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REPARATIONS TO VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT: LESSONS FROM INTERNATIONAL MASS CLAIMS PROCESSES

ABSTRACT. The implementation of the rights of victims under the Rome Statute of the International Criminal Court presents momentous challenges to the Court. Given the nature of the crimes falling under the Court's jurisdiction, victims' reparation claims are often likely to number thousands, if not tens of thousands. Under the Statute, it is the Court's task to organize and determine the modalities of victims' participation in the reparation proceedings. The Court is well advised to closely examine the approaches and solutions developed by modern international and national mass claims programs that have faced similar challenges. The paper analyses in detail these challenges and outlines the options available to the Court.

Key words: Rome Statute, International Criminal Court, rights of victims, reparation proceedings, mass claims, Trust Fund

On 17 January 2006, after more than three years of relative silence, the International Criminal Court has finally rendered what may be regarded as its first significant decision.¹ Considering the role victims were expected to play in the context of the International Criminal Court proceedings, it should not come as a surprise that it is the victims who have given the Court its first breath of judicial life.

When adopted in 1998, the Rome Statute of the International Criminal Court was praised for the place it reserved and the promises it made to victims of mass atrocities. From the victims' perspective, it

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¹ *Situation in the Democratic Republic of Congo* (Case No. ICC-01/04), Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006 ('Decision of 17 January 2006'). For a critical appraisal of the 17 January decision, see J. De Hemptinne and F. Rindi, *ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings*, 4 J. INT'L CRIM. JUSTICE 342 (2006).

is not far-fetched to say, the Rome Statute is a momentous advance compared to the *ad hoc* tribunals for not only the former Yugoslavia and Rwanda,² but also Nuremberg and Tokyo.³ The decision of 17

² The only provision relating to victims in the Statute of the International Criminal Tribunal for the former Yugoslavia is article 24(3), which states: 'In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners'. According to certain authors, the restitution as provided for by article 24(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia corresponds to a *restitutio in integrum* encompassing *damnum emergens* and *lucrum cessans* (see E. David, *Le Tribunal International Pénal pour l'Ex-Yougoslavie*, 25 REVUE BELGE DE DROIT INTERNATIONAL 564 (1992), pp. 593–594). Contra: A. Pellet, *Le Tribunal Criminel International pour l'Ex-Yougoslavie*, 98 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 7 (1994); E. HOFSTETTER, DAS VERFAHRENSRECHT INTERNATIONALER STRAFGERICHTE ZWISCHEN COMMON LAW UND CIVIL LAW 113–123 (2005). On the system of reparation applicable at the International Criminal Tribunal for the former Yugoslavia and International Criminal Court, see, generally, I. G. Bitti & G. 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, PERMANENT COURT OF ARBITRATION (2006); BOTTIGLIERO, REDRESS FOR VICTIMS OF CRIMES UNDER INTERNATIONAL LAW 193 *et seq.* (2004); P. Chifflet, *The Role and Status of the Victim*, in INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY 75 *et seq.*, in particular 98 *et seq.* (G. Boas and W. Schabas, eds., 2003); S. Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 INT'L CRIM. L. REV. 345–367 (2003); C. Jorda and J. de Hemptinne, *The Status and Role of the Victim*, in II THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1387–1419 A. Cassese, P. Gaeta and J. Jones, eds., 2002); I. Scomparin, *La Victime du Crime et la Jurisdiction Pénale Internationale*, in LA JUSTICE PÉNALE INTERNATIONALE ENTRE PASSÉ ET AVENIR 335–352 (M. Chiavario, ed., 2003); L. Walley, *Victimes et Témoins de Crimes Internationaux : du Droit à une Protection au Droit à la Parole*, 84 REVUE INTERNATIONALE DE LA CROIX ROUGE 51–77 (2002).

³ In taking this step, the Rome Statute has effectively endorsed an approach that is typical of the civil law system, where criminal courts are generally authorized to adjudicate reparations claims, as opposed to the common law system, where a clear line of separation often exists between courts dealing with criminal matters and those dealing with civil claims. The civil law system is adopted perhaps in its purest form in France, see article 3 of the Code de Procédure Pénale: '1. L'action civile peut être exercée en même temps que l'action publique et devant la même juridiction. 2. Elle sera recevable pour tous chefs de dommages, aussi bien matériels que corporels ou moraux, qui découleront des faits objets de la poursuite.' The same system applies with its own nuances in Spain; see *Código Penal*, nuevo, Título V, 'De la Responsabilidad Civil Derivada de los Delitos y Faltas y de las Costas Procesales'. Civil law countries which have adopted recently the adversarial system (as opposed to the

January 2006 constitutes a first step towards putting some of the Court's lofty statutory principles into practice.⁴

Momentous advance often creates momentous challenges – as is the case here. Criminal trials of the sort, handled by the International Criminal Court, usually involve dozens if not hundreds or even thousands of victims – and thus as many potential claimants.⁵ Implementation of the rights accorded under the Statute, and the logistics of victim participation in the proceedings, pose a great challenge to the Court. If improperly handled, reparation proceedings may substantially complicate and accordingly prolong trials. Given the complexity and relative novelty of the issue, the question of victim participation will likely haunt International Criminal Court trials from their inception.⁶ This challenge is largely one for the Court itself, as under the terms of the Statute it is the Court that is mandated to organize and determine the precise modalities of victim participation.

Footnote 3 continued

'inquisitorial system'), such as Italy and Germany, have maintained the right of the victims to claim damages caused by the accused before the tribunal in charge of the criminal case. See, in Italy: Codice di Procedura Penale, Titolo V: 'Parte Civile, Responsabile Civile e Civilmente Obligato per la Pena Pecuniaria'; in Germany: Strafprozessordnung (StPO), Fünftes Buch, 'Beteiligung des Verletzten am Verfahren; in particular, Dritter Abschnitt: Entschädigung des Verletzten'. For a comparative analysis of the various national systems of reparation to victims of crime, see M. BRIENEN, *VICTIMS OF CRIME* (2000).

⁴ The decision is remarkable in the fact that it not only allows victims to take part in the proceeding as far as their rights to receive reparations is concerned but on their right to assist the public prosecution with the view of making it more efficient in establishing the truth. It would appear that this decision is largely inspired by the case law of the French Cour de Cassation (see *Crim.*, 8 June 1971, *D.*, 1971, p 594, with a note by J. Maury).

⁵ For example, in the Darfur conflict, the United Nations estimated there were 1.65 million internally displaced persons in Darfur, and more than 200,000 refugees from Darfur in neighbouring Chad. There has been large-scale destruction of villages throughout the three states of Darfur. See 'Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur', UN Doc. S/2005/60, p 3.

⁶ See, e.g., Bitti & Gonzalez Rivas, *supra* note 2, at 321 ('No less important is the task the Court will face – unprecedented for an international criminal institution – regarding reparations to victims: it may, arguably, be much more difficult for the Court to determine thousands of claims than to decide on several criminal cases for each situation.')

