

THE CASE-BASED REPARATIONS SCHEME AT THE INTERNATIONAL CRIMINAL COURT



WAR CRIMES RESEARCH OFFICE
International Criminal Court
Legal Analysis and Education Project
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ABOUT THE WAR CRIMES RESEARCH OFFICE

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COVER PHOTOGRAPHS (from left)

A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad, 2007, courtesy Shane Bauer

The International Criminal Court building in The Hague, courtesy Aurora Hartwig De Heer

A village elder meets with people from the surrounding area. Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer

Archbishop Desmond Tutu and Minister Simone Veil at the second annual meeting of the Trust Fund for Victims, courtesy ICC Press Office

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CONTENTS

EXECUTIVE SUMMARY	1
I. INTRODUCTION.....	10
II. ICC REPARATIONS SCHEME.....	12
A. General Background on the Right to Reparations in International Law	12
B. Drafting History and Final Provisions of the Rome Statute and Rules of Procedure and Evidence	13
1. <i>The Rome Statute</i>	13
2. <i>Rules of Procedure and Evidence</i>	18
C. Overview of the Case-Based Reparations Scheme and the Trust Fund for Victims.....	23
III. UNIQUE NATURE AND CONTEXT OF THE INTERNATIONAL CRIMINAL COURT’S CASE-BASED REPARATIONS SCHEME	25
IV. ANALYSIS AND RECOMMENDATIONS	28
A. The Establishment of Principles Relating to Reparations.....	28
B. Issues Appropriate for Consideration in the Court’s Principles on Reparations	32
1. <i>Timing</i>	32
2. <i>Definition of “Victim” for Purposes of Reparations</i>	34
a) <i>What Constitutes “Harm” for Purposes of Reparations</i>	36
b) <i>Causation.....</i>	37
c) <i>Standard of Proof.....</i>	40

3.	<i>Forms of Reparation</i>	43
4.	<i>Use of Experts in Processing Claims and Determining the Substance of Reparations Awards</i>	52
	a) Technical Aspects of Claims Processing and Evaluation	52
	b) Determining the Appropriate Types and Modalities of Reparations Awards	56
5.	<i>Role of the Trust Fund for Victims in the Processing and Determination of Reparations Awards</i>	59
C.	Facilitating Positive Experiences for Victims in Their Interactions with the Court’s Reparations Scheme	62

EXECUTIVE SUMMARY

The adoption of the Rome Statute governing the International Criminal Court (ICC) marked the first time that an international criminal body was authorized to award reparations, including restitution, compensation, and rehabilitation, against individual perpetrators of mass atrocities for the benefit of their victims.¹ In the years since, the ICC's reparations scheme has generated a high level of expectations. Nevertheless, little is known about how the scheme will work in practice, due in part to the fact that the documents governing the ICC establish the scheme in very general terms, and in part to the fact that the scheme is *sui generis*.

The aim of this report is, first, to highlight the need for the Court to establish principles relating to the operation of the case-based reparations scheme outside of the context of any single case, as envisioned under the Rome Statute creating the Court. Second, the report contains a number of proposals for the Court to consider when drafting its principles on case-based reparations. Finally, the report contains two specific recommendations aimed at facilitating a positive experience for victims in their interactions with the ICC relative to its case-based reparations scheme.

ICC Reparations Scheme

The notion that the ICC should award reparations was controversial throughout the drafting of the Rome Statute, primarily due to concerns that the intermingling of civil claims with criminal proceedings would

¹ While the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR, respectively) have the authority to order restitution of property that was unlawfully taken by a perpetrator in association with a crime for which the perpetrator was convicted, efforts to expand the mandate of these bodies to include the power to award financial compensation to victims were rejected by the judges of the Tribunals, and no formal consideration was given to empowering the Tribunals to award other forms of reparations, such as rehabilitation. See Letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General, and accompanying annex, *annexed to S/2000/1063* (3 November 2000); Letter dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary General, *annexed to S/2000/1198* (15 December 2000).

distract the Court from its primary mission of fairly and expeditiously prosecuting individuals believed responsible for mass atrocities. Ultimately, however, a consensus emerged that the Court must be dedicated to not only retributive justice, but also *restorative* justice, and in fact the drafters agreed to create two separate reparative mechanisms for the benefit of victims of crimes within the jurisdiction of the Court. The first is case-based reparations, which is the focus of this report. This mechanism is governed by Article 75 of the Rome Statute, which provides, in paragraph 1, that the Court “shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.” Article 75 goes on to say that, on the basis of these principles, the Court may make an order of reparations “directly against a convicted person” to, or in respect of, victims.

The second reparative mechanism is unconnected to any individual case before the ICC and stems from the authority of the independent Trust Fund for Victims to generally use its resources “for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.” This second mechanism serves as an important complement to the case-based reparations scheme envisioned under Article 75, as the ICC will only have the time and the resources to prosecute a limited number of perpetrators for a limited number of crimes. Indeed, the Fund, which may receive voluntary contributions from governments, international organizations, and private donors, is currently implementing thirty-one projects, outside of the context of case-based reparations, targeting victims of crimes against humanity and war crimes in the Democratic Republic of Congo and Uganda.

It is important to stress that, while the Court is authorized to order that case-based reparations awards be made “through” the Trust Fund for Victims, meaning that the Court may deposit assets *seized from a perpetrator* into the Fund and direct the Fund to distribute those assets in a certain way, the Court has no control over resources received by the Fund from voluntary contributions. Thus, although the Fund may *choose* to use money it receives from voluntary contributions to fulfill case-based reparations awards against judgment-proof perpetrators, there is nothing that requires it to do so.

Analysis and Recommendations

The Establishment of Principles Relating to Reparations

The first recommendation of this report is that the Court should proactively develop the principles referred to in Article 75(1) of the Rome Statute outside of the context of any single case and prior to the issuance of its first reparations award. While we recognize that many aspects of implementing the reparations scheme will be case- and context-specific, and that the Court will therefore need to maintain a great deal of flexibility with regard to reparations, there are several factors that support the development of a set of guidelines independent of any given case, including:

- as a textual matter, Article 75 itself states that the Court “shall” make its determinations on damage, loss, and injury to victims “on [the] basis” of the principles to be established by the Court, suggesting that the principles should precede any individual findings of damage, loss, and injury;
- the significant ambiguity that currently exists as to both procedural and substantive aspects of the Court’s reparations scheme is likely to breed frustration on the part of victims and intermediaries seeking to conduct outreach with respect to the scheme; and
- the current absence of guidance on a variety of issues related to the scheme, combined with the fact that the judges of the ICC hail from diverse backgrounds, leaves open the possibility for wide discrepancies in the approach to reparations across cases, which may in turn lead to perceptions that the overall scheme is unfair or arbitrary.

Issues Appropriate for Consideration in the Court’s Principles on Reparations

Timing

The governing documents of the Court leave open the question of the stage in proceedings at which the Trial Chamber should hear evidence relating to reparations. While in some instances it may make sense for the Chamber to consider reparations-related evidence during trial, we recommend that, as a general matter, the Trial Chamber hold a

separate reparations phase, after the Chamber has made a determination that an accused is guilty of one or more crimes under the jurisdiction of the Court. This approach is logical because the Court may only order reparations in the event of a conviction, and holding hearings on reparations during the merits phase of trial may inappropriately raise the expectations of those who would be considered victims of an accused who is ultimately acquitted. At the same time, allowing extensive evidence on reparations during trial may be prejudicial to the accused and may interfere with the right to an expeditious trial. Nevertheless, there may be instances where it is more efficient for a Chamber to hear evidence on reparations during the trial, such as when a victim is testifying as a witness, and thus the principles should not exclude this possibility.

Definition of "Victim" for Purposes of Reparations

Because case-based reparations are ordered "directly against a convicted person" in light of the damage, loss, and injury caused by the crimes for which that person has been convicted, due process concerns require that the Court determine which individuals qualify as "victims" of the convicted person. Rule 85(a) of the ICC Rules of Procedure and Evidence defines "victims" as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." This definition raises three basic questions in the context of reparations that need to be addressed by the Court in its reparations principles: (i) what constitutes "harm" for purposes of reparations; (ii) the link required between the crime(s) for which a perpetrator is convicted and the harm to the victim; and (iii) the standard of proof required for reparations claims.

First, while Article 75 specifically refers to "damage, loss or injury" in the context of reparations, it is not clear whether there is any limit to the type of harm that may be claimed for purposes of reparations. This ambiguity leaves open the possibility that one Chamber may, for instance, exclude moral injury while another Chamber recognizes such injury. We therefore recommend that the Court make clear that "harm" may include material, physical, and psychological harm, and it can relate to both direct and indirect victims.

Second, the fact that case-based reparations may only be awarded against persons convicted by the Court means that the harm forming the basis of a claim for reparations must have been caused by the

crime or crimes for which the perpetrator was convicted. At the same time, a perpetrator may not reasonably be held responsible for every consequence of his or her illicit act, and every legal system recognizes that there is a point at which losses become too remote or speculative to warrant a finding of liability. The challenge is where to draw the line. As explained in detail below, various standards of causation have been applied in both international and domestic law, but the most common test appears to be one that requires that the harm be the “proximate cause” of the loss. Proximate cause, in turn, makes use of foreseeability and the temporal relationship between harm and loss to distinguish compensable from non-compensable claims. We therefore recommend that the Court establish a standard for determining “legal” causation along the lines of “proximate cause,” while recognizing that a clear understanding of the standard may not develop until the Court has applied it in a number of cases.

Finally, with regard to the standard of proof, we recommend that the Court adopt one of the standards considered by the drafters of the ICC Rules, which included “on balance of probabilities,” “more likely than not,” and “more probable than not.” As explained in our report, although the drafters did not reach consensus on any particular standard of evidence, none of the options discussed in the drafting was objected to on the grounds that the standard was too stringent or insufficiently stringent. At the same time, there does not appear to be a significant difference among the standards contemplated by the drafters, as all seem to require that the weight of evidence be on the side of supporting a claim, without requiring evidence beyond a reasonable doubt. Thus, the Court should choose some variant of this formula and, over time, the precise meaning of the standard will be developed. Importantly, regardless of the standard of proof the Court chooses, the principles should make clear that the Chambers have wide discretion with regards to the evidence they may consider in evaluating whether the standard has been met.

Forms of Reparation

Although Article 75 expressly mentions only “restitution, compensation and rehabilitation,” the Court should make clear that this list is not exhaustive, and specifically stress the availability of satisfaction as a form of reparation that may be awarded. At the same time, the Chambers should expressly recognize that there is no one-size-fits-all approach to reparations. Rather, the individual

circumstances of each case must be considered and any combination of the different forms of reparations may be awarded. Thus, for example, while some commentators have suggested that reparations should take the form of monetary compensation where the perpetrator has assets, it is not necessarily the case that other forms of reparations are only appropriate in the case of perpetrators with limited or no resources. Indeed, as discussed in detail in the body of our report, there are a number of reasons why dispensing individual compensation payments directly to victims may *not* be the most appropriate award, even where the Court has access to a perpetrator's assets. For instance:

- collective awards may be preferable where a group has suffered harm;
- reparations that take the form of an assistance or rehabilitation program may be better suited to address victims' harm than cash payments, particularly where the amount of payment to a given individual may be nominal;
- studies have shown that victims often value forward-looking reparations and reparations that will benefit their children, which may weigh against a one-time distribution of monetary compensation; and
- individual cash payments may increase tensions within a community.

Of course, there may be circumstances where individual monetary compensation is in fact the most appropriate option, or it may be that the optimal award would be some combination of individual monetary awards and other forms of reparations. As discussed immediately below, it is critical that the victim community and other potential stakeholders be consulted extensively in the determination of the form of any reparations award. The point here is simply that the Court should not assume that individual compensation payments to individual victims are the most appropriate form of award, even when such payments are possible.

Use of Experts in Processing Claims and Determining the Substance of Reparations Awards

Under Rule 97(2) of the ICC Rules, the Trial Chamber is authorized to “appoint appropriate experts to assist it in determining the scope,

extent of any damage, loss and injury to, or in respect of[,] victims and to suggest various options concerning the appropriate types and modalities of reparations.” While the authority of the Chamber to invoke expert assistance is entirely discretionary, we recommend that, in its principles, the Court emphasize the importance of utilizing expert assistance as envisioned in Rule 97(2) in all but the most straightforward of cases.

The first, and most obvious, reason for a Trial Chamber to make use of its authority to seek expert assistance in the reparations process is efficiency in the processing and evaluation of claims. Valuation and calculation of damages are complex even in straightforward cases, and the ICC is likely to be dealing with violations numbering in the hundreds, if not thousands, in each case. At the same time, the judges of the Trial Chambers are not necessarily experts in claims evaluation and processing, nor were they elected to perform such tasks. Hence, the Trial Chambers should liberally outsource the technical aspects of claims processing and evaluation. Specifically, while the Trial Chambers will likely need to determine the categories of victims in any individual case, neutral third parties could take over the task of making findings of fact with regard to who qualifies as a victim and the levels of loss, damage, and injury suffered, which would then be submitted back to the Trial Chamber for approval. As has often been the case in the context of mass claims processes, these third parties should not be limited to evaluating claimants and evidence that come before them, but should be authorized to identify additional potential beneficiaries and collect evidence on behalf of victims. The Court may also consider authorizing the use of sampling to determine the extent of damage for different categories of victims, another technique employed by mass claims processes.

The second reason that the Trial Chambers should make ample use of their authority under Rule 97(2) relates to the importance of the Chambers’ receiving assistance as to “the appropriate types and modalities of reparations.” As previously noted, there is no one-size-fits-all approach to reparations, and determining the best combination of the various forms of reparations awards should not occur in a vacuum. The most important role for experts in the determination of the “types and modalities” of a reparations award will involve consultation with the victim community. Such consultation is imperative, as the participation of victims in designing and implementing reparations programs is essential to ensuring that the

reparations are effective and meaningful. Moreover, the very process of consultation with victims regarding their needs and desires in respect of reparations can contribute to victims' healing.

In addition to victims, experts can consult with other potential stakeholders, such as the Board of Directors of the Trust Fund for Victims, government officials, and non-governmental organizations, as appropriate. The first benefit to consulting other stakeholders is the potential to secure resources to fulfill the award because it is anticipated that a majority of the perpetrators convicted by the ICC will be judgment-proof, either because they are genuinely indigent or because their assets are hidden from the Court. Yet, even where a perpetrator has available assets, the cooperation of both governmental and non-governmental agencies will often be essential for the implementation of an award. A final reason to consult other stakeholders in the determination of appropriate reparations is that it will often be critical that the Court adopt a "conflict-sensitive" approach to reparations, meaning that reparations must be conceived in a way that facilitates reconciliation, rather than increasing divisiveness.

Role of the Trust Fund for Victims in the Processing and Determination of Reparations Awards

Rule 97(2) not only leaves a Trial Chamber complete discretion as to whether to invoke expert assistance in the context of awarding reparations, it also leaves it to the Chamber to determine who are "appropriate experts." We recommend that the principles clarify that, wherever practicable, a Chamber shall designate the Trust Fund for Victims as the "appropriate experts" to assist it in the processing and determination of a reparations award. Several factors support the use of the Trust Fund for Victims in this context:

- because the Fund is authorized to provide assistance to victims of crimes falling within the jurisdiction of the Court *outside* the context of case-based reparations, by the time a Trial Chamber issues a final judgment in a case, the Trust Fund will often have already conducted significant activity for the benefit of victims of the more general situation from which the individual case arose;
- in determining which projects to implement under its general

assistance mandate, the Fund engages in many of the activities that will need to be undertaken in the processing and determination of case-based reparations awards; and

- the Fund is a permanent institution that will have an ongoing relationship with the Court, which offers a benefit over the use of *ad hoc* bodies of experts in a variety of ways.

