
International

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The core mandate of the WCRO is to promote the development and enforcement of international criminal and humanitarian law, primarily through the provision of specialized legal assistance to international criminal courts and tribunals. The Office was established by the Washington College of Law in 1995 in response to a request for assistance from the Prosecutor of the ICTY and ICTR, established by the United Nations Security Council in 1993 and 1994 respectively. Since then, several new internationalized or "hybrid" war crimes tribunals—comprising both international and national personnel and applying a blend of domestic and international law—have been established under the auspices or with the support of the United Nations, each raising novel legal issues. This, in turn, has generated growing demands for the expert assistance of the WCRO. As a result, in addition to the ICTY and ICTR, the WCRO has provided in-depth research support to the Special Panels for Serious Crimes in East Timor, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.

The WCRO has also conducted legal research projects on behalf of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). However, in view of how significant the impact of the Court's early decisions are likely to be on the ICC's future and in recognition of the urgent need for analytical critique at this stage of the Court's development, in 2007 the WCRO launched a new initiative, the ICC Legal Analysis and Education Project, aimed at producing public, impartial, legal analyses of critical issues raised by the Court's early decisions. With this initiative, the WCRO is taking on a new role in relation to the ICC. While past projects were carried out in support of the OTP, the WCRO is committed to analyzing and commenting on the ICC's early activities in an impartial and independent manner. In order to avoid any conflict of interest, the WCRO did not engage in legal research for any organ of the ICC while producing this report, nor will the WCRO conduct research for any organ of the ICC prior to the conclusion of the ICC Legal Analysis and Education Project. Additionally, in order to ensure the objectivity of its analyses, the WCRO created an Advisory Committee comprised of the experts in international criminal and humanitarian law named in the acknowledgments above.

(from left)

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

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

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

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

THE CASE-BASED REPARATIONS SCHEME AT THE INTERNATIONAL CRIMINAL COURT

WAR CRIMES RESEARCH OFFICE
International Criminal Court
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EXECUTIVE SUMMARY

The adoption of the Rome Statute governing the International Criminal Court (ICC) marked the first time that an international criminal body was authorized to award reparations, including restitution, compensation, and rehabilitation, against individual perpetrators of mass atrocities for the benefit of their victims.[1]

distract the Court

Analysis and Recommendations

The Establishment of Principles Relating to Reparations

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

- as a textual matter, Article 75 itself states that the Court "shall" make its determinations on damage, loss, and injury to victims "on [the] basis" of the principles to be established by the Court, suggesting that the principles should precede any individual findings of damage, loss, and injury;

- the significant ambiguity that currently exists as to both procedural and substantive aspects of the Court"s reparations scheme is likely to breed frustration on the part of victims and intermediaries seeking to conduct outreach with respect to the scheme; and

- the current absence of guidance on a variety of issues rel30051n8562Tmawceutrt

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

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

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

circumstances of each case must be considered and any combination of the different forms of reparations may be awarded. Thus, for example, while some commentators have suggested that reparations should take the form of monetary compensation where the perpetrator has assets, it is not necessarily the case that other forms of reparations are only appropriate in the case of perpetrators with limited or no resources.

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

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

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

assistance mandate, the Fund engages in many of the activities

INTRODUCTION

In one of the first decisions issued by the International Criminal Court (ICC), Pre-Trial Chamber I recognized both the distinct nature of the

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

Commission (ILC) – the body charged with creating a draft of the treaty – as early as 1992.[14] Specifically, the issue was brought before

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

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

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

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

[20] *See, e.g.*, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, vol. 1 (Proceedings of the Preparatory Committee during March-April and August 1996), U.N. Doc. A/51/22, ¶ 282 (13 September 1996). The first proposal, submitted by France, provided only that the Court would have authority to "transmit to the competent authorities of the States concerned the judgment by which the accused was found guilty of an offence which caused damage to a victim," and that the "victim or his successors and assigns [could], in accordance with the applicable national law, institute proceedings in a national jurisdiction or any other competent institution in order to obtain compensation for the prejudice caused to them." *Draft Statute of the International Criminal Court: Working Paper Submitted by France*, U.N. Doc. A/AC.249/L.3, Art. 130 (6 August 1996). France later amended this proposal to provide that, if "national competent authorities are no

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

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

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

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

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

[22] *Id.* at 264.

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

2. Rules of Procedure and

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

> (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
>
> (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.[32]

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

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

[30] *Id*.