The Statute and the Court's Rules of Procedure and Evidence (the 'Rules') provide little insight as to how the Court is expected to process the waves of reparation claims that are expected to reach its shores. Due to its incomplete and sometimes ambiguous structure, the Statute offers little guidance on most of the important aspects of a processing system, required to handle the mass of reparation claims likely to arise in connection to cases within the Court's jurisdiction. The Rules also fall short in filling in the statutory gaps and tend to perpetuate a sense of ambivalence as to how the Court is expected to deal with such claims. They convey bafflement with the incomplete structure with which the challenge posed by victims' claims may be met.

At the same time, the regime established in the Statute and in the Rules provides a great deal of flexibility for the Court to organize the reparation proceedings, as it sees fit and practical. The decision of 17 January 2006 clearly demonstrates that the Court is willing and able to empower and provide victims with a voice, even in the face of prosecutorial resistance and recalcitrance.⁷ The regime provided for by the decision entitles victims to assume, under certain conditions, a limited yet important role in the investigative phase of proceedings.⁸

This paper will focus on the questions raised by organization of the reparation proceedings themselves. It will analyse the legal framework within which decisions concerning victim participation

⁷ See decision of 17 January 2006, *supra* note 1, paras 51, 56–57. The prosecution sought certification for appeal of the Decision of the Pre-Trial Chamber I: *Situation in the Democratic Republic of Congo* (Case No. ICC-01/04), Prosecution Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 23 January 2006. The prosecution's application for leave to appeal was rejected on 31 March 2006: *Situation in the Democratic Republic of Congo* (Case No. ICC-01/04), Décision relative à la requête du Procureur sollicitant l'autorisation d'interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006. An application to the Appeals Chamber challenging the 31 March ruling was dismissed: *Situation in the Democratic Republic of Congo* (Case No. ICC-01/04), Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006.

⁸ See, generally, Decision of 17 January 2006, *supra* note 1, para 46, which provides for a general right of access to the Court ('un droit d'accès général à la Cour') to the victims under the conditions set out in article 68(3) of the Statute. Concerning the extent of victims' involvement at the investigatory stage, see, in particular, paras 59, 70 and 76.

and reparations must be made. Who are the potential claimants? What are the general criteria of eligibility for reparations? What type of damage, loss or injury will be considered in the proceedings? What relationship must exist between on the one hand the acts and the conduct of the accused, which formed the basis of the charges, and on the other the damage, loss or injury inflicted upon the claimants? What are the types of reparations available? What structures and procedures have to be put in place in order to ensure effective and efficient processing of reparation claims and the implementation of reparation awards?

Apart from the undoubtedly complex questions outlined above, this paper will address some of the likely, practical challenges the Court will face as it undertakes organization and oversight of reparation proceedings.

I. THE LEGAL FRAMEWORK OF REPARATION PROCEEDINGS

1.1. *General Principles Governing Reparations*

Article 75 establishes the statutory framework for victim reparations before the Court. It provides:

Reparations To Victims

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, 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.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Pursuant to article 75, reparation claims may be made for any damage, loss or injury 'to', but also 'in respect of', any victim of those crimes within the jurisdiction *ratione materiae* of the Court. Rule 85(1) of the Rules defines 'victims' broadly, as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.⁹ Rule 85(2) provides that 'victims' may include 'organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'.

Thus, with the exceptions mentioned in Rule 85(2), generally only natural persons are eligible for reparations in International

⁹ Concerning the concept of 'victims' under international law, see also 'The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms; Final Report of the Special Rapporteur, M. C. Bassiouni, submitted in accordance with Commission resolution 1999/33', UN Doc. E/CN.4/2000/62, 18 January 2000 (hereinafter, 'Special Rapporteur Final Report'), annex, para 8: 'A person is a "victim" where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights. A "victim" may also be a dependent or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental or economic harm.' See by comparison Article 8 of the framework decision of 15 March 2001 of the European Union on the standing of victims in criminal proceedings: '[victim] shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State'.

Criminal Court proceedings.¹⁰ It is noteworthy that the nationality of the victims is not a relevant criterion.¹¹

The definition of 'victims' adopted in Rule 85(2) ensures that not only those who were individually targeted, or who personally suffered harm as a result of the offences that form the basis of the charges, are potential claimants. All those whose rights or physical or psychological integrity have been violated are, in principle, entitled to claim under the International Criminal Court regime. Notably, this includes victims' family members.¹² Thus, International Criminal Court reparation proceedings are not limited to those who have suffered the direct consequences of the actions of the accused. This interpretation clearly follows from both the language of article 79(1) of the Statute and the negotiations that took place during the course of the drafting of the Statute.¹³

¹⁰ Compare the United Nations Compensation Commission, which was established by Security Council Resolution 687 (1991) to process claims and pay compensation for losses and damage suffered by individuals, corporations, governments and international organizations as a direct result of Iraq's invasion and occupation of Kuwait. Both shareholders (under categories 'C' and 'D') and corporate entities were thus eligible to claim compensation.

¹¹ The principles governing State responsibility and diplomatic protection are not relevant in the International Criminal Court proceedings. Generally their application will result in the exclusion of the nationals of the defendant State. See, e.g., the United Nations Compensation Commission, which excluded claims by Iraqi nationals, with the exception of *bona fide* dual nationals; see P. d'Argent, *Le Fonds et la Commission de Compensation des Nations Unies*, 25 REVUE BELGE DE DROIT INTERNATIONAL 485 *et seq.* (1992).

¹² It is unclear whether the International Criminal Court will seek to restrict that group and, if so, to what extent and how.

¹³ Article 79(1) of the Rome Statute expressly refers to 'victims of crimes' and to 'the families of such victims' as being potential beneficiaries of the system set up by the Trust Fund. Concerning the negotiations relevant to that matter see generally, C. Muttukumar, *Reparations to Victims*, in THE INTERNATIONAL CRIMINAL COURT – THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 262 *et seq.* (R. Lee, ed., 1999). Muttukumar refers in particular to a footnote inserted in the report of the Working Group on Procedural Matters dated 13 July 1998 (UN Doc. A/CONF.183/C.1/WGPM/L2/Add.7, 13 July 1998) which makes it clear that reparations pursuant to article 75 could in principle be obtained by victims as well as victims' families and successors: '[Article 75 of the Statute] refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as victims' families and successors. For the purposes of interpretation of the terms 'victims' and 'reparations', definitions are contained in the text of article 44, paragraph 4 of the Statute, article 68, paragraph 1, and its accompanying footnote [...], the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power [...] and the examples in paragraphs 12–15 of the

The Statute does not provide any specific guidance as to the damage, loss or injury for which reparation claims may be made under article 75.¹⁴ It appears that reparations may be sought for any type of damage, loss or injury, whether physical, moral, financial, legal, or of any other type. Indeed use of the terms 'damage, loss or injury' suggests not only various types of physical damage but also personal injury and financial and other losses are intended to be covered.¹⁵ Further guidance is clearly required and it may be expected the Court will provide this in the exercise of its authority to 'establish principles relating to reparations to, or in respect of, victims' (article 75(1) of the Statute). It may be presumed that the guidance provided by the Court will indicate the circumstances in which organizations and institutions mentioned in Rule 85(2) will be entitled to reparations.