Facilitating Positive Experiences for Victims in their Interactions with the Court's Reparations Scheme

Our final recommendations are unrelated to the Court's principles on reparations, and are geared at ensuring that victims' experiences with the reparations scheme are positive. The first of these recommendations, aimed at the Assembly of States Parties, is that the Court's Member States ensure appropriate funding of the Trust Fund for Victims, which will need to be staffed by individuals possessing a wide range of skills, as well as have sufficient resources to engage local actors to assist it in the regions in which it is active. The second recommendation is that the various organs of the Court that interact with victims develop proactive steps aimed at managing the expectations of victims with respect to the ICC reparations scheme. Given the scale of the crimes being prosecuted by the ICC, the damages caused to victims are expected to significantly outweigh the available resources, even with contributions from the Trust Fund for Victims. Moreover, due to the types of crimes falling within the jurisdiction of the Court, returning victims to their pre-injury status will likely be impossible in most, if not all, cases. Hence, while the goal of reparations may be *restitutio in integrum*, the reality may be quite different, and victims should be prepared accordingly. This is critical not only to avoid misleading individual victims, but also for the legitimacy of the Court as a whole.

I. INTRODUCTION

In one of the first decisions issued by the International Criminal Court (ICC), Pre-Trial Chamber I recognized both the distinct nature of the Court's reparations scheme and its importance, saying: "The reparations scheme provided for in the Statute is not only one of its unique features. It is also a key feature. In the Chamber's opinion, the success of the Court is, to some extent, linked to the success of its reparation system."²

As this quote suggests, the creation of a reparations scheme within the framework of the ICC has generated a high level of expectations. At the same time, however, little is known about how the scheme will work in practice. Indeed, over one year after Pre-Trial Chamber I recognized the significance of the ICC's reparations scheme to the success of the Court as a whole, one of the Court's judges observed: "Making [the reparations] provisions a reality for the thousands of victims remains [the Court's] biggest challenge."³ This is due in part to the fact that the documents governing the ICC establish the scheme in very general terms,⁴ and in part to the fact that the scheme is *sui generis* in that it is the first international process designed to award reparations to victims of mass atrocities in the context of criminal proceedings against individual perpetrators.⁵

The aim of this report is, first, to highlight the need for the Court to establish principles relating to the operation of the ICC case-based reparations scheme outside of the context of any single case, as

² *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, Case No. ICC-01/04-01/06, ¶ 136 (10 February 2006).

³ Clemens Nathan Research Centre and The Redress Trust, *Session III: International Principles and Practice of Reparations, in Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making*, Report of Proceedings, at 14 (September 2007) (summarizing a presentation by Judge E. Odio Benito).

⁴ See *infra* n. 14 *et seq.* and accompanying text.

⁵ See *supra* n. 1 (explaining that the ICTY and the ICTR have the authority to order restitution of property that was unlawfully taken by a perpetrator in association with a crime for which the perpetrator was convicted).

envisioned under the Rome Statute creating the Court. The report also contains a number of proposals for the Court to consider when drafting its principles on case-based reparations. Finally, the report contains two specific recommendations – one directed at the Assembly of States Parties relating to ensuring appropriate staffing of the Trust Fund for Victims, and one directed to the Court as a whole in relation to managing the expectations of victims – aimed at facilitating a positive experience for victims in their interactions with the ICC relative to its case-based reparations scheme.

II. ICC REPARATIONS SCHEME

A. General Background on the Right to Reparations in International Law

International law has long recognized that harm caused by wrongful action demands a remedy. Indeed, the Permanent Court of International Justice held as early as 1927 that “it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.”⁶ A number of human rights treaties also recognize the principle, including the Universal Declaration of Human Rights,⁷ the International Covenant on Civil and Political Rights,⁸ and the European and American Conventions on Human Rights.⁹ Most recently, in 2005, the United Nations (UN) General Assembly adopted the Basic Principles on the

⁶ *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction)*, Judgment No. 8, P.C.I.J., Ser. B., No. 3, 1925, at 15-16 (26 July 1927), available at http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow/.

⁷ Universal Declaration of Human Rights, Art. 8, G.A. res. 217A (III), U.N. Doc A/810 (1948) (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law.”).

⁸ International Covenant on Civil and Political Rights, Art. 2(3), United Nations General Assembly Resolution 2200A, 16 December 1966 (requiring parties to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”).

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 13, 213 U.N.T.S. 222, *entered into force* 3 September 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 which *entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998, respectively (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”); American Convention on Human Rights, Art. 25(1), O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* 18 July 1978 (“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”).

Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles),¹⁰ work on which began in 1989.¹¹ Among other things, the UN Basic Principles reaffirm the “obligation to respect, ensure respect for and implement international human rights law and international humanitarian law,” including “the duty to... [p]rovide effective remedies to victims, including reparation.”¹²

Yet, despite the consistent recognition of the right to a remedy in international law over the past century, neither the International Criminal Tribunal for the former Yugoslavia nor the International Criminal Tribunal for Rwanda, established by the UN Security Council in 1993 and 1994, respectively, was authorized to award reparations to victims of war crimes, crimes against humanity, and genocide.¹³ Hence, as noted above, the inclusion of a reparations scheme in the Rome Statute was a truly unique development in the context of individual criminal responsibility for violations of international law.

B. Drafting History and Final Provisions of the Rome Statute and Rules of Procedure and Evidence

1. The Rome Statute

The notion that the treaty governing the work of the International Criminal Court should include some mechanism for the compensation of victims arose in the context of the work of the International Law

¹⁰ See United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *adopted and proclaimed by* General Assembly Resolution 60/147 of 16 December 2005, available at <http://www2.ohchr.org/english/law/remedy.htm>.

¹¹ See Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 *Hastings Int'l & Comp. L. Rev.* 157, 162 (Winter 2004).

¹² United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* n. 10, Principle 3.

¹³ See *supra* n. 1 (explaining that the ICTY and the ICTR do have the authority to order restitution of property that was unlawfully taken by a perpetrator in association with a crime for which the perpetrator was convicted).

Commission (ILC) – the body charged with creating a draft of the treaty – as early as 1992.¹⁴ Specifically, the issue was brought before the ILC by the Special Rapporteur on the Draft Code of Crimes against the Peace and Security of Mankind, who proposed that the International Criminal Court “might deal both with the criminal trial of an accused person and with the issues of compensation arising therefrom.”¹⁵ The proposal was controversial, as Professor Theo van Boven later explained:

[F]rom the very beginning a majority of ILC members were very reluctant to grant victims a broader position under the authority of the proposed ICC. When the ILC held a general debate on the question of international criminal jurisdiction and on the tasks of the proposed ICC, the views prevailed of those who had strong reservations about the possibility of “intermingling strictly criminal proceedings against individuals and civil claims for damages.”¹⁶

Nevertheless, the ILC included a limited provision in its 1993 version of a Draft Statute for an International Criminal Court that allowed for proceeds from fines or confiscated property to be paid into a “trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime.”¹⁷ While the 1994 version of the Draft Statute transmitted to the United Nations General Assembly dropped the reference to “proceeds of property confiscated” from the accused,¹⁸

¹⁴ See *Report of the International Law Commission on the Work of its Forty-Fourth Session*, 4 May - 24 July 1992, Official Records of the General Assembly, Supplement, U.N. Doc. A/47/10, ¶¶ 88-89 (1992).

¹⁵ *Id.* at ¶ 88.

¹⁶ Theo van Boven, *The Victim and the ICC Statute*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS 77, 82 (Von Hebel, et al., 1999) (citing *Report of the International Law Commission on the Work of its Forty-Fourth Session*, 4 May - 24 July 1992, Official Records of the General Assembly, Supplement, U.N. Doc. A/47/10, ¶ 89 (1992)).

¹⁷ *Report of the International Law Commission on the Work of its Forty-Fifth Session* (3 May-23 July 1993), Art. 53(4), U.N. Doc. A/48/10 (1993).

¹⁸ *Report of the International Law Commission on the Work of its Forty-Sixth Session* (2 May-22 July 1994), U.N. Doc. A/49/10, at 60 (1994) (“The 1993 draft statute provided for the court to order restitution or forfeiture of property used in

the idea that fines against an accused could be paid into a trust fund for the benefit of victims was retained.¹⁹

As the drafters debated changes to the ILC Draft Statute, support for the notion that the ICC should have the power to order reparations to victims grew. Thus, for example, the 1996 Report of the Preparatory Committee notes that “[s]everal proposals were made concerning [the issue of compensation to victims], including the possibility of the Court being empowered to make decisions on these matters, among them the administration of a compensation fund, as well as to decide on other types of reparation.”²⁰ However, the idea remained

conjunction with the crime. However, some members of the Commission questioned the ability of the court to determine the ownership of stolen property in the absence of a claim filed by the original owner, which might need to be considered in a separate proceeding. Others felt that it was not appropriate to authorize the court to order the return of stolen property, a remedy which they considered to be more appropriate in a civil rather than a criminal case. One member suggested that allowing the court to consider such matters would be inconsistent with its primary function, namely to prosecute and punish without delay perpetrators of the crimes referred to in the statute. On balance the Commission considered that these issues were best left to national jurisdictions and to international judicial cooperation agreements, of which there is a growing network. The relevant provisions have accordingly been deleted.”)

¹⁹ *Id.* (“Fines paid may be transferred, by order of the Court, to one or more of the following: ... (c) A trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime.”).

²⁰ *See, e.g., Report of the Preparatory Committee on the Establishment of an International Criminal Court*, vol. 1 (Proceedings of the Preparatory Committee during March-April and August 1996), U.N. Doc. A/51/22, ¶ 282 (13 September 1996). The first proposal, submitted by France, provided only that the Court would have authority to “transmit to the competent authorities of the States concerned the judgment by which the accused was found guilty of an offence which caused damage to a victim,” and that the “victim or his successors and assigns [could], in accordance with the applicable national law, institute proceedings in a national jurisdiction or any other competent institution in order to obtain compensation for the prejudice caused to them.” *Draft Statute of the International Criminal Court: Working Paper Submitted by France*, U.N. Doc. A/AC.249/L.3, Art. 130 (6 August 1996). France later amended this proposal to provide that, if “national competent authorities are no longer able, due to their total or partial collapse or unavailability, to proceed upon the judgment, the court shall do so directly.” *Proposal of France: Article 45bis*, U.N. Doc. A/AC.249/1997/WG.4/DP.3 (5 December 1997). The United Kingdom then put forward a proposal recognizing “the Court should be given the power, if it is desirable to do so, to make an award against a convicted person by way of reparation for an act for which he has been convicted.” *Proposal of the United Kingdom*, U.N. Doc. A/AC.249/1997/WG.4/DP.13 (10 December 1997).

controversial among many delegates. According to one commentator, the main concerns surrounding the idea of a reparations scheme were as follows:

First, opponents of [including a reparations provision] took the view that the central purpose of the Statute was to prosecute, in a fair and effective manner, those accused of the most serious crimes of international concern; the need to make a determination of reparations would distract the Court's attention from the trial and appeal functions of the Court. A second point, linked to the first, was the practical difficulty of asking a criminal court to decide on the form and extent of reparations; the problem would be exacerbated by the fact that the judges would come from very different legal traditions. Thirdly, some delegations were concerned about the implications of reparation awards by criminal courts for domestic legal systems that did not recognize the concept. Finally, it was widely believed that the reparations article was a "stalking horse" for awards of reparations against States.²¹

Ultimately, however, a consensus emerged that "[a] court whose exclusive focus was purely retributive would lack a dimension needed to deliver justice in a wider sense" and there was "a gradual realization that there had to be a recognition in the Statute that victims of crimes not only had (as they undoubtedly did) an interest in the prosecution of offenders but also an interest in restorative justice, whether in the form of compensation or restitution or otherwise."²² Thus, the final version of the Rome Statute includes the following language under Article 75:

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances,

²¹ Christopher Muttukumaru, *Reparation to Victims*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 262, 263-64 (Roy S. Lee, ed. 1999).

²² *Id.* at 264.

determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States...²³

In addition, the drafters maintained the idea, first introduced in the 1993 Draft Statute, of creating a trust fund for the benefit victims. Specifically, Article 79 of the Rome Statute provides:

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

²³ Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, *adopted on 17 July 1998, entered into force 1 July 2002*, Art. 75. Note that, according to a footnote inserted in the proposed article on reparations during the drafting of the Rome Statute, the phrase “to, or in respect of, victims” “refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as the victim’s families and successors (in French, ‘*ayant-droit*’).” *See, e.g., Preparatory Committee on the Establishment of an International Criminal Court, Preliminary Draft Consolidated Text: Article 66, Reparations to Victims*, n. 1, A/AC.249/1998/WG.4/CRP.5 (25 March 1998). Although the footnote was ultimately dropped from the text of the final Statute, there is nothing to indicate that the phrase is intended to have any other meaning.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.²⁴

2. *Rules of Procedure and Evidence*

While the Rome Statute established the principle that the Court could award reparations to victims of those convicted by the Court and mandated the creation of the Trust Fund for Victims, the details of the reparations scheme and the relationship between the Court and the Fund were left to be clarified through the drafting of the Rules of Procedure and Evidence.

The first major issue to be resolved by the drafters of the Rules was the definition of victim. While no definition was agreed to during the drafting of the Rome Statute, “non-governmental organizations (NGOs), with the support of some delegations, expressed the view that victims had to be defined in the broadest possible way.”²⁵ Along these lines, “attention was drawn to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” (UN Declaration),²⁶ a document adopted by the UN General Assembly in 1985, which defines victims as “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.”²⁷ The UN Declaration continued to provide the basis for negotiations on a definition of victim when the issue came up for consideration in the drafting of the Rules.²⁸ However, it proved impossible to reach agreement on whether certain terms within the UN Declaration’s definition – such as “individually or collectively” and “substantial impairment of their fundamental rights” – needed to be

²⁴ Rome Statute, *supra* n. 23, Art. 79.

²⁵ Silvia A. Fernández de Gurmendi, *Definition of Victims and General Principle*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 427, 428 (Roy S. Lee, ed. 2000).

²⁶ *Id.*

²⁷ United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. GAOR, 40th Sess., 96th plenary mtg., Annex, U.N. Doc. A/RES/40/34, ¶ 1 (1985).

²⁸ Report on the International Seminar on Victims’ Access to the International Criminal Court, U.N. Doc. PCNICC/1999/WGRPE/INF/2, n. 1 (6 July 1999).

omitted or clarified.²⁹ There was also debate as to whether the definition should extend only to natural persons, or also to legal entities.³⁰ Ultimately, the drafters departed from the text of the UN Declaration in favor of a potentially broad definition of victim that would leave significant discretion to the Court in respect of both natural persons and legal entities.³¹ Specifically, Rule 85 provides:

(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.³²

Another issue that generated substantial debate during the drafting of the Rules was whether the Court should have the authority to order collective awards.³³ One view held that the reparations scheme was simply a means by which individual victims may enforce civil claims through the ICC, making collective reparations difficult to understand.³⁴ According to this view, “a victim pursuing a civil claim through the Court would wish to have their individual position restored by the Court and a collective award would not satisfy them.”³⁵ Additionally, for those that viewed the reparations scheme as a means of enforcing civil claims, collective awards would raise “problems in ensuring that the defendant did not face more than one claim for the

²⁹ Fernández de Gurmendi, *supra* n. 25, at 432.