[31] *Id*

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

In addition to outlining the appropriate form of reparations awards, the

A final issue addressed by the drafters of the Rules on the subject of reparations was that of the standard of proof required for an award. Early in the process, it was suggested that the standard be defined as "on the balance of probabilities," in order to ensure that the standard at the reparations phase would be lower than the standard for a criminal conviction.[44] While there seems to have been general agreement that the standard should be lower than "beyond a reasonable doubt," some delegations were uncomfortable with the phrase "on the balance of probabilities" because they felt it wask M þ [45] ."

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

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

[52] *Id.* at 487.

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

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

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

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

[57] *Id.* at 488.

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

C.

As outlined above, the ICC Rome Statute and Rules create a scheme whereby victims of individuals convicted by the Court may receive reparations for harm arising from the crimes for which those individuals are convicted.[59] Based on "the scope and extent of any damage, loss or injury," the Court may order individual reparations, collective reparations, or some combination of the two.[60] Although the award is

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

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is unable to reach their assets.[74] Notably, the Court has no authority to

ANALYSIS AND RECOMMENDATIONS

A.

The first recommendation of this report is that the Court should proactively develop the principles referred to in Article 75(1) of the Rome Statute outside of the context of any single case and prior to the issuance of its first reparations award. We recognize that, unlike the provisions of the Rome Statute and Rules of Procedure and Evidence authorizing the adoption of the Regulations of the Court[77] and

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

Finally, the current absence of guidance on a variety of issues related to the scheme, combined with the fact that the judges of the ICC hail from diverse backgrounds, leaves open the possibility for wide discrepancies in the approach to reparations across cases. This in fact occurred in the early jurisprudence of the Court with respect to the requirements set forth by different Chambers regarding participation of victims under Article 68(3) of the Statute, which permits victims to present their "views and concerns" to the Court at appropriate stages of proceedings.[82] For instance, Pre-

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

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

[86] *Id.* ¶ 16.

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

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

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

One open question regarding the establishment of reparations principles under Article 75(1) is who exactly is responsible for developing these principles? As set forth above, Article 75(1) states merely that "*[t]he Court* shall establish principles relating to reparations."[90] Article 34 of the Rome Statute provides that "[t]he Court" is "composed of the following organs: the Presidency; an Appeals Division, a Trial Division, and a Pre-Trial Division; the Office of the Prosecutor; and the Registry."[91] However, Article 75 is located under Part 6 of the Rome Statute, which deals with "The Trial,"[92] suggesting that, in this context, "the Court" is intended as a reference to the judges of the Trial Division.[93] This interpretation is logical in light of the fact that other references to "the Court" under Part 6 of the Statute plainly refer to the Trial Chamber. For instance, Article 66(3) provides that, "[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt."[94]

fact, we strongly recommend that the judges seek out the views of all organs of the Court in relation to its reparations principles, in particular the Victims Participation and Reparations Section, the

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

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

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

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[100] *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Version of "Decision on „Indirect Victims,‟" ICC-01/04-01/06-1813, ¶ 52 (Trial Chamber, 8 April 2009).

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

[102] *Lubanga*, Redacted Version of "Decision on „Indirect Victims,‟" *supra* n. 100, ¶ 2.

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

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

b) Causation

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

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

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

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

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

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

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

law,"[117] and there is no "settled view in international law" regarding the appropriate standard of causation.[118] In particular, the challenge is how to draw the line so as to exclude claims based on harm that is too remote or speculative to warrant a finding of responsibility on the part of the wrongdoer. As the Inter-

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

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

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

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

[123] Arthur W. Rovine and Grant Hanessian,

a single standard for determining “legal” causation[129] along the lines of “proximate cause,” it may be that a clear understanding of the standard may

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

> For some types of crimes, an exhaustive process to determine who was a victim could also provoke new harm to the applicants, especially in relation to crimes that are difficult to prove after many years, such as torture, rape, or other forms of sexual abuse. A requirement that victims produce records of medical exams performed at the time of the events, for example, will exclude many victims, including individuals who never received medical attention or who are fearful of speaking about their experience. Psycholog

> of support are not available, it might well be irresponsible to demand examinations that could re-open dreadful memories.[140]

3. Forms of Reparation

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

perpetrator has assets,[144] it is not necessarily the case that other forms of reparations are only appropriate in the case of perpetrators with

Furthermore, reparations that take the form of an assistance or rehabilitation program – whether designed to target specific individuals, or represent a "collective" award – may be better suited to address victims‟ harm than cash payments, particularly where the

payments issued by the government were ultimately dissatisfied with the compensation because they did not experience a substantial improvement in their material or emotional condition.[147] By contrast, Rwanda‟s reparations program – which eschews individual cash awards in favor of service packages offering victims of the genocide healthcare benefits, education grants/scholarships, housing, and small income generation assistance[148] – has been generally well-received.[149] Importantly, "[s]pecific measures can be assigned to specific categories of victims."[150] Thus, "[v]ictims of rape, imprisonment and torture, for example, might receive a pension, while victims of forced displacement might receive a one-time assistance with housing or farming tools."[151] This was the approach taken by Sierra Leone‟s Truth and Reconciliation Commission in formulating its

