



**CENTER ON
INTERNATIONAL
COOPERATION**

The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Article 79)

Recommendations for the Court Rules of Procedure and Evidence

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Preparatory Commission for the International Criminal Court*

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FOREWORD

The Center on International Cooperation is pleased to make available the following papers by Dinah Shelton and Thordis Ingadottir on "The International Criminal Court: Reparations to Victims of Crimes and the Trust Fund (Articles 75 and 79 of the Rome Statute)". By doing so we hope to make a contribution to current discussions of the merits and means of victim reparations under international law in the context of the July 26 — August 13 meeting of Preparatory Commission for the International Criminal Court. The Center itself takes no position on the legal questions involved but believes that the views of the papers' authors can help to both clarify provisions in the Rome Statute and inform decisions on the structure and use of the proposed Trust Fund. We invite readers to comment on the papers directly to the authors or to Center staff at <cic.info@nyu.edu>.

The Center on International Cooperation is an independent institute, established at New York University in 1996, to conduct policy research and international consultations on the management and financing of multilateral commitments. Our work, done in collaboration with partners around the globe, focuses on the institutions and actors that animate the international public sector and the body of norms, treaties, conventions and agreements that underlies it. In addition to maintaining a data-base on diverse areas of multilateral cooperation, we have undertaken specific projects on international justice, humanitarian assistance, post-conflict reconstruction aid and the Cairo Conference on Population and Development. Further detail on each of our projects is available, along with our publications and working papers, on the Center's web site <www.cic.nyu.edu>.

Aware that international law is the linchpin of this burgeoning international public sector the Center — in partnership with the Foundation for International Environmental Law and Development — launched the Project on International Courts and Tribunals. The Project stems from an acknowledgment of the proliferation of international courts and tribunals and their increased use in virtually every areas of international activity. The Project's intent is to examine — in a comprehensive and comparative framework -- the structure, function and use of these bodies, focusing particular attention on two interrelated matters: how institutional capacity and access affect the delivery of international justice. Additionally, the Project further seeks to clarify a number of legal issues that arise from the increased number and more frequent use of these international courts and dispute settlement bodies.

The papers presented in this publication represent the Center's contribution to the goals of PICT and in no way are intended to imply an endorsement on the part of PICT, its co-sponsors at FIELD or the PICT Steering Committee.

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PROLOGUE

The Statute of the International Criminal Court, adopted in Rome on 17 July 1998, is one of the most significant developments in international law and international relations of the second half of the twentieth century. Regardless of whether and when it will enter into force, and how many States eventually accede to it, what has been accomplished in Rome cannot be cancelled and pushed into oblivion. It will always stand as evidence that impunity for war crimes, crimes against humanity, genocide and aggression is no longer acceptable at any place and at any time. Certainly, this is not the first time that humanity has taken such a firm stand. In the aftermath of the Second World War, the International Criminal Tribunal at Nuremberg and the International Military Tribunal for the Far East were established to try major German and Japanese war criminals. Again, at the beginning of the 1990s, atrocities committed in the Former Yugoslavia and Rwanda prompted the UN Security Council to establish two ad hoc international criminal jurisdictions.

Yet, what makes the Statute of the International Criminal Court (the Rome Statute) significantly different from its predecessors, and in particular from the two more recent tribunals, is that for the very first time

victims of crimes and their families can access the Court to express their views and concerns (Article 68 of the Rome Statute) and to claim reparation for the wrongs suffered (Article 75).

Until the Rome Statute was adopted, the aim of international criminal justice was essentially to help restore international peace and security by punishing those responsible for heinous crimes during war-time (retributive justice). The impartial trial and punishment of some criminals (and not always the most culpable ones) by itself was considered vindication. Justice was done in the name of the abstract notion of "humanity" but not necessarily in that of the victims.

In the Yugoslavia and Rwanda tribunals, victims can enter the courtroom only as witnesses, providing one of the means through which evidence may be brought before the tribunal. In the Rome Statute, however, those who have suffered have been elevated from a mere aid in the judicial process _ with no own interest to protect but that of the criminal justice system _ into full legitimate participants. Several provisions in the Rome Statute stipulate the involvement of victims during all phases of the case (e.g. Articles 15.3, 19.3, 68.3, 75, and 82.4). Most importantly, victims of international crimes now can claim reparation for the violation of their rights. They will do so on their own behalf or through their representatives, not through a State espousing their claims.

The idea that individuals are entitled to have international judicial fora deciding upon and awarding reparations is not new. First the European Court of Human Rights and then the Inter-American Court of Human Rights, have for decades been awarding victims reparations. As the first part of this study shows, the individual's right to reparation is a fundamental human right that is not only expressly guaranteed by global and regional human rights instruments but also routinely applied by international and national courts. Yet, it is only with article 75 of the Rome Statute that the idea of restorative justice against the individual perpetrators of violations has become a dimension of international criminal justice.

Article 75 does not exhaust the means through which victims of crimes might be compensated. Again departing from previous practice, article 79 of the Rome Statute provides for the establishment of a Trust Fund for "...the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims" which, beside acting as intermediary between the convicted person, the Court and the victims for the modalities of compensation, is to pool together money and other property collected through fines, forfeiture or other sources (e.g. voluntary contributions). The Trust Fund is dealt with in the second part of this study.

Articles 75 and 79 of the Rome Statute confer on the Court and the Assembly of States Parties the duty of fleshing out the innovative provisions they contain. The Court's Rules of Procedure and Evidence therefore will be the means to foster or to undermine the breakthrough achieved by the Rome conference. In the interest of equity, efficiency and effectiveness of the future International Criminal Court, the papers that follow are intended to provide some suggestions as those Rules of Procedure and Evidence are being developed.

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Part One

**REPARATIONS TO VICTIMS
AT THE INTERNATIONAL CRIMINAL COURT**

By Dinah L. Shelton

I) INTRODUCTION

Article 75.1 of the Rome Statute mandates the Court to:

"...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."

Information provided and policies suggested in this section are based on the fundamental principle that the internationally guaranteed human rights of every person appearing before the Court, whether victim or defendant, be respected. Human rights law establishes a minimum standard of treatment that must inform the Court's work. Given the concurrence of jurisdiction between national tribunals and the International Criminal Court, individuals should receive no less favorable treatment at the International Criminal Court than that guaranteed them in national courts under the international customary and treaty law of human rights.

II) REPARATIONS TO VICTIMS IN INTERNATIONAL LAW: SOME LESSONS FOR THE INTERNATIONAL CRIMINAL COURT

1) The Right to a Remedy

The right to a remedy when rights are violated is expressly guaranteed by global and regional human rights instruments. Most texts guarantee both the procedural right of effective access to a fair hearing and the substantive right to a remedy. The Universal Declaration of Human Rights provides that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or laws" (art. 8). The International Covenant on Civil and Political Rights contains three separate articles on remedies. Article 2.3 calls on States Parties to ensure that any person whose rights or freedoms recognized in the Covenant are violated shall have an effective remedy notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have the right thereto determined by competent judicial,

administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and to ensure that the competent authorities shall enforce such remedies when granted. The Convention on the Elimination of Racial Discrimination, also contains broad guarantees of an effective remedy (art. 6), like the Convention on the Elimination of All Forms of Discrimination against Women, which requires competent national tribunals and other public institutions to ensure "the effective protection of women against any act of discrimination." (art. 2.c).

The United Nations Convention against Torture refers in article 14 to redress and compensation for torture victims:

"Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation."

Declarations, resolutions and other non-treaty texts also address the right to a remedy. In some instances, the issue is raised by human rights organs when issuing "general comments". In 1998, the Working Group on Involuntary or Enforced Disappearances issued a General Comment to Article 19 of the 1992 Declaration on the Protection of All Persons from Enforced Disappearance. The Working Group elaborated on the obligation to provide adequate compensation. Compensation is deemed "adequate" if it is "proportionate to the gravity of the human rights violation (e.g. the period of disappearance, the conditions of detention, etc.) and to the suffering of the victim and the family." Amounts shall be provided for any damage, including physical or mental harm, lost opportunities, material damages and loss of earnings, harm to reputation, and costs required for legal or expert assistance. In the event of the death of the victim, as a result of an act of enforced disappearance, the victims are entitled to additional compensation. Measures of rehabilitation should be provided, including medical and psychological care, rehabilitation for any form of physical or mental damage, legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty, family life, citizenship, employment or property, return to the place of residence, and similar forms of restitution, satisfaction and reparation that may remove the consequences of the enforced disappearance.

