



Université 
de Montréal

**REPARATION AND THE INTERNATIONAL CRIMINAL COURT:
MEETING THE NEEDS OF VICTIMS**

Report of the Workshop held January 28th 2006

Organized by the Research Group Victimology and Restorative Justice,
International Centre for Comparative Criminology, University of Montreal

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1. INTRODUCTION

Background

Victimology is a relatively young science, first established some fifty years ago. Since its conception, victimology has tended to focus on victims of conventional crimes, generating extensive research on the needs of crime victims and their experiences in the criminal justice system. Hence, today we know that crime victims need reparation, information, protection, support and recognition in the criminal justice system. However, relatively little research has been done on non-conventional kinds of victimization such as gross violations of human rights.

Growing interest in crime victims and a better understanding of victims' needs, formed the basis for an international effort, led by countries like Canada and non-governmental organizations like the World Society of Victimology, to establish international norms and standards for the treatment of victims. This effort culminated in 1985 with the adoption of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, by the General Assembly of the United Nations. The UN Declaration provides internationally agreed upon norms and standards for the treatment of victims. It includes issues such as access to justice, redress, reparation and support.

Despite the UN Declaration, none of the international Ad-hoc tribunals, from Nuremburg to Rwanda, recognized victims as more than simple witnesses for the Prosecution. Indeed, the fact that the UN's own tribunals failed to respect the UN Declaration was an embarrassment. In an effort to remedy this situation, for the first time in the history of the UN, a conscious effort was made to implement the UN Declaration and integrate victims' rights in the newly established International Criminal Court (ICC). The Rome Statute contains strong provisions concerning the rights and interests of victims.

The Rules of Procedure for the International Criminal Court provide for victim notification, participation as well as reparation. With respect to the latter, the Court can order offenders to

pay reparation to their victims. In addition, a newly established Trust Fund for Victims (TFV) is associated with the Court. All of this is very new and there are many questions with respect to the operation of the Court and The Trust Fund that are still unanswered. Given the novelty of the International Criminal Court and the absence of reparation in the Ad-hoc Tribunals, there is not yet any scientific research available that deals explicitly with reparation and the International Criminal Court.

There is, however, a substantial amount of knowledge available about reparation and victims of conventional crime. This research could serve as a starting point and guide the effective organization of the International Criminal Court and the Trust Fund. Using our acquired knowledge with respect to the reparation of victims of conventional crime, we could put in place a system that effectively meets victims' needs and helps rather than hinders their rehabilitation.

But there are other pressing issues. For example, we must ask to what extent this research, which was derived from victims of conventional crime, is pertinent in the context of international criminal law. On the one hand, the types of victimizations dealt with by the International Criminal Court are very different to those to be found in a national court, often more serious and on a larger scale than conventional victimizations. In addition to the individual responsibility of the perpetrator, there is the collective responsibility of the state that permitted such atrocities to take place. On the other hand, there are similarities regarding the consequences of victimization such as post-traumatic stress disorder, the need for crisis intervention and the need for reparation. By bringing together experts in victimology, psychology, sociology, criminal law and international criminal law, the workshop's objective was to address these issues in an interdisciplinary and international context, generating recommendations for the effective operation of the International Criminal Court.

Canada's Role

The organization funding this project is the Human Security Program of the Department of Foreign Affairs and International Trade Canada. The ICC and other tribunals that provide

accountability for the international crimes are a central focus of Canada's Human Security Agenda. They combat the culture of impunity by holding accountable individuals who commit crimes of international concern such as genocide, crimes against humanity and war crimes.

Canada's ICC and Accountability Campaign – a component of Foreign Affairs Canada's Human Security Program – focuses on three issues:

Encouraging ratification and implementation of the Rome Statute of the International Criminal Court (ICC), particularly in underrepresented regions of the world;

Promoting the effective operation of the ICC and the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) and Sierra Leone Special Court (SLSC);

Providing education and outreach on the ICC, ICTY, ICTR and SLSC.

This project falls under the second category of Canada's ICC and Accountability Campaign priorities namely, promoting the effective operation of the International Criminal Court. By providing policy-makers and professionals involved in the ICC and the Trust Fund with pertinent information regarding victims' need for reparation and translating the research into recommendations, the workshop aims to contribute towards the effective organization and operation of the ICC. Victims' rehabilitation will be enhanced and their security increased when the ICC and the Trust Fund arrange and carry out reparation in a way that meets their needs.

Purpose

The purpose of the workshop was to:

- Address key questions of accountability and reparation with respect to gross violations of human rights and the International Criminal Court
- To merge victimological research with research on gross violations of human rights and international criminal law

- Examine similarities and differences with respect to the needs of victims of conventional crime and victims of gross violations of human rights.
- To provide feedback on the functions of reparation for victims, especially accountability
- To provide feedback on the impact of reparation on victims' rehabilitation

Multi-disciplinary Approach

A defining characteristic of this project was its multi-disciplinary approach. The workshop brought together outstanding researchers and academics working on victim reparation, either from a psychological, sociological, human rights or legal point of view¹.

Regarding conventional victimization, the participants were:

- Marie-Marthe Cousineau, professor, International Centre for Comparative Criminology, Université de Montréal
- Marc Groenhuijsen, professor, Scientific Director of the International Victimology Institute, Universiteit van Tilburg, The Netherlands
- David Miers, professor, Cardiff University Law School, United Kingdom
- Irvin Waller, professor, University of Ottawa, Ottawa. Secretary-General of the World Society of Victimology, Vice-President of the International Organization of Victim Assistance
- Jo-Anne Wemmers, professor, Head of the research group Victimology and Restorative Justice, International Centre for Comparative Criminology, Université de Montréal

¹ While the contents of this report originate from the workshop participants, they and the organizations that they represent, do not necessarily fully endorse every aspect of this report.

Regarding non-conventional victimization, the participants were:

- Dianne Casoni, professor, International Centre for Comparative Criminology, Université de Montréal
- Pablo de Greiff, Director of research, International Center for Transitional Justice, New York
- Stéphane Leman-Langlois, professor, International Centre for Comparative Criminology, Université de Montréal
- Frédéric Mégret, professor, Canada Research Chair on the Law of Human Rights and Legal Pluralism, McGill University, Montreal
- Stéphan Parmentier, professor, Chair of the Department of Criminal Law and Criminology, Research Group on Human Rights and Transitional Justice, Katholieke Universiteit Leuven, Belgium

2. VICTIMS' NEEDS

Meeting victims' needs enhances their recovery from their victimization. The extent to which the ICC and the TFV are able to meet victims' needs will determine their ability to contribute to victim rehabilitation. But what are the needs of victims of crimes against humanity, war crimes and genocide and how are they similar or different from the needs of the victims of conventional crime? What can we learn from our experience with respect to meeting crime victims' needs that will help us to meet the needs of victims of gross violations of human rights? These questions will be addressed in this section.

