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## Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims

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### I. Introduction

The establishment of the Trust Fund for Victims (TFV) for the International Criminal Court (ICC), in combination with its reparations function, is an unprecedented act in international law. It reflects a growing international consensus that reparations play an important role in achieving justice for victims. Combined with the International Criminal Court's provisions on enhancing victim participation, the TFV affirms the importance and centrality of victims in international justice efforts.

At the same time, the resolve of the ICC Statute's drafters in seeking to provide recourse to victims must be reflected in procedures which allow for a meaningful exercise of that recourse, and which assist in the restoration of their dignity.<sup>1</sup> While the principles are beyond dispute, the modalities are far from resolved. The creation of a Trust Fund closely associated with a Court raises both practical and conceptual challenges that require careful deliberation. The challenges include the following:

- Courts typically interpret reparative justice for the cases they try in terms of the principle of full restitution (*restitutio in integrum*). But Trust Funds typically provide redress to large numbers of individuals –those whose cases do not make it to court. Courts and Trust Funds therefore represent different approaches to the issue of reparations. In this case of co-existence of a Court function and a Trust Fund, both will face hard questions about how to set the level of compensation for the victims they deal with. The Court will find it difficult to set compensation according to principles different from *restitutio in integrum*. But the TFV may have a mandate that is broader, and if so, the principle of full restitution will in all likelihood be unavailable for the TFV, despite the fact that some of the victims it addresses have suffered exactly the same categories of crimes suffered by those whose cases have been tried by the Court. This differential treatment will be hard to justify. This potential inequality is not remedied by adopting a narrow approach, restricting reparations to a few individuals, since such an approach

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<sup>1</sup> The Court has already begun exploring these issues through a series of consultations and the Registry circulated a policy paper on “The Organization and Management of the Trust Fund for Victims” which was discussed at an Expert Group meeting in The Hague on 17-18 February 2004.

would violate the expectations of many victims. Other scenarios are contemplated by the Rules (most notably Rule 98 paragraphs (2) to (4) laid out below), and indeed, the cases in which the Court may appropriately make awards to individual victims may well be exceptional.

- Conceptually, the notion of reparations is tied to issues of responsibility. Compensation and other reparative measures acquire the meaning –and the power—of reparation if they can be understood as the materialization of a recognition of responsibility. This is the difference between reparations and a crime insurance scheme, or a program of assistance for victims. Except for cases in which the TFV distributes funds recovered from perpetrators, from a successor regime that accepts responsibility, even if it is for failing to protect the rights of citizens, or from an international actor that may have been a party to the conflict, there will always be questions about whether the benefits of a TFV program should properly be thought of as reparations.

This paper argues that these challenges, although not completely solved, are easier to meet if the TFV, rather than the Court, plays the leading role in designing an overall approach to reparations programs. When the Court decides to make an order for reparations other than to specific individuals, the TFV should play an active role in the design of the Court’s order. The TFV is best placed to ensure equitable awards among different groups of victims and its flexibility can make a greater contribution to the goals of restoring victim dignity and trust than the more rigid procedures of the Court. The arguments that support this view are laid out below.

## **II. The legal framework governing reparations and the Trust Fund for Victims**

The Trust Fund for Victims operates under the legal framework of the Court’s Statute, Rules of Procedure and Evidence, and Regulations of the Assembly of States Parties (ASP).<sup>2</sup> Article 75 of the Rome Statute states that: “The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation, and rehabilitation.”<sup>3</sup> On this basis, in its decision the Court may, either upon request or on

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<sup>2</sup> The two regulations passed on the Trust Fund for Victims are ICC-ASP/1/Res.6 “Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims” and ICC-ASP/1/Res. 7 on “Procedure for the nomination and election of members of the Board of Directors of the Trust Fund for the benefit of victims.”

<sup>3</sup> According to M.C. Bassiouni, “*Draft Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*,” (E/CN.4/2000/62), these forms may be defined as follows:

*Restitution* should seek to restore a victim to the status quo ante, the original situation before the violation(s) of international human rights or humanitarian law occurred. This includes such measures as the restoration of liberty, legal rights, social status, family life and citizenship; return to one’s place of residence; and restoration of employment and return of property.