Norms adopted in the area of crime prevention and criminal justice also mandate remedies. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power [1](#) contains broad guarantees for those who suffer pecuniary losses, physical or mental harm, and "substantial impairment of their fundamental rights" through acts or omissions, including abuse of power. Victims are entitled to redress and to be informed of their right to seek redress. The Declaration specifically provides that victims of public officials or other agents who, acting in an official or quasi-official capacity, violate national criminal laws, should receive restitution from the state whose officials or agents are responsible for the harm inflicted. Abuse of power that is not criminal under national law but that violates internationally recognized norms relating to human rights should be sanctioned and remedies provided, including restitution and/or compensation, and all necessary material, medical, psychological, and social assistance and support.

Regional instruments also contain provisions requiring legal remedies for violations of human rights. The commissions and courts have interpreted and applied these guarantees in several cases. The European Convention on Human Rights modeled its general remedial provision, contained in article 13, on article 8 of the Universal Declaration of Human Rights. The American Convention on Human Rights goes further, entitling everyone to effective recourse to protection against acts that violate the fundamental rights recognized by the constitution "or laws of the state or by the Convention," even when the act is committed by persons acting in the course of their official duties (art. 25). The African Charter has several provisions on remedies. Article 7 guarantees every individual the right to have her/his cause heard, including "the right to an appeal to competent national organs against acts violating his fundamental rights as

recognized and guaranteed by conventions, laws, regulations and customs in force."

In sum, it is clear that the existence of effective remedies is an essential component of international human rights law.

2) The Purpose of Remedies

The primary function of corrective or remedial justice is to rectify the wrong done to a victim. Compensation can only provide something equivalent in value to that which is lost; rectification or restitution restores precisely that which is taken. Where restitution or rectification is not possible, substitute remedies, including damages, are required. In fact, monetary compensation is the most common form of reparation because, as Grotius says, "money is the common measure of valuable things." The amount of compensation must correspond to the value of restitution in kind. Arbitral tribunals frequently restate the theory that reparations "must wipe out all the consequences" of the illegal act. In the *Lusitania* cases, the arbiter Parker stated that the "remedy must be commensurate with the injury received.... The compensation must be adequate and balance as near as may be the injury suffered."²

Human rights violations committed by State officials are qualitatively different from private injury because of the motives and nature of the conduct as well as the identity of the wrongdoer. Individuals expect protection from the State; one of its fundamental purposes is to secure the safety and well-being of those within its power. For the government itself to cause harm adds an element of outrage generally not present in purely private wrongdoing. The Inter American Court of Human Rights recognized the profound impact that such violations can have. In the *Loayza Tomayo v. Peru* ³ (*Reparations*) decision, it pointed out that the very existence and conditions of the life of a person are altered by unfairly and arbitrarily imposed official actions taken in violation of existing norms and of the trust that is placed in the hands of public power, whose duty is to protect and provide security in order for individuals to exercise their rights and satisfy their legitimate personal interests. The remedies afforded should reflect the breach of trust involved because, in general, the more outrageous the wrongdoer's conduct, the more outraged and distressed the victim will be and the greater the harm that will be suffered.

Remedies should provide the important psychological and social functions of reintegration and rehabilitation of the victimized. Victims of abuse often are blamed for their victimization or avoided because of the horrific nature of the stories they have to tell. Bystander's guilt may also lead to rejecting the victims. Not infrequently, the social reaction is indifference or avoidance leading to a silence that is detrimental to the victims, producing isolation and mistrust. Children of victims may adopt these reactions and themselves become victims over time. The need to re-adapt to normal society and return to pre-victim ways of living and functioning is crucial.

As compensation is the most common remedy, every legal system should strive for certainty in calculating damages to avoid under- or over-compensating a victim. Uncertainty and arbitrariness in awards undermines respect for the law; legal certainty represents one of modern jurisprudence's central concerns as the law searches for order and predictability. The rule of law implies that society administers justice by fixing standards that individuals may determine prior to controversy and that reasonably guarantee all individuals like treatment. Accurate assessment is also necessary because inadequate or excessive awards frustrate the compensatory, retributive and deterrent functions of the law.

The prevalence of compensation as a remedy should not diminish consideration of the need for other kinds of redress. When rights are infringed, someone has been victimized because of an unwarranted act of interference and can therefore justifiably has the right to reclaim her/his prior position. This focus on the victim demands provision of something equivalent in value to that which was lost, or restoring precisely that which was removed. The primary goal of remedies thus should be rectification or restitution rather

than compensation. When rights are violated, the ability of the victim to pursue self-determination is impaired and it is not justifiable generally to assume that compensation restores the moral balance *ex ante*. A morally adequate response addresses itself in the first instance to restoring what was taken.

3) Who May Claim Reparations

International tribunals have adopted rules and decided cases setting forth the procedural requirements to claim remedies, including standing to file claims, presentation of claims, and the power of the tribunals to oversee the execution of judgments. The designation of a "victim" is an international legal question and at a minimum includes the individual whose right or freedom has been violated. It generally is not necessary for the victim to be a national or resident of the defendant state. When the victim is deceased or the injury has consequences for other persons, third parties also may be characterized as victims of the violation. The former European Commission on Human Rights defined the term "victim" as including "not only the direct victim or victims of the alleged violation, but also any person who would indirectly suffer prejudice as a result of such violation or who would have a valid personal interest in securing the cessation of such violation." [4](#)

Among the cases decided by the Inter-American Court of Human Rights by the end of 1998, few direct victims had survived the breaches to bring an international complaint. In all remaining cases, various family members and other dependents of the deceased were the claimants. In such cases they sought remedies for 1) injuries to the deceased prior to death; 2) wrongful death; and 3) consequential damages they have suffered in their own right. The Inter-American Court has held that both pecuniary and non-pecuniary claims survive and automatically pass to the victim's heirs or successors. In general, the Court requires the State to remedy the harm caused to those who suffer the "immediate effects" of its breaches of human rights guarantees when those effects are sufficiently direct and proximate. In *Loayza Tamayo v. Peru*, the Court held that the victim's family members were also "injured parties" within the meaning of article 63.1 and could present their own claims during the reparations phase of the case. The Court considered that the term "family members" should be understood in a broad sense to include all those persons linked by a close relationship, including the children, the parents and the siblings. Similarly, in *Blake v. Guatemala*, the parents and siblings of the disappeared all claimed to be directly injured by Blake's disappearance and death. The Court referred to the especially grave context of forced disappearance that caused the family anguish and suffering, together with insecurity, frustration and impotence in the face of the government's failure to investigate. Finding that the family had experienced grave moral damage and suffering as a result of the violations, it awarded each member of the family \$30,000. Finally, in *Suarez Rosero v. Ecuador*, the applicant sought \$20,000 in moral damages for himself, and \$20,000 for his wife and daughter. The Court awarded \$20,000 each to him and his wife, and \$10,000 to the daughter, holding that it is human nature to suffer in the circumstances he had been through and that no proof was required. Further, there must be presumed repercussions for his wife and daughter. The Court based its award on the totality of the circumstances and awards made in similar cases.

The Human Rights Committee has also indicated that family members may be considered victims of violations perpetrated on one of their relatives. In the case of a disappearance, the Committee found that the mother of the disappeared was a victim.