³⁰ *Id.*

³¹ *Id.* at 432-33.

³² International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, R. 85 (2000).

³³ Peter Lewis & Håkan Friman, *Reparations to Victims*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 474, 483 (Roy S. Lee, ed. 2000).

³⁴ *Id.*

³⁵ *Id.*

same loss.”³⁶ A second view was that reparations were another form of sanction, rather than strictly a means to satisfy a civil liability.³⁷ For those favoring this view, the fact that many convicted defendants would have limited resources meant that reparations were, in any event, more likely to be symbolic, aimed at the whole population affected, rather than geared toward the satisfaction of individual claims.³⁸ Finally, there was a compromise view that held that the Court should have flexibility to make individual or collective awards, depending on the desires and needs of the particular victims in a given case.³⁹ This last view ultimately prevailed, with Rule 97(1) providing that “the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.”⁴⁰

In addition to outlining the appropriate form of reparations awards, the drafters of the Rules addressed certain issues relating to the evaluation and processing of reparations claims. For instance, Rule 94 makes clear that victims need only provide documentation in support of a claim for reparations to the “extent possible.”⁴¹ In addition, Rule 97(2) provides that “the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of[,] victims and to suggest various options concerning the appropriate types and modalities of reparations.”⁴² According to one source, this provision allows the Court to rely on experts for a variety of tasks – from “assessing the harm caused to individual victims, to suggesting schemes that may benefit a whole community” – that “will often be difficult and time-consuming.”⁴³

³⁶ *Id.* Specifically, the concern was that a convicted person would have difficulty defending against a subsequent civil suit for damages in a domestic court if it was not clear which individual victims had been compensated *via* a collective award of reparations issued by the ICC, and the perpetrator may in fact be made to compensate the same victim(s) more than once for the same harm. *See id.*

³⁷ *Id.* at 483.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ ICC Rules, *supra* n. 32, R. 97(1).

⁴¹ *Id.* R. 94(1)(g).

⁴² *Id.* R. 97(2).

⁴³ Lewis & Friman, *supra* n. 33, at 484; Report on the International Seminar on

A final issue addressed by the drafters of the Rules on the subject of reparations was that of the standard of proof required for an award. Early in the process, it was suggested that the standard be defined as “on the balance of probabilities,” in order to ensure that the standard at the reparations phase would be lower than the standard for a criminal conviction.⁴⁴ While there seems to have been general agreement that the standard should be lower than “beyond a reasonable doubt,” some delegations were uncomfortable with the phrase “on the balance of probabilities” because they felt it was “unclear.”⁴⁵ Another proposal, submitted by the United States, stated that the “Court need not require proof beyond reasonable doubt, but may order reparations if the proof shows that it is more likely than not that the convicted person caused the victim’s damages, loss or injury.”⁴⁶ Again, however, there was disagreement as to what exactly would be required under this formulation.⁴⁷ Yet another proposal would have simply made clear that the Court need not establish proof beyond a reasonable doubt for purposes of a reparations order, but this option had the problem of not establishing any *minimum* standard.⁴⁸ Finally, it was suggested that the Court have the power to award reparations where it was “more probable than not” that the claimed damage “was caused.”⁴⁹ This proposal “received some support,” but again failed to gain consensus.⁵⁰ In the end, the delegates left the question of proof, and the related question of causation between the crime and the harm or damage sustained, to be established by the Court in the principles referred to in Article 75(1).⁵¹

Victims’ Access to the International Criminal Court, PCNICC/1999/WGRPE/INF/2, at n. 14 (6 July 1999).

⁴⁴ Lewis & Friman, *supra* n. 33, at 484. Article 66 of the Rome Statute states: “In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.” Rome Statute, *supra* n. 23, Art. 66(3).

⁴⁵ Lewis & Friman, *supra* n. 33, at 484-85.

⁴⁶ *Id.* at 485.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 486.

⁵⁰ *Id.*

⁵¹ *Id.* at 484-86 (noting “the experts fully realized that the regulation of a standard of proof would also require thorough considerations regarding other difficult matters

With respect to the Trust Fund for Victims created under Article 79 of the Rome Statute, the drafters of the Rules made clear that while the Trust Fund did not necessarily need to be involved in “straightforward awards to an individual,”⁵² it could play a role in various aspects of the case-based reparations scheme. For example, the drafters agreed that, in “cases where due to the youth or mental incapacity of an individual it would not be possible to make the award directly,” the Trust Fund may hold awards “until the young person becomes an adult or until a patient recovers from any mental incapacity.”⁵³ In addition, it was agreed that the Trust Fund is “a convenient body to administer collective awards,”⁵⁴ and thus the Rules state that collective awards may be implemented “through” the Fund.⁵⁵ With regard to the use of resources obtained by the Trust Fund through voluntary contributions, some delegates wanted to empower the Court to order the Trust Fund to make such money available to fulfill specific reparations awards against convicted persons.⁵⁶ However, it was pointed out that the Court does not have authority over the operation of the Fund, which is governed by the Assembly of States Parties.⁵⁷ Thus, the Rules state only that the “[o]ther resources of the Trust Fund may be used for the benefit of victims,”⁵⁸ leaving it to the Board of the Trust Fund to determine how to allocate its resources between victims of perpetrators convicted by the Court and victims of serious international crimes and their families more generally.

such as the requirement of ‘causation’ between the crime and the damage, loss or injury for which reparations could be awarded”).

⁵² *Id.* at 487.

⁵³ *Id.* See also ICC Rules, *supra* n. 32, R. 98(2) (“The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.”).

⁵⁴ Lewis & Friman, *supra* n. 33, at 487.

⁵⁵ ICC Rules, *supra* n. 32, R. 98(3).

⁵⁶ Lewis & Friman, *supra* n. 33, at 487-88.

⁵⁷ *Id.* at 488.

⁵⁸ ICC Rules, *supra* n. 32, R. 98(5).

C. Overview of the Case-Based Reparations Scheme and the Trust Fund for Victims

As outlined above, the ICC Rome Statute and Rules create a scheme whereby victims of individuals convicted by the Court may receive reparations for harm arising from the crimes for which those individuals are convicted.⁵⁹ Based on “the scope and extent of any damage, loss or injury,” the Court may order individual reparations, collective reparations, or some combination of the two.⁶⁰ Although the award is “directly against a convicted person,” the Court may order that the award be made “through” the Trust Fund for Victims.⁶¹ Finally, as made clear by the Regulations of the Trust Fund for Victims, adopted by the Assembly of States Parties in 2005, the Court may invite the Fund to use resources obtained from sources other than a particular perpetrator to fulfill an award to the victims of that perpetrator, but ultimately the decision as to how the Fund will use money obtained from voluntary contributions, including whether such resources will be used to complement case-based reparations awards, rests with the Board of Directors.⁶² As many details regarding the operation of the case-based scheme are left unclear, Article 75 of the Rome Statute mandates that “[t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”⁶³

In addition to this case-based reparations scheme, the Trust Fund for Victims is authorized generally to use resources obtained through voluntary contributions⁶⁴ “for the benefit of victims of crimes within

⁵⁹ See Rome Statute, *supra* n. 23, Art. 75; ICC Rules, *supra* n. 32, R. 85(a).

⁶⁰ ICC Rules, *supra* n. 32, R. 97(1).

⁶¹ Rome Statute, *supra* n. 23, Art. 75(2).

⁶² Int’l Criminal Court Assembly of States Parties, *Regulations of the Trust Fund for Victims*, ICC-ASP/4/Res.3, *entered into force* 3 December 2005, Reg. 56 (“The Board of Directors shall determine whether to complement the resources collected through awards for reparations with ‘other resources of the Trust Fund’ and shall advise the Court accordingly.”).

⁶³ Rome Statute, *supra* n. 23, Art. 75(1).

⁶⁴ The Trust Fund is authorized to receive voluntary contributions from “governments, international organizations, individuals, corporations and other entities.” Regulations of the Trust Fund for Victims, *supra* n. 62, Reg. 21(a).

the jurisdiction of the Court, and of the families of such victims.”⁶⁵ This function will serve as an important complement to the case-based reparations scheme envisioned under Article 75 of the Rome Statute, as the ICC will only have the time and the resources to prosecute a limited number of perpetrators for a limited number of crimes.⁶⁶ Thus, as one commentator involved in the drafting of the Rome Statute has observed, it is not the case that the Trust Fund will only benefit those who have “been victimized by an individual who happens to have been convicted by the ICC.”⁶⁷ Indeed, as discussed in more detail below, the Trust Fund has already implemented thirty-one projects, outside of the context of case-based reparations, “targeting victims of crimes against humanity and war crimes” in the Democratic Republic of Congo (DRC) and Uganda.⁶⁸ Through these projects, the Trust Fund has reached an estimated 42,300 direct beneficiaries and 182,000 indirect beneficiaries.⁶⁹

⁶⁵ Rome Statute, *supra* n. 23, Art. 79(1).

⁶⁶ See, e.g., International Criminal Court, Office of the Prosecutor, *Prosecutorial Strategy 2009 – 2012*, ¶¶ 18-20 (February 2010) available at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> (“The Rome Statute limits the Court’s jurisdiction to the most serious crimes of concern to the international community as a whole and requires the Office to take into account the gravity of the crime when deciding on the initiation of investigations. In accordance with this statutory scheme, the Office [of the Prosecutor] consolidated a policy of focused investigations and prosecutions, meaning it will investigate and prosecute those who bear the greatest responsibility for the most serious crimes... A policy of focused investigations also means that cases inside a situation are selected according to gravity, taking into account factors such as the scale, nature, manner of commission, and impact of the alleged crimes. A limited number of incidents are selected.”).

⁶⁷ Frédéric Mégret, *Of Shrines, Memorials and Museums: Using the International Criminal Court’s Victim Reparation and Assistance Regime to Promote Transitional Justice*, at 11 (13 May 2009), available at <http://ssrn.com/abstract=1403929>.

⁶⁸ The Trust Fund for Victims, *Recognizing Victims & Building Capacity in Transitional Societies*, Spring 2010 Programme Progress Report, at 5 (2010).

⁶⁹ *Id.* at 6.

III. UNIQUE NATURE AND CONTEXT OF THE INTERNATIONAL CRIMINAL COURT'S CASE-BASED REPARATIONS SCHEME

Before turning to our analysis and recommendations, it is worth highlighting the unique nature of the ICC's reparations scheme and the context in which it will be implemented. With regard to the nature of the scheme, as noted above, the ICC's reparations scheme represents the first international process designed to award reparations to victims of mass atrocities in the context of criminal proceedings against individual perpetrators. One author has aptly described the *sui generis* nature of the scheme as follows:

[W]hen reparations are awarded in the ICC system, the symmetry that exists both in national and international systems is missing. National civil or criminal procedures regularly order an individual to make reparations as a result of violations of the rights or goods of another individual. International law regularly attributes liability to repair the harm resulting from gross and systematic crimes of a collective nature to an identified state or other collective entity, rather than to an individual. Consequently, ... neither national nor international systems provide principles that are directly and comprehensively applicable to the ICC reparation system.⁷⁰

With regard to context, it must be stressed that, due to the nature of the crimes falling within the jurisdiction of the Court – namely, genocide, crimes against humanity, and war crimes – most cases that are prosecuted by the ICC will involve hundreds, if not thousands, of victims. Furthermore, because the ICC will generally focus on senior leaders and those most responsible for the relevant crimes,⁷¹ it will often, if not always, be the case that a perpetrator will be responsible

⁷⁰ Eva Dwertmann, *THE REPARATION SYSTEM OF THE INTERNATIONAL CRIMINAL COURT* 295 (2010).

⁷¹ *See supra* n. 66 (describing the ICC Prosecutor's strategy of focusing on "those who bear the greatest responsibility for the most serious crimes").

for widespread harm, both in the sense of affecting many individuals and in the sense of causing injury to communities as a whole.

Another important factor to consider is that, given the nature of the harms likely to be caused by the crimes within the jurisdiction of the ICC, many victims may have difficulty accessing the Court and putting together claims for reparations. Indeed, “it can be assumed that the individuals or groups most severely victimized are often precisely those who are not in the physical, material or mental condition to apply for reparations.”⁷² Hence, the Court cannot take for granted that all potential claimants will have participated in the proceedings on the merits in a case, or even that all will have filed claims at the time the Court begins to consider reparations. It is also critical to recognize that many, if not all, of the victims applying for reparations will be experiencing ongoing trauma that may be exacerbated by the experience of seeking reparations.⁷³ At the same time, in a broader sense, these victims will often be living in the midst of ongoing violence or in societies newly emerging from years of conflict and widespread atrocities, meaning resources may be scarce and tensions among groups of victims, or between victims and the government, may be high.

Finally, the reality is that in most cases dealt with by the ICC, the perpetrators convicted by the Court will most likely be judgment-proof, either because they are genuinely indigent or because the Court

⁷² *Id.* at 208-09. See also Marieke Wierda & Pablo de Greiff, *Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims*, at 6, INT’L CENTER FOR TRANSITIONAL JUSTICE (2004), available at <http://www.ictj.org/static/TJApproaches/Prosecutions/RepICCTrustFund.eng.pdf> (“Even legal systems that do not have to deal with massive and systematic crime find it difficult to ensure that all victims have an equal chance of accessing the courts, and even if they do, that they have a fair chance of getting similar results. The more frequent case is that wealthier, better educated, urban victims have not only a first, but also a better chance of obtaining justice. This will be similar before the ICC.”). Notably, research conducted by the Trust Fund for Victims in northern Uganda demonstrates that women and girls are less likely to have access to information about the ICC than men and boys because the former have less access to radios (whether to radios themselves or to enough time to spend listening to them). Correspondence between authors and Trust Fund for Victims, 10 May 2009. Such disparities in relation to lack of knowledge about the Court generally could easily translate into lack of knowledge about the ICC’s reparations scheme.

⁷³ See *infra* n. 140 and accompanying text.

is unable to reach their assets.⁷⁴ Notably, the Court has no authority to issue awards against a State, even where it makes a finding of State complicity in a crime.⁷⁵ Thus, for example, the ICC “cannot be considered analogous to the Inter-American Court [of] Human Rights or any other human rights court, which has powers to hold a state responsible and to order it to pay reparations or compensation to large numbers of victims.”⁷⁶

⁷⁴ See, e.g., Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1387, 1415 (Cassese, Gaeta, & Jones, eds. 2002) (noting that most accused before the *ad hocs* have not even had sufficient money to pay defense counsel); Thordis Ingadottir, *The Trust Fund for Victims (Article 79 of the Rome Statute): A Discussion Paper*, at 16, Project on International Courts and Tribunals (February 2001) (“Judging from the experience of the international criminal tribunals for the former Yugoslavia and Rwanda, collecting reparations might be wishful thinking since almost all of the defendants before the tribunals have been declared indigent... [Furthermore,] if assets do exist, freezing and collecting them might become a difficult task.”).

⁷⁵ See Muttukumar, *supra* n. 21, at 267-69.

⁷⁶ Wierda & de Greiff, *supra* n. 72, at 9.