The likely focus of the International Criminal Court on the responsibility of high-ranking state officials and military officers dictates a requisite nexus between the criminal conduct of the accused and the damage, loss or injury sustained by the victim that will potential limit the number of claimants. For instance, where there are multiple

Footnote 13 continued

revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law [...]' The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 (29 November 1985) and the Draft Basic Principles (UN Doc. E/CN.4/Sub.2/1996/17) give, in turn, a very extensive definition of 'victims' (see paras 1 and 2 of the Declaration). On the Declaration, see Roger S. Clark, *The 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, in *THE LIVING LAW OF NATIONS: ESSAYS ON REFUGEES, MINORITIES, INDIGENOUS PEOPLES AND THE HUMAN RIGHTS OF OTHER VULNERABLE GROUPS. IN MEMORY OF ATLE GRAHL-MADSEN 355 et seq.* (G. Alfredsson and P. Macalister-Smith, eds., 1996).

¹⁴ Pre-Trial Chamber I refrained from defining the notion of prejudice as found in Rule 85(a) (see decision of 17 January 2006, *supra* note 1, para 82).

¹⁵ Interestingly, the same terms – damage, loss or injury – were employed in Security Council resolution 687 (1991) establishing Iraq's liability for the consequences of its invasion and occupation of Kuwait. The United Nations Compensation Commission established to process claims against Iraq took the view that these terms covered a wide range of various types of damage, loss and injury, including departure costs, illegal detention, torture and witnessing of traumatic events, personal injury and death, personal property, bank accounts and securities, loss of income, real property, and various types of business losses and public service expenditures, including evacuation costs incurred by Governments. In assessing the relevance of the United Nations Compensation Commission precedent, one must keep in mind that Iraq's liability was not measured on the basis of international humanitarian law but general international law, which probably resulted in much a broader scope of potential liability.

accused alleged to have participated in a joint criminal enterprise to commit large-scale crimes, for reparation purposes the Court may be required to determine the scope of 'civil liability' for every perpetrator. The Court may further need to assess the extent to which individuals, who have not been indicted or arrested, have contributed to damage caused to the victim. A finding of guilt on the part of the Court must necessarily be accompanied by a finding as to the scope of the convicted person's 'civil liability', possibly necessitating the Court to lay down general criteria to allow identification of potential claimants.

The Statute does not specify the applicable standard of causation, or the relationship that must exist between the harm sustained by the claimant and the acts and conduct of the accused that form the basis of the charges. In its decision of 17 January 2006, Pre-Trial Chamber I held that the harm sustained by the victim must have resulted from those crimes that form the basis of the charges.¹⁶ In declining to specify,¹⁷ the Chamber left open whether the applicable standard of causation is directness, proximate cause, foreseeability, or some other standard. There is no settled view in general international law on this point. Although international claims commissions have developed extensive jurisprudence on causation, they have failed to come up with a uniform standard.¹⁸

The Statute is silent as to the minimum level of harm the victim, or the victim's family, must have suffered in order to claim reparation under the Statute. It is the Court's prerogative to determine whether entitlement to reparation requires that damage meet a certain threshold (e.g., 'serious' or 'significant' damage), or whether any type of damage (*de minimis*) will give rise to a valid claim. Considering the high number of potential claimants it is likely, and probably advisable, that the Court will adopt clear and relatively strict threshold criteria. The development of threshold criteria is complicated by the fact that the Statute envisages reparations to include compensation, restitution and rehabilitation. Again, the Court is expected to provide further guidance in its

¹⁶ *Supra* note 1, para 94.

¹⁷ *Ibid.*

¹⁸ For discussion see, e.g., N. Wühler, *Causation and Directness of Loss as Elements of Compensability before the United Nations Compensation Commission*, in THE UNITED NATIONS COMPENSATION COMMISSION (R.B. Lillich, ed., 1995). See also V. Heiskanen, *The United Nations Compensation Commission*, 296 RECUEIL DES COURS DE L'ACADÉMIE DE LA HAYE 259, 334-339 (2003).

decisions and orders on whether all or some of the various reparations will be available to claimants, in any particular case.

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.¹⁹ But the standard must be adequately restrictive to avoid flooding the Court with reparation claims remotely linked to the relevant crimes and which the Court, due to the volume of claims brought, will not be able to absorb.

The likely repetition of these issues suggests it is advisable that the Court adopts a comprehensive approach to reparations. The Court should, at the earliest possible opportunity, establish general criteria for reparation claims permissible under the Statute.²⁰ Such general principles should cover issues such as eligibility, types of claims to be made, the standard of causation and the applicable evidentiary standard. This will assist Trial Chambers, and any subsidiary body to which the Court may decide to delegate claims-processing functions, in dealing with claims in a consistent and systematic manner. Such guidelines and criteria may further assist claimants in preparing and substantiating claims, thus reducing the number of frivolous or otherwise clearly ineligible claims.

Where several accused are indicted with respect to the same incident, or where those victimized overlap in whole or in part, the Court may defer in making a finding regarding the nature and scope of 'civil liability' of a particular accused until all indictees have been tried. The difficulty in carrying out arrests may require the Court to address reparation matters in relation to just some of the accused individuals. In such a scenario, the Court must balance the potential need to further adjudicate on the issue with the presumption of innocence extended to those accused not yet arrested.

Determining the eligibility of potential victims, who claim to have suffered from the conduct acknowledged by the Court, may prove a challenging task. Failure on the part of the Court to give due

¹⁹ The Rules seem to recognize the practical difficulties that victims may face in presenting proof: see Rule 94(1), which provides that a victim's request for reparations 'shall contain [t]o the extent possible, any relevant supporting documentation, including names and addresses of witnesses' (emphasis added).

²⁰ As part of the first trial before the International Criminal Court, the Court could invite the parties as well as other interested parties (including *amici curiae*) to make submissions in relation to this issue.

consideration to these matters may lead to a flood of ineligible claims, wasting Court time and resources.

1.2. *Practical Considerations Relating to 'Eligibility' and 'Reparability'*

In order to claim for reparations, victims should be properly informed of proceedings, including the steps they should take to protect their rights and assert a claim.²¹ While international courts and tribunals, including international claims commissions, often rely on the internet and other electronic media to disseminate such information, these are unlikely to consistently be sufficient tools to conduct an information campaign. Victims do not always have access to the internet, Darfur being a case in point. The Court should develop strategies for dealing with information campaigns in such situations, keeping in mind the number of potential partners who can assist, including local authorities and international organizations (both governmental and non-governmental, such as the International Committee of the Red Cross).

As discussed above, in order to be eligible for reparations, a victim must establish that the damage, loss or injury for which she or he is seeking reparation was a consequence of the acts or conduct for which the accused was found guilty. The victim is required to establish a causal link and must provide in the reparation request, pursuant to Rule 94, information relating to the place and time of the incident and the identity of the person or persons the victim believes to be responsible for the harm.²² At the reparation stage, the claimant must substantiate entitlement. The former is essentially a question of 'eligibility', whereas the latter is one of 'reparability'.