Standing to claim remedies thus will extend to all direct and indirect victims of crimes within the jurisdiction of the ICC. This will necessarily include legal as well as natural persons. Article 8 of the Statute includes crimes whose victims most often are legal persons. These crimes include extensive destruction and appropriation of property (art. 8.2.a.iv), attacking or bombarding towns, villages, dwellings or buildings (art. 8.2.b.v), and intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, and historic monuments (art. 8.2.b.ix). The last, in particular, is likely to involve claimants from municipalities to foundations, religious institutions and

museums. Looting of cultural property and the destruction of cultural monuments is a war crime and contrary to the 1954 Hague Convention on the Protection of Cultural Property During Armed Conflict. It is a crime that has become particularly significant during ethnic and religious conflicts. Examples abound of such attacks and the efforts to recover such property by the legal entities entitled to the property, from the Greek Cypriot church lawsuits to recover stolen mosaics from churches in occupied Cyprus, to the looting of the museum of Kabul, to the taking of temple artifacts in Cambodia, to on-going efforts to recover art stolen during the Second World War. If legal persons are not permitted to make claims at the ICC, there will be many instances of looted or destroyed cultural property in which no one will have standing to seek restitution or compensation, thus rendering a portion of the Court's jurisdiction moot.

4) Kinds of Remedies

The law of remedies in legal systems throughout the world seeks to undo the effects of wrongdoing and restore what was taken from the victim. Thus, restitution is preferred when possible and money is awarded as a substitute when the victim cannot be restored to her/his pre-injury position. In practice, restitution is generally limited to claims of stolen property, unlawful termination of employment or arbitrary detention, and similar cases where the exact thing taken can be returned. For personal injury and death no restoration is possible, however. Life cannot be recovered, nor can a rape or torture victim have the rape or torture expunged. In such cases, money becomes a substitute for the pre-injury status.

A sum of money awarded as damages is designed to compensate plaintiffs for harm they have suffered, with the intention of making the victim as well off as he or she would have been if the injury had never occurred. It must be recognized that large amounts of money may be necessary to place the victim in the same position of relative satisfaction that he or she occupied before the event. The assessment or calculation of damages is complex. Physical injury, for example, can cause harm in two ways. First, it lowers the level of income received, and second it usually lowers the value of any income received because of the loss of possibilities to enjoy it.

Human rights tribunals classify monetary compensation under three headings: a) pecuniary losses, b) non-pecuniary damage and c) costs and expenses.

Intangible injuries such as physical pain and suffering have long been recognized as legitimate elements of damages. Mental anguish independent of physical injury is also now recognized as an element of recovery, including humiliation, loss of enjoyment of life and other non-pecuniary losses. Loss of consortium when one is deprived of a spouse may include loss of love and companionship as well as services in the home, society, and sexual relations. The impairment of any of these gives a right to damages. Interference with parent/child relations may lead to damages for loss of companionship, comfort, guidance, affection and aid. All these factors represent the irreplaceable intangibles of family life. In civil law systems, "préjudice moral" includes pain and suffering, sadness and humiliation caused by disfigurement, loss of amenities, loss of recreational ability, loss of any of the five senses, inability to enjoy sexual relations, harm to marriage possibilities, and generally damage to the enjoyment of life. Overall, where there has been an injury, the focus is at least in part on diminution of the injured person's expectations of life.

In sum, national and international tribunals award compensation for violations of basic rights and provide numerous examples of expansive remedies designed to ensure the restoration, as nearly as possible, of the situation that would have existed had the wrongful conduct not occurred.

5) Reparations in Large Numbers of Cases

Actions within the jurisdiction of the Court are likely to accompany internal armed conflicts, where the sheer number of victims and perpetrators may overwhelm the best efforts to provide full redress to victims. When there are thousands of victims in need of justice, both the procedures and the substance inevitably alter. Administrative solutions like sampling, or summary procedures can assist in affording swifter resolution of claims for compensation. Compensation and other remedies are part of the rehabilitation process of torture victims and other survivors of gross misconduct. In balancing needs and ability to pay, compromise is probably necessary in many cases because there are insufficient funds to provide full compensation to all victims. In the context of State action, a UN Victims of Crime report recommended that "if it is uncertain whether the budgetary means of the State will be sufficient to cover an unknown number of claimants, a fund should be established to limit the financial burden. A basic amount should be paid out immediately and the difference paid later, the final amount payable to each claimant being known only at the time when it is clear how many claimants filed claims and the amounts distributable out of the fund." [5](#)

The 1990 conflict in the Persian Gulf created new laws and procedures on reparations for mass violations during armed conflict. [6](#) The United Nations Compensation Commission has built upon the practice of international tribunals hearing claims of State responsibility for injury to aliens. It also has looked to U.S. mass tort claims administration as a model for the Iraqi claims process. It has used "some of the techniques and arts of sampling that were developed in the [U.S.] asbestos and Dalkon Shield cases." [7](#) The Commission is limited to awarding monetary compensation, and cannot impose restitution or punitive damages.

The UNCC has determined that pecuniary losses include loss of income and medical expenses, mental pain and anguish due to the death of a spouse, child or parent of the individual, or the individual's serious personal injury or suffering of a sexual assault, aggravated assault or torture. Compensation may be awarded for mental pain and anguish to individuals for dismemberment, disfigurement, loss of use of a body part, being taken hostage, being illegally detained, having a well-founded fear for one's life, and being deprived of all economic resources such as to threaten one's survival. The UN has published a scale of mental pain and anguish for most of the situations faced by individuals during the conflict. Victims of aggravated assault, sexual assault or torture may claim up to \$5,000 per incident. [8](#)

In the United States, the *Marcos* litigation exemplifies the problems associated with efforts to afford all victims some remedy. In the class action suit, the large numbers of victims necessitated innovative procedures that limited the individualized decision-making, taking of evidence, and procedural fairness to both sides that would normally be required in litigation. Rather than hold separate hearings on each of the 10,059 claims, the U.S. District Court allowed the use of a statistical sample of the claims in determining compensatory damages. After an initial review, 518 claims were ruled facially invalid, leaving a pool of 9,541, of which 137 were randomly selected by computer. The number chosen was based on the testimony of a statistical expert who stated that a random sample of 137 claims would achieve a 95 percent statistical probability that the same percentage determined to be valid among the examined claims would be applicable to the totality of claims filed. [9](#)

The 137 claimants randomly sampled, which included torture victims, families of those summarily executed, and those who disappeared, were deposed and the expert reviewed the depositions to determine the claims. Five percent of the claims were determined to be invalid. Based on the sample, the expert recommended that the 64 torture claimants get \$3,310,000, an average of \$52,719 per valid claim. For summary execution, the recommendation was \$6,425,767 for 50 valid claims, an average of \$128,515 per valid claim. For the disappearances, the expert recommended \$1,833,515, an average of \$107,853 per valid claim. The court applied the five percent invalidity rate found in the random samples in making its awards to the entire class of 10,059 remaining claims.

In calculating the amounts due for torture, the expert ranked the claims on a scale from one to five, with

five representing the worst abuses and suffering. Consideration was given to: 1) physical torture, including methods used and/or abuses suffered; 2) mental abuse, including fright and anguish; 3) duration of the torture; 4) length of detention, if any; 5) physical and/or mental injuries; 6) victim's age; and 7) actual losses, including medical bills. "Although each claim of torture was unique", the expert determined "that there were sufficient similarities within a rating category to recommend a standard damage amount to each victim within that grouping." The amount ranged from \$20,000 for category one to \$100,000 for category five.

For summary executions and disappearances, the existence of torture prior to the death or disappearance was weighed in the damages. Loss of earnings was also factored in, using the formula of $\frac{2}{3} \times (80 - \text{age of death}) \times \text{annual income}$, a formula adopted by the Philippine Supreme Court. A cap of \$120,000 was placed on lost earnings. When there was no evidence of earnings, the average for the occupation was utilized.

The *Marcos* cases and the national experiences described above demonstrate the unlikelihood of full compensation even when the desire to provide redress is present. Given the limited resources available, the courts and States have sought a fair way of prorating the claims based on the severity of injury. Such an approach maximizes the recovery of all of the victims who came forward, but should be coupled with other remedies, from prosecution to rehabilitation.

If the International Criminal Court decides upon a sampling or other summary procedure, it should consider utilizing its authority under article 76.3 to afford an appellate hearing to those who claim error in the application of the procedure of their claims.

6. Recommendations for the Processing of Claims under the Rome Statute

The Court will need to develop processes for the filing of claims early on and maintain them throughout the criminal proceeding. This process should begin as soon as an individual is accused of crimes within the jurisdiction of the Court, in order to allow the marshaling and preservation of evidence. Files can be maintained of those who wish to seek compensation for abuse perpetrated by the defendant. The actual hearing on reparations cannot take place until the conviction is obtained. During the criminal phase, the role of victims will be primarily as witnesses for the prosecution.

