



## **Victims' Rights Working Group**

### **Establishing effective reparation procedures and principles for the International Criminal Court**

**September 2011**

With potentially months to go before the landmark first reparation process at the International Criminal Court (ICC) begins, the Victims' Rights Working Group is concerned that insufficient progress has been made to clarify the reparation process and to establish principles on reparation required by Article 75 (1) of the Rome Statute.

Trial Chamber I is currently deliberating on the *Lubanga* case and is expected to deliver its final decision pursuant to Article 74 of the Rome Statute by the end of 2011. Trial Chamber II is expected to deliver its final decision in the *Katanga/Ngudjolo* case by June 2012.<sup>1</sup> Decisions in either of these cases could trigger the first process under Article 75 to determine whether the ICC will order reparation for victims. The proposed ICC budget for 2012 anticipates that reparation proceedings in the *Lubanga* case could extend into the first quarter of 2012.<sup>2</sup>

Unresolved procedural questions as well as reports that the judges intend to develop the principles required by Article 75 (1) on a case by case basis raises concern for the effectiveness of the first proceedings. In particular, determining the ICC's approach to reparation on a case by case basis creates a real risk that principles established and applied by different panels of judges could result in weak and inconsistent reparation orders. It also significantly delays proper information to victims about the reparation process which is creating confusion and frustration.

Furthermore, the lack of clarity about the process and the principles is causing tensions among states parties regarding the potential cost of the reparation process. The Committee on Budget and Finance has even implied that the Assembly should consider recommending that the ICC depart from the provisions of the Rome Statute or to look at the option of voluntary contributions to save costs.<sup>3</sup>

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<sup>1</sup> Proposed Programme Budget for 2012 of the International Criminal Court, ICC-ASP/10/10, 21 July 2011, paras. 7 and 62.

<sup>2</sup> *Ibid.*, para 61.

<sup>3</sup> In the Report of the Committee on Budget and Finance on the work of its seventeenth session, para. 36, the Committee states: "The Court is rapidly moving to, potentially, the first reparations proceedings, which will constitute an innovation in international criminal law. Depending on the type of process, the costs of a reparations proceedings could be significant. During its session, the Committee was informed that there was still no overall strategy for reparations in the Court. The Committee was of the view that this is an area where strategic guidance from the Assembly would be important. What should the proportion be between the costs of the reparations process in relation to the amount of voluntary funds and seized assets? In the context of significant costs for legal aid, are there alternatives to costly proceedings in order to maximise assistance or reparations to victims? Are there alternative mechanisms for delivering the same results, either through the Trust Fund for Victims or through a national process with assistance from the Court? Is there any area where States could provide voluntary funds to offset some of the costs."

The Victims' Rights Working Group calls on the ICC to take immediate measures to develop a clear court-wide vision on reparation, including resolving procedural issues promptly and establishing principles on reparation as required by Article 75 (1). In this paper, the Victims' Rights Working Group sets out a number of issues that should be reflected in the procedures and recommends key principles on reparation that should be applied from the first cases. In particular, we encourage the ICC to consult with victims, victims' legal representatives, experts within the ICC and outside and civil society in developing the principles.

## The need for clear procedures and principles

The reparation system of the ICC is in many respects unique. There is little precedent to be drawn from other international and internationalised criminal courts. The ICC system is also distinct from the practice of regional and international human rights bodies and courts which concern state responsibility. The ICC reparation system most closely resembles national civil law justice systems – in many countries referred to as *partie civile* – though differences remain and clearly the ICC is not a national court and not part of the machinery of any state.

The Victims' Rights Working Group considers that the establishment of clear procedures and principles is vital to:

- ***Inform victims, the defence, third parties and states about the ICC reparation process, how it may affect them and what they may expect from it***

At present, victims who have filed applications for reparation with the ICC in its first cases have almost no information, beyond the provisions of the Rome Statute itself, about the process potentially ahead of them or the potential outcomes should they be determined to be eligible beneficiaries of an ICC order. There is also reluctance on the ground to conduct extensive information campaigns with regards to ICC reparation due to the number of questions still unanswered as to what the process will entail both in terms of procedural steps and requirements, as well as in relation to the nature and extent of reparation. The situation is inevitably creating confusion and frustration.

Similarly, defendants will be unclear about what the process will mean for them, if they are convicted. For example, it is currently unclear whether the reparation process would proceed in the event that a convicted person files an appeal against conviction or be postponed until after the appeal is completed, even if there is no statutory provision that would allow such a postponement.<sup>4</sup> It is vital that the Defence is well-informed about the process and the principles.