Empirical research in victimology with the victims of conventional crimes has revealed that while each individual is unique, there are certain primary needs common to all. These are information, medical and emotional support, practical support, reparation, protection, and inclusion in the criminal justice system's processes. Underlying these needs is the fundamental need for recognition and validation that is satisfied through information, reparation and participation. In the following sections we examine the similarities and the differences with respect to the needs of victims of conventional crime and victims of gross violations of human rights.

Information

The need for information is the most common need identified in the victimological literature. It is also the most important, as information is often vital in order to access to services. Quite simply: victims who do not know whether a service exists cannot use it. Victims need to be informed about the services available to them such as compensation, psychological support and legal services.

In addition to information about services, victims need information about the criminal justice system. The justice system can be intimidating for victims who do not know what to expect or what is expected of them. As uncertainty can be a source of anxiety and stress, victims need to

be informed about their role and the choices available to them (if any). As their cases proceed through the criminal justice process, victims often want to be notified about new developments, such as whether an arrest has been made, whether charges have been made, the outcome of any trial, and the sentence imposed. Victims view notification as common courtesy that acknowledges their personal interest in the case.

Victims of conventional crime and victims of gross violations of human rights share these needs: the question then becomes, how to make information available to them?

National governments have found it difficult to respond effectively to victims' information needs. For example, in order to combat a lack of information regarding victim support services, national advertising campaigns have been employed in several countries in order to inform the public about victim services (e.g. The Netherlands, Canada). The ICC is faced with the same challenge, but one that, because of the circumstances of the victims it aims to reach, is much more demanding. Its target groups tend to be geographically distant and dispersed, often in rural areas where illiteracy makes written materials inadequate. In addition, their target groups may be very heterogeneous, speaking different languages and having different cultural traditions. How do officials inform victims in the villages of Sudan or Uganda about the ICC and the TFV? To this end the ICC hopes to count on civil society, notably non-governmental organizations, that are already active in the field in many of the countries under scrutiny of the ICC. We will return to the role of civil society later.

Another common reaction of crime victims is their search for an explanation for their victimization: why me? Their desire to try to understand what happened is often associated with the desire to regain a sense of control over their lives and prevent future victimizations. Much of this information comes from the offender. It can be relayed to the victim either directly by the offender or indirectly, through criminal justice authorities. Similarly, victims of gross violations of human rights also seek to understand why their victimization occurred. However, because these crimes often target an entire group (e.g. mass victimization), instead of asking why me? victims of crimes against humanity ask why us?

Medical and Emotional Needs

Victims who are injured as a result of the offence will have medical needs. These can be minor or major. Medical needs due to injuries are typically apparent immediately following the victimization and require immediate attention. Victims may only require short-term intervention. Depending on their injuries, some may require long-term medical intervention if lasting health problems occur (e.g. reduced mobility). With respect to the physical needs of individual victims there is no difference between victims of conventional crime and gross violations of human rights. A broken leg requires the same repair whether it was inflicted during a robbery or during a mass victimization. While the scale of the victimization may differ (more victims) when the crime involves gross violations of human rights, the actual physical needs of victims will not. However, the mental health needs may differ. We will refer to this below.

With respect to their emotional needs, victims often need to talk about or ventilate their experience; they need to feel reassured that what they are feeling is normal, given what they have been through. Typically victims will seek support in their own networks of family and friends. Often informal support is sufficient.

However, when victims are particularly traumatized by their experience or when they lack the personal resources to find adequate support in their informal network, they require professional help. Exposure to traumatic events can have a devastating impact on the individual and often requires treatment in order to heal properly violent victimizations, in particular, can lead to an acute stress reaction and can develop into full blown Post-Traumatic Stress Disorder. When victims require professional help, it is important that they get help quickly. Neglect can aggravate the negative impact of victimization and make treatment more difficult. Thus, quick and easy access to professional support is vital.

Given the level of violence, the scale of the victimization and the political context of the crime that characterizes crimes against humanity, trauma is expected to be frequent among this group.

Offences such as genocide, war crime and crimes against humanity are particularly traumatic, creating large groups of victims.

The Workshop participants addressed the possibility that because crimes like genocide and ethnic cleansing target the individual's social group they affect victims differently than other types of victimizations. According to the research literature on racial victimization, much like conventional crimes, victims' reactions include anger, fear, sadness, a sense of powerlessness, vulnerability and suspicion of others (Barnes and Ephross, 1994; Weiss, 1997; Craig-Henderson and Sloan, 2003; Silver et al, 2004). Racism is believed to exacerbate the impact of victimization, enhancing the likelihood of trauma (Bryant-Davis and Ocampo, 2005).

An important difference between conventional victimization and gross violations of human rights is the impact on the group. The harm of mass victimizations such as genocide, ethnic cleansing and mass rape is not restricted to the victims directly involved and their families. Victimization that targets a social group conveys a message of fear to all members of the community. Witnessing, experiencing second-hand, or hearing about racially or ethnically motivated victimizations may cause secondary traumatic stress, causing denial, anger, sadness and grief (Bryant-Davis and Ocampo, 2005, Craig-Henderson and Sloan, 2003). The trauma of extreme racial victimization, such as the Holocaust, can be transmitted from one generation to the next (Danieli, 1998; Baranowsky et al, 1998).

The challenge with respect to victims of crimes falling under the jurisdiction of the ICC is to provide and maintain adequate services to victims in isolated, rural areas that are able to intervene rapidly. Such services will be needed in the short and long-term given the magnitude of the violence. And someone has to pay for them. Given that many countries, like Sudan and Uganda, do not have the national resources for adequate (mental) health care, the resources for such services will have to come from the international community.

Practical help

Victims of crime may experience a variety of practical needs depending the context. Some everyday but often pressing examples are help filling in forms, help in fixing damaged property, replacing broken locks, help with child care, and transportation to court. Their practical needs depend in part on their personal resources, the nature of the victimization and the damage or injury they have suffered.

Like conventional crime, victims of human rights violations may also experience the need for practical help, such as filling in the application forms developed by the ICC. They may need help replacing damaged or stolen property or finding a new place to live if their home has been destroyed or is occupied by another family due to forced migration. Victims who have to travel to The Hague to testify in court may need help caring for their families while they are gone.

Reparation

Victims can suffer significant losses as a result of their victimization. Reparation aims at reducing the harm suffered by the victim. When considering reparation we must address both the tangible and intangible losses suffered by victims as well as the short- and long-term losses.