The Statute foresees that a hearing may be held in connection with sentencing, and this will require that claims be submitted within a reasonable time prior to the hearing. At the hearing, if there are a manageable number of claimants, the Court may accept oral arguments or evidence from each of them. If there are large numbers involved, proceedings similar to those used in the UNCC or the *Marcos* case will be required, perhaps using sampling techniques or designating a representative for the victims.

The issues of evidence and standards of proof will be extremely important. While the requisite standard for conviction is proof beyond a reasonable doubt, this is not an appropriate standard for claims of reparation after the conviction has been obtained. In essence, the claim of redress is a civil claim heard in the criminal jurisdiction. Different legal systems use different terminology, but all utilize a lower standard of proof for civil claims, usually preponderance of the evidence, a balance of probabilities, or "*conviction intime*". It would be unjust to require a high standard of proof of loss or injury, given the circumstances in which many of the victims will find themselves, including refugee status, homelessness, and lacking medical care where certificates or evidence of injury could be obtained.

Inevitably, there will be injuries that emerge or continue after the completion of the criminal proceedings. It seems unreasonable and unmanageable for the Court to continue reopening cases or retaining jurisdiction to hear all claims that may emerge after the date of conviction. In such instances, the Rules of

Procedure and Evidence might provide that claims have to be presented to the Trust Fund and not to the Court itself. If the national courts are functioning, there could be added an requirement of seeking relief in the domestic jurisdiction prior to filing the international claims against the defendant.

III. CONCLUSIONS

The inclusion of a provision on victim reparations in the Statute of the Court confers an opportunity and a responsibility on the Court to afford justice to those who have suffered from the heinous crimes committed by those indicted and convicted of crimes within the Court's jurisdiction. A moral imbalance is created by the wrongs done, and the direct means of correcting that imbalance is for the wrongdoer to restore what was taken or to pay full compensation in lieu of restitution. While criminal prosecution of the guilty serves the needs of the international society to deter and punish, victims require more if they are to be rehabilitated and reintegrated into society. To fulfill the goals of article 75, the Court Rules of Procedure and Evidence should recognize that there are direct and indirect victims, and that the term "victims" includes both natural and legal persons. All victims should be afforded full redress when possible, but at least some redress in every case. Methods of sampling, representation and other innovative mechanisms can assist in achieving this goal when the number of claimants is too large to allow individualized hearings and determinations of reparations. Finally, it is essential to recognize that the failure to provide justice would risk further cycles of violence, thus undermining one of the purposes for the creation of the Court.

Endnotes

1 UNG.A. Res. 40/34 of 29 November 1985. Paragraph 4 states that victims are entitled to access to the mechanisms of justice and prompt redress for the harm they have suffered. Procedures are to be expeditious, fair, inexpensive and accessible. Where appropriate, restitution should be made to victims, their families or dependants by offenders or third parties responsible for their behavior. (Para. 8) Victims of abuse of power are defined as those harmed by acts which do not yet constitute violations of national criminal laws. In 1990, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August - 7 September 1990), recommended that states base national legislation upon the Declaration and requested the UN Secretary General to study the feasibility of establishing an international fund for victims of transnational crimes. Report of the Congress, A/CONF.144/28. The Council of Europe produced the European Convention on the Compensation of Victims of Violent Crimes (1983), a 1985 recommendation R(85) 11 on the position of the victim in the framework of criminal law and procedure, and a 1987 recommendation R(87)21 on assistance to victims and prevention of victimization.

2 Lusitania cases, 7 R.I.A.A. 35, 36.

3 Loayza Tomayo v. Peru, Judgment of 27 November 1998, 43 Inter-Am.Ct.H.R. (ser.C)(1998).

4 X v. Federal Republic of Germany, App.4185/69, 35 Eur.Comm'n H.R. Dec.& Rep. 140, 142 (1970). See also Koolen v. Belgium, 1478/62 13 Eur. Comm'n H.R. Dec. & Rep. 89; X v Germany, 282/57, I Y.B. Eur. Conv. On H.R.166; Andronicou and Constantinou v. Cyprus (Admissibility), 82B Eur.Comm'n H.R. Dec. & Rep. 112 (1995).

5 Victims of Crimes: Working Paper prepared by the Secretariat, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, A/CONF.121/6 at 39 (1985). See also, United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para. 13, G.A. Res. 40/34, 29 Nov. 1985, annex.

6 David J. Bederman, The United Nations Compensation Commission and the Tradition of International

Claims Settlement, 27 INT'L L. & POL. 1 (1994).

7 N. C. Ulmer, The Gulf War Claims Institution, 10 J. INTL ARB. 85, 88 (1993).

8 Ibid.

9s In re Estate of Marcos, 103 F.3d 767, 782.

Part Two

THE TRUST FUND

UNDER ARTICLE 79 OF THE ROME STATUTE

By Thordis Ingadottir*

I) INTRODUCTION

According to article 79 of the Rome Statute:

- "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 States Parties."

Article 75.2 indicates that:

- "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."

The Rome Statute does not describe the way the Trust Fund is to be structured. Article 79 leaves to the Assembly of States Parties the task of deciding crucial issues such as who will control it (e.g. whether it is going to be a fully independent entity, subordinate to the Court or administrated by the UN Secretary-General), how it will be composed (e.g. trustees' nature and capacity), how it will function, and according to which criteria it will disburse. What the Rome Statute does prescribe is that the Trust Fund is to have two sources of income: Awards for reparations made by the Court (art. 75.2); and money and other property collected through fines or forfeiture (art. 79.2). In both instances, the Court is free to decide whether to disburse funds and property itself or rather to entrust the Trust Fund to do so. 1

This section does not intend to discuss what the Rome Statute has left to the Assembly of States Parties to decide and which is therefore outside the mandate of the Preparatory Commission. It will take some time before the Rome Statute enters into force and, as a consequence, the Assembly of the States Parties is convened. The structure and functioning of the Trust Fund will not be discussed for years and in a different forum. However, because the Rome Statute indicates that the Court can resort to the Trust Fund to carry out the fundamental task of awarding victims reparations and to handle money and other property collected through fines or forfeiture, the Preparatory Commission of the International Criminal Court needs to consider such arrangements already at this drafting stage of the Court's Rules of Procedure and Evidence.

If the Court is to eventually resort to the Trust Fund (and this paper advocates that it should be done to the maximum extent possible), then its Rules of Procedure and Evidence will necessarily discipline how it will do so. Moreover, when drafting the Court's Rules of Procedure and Evidence, the Preparatory Commission should keep in mind what the Trust Fund can and can not do under the Rome Statute, and what is left to the Assembly of States Parties to decide. Statutory provisions on the Trust Fund are extremely brief (art. 75.2 and 79) and are far from unambiguous. This section intends to present issues for consideration by the Preparatory Commission of the International Criminal Court.

II) THE TRUST FUND

Under the Rome Statute, the function of the Trust Fund is two-fold: [2](#)

1. it can be used by the Court as *depository* (i.e. the Court can order money and other property collected through fines or forfeiture to be transferred to the Trust Fund. The Trust Fund collects these funds, pools them together and utilizes them for the benefit of victims) (article 79.2); and
2. it can be used by the Court as *intermediary* (i.e. when the Court "...makes an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims...", it can also order that the award of such reparations be made through the Trust Fund) (article 75.2).

There is a substantial difference between the funds the Trust Fund will manage under article 75.2 and those under 79.2. Indeed, it is only in the case of funds deriving from fines and forfeiture (article 79.2) that the Trust Fund will actually act as a trustee (i.e. one who holds legal title to property in trust for the benefit of another person). The wording of article 75.2 clearly indicates that reparations can be awarded by the Court's order *through* rather than *into* the Trust Fund. [3](#) This means that the Trust Fund never acquires proprietary rights to compensation awarded for the benefit of victims. It merely acts as an intermediary. It follows that while the Trust Fund can use funds deriving from fines and forfeiture for anything it might consider beneficial for victims, in the case of awards for reparations, it is bound to disburse it solely to the victims of that particular convicted individual at the time and in the forms decided by the Court. This fundamental difference in functions has an enormous impact on the way the Trust Fund will be structured, managed and financed, and on its relations with the Court.