The evidentiary standard applicable at the investigative stage appears less demanding.²³ In its decision of 17 January 2006, the

²¹ See Recommendation R (85) 11 on the on the Position of the Victim in the Framework of Criminal Law and Procedure adopted by the Committee of Ministers of the Council of Europe on 28 June 1985.

²² See also Regulation 88 of the Court (Requests for Reparation in Accordance with Rule 94), 26 May 2004. The Registry of the International Criminal Court has now established standard forms for victims to claim reparations. The forms were approved by the Presidency of the International Criminal Court.

²³ See however the judgment by the French Cour de Cassation in Crim., 19 February 2002, Bull. Crim., no 34, where the French Supreme Court considered that the admissibility of a '*partie civile*' at the preliminary stage of inquiry requested, in any case, that the case shows *prima facie* that the victim suffers damage, which is directly caused by the alleged crime. On the approach to the procedural rights of the victims in the criminal procedure of the European Court of Human Rights, see *Perez v. France* (no. 47287/99), Judgment, 12 February 2004.

Pre-Trial Chamber rejected the prosecution's submissions on this point and held that victims were in principle permitted to participate in the investigative phase of proceedings. The Court required victims to establish a 'personal interest' (*'un intérêt personnel'*) within the meaning of article 68(3) of the Statute. In practice the victim must establish loss, damage or injury, that the crime of which he or she was a victim comes *a priori* within the jurisdiction of the Court, and that a sufficient nexus exists between the crime and damage to the claimant.²⁴ In situations such as Darfur, where victims are often illiterate and do not possess identification documents, it may be difficult for victims to file claims. Liaison offices established by the Court (or by an entity acting under the Court's supervision) may assist claimants in filling out claim forms and collecting evidence. In certain situations, individual claims could be grouped together – such as by village or district – for the purpose of preparation, to ensure consistency and efficiency yet bearing in mind that the purpose of victim reparation is in principle to dispense individual justice.

The burden to establish entitlement to reparation, and the nature and scope of the damage, loss or injury for which reparation is sought, rests with the claimant. It is insufficient for claimants to show they suffered damage, loss or injury as a result of criminal conduct. The claimant must demonstrate, in principle, that such damage was the result of, or was closely related to, the acts and conduct of the convicted person.²⁵ It is arguable that the acts and conduct that are relevant to this determination are those, and only those, which form the factual basis upon which conviction was entered. Facts that fail to meet this requirement, such as those giving rise to acquittal, cannot form the basis of a reparation claim.

Such a high level of proof may, in practice, be difficult to sustain in certain contexts. Adoption in similar circumstances, by certain mass claims resolution bodies, of 'plausibility' as the applicable standard of evidence (or another, more 'relaxed' standard of proof) may serve as a useful precedent. For example, the Property Claims Commission of the German Foundation 'Remembrance, Responsibility and the Future', which was established to process claims for compensation for property loss resulting from the 'aryanization' programme

²⁴ See, generally, decision of 17 January 2006, *supra* note 1, para 79 *et seq.*

²⁵ As noted above, the precise standard of causation is not specified in the Statute.

undertaken by the Nazi regime, applied a relaxed standard of proof in assessing claims. Nonetheless, the Commission did not consider mere allegations to be sufficient, no matter how credible.²⁶

Although it is unclear whether the Court would be permitted to take such steps under the Statute and the Rules, the Court should consider making use of, and referring to, information available independently of the claimants, and indeed should make a special effort to obtain such information if it possesses the appropriate discretion. Such *ex officio* or *proprio motu* verification of claims has become a standard feature of international mass claims processing, and it would be difficult for the Court to act otherwise.

The evidentiary standard applicable in the reparation proceedings is not specified in the Statute or in the Rules. As noted above, establishing the applicable evidentiary standard will be a critical policy question for the Court. In view of the unique circumstances in which reparation claims arise within the Court's jurisdiction, it cannot be assumed that the applicable standard will be one that generally applies in civil liability claims, being the balance of probabilities, or alternative standard depending on the jurisdiction.

For a claimant to be able to meet the applicable evidentiary standard, whether the balance of probabilities, plausibility, or an alternative, the Court is required to make findings as to the nature and extent of the convicted person's crimes. In particular, the Court must establish in a detailed manner the degree to which the relevant crimes impacted on victims, or categories of victims. This determines reparation proceedings generally occur *after* a guilty verdict is rendered. The responsibility of the Chamber to furnish a 'reasoned opinion' will be critical in defining the scope of 'civil liability' of convicted individuals.

Because an accused may be acquitted, trial proceedings should not be unnecessarily prolonged and resources expended in considering reparation matters. Where an accused has been charged in relation to several incidents or ambits of responsibility, and is acquitted in relation to some but not others, the final determination of the Court may significantly reduce the number of putative victims. Once the trial is over and the scope of responsibility of the accused is determined, the categories of potential claimants are more readily identified. Consequently,

²⁶ For further discussion see Pierre A. Katter, MASS CLAIMS TO PROVIDE ROUGH JUSTICE, IN GRENZÜBERSCHREITUNGEN. BEITRÄGE ZUM INTERNATIONALEN VERFAHRENSRECHT UND ZUR SCHIEDSGERICHTBARKEIT. FESTSCHRIFT FÜR PETER SCHLOSSER ZUM 70. GEBURTSTAG 329–339, 335 (2005).

For further examples see, *e.g.*, RESOLVING INTERNATIONAL MASS CLAIMS: A COMMENTARY (Howard M. Holtzmann and Edda Kristjansdottir, eds., forthcoming).

although reparation proceedings require a determination of guilt the proceedings themselves need not and should not form part of the trial. They may, and should, be conducted only after conclusion of trial proceedings. Undertaking preparatory administrative action at the trial stage may ensure that the necessary administrative and logistical infrastructure is in place when the reparation proceedings commence. The rights of the accused must consistently be preserved, whether in the course of the trial or in the context of reparation proceedings.

Responsibility under the Statute for damage, loss or injury to victims is limited to that caused by the convicted person to the victim or victim's family, though the perpetrator need not have been solely responsible. The negotiators of the Statute specifically excluded the possibility that States could be held liable for damage, loss or injury caused even if, at the pertinent time, the convicted individual was a State official or representative.²⁷ Should victims wish to pursue claims also against a State, such claims would have to be brought before a forum other than the International Criminal Court. The Statute confirms this by providing that the reparation regime established in the Statute is without prejudice to the rights of victims under national or international law (article 75(6) of the Statute).

Statutory exclusion of State responsibility does not prevent competent international bodies, such as the Security Council, from confiscating State assets to ensure the availability of reparations. Assets may be confiscated or otherwise set aside and placed in the custody of the Trust Fund for the purpose of satisfying reparation claims. Exclusion of State responsibility does not prevent the Security Council or any other competent body from taking a specific decision to assist the Court in the recovery of funds or obtaining the assistance of a State connected with the incidents that gave rise to the charges in question.

