



**Reparations before the International  
Criminal Court:  
Issues and Challenges**

Conference Report  
Peace Palace, The Hague, 12 May 2011



## Table of Contents

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>5</b>
<b>II.</b>	<b>Opening Remarks: Judge Sang-Hyun Song, President of the International Criminal Court .....</b>	<b>5</b>
<b>III.</b>	<b>The Scope of Reparations: who is entitled, who is eligible?.....</b>	<b>5</b>
	Fiona McKay, Introduction.....	5
	Paolina Massidda, Lessons drawn from International and National Courts: Reparation Principles.....	6
	Cynthia Chamberlain, Lessons Drawn from the Inter-American Experience .....	7
	Mia Swart, Who is Entitled to Reparations vs. Manageability.....	8
<b>IV.</b>	<b>Issues surrounding the assessment of harm/collective approaches .....</b>	<b>9</b>
	Ms. Mariana Goetz, Introduction .....	9
	Liesbeth Zegveld, National Practice on Assessment of Harm for Reparations Claims .	9
	1. The law applicable to a reparation claim .....	9
	2. Standard of proof.....	10
	Susanne Sehlbach, Assessment of harm in German forced labour compensation programme & the use of presumptions .....	10
	Silke Studzinsky, Reparations at the Extraordinary Chambers in Courts of Cambodia (ECCC).....	11
<b>V.</b>	<b>Implementation of reparations awards: forms of reparation/expertise .....</b>	<b>13</b>
	Pieter de Baan, Introduction.....	13
	Heike Niebergall, Implementation of reparations: from outreach to distribution of benefits in difficult environments .....	13
	Laurence André, The experience of the UN Voluntary Fund for Victims of Torture in the field of assistance to victims .....	14
<b>VI.</b>	<b>Cooperation of States: Investigating financial aspects and implementation of reparations.....</b>	<b>15</b>
	Brendan Rook /Miriam Spittler, Financial investigations.....	15
	Sandrine Giroud, Asset tracing in Switzerland.....	16
	Gerard Dive, Expertise on identifying/freezing assets .....	16
<b>VII.</b>	<b>Closing Remarks: Ms. Silvana Arbia.....</b>	<b>17</b>
<b>VIII.</b>	<b>Conclusion.....</b>	<b>17</b>

## Background and Acknowledgments

As the first Trial at the International Criminal Court advances towards its conclusion, the first ever reparations proceedings at the International Criminal Court become a concrete eventuality. Numerous stakeholders ranging from victims and their legal representatives, civil society organizations, academics, Court officials and States Parties to the Rome Statute share an interest to explore the issues and challenges ahead, and to ensure that reparations proceedings are adequately prepared, well-executed and affirming for victims both in terms of process and result.

In recognition, REDRESS co-organised with the Grotius Centre for International Legal Studies, University of Leiden, den Haag Campus, a 1 day Conference entitled ***First Reparations before the International Criminal Court: Issues and Challenges***. The Conference was held at the Peace Palace, in The Hague on 12 May 2011. This followed on from an earlier conference REDRESS co-organised in 2007 with the Clemens Nathan Research Centre, entitled *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity, Systems in Place and Systems in the Making*, at which a number of international experts from around the world shared their expertise and experiences on a range of mass reparations processes. There is considerable experience of reparations processes available, from reparations for the Holocaust survivors to UN Claims Commissions and regional human rights bodies such as the Inter-American Court of Human Rights.

We are grateful to the Ministry of Foreign Affairs of Finland for providing financial support for the Conference and to the John D. and Catherine T. MacArthur Foundation for its broader support to REDRESS' ICC Programme through which this Conference was organised. We are grateful to all the speakers and chairs who gave their time and input as well as to the participants for the lively and informative debates generated in discussions. We would also like to thank Noemi Manco who provided live translation into French during the conference and Timothy Synhaeve who transcribed and summarized the discussions.

What follows is a brief and informal summary of the conference proceedings. For further information, please contact Gaelle Carayon at: [gaelle@redress.org](mailto:gaelle@redress.org).

## **I. INTRODUCTION**

As the first cases relating to the situation in the Democratic Republic of Congo are nearing conclusion, questions arise regarding the implementation of the International Criminal Court's (ICC) reparations mandate. Article 75 of the Rome Statute has largely left open the question of how reparations will be determined. Article 75(1) of the Statute provides:

'The Court shall establish principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision, the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.'

To date, the Court has not established principles on reparations. Arguably, planning and preparation is necessary in order to make the ICC's reparations mandate effective. The goal of the Conference is therefore to assist in this process by sharing expertise and providing fresh ideas.

## **II. Opening Remarks: Judge Sang-Hyun Song, President of the International Criminal Court**

President Song began by emphasising the timeliness of the Conference and the importance of the ICC's reparations mandate. President Song recalled that several cases have entered the trial phase with the *Lubanga* trial nearing conclusion. He mentioned that the Court has been actively preparing for the eventuality of the first reparations hearings.