1) The Trust Fund as "Depository" (art. 79.2)

Under article 77.2, in addition to imprisonment, the Court may order fines and forfeiture of proceeds, property and assets derived directly or indirectly from the adjudged crime, without prejudice to the rights of bona fide third parties. Fines will be collected and property will be forfeited by States Parties, in accordance with the procedure of their national law, and they will transfer those funds to the Court (art. 109). The Court may eventually order money and any other property collected through fines or forfeiture to be transferred to the Trust Fund (art. 79.2).

The significance of this funding source for the Trust Fund will largely depend on the amount of fines imposed. [4](#) In determining fines, in accordance with criteria provided for in the Rules of Procedure and Evidence, the Court shall take into account such factors as the gravity of the crime and the individual circumstances of the convicted person (e.g. age or social and economic conditions of the convicted person, the motive of crime, or superior orders), (art. 78.1). [5](#) A proposal has been made to let the Rules of Procedure and Evidence decide a maximum fine which can be imposed by the Court. [6](#)

When these funds are transferred to the Trust Fund, the Rome Statute does not give any further directions on how they can be used, nor who will have the power of decision. This is a critical gap that should be addressed in drafting the Court's Rules of Evidence and Procedure. The power to decide how to allocate money and any other property collected through fines or forfeiture could rest either with the Court or with the Trust Fund. Of the two solutions, it is the Court which should be given the primary responsibility to determine allocation in its order of transfer to the Trust Fund. The Trust Fund should be allowed to determine the destination and use of such funds only when the Court has declined to do so. In the Rome Statute the power to decide on the amount, management and destination of compensation rests with the Court. If money and any other property collected through fines or forfeiture is eventually to be used also to supplement inadequate reparations that victims of crimes can obtain from the convicted person (i.e. inadequate because assets could not be seized or because they are insufficient), then the Court must have full control of these resources. [7](#)

Regardless of whether the decision on the use of funds deriving from fines and forfeiture is taken by the Trust Fund or the Court, such funds should be used for the benefit of victims only. Under no circumstances should they be used to support operational costs of the Court. The legislative history of the article supports such interpretation. [8](#) The fact that funds deriving from fines and forfeiture are not included as sources of the Court's funding listed in article 115 also strongly supports such a conclusion. Having said this, it remains to be seen which victims should benefit and how from money and other property collected through fines or forfeiture.

Clear policies on the allocation of such funds between cases will have to be adopted. Indeed, in the Rome Statute article 79.2, funds are not earmarked exclusively for the benefit of the victims of the case from which they originate.

Nothing in the Statute prohibits the use of money and other property collected through fines or forfeiture for purposes other than financing compensation. The Rules of Procedure and Evidence should clearly indicate that the Court (or the Trust Fund, if the Court declines to do so) may designate such funds for purposes other than financial compensation.

In the first place, the Court should be allowed to designate money and other property collected through fines or forfeiture for victims' *legal assistance*. Legal expenses incurred by victims for filing their claims and having them adjudicated should be included in reparations. However, the Trust Fund could fund legal assistance to individuals who wish to file claims but are unable to do so because they cannot afford the legal expertise to prepare them, or to defray legal costs for those who file claims and whose cases are pending. Legal aid should be granted not only in proceedings before the Court itself, but also for any other proceedings in national fora aimed at obtaining reparations when the Court has declined doing so. Indeed, since the Rome Statute leaves the Court discretion to decide whether to order reparations, in those cases where proceedings result in conviction but the Court does not order reparations, victims should nonetheless receive help in pursuing remedial justice in national or regional human rights courts. The right to a remedy is a fundamental human right, and the discretionary powers conferred upon the Court should not thwart it. Nothing in the Rome Statute's provisions on reparations to victims can be interpreted as prejudicing the rights of victims under national or international law (art. 75.6).

Secondly, the Court should be allowed to designate funds deriving from fines and forfeiture for individual victims' *interim relief*. Years are likely to pass between the time when crimes are committed and when victims might be awarded reparations (which requires a full trial, conviction and the seizure of assets). The use of funds from fines and forfeiture might help victims sustain themselves, especially when expensive medical and/or psychological support is severely needed.

Thirdly, the Court should be able to designate funds deriving from fines and forfeiture for *humanitarian aid*. Such funds could be allocated to victims directly or through established channels of humanitarian assistance. ⁹ The Trust Fund can engage directly or indirectly in activities benefiting groups of victims (e.g. by helping establish orphan centers, psychological assistance and medical assistance training programs). ¹⁰ This form of aid could reach unidentified victims who, due to their victimization and/or social situation, cannot claim their right to reparation through formal procedures.

2) The Trust Fund as "Intermediary" (art. 75.2)

According to article 75.3 of the Rome Statute:

"Before making an order under this article [i.e. an order to repair and/or to award reparations through the Trust Fund], 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".

The Court is not required to consult the convicted person, victims, other interested persons or interested States before ordering and/or awarding reparations, since it is given a discretionary power to do so ("may"). However, once the position of these participants has been ascertained, the Court shall take it into account. What is remarkably missing from this reference is the Trust Fund. Nothing seems to bar the Court from inviting representations from the Trust Fund for this purpose. However, to ensure the competent management and control of funds entrusted to the Trust Fund, it is crucial that the Rules of Procedure and Evidence mandate the Court to consult the Trust Fund before an order on reparations is made. The Trust Fund can best assess its capacity to fulfil reparations orders. Admittedly, awarding of reparations by the Court will be based first and foremost on abstract legal principles relating to reparations for victims. Yet, the Trust Fund's actual capacity to obtain such awards must be considered. Moreover, the Trust Fund will be bound by its own regulations and operational policies which might prevent it from transferring funds in the terms requested by the Court .

Once the Court has ordered the convicted person to make reparations, it can also order the award to be made through the Trust Fund. The actual use of the Trust Fund as a means to transfer reparations from the convicted person to victims is only optional. Reparations are transferred to the Court first, and the Court could decide to transfer them directly to the victims. Yet, direct transfer is likely to take place only for those cases where reparations do not take the form of monetary compensation but rather of restitution. When reparations take the form of compensation, preference should be given to using the Trust Fund. ¹¹

As the experience of the 1990 Gulf War demonstrates, it is unlikely that sufficient funds could be exacted from convicted persons to pay all claims. ¹² Fines and forfeiture transferred to the Trust Fund could provide additional funding for these award. Actually, it might be easier for the Court to seize fines and forfeited property or assets than to get reparations. The Rome Statute provides that upon warrant of arrest or summons, the Court might ask States Parties to identify, trace and freeze proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, should the indictee be

found guilty (art. 57.3.e and 93.1.k). [13](#) However, under the Statute the Court cannot take similar provisional measures with regard to reparations until it has actually convicted the accused person. [14](#) This makes the collection of forfeited assets and property more likely than that of reparations. This is why article 79.2 funds should also be used to finance reparations. [15](#)

Yet, even when funds deriving from fines and forfeiture are drawn, it is still unlikely that the Trust Fund will have sufficient resources to pay all claims. Criteria on priority of payments should be set. Various factors could be taken into account, such as the kind of injury to be repaired, or the nature of the claimant (natural or legal person). [16](#) Another issue to be considered is whether to resort to installment payments for all or only certain groups of victims. [17](#) Finally, in the case that awards are financed by article 79.2 funds because they are not earmarked for the benefit of the victims of the case from which they originate, [18](#) it should be decided whether all awards in one case should be paid out before those claimed in another case, or only some (and which) of them.

3) Other Possible Sources of Funding for the Trust Fund

Because of the problems the Court will likely experience in securing payment of fines and reparations, and its likely inadequacy to compensate victims and fund essential support activities, alternative sources of financing for the Trust Fund not listed in the Rome Statute, need to be considered.