IV. ANALYSIS AND RECOMMENDATIONS

A. The Establishment of Principles Relating to Reparations

The first recommendation of this report is that the Court should proactively develop the principles referred to in Article 75(1) of the Rome Statute outside of the context of any single case and prior to the issuance of its first reparations award. We recognize that, unlike the provisions of the Rome Statute and Rules of Procedure and Evidence authorizing the adoption of the Regulations of the Court⁷⁷ and Registry,⁷⁸ respectively, there is no specific procedure established for the adoption of the “principles” referred to in Article 75, and no indication that the principles will be binding on any organ of the Court. We further recognize that many aspects of implementing the reparations scheme will be case- and context-specific, and that the Court will therefore need to maintain a great deal of flexibility with regard to reparations. Nevertheless, several factors support the development of a set of guidelines relating to reparations independent of any given case.

First, as a textual matter, Article 75 itself states that the Court “shall” make its determinations on damage, loss, and injury to victims “on [the] basis” of the principles to be established by the Court, suggesting that the principles should precede any individual findings of damage, loss, and injury.⁷⁹ Second, the significant ambiguity that currently exists as to both procedural and substantive aspects of the Court’s reparations scheme is likely to breed frustration on the part of victims and intermediaries seeking to conduct outreach with respect to the scheme.⁸⁰ For instance, under current provisions, it is unclear whether

⁷⁷ Rome Statute, *supra* n. 23, Art. 52.

⁷⁸ ICC Rules, *supra* n. 32, R. 14.

⁷⁹ Rome Statute, *supra* n. 23, Art. 75(1).

⁸⁰ *See, e.g.*, Carla Ferstman & Mariana Goetz, Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and Its Impact on Future Reparations Proceedings, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 313, 350 (Ferstman, Goetz, & Stephens, eds. 2009) (“If [certain] very basic considerations about the nature and forms of reparations will only be considered after the trial, the application forms for reparations which are currently available for victims to complete and submit to the

Chambers will hold a separate hearing, distinct from the trial on an accused's guilt, to determine issues of reparations, meaning it is unclear whether victims wishing to present their views on reparations to the Chambers must already be participating in the proceedings on the merits.⁸¹ Similarly, it is presently unclear what standard the Court will apply to determine whether an individual qualifies as a "victim" for purposes of case-based reparations, or what evidence will be required of persons wishing to establish themselves as victims.

Finally, the current absence of guidance on a variety of issues related to the scheme, combined with the fact that the judges of the ICC hail from diverse backgrounds, leaves open the possibility for wide discrepancies in the approach to reparations across cases. This in fact occurred in the early jurisprudence of the Court with respect to the requirements set forth by different Chambers regarding participation of victims under Article 68(3) of the Statute, which permits victims to present their "views and concerns" to the Court at appropriate stages of proceedings.⁸² For instance, Pre-Trial Chamber I, presiding over the Situation in the Democratic Republic of Congo, and Pre-Trial Chamber II, presiding over the Situation in Uganda, adopted different approaches to the requirement in Rule 85(a) that victims be "natural persons." Pre-Trial Chamber I, the first Chamber to rule on the issue, held that a "natural person" is "any person who is not a legal person,"⁸³ and that therefore victims will satisfy the "natural persons" requirement simply by virtue of being "human beings."⁸⁴ Over a year

Court[] are like a 'shot in the dark' – victims have no idea what they are aiming at, nor is it clear whether the detailed information they provide would serve any utility whatsoever in the determination of the award.").

⁸¹ As discussed immediately below, *see infra* n. 82 and accompanying text, Article 68(3) of the Rome Statute allows victims to participate in the proceedings of the Court at all stages of the proceedings, provided that victims establish that their "personal interests" are affected and that their participation will not be "prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." Rome Statute, *supra* n. 23, Art. 68(3).

⁸² Rome Statute, *supra* n. 23, Art. 68(3). Note that a victim need not participate in proceedings under Article 68(3) to receive reparations under Article 75.

⁸³ *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, ¶ 80 (Pre-Trial Chamber I, 17 January 2006).

⁸⁴ *Id.*

and a half later, however, Pre-Trial Chamber II held that the term “natural persons” requires that the “identity of the applicant” be “duly established.”⁸⁵ Moreover, Pre-Trial Chamber II held that such identity could only be established by a document “(i) issued by a recognized public authority; (ii) stating the name and the date of birth of the holder; and (iii) showing a photograph of the holder,”⁸⁶ whereas Pre-Trial Chamber I permitted victims to establish their identity through a wide range of documents.⁸⁷ While Pre-Trial Chamber II subsequently relaxed its identification requirements for applications to participate in proceedings,⁸⁸ it would be much more difficult to retroactively standardize requirements for reparations awards *after* one or more awards have been ordered. Importantly, discrepancies in the Court’s approach to reparations will not only result in unfairness to individual victims in particular cases, but may also lead to perceptions that the overall scheme is unfair or arbitrary. Indeed, the Inter-American Court of Human Rights, despite being one of the most progressive mechanisms with respect to ordering reparations, has been criticized for providing inconsistent awards to similarly situated victims, particularly because there is no comparative analysis between cases to show how the Court makes its determinations given the differing circumstances in each case.⁸⁹ The establishment of principles guiding the ICC reparations scheme from the outset may help the Court avoid similar criticisms by establishing consistent and transparent standards and procedures to apply across cases.

⁸⁵ *Situation in Uganda*, Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, ¶ 12 (10 August 2007).

⁸⁶ *Id.* ¶ 16.

⁸⁷ *See Situation in Democratic Republic of the Congo*, Decision on the Requests of the Legal Representative of Applicants on Application Process for Victims’ Participation and Legal Representation, ICC-01/04-374, ¶¶ 13-15 (Pre-Trial Chamber I, 17 August 2007).

⁸⁸ *Situation in Uganda*, Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0128/06, ICC-02/04-125 (Pre-Trial Chamber II, 14 March 2008).

⁸⁹ *See, e.g.,* Arturo J. Carrillo, *Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past*, in THE HANDBOOK ON REPARATIONS 504, 529-530 (Pablo de Greiff, ed. 2006).

One open question regarding the establishment of reparations principles under Article 75(1) is who exactly is responsible for developing these principles? As set forth above, Article 75(1) states merely that “[t]he Court shall establish principles relating to reparations.”⁹⁰ Article 34 of the Rome Statute provides that “[t]he Court” is “composed of the following organs: the Presidency; an Appeals Division, a Trial Division, and a Pre-Trial Division; the Office of the Prosecutor; and the Registry.”⁹¹ However, Article 75 is located under Part 6 of the Rome Statute, which deals with “The Trial,”⁹² suggesting that, in this context, “the Court” is intended as a reference to the judges of the Trial Division.⁹³ This interpretation is logical in light of the fact that other references to “the Court” under Part 6 of the Statute plainly refer to the Trial Chamber. For instance, Article 66(3) provides that, “[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.”⁹⁴ Similarly, Article 69(2) states that “[t]he Court” may authorize testimony at trial through means other than live, in person testimony; Article 69(4) states that “[t]he Court” may rule on the relevance and admissibility of evidence; and Article 69(6) states that “[t]he Court” may take judicial notice of facts of common knowledge.⁹⁵ Finally, Article 75 itself provides, in sub-paragraph (2), that “[t]he Court” may make an order of reparations against the convicted person.⁹⁶ Clearly, decisions on the guilt of the accused, evidentiary matters, and awards of reparations against convicted persons are to be made by the Trial Chamber, as opposed to the four organs of the Court referenced in Article 43. On this basis, we recommend that the principles referred to in Article 75(1) be established by the judges currently constituting the Trial Division of the ICC. Of course, nothing in the Rome Statute prevents these judges from consulting with the judges of the Pre-Trial and Appeals Division, or with other organs of the Court, in developing their principles. In

⁹⁰ Rome Statute, *supra* n. 23, Art. 75(1) (emphasis added).

⁹¹ *Id.* Art. 34.

⁹² *Id.* Art. 75.

⁹³ See Dwertmann, *supra* n. 70, at 46-47 (supporting this view).

⁹⁴ Rome Statute, *supra* n. 23, Art. 66(3).

⁹⁵ *Id.* Art. 69.

⁹⁶ *Id.* Art. 75(2).

fact, we strongly recommend that the judges seek out the views of all organs of the Court in relation to its reparations principles, in particular the Victims Participation and Reparations Section, the Office of Public Council for Victims, and the Office of Public Council for the Defence, as well as the Trust Fund for Victims.

B. Issues Appropriate for Consideration in the Court's Principles on Reparations

1. Timing

As mentioned above, the governing documents of the Court leave open the question of the appropriate stage in proceedings at which the Trial Chamber may hear evidence relating to reparations. Specifically, the Rome Statute provides that, *if* the Court decides to hold a separate hearing on matters relating to sentencing, it “shall” hear “any representations under [A]rticle 75” during such hearing, or in any additional hearings as necessary,⁹⁷ while Regulation 56 of the Regulations of the Court states that the Court “*may* hear the witnesses and examine the evidence for the purposes of a decision on reparations... at the same time as for the purposes of trial.”⁹⁸ While in some instances it may make sense for the Chamber to invoke its authority under Regulation 56, we recommend that the Court establish in its principles on reparations that, as a general matter, the Trial Chamber should hold a separate reparations phase, after the Chamber has made a determination that an accused is guilty of one or more crimes under the jurisdiction of the Court. This approach is logical because the Court may only order reparations in the event of a conviction, and holding hearings on reparations during the merits phase of trial may inappropriately raise the expectations of those who would be considered victims of an accused who is ultimately acquitted. At the same time, allowing extensive evidence on reparations during trial may be prejudicial to the accused and may interfere with the right to an expeditious trial,⁹⁹ particularly in light of

⁹⁷ Rome Statute, *supra* n. 23, at Art. 76(3).

⁹⁸ International Criminal Court, Regulations of the Court, ICC-BD/01-02-07, *as amended* 14 June and 14 November 2007, Reg. 56 (emphasis added).

⁹⁹ Rome Statute, *supra* n. 23, Art. 64(2) (“The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”).

the fact that victims may be entitled to reparations for harm that *flows from* the charges against the accused, but that is not necessarily relevant to *establishing the guilt of the accused* on those charges. For instance, in the current case against Thomas Lubanga Dyilo, who is only charged with war crimes relating to the conscription, enlistment, or use of child soldiers, Trial Chamber I determined that some 200 individuals who were themselves victimized by children under the command of Mr. Lubanga could not participate in the trial under Article 68(3) because “[t]he purpose of trial proceedings at the ICC... ‘is the determination of the guilt or innocence of the accused person of the crimes charged’ and it is only victims ‘of the crimes charged’ who may participate in the trial proceedings pursuant to Article 68(3).”¹⁰⁰ However, the Trial Chamber may determine that those same individuals are entitled to reparations in the event Mr. Lubanga is convicted on the charges against him.¹⁰¹ Arguably, permitting those 200 victims, and any others who were victimized by children under the command of Mr. Lubanga, to enter evidence relating to their injuries, which include “pillage, murder, rape, enslavement, [and] inhuman treatment,”¹⁰² during the trial on the guilt of the accused would not only substantially lengthen the trial, but would significantly risk prejudice to the accused.

However, there may be situations where it is actually more efficient for the Trial Chamber to hear evidence on reparations during trial, such as when a victim is testifying as a witness or a participating victim has taken the stand to present his or her views and concerns pursuant to Article 68(3) of the Statute. We therefore recommend that, as a practical matter, Chambers follow the approach adopted by Trial Chamber I in the *Lubanga* case, which held:

there will be some areas of evidence concerning reparations which it would be inappropriate, unfair or

¹⁰⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Version of “Decision on ‘Indirect Victims,’” ICC-01/04-01/06-1813, ¶ 52 (Trial Chamber, 8 April 2009).

¹⁰¹ This would depend on the Trial Chamber’s determination regarding the appropriate standard of causation to be applied to reparations claims and its application of the standard to the facts of the case. For more on causation, *see infra* n. 115 *et seq.* and accompanying text.

¹⁰² *Lubanga*, Redacted Version of “Decision on ‘Indirect Victims,’” *supra* n. 100, ¶ 2.

inefficient to consider as part of the trial process. The extent to which reparations issues are considered during the trial will follow fact-sensitive decisions involving careful scrutiny of the proposed areas of evidence and the implications of introducing this material at any particular stage. The Trial Chamber may allow such evidence to be given during the trial if it is in the interests of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination. However, the Chamber emphasises that at all times it will ensure that this course does not involve any element of prejudgment on the issue of the defendant's guilt or innocence, and generally that it does not undermine the defendant's right to a fair trial.¹⁰³

2. *Definition of "Victim" for Purposes of Reparations*

Because case-based reparations are ordered "directly against a convicted person" in light of the damage, loss, and injury caused by the crimes for which that person has been convicted, due process concerns require that, regardless of the form of the reparations award, the Court determine which individuals qualify as "victims" of the convicted person. Importantly, the Court must make such findings even if the perpetrator is judgment-proof and the money used to fulfill the reparation award is provided by the Trust Fund for Victims or a State, as there may be instances where a State that contributes to the satisfaction of an award against a judgment-proof perpetrator (through a contribution to the Trust Fund¹⁰⁴ or independently) may attempt to recover from that perpetrator in the future.¹⁰⁵ In addition, a finding by

¹⁰³ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims' Participation, ICC-01/04-01/06-1119, ¶ 122 (Trial Chamber I, 18 January 2008).

¹⁰⁴ The Trust Fund for Victims is "able to release donor appeals linked to Court orders for reparations," enabling "States and other donors to provide additional support for administering awards for reparations, especially in a context where the individual convicted might have limited resources." Trust Fund for Victims, *Program Progress Report: November 2009*, at 7 (2009).

¹⁰⁵ United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* n. 10, Principle 15 ("In cases where a person, a legal person, or other entity is found liable for reparation to a

the Court that a perpetrator has caused a victim's harm may increase the likelihood that an award is viewed by that victim as reparative for the harm caused, as opposed to development assistance for the benefit of a broader group, even if the funds do not come from the perpetrator.

Under Rule 85(a) of the ICC Rules of Procedure and Evidence, the definition of victim, for purposes of individuals, states that: “[v]ictims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”¹⁰⁶ Thus, as various Chambers of the ICC have held in the context of determining victims’ rights to participate in proceedings under Article 68(3), Rule 85(a) requires the Court to determine: (i) whether the applicant is a natural person; (ii) whether the events described in the application constitute crimes within the jurisdiction of the Court; (iii) whether the applicants claim to have suffered harm; and (iv) whether the harm arose “as a result of” the event constituting a crime within the jurisdiction of the Court.¹⁰⁷ However, in the context of reparations, the definition raises three basic questions that are not answered by the provisions of the Rome Statute or Rules: (i) what constitutes “harm” for purposes of reparations; (ii) the link required between the crime(s) for which a perpetrator is convicted and the harm to the victim; and (iii) the standard of proof required for reparations claims. While the answers to these questions involve matters of law, and thus cannot be determined definitively in the principles developed under Article 75,¹⁰⁸ it would greatly reduce the risk of unjustified disparities in reparations awards if the principles recommended

victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.”).

¹⁰⁶ ICC Rules, *supra* n. 32, R. 85(a).

¹⁰⁷ *See, e.g., Situation in DRC*, Decision on the Applications for Participation in the Proceedings VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *supra* n. 83, ¶ 79; *Situation in Uganda*, Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, *supra* n. 85, ¶ 12.