[147] Studies suggest that this was the case with respect to both the "Urgent Interim Reparation" payments dispersed to approximately 12,000 victims between 1998 and 1999, as well as the final grants of R30,000 (approximately US$4,000 at the time of payment) paid to each of the 18,000 victims named by South Africa‟s Truth and Reconciliation Commission. *See, e.g.*, *Parameters for Designing a Reparations Program in Peru*, *supra* n. 146, at 25 (explaining that South African victims who received the temporary emergency payments were "left dissatisfied because they [did] not feel a substantial improvement in their material or emotional condition"); Oupa Makhalemele,
and the Impact of the 30,000 Financial Reparations on Survivors, at 17 (Center for the Study of Violence and Reconciliation, 2004), available at http://www.csvr.org.za/docs/reconciliation/stillnottalking.pdf ("This study shows

recommendations on reparations, which include measures that were identified based on the victims‟ interests and demands and designed to promote victims‟ empowerment, as well as their rehabilitation and reintegration into their communities.[152] Specific recommendations of the Commission include: free health care for life or as long as necessary for victims of sexual violence and amputees; monthly pensions for victims of sexual violence, amputees, and otherwise

regarding division and friction among victims were cited by the Sierra Leone Truth and Reconciliation Commission as a reason to eschew cash payouts to victims of that country‟s civil war.

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

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

[162] This has been the approach taken by the Inter-American Court of Human Rights

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

Under Rule 97(2) of the Rules of Procedure and Evidence, the Trial Chamber is authorized to "appoint appropriate experts to assist it in

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

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

b) Determining the Appropriate Types and Modalities of Reparations Awards

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

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

[185] *See, e.g.*, Linda Keller, *Seeking Justice at the International Criminal Court:* , 29 T. Jefferson L. Rev. 189, 212 (2007) ("The process of developing community priorities based on victims' needs can be part of the healing process."); Ferstman & Goetz, *supra* n. 80, at 341 ("Regardless of the form(s) of reparations afforded, the measures will inevitably be symbolic, and therefore the process can be as important as the result. The procedural handling of the reparations process plays an important role in ensuring that the process is well received, accepted, indeed that the process is *owned* by victims and that it *empowers* them as survivors, eventually reinstating dignity, respect and their rightful place in society. Consequently, in determining reparations, the process should, as far as possible, be nourished by the requirements of victims themselves. It should be victim-led."); REDRESS, *Collective Reparations: Concepts & Principles*, available at http://docs.google.com/viewer?a=v&q=cache:qT8AwIWwbxgJ:www.redress.org/PeacePalace/CollectiveReparationsMG.pdf+REDRESS,+Collective+Reparations:+Concepts+%26+Principles&hl=en&gl=us&pid=bl&srcid=ADGEEShf7cpYffIVSK0I01FEnqar2yrd95_fxwZj8txcei0oY5cZCreyEI0rbtffKptbBj8c39Y4btn6wnxqux5bMRnR0Em-ZwYFebNqAFbcpyBF0swyOvc4dUNlTPvZaw_eC--keh8O&sig=AHIEtbR4wPTngCxO-UGZxp1978HUHJt-nA ("For victims, [j]ustice is … as much about the way that they are treated, consulted and respected procedurally … as it is about the substantive remedy…"). For a discussion of restorative justice for victims more generally, *see* War Crimes Research Office, *Victim Participation Before the International Criminal Court*, at 8-11 (December 2007), available at http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf?rd=1.

[186] Magarrell, *supra* n. 140, at 9.

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

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

In addition to victims, experts can consult with other potential stakeholders, such as the Board of Directors of the Trust Fund for Victims, government officials in the State where victims are living, third-party States that may want to provide assistance in implementing the reparations award, and non-governmental organizations, as appropriate. The first benefit to consulting other stakeholders is the potential to secure resources to fulfill the award because, as discussed above, it is anticipated that a majority of the perpetrators convicted by the ICC will be judgment-proof.[188] Thus, it will often be the case that alternative sources of funding will need to be found for the purposes of fulfilling a reparations award, and the availability and extent of these resources will play a large role in determining the scope of the award. Yet, even where a perpetrator has assets that can be seized by the Court,

In sum, as the Inter-Amer

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