3.a) *The Court's Budget*

Unlike the international criminal tribunals for Former Yugoslavia and Rwanda, which are subsidiary organs of the UN Security Council, the expenses of which are covered by the core budget of the United Nations and by voluntary contributions, the International Criminal Court is to be funded by States Parties (art. 115.a); funds provided by the United Nations, but only in particular in relation to the expenses incurred due to referrals by the Security Council and subject to the approval of the General Assembly (art. 115.b); and voluntary contributions from governments, international organizations, individuals, corporations or other entities (art. 116). Compared to the International Criminal Court therefore, the two ad hoc tribunals benefit from a much larger and secure financial footing.

The Court will require significant amounts of resources. [19s](#) In comparison, the 1998 budget of the International Criminal Tribunal for Former Yugoslavia was \$64 million, while in the same year the International Criminal Tribunal for Rwanda was slightly less than \$59 million. Among international courts and tribunals only the European Court of Justice has a higher budget (about \$140 million in 1998), while that of other international judicial fora is just a fraction of that of the two ad hoc criminal jurisdictions. [20](#)

The reason for the high cost of international criminal justice is that unlike other jurisdictions, where plaintiffs and defendants bear the costs associated with preparing their cases, in international criminal tribunals the investigation of cases and evidence-gathering are costs borne by the prosecutor's office, hence by the tribunal itself. Moreover, any international criminal tribunal will also invariably bear the costs, wholly or in part, of the defense of the indictees, their maintenance while in detention, and protection of the witnesses, etc. These items do not exist in the case of all other international courts and tribunals (with some exceptions in the case of human rights courts). [21](#)

Because the Court will require large amounts to finance its core activities, and because securing such financing is by itself arduous (as the experience of the two ad hoc criminal tribunals demonstrates), the Trust Fund should not encumber the Court's budget. The Rome Statute does not allocate funds for the Trust Fund to come from the budget of the Court and of the Assembly of State Parties. Article 114 merely

provides that "[e]xpenses of the Court and the Assembly of the States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court". If the Trust Fund is also to be financed with resources from the Court's budget, the Assembly of States Parties will need to amend the Statute; by all means a politically arduous operation.

Besides, subsuming the Trust Fund under the Court and Assembly of States Parties' budget goes against the very nature of trust funds. A trust fund is money or property set aside for the benefit of another and held by a trustee. [22](#) One of the essential characteristics of any trust is self-sufficiency. A trust must have its own separate and sustainable budget, and funds must be sufficiently identifiable to enable legal title to pass to the trustee and from the trustee to the beneficiary. [23](#)

3.b) Voluntary Contributions

The Rome Statute also leaves out voluntary contributions as one of the Trust Fund's means of funding. [24](#) This omission is even more striking when considering that voluntary contributions of Governments, international organizations, individuals, corporations and other entities, can be used by the Court in accordance with criteria adopted by the Assembly of States Parties (art. 116). Despite this, nothing prohibits the Assembly of States Parties from allowing voluntary contributions be made to the Trust Fund. As a matter of fact, the Rome Statute does not determine the structure and operation of the Trust Fund. It merely mandates its establishment by the Assembly of States Parties. The Rome Statute disciplines only funding of the Court itself.

If the Trust Fund is going to accept voluntary contributions, the Assembly of States Parties will need to adopt criteria deciding when, from whom and in which form donations can be accepted. [25](#) It would also need to establish clear policies for the allocation of these contributions. Indeed, donors might want to earmark their contributions for the benefit of victims of certain cases, crimes, regions or for certain activities. The form of acceptable contributions would also need to be decided (e.g. whether contributions will be limited to funds, goods or professional assistance). [26](#)

The criteria on voluntary contributions to the Trust Fund should be broader than those on the Court. Two considerations lead to this conclusion. First, while voluntary contributions to the Court might raise questions about its ultimate independence and impartiality, those to the Trust Fund, because they will eventually benefit only victims, do not. Secondly, although it is impossible to estimate income from voluntary contributions, it is not unlikely that they will involve considerable resources, possibly surpassing funds collected under articles 75.2 and 79.2. Indeed, during the biennium 1996-1997, total income for all general trust funds under the direct responsibility of the UN Secretary-General was \$408.9 million, of which \$315.2 million represented contributions by Governments. [27](#) Total expenditures of these funds was \$356.2 million for the same period, 25.2 percent lower than in the biennium of 1994-1995. [28](#)

Among other trust funds with competencies which might eventually overlap with those of the Trust Fund, [29](#) the UN Voluntary Fund for Victims of Torture receives voluntary contributions from governments, non-governmental organizations and private individuals. The number of States contributing to the UN Voluntary Fund for victims of Torture rose from five in 1982 to 14 in 1990, and 37 in 1998. In 1998, the UN Voluntary Fund for Victims of Torture awarded grants to 114 projects by 105 organizations for \$4.1 million and in 1999, it awarded grants to about 130 organizations for \$5.1 million. Requests for assistance for victims of torture are constantly increasing. In 1996, more than \$5 million was requested from the Voluntary Fund for Victims of Torture; in 1998 this amount was \$6.8 million and in 1999 it was more than \$8 million. [30](#) It has been estimated that about 60,000 victims and members of their families were assisted in 1997 through the support of the UN Voluntary Fund for Victims of Torture. [31](#)

While potentially considerable in amount, voluntary contributions are by their very nature highly volatile and tend to be emergency driven. The Trust Fund should be allowed to engage in negotiations with

governments and other potential contributors. Direct negotiations with States Parties and Non-Parties is essential to obtain long-term voluntary pledges to ensure stability for the fund and greater effectiveness of the Trust Fund. The Trust Fund should also be able to negotiate with Governments *ex gratia* contributions. Under the Rome Statute only individuals can be held responsible for crimes. ³² However, while not legally responsible under the Rome Statute, States might nonetheless feel the moral obligation to contribute to the reparation of certain crimes (e.g. when the convicted person is a national, or when crimes have been committed under a previous government which has been overthrown).

Finally, should voluntary contributions be excluded from the Trust Fund, the Court should nonetheless consider whether it should share some of the voluntary contributions it might receive under article 116 of the Rome Statute with the Trust Fund. Voluntary contributions to the Court are "additional funds". ³³ This seems to indicate that while core expenses of the Court are to be covered by States Parties' assessed contributions, voluntary contributions could be used for collateral activities such as those to be funded by the Trust Fund.

III) CONCLUSIONS

The primary rationale for the provision of the Trust Fund in the Rome Statute was originally to endow the Court with a mechanism to collect, pool together and redistribute funds deriving from the enforcement of fines and forfeiture. Beside this core function, the Court might use the Trust Fund as an intermediary for the financing of reparations. The use of the Trust Fund for these functions is not mandatory, but this paper suggests that the Court should use the Trust Fund to the maximum extent possible. This will free the Court from routine tasks and allow it to concentrate on its judicial functions.

The Rome Statute does not give directions on how funds derived from money and any other property collected through fines or forfeiture should be allocated, nor regarding who will have the power to make such decisions. This is a critical gap that should be addressed at the stage of drafting the Court's Rules of Evidence and Procedure. This study argues that the Court should be given the primary responsibility to decide on the use of funds deriving from fines and forfeiture. The Trust Fund should be allowed to determine the destination and use of such funds only when the Court has declined to do so.

Article 79.2 funds (fines and forfeiture), should be used for the benefit of victims only. Under no circumstances should they be used to support operational costs of the Court. They should be used to finance compensation first. However, the Rules of Procedure and Evidence should further indicate that the Court (or the Trust Fund, if the Court declines to do so) may use such funds for purposes other than compensation, such as legal aid of victims, interim relief or humanitarian assistance. In particular, legal aid should be granted not only in proceedings before the Court itself, but also for any other proceedings in national fora aimed at obtaining reparations when the Court has declined to do so.

It is the responsibility of the Assembly of States Parties to decide whether the Trust Fund should take on a broad role and assist all victims within the jurisdiction of the Court and their families by various means. Nevertheless, the Trust Fund's non-judicial nature will need to be clearly stressed to avoid any misgivings on the effects of its various engagements.