1.3. *Forms of Reparation*

Article 75(1) of the Rome Statute requires the Court to 'establish principles relating to reparations'. It is unclear from this provision and the *travaux préparatoires* what is meant by 'principles'. In particular it remains unclear whether the Court's authority to establish such principles may be exercised only on a case-by-case basis, or whether the scope extends to a generalized application. It is arguable

²⁷ See e.g. T. van Boven, *The Position of the Victim in the Statute of the International Criminal Court*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT – ESSAYS IN HONOUR OF ADRIAAN BOS 77 *et seq.* (H. von Hebel et al., eds., 1999).

the latter interpretation is more in line with the language and underlying policy rationale of Article 75.

The 'principles' the Court is required to establish clearly include those regarding *the form* of reparation in a particular case.²⁸ Article 75(1) of the Statute specifically mentions *restitution, compensation and rehabilitation*. In view of the language used ('including'), the modes of reparation in article 75 cannot be considered to be exhaustive. This is not particularly significant in practical terms since two of the forms of reparation specifically mentioned – restitution and compensation – are generally considered the principal forms of reparation under international law.²⁹

The first form of reparation expressly mentioned in the Statute is 'restitution'. Restitution is the primary form of reparation provided for in general international law³⁰ and most domestic criminal proceedings.³¹ Restitution seeks to restore the victim to the situation – financial, personal or legal – that prevailed prior to the offence. Restitution may take the form of return of property or reimbursement of expenses made. The practice of the *ad hoc* tribunals suggests that restitution is rarely available in practice, and that it is often a complicated remedy to administer.³²

²⁸ These are also endorsed in the Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, prepared by Professor T. van Boven, Special Rapporteur of the Sub-Commission on Human Rights, UN Doc. E/CN.4/1997/104, as well as Professor Bassiouni's 'Special Rapporteur Final Report', *supra* note 8.

²⁹ Bassiouni, *supra* note 8, considers that two other forms of reparation should be considered, when gross violations of human rights and fundamental freedoms are concerned, *i.e.*, satisfaction and guarantees of non-repetition.

³⁰ *Case Concerning the Factory at Chorzow (Claim for Indemnity) (The Merits)*, PCIJ, Series A, No 17, 13 September 1928, p 47: '[R]eparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all possibility, have existed if that act had not been committed.' See also: *Sapphire International Petroleum Ltd. v. National Iranian Oil Co*, 75 INT'L L. REP. 136 (1967) 136 *et seq.*

³¹ See reference at *op cit.* n. 4, in particular the comparative study done by Brienen. See also Rule 105 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (Restitution of Property).

³² Neither of the *ad hoc* Tribunals have to this day made use of their ability to order restitution of properties or criminal proceeds. Among the factors that appear to have convinced the Tribunals to stay clear of such matters are the length and complication of such proceedings and the level of cooperation required of local authorities for the purpose of enforcement of any measures that it could decide to adopt.

The purpose of the second form of reparation mentioned in the Statute, 'compensation', is to make good, normally in monetary terms, any economically assessable damage suffered by the victim, or victim's family, as a result of the crimes for which the accused was convicted. While in theory compensation may take various forms or shapes, in practice monetary compensation is likely to be the most common form of compensation.³³ Other forms may be considered, such as 'psychological' reparation granted in allowing the victims to make symbolical statements at the Court to assist recovery from psychological stress.³⁴

'Rehabilitation' implies a more general, and less defined, notion. It may consist of remedies intended to assist victims in reintegrating in the society under the best possible conditions by providing, for instance, medical, psychological, legal or social services.³⁵ In practice, rehabilitation is likely to be linked, and form part of, a peace-building or socio-economic programme put in place, by a competent international body, to enhance regional recovery from the crisis in which the relevant crimes occurred. Of the three forms of reparation specifically mentioned in article 75(1), rehabilitation is likely to be the one that the Court will award on a collective rather than individualized basis.³⁶

As noted above, the authority of the Court is not limited to the three forms of reparation specifically referred to in article 75(1). Given the variety of circumstances in which the offences falling under the Court's jurisdiction may take place, it is envisaged that other forms of reparation, unspecified in the Statute, may be utilized.³⁷ Precipitating

³³ According to Article 4 of the European Convention on the Compensation of Victims of Violent Crimes, [1983] ETS 116, 'Compensation shall cover, according to the case under consideration, at least the following items: loss of earnings, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of maintenance.'

³⁴ See, critical on this issue, M.L. Cesoni and R. Rechtman, *La Réparation Psychologique de la Victime: Une Nouvelle Fonction de la Peine?*, 85 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 158 (2005).

³⁵ See, generally, United Nations Commission on Crime Prevention and Criminal Justice, *Handbook on Justice for Victims on the Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. E/CN.15/1998/CRP4/Add.1.

³⁶ This is allowed under Rule 97(1) of the Rules, which provides that, '[t]aking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both'.

³⁷ The defendant and the claimant would have to be given fair notice of the Court's view in that regard, if it is considering the possibility of recourse to other forms of reparation.

circumstances may relate to the situation of the victims or that of the convicted individual, or they may be of a more practical nature such as the availability of funding. These kinds of practical considerations require application of common sense on the part of the Court and other parties involved in the reparation proceedings.³⁸

In addition to its obligation to establish general principles, the Court *may* – ‘either upon request or on its own motion in exceptional circumstances’ – set out in a decision the scope and extent of any loss, damage or injury to, or in respect of, victims (article 75(1) of the Statute). The language of article 75(1) confirms that the Court has a great deal of discretion as to how to organize and conduct reparation proceedings. It is arguable that this provision empowers the Court to delegate some of the responsibility concerning the actual application of those principles, and the processing of individual reparations claims to a subsidiary body. This interpretation is supported by Rule 97 (‘assessment of reparations’), which provides the Court may, at the requests of the victims, their legal representatives, the convicted person, or by its own motion, ‘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’. The extent to which the Court is allowed to delegate its functions to a subsidiary body remains debatable. However, if the Court retains an appropriate degree of control over the proceedings, and in particular if it requires that all decisions be submitted to the Court for its review and approval, it is arguable that delegation of the claims processing function is not itself contrary to the Statute and does not amount to an inappropriate delegation of the judicial function.

Whether or not such a panel or panels of experts should be established and what their mandate should be essentially depends on the number and complexity of eligible claimants. When reparation matters can be dealt with simply and swiftly, as for instance where reparations may be claimed only by a limited number of claimants, the Court itself may choose to adjudicate the reparation claims without recourse to expert assistance. In instances where potential claimants number hundreds or thousands, and consequently where

³⁸ The extent to which the Court will be willing, and capable, of obtaining the assistance and cooperation of investigative authorities in domestic legal systems might well be critical in determining its ability to give practical significance to its orders regarding reparations.

the processing of the claims would drag the Court into the complexities of mass claim processing, the Court may prefer to delegate the claim processing function to a panel or panels of experts, acting under the Court's guidance and supervision. This model is often used in domestic mass torts litigation.³⁹

Panels of experts are only part of the solution. To be able to deal with a mass of compensation claims, they will need an administrative secretariat to support their work.⁴⁰ Secretariat services are needed, in particular, to organize tasks such as the collection of claims (which are often likely to occur in difficult circumstances), to develop and maintain the necessary administrative and technical infrastructure (in particular information technology), to categorize and group the claims received, as well as review and, where appropriate, verify the evidence produced by claimants. Apart from these 'upstream' services, the Court will be required to ensure a capability to provide the necessary 'downstream' services, including notification and execution of reparation awards. In developing these services, the Court is well advised to draw on the wealth of experience that international mass claims programmes have developed in these areas.⁴¹

The administrative secretariat should be organized in a flexible manner, to ensure expansion and contraction as dictated by the number of victims. This presents a particular organizational and management challenge for the Court. There are a number of options in which this challenge can be addressed, one of them being that a core team of mass claims processing experts is created within the Court, *e.g.*, within the Registry or the Trust Fund. Another option would be 'outsourcing,' for example procuring the necessary services on a case-by-case basis from an international organization that has experience in mass claims processing, or from a group of private expert consultants.