Equally, third parties who may be affected by reparation orders have the right to understand the entire process, in addition to the possibility that they may be invited to make representations during the reparation process<sup>5</sup> and are able to appeal.<sup>6</sup>

Furthermore, states should be made more clearly aware of the forms of cooperation they may be expected to carry out to assist the ICC and enforce reparation orders.

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<sup>4</sup> Article 75 regulating Reparations is placed at the end of the trial, in part VI of the Rome Statute.

<sup>5</sup> Such third parties would fall under "interested persons" in Article 75 (3).

<sup>6</sup> Article 82(4), Rome Statute.

- ***Ensure a court-wide approach to reparation***

Reparation is not simply a responsibility of the judges. All organs of the ICC have responsibilities when it comes to ensuring that the reparation process is capable of affording victims full and effective reparation.

The Office of the Prosecutor is responsible for conducting financial investigations to identify a suspect's assets in order to ensure that measures are taken to trace, identify and freeze them so that they are not disposed of.

The Registry is responsible for coordinating and facilitating the application process for victims wishing to apply for reparation and for the administration of reparation awards, including pursuing enforcement.

The Court may order that awards for reparation be made through the Trust Fund for Victims. The Trust Fund also implements projects of assistance to victim communities.

Across its organs, the ICC needs to engage strongly with victims and affected communities on reparation issues, including through a strengthening of the ICC's field presence.

Clear procedures and principles on reparation would ensure greater clarity for all organs of the ICC on how they should be contributing to the overall process and would foster greater coordination. As implied by the wording of Article 75 (1), which requires "the Court" to establish principles, it is essential that all organs of the ICC contribute to the process of identifying the appropriate principles<sup>7</sup>.

- ***Ensure consistency in the ICC's decision making from the very first cases***

The ICC is made up of judges from all regions of the world and different national legal systems and traditions— which may approach reparation in different ways. A process whereby trial chambers decide reparation orders without, at a minimum, a general framework of principles in place could lead to inconsistency. Different approaches taken in different cases will confuse victims, lead to accusations of unfairness against different convicted persons and undermine the reputation of the ICC which has been lauded for its mandate to protect the rights of victims. Principles should provide clear guidance for all judges to follow in order to ensure consistent decisions. At the same time, principles must still afford the necessary flexibility to enable judges to make substantive orders that reflect the particularities of the victimisation in the given case. Principles should allow for the establishment of a general framework, which will inevitably be further defined through jurisprudence in particular cases. Although the Appeals Chambers will certainly play an important role to ensure consistency in the long term, the desirability of a general framework of key principles at the outset cannot be contested.

- ***Establish the ICC reparation system in the broader context of the right to reparation***

The ICC reparation process does not exist in a vacuum. It exists amidst other avenues that may

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<sup>7</sup> While the "Court" means all the four organs of the Court under article 34, the term the "Court" has been used in several articles of the Rome Statute as referring to the relevant Chamber adjudicating at given stages of the proceedings. Therefore, an interpretation of the "Court" in article 75 can be referred to the Trial Chamber at post-conviction or sentencing stage. Even if this interpretation would prevail, all above-mentioned organs of the Court should still have an important role to play in the reparation process.

or may not be open to victims under national and international law. Indeed, since the Rome Statute is limited to only providing reparation in relation to persons convicted by the ICC and not against states, the ICC will not be able to provide full reparation to victims in all cases. The current restrictive prosecution strategy makes it even more essential that the ICC reparation process acts as a catalyst for states to fulfil their obligations to ensure that all victims of genocide, crimes against humanity and war crimes are provided full and effective reparation.

- ***Address states concerns regarding costs***

The Victims' Rights Working Group is seriously concerned that the failure of the ICC to present a clear vision for the reparation process is fuelling a negative debate among states parties and within the Committee on Budget and Finance about the cost of the reparation process, which could undermine the ICC's ability to perform this vital part of its mandate. In particular, as discussed further below, recommendations to limit the costs of the reparation process to the assets of the convicted person or the resources of the Trust Fund for Victims demonstrates misunderstandings about the right to reparation and the purpose of the process, which must be positively addressed by the ICC. Certain procedural issues, including the composition of chambers conducting the reparation process, should be communicated to states by the ICC without delay.<sup>8</sup>

- ***Realise the rights of the victims***

International criminal justice has many objectives, including the key aim of providing redress to victims of crimes under international law. The ICC's procedures and principles should ensure that the ICC upholds the rights of victims participating in reparation proceedings set out in the Rome Statute and in international law. Since victims and affected communities are the main stakeholders and clients of the ICC, the reparation principles should aim at enhancing the ICC's positive impact on these groups and reinforcing the role of the ICC as a pillar of international justice.