President Song clarified that the judges have discussed the establishment of reparations principles during the 2005 and 2007 plenary meetings and that it was decided that these principles will be established through the Court's jurisprudence in specific cases, including any appeals. He also indicated that the exact form of future reparations is unknown, as each situation, each case and more importantly each victim will present unique circumstances which in turn will require tailored forms of reparations.

## **III. The Scope of Reparations: who is entitled, who is eligible?**

### **Fiona McKay<sup>1</sup>, Introduction**

According to Rule 97 of the Rules of Procedure and Evidence, the Court may award reparations on an individualised basis or, where it deems it appropriate, on a collective basis, or both. However, the Court's legal framework provides little guidance as to who could in practice benefit from a reparation award. President Song mentioned that this has been left for the judges to decide. Fortunately, there is a lot of experience from other courts and bodies which the judges can benefit from. This Panel of the Conference will focus upon and try to clarify who could or should be entitled to reparations by referring to how this question has been dealt with by other jurisdictions.

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<sup>1</sup> Ms. Fiona McKay is the Chief of the Victims Participation and Reparation Section of the ICC.

## **Paolina Massidda<sup>2</sup>, Lessons drawn from International and National Courts: Reparation Principles**

Ms. Massidda began her presentation by pointing out that gross and serious human rights violations usually affect a large number of persons, though there is often only limited resources available for reparations. She noted that the judges would have to develop an objective test to determine who is a victim and eligible to receive reparations. This test should be a multidisciplinary exercise which not only takes into account the letter of the law, but also the experiences and the real needs of victims. Ms. Massidda stated that, the definition of a victim for the purposes of reparation should not be too restricted and should include all persons adversely affected by a conflict, as is the case for the compensation claims dealt with by the UN Claims Commission.<sup>3</sup> In her opinion, the definition should also take into account the specificity of different categories of victims, such as victims of gender crimes and/or victims of economic crimes. In this regard, Ms. Massidda highlighted that some national courts recognise a presumption of moral harm suffered by victims of gender crimes and/or give priority to specific categories of victims, such as elderly people or victims affected by HIV/AIDS.

Ms. Massidda further noted that the ICC will also have to decide on a standard of proof for the harms suffered. She explained that the judges will in particular have to clarify the standard of causation. In doing so, she noted, they could benefit from the approach taken by the UN Claims Commission. Ms. Massidda noted that the UN Claims Commission had categorised claims and harms based on the losses suffered and established fixed sums of compensation for successful claimants in each category. The UN Claims Commission also established different standards of proof for individuals and for corporations and took into account the fact that sometimes victims cannot prove ownership or provide evidence of loss. In that regard, Ms. Massidda noted that the UN Claims Commission took into account population demographics, real estate ownership pardon reports and reports of UN Special Rapporteurs in order to lessen the burden of proof on the claimants. It also considered cultural sensitivities by, for example, allowing victims of torture and rape to support their claims through witnesses and limited documents instead of medical evidence, given the social stigma surrounding such issues.

Lastly, Ms. Massidda underscored that adequate, effective and prompt reparations should be awarded to the victims. When doing so, the judges should take into account the *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* adopted by the UN General Assembly in 2005. She noted that reparations should, to the extent possible restore the situation that would have existed if the wrongful act had not taken place. She acknowledged that this is a very challenging task, especially with regards to victims of crimes under the jurisdiction of the Court. Ms. Massidda underlined that it will therefore be important that the judges take the opportunity to hear the victims before granting reparation, so that the reparations granted meets the real needs of the victims.

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<sup>2</sup> Ms. Paolina Massidda is the Principal Counsel of the Office of the Public Counsel for Victims of the ICC.

<sup>3</sup> The UN Claims Commission was established in 1991 as a subsidiary organ of the UN Security Council. Its mandate is to process claims and pay compensation to victims for losses and damage suffered as a direct result of Iraq's invasion and occupation of Kuwait in 1990-1991.

## Cynthia Chamberlain<sup>4</sup>, Lessons Drawn from the Inter-American Experience

Ms. Chamberlain spoke about the lessons that the ICC could draw from the Inter-American human rights system, which has in many ways been a pioneer in the field of reparations. The reparation principles it has developed could be adapted for use by the ICC.

Ms. Chamberlain noted that the Inter-American Court of Human Rights has adopted a very inclusive definition of 'victim'. She explained that the Inter-American Court has recognised that victims did not need to have suffered directly from a violation of the American Convention on Human Rights in order to be entitled to reparation. In *Mapiripán v. Colombia*, for example, the Inter-American Court held that not only the persons that had been killed during the Mapiripán Massacre were entitled to reparation, but also those who had fled the town in fear of the massacre should be repaired.<sup>5</sup>

In addition, she noted that the Inter-American Court has been very innovative when interpreting the definition of a victim by taking into consideration cultural and social aspects of the countries in the region and indigenous peoples. She explained that this had allowed the Court to give a broad meaning to the concept of 'next of kin', which has been held to include unborn children and extra-marital companions.