³⁹ For example, the District Court for the Eastern District of New York, which is the competent court supervising the implementation of the Settlement Agreement reached in the Holocaust Victim Assets Litigation, delegated the processing of individual restitution claims to the Zurich-based Claims Resolution Tribunal and other similar bodies. For discussion see, *e.g.*, V. Heiskanen, *CRT-II: The Second Phase of the Swiss Banks Claims Process*, in *CRIMES DE L'HISTOIRE ET RÉPARATIONS: LES RÉPONSES DU DROIT ET DE LA JUSTICE* 147 (L. Boisson de Chazournes, J.-F. Quéguiner and S. Villalpando, eds., 2004).

⁴⁰ It is well known that a strong secretariat is a key feature of a successful mass claims programme. For discussion see *e.g.* V. Heiskanen, *supra* note 18, pp. 272–74, 390–392.

⁴¹ For a useful comparative study of the various approaches adopted in practice see Holtzmann & Kristjansdottir, *supra* note 26.

1.4. *The Existing Structure to Provide Reparations – The Trust Fund and The Court’s Binding Orders*

Article 75(2) of the Statute provides the Court with the authority to issue orders directing a convicted person to make specific reparation to the victims. Provision is included for reparation to be made through the Trust Fund rather than directly to victims. The latter approach should presumably be adopted in cases in which it is impossible or impracticable, at the time of making the order, to award each individual directly. This may be the case, for instance, when individual victims are not readily identifiable or deceased.⁴² Collective awards through the Trust Fund are also envisaged in circumstances ‘where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate’ (Rule 98(3)).

The Trust Fund figures prominently in the International Criminal Court reparations scheme. The role and structure of the Trust Fund is laid down in general terms in article 79 of the Statute:

Trust Fund

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

The regulatory framework outlined in article 79 was subsequently complemented by a Resolution of the Assembly of States Parties, which provided for a clearer, although by no means complete operational design for the Trust Fund.⁴³ The Resolution dictates the functioning and organization of the Trust Fund. It provides for the establishment of a five-member Board of Directors whose primary responsibility will be ‘to develop suggestions for further criteria for the management of the Trust Fund for consideration and adoption

⁴² See article 75(2) in combination with Rule 98(1)-(3) of the Rules of Procedure and Evidence.

⁴³ ‘Establishment of a Fund for the Benefit of Victims of Crimes Within the Jurisdiction of the Court, and of the Families of Such Victims’, ICC-ASP/1/Res.6, adopted at the third plenary meeting on 9 September 2002 (by consensus).

by the Assembly of States'. More generally, the Board will be responsible for establishing and directing the activities and projects of the Fund 'and the allocation of the property and money available to it, bearing in mind available resources and subject to the decisions taken by the Court'.⁴⁴ A complementary step was taken when the Assembly of State Parties adopted the Regulations of the Trust Funds for Victims.⁴⁵

The Registrar of the Court is made responsible for providing the necessary assistance to the Board of the Trust Fund. The Resolution foresees that as and when the workload of the Trust Fund justifies, an Executive Director may be appointed to ensure the proper and effective functioning of the Fund. The set up and composition of the Board of Directors suggests that the Trust Fund is intended to act as a financial administration organ rather than an operative body in charge of settling mass claims on behalf, and under the supervision and guidance of, the International Criminal Court.⁴⁶ As noted above, delegating the operative function of claims processing to a subsidiary quasi-judicial body such as a panel of experts would be a more effective and efficient solution and in line with international practice.

To ensure eligible victims receive financial compensation or reparation for their suffering, the Court may be required to both issue and enforce orders to State authorities or other third parties for the purpose of confiscating, freezing or obtaining information about the assets of the accused. Articles 57(3)(e) and 93(1)(k) of the Statute vest the Court with a general power to seek the cooperation of States in relation to the 'tracing and freezing or seizure of proceeds, property, and assets and instrumentalities of crimes for the purpose of eventual forfeiture'.⁴⁷ Pursuant to article 93(1), States parties to the Statute are bound to comply with any such orders. Binding orders may also be necessary following a guilty verdict, to ensure proper implementation of reparation measures that the Court may consider necessary or appropriate in the circumstances.⁴⁸

⁴⁴ *Ibid.*, annex, para 7.

⁴⁵ ICC-ASP/4/Res.3, 3 December 2005.

⁴⁶ See, generally, 'Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the Period 16 July 2004 to 15 August 2005', ICC-ASP/4/12, 29 September 2005.

⁴⁷ See also Rule 99 and article 75(4) concerning post-conviction orders and article 109 concerning the enforcement of fines and forfeiture measures.

⁴⁸ See, in particular, article 75(4) and Rule 99.

The Court may order seizure of instrumentalities, proceeds, or property the value of which corresponds to such proceeds, even where the assets are in the possession of an individual other than the accused, provided it can be established the accused is the true owner of those valuables.⁴⁹ If the Court fails to exercise its powers to seize assets, it is unlikely that funds obtained through fines, forfeiture measures or voluntary contributions would allow for more than symbolic awards. Victims and their representatives must be proactive in seeking such orders as early as possible in the proceedings, lest the prospect of monetary awards remain illusory. In making an order, the Court must ensure the rights of the accused, in particular the presumption of innocence, is not prejudiced.

Once the Court has established the principles governing the reparation proceedings and identified the scope of 'civil liability' of the accused, it retains the discretion to delegate practical aspects of reparation claims to a subsidiary body such as the Trust Fund or, more appropriately, to a panel of experts. Nothing in the Statute requires the Court itself to process reparation claims, in particular where the number of claims or their complexity is such that the Court's ability to exercise its principal function – conducting criminal trials – would be at risk.

It will be necessary for the Court to retain overall control of the process. The Statute and the Rules provide the Court with sufficient flexibility to allow delegation of the mass claims processing function to a quasi-judicial panel of experts acting under the Court's guidance, responsibility and supervision. The Rules specifically provide that in assessing the scope and extent of the damage suffered by victims, the Court may appoint experts to assist.⁵⁰ Such experts may be further mandated to recommend various options concerning the appropriate types and modalities of reparations.⁵¹

Because the Statute places primary responsibility for reparations upon the Court itself, it is the Court's responsibility to supervise the reparation process and activities of both the Trust Fund and any other body to which the Court may decide to delegate the conduct of the process.⁵² The Court's ultimate authority is likely to require any

⁴⁹ See by comparison the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, [1990] ETS 141.