## **Recommendations for key principles that should be applied by the ICC<sup>9</sup>**

To assist the ICC in preparing for the first reparation process, the Victims' Rights Working Group sets out below its recommendations for key principles that the ICC should apply from its first cases. In accordance with Article 21 of the Rome Statute, the recommendations take into account the provisions of the Rome Statute and the Rules of Procedure and Evidence as well as principles on reparation established in existing international law, including those set out in international standards. References to international standards and other precedents are listed in footnotes.

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<sup>8</sup> The Victims Rights Working Group has recommended: "Reparation proceedings should be conducted by the relevant Trial Chamber, recognizing that the reparation process in the Rome Statute forms part of the trial. Should a judge no longer be available, as opposed to a Judge whose term of office might expire, he or she should be replaced, allowing for efficiency while limiting the organizational demands.... A full chamber should conduct reparation proceedings, at least for the first cases whilst the principles on reparation are being developed. Indeed, these decisions will not be easy and will set an important precedent. Only once the ground work has been set, and the process gone through at least a full cycle, could discussions around a modification of the structure to a single judge be considered." Victims' Rights Working Group, A victims' perspective: Composition of the Chambers for reparation proceedings at the ICC, April 2011, available at: [http://www.vrwg.org/VRWG\\_DOC/2011\\_VRWG\\_JudgesReparations.pdf](http://www.vrwg.org/VRWG_DOC/2011_VRWG_JudgesReparations.pdf)

<sup>9</sup> The development of these recommendations was greatly facilitated by the report *Justice for Victims: The ICC's Reparations Mandate* issued by Victims Rights Working Group member Redress in May 2011. Many of recommendations reflect Redress's reflections on Draft ICC Reparations Principles contained in Annex 1 of that paper.

## ***Principles to ensure victims have equal, effective and safe access to reparation before the ICC***

Achieving equal and effective access should be a fundamental goal of any reparation process. Failure will result in disappointment of victims, accusations of discrimination and damage to the ICC's credibility. The need for equal access is reflected in international standards.<sup>10</sup> For the ICC, this point is particularly vital given that victims will, in many cases, be at a long distance from the ICC process and unaware of their rights. While some affected communities will have been reached through outreach efforts of the ICC and civil society, there will be many more who have not yet heard about their rights under the Rome Statute and the possibility and process to claim reparation before the ICC. Ensuring equal and effective access will thus require an active effort by the ICC to identify potential challenges and address them. Victims may also face obstacles to access the ICC reparation process, including social, linguistic, logistical, economic and gender-based barriers that must be considered and addressed in the development of procedures that cater to these realities and in the substantive forms of reparation afforded. The Victims' Rights Working Group recommends that principles clearly set out the ICC's commitment to:

- *Non-discrimination*<sup>11</sup>: In establishing policies and making decisions, the ICC shall ensure non-discrimination on the basis of sex, gender, ethnicity, race, age, political affiliation, class, marital status, sexual orientation, nationality, religion, geographic location and disability, and will endeavour to provide affirmative measures to redress inequalities.
- *Ensure women and girls' access to reparation*<sup>12</sup>: In view of the prevalence of gender-based violence that forms part of genocide, crimes against humanity and war crimes, and the common socio-economic and discriminatory obstacles that women and girls face in seeking access to justice, the ICC must take specific measures to facilitate their applications and participation in all stages of reparation proceedings. This would include widows, girls, the children of child-mothers and other dependants of victims, with particular concern for women and children. Best practices should apply to ensure that women and girls are not subject to discriminatory laws or customs divesting them of accessing their rightful benefits.
- *Ensure children's access to reparation*<sup>13</sup>: Children have been victims of genocide, crimes against humanity and war crimes. Indeed the first cases being prosecuted by the ICC include individuals who are charged by the ICC with committing the war crime of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities. In view of the legal, educational and social obstacles facing children in accessing reparation, the ICC must take specific measures to facilitate children's applications and participation in all stages of reparation proceedings, acting in their best interests and according to the evolving capacities of the child, including providing psychological support.