Ms. Chamberlain further indicated that the ICC could learn from the Inter-American Court's proactive approach to determining who would qualify as a victim and its innovative interpretation of what constitutes immaterial harm. She explained that the Inter-American Court recognised certain presumptions, such as the presumption that parents suffer from the direct human rights abuse of their children. The Inter-American Court also recognised that the principle of equity applies when insufficient evidence is available to prove immaterial harm.

Ms. Chamberlain lastly underscored the importance of full reparation and stated that the Inter-American Court had been very innovative in granting reparation for moral harm. She highlighted that the Inter-American Court grants, in addition to compensation, symbolic reparations, such as naming streets or monuments to victims. She also underlined that the Inter-American Court has taken into account victims' unrealised potential and ambition when considering the damage to a life plan.

Ms. Chamberlain concluded by highlighting that article 21 of the Rome Statute, which states that the application and the interpretation of the law applicable to the ICC should be consistent with international human rights law, gives the necessary legal basis for the ICC to consider the Inter-American Court jurisprudence. She also recalled that the ICC has in the past already referred to the jurisprudence of the Inter-American Court and the European Court of Human Rights and should do so again for the purpose of the reparations proceedings. When doing so, the ICC should however take into account the principle of non-discrimination, which was not always considered by the Inter-American Court in its early years. Ms. Chamberlain explained that the Inter-American Court had for example applied gender considerations when calculating the damage to a life plan. She argued that the ICC should avoid this and should not grant restitution when this would bring the victim back to a previous situation of discrimination.

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<sup>4</sup> Ms. Cynthia Chamberlain is a Legal Officer in the Trial Division of the ICC.

<sup>5</sup> *Mapiripán v. Colombia*, Case 12.250, Report No. 34/01, OEA/Ser.LV/II.11 Doc.20 rev. at 209 (2000).

## Mia Swart<sup>6</sup>, Who is Entitled to Reparations vs. Manageability

Ms. Swart began her presentation by emphasising that the resources for reparation will undoubtedly be limited and that the ICC will therefore have to consider carefully who will be entitled to reparation. Rule 85 of the Rules of Procedure and Evidence defines victims as *'persons who have suffered harm as a result of a commission of any crime within the jurisdiction of the Court'*. She noted that while the word harm is central to this rule, it has not been defined in the Statute or the Rules of Procedure and Evidence. However, the Appeals Chamber in the *Lubanga* case has indicated that the word 'harm' denotes hurt, injury, loss or damage, though she stated that this interpretation is not particularly illuminating, as it only gives synonyms for the word 'harm'. In her opinion the vague and open definition of 'harm' creates expectations that cannot realistically be fulfilled by the ICC. As a consequence the judges will need to define and delineate the harm requirement.

She noted that the Court has decided that harm should not necessarily be direct, though it must be personal: *'material, physical and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim. Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. This is evident for instance, when there is a close personal relationship between victims such as the relationship between a child soldier and the parents of that child.'* She warned that this could lead to an unmanageable number of victims, especially considering the fact that the Court has not set specific thresholds regarding the harm suffered. She explained that this could be particularly problematic in case compensation is awarded in addition to symbolic measures. This makes one wonder whether the Court will be consistent for the purpose of reparations.

One could also wonder whether the ICC would be consistent in an inter-institutional sense. For example, it can be questioned whether the ICC should follow the example of the Inter-American Court, which has recognised polygamy as the sensible unit to use when identifying the beneficiaries in certain tribes. Ms. Swart held that, although this might seem a rather academic exercise, it is still an important matter to reflect upon given that it could impact victims' perception of the Court.

Ms. Swart further stated that reparations should be individualised. She explained that the Court shouldn't limit a reparation award to collective measures such as services or infrastructure. She noted that infrastructure or services are not reserved to the victim group and can even benefit the perpetrator. Limiting a reparation award to infrastructure or services may therefore create the feeling amongst victims that governments circumvent the real issue of reparation as was the case in South Africa.

Lastly, Ms. Swart emphasised that it is very likely that not all categories of victims will receive reparation. She underlined that it is therefore important that the Court clarifies the standard of proof and causality and hears the victims before awarding reparation. This cannot be done arbitrarily, but should be based on objective and neutral criteria, in order to avoid resentment between the victims.

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<sup>6</sup> Mia Swart is an Assistant Professor of public international law at Leiden University.



## **IV. Issues surrounding the assessment of harm/collective approaches**

### **Ms. Mariana Goetz<sup>7</sup>, Introduction**

In accordance with Article 75 of the ICC Statute, “the Court may [...] determine the scope and extent of any damage, loss and injury”. Thus, the Court may choose to undertake an assessment of harm, which could be on an individual basis, collective basis or both. Equally, it would appear that the Court may choose not to undertake an assessment and simply “order that the award for reparations be made through the Trust Fund”, if it found it appropriate to do so.