*Compensation* may be provided for:

- Physical or mental harm, including pain, suffering and emotional distress
- Lost opportunities, including education
- Material damages and loss of earnings, including loss of earning potential
- Harm to reputation or dignity and

its own motion in exceptional circumstances, 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.” The Article goes on to state that such awards may be made directly against a convicted person, or that the Court may order for the award to be made through the Trust Fund for Victims.<sup>4</sup>

A Trust Fund for Victims (“TFV”) is provided for in Article 79 of the Statute: “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.” Victims that are eligible to receive funds from the TFV are defined in Rule 85 as “natural persons who have suffered harm as a result of the commission of any crime *within the jurisdiction of the Court*” and “may include organizations or institutions that have sustained direct harm to any of their property.” This provision is open to a range of possible interpretations in terms of the scope of operations of the TFV. The most narrow interpretation would only allow for the TFV to implement orders of the Court involving victims who have appeared before the Court. A broader interpretation would allow for a role for the TFV in assisting to define who should benefit, including victims that have not participated in Court proceedings.

The TFV and its functions are further elaborated in the Rules of Procedure and Evidence and the Resolutions of the Assembly of States Parties. For instance, the TFV is authorized to receive funds from the following sources: (a) Voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties; (b) Money and other property collected through fines or forfeitures transferred to the Trust Fund if ordered by the Court pursuant to Art. 79, paragraph 2, of the Statute; (c) Resources collected through awards for reparations if ordered by the Court; and (d) Such resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate to the Trust Fund.<sup>5</sup>

Furthermore, according to Rule 98, the TFV will make awards in the following situations;

- (1) directly against a convicted person (Rule 98 (1));
- (2) upon a Court order against a convicted person where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim (Rule 98 (2));

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- Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

*Rehabilitation* should include medical and psychological care, as well as legal and social services and may be provided either directly as services or indirectly through recovery of funds.

<sup>4</sup> Another type of reparations, *satisfaction and guarantees of non-repetition*, is not included in the Statute presumably because they originate from the law of state responsibility. Satisfaction and Guarantees of Non-Recurrence may include cessation of violations, verification of facts, official apologies, and judicial rulings that establish the dignity and reputation of the victim, full public disclosure of the truth, searching for, identifying and turning over the remains of the dead and disappeared persons, along with the application of judicial or administrative sanctions for perpetrators, and institutional reform

<sup>5</sup> Resolution ICC-ASP/1/Res.6.

- (3) upon a Court order where the number of victims and the scope, forms, and modalities of reparations makes a collective award more appropriate (Rule 98 (3));
- (4) following consultations with interested states and the TFV, upon a Court order for an award for reparations to an intergovernmental, international, or national organization approved by the TFV (Rule 98 (4)).
- (5) apart from that, other resources from the Trust Fund may be used “to the benefit of victims” (Rule 98 (5)).

In the case of Rules 98 (2) through (4), the TFV may supplement funds available through the collection of reparations or fines and forfeitures with voluntary contributions. In the case of Rule 98 (5), any disbursements will come entirely out of voluntary contributions.

The development of the relationship between the ICC and the TFV may therefore take any of a number of forms:

- In the most straightforward scenario, the Court may order reparations directly from a perpetrator and the TFV is by-passed completely.
- In other situations (Rules 98 (2) – 98 (4)), the Court will order awards to be made through the Trust Fund for Victims.
  - If the order is specific in its nature, specifying the nature of reparations and the identities of victims to whom reparations should be made, the role of the TFV may simply be to implement the order.
    - However, it is also conceivable that the TFV would be called upon to advise the Court on the design of the order.
  - The order may take a more general form, and may simply lay out a framework or “principles” which need to be filled out. This may leave the TFV the discretion in designing an approach but would require it to report back to the Court on implementation.
- Finally, the TFV has discretion accorded to it by Rule 98 (5) to implement initiatives for the benefit of victims. It is not specified in the Rule whether this must be in relation to an order of the Court.

The approach taken will depend on both normative and practical considerations. These are now examined in turn.