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<sup>10</sup> See for example, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines on Reparation), Principle 11.

<sup>11</sup> Basic Principles and Guidelines on Reparation, Principle 25; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 3; Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, Principle 1.

<sup>12</sup> Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, Principle 2. See also: Reparations For Women Subjected To Violence: First Thematic Report Submitted to the Human Rights Council by Rashida Manjoo, Special Rapporteur on Violence Against Women, Its Causes and Consequences, 19 April 2010.

<sup>13</sup> Convention on the Rights of the Child, Article 12, guaranteeing children the right to participate in judicial and administrative proceedings affecting them, and Article 39, regarding the promotion of physical and psychological recovery and social reintegration of child victims.

- *Publicize the ICC's reparation process effectively*<sup>14</sup>: The ICC shall ensure effective outreach to appraise potentially eligible victims and affected communities of eventual reparation proceedings to enable applications for reparation in advance of any reparation hearings, including the measures required of the Registry in Rule 96 of the Rules of Procedure and Evidence.<sup>15</sup> Outreach strategies must consider the specific needs of children, including by ensuring that information is also available in child friendly formats, and that children, as well as parents and teachers, are informed<sup>16</sup>. In situations where security considerations prevent the ICC's staff from conducting outreach in locations where affected communities reside, specific strategies will be designed, well ahead of reparation proceedings, to ensure alternative ways of sharing information with potentially eligible victims. Publicity of the reparation process will also strengthen the understanding and knowledge by victims and affected communities about the reparation phase and enable them to make an informed decision about whether they want to seek reparation.
- *Provide proper assistance to victims, including legal representation*<sup>17</sup>: In many cases, victims of genocide, crimes against humanity and war crimes will require assistance to complete and lodge application forms to the ICC and then to participate throughout the reparation process. The ICC shall ensure that victims are provided with proper assistance, including through working with intermediaries, so that victims can apply for reparation. In particular, in many situations special support structures may be required to assist women and children in the process of speaking out and claiming reparation.<sup>18</sup> Because of their age, level of education and legal status under national law, children would need specific support in applying for reparation. In particular, children's applications should not be conditional to the consent of the parents.<sup>19</sup> The ICC shall then ensure that all victims seeking reparation are able to appoint a legal representative of their choice to assist and represent them throughout the process as required by Rule 90 (1)<sup>20</sup> and that the said legal representative benefit from adequate support from the Registry. Recognizing that, in most cases, victims of genocide, crimes against humanity and war crimes will lack the resources to fund their legal representation, the Registry should fund their

<sup>14</sup> Basic Principles and Guidelines on Reparation, Principle 12 (a); Updated Set of Principles for the Protection and Promotion of human rights through action to combat impunity, Principle 33; Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, Principle 2 (a).

<sup>15</sup> Rule 96 of the Rules of Procedure and Evidence states that the Registrar shall "take all the necessary measures to give adequate publicity of the reparation proceedings before the Court.[...] [In doing so], the Court may seek [...] the cooperation of relevant states parties."

<sup>16</sup> UN Guidelines on Justice in Matters Involving Child Victims and Witnesses, Chapter VII, The right to be Informed, paras. 19 and 20.

<sup>17</sup> Basic Principles and Guidelines on Reparation, Principle 12 (c); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 6 (c).

<sup>18</sup> Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, Principle 3 (g).

<sup>19</sup> The Committee on the Rights of the Child in its concluding observations on Laos (CRC/C/LAO/CO/2) stated:

"30 ...The Committee is also concerned that the views of the child are not respected before the courts, where children do not have the right to be a witness or to bring a complaint or seek reparation without the consent of their parents.

31. The Committee recommends that the State party ensure respect for the views of the child in all settings, including in the home. The Committee encourages the State party to take the necessary steps to raise awareness among persons working with or for children on the need to respect the views of the child. The Committee also encourages the State party to put in place measures to ensure that children are not denied their legitimate right to reparation or to bring a complaint before the court, solely because of the parental consent requirement. The Committee recommends that the State party take into account its General comment No. 12 (2009) on the right of the child to be heard (CRC/C/CG/12)."

<sup>20</sup> Rule 90 (1) of the Rules of Procedure and Evidence requires, consistent with Article 68 (3) of the Rome Statute that "[a] victim shall be free to choose a legal representative." See also: Basic Principles and Guidelines on Reparation, Principle 12 (d).

representation in accordance with Rule 90 (5) of the Rules of Procedure and Evidence.<sup>21</sup> If the ICC is inclined to appoint one or several common legal representatives for the reparation process, victims must be provided with ample opportunity to express their views on choice of counsel, and the representative must be afforded adequate human and logistical support to effectively carry out the functions.