There are a number of options for the Court in determining the extent and type of assessments that it may wish to undertake. This Panel; will explore such options further.

### **Liesbeth Zegveld<sup>8</sup>, National Practice on Assessment of Harm for Reparations Claims**

Ms. Zegveld pointed out that the ICC should learn from the experiences of domestic criminal courts, which provide for a quick and cheap reparations procedure. However, she noted that often, problems arise in domestic criminal courts when dealing with civil compensation claims. Some national criminal courts consider the civil reparations claim on a subordinate level to the criminal case or are uncomfortable dealing with complex civil claims and therefore refer the civil component of the to a civil court for determination. This all leads to frustrated victims, who feel that they are denied justice in criminal proceedings.

Ms. Zegveld asked whether similar problems might not also arise before the ICC. She discussed two issues which may cause problems before the ICC: 1) the law to be applied to a reparation claim; 2) the standard of evidence required.

#### **1. The law applicable to a reparation claim**

Ms. Zegveld indicated that the ICC will have to decide on the law and principles it will apply to reparations proceedings. In doing so, it could work in isolation or refer to domestic law or international human rights law. Ms. Zegveld held that an important preliminary question which needs to be clarified is whether victims’ reparation claims are of a private or a public law character or both.

She explained that domestic courts consider victims’ claims to be of a private law character, which means that they adhere strictly to the law on civil liability. Consequently, domestic courts dealing with international crimes may be called to apply foreign law of civil liability to victims’ reparation claims, in line with international private law. She argued that this creates several problems. For example, in the *Frans Van Anraat case*, where a Dutch businessman was being tried for complicity in war crimes in Iraq, the Dutch criminal Court decided that the reparation claims before it were inadmissible because it lacked the expertise to apply Iraqi law to the reparation claims. The Dutch criminal court referred the case to the civil court, where it has been pending since 2004. Ms. Zegveld, who is

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<sup>7</sup> Ms. Mariana Goetz is the Deputy Director and the Head of Programmes at the Redress Trust.

<sup>8</sup> Ms. Liesbeth Zegveld is a Professor of Public International Law at Leiden University and a Legal Representative of Kenyan victims at the ICC.

involved in the case, indicated that as of now they were still dealing with very complex legal issues of Iraqi law, such as causation and joint liability.

Subsequently, she recalled that under international law reparation claims are of a mixed private public character and emphasised that article 21 of the Rome Statute only obliges the Court to apply applicable treaties, principles and rules of international law. She indicated that public international law is well capable of solving private compensation claims, arguing that many aspects of international law stem from national private law. She recalled that private parts of international law have operated in the field of inter-state claims and claims between states and individuals and concluded that there are no good reasons why these private law parts would not also apply to relations between individuals.

## **2. Standard of proof**

Ms. Zegveld recalled that the elements of the crimes are for the prosecutor to prove, while victims only need to draw the line between the criminal behaviour and the scope of their damages. However, she explained that it may be difficult for victims to gather evidence given the conflict and the fact that they were displaced. She also indicated that proving harm will be even more difficult for indirect victims by referring to her own experience as legal representative of some victims of the Rwandan genocide. She emphasised in this regard that the ICC should clarify the standard of causation and what standard of proof the Court will apply in this respect. However, she surmised that she expects the ICC to take a flexible approach, given that rule 94 of the Rules of Procedure and Evidence requires that victims provide relevant supporting documentation to their reparation claim only 'to the extent possible'. She also mentioned that the Court had already admitted indirect proof, in the context of assessing victims' applications for participation, when evidence seemed to be based on a series of facts which are linked together and can lead logically to a single conclusion. She concluded by pointing out that additional flexibility could be considered when considering moral and collective reparations.

Lastly, Ms. Zegveld pointed out that before the ICC there was no possibility to refer reparation claims to an international civil court, which does not exist, or to the Trust Fund for Victims, which does not provide for legal representation proceedings based on rights and responsibility. Nevertheless, she noted that a clear division between the reparation and the criminal proceedings would allow the judges to pay full attention to victims' claims and deal with difficult issues. It would also not delay the trial. Ms. Zegveld further stated that it is plausible that a person could be acquitted criminally, but held liable at the civil level. She however stressed that the ICC uses a different standard of *mens rea* (intent) from national criminal courts (knowledge) and called for victims whose claim has been rejected by the ICC not to be left in the cold and to receive some sort of reparation. She held that it is therefore important that at least one of the ICC judges on the bench should be a civil law expert.