### **III. Reparations Programs: Goals and Forms**

In considering which approach should be taken to the relationship between the Court and the TFV, it is first necessary to examine what may be some of the normative considerations for reparations programs and the goals such programs seek to achieve.

From a practical perspective, due to the mass nature of the crimes encompassed in ICC jurisdiction, there are likely to be a great many potential claimants against few resources before the TFV of the ICC. This makes the situation that the ICC will face similar to that

which many transitional governments have to resolve when they assume power against the background of a history of mass crime.<sup>6</sup> Because of the large demands that the pursuit of reparations through individualized, case-by-case civil litigation places on the domestic legal systems of such countries, some of them have chosen to implement reparations programs which deal with a universe of victims.

Indeed, many governments of countries dealing with a legacy of mass crimes such as those found in the Rome Statute have abandoned an individualized claims procedure approach to reparations and have chosen to implement reparations programs instead.<sup>7</sup> For instance, in the case of Peru, the Peruvian Truth and Reconciliation Commission recommended some amount of compensation to family members of as many as 69,000 dead or disappeared, plus victims disabled because of torture or other injuries that occurred during the period of the armed conflict, as well as other categories of victims.

There are good reasons to implement reparations programs beyond considerations of costs.<sup>8</sup> Reparations programs typically attempt to distribute a combination of material and symbolic benefits, and do so individually and collectively. At their best, these programs are administrative procedures that, among other things, obviate some of the difficulties and costs associated with litigation. These include long delays, high costs, the need to gather evidence that might withstand close scrutiny (which in some cases may be simply unavailable), the pain associated with cross-examination and with reliving sorrowful events, and finally, the very real risk of a contrary decision, which may prove to be devastating, adding insult to injury. A well-designed reparations program may distribute awards which are lower in absolute terms, but comparatively higher than those granted by courts, especially if the comparison factors in the faster results, lower costs, relaxed standards of evidence, non-adversarial procedures, and virtual certainty that accompanies the administrative nature of a reparations program.<sup>9</sup>

While the preceding considerations pertain to the possible pragmatic advantages for victims of participating in a reparations program—as opposed to trying to recover awards through litigation—there are additional broader, considerations that favor the establishment of such programs. There is a sense in which dealing with reparations through individualized, case-by-case court proceedings fragments the universe of victims and thereby diminishes the aggregate reparatory effect of the awards. It is important to keep in mind that massive and systematic crime—the only kind of crime that the ICC will address—harms individuals in many ways. One of the ways in which they are harmed is

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<sup>6</sup> Except that it is predictable that the TFV will be even more resource starved than most transitional countries.

<sup>7</sup> Examples of national reparations programs include the post-World War II reparations paid by Germany for holocaust survivors and slave laborers, the UNCC, several programs in Latin America (including Chile, Argentina, Brazil, and most recently the program recommended to the government by the TRC in Peru) and the program recommended by the TRC in South Africa.

<sup>8</sup> It would have been impossible for Peru, as it has been for virtually every country that has suffered massive violence and which has attempted to repair the victims to compensate each of them at the same rate as they would have been compensated individually by a court. In the case of Peru, attempting to compensate the universe of victims using the calculations typical of the Inter American system (which in the case of Peruvian victims resulted in awards averaging \$120,000 per victim) would have easily consumed the \$9 billion national budget.

<sup>9</sup> Pablo de Greiff, *The Role of Reparations in Transitions to Democracy*.

on the societal plane. In other words, what needs to be redressed in the aftermath of systematic crime is *not only* individual harm but human and social relations that have been violently destroyed. It is reasonable to think that reparations programs may be more successful at achieving goals that go beyond individual redress than individualized court proceedings.

International experience makes it plain that no reparations program has been able to satisfy the criterion of *restitutio in integrum*. The point of this paper is not at all to impugn this criterion of fairness. In relatively isolated cases, where violations are the exception rather than the rule, this way of thinking about just reparation is unimpeachable. However, aside from the fact that it is unlikely that the TFV will have sufficient resources to compensate victims in accordance with this principle, the main point is that this criterion of justice can be satisfied only by following certain procedures which in their effort to individualize harm, may not be the most suitable for redressing the more societal, structural aspects of the harm suffered by individuals and collectivities. This is so for the following reasons:

Firstly, a case-by-case treatment of harm disaggregates *victims* in more than one way.

