be able to secure the assets of offenders. The main objective of this recommended study would be to develop a practical and adoptable prototype for the ICC. This prototype would ensure that the appropriate protective measures would be undertaken in a timely manner without offending the rights of the (alleged) offender. If used, this Regime would provide the best assurance that a suspect would not have the opportunity to hide assets that would otherwise be subject to confiscation. The norms as regards reparations worldwide and then the inter-relationship between reparations, fines, and forfeitures under the *Rome Statute* would have to be studied. In the latter part of the work, the amendments the State Parties are obliged to adopt as regards this prototype would have to be suggested. Finally, it would be necessary to explore how such states, as potential interfaces with other international agreements, could be utilized to strengthen this prototype as well as the existing international enforcement networks.

This future study is of great value, because an effective Reparations Regime for the International Criminal Court will greatly advance the quality of justice that victims of genocide, war crimes, and crimes against humanity will be able to obtain in the future. From this author's perspective, all reasonable measure should be taken to achieve this
laudable goal.
ARTICLES AND CHAPTERS IN BOOKS


DOMESTIC LEGISLATION


INTERNATIONAL AGREEMENTS


INTERNATIONAL DOCUMENTS


**OTHER DOCUMENTS**

*Black’s Law Dictionary, 6th ed.*, s.v.

**MONOGRAPHS AND COLLECTIONS OF ESSAYS**


**NON-GOVERNMENTAL PUBLICATIONS AND REPORTS**