## **Susanne Sehlbach<sup>9</sup>, Assessment of harm in German forced labour compensation programme & the use of presumptions**

Ms Sehlbach gave a brief outline of how the Foundation "Remembrance, Responsibility and Future", where she acts as legal advisor, came into being and described some of the payment programmes which have been implemented for former forced labourers. She

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<sup>9</sup> Ms. Susanne Sehlbach is a Legal Adviser at Foundation EVZ.

explained that the Foundation was established to provide rapid access to financial payments for victims of forced labour during the German National Socialist era. The second statutory mandate of the Foundation is to support international projects. Payments for forced labour were disbursed to 1.67 million applicants or their legal successors. The implementation of the payment programmes raised numerous difficulties, not least the age of the crimes, which had been committed at least 56 years before.

Ms. Sehlbach explained that due to the heterogeneous nature of victim groups and their dispersal throughout the world, it was necessary to entrust the implementation of payment programmes to seven different partner organisations. The main task of the Foundation was to examine their work, to issue general guidelines, to provide support and to transfer the funds to these partner organizations.

She also mentioned that the applicants had to prove their forced labour with original documents. However, at the same time the partner organisations were required to collect accessible material evidence and the Foundation also financed an archive network. She indicated that in case no evidence was found, entitlement to payments could be substantiated through other means: various methods of producing *prima facie* evidence were developed and in some cases a personal description by the applicant was considered sufficient. As a matter of principle the partner organisations were also expected to adopt a victim-friendly approach.

Ms. Sehlbach held that even though a personal description was ultimately sufficient to establish proof of entitlement, it was still necessary to establish both rebuttable and conclusive rules of presumption. She also noted that the biggest problem was that the personal declarations of the applicants did not always contain all the essential facts of the case needed to establish entitlement. She mentioned that only a few partner organisations were able to contact applicants and request further information due to the large scale of the undertaking. In addition, the archive information relating to applicants in the former Soviet Union turned out in many respects to be unreliable. Consequently, flaws in the individual application forms came to light: in many cases the forms did not request all the relevant information, nor did they offer the possibility of describing the facts in sufficient detail. She explained that in order to solve these problems conclusive and rebuttable presumptions were established. Ms. Sehlbach however recalled that all rules of presumption have their limits: they help achieve a relatively high degree of overall equity but they are not infallible. She furthermore stressed that the provision of evidence was only one small aspect of the challenges faced by the Foundation and its partner organisations.

In her opinion the project (the primary objective of which was completed in 2007) was successful even though she recognised that a programme of this scale can never satisfy every single person.

### **Silke Studzinsky<sup>10</sup>, Reparations at the Extraordinary Chambers in Courts of Cambodia (ECCC)**

Ms. Studzinsky began her presentation with an overview of the current state of affairs of the cases pending before the ECCC. She noted that the judgment delivered in July 2010 in the first case was under appeal by all parties and that the indictments against 4 senior

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<sup>10</sup> Ms. Silke Studzinsky is a German lawyer representing victims at the Extraordinary Chambers in the Courts of Cambodia.

leaders in the second case had been finalised in January 2011 with the parties currently preparing for the trial.

She also gave an overview of the ECCC's reparations mandate, explaining that only moral and collective reparations could be awarded. She stated that the internal rules applicable to the first case did not provide a definition of reparations, only a list of examples. The rules also provided that the costs of reparation had to be borne by the convicted perpetrator. This changed with the adoption of amendments to the rules which came into force ahead of the second case. The new rules provide a rather unclear definition of moral and collective harm (*'measures that first acknowledge the harm suffered by civil parties as a result of the commission of the crimes of which an accused is convicted and second provide benefit to the civil parties which address this harm'*) and allow for reparations to be covered by external funds, which should be secured by the Victims Support Section (VSS). The VSS was also granted the competence to develop and implement non-judicial programmes addressing the broader interests of victims. Lastly, the new rules imposed the additional requirement on the claimants to give: (1) a description of the award sought; (2) a reasoned argument as to how such an award would address the harm; and (3) a specification regarding the implementation of the reparation award.

Ms. Studzinsky noted that although these new rules seem rather promising at first glance, they might possibly worsen the situation for victims, given the lack of funds at the VSS, the non-existence of a Trust Fund and the fact that the enforceability of reparations now becomes a prerequisite for any reparation order. She also noted that, after more than a year, the VSS had not done anything visible – apart from hiring additional staff – to give effect to its new competences.

Ms. Studzinsky mentioned that the Trial Chamber in the first case had rejected most of the reparations sought, because of the lack of specificity and the indigence of the accused. She stressed that the decision has been appealed and highlighted that the outcome of the appeal (which is not yet decided) will immediately impact on the requests the civil parties can submit in the second case. In that respect, she argued that the Trial Chamber's judgment places an unfair burden on the claimants as no guidance regarding the standard of specificity of harm was provided ahead of the judgment. She argued that guidance must therefore be sought at the international level and highlighted that other international courts, like the Inter-American Court accept requests in general terms.