The Court's use of the Trust Fund to award reparations needs to be carefully considered. First of all the legal implications of the Court's order under article 75.2 need to be elaborated upon, and the eventual extent of the Trust Fund's obligations has to be specified. Secondly, the Court will need to establish a mechanism or organ (perhaps a "Claims Bureau") to keep track of and process claims for reparations. The Trust Fund should be allowed to rely on such an organ as much as possible. Because of its relatively limited assets, the Trust Fund should not be burdened with procedural costs which could otherwise be handled by other bodies financed from the regular budget of the Court. Thus, the Trust Fund should only

be used for distribution of available funds but not as a claim-processing instrument. Reasons of efficiency, economy and specialty argue against a dual system.

Criteria on setting priorities for payment of reparations need to be set, possibly as early as in the Rules of Procedure and Evidence. Moreover, to ensure the competent management and control of funds entrusted to the Trust Fund, it is crucial that the Rules of Procedure and Evidence mandate the Court to consult the Trust Fund before an order on reparations is made.

Finally, concerning funding of the Trust Fund with resources other than those specified in the Statute, this paper argues that the Trust Fund should not encumber the Court's budget and vice versa. The two should remain as separate as possible.

The Trust Fund should be allowed to receive voluntary contributions, and the Assembly of States Parties will need to adopt criteria deciding when, from whom and in which form donations can be accepted and how these funds will be used. These criteria should be broader than those of the Court, and the Trust Fund should be allowed to engage in negotiations with governments and other potential contributors. However, should voluntary contributions be excluded from the Trust Fund's funding sources, it should nonetheless be considered whether the Court should share with the Trust Fund some of the voluntary contributions it might receive under article 116 of the Rome Statute.

RECOMMENDATIONS TO THE PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT

1. The Rules of Procedure and Evidence should state that, in addition to the Statute, the Court is to apply the general principles and norms of human rights law, affording its guarantees to the accused, to witnesses and to victims seeking reparations.
2. The Rules of Procedure and Evidence should include a broad definition of victims, giving standing to all natural and legal persons who have been directly or indirectly injured by a crime committed by a convicted person.
3. The Rules of Procedure and Evidence should contain a procedure for the processing of mass claims against a convicted person, based upon the work of the UNCC and mass torts litigation in national legal systems.
4. The Rules of Procedure and Evidence should specify that claims may be filed upon the issuance of an arrest warrant pursuant to Article 58 and may continue to be filed until 30 days before the sentencing hearing referred to in Article 76. Information and evidence upon which a later claim may be based may be submitted to the prosecutor's office at any point during the investigation of a possible defendant.
5. The Prosecutor's office should establish a claims division responsible for maintaining information and files concerning claims and potential claims. Claims that come in after the deadline for submission shall be transferred to the Trust Fund for processing and notification shall be given to the national authorities having jurisdiction over the convicted person.
6. The Rules of Procedure and Evidence should provide for pro-rating compensation awards when the number of claimants precludes full recovery from the convicted person for any individual claimant.
7. The Rules of Procedure and Evidence should strengthen states' duty to give effect to the Court's judgments on fines and forfeiture and award of reparations.
8. The Rules of Procedure and Evidence should prescribe that funds collected from fines and forfeiture should only be used for the benefit of victims.
9. The Rules of Procedure and Evidence should mandate the Court to consult the Trust Fund before making awards for reparations.
10. The Rules of Procedure and Evidence should allow the Court to designate funds from fines and forfeiture in its order of transfer to the Trust Fund.

11. Awards of reparations made through the Trust Fund by order of the Court should be made from collected assets of convicted persons and other funds which have specifically been designated for such use.

12. The Trust Fund should be allowed to accept voluntary contributions. Broad criteria on acceptance of pledges should be adopted.

13. Undesignated funds transferred to the Trust Fund from the Court, and funds accepted from other sources, should be allocated by recommendation of the Fund's Trustees to victims within the jurisdiction of the Court and to the families of such victims.

ANNEX I

Article 75

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.

Article 79

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 States Parties.

ANNEX II

Basic References (in chronological order)

1. *Administrative Instructions: General Trust Funds* (UN Doc. ST/AI/284, (1982)).
2. *Establishment and Management of Trust Funds* (UN Doc. ST/SGB/188 (1982)).
3. *Financial Regulations and Rules of the United Nations* (UN Doc. ST/SGB/Financial Rules/1/Rev.3 (1985)).
4. *The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (UN Doc. G.A. Res. 40/34 (1985)).
5. *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*. Final Report Submitted by Mr. Theo van Boven, Special Rapporteur, Commission on Human Rights (UN Doc. E/CN.4/Sub.2/1993/8).
6. *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Humanitarian Law*, by Mr. Theo van Boven (UN Doc. E/CN.4/1997/104, Appendix).
7. *The Administration of Justice and the Human Rights of Detainees: The Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*. Revised Final Report prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119 (UN Doc. E/CN.4/Sub.2/1997/20/Rev. 1).
8. *Guide for Policymakers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (UN Doc. E/CN.15/1998/11, CRP 4).
9. *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.15/1998/11, CRP 4, Add.1).
10. *Rome Statute for the International Criminal Court*, Rome Statute (UN Doc. A/CONF.183/9 (1998)).
11. *Civil and Political Rights, including the Question of Independence of the Judiciary, Administration of Justice and Impunity*. Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Mr. M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights Resolution 1998/43 (UN Doc. E/CN.4/1999/65).
12. Shelton, D. L., *Remedies in International Human Rights Law*, Oxford, Oxford University Press, 1999.

Authors' Biographies

Dinah L. Shelton is professor of international law at the Center for Civil and Human Rights, Notre Dame Law School, and a graduate of the University of California, Berkeley (B.A. 1967, J.D. 1970). She is a member of the executive councils of the Marangopoulos Foundation for Human Rights, Redress International, the International Institute of Human Rights, and Environnement sans frontières. She is co-author of *Protecting Human Rights in the Americas* (with T. Buergenthal; winner of the 1982 book prize of the Inter-American Bar Association), *International Environmental Law*, and *European Environmental Law*

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Thordis Ingadottir graduated as "Cand. Juris" from the University of Iceland, Reykjavik, and holds an LL.M. in International Legal Studies from the New York University School of Law, where she studied with the support of a J. William Fulbright Scholarship. As an attorney, a legal counselor for NGOs and legal scholar Ms. Ingadottir has worked on various legal issues like conflicts of law and the international legislative process. She currently manages PICT's website (News section).

Cesare P.R. Romano is Associate of the Center on International Cooperation where he is in charge of the Project on International Courts and Tribunals. He took the "Laurea" in Political Science at the Università degli Studi di Milano. He subsequently studied at ISPI (Istituto per gli Studi di Politica Internazionale) in Milan; at the Graduate Institute of International Studies, Geneva, where he obtained a D.E.S (Diplômes des Études Supérieures) and a Ph.D. in International Law; and at the New York University School of Law, where he obtained an LL.M. in International Legal Studies. As a legal scholar, Dr. Romano has worked on a number of issues, including the peaceful settlement of international disputes and the international protection of the environment, benefiting from a number of scholarships, grants and prizes from Swiss, Italian and American institutions.

Endnotes

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1 "The Court may order money " (art. 79.2); "Where appropriate, the Court may order" (art. 75.2).

2 Of course, the Assembly of States Parties might extend the competencies of the Trust Fund beyond these two aspects to benefit victims of crime within the jurisdiction of the Court, and of the families of such victims.

3 Indeed, the Preparatory Committees Draft Statute authorized the Court to order that the award of reparations be made into the Trust Fund. See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, UN Doc. A/Conf.183/2/Add.1, 1998, art. 73. In any event, the French text of article 75.2 leaves no room for doubt. It reads: "La Cour peut rendre contre une personne condamnée une ordonnance indiquant la réparation qu'il convient d'accorder aux victimes ou leurs ayants droit. Cette réparation peut prendre notamment la forme de la restitution, de l'indemnisation ou de la réhabilitation. Le cas échéant, la Cour peut décider que l'indemnité accordée titre de réparation est versée par l'intermédiaire du Fonds vis l'article 79."

4 The international criminal tribunals for the former Yugoslavia and Rwanda offer no guidance as they do not have provisions on the imposition of fines in their statutes.

5 Note included in the Report of the Working Group on Penalties at the Rome Conference, UN Doc. A/CONF.183/C.1/WGP/L.14/Corr.2.