*Set reasonable time limits for applications and participation:* Time limits set by the ICC should not unduly limit victims' access to rightful entitlements. In order to ensure adequate access to reparation, notification should ensure sufficient time for applicants to make requests and participate in relevant processes, including allowing for adequate time and/or resources for the Victims Participation and Reparation Section to fully process the applications received and obtain any missing information. Time-limits should take into account the specific circumstances of each situation, including factors such as remoteness of victims and the ability to reach victims through existing infrastructure, plus specific assistance that the victims are likely to require. The ICC should seek and take into account the views of victims, victims' representatives, experts with knowledge of the situation on the ground, experts who have carried out mass reparation programmes in other countries, civil society, the Public Information and Documentation Section, the Trust Fund for Victims and the Victims Participation and Reparation Section in setting time-limits.

- *Protect victims seeking reparation*<sup>22</sup>: Appropriate policies and measures shall be put in place to respect victims' psychological well-being, dignity and privacy with regard to reparation as required by Article 68 of the Rome Statute, which binds all the organs of the ICC at all stages of the proceedings. Considering the varying levels of insecurity in situation countries and the specific risks linked to victims' association with the ICC's processes, best practices regarding protection and safety must apply with regard to reparation proceedings, the issuance of awards and their implementation. The privacy of vulnerable victims, must be protected and their identity and identifying personal data must be considered protected information to be disclosed to parties to the proceedings with appropriate safeguards when withholding such information would be prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial hearing. Specific risks to the physical, psychological and cultural/familial well being of victims of gender based violence when applying for and receiving reparation should be identified in advance and adequate strategies put in place to address them.
- *Inform victims about the proceedings*<sup>23</sup>: Victims shall be kept regularly informed of the status of proceedings, including through notifications by the Registry and through their legal representatives. The Registry will take the necessary steps to ensure that the information is indeed safely received by victims in a format they understand and to address any challenge faced in that regard.
- *Conduct reparation processes on the ICC's own motion.* As set out in Article 75 (1), the ICC may make determinations in relation to reparation on its own motion in view of "exceptional" circumstances. This should include conflict and post-conflict situations, where victims, particularly the most vulnerable ones most in need of reparation, may not be in a position to request reparation of their own accord.

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<sup>21</sup> Rule 90 (5) states: "A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance."

<sup>22</sup> Rome Statute, Article 68; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 6 (d); Updated Set of Principles for the Protection and Promotion of human rights through action to combat impunity, Principle 32.

<sup>23</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 6(a).

- *Conduct in situ hearings:* Where possible, the ICC should conduct at least some of the reparation hearings at a location where victims can attend and participate in a safe manner, as provided for in Article 3 (3) of the Rome Statute.
- *Conduct reparation processes on request:* Rule 95 (2) (b) of the Rules of Procedure and Evidence provides that victims shall be able to request that the ICC does not make an individual order in respect of them. This should include allowing victims to withdraw but also to amend a request for reparation.<sup>24</sup>

### ***Principles relating to eligibility***

Principles are required to establish who the ICC may award reparation to. These should include:

- *The definition of Victim:* Consistent with the definition of “victim” in Rule 85 of the Rules of Procedure and Evidence, “victim” shall include immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.<sup>25</sup>
- *The scope of beneficiaries:* In determining the scope of beneficiaries within the context of an award against a convicted person, due regard shall be given to victims who have explicitly requested reparation, as well as victims that have suffered harm as a result of the specific crimes for which there is a conviction, even if such individuals are as yet unidentified.

### ***Principles to “determine the scope of any damage, loss or injury to, or in respect of, victims”***

Principles relating to determining the scope of harm are expressly required in Article 75 (1), which also requires the ICC to state the principles upon which it is acting. The ICC may conduct such an analysis even where it does not go on to order reparation against a convicted person. Indeed, a comprehensive analysis which documents the full scale of the harm caused to victims will no doubt be a useful tool for victims outside the scope of ICC reparation orders to campaign nationally for reparation. Principles should include:

- *The scope of determinations:* Judges should base their orders on reparation on a comprehensive analysis of the harm caused to victims of crimes for which the perpetrator has been convicted, including both individual and collective aspects of harm caused to eligible victims, and taking into account the specific and differential impact on victims in all their diversity.
- *Appointing experts:* The ICC may appoint, in accordance with Rule 97, appropriate experts to assist it. Experts should include experts on trauma, sexual violence and violence against women and children, in addition to those with area-specific or country expertise or technical expertise on reparation such as valuation specialists.