Victims' losses that can easily be translated into dollars and cents are referred to as tangible losses. Depending on the legal culture, they may alternatively be called special damages, pecuniary loss, or material loss. Tangible losses include damaged or stolen property, lost wages, and medical expenses. With respect to the cost of conventional victimization, Klaus (1994) found that on average, crime victims in the USA had a mean loss of \$525 (1993 US Dollars). For personal crimes such as assault, rape, and robbery, the average loss was \$218. In contrast to personal crime, the average loss for household victimizations (theft, burglary and theft of motor vehicle) was much higher: \$914, due to the value of the goods stolen. However, these estimates are based on the National Crime Victimization Survey data, which only asks about short-term costs. Some costs, such as mental health care costs, are excluded altogether.

When long-term costs are included, US research finds that the costs of violent crime outweigh the costs of household crime (Miller, Cohen and Wiersema, 1996). The tangible cost of rape was estimated to be \$5,100, which included \$2,200 in lost productivity and \$2,200 in mental health care. When the intangible losses were added, the cost of rape increased markedly, to \$87,000. Depending on the legal culture, intangible losses may alternatively be called general damages, non-pecuniary loss, or non-material loss. The researchers found that the intangible or quality of life costs tended to constitute the largest component of crime costs. However, the ratio of intangible to tangible costs varies considerably by the crime, with burglary being on the low end and rape being on the high end.

In many industrialized nations, such as Canada, victims have private insurance in order to cover the costs of household crime. According to the 1999 General Social Survey, 74% of Canadian victims of household crime said that their losses were covered by insurance (Besserer and Trainor, 2000). However, coverage by insurance varies depending on the type of theft. While only 58% of victims of theft of household property were covered by insurance, the figure for motor vehicle theft was 88%. Although many were insured, only 31% of victims actually attempted to obtain reimbursement from their insurance. Whether or not they do generally depends on the value of the damaged or stolen property: the higher the value, the more likely the victim will make a claim. This is because most insurance policies operate an 'excess' threshold below which they will not pay out. On average this is \$500. Most victims of household theft (73%) suffered tangible losses amounting to less than \$500 (Canadian Dollars).

Many western nations, such as Canada and Great Britain, provide national health care services. In others, like the USA, national health care is not available and the costs of uninsured medical costs can be very substantial, far beyond many citizens' means. US data from the National Crime Victimization Survey indicates that 40 to 45% of violent crime victims have immediate medical costs of at least \$250 (US Dollars). This excludes long-term medical costs and mental health services (Britt, 2001).

When examining the costs of victimization, it is important to bear in mind the victim's ability to carry these costs. Poorer victims will find it more difficult to carry the costs of victimization than victims who are well off. The impact of economic losses is relative and not absolute.

Crimes against humanity are particularly violent. Based on our knowledge of the costs of victimization, we can assume that the economic prejudice imposed upon these victims will be significant. The absence of private and social insurance in many developing nations will mean that any losses will fall squarely on the victims' shoulders. In addition, given the poverty experienced by many of these victims, they will not be able to carry the economic burden alone. The costs of violent victimization can be broken down into tangible and intangible losses, where intangible losses are by far the most expensive. However, even if one were to focus exclusively on victims' tangible or pecuniary losses, because of the sheer volume and scale of violence involved in these types of crimes, this could add up to tens of billions of dollars.

Protection

Crime victims may feel vulnerable and fearful. They may be afraid of their assailant and fear the reactions of others to their victimization. In particular, they may fear the commission of further offences against them, or indeed against other members of their family should they report the crime.

Since the 1970s, national jurisdictions have introduced various measures designed to protect victims, many of which aim to make testifying easier for those who are called as witnesses. Relatively few measures provide protection outside the courtroom. Examples of protective measures developed at the national level include the non-publication of victims' identities, which protects their privacy and shields them from public scrutiny. Because due process requires that defendants know their accusers, this cannot be used to hide a victim's or a witness' identity. For this reason, anonymous testimony is very rare in national courts, requiring very clear justification. Another rarely used example is victim-witness protection programs, which change the victim's identity. However, ordinary victims generally don't want to take part in

these programs because this means not only changing their identity and home, but also leaving everything behind. Much more common, in particular where the victim / witness is a child, are such measures as live or even recorded video-testimony and the use of screens that allow victims to testify in court without being confronted face-to-face with their aggressor. Outside the court a common protective measure is to place the offender under an order to not contact the victim, which will be a condition for his/her release from detention. Breach will trigger recall or other measures against the offender.

The question how to protect victims and their families is by no means new to national courts. Here again, however, the challenge for the ICC is much greater. The crimes falling under its jurisdiction will be more serious and more numerous; in short, the stakes are higher. The accused are often powerful and have a lot to lose. Victims and witnesses may fear for their safety and that of their family members. Moreover, given the political context of many of these crimes, victims may have lost all faith in authorities. Among the challenges facing the ICC is how to offer protection to victims, witnesses and their families before, during and especially after a trial. The most difficult phases in terms of victim and witness protection are prior to and after a trial. The trials will take place in The Hague, which will often be far from where the crimes took place. By the time the actual trial begins, it may be several years after the crime and this long time lag means that the structures supporting crime are likely to be severely broken by the time the victims actually testify. In addition, throughout the trial there will be a lot of international attention, which will offer victims some protection as potential offenders will shy away from acting out as long as there is a high risk of getting caught. However, as the assassination of Zoran Djindjic, the former Prime Minister of Serbia, in March 2003 illustrates, international attention is not always enough.

Inclusion in the Criminal Justice System

Victims have a personal interest in their case. Often they do not understand why the criminal justice system does not recognize them as full actors in its processes, but instead merely gives them walk-on parts as witnesses to a presumed crime. They seek recognition and validation in the criminal justice system; typically they want to be informed of the developments in their case

and consulted before decisions are made. What they seek is recognition, not decision-making power (Wemmers and Cyr, 2004).

Like conventional crime, victims of crimes against humanity seek inclusion in the Court's proceedings. In the case of the ICC, the possibility for victim participation is unique. Learning from the negative experiences with the Ad hoc Tribunals, the ICC took a bold step, recognizing the legitimate interest of victims in the cases before the Court. Article 68(3) of the Statute provides that victims whose personal interests are affected can present their views and concerns to the Court at those stages and proceedings that it determines are appropriate, and in a manner that is not prejudicial to or inconsistent with the right of the accused and a fair and impartial trial. By allowing victim participation, the ICC has, unlike its predecessors, respected the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985). Sure enough, some of the first decisions taken by the ICC deal with victim participation in the early stages of the investigation.