⁵⁰ Rule 97(2).

⁵¹ *Ibid.*

⁵² Concerning the Trust Fund, in particular, article 79(1) makes it clear that it is being set up 'within the jurisdiction of the Court'.

awards that may have been determined by a subsidiary body, such as a panel of experts, to be referred to the Court for approval. In other words, the Court may decide to treat such awards effectively as recommendations.⁵³

While the Statute advances the right of victims to participate in reparation proceedings and clarifies the manner in which this may occur, it remains largely silent on the actual mechanics of reparation. Establishing a mechanism has been left to the Court's discretion. The Statute and the Rules do not provide, for instance, for any pre-determined mechanisms or procedures for processing reparations claims and the implementation of awards. The Statute is also silent on the priority of reparations – if any – between different categories of victims and between various cases pending before the Court. Nor is it clear from existing regulations what role the Trust Fund will eventually have in the reparation process, or whether all of the practical aspects of mass claims processing will be left to other bodies, such as the panels of experts.

A further open question is that of administrative support: is it the Registry, or another administrative entity established by the Court, that will provide the necessary administrative, technical, legal support and other forms of secretariat services to the body responsible for mass claims processing?

II. LEGAL AND PRACTICAL CHALLENGES OF REPARATIONS PROCEEDINGS

Judge Claude Jorda, once President of the International Criminal Tribunal for the former Yugoslavia and now a judge at the International Criminal Court, has noted, 'the right to obtain reparation [and] the consequences and difficulties arising from the implementation of such a right do not appear to have been clearly contemplated in the provisions governing the ICC'.⁵⁴ The challenging and ambitious mandate assigned to the International Criminal Court under article 75 to ensure reparations for victims of crimes is in stark

⁵³ Compare the United Nations Compensation Commission, where the panels of Commissioners processed the claims and submitted their 'reports and recommendations' to the Commission's Governing Council for its approval. It is unclear what sort of appeal proceedings will be provided to challenge any such decisions.

⁵⁴ C. Jorda and J. de Hemptinne, *supra* note 2.

contrast with the embryonic structure put in place to ensure the fulfilment of that mandate.

A number of problems are readily identifiable. Below is a tentative list of *some* of the problems and challenges which the Court is likely to face as soon as trial or pre-trial proceedings get under way:

- (i) *Scale of reparations proceedings and the number of claimants:* The crimes which are within the jurisdiction *ratione materiae* of the Court generally involve large numbers of victims and, consequently, large numbers of potential claimants.⁵⁵ This is likely to be the case because the Prosecutor of the International Criminal Court will in all likelihood focus on high-level officials or high-ranking officers – any criminal activity by such persons is likely to result in a high number of victims. Large-scale reparation proceedings arising from such offences have the potential to undermine the Court's ability to fulfil its primary mandate to determine the guilt or innocence of the accused.

How strictly the Court determines the conditions of eligibility will significantly impact on the overall scale of the reparations proceedings. Lack of guidance as to the basis for distribution of funds between victims and lack of expertise on the part of Court staff in settling reparations claims on a mass basis may bring the judicial process to a halt and absorb much of the Court's resources. Multiplication of claimants will also increase the cost of legal representation of victims, although Rule 90(2) provides a mechanism whereby victims or groups of victims may be compelled to pool together legal resources and choose a common legal representative or representatives.

- (ii) *Lack of funding and resources:* Because of the high number of potential claimants and the limited assets that are likely to be available for reparation purposes, reparations awards are likely to be rather modest. While States proved generous with their

⁵⁵ For example, the United Nations Compensation Commission received approximately 920,000 category 'A' claims and it approved the payment of more than US\$3.2 billion in compensation for over 860,000 successful 'A' claimants. The Commission received approximately 6,000 category 'B' claims. US\$13,450,000 was distributed in compensation for distribution to 3,945 successful claimants of category 'B'. It received approximately 420,000 category 'C' claims and paid more than US\$4.9 billion to successful category 'C' claimants (all figures taken from <http://www2.unog.ch/uncc/clmsproc.htm>).

words at the time of drafting the Rome Statute, it is more than probable they will adopt a much tighter approach when the time comes to actually make a financial contribution.⁵⁶

Likewise, judging from the experience of the *ad hoc* tribunals, the prospect of confiscating any meaningful amounts from the accused through fines and forfeiture orders may remain rather remote, and the practical difficulties involved have proven a resilient enemy of victim reparations. Considering these limitations, any determination by the Court as to the nature and scope of the damage for which reparation may be claimed, and the evidentiary standard applicable in reparation proceedings, will determine whether reparations before the International Criminal Court will prove more than symbolic.⁵⁷

- (iii) *Lack of expertise*: The International Criminal Court 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 are likely to be faced with. Nor has the Court been provided with the resources that would allow it to perform the functions of a mass claim commission. While the Statute and the Rules arguably provide the Court with the authority to delegate some of the claims processing tasks to a subsidiary body, it is not yet clear whether the Court is inclined to adopt this course of action, in practice.
- (iv) *Lack of an adequate procedural mechanism*: Judges will further be hampered by the institutional deficiencies of the mecha-

⁵⁶ As of 15 August 2005, the Trust Fund had received less than 700,000 euros in voluntary contribution (see 'Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the Period 16 July 2004 to 15 August 2005', ICC-ASP/4/12, 29 September 2005).

⁵⁷ For example, the procedure at the United Nations Compensation Commission had clearly no ambition, from the start, to cover all the losses of the victims of the invasion of Kuwait by Iraq, but intended to 'make determinations on a large number of claims in a reasonable time' (<http://www2.unog.ch/uncc/clmsproc.htm>) or, put in other terms, 'de donner aux victimes d[u] conflit la possibilité d'obtenir, en compensation de leurs préjudices, une somme raisonnable d'argent afin que l'injustice qu'ils ont subie soit amoindrie, rendant possible le rétablissement de la paix internationale' (d'Argent, *supra* note 11, p. 517).

nism that has – or has not – been put in place to deal with reparation claims. As noted above, there are no detailed rules concerning collection and processing of reparation claims and the implementation of awards. Nor has the Trust Fund, in its current format, the ability to serve as a mass claim institution that could be put in charge of reparation proceedings. Panels of experts would be more suitable for that purpose, but again the degree and nature of responsibility the Court will favour investing in is unclear. Responsibility for providing the vital administrative support services also remains open.

- (v) *Evidentiary issues*: Mass claims raise complicated and unique evidentiary issues, including those relating to the nexus between the harm sustained by a victim and the acts of the convicted person and evaluation and quantification of damage. As highlighted above it is unclear who will bear the onus of establishing the ‘civil’ liability of the convicted person (and the extent thereof), and what standard of proof will apply to this finding.⁵⁸

Before the *ad hoc* tribunals the prosecution often sought to speak – and sometimes to act – as a representative of victims. It is doubtful whether the Prosecutor of the International Criminal Court has such a mandate under the Rome Statute and if so, the extent to which resources may be invested accordingly. The responsibility for establishing a case for victims (and undertaking the relevant investigative work) will therefore fall, in most part, upon the legal representatives of the victims. This, in turn, will further drain Court resources.