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<sup>24</sup> Regulation 101 of the Regulations of the Registry..

<sup>25</sup> Article 75(1) stipulates that “principles relating to reparations to, or in respect, victims” shall be established by the Court. The wording “in respect of” victims was included to “extend the scope of application of article 75 to all victims defined in the UN Declaration of victims’ rights of 1985” (cf. Triffeter’s Commentary, Article 75, page 1402, citing the text of a footnote unanimously adopted by the relevant Committee of the Rome Diplomatic Conference in UN Doc. A/CONF. 183/C.1/WGPM/L.2/Add.7, page 5). See also: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 2, and Basic Principles and Guidelines on Reparation, Principle 8.

- *Consulting with victims:* In accordance with Article 75 (3), the ICC should seek and take into account the views of victims on the scope of harm they have experienced.
- *Effective standards of proof.* The standard of evidence for establishing identity and evidence of harm should recognise the often difficult circumstances of victims and availability of evidence and should make use of presumptions and the balance of probabilities where appropriate.
- *Recognizing all forms of harm:* The ICC should take into account all forms of harm resulting from the commission of crimes for which there has been a conviction in determining the damage, loss or injury to, or in respect of victims, including: physical injury and death; disease; psychological harm including traumatic stress; damage or loss of property or land; exile; loss of education; loss of earnings; damage to victims' life plan<sup>26</sup>; loss of liberty; loss of rights; loss of family life; social harm and cultural harm.
- *Factors related to the crimes:* The ICC should take into account the rights violated by the specific crimes; the gravity of the violation, including any aggravating circumstances; any patterns of violations and the characteristics of the individuals or groups targeted.
- *Response to the crimes:* The ICC should take into account additional harm experienced by victims as a result of the crimes, including stigma (particularly experienced by survivors of sexual violence<sup>27</sup> and child soldiers or their relatives<sup>28</sup>) and knock-on crimes, as well as the ongoing effects of continuing crimes.
- *Services provided to victims:* The ICC should take into account the impact of any services provided or denied to victims since the crime was committed in assessing the harm and needs for rehabilitation, including healthcare and psycho-social support, financial assistance etc.

### **Principles to guide the development of reparation orders against a convicted person**

ICC reparation orders will need to be tailored to each specific case. To guide this process and ensure consistency, the ICC should establish principles to guide the process, including:

- *The aim of reparation orders:* ICC reparation orders shall seek to, as far as possible, wipe out the consequences of the crimes and re-establish the situation which would, in all probability, have existed if that act had not been committed.<sup>29</sup> Where the pre-existing situation was a

<sup>26</sup> Intern-American Court of Human Rights, Case of Loayza-Tamayo v. Peru, Judgment of 27 November 1998, paras. 147-150.

<sup>27</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo: A/HRC/14/22, 19 April 2010, para. 45, states: "harms emanating from sexual violence — including the contraction of AIDS and other sexually transmitted diseases, undesired pregnancies, complications due to often unsafe abortions, unwanted children, loss of reproductive capacity, fistulas and vaginal injuries, and multiple psychological disorders — are always compounded with social stigmatization and ostracism by the family and/or community, subsequent emotional distress, loss of status and the possibility to marry or have a male protector, and access communal resources".

<sup>28</sup> With regards to designing reparation programmes, the Truth and Reconciliation Commission for Sierra Leone noted that "developing programmes for specific categories of people carries the risk of creating new stigma, whereas some of the victims already suffer from stigmatisation. Avoiding new stigma or reinforcement of existing stigma was one principle behind the development of this programme. The Commission wanted to reduce existing stigma as much as possible and considers the development of programmes to increase awareness and understanding of the specific needs of victims as a necessary measure in reducing their suffering."