¹⁰⁸ *See supra* n. 77 and accompanying text (recognizing that there is no authority under the Rome Statute or the Rules of Procedure and Evidence for rendering the Article 75 principles binding in nature).

common standards from which all Chambers could operate in issuing their awards.¹⁰⁹

a) What Constitutes “Harm” for Purposes of Reparations

While Article 75 specifically refers to “damage, loss or injury” in the context of reparations, it is not clear from the Rome Statute or Rules whether there is any limit to the type of harm that may be claimed for purposes of reparations. This ambiguity leaves open the possibility that one Chamber may, for instance, exclude moral injury while another Chamber recognizes such injury, suggesting that the extent of harm is an area that should be addressed by the Court in its principles on reparations. We therefore recommend that the Court make clear that, for purposes of reparations, it will adopt the same broad approach to defining harm as it has taken in relation to participation. Thus, “harm” may include “material, physical, and psychological harm,”¹¹⁰ and it can “attach to both direct and indirect victims.”¹¹¹ This is consistent with the UN Basic Principles, which expressly recognize that “victims” include those who have suffered “physical or mental injury, emotional suffering, economic loss or substantial impairment of their

¹⁰⁹ Cf. *Report of the Court on the Strategy in Relation to Victims*, ICC-ASP/8/45 (10 November 2009), available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf (setting forth a “common framework” in relation to victims, developed by the Office of the Prosecutor and the Registry, while recognizing that the strategy “does not in any way impinge on the powers of the Chambers” regarding “judicial determination or interpretation” of the “legal framework of the Court”).

¹¹⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of The Prosecutor and The Defense against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06, ¶ 32 (Appeals Chamber, 11 July 2008). The *Lubanga* Trial Chamber subsequently clarified that “indirect victims” are persons who have “suffer[ed] harm as a result of the harm suffered by direct victims.” *Lubanga*, Redacted Version of “Decision on ‘Indirect Victims,’” *supra* n. 100, ¶ 44 (Trial Chamber, 8 April 2009). Thus, indirect victims must establish that the loss, injury, or damage suffered by the direct victim – which itself must be “brought about by the commission of the crimes charged” – gives rise to harm to the indirect victim as a result of the relationship between the direct and indirect victims. *Id.* ¶ 49. The Trial Chamber excluded from the definition of “indirect victim” those who “suffered harm as a result of the (later) *conduct* of direct victims.” *Id.* ¶ 52 (emphasis in original).

¹¹¹ *Lubanga*, Judgment on the Appeals of The Prosecutor and The Defense against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, *supra* n. 110, ¶ 32.

fundamental rights.”¹¹² It is also consistent with the approach taken by the Inter-American Court of Human Rights, which has developed a rich body of jurisprudence on the right to reparations for human rights violations.¹¹³ Similarly, the Internal Rules for the Extraordinary Chambers in the Courts of Cambodia (ECCC) make clear that the Chambers may provide reparations for a victim who has “suffered physical, material or psychological injury.”¹¹⁴

b) Causation

In terms of causation, Rule 85(a) requires only that an individual suffered harm “as a result of” a crime “within the jurisdiction of the Court.”¹¹⁵ However, because case-based reparations may only be awarded against persons convicted by the Court, it is clear that the “damage, loss and injury” forming the basis of a claim for reparations must have been caused by the crime or crimes for which the perpetrator was convicted.¹¹⁶

Unfortunately, as recognized by Pre-Trial Chamber II of the ICC, “the determination of a causal link between a purported crime and the ensuing harm is one of the most complex theoretical issues in criminal

¹¹² United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* n. 10, Principle 8.

¹¹³ *See, e.g.*, Inter-American Court on Human Rights, “*Las Dos Erres Massacre*” v. *Guatemala*, Judgment of November 24, 2009, ¶ 226 (“[I]t is evident that the victims of prolonged impunity suffer different infringements in their search for justice, not only materially, but also other suffering and damages of a psychological and physical nature and in their life projects, as well as other potential alterations to their social relations and to the dynamics of their families and communities.”).

¹¹⁴ Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 5), *as revised on* 9 February 2010, R. 23*bis*(1)(b).

¹¹⁵ ICC Rules, *supra* n. 32, R. 85(a).

¹¹⁶ *See, e.g.*, Rome Statute, *supra* n. 23, Art. 75(2) (“The Court may make an order directly against a convicted person specifying appropriate reparations...”); Regulations of the Trust Fund for Victims, *supra* n. 62, Reg. 46 (“Resources collected through awards for reparations may only benefit victims as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, affected directly or indirectly by the crimes committed by the convicted person.”).

law,”¹¹⁷ and there is no “settled view in international law” regarding the appropriate standard of causation.¹¹⁸ In particular, the challenge is how to draw the line so as to exclude claims based on harm that is too remote or speculative to warrant a finding of responsibility on the part of the wrongdoer. As the Inter-American Court of Human Rights has explained:

Every human act produces diverse consequences, some proximate and others remote. An old adage puts it as follows: *causa causae est causa causati*. Imagine the effect of a stone cast into a lake; it will cause concentric circles to ripple over the water, moving further and further away and becoming ever more imperceptible. Thus it is that all human actions cause remote and distant effects.

To compel the perpetrator of an illicit act to erase all the consequences produced by his action is completely impossible, since that action caused effects that multiplied to a degree that cannot be measured.¹¹⁹

Accordingly, the Inter-American Court only requires that the State make reparations to those who suffer the “immediate effects” of its unlawful acts.¹²⁰ Another standard, applied by the United Nations Compensation Commission (UNCC) established to determine claims arising out of Iraq’s invasion and subsequent occupation of Kuwait, limits the liability of the perpetrator to “direct” losses.¹²¹ The standard

¹¹⁷ *Situation in Uganda*, Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101, *supra* n. 85, ¶ 14.

¹¹⁸ Marc Henzelin, Veijo Heiskanen, & Guénaél Mettraux, *Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes*, 17 *Crim. L. Forum* 317, 325 (2006).

¹¹⁹ *Aloboetoe Case (Reparations)*, 15 *Inter-Am. Ct. H.R. (ser. C)*, ¶ 48 (1993). *See also* Dwertmann, *supra* n. 70, at 142 (“The principle that no compensation needs to be paid for damage which is too remote from the wrongful conduct is undisputed both in international and national legal systems.”).

¹²⁰ *Aloboetoe Case*, *supra* n. 119, ¶ 49.

¹²¹ *See generally* Norbert Wühler, *Causation and Directness of Loss as Elements of Compensability before the United Nations Compensation Commission*, in *THE UNITED NATIONS COMPENSATION COMMISSION 207* (R.B. Lillich, ed. 1995).

of “directness” has also been applied by tribunals presiding over state-to-state arbitrations.¹²² However, this standard has been criticized as “inapt, inaccurate and ambiguous,”¹²³ and there are “famous examples of pairs of cases with apparently similar fact situations where the judges came to directly opposite results.”¹²⁴ Hence, according to Norbert Wühler, former head of the legal department at the UNCC, “the most commonly used test in damages claims seems to be whether the act of a state was the ‘proximate cause’ of the loss suffered, or whether that act was too remote for liability to be imposed.”¹²⁵ Indeed, according to Dinah Shelton, who has written extensively on reparations for human rights abuses, “most legal systems” use a standard similar to that of “proximate cause” to distinguish compensable from non-compensable claims.¹²⁶ Proximate cause, in turn, is “generally considered to be a relative term meaning ‘near’ or ‘not remote,’ and to include concepts of foreseeability and temporal proximity.”¹²⁷

Of course, regardless of the standard applied, “the difficulty lies in the determination of whether a particular loss falls within the classification.”¹²⁸ Thus, while we recommend that the Court establish

Likewise, the ECCC rule governing reparations requires the injury to be a “direct consequence of at least one of the crimes alleged against the Charged Person.” ECCC Internal Rules, *supra* n. 114, R. 23bis(1)(b). The ECCC has yet to issue a reparations award in any case as of the time of this writing, so it is unclear how the judges will apply this standard.

¹²² Wühler, *supra* n. 121, at 230-31.

¹²³ Arthur W. Rovine and Grant Hanessian, *Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission*, in THE UNITED NATIONS COMPENSATION COMMISSION 235, 243 (R.B. Lillich, ed. 1995) (quoting the observations of the United States-German Mixed Claims Commission).

¹²⁴ *Id.* at 242 (quoting C. Gray, JUDICIAL REMEDIES IN INTERNATIONAL LAW 22 (1987)).

¹²⁵ Wühler, *supra* n. 121, at 232.

¹²⁶ Dinah Shelton, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 231 (Oxford University Press, 2001).

¹²⁷ Rovine & Hanessian, *supra* n. 123, at 244. Rovine and Hanessian provide an excellent review of the concepts of proximate cause and foreseeability as applied by international claims commissions throughout the twentieth century. *Id.* at 243-48.

¹²⁸ Wühler, *supra* n. 121, at 232.

a single standard for determining “legal” causation¹²⁹ along the lines of “proximate cause,” it may be that a clear understanding of the standard may not develop until the Court has applied it in a number of cases.

In terms of satisfying causation, ideally, the Court’s judgment in the criminal case against the perpetrator against whom reparations are being awarded will assist victims significantly in establishing their claim. While we have yet to see a judgment from the International Criminal Court, the approach taken by the International Criminal Tribunals for the former Yugoslavia and Rwanda suggest that the ICC’s judgments will contain detailed findings of fact regarding the perpetrator’s crimes and his or her role therein. Thus, victims may only need to establish their presence in a particular village at a particular time to support a finding that their harm was caused by acts of the perpetrator that are detailed in the relevant judgment.

c) Standard of Proof

As explained above,¹³⁰ the appropriate standard of proof to be applied to reparations claims was an issue considered by the drafters of the ICC’s Rules of Procedure and Evidence. While the drafters never reached agreement on a standard, there was general consensus that the standard should be lower than that required for a conviction.¹³¹ At the same time, however, the standard must be sufficiently high to satisfy due process concerns. As one commentator has summarized: “[i]n essence, the claim of redress [addressed by the ICC case-based

¹²⁹ Each of the standards mentioned here are used to establish “legal” causation, as opposed to “factual,” or “but-for,” causation. It is assumed that every victim will need to establish factual causation, in the sense that “but for” the wrongful act of the perpetrator, the harm would not have occurred. However, “international and municipal law norms” require proof of both “factual” and “legal” causation. Rovine & Hanessian, *supra* n. 123, at 241. Authors Rovine and Hanessian offer a useful illustration from the UNCC, which was established to compensate losses suffered as a direct result of Iraq’s 1990 invasion and subsequent occupation of Kuwait: “[A] U.S. citizen held hostage in Iraq sought compensation from the Commission for the loss, while he was held hostage, of his boat in Texas in a storm. The claimant argued that ‘but for’ Iraq having held him hostage, he would have returned to Texas and secured his boat.” *Id.* As the authors explain, this claimant had an arguable claim that “the war was the cause-in-fact of the loss.” *Id.* However, the authors note, “there is also the matter of legal causation.” *Id.*

¹³⁰ See *supra* n. 44 *et seq.* and accompanying text.

¹³¹ See *supra* n. 45 *et seq.* and accompanying text.

reparations scheme] is a civil claim heard in the criminal jurisdiction,” meaning the Court should apply an appropriate standard for civil claims.¹³² Unfortunately, “[d]ifferent legal systems use different terminology” in the context of civil claims.¹³³ However, the standards contemplated by the drafters of the Rules, which included “on the balance of probabilities,” “more likely than not,” and “more probable than not,”¹³⁴ do not seem to differ significantly. Indeed, Black’s Law Dictionary defines the “balance of probabilities” as “the greater weight of the evidence,”¹³⁵ which seems interchangeable with “more likely than not” and “more probable than not.” As indicated above, although the drafters did not reach consensus on any particular standard of evidence, none of the options discussed in the drafting was objected to on the grounds that the standard was too stringent or insufficiently stringent. Thus, we recommend that the Court establish a standard of proof along the lines of those considered during the drafting of the Rules.¹³⁶ Again, it is important that Chambers apply the same standard across cases, and, over time, the precise meaning of the standard in the context of reparations claims before the ICC will be developed.

Regardless of the standard of proof the Court applies to reparations claims, it should make clear that the Chambers have wide discretion with regards to the evidence they may consider in evaluating whether the standard has been met. This approach is consistent with the ICC Rules of Procedure and Evidence, which only require that a victim provide documentation in support of a reparations claim “[t]o the extent possible.”¹³⁷ Moreover, it makes sense as a practical matter for a number of reasons. First, evidence regarding the cause, nature, and extent of a victim’s harm may be difficult to obtain due to the fact that the injury will have necessarily taken place in the context of armed conflict, a widespread or systematic attack against a civilian

¹³² Dinah L. Shelton, *Reparations to Victims at the International Criminal Court*, § II.6 (Center on International Cooperation, 1999).

¹³³ *Id.*

¹³⁴ See *supra* n. 44 *et seq.* and accompanying text.

¹³⁵ BLACK’S LAW DICTIONARY 1220 (8th ed. 2004).

¹³⁶ It is worth noting here that the ECCC requires that the facts alleged in an application for reparations be “more likely than not to be true.” ECCC Internal Rules, *supra* n. 114, R. 23bis(1)(b).

¹³⁷ ICC Rules, *supra* n. 32, R. 94(g).

population, or genocide.¹³⁸ Second, requiring that a victim meticulously itemize and document the extent of harm he or she suffered may raise expectations that the victim will be made whole with respect to that harm, something that will nearly always be impossible to achieve in the context of the ICC reparations scheme.¹³⁹ Finally, and most importantly, establishing the process of documenting harm and causation may itself be traumatizing. As one commentator has explained:

For some types of crimes, an exhaustive process to determine who was a victim could also provoke new harm to the applicants, especially in relation to crimes that are difficult to prove after many years, such as torture, rape, or other forms of sexual abuse. A requirement that victims produce records of medical exams performed at the time of the events, for example, will exclude many victims, including individuals who never received medical attention or who are fearful of speaking about their experience. Psychological examinations performed years after the facts can be misleading. They can also force victims to choose between revisiting the experience and foregoing reparations, thus producing a further form of victimization. Moreover, if full therapy or other forms

¹³⁸ See, e.g., Jorda & de Hemptinne, *supra* n. 74, at 1411 (“In all cases, the Court should take into account the fact that victims will often be unable, on account of the hostilities, to gather the written or oral evidence needed to prove, for example, that they received treatment or that a close relative died.”); Henzelin, *et al.*, *supra* n. 118, at 326 (“The applicable evidentiary standard will be critical in establishing a just and effective reparation system. Such a standard must be sufficiently flexible to take account of the circumstances in which the damage, loss or injury occurred, including the possible destruction or unavailability of evidence.”); Heike Niebergall, *Overcoming Evidentiary Weaknesses in Reparation Claims Programmes*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 145, 149-50 (Ferstman, Goetz, & Stephens, eds. 2009) (“Various factors make it difficult, and sometimes impossible, for victims to provide the necessary information to prove their eligibility or to substantiate their claim.”).

¹³⁹ Dwertmann, *supra* n. 70, at 179 (“[A]s it seems unlikely that there are enough resources available to award full compensation to victims, there is no practical reason for precisely assessing and calculating the concrete damage caused to each individual.”). See also *supra* n. 74 and accompanying text (discussing the likelihood that most perpetrators convicted by the ICC will be judgment-proof).

of support are not available, it might well be irresponsible to demand examinations that could reopen dreadful memories.¹⁴⁰

3. *Forms of Reparation*

Although Article 75 expressly mentions only “restitution, compensation and rehabilitation,” the Court should make clear that this list is not exhaustive,¹⁴¹ and specifically stress the availability of satisfaction as a form of reparation that may be awarded. Importantly, each of these forms of reparations fulfills a different purpose, as evidenced by the UN Basic Principles, which explain as follows:

Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.

Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of

¹⁴⁰ Lisa Magarrell, *Reparations in Theory and Practice*, at 8 (Int’l Center for Transitional Justice, October 2007), available at <http://www.ictj.org/static/Reparations/0710.Reparations.pdf>. See also Dwertmann, *supra* n. 70, at 179 (noting that “the process of having to establish individual harm and causation can lead to re-traumatization”). One way to help avoid re-traumatization is to ensure that the individuals charged with evaluating evidence and making findings of fact are properly trained and treat victims with respect. Cf. Roht-Arriaza, *supra* n. 11, at 170 (noting that many Holocaust victims were unsatisfied with German efforts to provide reparations, despite the “billion-dollar sums involved,” in part because the “administrative procedure was intimidating and degrading, officials tried to weed out claims rather than support victims, and professionals were treated far better than ordinary workers”). The need for well-trained experts in the processing of victims’ reparations claims is addressed further below. See *infra* n. 205 *et seq.* and accompanying text.

¹⁴¹ Rome Statute, *supra* n. 23, Art. 75(1) (“The Court shall establish principles relating to reparations to, or in respect of, victims, *including* restitution, compensation and rehabilitation.” (emphasis added)).

each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; [and] (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

Rehabilitation should include medical and psychological care as well as legal and social services.

Satisfaction should include, where applicable, any or all of the following: (a) Effective measures aimed at the cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; (f) Judicial and administrative sanctions against persons liable for the violations; (g) Commemorations and tributes to the victims; [and] (h) Inclusion of an accurate account of the violations that occurred in international human

rights law and international humanitarian law training and in educational material at all levels.¹⁴²

In addition to making clear that each of these forms of reparation is available to the Court in structuring its awards, the Chambers should expressly recognize that there is no one-size-fits-all approach to reparations. Rather, as the UN Basic Principles recognize, the “individual circumstances” of each case must be considered and any combination of the different forms of reparations may be awarded.¹⁴³ Thus, for example, while some commentators have suggested that reparations should take the form of monetary compensation where the

¹⁴² United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* n. 10, Principles 19-22. Note that the UN Basic Principles also identify “guarantees of non-repetition” as a form of reparations. *Id.* Principle 23 (defining guarantees of non-repetition as including “where applicable, any or all of the following measures, which will also contribute to prevention: (a) Ensuring effective civilian control of military and security forces; (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (c) Strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; [and] (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law”). While it may theoretically be possible that the ICC will issue an order including guarantees of non-repetition, it is difficult to envision how such an order could be affected, given that the Court cannot direct an order of reparations against a State. Nevertheless, at least one commentator has argued that, while “no individual could be made responsible wholly for non-repetition,” certain individuals – such as a head of state who, despite being convicted by the ICC, “still retains significant influence with a part of the population” – “could contribute to maximizing the chances of non-repetition.” Frédéric Mégret, *The International Criminal Court and the Failure to Mention Symbolic Reparations*, *Int’l Rev. of Victimology*, at 11 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275087.

¹⁴³ United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* n. 10, Principle 18.

perpetrator has assets,¹⁴⁴ it is not necessarily the case that other forms of reparations are only appropriate in the case of perpetrators with limited or no resources. Indeed, there are a number of reasons why dispensing individual compensation payments directly to victims may *not* be the most appropriate award, even where the Court has access to a perpetrator's assets. First, collective awards – which may include symbolic measures, victim assistance programs, community development grants, and institutional reform, among other things – may be preferable where a group has suffered harm. Indeed, as one author has explained:

Collective reparations are focused on delivering a benefit to people that suffered from human rights violations as a group. For example, collective reparations measures might address identity-based dimensions of individual violations (such as the violation of women's rights and dignity in a campaign that used rape as a means of repression, or systematic attacks on a particular ethnic group). In other instances, they might address violations such as bombings or a destruction of villages that had the intention of terrorizing a whole population, affecting means of subsistence, dismantling organizations or destroying public trust among residents. In such contexts, collective reparations may offer an effective response to damage to community infrastructure, identity and trust, by supporting, for example, a community-generated project that helps locate missing relatives or that builds a meeting lodge to promote renewed community life and governance.¹⁴⁵

¹⁴⁴ See, e.g., Wierda & de Greiff, *supra* n. 72, at 10 (“It is suggested that the Court should order compensation payments to individuals only in the rare cases in which the accused himself or herself has assets that have been seized to this purpose; and (1) there is a clear link between the accused and the particular victim or group of victims in question; (2) when the case concerns a limited and clearly definable closed group of victims.”); Dwertmann, *supra* n. 70, at 274-75 (arguing that “direct monetary awards” make sense where the Court is able to access assets of the perpetrator, identify the victims, and substantiate the claims of the perpetrator's victims).

¹⁴⁵ Magarrell, *supra* n. 140, at 5-6. See also Ferstman & Goetz, *supra* n. 80, at 340-41 (noting that collective reparations may be awarded “to address group

Furthermore, reparations that take the form of an assistance or rehabilitation program – whether designed to target specific individuals, or represent a “collective” award – may be better suited to address victims’ harm than cash payments, particularly where the amount of payment to a given individual may be nominal.¹⁴⁶ For instance, in South Africa, victims of apartheid who received cash

victimisation, if harm was inflicted on a specific group”); Roht-Arriaza, *supra* n. 11, at 169 (“[H]arms to community life and trust cannot easily be redressed through individual awards.”); Extraordinary Chamber in the Courts of Cambodia, *Civil Parties’ Co-Lawyer’s Joint Submission on Reparations*, 001/18-07-2007-ECCC/TC, ¶ 7 (14 September 2009) (noting that “[c]ollective reparations provide for collective healing and create a sense of solidarity and unity among the Civil Parties in this case”).

¹⁴⁶ Dwertmann, *supra* n. 70, at 121-22 (“[T]he greater the damage the convicted person caused, the less likely it is that individual awards are appropriate to repair the harm caused to victims in a meaningful and sufficient way.”); REDRESS, *Ensuring the Rights of Victims in the ICC: Specific Concerns and Recommendations Relating to the Trust Fund for Victims, Prepared for the 8th Preparatory Commission (24 September – 5 October 2001)*, at 18, available at <http://www.iccnw.org/documents/REDRESStrustfunddraft0901.pdf> (“Collective reparation has become an important feature of reparation awards, particularly in scenarios of mass claims, where individualised awards may be difficult if not impossible to administer, and/or have less impact on individual victims.”); Ferstman & Goetz, *supra* n. 80, at 341 (noting that, in the face of “limited funds and mass victimisation,” individualized payments “could result in *de minimus* awards that can lose all practical meaning for beneficiaries”); Edda Kristjansdottir, *International Mass Claims Processes and the ICC Trust Fund*, in *REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY* 167, 183 (Ferstman, Goetz, & Stephens, eds. 2009) (“Monetary compensation may... be of limited use in places where there is nothing money can buy.”); International Center for Transition Justice & Asociación pro Derechos Humanos, *Parameters for Designing a Reparations Program in Peru*, at 24 (September 2002), available at <http://www.ictj.org/static/Americas/Peru/Parameters.eng.pdf> (noting that, without measures to address emotional and psychological suffering, “many [victims] will feel dissatisfied and disappointed in the reparations program even if they receive monetary compensation”); *Public Policy on Reparations in Guatemala*, General Hearing, 19 March 2010, IACHR 138th Regular Period of Sessions, available at <http://www.cidh.oas.org/prensa/publichearings/Hearings.aspx?Lang=EN&Session=118> (including victim testimony to the Inter-American Court of Human Rights emphasized the “hollowness” of monetary compensation and demanded psychosocial support, land restitution, judicial remedies, *etc.*); David Donat-Cattin, *Article 75: Reparations to Victims*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 1399, 1405 (Otto Triffterer ed., 2008) (noting that certain non-pecuniary forms of reparations, such as “apology, commemoration, [or] ‘public insurance’” may be important in restoring “the dignity of victims in a societal context”).

payments issued by the government were ultimately dissatisfied with the compensation because they did not experience a substantial improvement in their material or emotional condition.¹⁴⁷ By contrast, Rwanda's reparations program – which eschews individual cash awards in favor of service packages offering victims of the genocide healthcare benefits, education grants/scholarships, housing, and small income generation assistance¹⁴⁸ – has been generally well-received.¹⁴⁹ Importantly, “[s]pecific measures can be assigned to specific categories of victims.”¹⁵⁰ Thus, “[v]ictims of rape, imprisonment and torture, for example, might receive a pension, while victims of forced displacement might receive a one-time assistance with housing or farming tools.”¹⁵¹ This was the approach taken by Sierra Leone's Truth and Reconciliation Commission in formulating its

¹⁴⁷ Studies suggest that this was the case with respect to both the “Urgent Interim Reparation” payments dispersed to approximately 12,000 victims between 1998 and 1999, as well as the final grants of R30,000 (approximately US\$4,000 at the time of payment) paid to each of the 18,000 victims named by South Africa's Truth and Reconciliation Commission. *See, e.g., Parameters for Designing a Reparations Program in Peru*, *supra* n. 146, at 25 (explaining that South African victims who received the temporary emergency payments were “left dissatisfied because they [did] not feel a substantial improvement in their material or emotional condition”); Oupa Makhalemele, *Still Not Talking: Government's Exclusive Reparations Policy and the Impact of the 30,000 Financial Reparations on Survivors*, at 17 (Center for the Study of Violence and Reconciliation, 2004), available at <http://www.csvr.org.za/docs/reconciliation/stillnottalking.pdf> (“This study shows that the R30,000 grants received have not made any meaningful impact on the survivors' quest to overcome the consequences of their victimisation.”). In particular, the study published by the Center for the Study of Violence and Reconciliation demonstrates frustration on the part of victims in light of the fact that the “individual financial grants” could not address “urgent needs,” including health services, skills development, education, and housing. Makhalemele, *supra*, at 17.

¹⁴⁸ *See* Law No. 02/98 of 22 January 1998 Establishing a National Assistance Fund for Needy Victims of Genocide and Massacres Committed in Rwanda Between 1 October 1990 and 31 December 1994 (Rwanda), 1 February 1998.

¹⁴⁹ *See* Ismene N. Zarifis, *The Realization of Victims' Rights to Reparations: Assessing the Need for a Comprehensive Reparations Program in Uganda*, LLM dissertation, at 46, University of Pretoria (2009), available at www.up.ac.za/dspace/bitstream/2263/12500/1/zarifis.pdf; Ismene N. Zarifis, *Reparations for Survivors of the Genocide in Rwanda: Reparations as a Tool for Reconciliation?*, LLM paper, at 7, University of Pretoria (2009), available at http://www.chr.up.ac.za/academic_pro/llm1/fieldtrips2009.html.

¹⁵⁰ Magarrell, *supra* n. 140, at 7.

¹⁵¹ *Id.*

recommendations on reparations, which include measures that were identified based on the victims' interests and demands and designed to promote victims' empowerment, as well as their rehabilitation and reintegration into their communities.¹⁵² Specific recommendations of the Commission include: free health care for life or as long as necessary for victims of sexual violence and amputees; monthly pensions for victims of sexual violence, amputees, and otherwise injured who suffered a 50 percent or more reduction in their earning capacity; free education until senior secondary level for war effected youth (including child amputees, victims of sexual violence, and children of victims of sexual violence); and skills training and micro-credit projects for individuals.¹⁵³ The Commission also recommended community reparations in view of the widespread material destruction across the country.¹⁵⁴

In addition, studies have shown that victims often value programs that are likely to have long-term impact, such as “forward-looking measures that improve the chances of future generations.”¹⁵⁵ Such attitudes may weigh against a one-time distribution of monetary compensation.

At the same time, individual cash payments may increase tensions within a community. For instance, in Chile, “it has been reported that payment of individual reparations to members of indigenous communities that had a strong collective ethos had an adverse effect on internal harmony in those communities.”¹⁵⁶ In addition, concerns

¹⁵² Report of the Sierra Leone Truth and Reconciliation Commission, Vol. 2, ¶¶ 78-80 (2004).

¹⁵³ *Id.* ¶¶ 71, 100, 104-194.

¹⁵⁴ *Id.* ¶¶ 206-209.

¹⁵⁵ Roht-Arriaza, *supra* n. 11, at 180-81. *See also* Zarifis, *supra* n. 149, at 41 (demonstrating that victims in Gulu, Northern Uganda, consistently expressed concern about their children's welfare when asked about their desired measures for reparations for harm suffered to them and/or to their children); Kristjansdottir, *supra* n. 146, at 184 (“According to some studies, victims who feel there is no hope to mend their own broken lives tend to prefer and request only aid for their children.”).

¹⁵⁶ Magarrell, *supra* n. 140, at 6. *See also* Christian Tomuschat, *Darfur-Compensation for the Victims*, 3 J. Int'l Crim. Justice 579, 586 (2005) (arguing for collective reparations for victims of the conflict in Darfur on the grounds that “[a]ny individualization of the reparation process would have disruptive effects”).

regarding division and friction among victims were cited by the Sierra Leone Truth and Reconciliation Commission as a reason to eschew cash payouts to victims of that country's civil war.¹⁵⁷ Significantly, concerns regarding division and friction among victims are likely to play a role in the context in which the ICC is awarding reparations, as noted above.¹⁵⁸ Furthermore, cash payouts, particularly if not accompanied by other forms of reparations, may be seen as inadequate,¹⁵⁹ and victims have repeatedly asked for official and societal acknowledgement that they were wronged, restoration of their good name, knowledge of what happened and moral reparations.¹⁶⁰

This is not to say that individual cash payments will never be appropriate. For instance, cash payments from the Court may be warranted where victims are geographically dispersed, such as in the case of an attack on a multi-national peacekeeping force serving in a conflict zone, where peacekeepers injured in the attack have since returned to their home countries and family members of peacekeepers killed in the attack live in diverse areas. Furthermore, there may be drawbacks to awarding certain types of collective reparations.¹⁶¹ Given

¹⁵⁷ REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, *supra* n. 152, Vol. 2, ¶ 71.

¹⁵⁸ *See supra* Section III.

¹⁵⁹ Roht-Arriaza, *supra* n. 11, at 180. *See also Parameters for Designing a Reparations Program in Peru*, *supra* n. 146, at 40 (explaining that, where individual compensation payments are not part of “an integrated program,” the payments “may be seen as a way of ‘buying’ victims’ silence or acquiescence”).

¹⁶⁰ *Id.*

¹⁶¹ *See, e.g.,* Ferstman & Goetz, *supra* n. 80, at 341 (“While collective reparations may be extremely beneficial for victims, particularly if victims are involved in the conceptualization of the reparations package, though [*sic*] there are also dangers that such forms of reparation lose their reparative objective, becoming humanitarian or developmental in nature...”); Magarrell, *supra* n. 140, at 6 (“Collective reparations have their own challenges. They are not easy to implement and they risk being resisted by individual victims because they do not respond to the often quite intimate, individual nature of the violations and suffering. Often, it will be difficult to define the communities that stand to benefit or to justify benefiting some to the exclusion of others. Moreover, the process can be used for political gain and the measures can become confused with development policies that those communities are entitled to anyway.”). Indeed, victims in Peru “demanded individual as well as collective reparations as a way to assert their status as individual citizens of equal value to their urban counterparts.” *Id.* These victims “insisted on this as a way to overcome the amorphous group identity that made it easier for urban elites to be

the diverse forms and degrees of harm generated by mass violations, it may often be the case that the most appropriate form of reparations will be a combination of individual monetary awards and other forms of reparations, whether institutional, moral, or symbolic.¹⁶² As discussed below, it is critical that the victim community and other potential stakeholders be consulted extensively in the determination of the form of any reparations award. The point here is simply that the Court should not assume that individual compensation payments to individual victims are the most appropriate form of award, even when such payments are possible.¹⁶³

indifferent to their fate during long years of repression.” *Id.* These examples highlight the need for a context-sensitive approach to determining appropriate reparations, as well as the importance of consultation with the relevant victim community, as discussed below. *See infra* n. 182 *et seq.* and accompanying text.