Lastly, Ms. Studzinsky considered that it was nearly impossible for victims or even experts to link the harm suffered to the crimes or charges considering that harm was multi-layered and had merged with other instances of harm, as the crimes had occurred more than 30 years ago and over a period of 3 years. She argued that victims should therefore only be required to provide a very general description of symptoms and/or direct statements on how the harm suffered stems from the crimes charged. She concluded by stating that the ICC should keep this in mind when deciding on the standard of proof in relation to reparations.

During the discussion, Ms. Studzinsky emphasised the importance of setting up a Trust Fund as a back-up, should the convicted person be indigent. However, she stressed that the convicted person should still be the first to contribute to reparation awards, deploring the ECCC's lack of competence to trace, freeze and seize the assets of convicts.

## **V. Implementation of reparations awards: forms of reparation/expertise**

### **Pieter de Baan<sup>11</sup>, Introduction**

Pursuant to article 75 (2) of the Rome Statute, *'the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'*. Further, and *'where appropriate, the Court may order that the award for reparations be made through the Trust Fund'*.

Mr. de Baan gave a brief overview of the Trust Fund's mandate and discussed the practical considerations in relation to the judicial nature of an award of reparations. He stressed the importance of a consultative process that is not patronising to victims and that includes the principle of 'do no harm'. He also underlined that vulnerable categories of victims, such as children or victims of sexual violence have specific needs which must be taken into account. As a conclusion he mentioned that the financing of reparations will be a huge challenge and that so far the Trust Fund had a reserve of one million euros set aside for the purpose of reparations.

During the discussions Mr. de Baan pointed out that local contacts will be important for the implementation of any reparations order. That is why much of the staff of the Trust Fund is based in the field. He also indicated that the Trust Fund was aware of the specific challenges which could arise in relation to reparations awards benefiting former child soldiers, who are also perceived as possible perpetrators. He stressed that the Fund would undertake action to ensure that former child soldiers are not harmed or further victimised.

### **Heike Niebergall<sup>12</sup>, Implementation of reparations: from outreach to distribution of benefits in difficult environments**

Ms. Niebergall began by stating that the implementation of reparative programmes poses several challenges at each phase of their implementation.

Ms. Niebergall gave an overview of the challenges faced by the reparations project in Sierra Leone. She noted that in Sierra Leone, the Truth and Reconciliation Commission had proposed five categories of victims (the amputees, war wounded, victims of sexual violence, war widows and children) which had to be given priority in the reparations process. In the case of Sierra Leone, the Truth and Reconciliation Commission had made specific recommendations in terms of benefits to be provided and in-kind benefits as opposed to financial payments were preferred. Ms. Niebergall pointed out that a transparent and consultative process was required in order to avoid tensions and ensure that reparations meet the real needs of the victims.

She also talked about the difficulties to carry out outreach and to provide benefits to a largely illiterate population lacking fundamental infrastructure with often diverging groups. She highlighted that the main challenge lies in convincing victims to trust the process. She stated that it was especially the case for victims of sexual violence, who have often isolated themselves from their community. She further indicated that special measures

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<sup>11</sup> Mr. Pieter de Baan is the Executive Director of the ICC Trust Fund for Victims.

<sup>12</sup> Ms. Heike Niebergall is a Senior Legal Officer in the Emergency and Post Conflict Department of the International Organization for Migration (IOM).

must be taken in the context of gender crimes, to ensure confidentiality during the registration of victims in order to protect them against perceived stigmatisation and thus further victimisation within their communities.

Ms Niebergall also stated that the relaxation of evidentiary standards of proof is necessary in a mass-claim context. This is largely due to the loss or destruction of documentary evidence, but also because of social stigma. She explained that sometimes families of victims try to convince witnesses not to testify, because of stigma. Therefore, in the Sierra Leone context it was decided that gender crimes could be proven by a statement with a signature of an entrusted community leader.

Ms. Niebergall pointed out that additional difficulties had arisen regarding the treatment of orphaned children in Sierra Leone where, in the absence of a formal adoption process or identification documents, there was no way to identify their legal custodians. She explained that this created a huge challenge to ensure that financial compensation for school books and lunch packages went to the child.

Ms. Niebergall concluded by recalling the need to consider the specific needs of women stressing that for example, in the Sierra Leone context, some women had been excluded from the registration process due to their inability to travel long distances.

During the discussion Ms. Niebergall also talked about the need for good and well trained local contacts for the purpose of outreach activities. She mentioned in that respect that the ICC will have to rely on local civil society organisations which might have easier access to victims and benefit from their trust. Responding to a question on where to draw the line between development projects and reparative ones, she underlined that the ICC should ensure that reparations projects do not undertake tasks which ought to be done by the government. Instead, reparation project should strive to create something additional to these.