<sup>29</sup> Chorzow Factory (Claim for Indemnity, Merits) Judgment, 13 September 1928, PCIJ Series A, No. 17, para. 28.

contributing factor to the crime, reparation should as far as possible aim to be transformative, to avoid recurrence.<sup>30</sup>

- *Proportionality to the harm*<sup>31</sup>: Reparation shall be proportional to the gravity of the violations and the harm suffered.
- *The need to consult with the victims*. In support of restoring victims' dignity, rehabilitation and reintegration into communities, ICC policies should encourage the participation of victims, including women<sup>32</sup> and children<sup>33</sup>, in the process of decision making about reparation. Due consideration should be given to victims to determine for themselves what forms of reparation are best suited to their situation. In particular, victims may present to the ICC the realities they face and, where appropriate, how they would want reparation awards to reflect local cultural and customary practices.
- *Forms of reparation*<sup>34</sup>: Although Article 75 (1) of the Statute refers to restitution, compensation and rehabilitation, these types of measures of reparation should be interpreted in conformity with Article 21(3) of the Rome Statute, thereby entailing essential forms of reparation such as satisfaction and guarantees of non-repetition, which – in and of themselves – may have a rehabilitative meaning not only for the victims, but also for the convicted persons. Guarantees of non-repetition of the crimes adjudicated in a given case should be always sought as one of the appropriate forms of reparation.
- *Provisions related to the ability of the convicted person to provide reparation*: Reparation should address the specific harm suffered and should not be linked to the convicted person's capacity to pay. Where the convicted person is unable, due to a lack of or insufficiency of resources, to comply with a reparation award, or in other circumstances as set out in Rule 98 of the Rules of Procedure and Evidence, the Trust Fund for Victims may apply a portion of its voluntary income towards implementing the order. Furthermore, as provided in Rule 98 (4), the ICC may order that an award for reparation against a convicted person be made through the Trust Fund for Victims to an intergovernmental, international or national organization approved by the Trust Fund for Victims. The Trust Fund can conduct specific fundraising efforts in relation to fulfilling the order.

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<sup>30</sup> Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, Principle 3 (h). See also: Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo: A/HRC/14/22, 19 April 2010, paras. 24 and 31: "Since violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization, measures of redress need to link individual reparation and structural transformation."

<sup>31</sup> Basic Principles and Guidelines on Reparation, Principle 15.

<sup>32</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo: A/HRC/14/22, 19 April 2010, para. 29: "Without the participation of women and girls from different contexts, initiatives are more likely to reflect men's experience of violence and their concerns, priorities and needs regarding redress. Additionally, without such participation, an opportunity is missed for victims to gain a sense of agency that may in itself be an important form of rehabilitation, especially when victims come to perceive themselves as actors of social change."

<sup>33</sup> Convention on the Rights of the Child, Article 12 states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

See also: UN Guidelines on Justice in Matters Involving Child Victims and Witnesses, Chapter III, Principle 8 (d) the right to participation and Chapter VIII, Paragraph 21, the Right to be heard and express views and concerns.

<sup>34</sup> Basic Principles and Guidelines on Reparation, Principles 18 to 23.

- *State cooperation in implementing certain forms of reparation:* Certain forms of reparation may not be directly executable without the assistance of the state. For example, an order for the convicted person to establish a memorial to victims may require planning and other permissions by the national authorities. Where appropriate, the ICC may request the cooperation of the national authorities in accordance with Article 93 (1).
- *Individual and/or collective awards.* Victims' requests specified through application forms, consultation, hearings or other means should be given due consideration in determining the nature and form of awards. Particularly in relation to collective awards, facility should be made to enable, though not require, groups of victims, associations and other collectives to make joint submissions. Determination of individual awards should be made in the context of the circumstances and the particular nature of the victimisation in the case before the ICC. Where reparation is awarded on a collective basis, forms of reparation should address the specific harm suffered by eligible victims such as specific medical services, psychosocial treatment, housing, education and training benefits or awareness raising on victimisation as a means of enabling more effective reintegration, without being subsumed within general humanitarian or developmental assistance, as appropriate.
- *Feasibility.* In determining time frames for implementing reparation benefits, due regard should be given to both the immediate short term needs of the victim as well as long term needs.
- *Sustainability:* To ensure sustainability, reparation benefits may seek to address dependency reduction and the empowerment of victims.
- *Rights of third parties: Bona fide* third parties, whose ownership of proceeds, property and assets derived directly or indirectly from the crimes is recognized as a barrier to enforcement of fines and forfeiture and therefore reparation orders, should not include those who took advantage of the situation of the prior owners or who knew or ought to have known that the property was derived from crime.
- *Best interests of the child.* With respect to reparation directed at children, the best interests of the child shall be the guiding principle in developing appropriate measures,<sup>35</sup> according to the evolving capacities of the child, including support to those whom the child is dependent upon.