- (a) The first has to do with the complex and ultimately intractable problem of the accessibility of courts. 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.
- (b) Second, doing justice to victims on a case-by-case basis inevitably involves trying to assess individual harms and compensating accordingly, which naturally leads to awards of different magnitude for different victims. This may serve to send a message that the violation of the rights of some people is worse than the violation of the same rights of others, thereby undermining an important egalitarian concern and resulting in a hierarchy of victims.
- (c) Third and more generally, a case-by-case approach weakens the link between the violation and the reparation benefit by the introduction of the third, intermediary consideration: that of loss. Since not all victims of the same crime suffer the same losses, this procedure ends up disaggregating victims.

Similarly, a case-by-case approach disaggregates *reparations efforts*. Part of the difficulty has to do with issues of publicity: due to reasons of privacy, case-by-case approaches might find obstacles to full disclosure of facts needed to treat like cases alike. Moreover, the piece-meal nature of the process makes it comparatively more difficult to provide a comprehensive view of the nature and magnitude of the reparations efforts.

Finally, because it is easy, in employing a case-by-case approach, to conclude that justice is exhausted by the satisfaction of the criterion of full restitution (what is it,

after all, that victims could want in addition to this?), benefits distributed in this manner tend not to be coordinated with other justice measures that are also important.

Consequently, and quite apart from considerations of cost and administrative capacity – both at a premium for the ICC—there are good reasons for the Court, which will inevitably find it virtually impossible to adopt a more flexible approach to reparations, to assign responsibility for this issue to the TFV. The truth is that the Court will simply be unavailable as a mechanism for the distribution of individualized reparations for all but a minuscule number of victims, simply in virtue of its nature, structure, and purpose. If the Court attempted to do so, it is not clear how it could avoid creating invidious differences between the awards it grants to those lucky enough to have their cases tried by the Court and all the other victims of the same perpetrators and the same categories of crimes who may receive benefits through the TFV.

One of the arguments of this paper is that given the freedom of the TFV from narrowly defined legal principles –a freedom unavailable to the Court itself—it will be more feasible for the TFV than for the Court to design reparations programs that attain whatever goals could be attained by a reparations program at this level. Just as prosecutions before the Court should not be conceived of as merely in pursuit of retribution or deterrence, it can be argued that reparations try to achieve social goals beyond ensuring compensation for harms suffered. The question is how these goals should be conceptualized.

The experiences of societies in transition may be instructive in this regard. In the context of a transition, the goals of reparations can be said to include (1) the restoration of the dignity of victims through recognition of victims as individuals (and collectives) who have suffered harm; and (2) contributing to the re-establishment of the rule of law, through the reconstruction of civic trust and social solidarity.

In the context of transitional justice it has been argued that one of the legitimate goals of a reparations programs is to contribute to recognizing victims, and in this manner, to strengthen their status as right bearing citizens.<sup>10</sup> Perhaps the most radical way in which someone can be denied even the most minimal moral and political standing is by failing to recognize the ways in which she is vulnerable to the actions of others. A basic condition for recognizing someone as an individual is to acknowledge the many ways in which that person can be severely and negatively affected by the behavior of others. It is impossible to claim that one deals with others as individuals as long as this standing, this sort of consideration is denied. Since states that aspire to be ruled by law must care about the equality of rights of citizens and since that equality sometimes requires providing special treatment to those whose rights were formerly violated, this explains part of the rationale for reparations.

In the context of transitional justice it has also been argued that reparations may contribute to the fostering of a sense of civic trust, that is, a thin but basic form of trust among citizens, and especially, among citizens and the institutions under which they live. Through reparations benefits, former victims of abuse are given a material manifestation

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<sup>10</sup> Pablo de Greiff, *The Role of Reparations in Transitions to Democracy*.

of the fact that they are now living among a group of fellow citizens and under institutions that aspire to be trustworthy.