Because victim participation is new and relatively foreign to criminal law, it is also very fragile. Experience with national criminal courts has repeatedly revealed the importance of attitudes held by those working in the justice system on victim participation. Lawyers, who are trained to view crime as an offence against the State, and the criminal justice process as a procedure involving two parties, the accused and the State, tend to have conservative views on victim participation. Those working in the Court have been trained nationally and are not necessarily accustomed to victims acting as parties. Such negative attitudes form the biggest obstacle blocking the proper treatment of crime victims in the criminal justice system (Brienen and Hoegen, 2000). The recent decision by the Office of the Prosecution to appeal a decision by the Pre-Trial Chamber regarding victim participation can be interpreted as a sign of reluctance to allow victim participation. On January 17th 2006, the Pre-trial Chamber ruled that victims could participate during the investigative phase, even before the issuance of an indictment or arrest warrant². The victims who had submitted this application were represented by lawyers

² Pre-Trial Chamber 1, ICC-01/04, 17 January 2006

from the *Federation Internationale Droits des Hommes* (FIDH), a non-governmental organization working for human rights. On January 23 2006, the Office of the Prosecutor submitted an application for leave to appeal this decision, stating that the decision would significantly affect the fair conduct of proceedings, causing prejudice to the rights of the defence³. This appeal is unusual for two reasons. Firstly, it is odd to see the Prosecutor rather than the Defence arguing that the rights of the accused might be comprised. There exists a well-organized International Criminal Defence Attorneys Association (ICDAA) that advocates the right to a fair trial. One would expect either the defence attorney or the ICDAA and not the Prosecutor to appeal the Pre-trial Chamber's decision if it threatened the rights of the accused. Secondly, it would be surprising to find that an organization like FIDH, with a strong track record in human rights and conscious of the fair trial right, would overtly act against the rights of the accused. As the Pre-Trial Chamber pointed out, it is the extent of the victim's participation in proceedings that is important for the fairness of proceedings, not their participation as such. At the investigative stage victims' participation will be limited to information and consultation. They will not have access to the record of the investigation and will not affect the Prosecutor's capacity to conduct the investigation. This makes it hard to see how they might negatively impact the rights of the accused.

Special Groups

In addition to their primary needs, some special groups of victims require particular attention. The Workshop participants identified three concerns: gender issues, cultural differences and child victims. However, only the question of child victims / witnesses was elaborated on by the participants. With respect to child victims and witnesses, in July 2005 the UN Economic and Social Council adopted a set of Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime⁴. These Guidelines contain a number of important recommendations for

³ Pre-Trial Chamber 1, ICC-01/04, 23 January 2006

⁴ ECOSOC Resolution 2005-20

national justice systems with respect to the treatment of child victims and witnesses. They are equally relevant for the ICC, which until now has largely neglected this group's special needs.

Conclusion

Victimology identifies six types of needs common among victims. These are the need for information, reparation, protection, medical and emotional needs, practical needs and inclusion in the criminal justice system. Underlying these needs is fundamental need for recognition and validation. These needs are also prevalent among victims of crimes against humanity, war crimes and genocide. However, given the level of violence, the scale of victimization, and the political context of these crimes, victims of gross violations of human rights will experience these needs more frequently and more acutely than victims of conventional crimes.

Before leaving this matter, it is important to note that the Court and the TFV differ in their capacity to meet victims' needs. Only a minority of victims will have their cases dealt with by the International Criminal Court, which makes the Trust Fund for Victims very important in meeting their needs. The Trust Fund for Victims will be available to all the victims of the crimes that fall under the jurisdiction of the ICC, even if the Court does not deal with their particular case.

3. THE FUNCTIONS OF REPARATION

Reparation plays a key role in the ICC. Article 75 of the ICC Statute specifies that the Court shall "establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation". Article 75 also states that such awards may be made directly against a convicted person or that the Court may order for the award to be made through the TFV. In addition to carrying out court orders regarding reparation⁵, the TFV may use voluntary contributions for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims⁶. Thus the TFV can assist victims who fall under the jurisdiction of the ICC, not only the victims whom cases are under investigation by the Court. Given the seriousness and the mass scale of the types of victimization that fall under the jurisdiction of the Court, reparation poses a serious challenge for the Court and the TFV. It is vital to understand what reparation means to victims and the different forms that it can take.

Definition

What is reparation? According to the ICC, reparation includes restitution, compensation and rehabilitation. Restitution aims to restore the victim to the original situation before the victimization occurred. It includes the restoration of rights and property. Compensation is the financial reimbursement for losses, both pecuniary and non-pecuniary. Rehabilitation includes medical and psychological care as well as legal and social services.

Other functions of reparation are found in 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. These guidelines, which were adopted by the Office of the High Commissioner for Human Rights⁷ and by the Economic and

⁵ Rule 98(1) to (4) of the Rules of Procedures and Evidence

⁶ Rule 98 (5)

⁷ Commission on Human Rights, Resolution 2005/35 , 19 April 2005

Social Council⁸, take a broader view of reparation than the Court. In addition to restitution, compensation, rehabilitation, they include satisfaction and guarantees of non-repetition. Satisfaction is a very broad concept, including: effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth; the search for the whereabouts of the disappeared; an official declaration restoring the dignity of the victim; a public apology; sanctions against the person liable for the violations, and commemorations and tributes to the victims. Finally, guarantees of non-repetition include a number of different measures aimed at eliminating abuses of power and human rights violations in the future. In the following we will examine the different functions of reparation more closely.

Restitution

Restitution refers to returning things to their proper owner, typically the return of stolen property. Victims who have had their possessions stolen usually want them back. If the police find the offender and the stolen property, victims of crime can receive restitution through the criminal justice system. However, the experience is that this is often a very slow and unsatisfactory process. First, even where it is recovered, their property may be retained as evidence throughout the criminal justice process, to be returned only on completion of the trial. This may take some months or possibly years. A second problem is that the authorities may have recovered stolen property but not know to whom it belongs. The much more common experience is that the offender has sold the property, which in turn raises the question whether the authorities can lawfully these proceeds of crime. This is considered further below. Besides property, restitution may assume a much broader significance, to include the restoration of rights or privileges.

⁸ Economic and Social Council, Resolution 2005/30, 25 July 2005

For example, it might mean giving someone back a job that he/she had before the victimization occurred. Professionals and public officials from minority groups may be forced out of their jobs in the wake of genocide or ethnic cleansing. This happened in the Netherlands and other European countries following German occupation. Jewish professors in Dutch universities were fired and banned from teaching⁹.

Some national governments have modified their legislation in order to facilitate the return of stolen property to victims. If the property of the victim is required as evidence, photographs can be taken or sworn statement prepared by the investigating officer. The property can then be restored to the victim, unless a formal objection is made. These provisions mean that victims no longer have to wait until the end of the trial to have their property returned to them and allows them to have their property returned to them more quickly.

The problems associated with restitution in national criminal courts will all figure in the work of the ICC, not least because of the scale of the crimes with which it deals. Not all of its cases will be solved, and the recovery and return of the victims' goods will be hampered by a variety of practical obstacles. Moreover, the ICC is not a national court and as such it cannot effectively restore property rights to anyone without the active collaboration of national governments. Its capacity to offer the restitution of rights and property will be limited, but may be the only substantial reparation that the Court can offer.