¹⁶² This has been the approach taken by the Inter-American Court of Human Rights in cases arising out of violations perpetrated against specific indigenous communities in Latin America. For instance, in *Plan de Sanchez v. Guatemala*, a case involving 268 victims of crimes including rape and mass displacement of an indigenous population, the Court ordered individual monetary reparations to each of the victims, as well as ordering the State to, among other things, implement a housing program for those that lost their homes during the massacre, provide medical and psychological treatment programs, and create a development program for the community. *Plan de Sanchez Massacre v. Guatemala*, Reparations, Inter-Am. Ct. H.R., Series C, No. 116, ¶¶ 49, 75-76, 88-89, 93-111 (19 November 2004). *See also Saramaka People v. Suriname*, Inter-Am. Ct. H.R., Series C, No. 172, ¶¶ 186-213 (28 November 2007); *Sawhoyamaya Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R., Series C, No. 146, ¶¶ 195-247 (29 March 2006); *Yakye Axa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R., Series C, No. 125, ¶¶ 179-227 (17 June 2005). Victims’ interest in a combined approach is also reflected in a survey conducted with victims in Uganda whereby, due to the collective identity of victims of the Acholi culture, a combination of individual and collective reparations was suggested. *See Zarifis, The Realization of Victims’ Rights to Reparations: Assessing the Need for a Comprehensive Reparations Program in Uganda*, *supra* n. 149, at 40.

¹⁶³ Indeed, research that may be applied to cases currently before the Court support this notion. For instance, REDRESS has highlighted the fact that, in the context of child soldiers, the victims will need assistance with reintegration and social acceptance into their communities. REDRESS, VICTIMS, PERPETRATORS OR HEROES? CHILD SOLDIERS BEFORE ICC at 14 (2006). Similarly, field research in Northern Uganda reflects that women who were abducted by rebels and returned home with children from unions with rebels are ostracized socially and have experienced harm at multiple levels, suggesting that these women would benefit from social support programs designed to reintegrate them and their children into their communities. Zarifis, *The Realization of Victims’ Rights to Reparations: Assessing the Need for a Comprehensive Reparations Program in Uganda*, *supra* n.

4. *Use of Experts in Processing Claims and Determining the Substance of Reparations Awards*

Under Rule 97(2) of the Rules of Procedure and Evidence, the Trial Chamber is authorized to “appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of[,] victims and to suggest various options concerning the appropriate types and modalities of reparations.”¹⁶⁴ While the authority of the Chamber to invoke expert assistance is entirely discretionary, we recommend that, in its principles, the Court emphasize the importance of utilizing expert assistance as envisioned in Rule 97(2) in all but the most straightforward of cases.

a) Technical Aspects of Claims Processing and Evaluation

The first, and most obvious, reason for a Trial Chamber to make use of its authority to seek expert assistance in the reparations process is efficiency in the processing and evaluation of claims. As one author has observed, the “[v]aluation and calculation of damages is already complex in the context of individual violations,”¹⁶⁵ and the ICC is likely to be dealing with violations numbering in the hundreds, if not thousands, in each case. At the same time, the judges of the Trial Division presumably are not experts in claims evaluation and processing, nor were they elected to perform such tasks.¹⁶⁶ It is therefore not surprising that one of the primary reasons that the proposed reparations scheme was so controversial during the drafting of the Rome Statute was concern regarding the potential impact of the scheme on the Court’s primary mandate of prosecuting individuals suspected of responsibility for the gravest crimes known to mankind.¹⁶⁷ Nor is it surprising that commentators have repeatedly

149, at 28, 42.

¹⁶⁴ ICC Rules, *supra* n. 32, R. 97(2).

¹⁶⁵ Dwertmann, *supra* n. 70, at 167.

¹⁶⁶ Henzelin, *et al.*, *supra* n. 118, at 340 (“The [ICC] is first and foremost a criminal court and its mandate has been tailored accordingly. It is not a truth and reconciliation commission and, even less, a mass claims resolution body. Its judges have been selected and elected primarily with that mandate and responsibility in mind. Few of them will possess the necessary expertise, or experience, required to deal with mass claims of the sort the Court [is] likely to be faced with.”).

¹⁶⁷ *See supra* n. 16 *et seq.* and accompanying text. Indeed, as noted in a footnote to

raised concerns regarding the practical implications of assigning the evaluation of reparations claims to the Trial Chambers of the ICC.¹⁶⁸ Importantly, these concerns relate not only to the overall functioning of the ICC and the rights of individual accused brought before the Court, but also to the rights of victims. As one commentary explains: “[c]onsidering the hopes that have been invested in the ability of the Court to provide a meaningful remedy to victims of the crimes falling under its jurisdiction, and the legal and practical difficulties which reparation claims potentially stimulate, there is a real risk of procedural impotency on the part of the Court and unfulfilled expectations on the part of the victims.”¹⁶⁹

To allay these concerns, the Trial Chambers should liberally outsource the technical aspects of claims processing and evaluation, while

the reparations provision considered at the Rome Conference, some delegations were of the view that “[w]here there are more than a few victims, . . . the Trial Chamber will not attempt to take evidence from or enter orders identifying separate victims or concerning their individual claims for reparations,” but rather would “make findings as to whether reparations are due because of the crimes and . . . not undertake to consider and decide claims of individual victims.” *Report of the Working Group on Procedural Matters*, A/Conf.183/C.1/WGPM/L.2/Add.7, n. 6 (13 July 1998). Notably, concerns that “victims’ compensation claims can seriously delay criminal trials” was the primary reason that the judges of the International Criminal Tribunals for the former Yugoslavia and Rwanda rejected calls that those bodies amend their statutes to allow for the award of reparations to victims. Liesbeth Zegveld, *Victims’ Reparations Claims and International Criminal Courts*, 8 J. Int’l Crim. Justice 79, 94 (2010).

¹⁶⁸ See, e.g., Jorda & de Hemptinne, *supra* n. 74, at 1414-15 (“It goes without saying that, in entrusting to the trial judges exclusive responsibility for dealing with all technical matters relating to reparations, the drafters of the Statute and of the Rules have taken the risk of complicating the proceedings before the Court and of seriously compromising the expeditious conduct of those proceedings. Given the large scale of the crimes falling within the jurisdiction of the ICC, it will be especially difficult to exercise that function.”); Gilbert Bitti & Gabriela Gonzalez Rivas, *The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court*, in REDRESSING INJUSTICE THROUGH MASS CLAIMS PROCESSES: INNOVATIVE RESPONSES TO UNIQUE CHALLENGES 321 (2006) (“[I]t may, arguably, be much more difficult for the Court to determine thousands of claims than to decide on several criminal cases for each situation.”); Henzlin, *et al.*, *supra* n. 118, at 319 (“If improperly handled, reparation proceedings may substantially complicate and accordingly prolong trials.”); Lewis & Friman, *supra* n. 33, at 475 (“The main concern in the context of the Court has been the Court’s capacity – in a broad sense – to handle reparations to victims in an efficient and yet fair and purposeful way.”).

¹⁶⁹ Henzlin, *et al.*, *supra* n. 118, at 343.

retaining the authority to review the work of the experts and ultimately issue the order of reparations as envisioned under Article 75. Importantly, the use of neutral third parties in the evaluation and processing of claims is a technique that has been used widely in both domestic and international mass claims processes. For instance, in *Hilao v. Marcos*, a class action brought in the United States on behalf of nearly 10,000 victims of human rights abuses committed during the reign of Filipino president Ferdinand Marcos,¹⁷⁰ the court appointed a Special Master “to supervise proceedings related to the compensatory-damage phase of the trial in connection with the class” and make recommendations to the jury regarding the appropriate scope of awards.¹⁷¹ Similarly, the UNCC made use of “Panels of Commissioners” to evaluate claims and recommend appropriate compensation to the Governing Council, the body with ultimate authority to issue awards,¹⁷² as well as a Secretariat, which has been described as the “workhorse” of the overall Commission.¹⁷³

In the context of the ICC, the Trial Chambers will likely need to determine the categories of victims in any individual case, based on the causation standards set forth in the principles. Third parties could then take over the task of making findings of fact with regard to who qualifies as a victim and the levels of loss, damage, and injury suffered, which would then be submitted back to the Trial Chamber for approval. As has often been the case in the context of mass claims processes, these third parties should not be limited to evaluating claimants and evidence that come before them, but should be authorized to identify additional potential beneficiaries and collect evidence on behalf of victims. For instance, members of the United Nations Compensation Commission obtained “independent information,” including “refugee camp rosters, census data, border crossing records, departure and arrival records, evacuation records,

¹⁷⁰ *Hilao v. Marcos*, 103 F. 3d 767, 771, 774 (9th Cir. 1996).

¹⁷¹ *Id.* 782-84. See also Ferstman & Goetz, *supra* n. 80, at 343 (noting that, in the Swiss Banks litigation, “US courts utilised a Special Master as an outside expert to consult with potential beneficiaries and interested parties and to develop a reparations plan that was agreeable to the parties.”).

¹⁷² Has Van Houtte, Hans Das, & Bart Delmartino, *The United Nations Compensation Commission*, in *THE HANDBOOK ON REPARATIONS* 321, 328-29 (Pablo de Greiff ed., 2006).

¹⁷³ Wühler, *supra* n. 121, at 210.

diplomatic records, and flight, ship and bus manifests,” which it used to verify applicants’ claims.¹⁷⁴ Permitting claims processors to conduct outreach and seek out evidence is important because, as discussed above, the reality is that not all victims will be represented before the Court, and it may be assumed that the best-off are the ones who will be in position to take advantage of the ICC reparations scheme, both in terms of accessing the Court and in terms of being able to document their claims.¹⁷⁵

The Court may also consider authorizing the use of sampling to determine the extent of damage for different categories of victims.¹⁷⁶ In the *Marcos* case, for example, the Special Master appointed by the court used statistical sampling to determine the average amount of damages suffered by select members of various categories of victims, and then recommended that the jury award that amount to all victims falling within the same category.¹⁷⁷ The UNCC similarly made use of statistical sampling.¹⁷⁸ Of course, while the Court may generally authorize the use of time-saving techniques in its principles, it would make sense for the experts retained to process and evaluate claims for

¹⁷⁴ Linda A. Taylor, *The United Nations Compensation Commission*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 197, 209 (Ferstman, Goetz, & Stephens, eds. 2009). See also Howard M. Holtzmann & Edda Kristjánsdóttir, INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES 141-42 (2007) (describing the importance of outreach to potential claimants in the context of mass claims processes); Niebergall, *supra* n. 138, at 153 (“The secretariats of most claims processes have themselves actively participated in the gathering of evidence.”).

¹⁷⁵ See *supra* n. 72 *et seq.* and accompanying text.

¹⁷⁶ Dwertmann, *supra* n. 70, at 172-73 (“International and national courts and reparations schemes have acknowledged that in certain cases precise damage assessment or proof is impossible, and even where it is possible, it might under certain circumstances be inappropriate. A general tendency towards standardized or lump awards can be assessed, which are based on tables or guidelines in cases of typical categories of harm, instead of individual assessment of damage.”); Jorda & de Hemptinne, *supra* n. 74, at 1410 (noting that, “[i]n order to avoid having to undertake a separate analysis of each individual claim” for compensation, many national systems have procedures that allow large numbers of claims “to be dealt with collectively by experts and, where necessary, for recourse to be had to statistics for the purposes of fixing the quantum of compensation and distributing such compensation amongst all the victims concerned.”).

¹⁷⁷ *Hilao v. Marcos*, 103 F. 3d 767, 783 (9th Cir, 1996).

¹⁷⁸ See Van Houtte, *et al.*, *supra* n. 172, at 346.

reparations in a given case to seek prior approval from the Trial Chamber before implementing any administrative techniques aimed at expediting their work. Importantly, both the use of sampling and allowing experts to collect evidence on behalf of victims will minimize the risks, discussed above, that a victim who is asked to itemize and document his or her loss will expect to receive full compensation for that loss,¹⁷⁹ or will suffer re-traumatization brought on by the process of having to document his or her harm.¹⁸⁰

b) Determining the Appropriate Types and Modalities of Reparations Awards

The second reason that the Trial Chambers should make ample use of their authority under Rule 97(2) relates to the importance of receiving assistance as to “the appropriate types and modalities of reparations.”¹⁸¹ As explained above, there is no one-size-fits-all approach to reparations, and determining the best combination of the various forms of reparations awards should not occur in a vacuum.

The most important role for experts in the determination of the “types and modalities” of a reparations award will involve consultation with the victim community.¹⁸² Such consultation is imperative, as the “participation of victims and victims groups in the design, implementation, and oversight of reparations programs can be critical to ensuring that reparations are meaningful, timely, and have an impact.”¹⁸³ By contrast, “insufficient outreach to and consultation with

¹⁷⁹ See *supra* n. 139 and accompanying text.

¹⁸⁰ See *supra* n. 140 and accompanying text.

¹⁸¹ ICC Rules, *supra* n. 32, R. 97(2).

¹⁸² Importantly, “victim community” may be broader than simply the class of victims that have applied for reparations from the Court. For instance, in the context of designing reintegration projects for the benefit of former child soldiers in Ituri, the Trust Fund for Victims has highlighted the importance of consulting not only the former child soldiers, but also their parents and other “responsible adults” to “ensure that there is mutual support and trust within the family.” Trust Fund for Victims, *Spring 2010 Programme Progress Report*, *supra* n. 68, at 17.

¹⁸³ Magarrell, *supra* n. 140, at 9. See also Diane Orentlicher, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, ¶ 59(e), E/CN.4/2005/102 (18 February 2005) (explaining that involving victims “in the process of designing and implementing” a reparations program will promote the recognition of victims “as citizens and bearers of equal human rights”).

targeted beneficiaries about reparations measures may reduce the impact of such measures with local communities, and lessen the likelihood that the special needs of particularly vulnerable or marginalised sectors of society (including women, children and minority groups) are adequately considered.”¹⁸⁴ Moreover, the very process of consultation with victims regarding their needs and desires in respect of reparations can contribute to victims’ healing.¹⁸⁵ At the same time, however, “[e]nsuring victim participation is not necessarily an easy thing to accomplish, given the usual heterogeneity of victim groups, their frequent lack of resources and organization, and, in many cases, the security risks and repression they may face as they seek redress.”¹⁸⁶ Such difficulties highlight the need for the Court to make use of experts experienced in “victims and trauma issues”¹⁸⁷ generally,

¹⁸⁴ Clemens Nathan Research Centre & The Redress Trust, *Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making, Report of Proceedings*, at 6 (September 2007).