### **Laurence André<sup>13</sup>, The experience of the UN Voluntary Fund for Victims of Torture in the field of assistance to victims**

Ms. André described the mandate of the Voluntary Fund for Victims of Torture as establishing humanitarian assistance through trust fund grants for organisations assisting torture victims. She mentioned that the Voluntary Fund funds over 300 organisations, which are not limited to NGOs but also include hospitals and psychological services.

Ms. André emphasised that there is no link between the Voluntary Fund and reparations. She stated that the Board of directors establishes whether or not a person has been tortured. No link needs to be established between the harm suffered and criminal responsibility. Perpetrators also do not need to be identified in a court of law in order for the Voluntary Fund to become involved. A testimony of a victim will usually suffice. The Voluntary Fund also takes into account information on the situation of the countries to assess whether someone is a victim.

She concluded her presentation by stating that the Voluntary Fund relies on organisations, which are selected based on merit. She pointed out that it has a budget of over 10 million USD, but indicated that it faces financial challenges as an immediate consequence of the world financial crisis.

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<sup>13</sup> Ms. Laurence André works for the UN Voluntary Fund for Victims of Torture.

During the discussion Ms. André also highlighted that working with small local organisations provides a number of advantages especially in terms of outreach and capacity building. However, she recognised that it will of course be more difficult to monitor their activities.

## **VI. Cooperation of States: Investigating financial aspects and implementation of reparations**

### **Brendan Rook<sup>14</sup> /Miriam Spittler<sup>15</sup>, Financial investigations**

Mr. Rook explained that the financial investigations unit of the Office of the Prosecutor (OTP) has four main functions: (1) to provide financial links between actions and crimes within the jurisdiction of the ICC; (2) to identify proceeds of crime, which are assets obtained directly or indirectly or goods acquired because of the crime; (3) to identify instrumentalities of crimes, which are those items that were used to carry out the crime; (4) to identify assets for eventual forfeiture. He noted that 'assets' are not defined anywhere in the Statute or the Rules which creates certain challenges. He also noted that the ICC is currently discussing these issues with UNODC and the World Bank.

Mr. Rook explained that financial investigators achieve their goals by assessing open source material and questioning witnesses. They can also send a request for cooperation to a State pursuant to part 9 of the Rome Statute. The financial investigators aim at having sufficient information ready by the time the Prosecutor files his application for an arrest warrant or summons to appear. The financial investigations unit however faces several challenges such as bad record keeping in countries with weak economies, countries' unwillingness to cooperate with an investigation and legislation on data sharing.

Ms. Spittler indicated that so far 41 requests for judicial cooperation had been addressed to 20 different States. A request for cooperation could, for example, encompass the identification of property, real estate, or the confirmation that a certain bank account exists. She underlined that State Parties are obliged to cooperate with the Court, while third states do not have such an obligation.

Ms. Spittler explained that the execution of a cooperation request also depends on national legislation. She noted that some countries have created a centralised body to deal with incoming requests and have allowed the OTP to ask very general questions. Other States have adopted legislation prohibiting so called fishing expeditions and require that the requests for cooperation be specific. Lastly, she encouraged States to further explore all available instruments and possibilities in their system in order to be as efficient as possible. In that respect she noted that some countries have internal compliance officers, who can immediately look up the account information of a suspect and inform the relevant bank, which in turn has the possibility to freeze the bank account of the suspect.

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<sup>14</sup> Mr. Brendan Rook is a financial investigator at the Office of the Prosecutor of the ICC.

<sup>15</sup> Ms. Miriam Spittler is a financial investigator at the Office of the Prosecutor of the ICC.

## **Sandrine Giroud<sup>16</sup>, Asset tracing in Switzerland**

Ms. Giroud began her presentation by clarifying that there are three types of judicial cooperation in Switzerland. First, Switzerland can assist other countries or jurisdictions in legal matters based either on a treaty or a non-treaty basis. Second, it could also provide assistance to foreign proceedings in case criminal proceedings are initiated in Switzerland. The last type of judicial cooperation is based on the *Lex Duvalier*, which allows Switzerland to confiscate assets at the end of proceedings in case a State is unable to make a proper judicial request.

Ms Giroud also noted that Switzerland appointed the Swiss Federal Office of Justice as central authority to deal with ICC requests. It can delegate a request to a canton or the federal authorities and also take measures itself. For example, the Federal Office of Justice can hand over property for the purpose of forfeiture or return. She further noted that Swiss banks are obliged to denounce money laundering activities and report them to the central authorities. In that respect, she pointed out that Swiss banks have reported about Libyan, Egyptian and Tunisian assets.

Ms. Giroud further explained that Switzerland does not allow for fishing expeditions. In addition, Switzerland requires the requesting authority to establish a link between the assets and the crime. Ms. Giroud pointed out that the Swiss Supreme Court in the *Duvalier* case interpreted this link in a very strict sense. She explained that the Court in that instance had ruled that there were insufficient links between the alleged crimes against humanity and the money that had been stolen by the former Haitian dictator. She expressed the hope that the Supreme Court would change its position.