Compensation

Compensation means financial payment, typically in respect of either or both of two kinds of loss. The first is pecuniary loss, that is, any financially assessable losses incurred as a result of the victimization. Typical examples are loss of wages, medical and hospital expenses, which may include counseling, and damaged or stolen property. Compensation for pecuniary loss, in

⁹ See for example R.P. Cleveringa, Rijksuniversiteit Leiden, 26 November 1940.

common law systems often called special damages, may therefore refer both to crimes against the person as well as against property. Of course the property stolen or damaged might have been very valuable, requiring substantial compensation. Equally, where the offence was a serious crime of violence against the person, compensation may need to take account of the victim's long-term needs. In the case of permanent disabilities, for example, victims may require compensation all their lives to cover adaptations to their accommodation, the cost of full time care, and associated expenses.

The second kind of loss for which victims may seek compensation constitutes payments made in relation to the injury that they sustained. These payments, sometimes called general damages, compensate not the consequences of the offence, but the hurt (physical or mental) that it caused. It is conceivable that the theft of an item of jewellery could be as hurtful for its owner for its sentimental, as for its material value. But compensation for hurt is normally associated with personal injuries. Here the function of compensation is, so far as money can, to reflect the loss of an eye, a limb, or the necessity for surgery to repair a stomach wound.

Compensation of either kind can be forthcoming from the offender or from a third party such as private insurance or the State.

Compensation by the Offender

As crimes against the person or property also constitute civil wrongs, victims in theory enjoy a right to sue their offenders for the injury or loss they suffer. However, civil proceedings are expensive and ineffective and therefore, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power encourages countries to allow victims to obtain compensation through the criminal courts. Examples of procedures that permit this include the *partie civile* procedure in France, and Compensation Orders in England and Wales. These measures have the advantage of allowing victims to 'piggy back' on the criminal justice process, thus saving them the expense and hassle of a separate civil trial. Similarly, the ICC includes provisions that allow victims to obtain compensation from their offenders. The Court

can order convicted offenders to pay compensation to their victims. This is new to international criminal law.

Research shows that victims rarely receive compensation from their offenders, largely for reasons that are readily understandable (Wemmers, 2003; Brienen and Hoegen, 2000). First, many offenders are never identified, and even where they are, successful criminal proceedings do not always follow. Though convicted, there is no guarantee that offenders will be able to reimburse their victims; most commonly because they simply do not have the resources to do so. A more complex obstacle lies in confronting and overcoming negative attitudes held by criminal justice authorities (Brienen and Hoegen, 2000). Since the 1980s many western countries have developed initiatives designed to make it easier for crime victims to obtain compensation from the offender within the criminal justice system. However, their overall success has been limited. Judges and prosecutors prefer not to mix what they perceive as a civil matter - compensation- with the criminal law.

The ICC hopes to seize the assets of offenders and order them to pay compensation to their victims. Seizing the proceeds of crime has proved very difficult for national courts. The authorities must locate the proceeds and then must prove that they are linked with crime. This is not always easy, and in Europe also raises legal issues under the European Convention on Human Rights. International experience recovering funds from perpetrators is miserable (Wierda and De Greiff, 2005). Well-known people like the Marcos family¹⁰ have escaped paying compensation. By the time they are arrested, offenders often have no resources left or use their resources to pay legal fees. It is likely that the Trust Fund will have little money from offenders to use to provide reparation to victims.

The application form that has been developed and adopted by the ICC for victim reparation asks about the victim's financial losses. Among other things, victims are asked to indicate on the form the damages suffered and the type of reparation they desire (i.e. compensation,

¹⁰ Ferdinand Marcos, former leader of the Philippines.

restitution, rehabilitation or other)¹¹. It is possible that the form will create an expectation among victims that they can expect compensation for their damages from the court. Experience at the national level with victims of conventional crime teaches us that the authorities have to be very careful about creating expectations that cannot reasonably be met (Shapland, 1985; Sanders, Hoyle, Morgan and Cape, 2001).

Another question that needs to be addressed with respect to compensation by the offender is whether or not the offender's means should be taken into account when ordering compensation? This is the case in criminal law. For example, fines and compensation orders in England and Wales are based on the offender's ability to pay, the reason being that an unrealistic obligation to pay is likely to drive the offender back to crime. By contrast, civil law does not take the offender's ability to pay into account. In practice, those (typically negligent) defendants who are ordered to pay damages are those who are backed by insurance, and thus the question of the defendant's means is never an issue. Unless motivated otherwise than by a wish to be financially compensated, no claimant will embark on the inevitable expense of civil proceedings. Given the financial circumstances of most criminal defendants, it is unsurprising that actions against them are so rare. These realities do not answer the connected questions, which model should apply to the ICC, and are victims helped where unrealistic demands are imposed on their offenders?

If offenders before the ICC cannot be ordered to pay compensation, due, for example, to an inability to prove the link between their assets and their criminal activity, it is possible that they may make a voluntary donation to the Trust Fund. In countries that allow plea-bargaining offenders may, for example, agree to make a donation to a good cause and, in exchange for this good deed, receive a lesser sentence. It is not clear whether or not this type of agreement will be possible in the ICC. More importantly, how will victims perceive such an arrangement: as a buy-out or as a positive development?

¹¹ Formulaire standard de demande de réparations devant la cour pénale internationale réservé aux personnes physiques et aux personnes agissant en leur nom. Formulaire de réparations-1.

Another possibility might be to obtain money from private companies that have profited from the crime. Examples can be found in post-Nazi Germany, where companies that profited from Hitler's slave labour were forced to compensate their victims. However, this will depend on the availability of wealthy businesses, such as multi-nationals, in the region where the victimization occurred.

State Compensation

Because compensation from the offender is so rare, many countries have established State compensation programs to provide some financial assistance to crime victims. These programs vary substantially in their scope and the benefits that they provide. Some offer victims short and long-term financial assistance, depending on the situation. However, state run compensation programs are expensive. For example, in 2002/03 the British Criminal Injuries and Compensation Scheme made awards totaling £1,320,000 (\$2,640,000 CDN) under its tariff scheme to 33,330 claimants. This figure is nearer to £1,700,000 (\$3,400,000 CDN) when the claims for 'additional compensation' (that is, long term care and loss of earnings) are included (Criminal Injuries Compensation Authority, 2004).