These two goals of reparations find their natural place in *national* reparations programs. Admittedly, the recognition rationale can be stretched so as to encompass a program established by the TFV. The argument here would be that the benefits of such program, although they will never compensate in full, will reaffirm the status of victims as bearers of rights and of deserving the minimal form of consideration that human rights seek to protect. The relevant form of recognition can be achieved not just by the design and implementation of a reparations program, but also through participation of victims throughout the process, namely their participation in the prosecution (as is possible before the ICC), through being able to relate their experiences (truth-telling), and through their consultation in the design of a reparations program.

The other rationale for reparations, the strengthening of civic trust is harder to extend: a reparations program mandated and probably funded by the international community is less likely to contribute to solidifying victims' trust in their fellow citizens and their institutions –although, of course, it may do something to strengthen perceptions about the reliability of *international* institutions, in itself a desirable goal.

This may lead some to conclude that the TFV should not have been conceived of as a *reparations* fund, but as a fund to provide assistance to victims. Although it goes without saying that reparations benefits should be of assistance to victims, reparations are conceptually linked to an acknowledgment of responsibility. Reparations, strictly speaking, represent the recognition of past wrong and the willingness to do things differently in the future. For such gestures to have a reparative effect, they need to be understood as coming in the name of a party that has standing in a conflict with whom relations need to be repaired. In this regard, there may be a role for the Court in defining principles or granting orders that may be enforced by national courts. Any remedial actions taken by national courts will do more to bring a measure of recognition to victims than a program implemented exclusively by the ICC.

Without this element of recognition, the benefits will become akin to the payments of a crime insurance program, which, needless to say, play a tangential role at best in reconstituting social relations. This conceptual difficulty, which points towards a close analogy between the benefits that could be distributed by a program designed under the impetus of the Rome Statute and social assistance to victims, counts as one more argument for the TFV, rather than the Court taking the lead in this issue, for while Courts are well suited for making decisions on the basis of desert, they are not ideally designed for decisions concerning *need*.

#### **IV. Practical reasons for according an expanded role to the TFV**

Apart from the fact that an expanded role for the TFV may allow for a more normatively coherent approach to reparations before the ICC, there are also practical reasons that favor such an approach.

*(1) It is unlikely that the Court will be in a position to order compensation payments to individuals.*

To begin with it is pertinent to remember that there is something rather fictitious about the Court ordering reparations. Where should the resources for these reparations come from? The ICC is not a human rights court and cannot be considered analogous to the Inter-American Court for 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. Furthermore, international experience recovering funds from perpetrators is dismal,<sup>11</sup> and the level of contribution from the international community to different reparations efforts does not provide reasons for optimism either.<sup>12</sup>

Given the types of crimes included in the Rome Statute, the majority of cases before the Court will involve large groups of victims each of whose members has suffered harms that are difficult to quantify exactly and even more difficult to redress individually. The Court will often be responding to a situation of protracted conflict or one where the State machinery itself has been instrumental in perpetrating the crimes and where the domestic legal system is ruined. There exists little precedent for how such large numbers of victims should be dealt with by a single court. Typically, domestic legal systems work on the presumption that a breach of the law is an exception rather than it being so widespread as to constitute the norm, as will often be the case with crimes against humanity and genocide, which are often perpetrated by political systems.

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<sup>11</sup> For example, most of the large awards ordered by US courts in ATPA cases remain unpaid. The ICC is already seeking to develop expertise in tracking, freezing and seizing of assets, but such procedures are complex to operate and it will take some time to put effective systems in place. For instance, in the cases of perpetrators with known assets, *Milosevic* and *Taylor*, these have been frozen by the ICTY and the Special Court for Sierra Leone respectively, upon indictment, but these can probably only be seized post-conviction and even so it may be complex. This area may take the Court some years to systematize. In any case, perpetrator assets are not likely to be a significant source of funds. Experience with previously established international criminal tribunals shows that perpetrators are often bereft of assets by the time they are arrested and many declare indigence. Those who have some assets left may use these in legal fees. Moreover, dependents of the accused may be allowed to make representations as “interested persons” pursuant to Art. 75 (3). Property restitution will likewise be difficult to effect. In resource-poor environments, particularly where capacity is lacking on the domestic level or where there is lack of political will to enforce Court orders, property restitution may become very contentious. Fines and forfeitures are also not likely to yield substantial revenues. At ICTY, for instance, fines are rare have usually not exceeded some thousands of dollars.