- (vi) *Investigative issues*: Locating and identifying the assets of an accused or convicted person will require significant investigative resources, which the Court may not be willing to invest unless there is a credible opportunity to confiscate the necessary – or, in any case, meaningful – resources. Even where resources have been identified, it will not be an easy

⁵⁸ See above.

task to prove the relevant assets were obtained as the result of an offence for which the accused was convicted.⁵⁹

- (vii) *Administrative and management issues*: The procedure for establishing a competent reparations body, if one will indeed be established, as well as any institutional relationship it may have with the Court, will be of critical importance to ensure an effective and efficient process. If not properly handled, reparations proceedings before the International Criminal Court are condemned to a fate similar to that of the *ad hoc* tribunals.⁶⁰ The manner in which the proceedings would be conducted before the reparations body is equally important. A best practice model of international mass claims resolution should be implemented.⁶¹

⁵⁹ For example, given the large numbers of claims in categories 'A' (claims of individuals who were forced to leave Iraq or Kuwait) and 'C' (the claims of those who suffered personal losses of up to US\$100,000), the relatively small amount of compensation sought by each claimant and the acceptance by Iraq of legal responsibility for damage arising directly from its invasion of Kuwait, a detailed individual review of these urgent individual claims by the United Nations Compensation Commission was neither warranted nor feasible. To deal with these claims in an efficient, fair and impartial manner, the Commission employed, in addition to individual review of claims where necessary, a variety of internationally recognized techniques for processing claims, including computerized matching of claims and verification information, sampling, individual review and, for some loss elements in category 'C', statistical modelling. Category 'B' claims (claims of those who suffered serious personal injuries or whose spouse, child or parent died), on the other hand, being relatively few in number, allowed the panel concerned to resolve them largely through a claim-by-claim review. (<http://www2.unog.ch/uncc/clmsproc.htm>).

⁶⁰ See, generally, S. Malstrom, *Restitution of Property and Compensation to Victims*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD* 376 *et seq.* (R. May et al., eds., 2001) and Chifflet, *supra* note 2. About the procedure at the United Nations Compensation Commission, see d'Argent, *supra* note 11.

⁶¹ Important issues in this respect are, for instances, whether two or more tracks should be put in place, depending on the degree of urgency of the claim. For example, in its very first decision, the Governing Council of the United Nations Compensation Commission decided to expedite and treat on an urgent basis the resolution of claims of individuals who were forced to leave Iraq or Kuwait (category 'A'); the claims of those who suffered serious personal injuries or whose spouse, child or parent died (category 'B'); and the claims of those who suffered personal losses of up to US\$100,000 (category 'C'). Given the traditional emphasis in previous proceedings for the losses suffered by Governments and corporations, this decision to focus first on urgent individual claims marked a significant step in the evolution of international claims practice. (<http://www2.unog.ch/uncc/clmsproc.htm>).

- (viii) *Lack of cooperation with the Court*: It is likely that cooperation from interested state authorities will be less than forthcoming, as suggested by the experience of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. State authorities will likely cooperate only if the Court is willing to invest significant time and resources in ensuring – and enforcing – such cooperation. It is uncertain at this stage whether the Court will be willing to invest its political capital in enforcing reparation orders – and whether it would be successful if it decided to do so.
- (ix) *Fundamental rights of the accused*: The direct impact of reparations on the accused indicates award consideration would occur in the trial proper. Alternatively, and preferably, separation of the procedures would allow independent consideration. A divergent approach would be more logical given the potential for the accused to be acquitted.

If the two processes were not separated, the length of the reparation proceedings must be taken into account, *inter alia*, when assessing the right of the accused to a fair and expeditious trial. The involvement of the accused/convicted person in the reparation proceedings, and the form and the extent thereof, would need to be organized in such a manner as to ensure compliance with his or her fundamental rights. The Court would also have to ensure that reparation proceedings and any orders made in that context are consistent with the right of the accused to be presumed innocent. Considering 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. That risk, however, may be minimized if the reparations system outlined in the Statute and in the Rules is used as effectively, efficiently and fairly as these permit.

CONCLUSION

Although the Pre-Trial Chamber's Decision of 17 January 2006 provides some clarification on the role and participation of victims at the investigative stage, the Decision provides little indication as to how

the Court intends to organize and conduct the reparation proceedings themselves. The prospect of cases being heard before the Court is now real and resolution of the issues highlighted in this paper impending.

The role assigned to the Court by its Statute is not merely to determine the criminal responsibility of the accused. The Court's mandate is broader, and it is specifically envisaged that the Court is expected to 'contribute to efforts to restore and maintain peace and security and guarantee lasting respect for and enforcement of international justice'.⁶² An effective, efficient and fair reparation system for victims may greatly contribute to this effort. And so it should. But if victim reparation is to serve its goal, substantial time and resources must be invested by the Court and by its supporters to establish a functioning victim reparation system.

Postponing the difficult practical and legal questions of reparation is no longer possible and the time for action has arrived. The first cases arising before the International Criminal Court will dramatically bring this expectation to the fore. The challenges relating to the organization of victim participation in the proceedings, as provided in the Statute, will have a substantial impact on the pace of the proceedings and the structure of trials. Unless the Court prepares itself for those challenges, and for the potentially disruptive nature of victim involvement, a dark shadow of disappointed expectations will be cast over its proceedings. Those responsible for establishing a Court reparation system are well advised to closely examine those contemporary international and domestic mass claims programs that have successfully faced similar challenges.

Judges of the Court will be required to contribute to the victim reparation's system to ensure the system is properly established and functions effectively and efficiently; while avoiding becoming submerged to the detriment of their primary judicial responsibilities towards both accused and prosecution.

States parties and victims' representatives will also have a role. States must ensure sufficient funds are available to the Court to ensure awards that are more than merely symbolic and to support the Court's efforts to ensure binding orders are complied with. Victims' representatives are required to provide adequate legal and practical advice to those who perceive the International Criminal Court as a forum for justice, thus supporting the victims' quest for recognition of their suffering.

⁶² 'Report of the International Criminal Court', UN Doc. A/60/177 (1 August 2005), p 4.

CRIMINAL LAW FORUM

An International Journal

KEVIN JON HELLER / The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process	255-280
RAY MURPHY / Gravity Issues and the International Criminal Court	281-315
MARC HENZELIN, VEIJO HEISKANEN and GUÉNAËL METTRAUX / Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes	317-344
<i>Book Reviews</i>	
GUY CUMES / <i>Ad Hoc</i> Tribunals	345-353
KAI AMBOS / International Criminal Proceedings	355-359
EDEL HUGHES / European Integration: The Interaction between European and National Law	361-365
THOMAS MORAWETZ / The Language of Responsibility	367-373
Author Index	
Volume Contents	