¹⁸⁵ See, e.g., Linda Keller, *Seeking Justice at the International Criminal Court: Victims’ Reparations*, 29 T. Jefferson L. Rev. 189, 212 (2007) (“The process of developing community priorities based on victims’ needs can be part of the healing process.”); Ferstman & Goetz, *supra* n. 80, at 341 (“Regardless of the form(s) of reparations afforded, the measures will inevitably be symbolic, and therefore the process can be as important as the result. The procedural handling of the reparations process plays an important role in ensuring that the process is well received, accepted, indeed that the process is *owned* by victims and that it *empowers* them as survivors, eventually reinstating dignity, respect and their rightful place in society. Consequently, in determining reparations, the process should, as far as possible, be nourished by the requirements of victims themselves. It should be victim-led.”); REDRESS, *Collective Reparations: Concepts & Principles*, available at http://docs.google.com/viewer?a=v&q=cache:qT8AwIWwbxgJ:www.redress.org/PeacePalace/CollectiveReparationsMG.pdf+REDRESS,+Collective+Reparations:+Concepts+%26+Principles&hl=en&gl=us&pid=bl&srcid=ADGEEShf7cpYffTVSK0I0IFEnqar2yrd95_fxwZj8txcei0oY5cZCreyEI0rbtffKptbBj8c39Y4btn6wnxqux5bMRnR0Em-ZwYFebNqAFbcpyBF0swyOvc4dUNITPvZaw_eC--keh8O&sig=AHIEtbR4wPTngCxO-UGZxp1978HUHJt-nA (“For victims, [j]ustice is ... as much about the way that they are treated, consulted and respected procedurally ... as it is about the substantive remedy...”). For a discussion of restorative justice for victims more generally, see War Crimes Research Office, *Victim Participation Before the International Criminal Court*, at 8-11 (December 2007), available at http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf?rd=1.

¹⁸⁶ Magarrell, *supra* n. 140, at 9.

¹⁸⁷ Victims Rights Working Group, *Suggested Principles on the Establishment and Effective Functioning of the Trust Fund for Victims*, at 5 (April 2004), http://www.vrwg.org/Publications/01/VRWG_apr2004.pdf.

as well as those who have knowledge of the particular victim community being engaged.

In addition to victims, experts can consult with other potential stakeholders, such as the Board of Directors of the Trust Fund for Victims, government officials in the State where victims are living, third-party States that may want to provide assistance in implementing the reparations award, and non-governmental organizations, as appropriate. The first benefit to consulting other stakeholders is the potential to secure resources to fulfill the award because, as discussed above, it is anticipated that a majority of the perpetrators convicted by the ICC will be judgment-proof.¹⁸⁸ Thus, it will often be the case that alternative sources of funding will need to be found for the purposes of fulfilling a reparations award, and the availability and extent of these resources will play a large role in determining the scope of the award. Yet, even where a perpetrator has assets that can be seized by the Court, the cooperation of both governmental and non-governmental agencies will often be essential for the implementation of an award. For instance, the cooperation of the State may be required for an effective order of restitution, which consists of measures aimed at restoring the victim to his or her pre-injury status. The cooperation of a governmental or non-governmental agency operating in the affected area will also often be necessary for purposes of awarding rehabilitation in the form of social and health services, such as trauma rehabilitation, mental health, outpatient consultation, diagnostic support procedures, specialized care, and hospitalization. The same may be said for reparations orders involving satisfaction, which, as discussed above,¹⁸⁹ may include public apologies, full and public disclosure of the truth, identification of remains and reburials of deceased, commemorative events, and memorials for victims. A final reason to consult other stakeholders in the determination of appropriate reparations is that it will often be critical that the Court adopt a “conflict-sensitive” approach to reparations, meaning that reparations must be conceived in a way that facilitates reconciliation, rather than increasing divisiveness.¹⁹⁰

¹⁸⁸ See *supra* n. 74 and accompanying text.

¹⁸⁹ See *supra* n. 142 and accompanying text.

¹⁹⁰ As noted above, the Court will often be operating in a context of ongoing armed conflict or a society newly emerging from conflict or other widespread violence. See

In sum, as the Inter-American Court of Human Rights has observed, reparations should be “possible, sufficient [and] appropriate,”¹⁹¹ and this goal is far more likely to be met if victim communities and other interested parties are broadly consulted in the determination of the reparations award.

5. *Role of the Trust Fund for Victims in the Processing and Determination of Reparations Awards*

Rule 97(2) not only leaves a Trial Chamber complete discretion as to whether to invoke expert assistance in the context of awarding reparations, it also leaves it to the Chamber to determine who are “appropriate experts.” We recommend that the principles clarify that, wherever practicable, a Chamber shall designate the Trust Fund for Victims as the “appropriate experts” to assist it in the processing and determination of an appropriate reparations award. Several factors support the use of the Fund, not only for implementing reparations awards as envisioned by Article 75(2),¹⁹² but also for evaluating and processing claims and recommending the form of reparations awards.

First, because the Trust Fund is authorized to provide assistance to victims of crimes falling within the jurisdiction of the Court *outside* the context of case-based reparations, it will often be the case that, by the time a Trial Chamber issues a final judgment convicting a particular perpetrator, the Trust Fund will have already conducted significant activity for the benefit of victims of the more general situation from which the individual case arose. For instance, although the Court has yet to reach a verdict in either of the two cases currently being prosecuted out of the Situation in the Democratic Republic of Congo, the Trust Fund is currently implementing sixteen projects in the DRC, targeting an estimated 26,750 direct beneficiaries.¹⁹³ Importantly, twelve of those projects involve victims living in Ituri, the region from which the Court’s two DRC cases originate,¹⁹⁴ and several

supra Section III.

¹⁹¹ *Aloeboetoe Case*, *supra* n. 119, ¶ 49.

¹⁹² Rome Statute, *supra* n. 23, Art. 75(2) (providing that, “[w]here appropriate, the Court may order that the award for reparations be made through the Trust Fund”).

¹⁹³ Trust Fund for Victims, *Spring 2010 Programme Progress Report*, *supra* n. 68, at 15.

¹⁹⁴ *Id.*

of the projects specifically target victims of child conscription and sexual and gender-based violence, which are among the crimes being prosecuted in the two DRC cases.¹⁹⁵ Thus, it may be possible to integrate victims ultimately awarded case-based reparations into programs already established on the ground, thereby significantly expediting the delivery of reparations. More generally, the Fund is “well positioned to inform the Court of victims’ needs and attitudes about the broader processes of reconciliation, healing, and justice, and their link to the Court’s judicial process,”¹⁹⁶ as well as to share “valuable lessons about the operational realities” in countries where the Court is awarding case-based reparations.¹⁹⁷

Second, in determining which projects to implement under its general assistance mandate, the Trust Fund engages in many of the activities that will need to be undertaken in the processing and determination of case-based reparations awards. For instance, the Fund is developing “tools and training” for its staff and partners to facilitate identifying and locating groups of victims falling within the jurisdiction of the Court and “gather[ing] information on the needs related to these crimes.”¹⁹⁸ Important in this context is the fact that the Fund engages in gender mainstreaming in all of its activities, drawing on the Inter-Agency Standing Committee’s *Gender Handbook in Humanitarian Action* and the World Health Organization’s *Ethical Standards and Procedures for Research with Human Beings*.¹⁹⁹ In addition, the Fund “works with survivors and their communities as fully-fledged partners in designing sustainable, effective, and locally-relevant interventions.”²⁰⁰ To this end, it has developed partnerships with

¹⁹⁵ *Id.*

¹⁹⁶ Indeed, the Fund has already concluded its first round of a “longitudinal impact evaluation,” during which it gathered information about the views and experiences of more than 14,000 victims receiving assistance from the Fund in the DRC and Uganda. Correspondence between authors and Trust Fund for Victims, 10 May 2009.

¹⁹⁷ Trust Fund for Victims, *Program Progress Report: November 2009*, *supra* n. 104, at 8.

¹⁹⁸ *Id.* at 9.

¹⁹⁹ Trust Fund for Victims, *Spring 2010 Programme Progress Report*, *supra* n. 68, at 10-11.

²⁰⁰ Trust Fund for Victims, *Program Progress Report: November 2009*, *supra* n. 104, at 6. As of spring 2010, the Fund was working with thirty-four implementing partners located on the ground in the DRC and Uganda, twenty-six of which are local

“actors at the grassroots level,” such as “local [non-governmental organizations], traditional/religious leaders, local authorities, and especially the victims themselves.”²⁰¹ Working with its partners, it has developed programs aimed at benefiting victims both “materially and symbolically,” as well as “individually and collectively.”²⁰²

Finally, use of the Trust Fund for Victims as the “appropriate experts” envisioned under Rule 97(2) is warranted because the Fund is a permanent institution that will have an ongoing relationship with the Court. This offers a benefit in at least three ways over the use of *ad hoc* bodies of experts appointed on a case-by-case basis. First, the Trust Fund will benefit from institutional knowledge and lessons learned in the implementation of both its general assistance and, over time, court-ordered reparations awards. Second, as a permanent institution, the Fund will be able to develop processes that its staff will follow across cases and situations, thereby increasing the likelihood that reparation awards will be perceived as fair. As one commentator has observed, “consistency [in the context of mass claims processes] means applying the same amount of due diligence and effort when gathering and reviewing claims in different cases and putting in place sufficient safeguards for preventing unjustified irregularities.”²⁰³ Such consistency will be critical to the overall legitimacy of the Court’s reparations scheme. Lastly, if the Fund is intimately involved in both case-based reparations and providing assistance to victims through its more general mandate, the Fund will be able to develop a comprehensive view of the status of victims in a given country or region in which the Court is working, decreasing the likelihood that a large segment of victims will fall through the cracks.

and eight of which are international. See Trust Fund for Victims, *Spring 2010 Programme Progress Report*, *supra* n. 68, at 8.

²⁰¹ Trust Fund for Victims, *Program Progress Report: November 2009*, *supra* n. 104, at 7.

²⁰² *Id.* at 7.

²⁰³ Kristjansdottir, *supra* n. 146, at 188. See also Van Houtte, *et al.*, *supra* n. 172, at 372 (“Clear criteria and uniform guidelines that are to be followed by all decision-makers are essential elements of any compensation program that handles large volumes of claims.”).

C. **Facilitating Positive Experiences for Victims in Their Interactions with the Court’s Reparations Scheme**

Our final recommendations are unrelated to the Court’s principles on reparations, and are geared at ensuring that victims’ experiences with the reparations scheme are positive.

The first of these recommendations, aimed at the Assembly of States Parties, is that the Court’s Member States ensure appropriate staffing and funding of the Trust Fund for Victims. As discussed above, the Fund has a vital role to play not only through its provision of general assistance to victims of crimes falling within the jurisdiction of the Court and their families, but also with regard to the proper processing of claims for case-based reparations and the determination of appropriate awards. Thus, as the Victims Rights Working Group recognized early in the establishment of the Trust Fund, the Fund’s secretariat will need to be staffed with individuals possessing a wide range of “experience and expertise,” including in areas such as “victims and trauma issues, reparations, fundraising, accounting, data processing, outreach and liaison (to a range of actors including victims, their legal representatives, nongovernmental and intergovernmental organizations), project development and project monitoring and evaluation.”²⁰⁴ Furthermore, the Fund will need to have sufficient resources to engage local actors to assist it in the regions in which it is active, as it will be important for the Fund to have substantial assistance from individuals who speak the local language(s) and who are trusted by the victim community. At the time of this writing, the Fund employs just six full-time staff members,²⁰⁵ and thus it will need to staff-up significantly as the work of the Court grows.²⁰⁶

²⁰⁴ Victims Rights Working Group, *Suggested Principles on the Establishment and Effective Functioning of the Trust Fund for Victims*, *supra* n. 187, at 5.

²⁰⁵ See Trust Fund for Victims Website, Financial Info, available at <http://www.trustfundforvictims.org/financial-info> (last visited 13 May 2010).

²⁰⁶ Based on a review of eleven mass claims processes, the average number of staff members employed at the “height” of each body’s operation was approximately 130. See Kristjansdottir, *supra* n. 146, at 176-77. For instance, the UNCC employed 300 staff members at the height of its operations, the Iran-United States Claims Tribunal had 100 members, and the German Forced Labour Compensation Programme had 250 members. *Id.*

Our final recommendation is that the various organs of the Court that have interaction with victims – including the Office of the Prosecutor, the Victims and Witnesses Unit, and the Victim Participation and Reparations Section – develop proactive steps aimed at managing the expectations of victims with respect to the ICC reparations scheme. Given the scale of the crimes being prosecuted by the ICC, the damages caused to victims are expected to “dwarf” the available resources, even with contributions from the Trust Fund for Victims.²⁰⁷ Moreover, due to the types of crimes falling within the jurisdiction of the Court, returning victims to their pre-injury status will likely be impossible in most, if not all, cases. Hence, while the goal of reparations may be *restitutio in integrum*,²⁰⁸ the reality may be quite different, and victims should be prepared accordingly.²⁰⁹ Not only would it be “devastating” for victims to enter the process thinking they will receive far more in terms of reparations than the Court is able to award them,²¹⁰ but the legitimacy of the Court as a whole will suffer if reparations are seen as a “false promise.”²¹¹

²⁰⁷ Keller, *supra* n. 185, at 191.

²⁰⁸ See, e.g., *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits)*, P.C.I.J., Judgment No. 13, at 47 (13 September 1928), available at http://www.icj-cij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf (“[R]eparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”).

²⁰⁹ In relation to this point, one specific action that may be taken by the Court is to revise the Standard Application Form for Individuals currently available to victims seeking reparations. As Eva Dwertmann explains: “The variety of types of losses listed for the purposes of reparation in the Standard Application Form for Individuals conform with international human rights, and suggest a broad notion of compensable harm... However, it is doubtful whether the ICC has the capacity to individually assess and compensate a wide range of types of harm... [T]he broad definition adopted by the Standard Application Form could raise legitimate expectations among victims that the types of losses listed will be compensated.” Dwertmann, *supra* n. 70, at 141.

²¹⁰ Clemens Nathan Research Centre & The Redress Trust, *Session II: The Claims Conference Experience, in Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making*, Report of Proceedings, at 11-12 (September 2007) (summarizing a presentation by Gideon Taylor and Greg Schneider).

²¹¹ Keller, *supra* n. 185, at 216.

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THE CASE-BASED REPARATIONS SCHEME AT THE INTERNATIONAL CRIMINAL COURT

The adoption of the Rome Statute governing the International Criminal Court (ICC) marked the first time that an international criminal body was authorized to award a range of reparations, including restitution, compensation, and rehabilitation, against individual perpetrators of mass atrocities for the benefit of their victims. In the years since, the ICC's reparations scheme has generated a high level of expectations, and it has been suggested that the very success of the Court will, at least in part, depend on its ability to effectively implement the Statute's reparations regime. Nevertheless, little is known about how the scheme will work in practice. This is due in part to the fact that the documents governing the ICC establish the scheme in very general terms, and in part to the fact that the scheme is *sui generis* in that it is the first international process designed to award reparations to victims of mass atrocities in the context of criminal proceedings against individual perpetrators.

The aim of this report is, first, to highlight the need for the Court to establish principles relating to the operation of the case-based reparations scheme outside of the context of any single case, as envisioned under the Rome Statute. Second, the report contains a number of proposals for the Court to consider when drafting its principles on case-based reparations, including those relating to issues of timing, the definition of "victim" for purposes of reparations, forms of reparations, the use of experts in processing claims and determining the substance of reparations awards, and the role of the Trust Fund for Victims in relation to case-based reparations. Finally, the report contains two specific recommendations aimed at facilitating a positive experience for victims in their interactions with the ICC relative to its case-based reparations scheme.



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