<sup>12</sup> The list of failures here is long, but it spans both national reparations efforts from the case of El Salvador, in which the UN sponsored truth commission recommended dedicating (just) 1% of international assistance to a reparations fund that was never established, to the case of South Africa, where the TRC asked for international assistance for reparations, a request which remained unheeded. The international community has not fared much better regarding *international* reparations efforts: in more than 20 years the UN Trust Fund for Victims of Torture, has only received \$54 million since it started operating in 1983. Reparations are not necessarily considered an attractive cause to donate to. In general, many governments prefer more “optimistic” or future-oriented causes such as development. Governments often need to allocate donations to particular areas, and are more likely to give to specific causes. The notion of voluntary contributions should be made as attractive as possible, and earmarked contributions should be allowed and accommodated but there should be a requirement that a percentage of any donation remains un-earmarked. If there is excessive earmarking, inequities will be common and the TFV will simply implement donor desires which may reflect negatively on the independence of the ICC regime.

It is possible that a large number of victims will pursue claims against a single perpetrator, but there are many potential legal difficulties for such claims to succeed. It will be for the Court to determine what link will be required between the crime and the victim of that crime. In many cases an accused may attempt to argue that the harm caused to individual victims is a matter of joint liability shared with other perpetrators, who may or may not be before the Court. If the Court will seek to award restitution or compensation to large numbers of claimants in most cases before it, funds will be quickly spent on filling out claims. Taking this approach may be problematic, as the victims most likely to succeed in reparations proceedings before the ICC are not necessarily the most deserving, but more likely the most organized and vocal.<sup>13</sup>

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. In other situations, the Court should opt for a comprehensive approach, encompassing the universe of victims, and the TFV should help to design it.

*(2) The TFV, through its flexibility of mandate, operations and composition of the Secretariat, is better placed than to Court to devise a program that takes into account the realities on the ground.*

The premise of this paper is that the TFV rather than the Court itself may be better placed to devise reparations for large numbers of victims because of (1) its mandate, which allows it to deal with victims beyond those participating in proceedings before the Court; (2) the flexibility in its procedures, including its ability to consult with victims without prejudicing a particular case, and its freedom from narrowly defined legal principles and precedent for decision-making; (3) its capacity, including its ability to operate at lower costs than the Court and with a much less cumbersome procedure and with the ability, if need be, to conduct additional and independent needs assessment as a result.

In terms of its mandate, it is clear that the TFV can take into account victims other than those that participate in Court proceedings. This is clear from the language of Art. 79, which states that the Fund was created “for the benefit of victims of crimes within the jurisdiction of the Court (language which is repeated in Rule 85).” Nowhere is this language qualified to state that a victim must have been a participant to proceedings before the Court at either the trial or the reparations stages.

The TFV can carry out its own additional needs assessment in order to make recommendations to the Court even before the latter has established the framework for reparations. This is within the mandate of the TFV, which was established “for the benefit of victims of crimes within the jurisdiction of the Court.” The TFV therefore has broader competence to include in its measures victim groups that have not been represented either at trial or at reparations proceedings. Where the Court order may

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<sup>13</sup> Issues of victim representation may be complicated in that context and victims may have ambivalent relationships with those who represent them. In general, those least empowered are least likely to make their voices heard or heard directly.

pertain to the establishment of medical centers towards the rehabilitation of victims, the needs assessment could also include an analysis of what services are available already which the reparations program can build on.

Therefore, in situations where there are no resources available from the perpetrator, the Court may lay down “principles” which should form the basis of a framework for reparations, and which seek to give the contours of guidance to the TFV, which will subsequently work out the details. Due to the magnitude of the crimes it is submitted that this will happen frequently.