6 Proposal submitted to the Preparatory Commission for the International Criminal Court by Australia, Draft Rules of Procedure and Evidence of the International Criminal Court, 26 January 1999, rule 104, UN Doc. PCNICC/1999/DP.1. Proposal submitted by France, General Outline of the Rules of Procedure and

Evidence, UN Doc. PCNICC/1999/DP.2, rule 110.

7 See supra p. 26.

8 Article 79, providing for the establishment of the Trust Fund, is in Part 7 of the Rome Statute (Penalties). In earlier drafts the Trust Fund was part of the provision on fines collected by the Court. Both the International Law Commission Draft Statute and the Preparatory Committee Draft Statute indicated that fines could either be transferred to a trust fund, to the State of which the victims were nationals, or to the Registry to defray the costs of the trial. Conversely, during the negotiations in Rome, preference was given to using the funds collected through fines and forfeiture to benefit victims through a trust fund and other options were accordingly dropped from the text, see Report of the International Law Commission on its Forty-Sixth Session, Draft Statute for an International Criminal Court, May 2 July 22, 1994 (UN Doc. G.A., 49th Sess., Supp. No. 10, A/49/10, 1994), art. 47 and Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, supra note 3, art. 79. In 1996, the Preparatory Committee on the Establishment of an International Criminal Court, debated whether "the International Criminal Court should concern itself with the collection of pecuniary sanctions, other than for the purpose of compensating victims". See UN Doc. G.A., 51st Sess., Supp. No 22, A/51/22, 1996, footnote 69, at 228.

9 Both the UN Voluntary Fund for Victims of Torture and the UN Voluntary Trust Fund on Contemporary Forms of Slavery provide financial assistance "through established channels of assistance", UN Doc. A/RES/36/151 (1981) and UN Doc. A/RES/46/122 (1991). At the UN Voluntary Fund for Victims of Torture "this has been interpreted to mean that the assistance will be provided through existing humanitarian organizations to projects or to initiate projects sponsored or administered by these humanitarian organizations. The fund does not directly administer projects nor does it give assistance directly to individuals", UN Doc. A/48/520, Appendix II.

10 The UN Voluntary Fund for Victims of Torture finances programs which provide medical, psychological, social or legal assistance as directly as possible to the victims of torture and their relatives. Examples of this include the establishment of treatment centers, meetings of experts, aid to indirect child victims, publications, legal assistance and economical and social rehabilitation. See UN Doc. A/48/520, Annex I.

11 For instance, trust funds under the management of the United Nations Secretary-General have rules requiring the preparation of a cost plan and spending authority, see Secretary-Generals Bulletin, Establishment and Management of Trust Funds, UN Doc. ST/SGB/188 of 1 March 1982, Administrative Instruction: General Trust Funds, UN Doc. ST/AI/284 of 1 March 1982, Secretary-Generals Bulletin, Financial Regulations and Rules of the United Nations, UN Doc. ST/SGB/Financial Rules/1/Rev.3(1985).

12 This is even more true given that while UNSC Resolution 687 established State responsibility, in the case of the ICC only individual responsibility applies. Since 1991, the United Nations Compensation Commission has received approximately 2.6 million claims seeking compensation in excess of \$300 billion. As of April 1999 the fund has been able to pay \$2.7 billion. As it was clear that available funding would not be enough to pay all claims, the United Nations Compensation Commission adopted the Priority of Payment and Payment Mechanism Guiding Principles, UN Doc. S/AC.26/Dec. 17 (1994).

13 Of course, assistance in the identification and tracing of assets by States which are not party to the Rome Statute would depend on their national law. E.g., the U.S. Statutes on International Judicial Assistance provides that the "district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal", 28 U.S.C. 1782.

14 "In exercising its power under [article 75: Reparations to Victims], 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". [Emphasis added].

[15](#) Supra p. 23.

[16](#) For instance, in the UNCC, compensation of claims under categories "A" (Claims for departure), "B" (personal injuries) and "C" (damages up to \$100,000) has been given priority over State and corporate claims. UNCC Dec. No. 1, Criteria for Expedite Processing of Urgent Claims, UN Doc. S/AC.26/1991/1 (1991). The first award paid went to category B.

[17](#) The UNCC made pro rata payments to Governments as funds became available, *ibid.*

[18](#) Supra p. 22.

[19](#) In an estimate made by Thomas S. Warrick in 1997, an initial fund of \$60 million was considered adequate to finance startup costs and one large or two small active matters during the first year or two of operations of the International Criminal Court, "(Observation) of the International Criminal Court: Administrative and Financial Issues", in *The International Criminal Court: Observations and issues before the 1997-98 Preparatory Committee; and Administrative and Financial Implications*, 37 (M. Cherif Bassiouni, ed., 1997).

[20](#) E.g. in 1998, the budget of the International Court of Justice was about \$10 million (half of the biannual 1998-1999 budget), the International Tribunal for the Law of the Sea \$5.7 million, the Dispute Settlement System of the World Trade Organization \$1.2 million and the European court of Human Rights \$25 million.

[21](#) In the case of the international criminal tribunals for former Yugoslavia and Rwanda only indigent indictees can request the assignment of a counsel. Most indictees have done so fulfilling the tribunals requirements.

[22](#) *Blacks Law Dictionary*, sixth edition, 1990, at 1508-1509.

[23](#) *Ibid.* All general trust funds under the administration of the Secretary-General are charged for the program support function carried out by the organization, Administrative Instructions: General Trust Funds, supra note 11.

[24](#) See for comparison the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery: "Funding shall be obtained by means of voluntary contributions from Governments, non-governmental organizations and other private or public entities", UN Doc. A/RES/46/12 (1991).

[25](#) See for instance the policies on acceptance of pledges in the Secretary General Bulletin: Establishment and Management of Trust funds, supra note 11, rule 17.c.

[26](#) See here in this regard the following footnote made by the Committee of the Whole at the Rome Conference on Voluntary Contribution to the Court: "The view was expressed that the Court may only receive contributions in kind from individuals and corporations.", UN Doc. A/CONF.183/C.1/L.78 of 15 July 1998.

[27](#) Income of general trust funds for humanitarian activities was \$220 million. Six large funds accounted for 49.8 percent of total expenditures for these trust funds: the Trust Fund for Disaster Relief (\$60.3 million), the Afghanistan Emergency Trust Fund (\$39.1 million), the Trust Fund for Enhancement of the Capacity of the United Nations Support Mission in Haiti (\$27.0 million), the Voluntary Trust Fund for Assistance in Mine Clearance (\$17.3 million), the Trust Fund for the Restoration of Essential Services in

Sarajevo (\$18.7 million) and the Trust Fund for Humanitarian Relief in Iraq (\$19.7 million), Financial report and audited financial statements for the biennium ended 31 December 1997 and Report of Board of Auditors, UN Doc. A/53/5 (1998).

28 This decrease was due primarily to decreases in expenditures for humanitarian activities.

29 Trust funds are not the only way through which victims of crimes might receive humanitarian assistance. For instance, during 1994-1998 the former Yugoslavia received \$2.4 billion in emergency assistance through UN Consolidated Inter-Agency Humanitarian Assistance Appeals, see .

30 UN Doc. A/53/283 of 20 August 1998 and the High Commissioner for Human Rights, Press Release of 23 June 1999, available at www.un.org/news (Site last visited 18 July 1999).

31 Ibid.

32 An unsuccessful proposal was advanced in Rome to include state responsibility for reparation to victims. The Preparatory Committee Draft Statute had a provision that "[b]The Court may also [make an order][recommend] that an appropriate form of reparations to, or in respect of victims, including restitution, compensation and rehabilitation, be made by a State: [-if the convicted person is unable to do so himself/herself; [and if the convicted person was, in committing the offence, acting on behalf of that State in an official capacity, and within the course and scope of his/her authority]]; c) [in any case other than those referred in subparagraph b), the Court may also recommend that States grant an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation].", see Report on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act, *supra* note 3, art. 73.

33 "Without prejudice to article 115, The Court may receive and utilize, as additional funds, voluntary contributions." Rome Statute, art. 116.