As a conclusion Ms. Giroud pointed out that having a right contact person who can deal with requests for cooperation is essential. She also recalled that the initiation of criminal proceedings in Switzerland could allow the claimant to request and obtain more information regarding assets of the alleged perpetrator.

## **Gerard Dive<sup>17</sup>, Expertise on identifying/freezing assets**

Mr. Dive explained that there are three different kinds of requests for cooperation from the ICC: (1) a request for information which comes from the Registry; (2) a request for seizure which either comes from the OTP or the Registry; (3) a request coming from the Court for forfeiture. He explained that Belgium will always ask for a link between the assets and the commission of the crimes.

Mr Dive highlighted that requests for cooperation should be implemented quickly. In that respect he stated that the ICC should always be as specific as possible when forwarding a request for cooperation. For example, a request for seizure should always specify whether or not it also covers the assets "owned" by a 'man of straw'. Mr. Dive explained that suspects mostly know that their assets are being traced and will thus try to retransfer their properties as soon as possible so that they remain hidden.

He also mentioned that States have a responsibility to adopt measures to ensure that the request for cooperation is dealt with quickly. He noted in that respect that Belgium has centralised all incoming requests. Thus, all incoming requests for cooperation are sent to him without a diplomatic intervention. In addition, he stated that he can order any national authority to carry out actions with

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<sup>16</sup> Ms. Sandrine Giroud is a Swiss lawyer specialized in international law and a Board Member of TRIAL.

<sup>17</sup> Mr. Gerard Dive is the Coordinator on judicial cooperation with international criminal tribunals at the Belgian Ministry of Justice.



a view to implement the ICC's request. He stipulated that measures like that are particularly important in States where there is no central competent authority for bank accounts and properties, like Belgium.

Lastly, Mr. Dive underlined the necessity to guarantee the protection of bona fide third parties. He pointed out that Belgium had drastically reduced the standard of proof for bona fide third parties to prove that a property was really theirs. Lastly, he indicated that Belgian authorities were also competent to sell seized properties which are depreciating in value.

## **VII. Closing Remarks: Ms. Silvana Arbia<sup>18</sup>**

Ms. Arbia recalled that the ICC is the first international criminal jurisdiction which has the ability to award reparations. She emphasised that the ICC has a heavy responsibility to give effect to its reparations mandate. She highlighted that this issue could not be delayed and that the Court should be well prepared.

Ms. Arbia acknowledged the important contribution of the Victims Participation and Reparations Section (VPRS) of the Registry to the advancement of the rights of victims before the Court. In particular, she mentioned that the VPRS had drafted new and improved reparations and participation forms, based on its experience in the field. She also noted that VPRS had received 867 applications for reparation as of December 2010.

Ms. Arbia also acknowledged the valuable contributions of intermediaries and States. She also recognised that the Counsel Support Section and the Office of Public Counsel for Victims (OPCV) had so far been of vital importance for the defence of the rights and interests of victims. Ms. Arbia in that respect noted that the Registry had encouraged female lawyers who understand local cultures in Africa to join the list of lawyers authorised to practice before the Court. She mentioned that this campaign had been a success and will continue in the future.

Thereafter, she emphasised the importance of the role of the Trust Fund for Victims and stated that the Registry and the Fund will have to work together and coordinate their work on the issue of reparations. She noted that the Registry could not work in a legal vacuum and should consult with the Trust Fund regarding reparations.

Ms. Arbia concluded with a reference to Rule 96 of the Rules of Procedure and Evidence which provides that the Registrar shall take '*all the necessary measures to give adequate publicity of the reparations proceedings before the Court*' and shall '*seek the assistance of intergovernmental organizations in order to give publicity, as widely as possible, and by all possible means, to the reparation proceedings before the Court*'. She invited the audience to reflect upon these matters and stressed that the opportunity to make a success of the reparations mechanism of the Court should not be missed.

## **VIII. Conclusion**

Carla Ferstman<sup>19</sup> closed the conference by thanking all speakers, chairs, participants and sponsors. She noted that the discussions made clear that there were a number of challenges that shouldn't be underestimated. She also noted that there was still a lot of work to be done. She however emphasised that this did not mean that it was an impossible task, nor did it mean that one should reduce the way of dealing with these issues by limiting the scope of victims eligible for reparations, or thinking small. The ICC is focused on the worst crimes known to humanity and naturally, these crimes have a wide impact; the ICC thus had a responsibility to deal with this fact

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<sup>18</sup> Ms. Silvana Arbia is the Registrar at the International Criminal Court.

<sup>19</sup> Ms. Carla Ferstman is the Director of the Redress Trust.

appropriately. Ms. Ferstman in that regard noted that the emphasis should not always be on 'managing' or 'limiting' the expectations of victims; rather civil society, States and the ICC should try to work together in order to provide victims with more information so that expectations are realistic, and then proceed to meet those expectations.