The time between a conviction and reparations proceedings can be used constructively to engage with victims, both to give them a realistic sense of what they are to expect as outcomes of the process and to engage them in how they would like to see the resources available used. This work should be carried out by the Trust Fund Secretariat. Victim organizations should also be consulted, and the TFV should make particular efforts to reach beyond those already represented before the Court. Any information which the Court has gathered from standard forms requesting reparations should be stored in a database to which the TFV would have access. In cases where the perpetrator has no assets, public expectations regarding reparations, which are likely to be a significant challenge to the work of the ICC, could be addressed and managed even while the trial is ongoing.

For certain types of measures, consultation with governments may be necessary and desirable to achieve similar forms of reparations as are available under state responsibility. For instance, since collective reparations may take the form of symbolic measures, such as public acts of atonement, commemorative days, establishment of museums, changing of street names and other public places etc., consultation with governments will be necessary to make these feasible. (Even countries that have been “unwilling or unable” to prosecute for the crimes under the Statute may be willing to assist in the implementation of such measures, which may be seen as unifying or nation-building after a period of strife.)

Much of this preparatory work could be done prior to an order of the Court, so that the order can provide the basic framework or “principles” which should apply. After this, the Secretariat of the TFV would then take the Court order and draw up a plan for implementation which will require approval by the Court, but which will not engage the full Court further in the details of implementation (which would be both cumbersome and expensive). Instead, implementation of the order could be supervised further by an individual judge.

It is clear that to perform this work, the TFV will need a properly staffed Secretariat, as the Board members, persons of great eminence, themselves will not be able to carry out many of these tasks. This point has been highlighted in the joint statement by the Victims Rights Working Group,<sup>14</sup> as well as in the Registry’s own paper on how the Secretariat should function.<sup>15</sup>

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<sup>14</sup> The Victims Rights Working Group *Suggested Principles on the Establishment and Effective Functioning of the Trust Fund for Victims* of March 2004 read: “As the Trust Fund becomes increasingly

## V. Considerations for activating TFV and design of programs

Finally, the paper wishes to put forward some practical considerations on how the TFV should be activated or triggered; and some technical variables that may guide the design of programs.

### *(a) Considerations in activating the TFV*

Although this paper lays out a general vision for the relationship between the Court and the TFV, the following practical questions will still need to be considered:

- What should activate the TFV? Can it only be triggered by a Court finding that crimes within its jurisdiction have occurred or can anything short of that suffice to activate the TFV?
- Should any of the funds of the TFV be used to assist victims while cases before the Court are ongoing?
- What should the relationship of the TFV be to cases of crimes “within the jurisdiction of the Court” which are proceeding before domestic courts under the complementarity principle?

This paper will not seek to resolve these difficult questions, which are the matter of some controversy and should be the subject of more debate. However, we wish to raise the following considerations which we believe may be relevant:

### *On what should activate the TFV:*

- If the TFV is to be triggered at any stage in the Court process short of a finding by the Court that crimes within its jurisdiction have occurred, this may lead the TFV to come to conclusions that are inconsistent with or even pre-empt subsequent Court findings. This may complicate the work and erode the credibility of both.
- It may not be necessary for the Court to convict in order to award reparations. It could acquit a defendant and still make a finding that crimes within its jurisdiction have occurred. However, any awards for reparations in such a situation should be funded by voluntary contributions.

### *On whether the TFV should seek to assist victims while trials are ongoing:*

- The point has been made above whether the TFV should not have been construed as a fund for the assistance of victims rather than as a reparations fund. On the other hand, the TFV should not usurp functions that belong to the Victims and Witness Unit of the Court and which may make it more difficult for the VWU to ask for appropriate funds for those functions from the regular budget of the Court.

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active, its secretariat will need to be staffed with persons who have experience and expertise in the following areas: 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.”

<sup>15</sup> Registry Paper on *The Organization and Management of the Trust Fund*, February 2004. See section on “Suggested Further Criteria.”

It is important to draw a clear ‘division of labor’ between the functions of the VWU and the TFV.