While victims often suffer pecuniary losses that are not compensated, research suggests that they are often willing to accept partial compensation rather than insist on being compensated in full (Shapland, et al. 1985; Van Hecke and Wemmers, 1992). Compensation, be it from the offender or the State, has a symbolic value. It displays a public recognition of the victim's experience of being a victim of crime. In the British scheme the state's financial payment is not strictly speaking compensation, but is a conventional sum paid according to a tariff of injuries. Even though it is not based on any acceptance of state liability for the victim's injuries, the payment nevertheless reflects the graduated table of damages to be found in civil proceedings. But this is unusual. Most jurisdictions have much more limited programs. This is especially so in the United States, where state payments perform a welfare function, and in which compensation for the injury itself is very rare. Though less minimalist, schemes in Canada and Australia generally impose very tight limits on both the items for which compensation is payable, and their amounts. It is important to bear these points and these contrasting state

responses in mind as full compensation will not always be possible within the framework of the ICC and the TFV.

Like conventional crime, victims of crimes against humanity will similarly experience the need for reparation. However, given the level and the scale of the violence suffered, the demand for reparation is potentially colossal, far in excess of what even the most generous state scheme provides. Consequently, state compensation by national governments is highly unlikely given the high costs and low resources of many nations.

When faced with the choice between reparation and development programs, developing nations will often chose development. Development programs and reparation programs can be coordinated with one another, but they should not be dissolved one into the other.

While rare, the Workshop participants identified some examples of successful reparation programs at the State level. Wiedergutmachung is an extensive program through which the German State provided financial reparation to individuals and groups, victims of Nazi Germany. A second example is the building of schools for the victims of Rwanda's genocide. In order that they are distinguished from general humanitarian aid, it is important that the compensation program services victims rather than the community as a whole.

Trust Fund for Victims:

The Trust Fund can be likened to national state compensation programs. Acting as a third-party, it offers compensation to victims. Consequently, the TFV faces many of the same questions that arise when determining the content of national state compensation programs: What to compensate? Who to compensate? Who not to compensate? What is the underlying philosophy?

Who to compensate?

The question, who to include and who to exclude is both central and also difficult to answer. All State programs have exclusion criteria and the notion of blame is inherent in them all. Programs have been criticized for fostering an image of 'ideal', to the detriment of real victims (Elias, 1993). Many describe themselves as being for the benefit of 'innocent' or 'blameless' victims, which of course immediately raises the question, what makes a victim undeserving of compensation? Two broad answers can be given. First, all schemes will exclude victims whose conduct at the time of the incident causally contributed to the injuries they sustained. The key point here is that the victim could as well have been the offender in the fight in which he engaged, and should not be allowed the benefit of public funds because he came off worse in a fight. This is the kind of behaviour in which offenders engage, and state compensation schemes are not created to assist offenders.

Most commentators regard the exclusion of victims who behave as offenders at the time as uncontroversial, even if there may be disagreement about the scope of the disentiing provision. What is controversial is the exclusion of victims where they have criminal records, even though they have no connection with the injury-causing event. Here victim, and as a result their family members, are excluded because they have behaved as offenders. They are for this purpose, in effect, outlaws, refused the state benefits that would otherwise apply.

In these ways state compensation programs tend to serve 'good' victims who meet society's image of the innocent victim who is deserving of our help. At the same time, they exclude 'bad' victims who are considered to in some way merit their victimization. Victim blaming can have devastating consequences on victims who experience exclusion not only as denial of access to resources but as secondary victimization.

The question of good and bad victims is no less complicated for crimes against humanity than it is for conventional crimes. Reality is seldom black and white. It is possible that someone can be a victim at one time and an offender at another time. Similarly, it is possible that a victim may be the family member (i.e. child or partner) of an offender. An easy example is the case of child

soldiers. Due to their young age, child soldiers are not considered responsible for their offences. It becomes more complicated when the offender is an adult. For these complicated questions, the ICC does not yet have answers.

Interestingly, regardless of differences between systems with respect to their criteria for eligibility and their other terms, roughly 50% of all claims across European nations are refused (Groenhuijsen, 2001). This is an intriguing finding which is difficult to explain.

The perceived fairness of allocations is paramount. Selection criteria must address issues of distributive justice. How to distribute scarce resources in a way that is fair? Should victims be eligible based on their level of need or on the losses they sustained? Or should some criteria based on merit be devised? In the reality of war and mass victimization, it is very likely that victims and offenders do not form completely separate groups. Criteria for exclusion must be developed before any requests can be accepted or rejected by the Trust Fund.

What to compensate?

Another important question faced by compensation schemes is what to compensate. Some countries, such as the UK, have developed standard headings under which compensation will be awarded. However, the reality is that the TFV may have too few resources to give full compensation to all victims.

Recent terrorist crimes in Great Britain and the USA show some interesting differences between the compensation of victims of terrorism and victims of conventional crime. In the United States the Federal Victim Compensation Fund, established following the events of 9/11, was an 11th hour afterthought to the Air Transport Safety and System Stabilization Act 2001, which exempted the airlines and various other bodies from liability in tort for any negligence on their part. Under this arrangement survivors or their dependants could apply for compensation for loss of earnings or dependency. The families of those who were killed could receive a bereavement award of US\$250,000, while each dependant received a further US\$50,000. We

do not examine further here the full extent and complexity of the Fund (Issachoroff and Mansfield, 2006). The point is that it is far more generous in its scope and award levels than any of the crime victims compensation schemes established in any of the 52 states.

By contrast, the British scheme makes no special provision for victims of terrorist crime. Those who were injured and the dependants of those who were killed on 7 July 2005 are eligible for exactly the same benefits as any other victim of crime (Miers, 2006). However, both arrangements share one problem, to which they have given the same answer. This is whether the body awarding compensation should take into account (that is, deduct) the very substantial charitable donations that applicants had received or might receive. Following the common law, they are not, which means that many claimants will enjoy substantial private benefit at the expense of the American or the British taxpayer. The common law's position is that third party benevolence ought not to reduce the financial burden to pay damages that is ordered against a negligent party. But this incident of corrective justice is untenable where the primary source is the taxpayer. Moreover, in the British case, permitting the victims of 7/7 (and possibly other terrorist bombings) to benefit twice because they happen to be the objects of charity, while 'ordinary' victims of violent crime benefit only once, raises as yet unanswered issues of equity as between similarly placed victims. Research shows that crime victims see it as unjust that one victim is worth more than another. Injustices in the distribution of rewards constitute a form of secondary victimization (Feldhusen, Hankivsky and Greaves, 2000).

Given the scale of crimes that fall under the jurisdiction of the ICC, the question of group or collective claims versus individual claims needs to be addressed. Should individual claims be excluded in favor of group claims? Is it realistic to think that the TFV will have enough money to provide compensation to individual victims, and that if it did, it would also have the capacity and the information on which to calculate individual awards? Collective or group compensation might be more realistic but there are problems here too. To begin with, one has to consider how collective compensation differs from general humanitarian aid. Compensation programs must distinguish themselves from humanitarian programs. They should target victims instead of the population in general. For example, they might do this by focusing on the rehabilitation of victims.