### **Principles on the issuing of reparation orders**

Victims will await the outcome of the ICC's reparation process and details of reparation orders with anticipation. It is essential that orders are communicated effectively and recognize that, where orders do not provide reparation to all victims of crimes in a situation, other victims will be looking to the process with hope that it may set an important precedent that could lead to the realisation of their rights nationally. Principles should therefore be developed which include:

- *Effective communication of orders.* Orders should be issued in a language and format appropriate and understood by the victims in question, using victim-friendly language. Communication and outreach strategies should be employed to ensure that all those who

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<sup>35</sup> Convention on the Rights of the Child, Article 3.

applied for reparation, others who may be eligible for reparations under the order and the whole of the affected community understand the ICC's decisions.

- *Appropriate and symbolic means of communication.* In communicating decisions, the harm suffered as a result of specific crimes should be acknowledged, as should the impossibility of fully repairing such harm. Use of appropriate language to acknowledge massive trauma can provide a basis for healing when recognised at individual, community, national and international levels.
- *Recognition of the rights of all victims of genocide, crimes against humanity and war crimes to full and effective reparation.* In awarding reparation to sub-groups of victims of crimes in a situation, the ICC should recognize in each decision that all victims of genocide, crimes against humanity and war crimes have a right to full and effective reparation, including the right to access to an effective remedy before their national courts<sup>36</sup>.
- *Communication between the ICC and the Trust Fund for Victims, when the ICC orders that reparation be made through the Trust Fund.* Regulation 56 of the Trust Fund for Victims states that the Board of Directors of the Trust Fund shall determine whether to complement the resources collected through awards for reparations with “other resources of the Trust Fund” and shall advise the Court accordingly. In particular, the Trust Fund and the Court should communicate to ensure uniformity of decisions on reparation orders.
- *Use of information.* Procedures and mechanisms should be established to guide the coordination and verification of information with civil society and other stakeholders to ensure the best management of the reparation process and orders. This should include appropriate feedback mechanisms.
- *Review of reparation orders and processes.* Procedures and mechanisms should be established to carry out reviews of reparation orders and processes, to enhance efficiency and effectiveness of the reparation system.

### **Principles related to enforcement**

Principles should clearly state what will be expected of states in enforcing reparation orders. Principles should include:

- *States parties have a legal obligation to cooperate in identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crime.* Article 93 (1) (k) expressly requires states parties cooperation in relation to forfeiture and Article 75 (4) provides that the ICC may seek additional measures to give effect to reparation orders under Article 93 (1) following conviction. States must ensure against provisions in their national laws that, *de facto* or *de jure*, would impede effective cooperation.

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<sup>36</sup> Article 75(6) provides a specific legal basis for this extremely important component of the future jurisprudence of the ICC on reparation in so far as it specifically refers to “the rights of victims under national and international law”, namely, all victims of Rome Statute crimes and not only the victims of the specific criminal acts regarding which the Prosecutor and the relevant Chambers have decided to exercise their jurisdiction. The jurisprudence of the Court shall not be prejudicial for the rights all victims under existing national and international law, including victims applying for reparation before the ICC but necessitating additional measures to be undertaken by competent national authorities to ensure the application of adequate means of reparation (e.g. reintegration of survivors of the crime against humanity of persecution into their civil, political, cultural, social and economic rights).

- *States parties have a legal obligation to cooperate in the enforcement of reparation orders.* Article 109, interpreted in accordance with Article 75 (5), requires states to give effect to reparation orders.
- *The ICC shall make a final decision in relation to claims by bona fide third parties.* Under Article 82 (4), third parties have the right to appeal an order in relation to property affected by an order under Article 75. States who encounter third parties that claim to be *bona fide* third parties must not make decisions on the validity of such claims – which is a decision of the ICC. If requested by the ICC, the state shall identify, trace, freeze or seize such assets pending a decision by the ICC.
- *Barriers to reparation in national law must not prevent full enforcement of the ICC reparation orders.* Although Article 109 (1) provides that orders for reparation shall be implemented in accordance with the procedure of the state party's national law, it should not allow for the imposition of barriers, including immunities, amnesties, statutes of limitations or any other *de facto* or *de jure* barriers.
- *Enforcing the monetary awards:* The Trial Chamber shall remain seized in respect of monetary enforcement. The Chamber shall ensure monitoring and oversight of implementation or enforcement of individual and collective awards made against the accused and deposited with or made through the Trust Fund for Victims.