*On whether the TFV should be activated in response to domestic proceedings:*

- In the same way that it would be complex for the TFV to activate in the absence of a Court finding that crimes within its jurisdiction have occurred, it may be equally complex to devise a way in which the TFV could activate in respect of domestic proceedings without disturbing the appropriate relationship between the Court and domestic proceedings as regulated by the complementarity regime.
- Since funds within the TFV are likely to be limited in any case, the TFV should not assume additional responsibilities and raise false expectations in respect of domestic proceedings.

*(2) Technical variables for the TFV’s design of reparations programs*

These are some of the technical variables which can be used to analyze domestic reparations programs and which could also apply to programs designed by the TFV:

- Comprehensiveness. This category relates to the distinct types of crimes, or harms it tries to redress. All things considered, comprehensiveness is a desirable characteristic. It is better, both morally and practically, to repair as many categories of crime as feasible and to deal comprehensively as possible with the universe of victims that have suffered the relevant crimes. This may require consultation, on the ground assessment, and a survey of pre-existing efforts and initiatives.
- Complexity. Whereas comprehensiveness relates to the types of crimes reparations efforts seek to redress, complexity refers to the ways in which the efforts attempt to do so. Thus, rather than focusing on the motivating factors, complexity measures the character of the reactions themselves. A reparations program is more complex if it distributes benefits of more distinct types, and in more distinct ways, than its alternatives. Thus, at one end of the spectrum lie very simple programs that distribute, say, money, exclusively, and in one payment. Money and an apology, or money and some measure of truth telling, constitute an increase in complexity. Monetary compensation, health care services, educational support, business loans, and pension reform, increase the complexity of the reparations efforts even more. In general, since there are certain things that money cannot buy, complexity brings with it the possibility of targeting benefits flexibly so as to respond to victims’ needs more closely. All other things being equal, then, this is a desirable characteristic. Of course, in most cases not all things remain equal. There are some costs to increased complexity that may make it undesirable beyond a certain threshold.

The TFV will be able to ensure a certain complexity in any program by consulting with victims and organizations, carrying out needs assessments on the ground as to the availability of programs and services, and consulting with implementing

partners. It is much more feasible for the TFV Secretariat to carry out this work than for Court employees to be engaged in this.

- Integrity or coherence. Reparations programs should, ideally, display integrity or coherence, which can be analyzed in two different dimensions, internal and external. *Internal* coherence refers to the relationship between the different types of benefits a reparations program distributes. Most reparations programs deliver more than one kind of benefit. These may include symbolic as well as material reparations, and each of these categories may include different measures and be distributed individually or collectively. Obviously, in order to reach the desired aims, it is important that benefits internally support one another.

*External* coherence expresses the requirement that the reparations efforts be designed in such a way as to bear a close relationship with other transitional justice mechanisms, that is, minimally, with prosecutions, truth telling, and institutional reform. This requirement is both pragmatic and conceptual. The relationship increases the likelihood that each of these mechanisms be perceived as successful (despite the inevitable limitations that accompany each of them), and, more importantly, that the justice efforts, on the whole, satisfy the expectations of citizens. But beyond this pragmatic advantage, it may be argued that the requirement flows from the relations of complementarity between the different mechanisms.

Many reparations programs have not managed to achieve such external coherence. Few reparations efforts have really been designed programmatically, either in an internal sense—i.e., in a way that coordinates benefits for distinct crimes in a systematic way—let alone in an external sense—i.e., so as to coordinate the reparations program with prosecutorial, truth-telling, and institutional reform policies.

The external coherence that can be achieved within the ICC regime relates to the relationship of the experience of victims more generally with participation in the Court's proceedings (which may amount to a degree of truth-telling) and with prosecutions. All these functions should be coordinated to achieve a coherent whole.

## **VI. Conclusion**

Ultimately, the goal of reparations within the ICC regime should be to avoid creating unrealistic expectations or contributing to arbitrary distinctions, but instead to benefit a wide scope of victims by designing an approach responsive to their particular circumstances and respectful of their dignity. The flexible procedures that the TFV may apply make it more suitable to design approaches to reparations for mass crimes than the Court itself. It is therefore suggested that the TFV assume the primary role in designs of reparations under the Rome regime.