Limited resources

The funds entering the TFV from offenders are likely to be limited due to the difficulties involved in seizing assets and establishing a link between assets and the criminal offence. Whenever compensation from offenders enters the TFV, it is likely to be court-ordered and destined for victims whose cases have been handled by the Court.

It can confidently be predicted that the Court will not in fact directly handle the vast majority of cases that fall within its jurisdiction. Common reasons for this are that offenders are not apprehended, or a victim's particular injury is not included in the case against those who are. Much of the TFV money available to assist victims whose cases are not before the court will therefore come from voluntary contributions rather than the offender. As of December 2005 the TVF had received €96,760 (\$1,385,496 CDN) and another €525,000 (\$727,750 CDN)¹² had been pledged. Experience with the United Nations Voluntary Fund for Victims of Torture, which has received little by way of financial donations, does not provide a case for optimism. The Workshop participants expressed great concern that too little money would be available to do very much of anything, either now or in the future. If the funding is fragile there will be fundamental issues concerning the levels of payment that ought to be made now (so as to preserve the capital), and sustainability into the future. To create a fund for victims of immediate past crimes against humanity creates an expectation that similar funds will be available for future crimes. And of more immediate concern, there are no reliable estimates of how many victims will apply over the next two or three years. How will the trustees respond if demand exceeds supply? Will victims be prioritized for compensation because of the severity of their injuries, the scale of the crime or the atrocity with which it was committed, or because they were first to make an application? These are operational questions, but they raise profound policy dilemmas.

¹² Source: ICC website. www.icc-cpi.int/vtf.html

The limitations of the TFV will be clear to those working in it. In his speech at the first meeting of the Board members on April 22nd 2004 Archbishop Desmond Tutu said: "when a country, a nation, the international community says, symbolically 'we cannot compensate you but we want to show that we care, we want to show that we hope that this small thing that we do for you will somehow pour balm on your wounds and help those wounds to heal',"¹³ he acknowledged that there is a limit to what a community, however large, can do. Many past commentators have argued that limited state crime victim compensation can only ever be a symbolic gesture of public recognition of the victim's experience. A candid and public acceptance by international organizations that they will never have the means or the capacity to deliver 'compensation' in its legal sense of a full restoration (as far as money can) of the victim's pre-injury position will help to manage victims' expectations. The shift in the TFV's focus from reparation to victim assistance is realistic and reduces the risk of further disappointment among victims.

How to offer compensation to victims?

How reparation is organized is paramount to victims' sense of justice. In order that justice is seen to be done procedures must be open and inclusive. Victims must be treated with dignity and respect. They should be kept informed and be consulted regarding the developments in their case.

NGOs will play a key role in bringing services to victims. These organizations typically have the infrastructure and the network to be accessible to victims in the field. By using existing structure, administrative costs can be kept low. This is vital in order to ensure that most money goes directly to assist victims

In many western countries, such as the USA, grass roots organizations created by victims for victims have played an important role in providing support and advocating legal reform. We know from national victim assistance programs that victims helping victims has both

¹³ Quoted in: Regulations of the Trust Fund for Victims are Finally Adopted, by Karine Bonneau and Carla Ferstman, *VWRG Bulletin*, Issue No. 5, Feb 2006, p. 8

advantages and disadvantages. Self-help groups are easily accessible and relatively inexpensive. Some of their disadvantages are that victims tend to suffer from burn out and may still be dealing with the consequences of their own victimization, which makes it very difficult for them to help someone else.

Many of the above questions all lead back to the broader question: what is the underlying philosophy behind the program? Is it about holding the state or the international community accountable for its failure to protect its citizens? Or is it about solidarity with victims: sharing the burden of loss across society rather than leaving it all on the victim's shoulders. Or is it about helping victims rebuild their lives? The aim or purpose of the program will determine who will be compensated, when and how. These questions need to be answered beforehand. Before the TFV starts accepting applications, it must have given careful consideration to all of these questions and, more importantly, have answers to them.

Rehabilitation

Rehabilitation refers to medical, psychological, legal and social services aimed at promoting the victim's healing. In many countries these services are available through public programs such as public health insurance, legal aid and other publicly run services. However, there are countries with little or no state-run social services and in these countries state compensation programs are important, as is the case in the United States. Without state compensation, these victims would often not have access to medical, psychological or legal services.

Bearing in mind their scale and seriousness the availability of these services is an equally important concern for the crimes that fall under the jurisdiction of the Court. In developing countries in particular, where such resources are often scarce, victim rehabilitation poses serious challenges. The recent decision by the Assembly of State Parties to cut two field posts¹⁴,

¹⁴ VRWG, Conclusions of the ASP on the Budget, January 7 2006.

raises additional concerns about whether victims will have access to the services that they need, and that are often vital for their survival.

Although rehabilitation falls under the definition of reparation that it adopted, the Court has a limited capacity to provide rehabilitation for victims. Rehabilitation is not its main objective, which is intended to prosecute and establish the guilt of a person regarding the commission of a crime. The TFV, however, in its mandate to provide reparation has repeatedly emphasized its role in providing assistance to victims.

Given its limited financial resources, reparation through victim rehabilitation and the provision of services that are intended to help victims heal, would enable the TFV to make a significant contribution. In particular, the TFV could focus its actions around rehabilitative efforts for the collectivity. Its mission could be tailored to the collective needs of the society, which has been victimized, without forgetting about the individual needs victims might have. For example, it could finance rehabilitative efforts, including financial support to victims' organizations and commemorative actions, contributing to the truth seeking process.

Satisfaction and Guarantees of Non-Repetition

The Commission on Human Rights'¹⁵ definition of reparation also includes satisfaction and guarantees of non-repetition. Here, their definition of reparation is oriented both towards the future and the past. Measures that contribute to prevention are clearly aimed at the future, while the search for the whereabouts of the disappeared, public disclosure of the truth, a public apology and commemorations focus on reparation of the past. The research literature on restorative justice recognizes the rehabilitative or healing function of an apology and an explanation by the offender. Such acts provide victims with recognition. While satisfaction and

¹⁵ Commission on Human Rights, Resolution 2005/35, 19 April 2005

guarantees of non-repetition may be very important for victims, the ICC has not adopted these functions of reparation.

Summary

The ICC's somewhat narrow definition of reparation may raise some problems regarding victims' expectations. It focuses on restitution, compensation and rehabilitation. The emphasis on material compensation may create expectations that cannot be fulfilled. The more abstract notion of satisfaction and the guarantees of non-repetition were not adopted. Nevertheless, its understanding of reparation can embrace different conceptions and understandings of the harm and the damage done. These may in turn meet the differing expectations that arise from victims' differing cultural and geo-political backgrounds. There is a need to differentiate reparation according to those cultural differences.

4. THE IMPACT OF REPARATION ON VICTIMS' REHABILITATION

Rehabilitation is about healing and recovery. There is no doubt that victim reparation can have a positive effect on a victim's rehabilitation. At the individual level, it can restore self-esteem, reduce anxiety and stress, foster trust in others as well as in social institutions and the State. At the group level, it can promote social solidarity. However, it can also have a profound negative impact. In particular, the absence of reparation or inadequate reparation can exacerbate victims' suffering. Not being recognized or validated by the ICC or the TFV can lead to secondary victimization. In addition, the mere process of testifying or applying for reparation may be difficult for some victims. Victims have to recall terrible events and re-living the experience by sharing it can be traumatic. A process that does not appease victims' sense of justice will have a negative impact on their well-being as well as their faith in social institutions (Wemmers, 1996; Wemmers, 2005).

Managing Victims' Expectations

The way reparation affects victims will depend in part on their expectations as well as on what the ICC and the TFV can deliver. It is important to realize that victims' expectations are influenced by how information is presented to them. The application form for victim reparation has already been adopted by the Assembly of State Parties. On it, victims are asked to indicate whether they wish compensation, restitution, rehabilitation or something else. Without further information this question may create an expectation among victims that they can receive financial compensation from the court. However, the ability of the ICC and the TFV to provide financial compensation is very limited and it is highly unlikely that most victims will receive full financial compensation for their losses. It is important that when victims are provided this questionnaire, they understand the context and the limitations of the ICC in providing financial compensation. Otherwise, victims will be disappointed and this in turn will hurt their recovery from their victimization as well as their confidence in the ICC.

Parallels can be drawn with the experience in the many nations that have introduced victim impact statements. As in Canada, victims are typically provided with a basic form on which they are asked to indicate the impact that their victimization had on them. Specifically, they are asked to indicate any medical expenses, and financial losses, and emotional consequences. This inevitably creates the expectation that the court will bear their answers in mind when sentencing and that they will receive financial reparation. Research on victim impact statements shows that unless victims have some indication that something was done with their statement, they are often left feeling disappointed and disillusioned (Erez and Tontodonato, 1992; Sanders, Hoyle, Morgan and Cape, 2001).

As we cannot change the ICC application form for reparation, thought must be given to how it will be presented to victims. Key questions need to be addressed. These include who distributes the information to victims when, and how the forms will be presented? Victims must be given realistic expectations at the beginning. If they are given false hope, this will only lead to disappointment and problems later on.

In addition to its presentation, how reparation is implemented will also strongly determine whether it helps or hinders victims' rehabilitation. This is still largely unknown given the newness of the Court and the TFV; however, those working in these organizations must reflect upon the possible effects that their actions will have on victims. The Court's and the TFV's failure to satisfy victims' sense of justice will have negative consequences both at the individual and the group level.

Reconciliation

The literature on transitional justice identifies four elements that are essential for the transition from an authoritarian state to a democracy. These are: truth seeking, accountability, reparation and reconciliation. As a criminal court the ICC emphasizes accountability. To some extent the Court and the TFV also strive to unveil the truth and to provide reparation. The Court does not directly address the question of reconciliation, but experiences in the Former Republic of

Yugoslavia and Rwanda have illustrated the importance of reconciliation for the future of the nation and its peoples.

Even though satisfaction is not part of the formal definition of reparation adopted by the Assembly of State Parties, many of its elements, such as an apology, public acknowledgement and commemorations, can have a rehabilitative effect on victims. Thus, satisfaction should be considered by the ICC and especially the TFV, with respect to victim rehabilitation. Such acts are not only important for the individual victims but also at the group or societal level.

Instruments that foster reconciliation and healing include Truth Commissions, such as the South African Truth and Reconciliation Commission. Truth Commissions can provide victims with a forum to speak, a means to learn the truth about what happened and public acknowledgment of their victimization. The Gacaca Tribunals of Rwanda may be considered another instrument that fosters reconciliation and healing. However, in Gacaca there is no support for victims and participation is not voluntary. The latter makes it markedly different from restorative justice programs that operate on a voluntary basis.

The TFV could tailor its response to the situation in order to maximize the potential for healing. For example, in cases of abuse of power, the focus might be on rehabilitation measures that restore confidence in the State. In the case of genocide, the focus could be on social restoration such as activities that restore faith in others. In the case of war crimes, emphasis could be placed on the cessation and the prevention of violence. In this way the TFV could contribute to social reparation and rehabilitation while staying within its means.

5. RECOMMENDATIONS

Based on the deliberations of the day, the Workshop participants recommend the following:

- The only way that the Trust Fund for Victims will be able to accomplish its objectives is if sufficient resources are made available. Concretely, the participants recommended that 5% of a nation's budget for the ICC should be earmarked for victim services, specifically the Victim Participation and Reparation Unit and the Victim Witness Protection Unit. In addition, given the large number of victims affected by these crimes, an amount equal to 10% of the country's contribution to the ICC should be donated to the TFV.
- In order to accommodate victims' needs, emphasis should be placed at the front end of the organization, namely victim outreach. What information and how it is presented to victims will be key in managing victims' expectations in order to avoid disillusionment and further suffering. Money must be available for outreach and other field activities.
- Reparation is more than filling in a form. It is vital that the ICC and the TFV take a broad approach to reparation, recognizing the impact of satisfaction on victim rehabilitation and the importance of avoiding re-victimization.
- In line with Article 60 of the Regulations of the Trust Fund, the money that is allocated should be designated for projects and organizations having a clear victims' mandate such as victim support.
- In making its decisions the Court should be encouraged not to differentiate between victims where no justifiable difference exists. The healing effects of reparation will be undermined where victims see that one person's suffering is worth more than another's.

- The Court differs from the TFV. It has a different function that will serve victims differently. The TFV's function is to recognize victims and advance their rehabilitation. It should tailor its responses to the particular needs of victims in each situation.
- Satisfaction and the guarantees of cessation should also be viewed in terms of victim rehabilitation. Truth seeking and reconciliation can contribute to victims' rehabilitation both at the individual and the group level.
- The TFV plays a vital role with respect to victim recognition and validation. It is important that victims are not discriminated against on the basis of prior criminal conduct.
- The TFV must pay attention to managing costs in relation to rewards. No more than 10% of the budget should be spent on administering the program.
- Development funds should be excluded from TFV. There should be a clear distinction between reparation programs and humanitarian aid.
- All staff, including judges and especially investigators, should undergo mandatory training with respect to victims. The ICC is unique in its recognition of victims, and if this is not reflected in its working, victims will be disappointed.
- Guidelines should be developed for those in contact with victims on how to deal with their experience and their wishes. Precedents exist at a national level that could serve the Court.

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