

# Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families

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## Abstract

In this contribution the reparation possibilities for victims of sexual violence at the International Criminal Court and at the Trust Fund for Victims and their families are explored. This is done by explaining first of all why victims of sexual violence – and especially women – are in urgent need of reparation during and after conflict, with a special focus on the situation of female survivors of sexual violence in Rwanda. The reparation possibilities for victims of sexual violence at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda are subsequently discussed, followed by a similar discussion with regard to the ICC. Questions such as the nature of the best forms of reparation for victims of sexual violence and at what point they are made are also dealt with. Although the ICC reparations regime offers in theory a good means of providing restorative justice to victims of sexual violence, it is important that the special concerns and needs of such victims are not easily overlooked by the Court and that swift action is taken by the Trust Fund for Victims and their families to address their plight.

## Key words

gender-based crimes; HIV/AIDS; International Criminal Court; International Criminal Tribunal for Rwanda; International Criminal Tribunal for the former Yugoslavia; reparation; Rwanda; sexual violence; Trust Fund for Victims; victims of sexual violence

## I. INTRODUCTION

Victims' rights to reparation (comprising restitution, compensation, and rehabilitation) have been widely recognized at both national and international level. Yet in many situations the enforcement of victims' rights to reparation through national and/or international reparation mechanisms has proved extremely difficult.<sup>1</sup> For

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1. See, *inter alia*, M. E. I. Brienens and E. H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (2000), at 1057–101; and T. Ingadottir, C. Ferstman, and E. Kristjanjssdottir, 'Victims of Atrocities – Access to Reparations', paper presented at the conference 'Searching for Justice: Comprehensive Action in the Face of Atrocities', York University, Canada, 4–6 June 2003, available at [http://www.pict-icti.org/publications/pict\\_articles/warcrime.pdf](http://www.pict-icti.org/publications/pict_articles/warcrime.pdf) (last visited November 2006).

this reason many victims have been left without reparation despite gross violations of human rights and international humanitarian law committed against them. As far as the supranational criminal law level is concerned, the reparation regime of the International Criminal Court (ICC or Court) may bring about a positive change for victims. The notion that international justice should not only address traditional retributive justice, namely the punishment of the offender, but also restorative justice, namely having victims participate in the proceedings as well as providing them with reparation for their injuries, has gained increasing recognition with the establishment of the ICC. The ICC departed here from the overall retributive justice approach as applied by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

This article deals with victims of sexual violence and their claims for reparation under supranational criminal law. In general it can be held that the needs of victims of sexual violence for reparation during and in the aftermath of sexual violence committed as genocide, a crime against humanity, and a war crime are readily apparent. In addition to the devastating physical, psychological, social, and economic consequences women and girls generally face, they often contract sexually transmitted diseases, including HIV/AIDS. They may furthermore face unwanted pregnancies and health complications resulting from botched abortions, and suffer sexual mutilation and other injuries, such as fistulas, uterine problems, vaginal lesions, and scarring. The combination of physical injuries and disabilities, trauma, stigmatization, poverty, and sexually transmitted diseases such as HIV/AIDS are typical consequences that many victims of sexual violence have to face, most of them women.<sup>2</sup> One only has to look at the situation in countries such as Sudan (especially Darfur), the Democratic Republic of Congo (DRC), Uganda, the Central African Republic, Sierra Leone, Rwanda, and the former Yugoslavia. In these countries, and the list is not exhaustive, the majority of victims of sexual violence are women who have been left without any form of reparation, including adequate medical and psychological care.<sup>3</sup> Because of their desperate situation, without help many survivors

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2. While men may also be targeted for sexual violence during conflict, it is an acknowledged fact that sexual violence primarily and disproportionately affects women, particularly when it rises to the level of genocide, crimes against humanity, or war crimes. The combination of physical, psychological, social, and economic consequences as well as health complications, such as HIV/AIDS, affects female survivors of sexual violence primarily and most severely. For this reason this article focuses on female survivors of sexual violence.
  3. On the DRC see, *inter alia*, J. Martens, 'Congo Rape Victims Seek Solace', BBC, 24 Jan. 2004; 'Report Shows DR Congo Rape Horror', BBC, 26 Oct. 2004; Amnesty International, 'Democratic Republic of Congo: Mass Rape – Time for Remedies', AI Index: AFR 62/022/2004, 26 October 2004; Médecins sans frontières, 'I Have No Joy, No Peace of Mind: Medical, Psychosocial, and Socio-Economic Consequences of Sexual Violence in Eastern DRC', 2004; Human Rights Watch, 'The War within the War: Sexual Violence against Women and Girls in Eastern Congo', June 2002; and Human Rights Watch, 'Seeking Justice: The Prosecution of Sexual Violence in the Congo War', March 2005. On Rwanda see, *inter alia*, African Rights, *Broken Bodies, Torn Spirits: Living With Genocide, Rape and HIV/AIDS* (2004); Amnesty International, 'Rwanda: Marked for Death', AI Index: AFR 47/007/2004, 5 April 2004; Human Rights Watch, 'Struggling To Survive: Barriers to Justice for Rape Victims in Rwanda', September 2004; and F. Nduwimana, 'The Right to Survive: Sexual Violence, Women and HIV/AIDS', Rights and Democracy (International Centre for Human Rights and Democratic Development), 2004. On Sudan see, *inter alia*, Médecins sans frontières, 'The Crushing Burden of Rape: Sexual Violence in Darfur', 8 March 2005; and Human Rights Watch, 'Sexual Violence and its Consequences among Displaced Persons in Darfur and Chad', April 2005. On Sierra Leone see, *inter alia*, Human Rights Watch, 'We'll Kill You if You Cry: Sexual Violence in the Sierra Leone Conflict', January 2003; and Physicians for Human

of sexual violence can barely continue to exist, have died since, or face death in the near future. Female survivors of sexual violence therefore deserve separate attention when it comes to reparation.<sup>4</sup>

In particular HIV/AIDS has become an issue of major concern, since many female victims of sexual violence have contracted the disease through (often repeated and incessant) sexual violence during conflict situations. It has been established that sexual violence and the increasing spread of HIV/AIDS among women are interlinked.<sup>5</sup> The risk of HIV transmission increases up to threefold when sex is forced, especially for girls and young women, because their vaginal tracts are immature and tear easily.<sup>6</sup> Furthermore, women are more susceptible to HIV infection than men: 'male-to-female HIV transmission during sex is about twice as likely to occur as female-to-male transmission'.<sup>7</sup> Women are increasingly affected in each region of the world, and close to half of 37.2 million adults (aged 15–49) living with HIV are women.<sup>8</sup> In sub-Saharan Africa 57 per cent of the adults living with the virus are women, and two thirds of young HIV-positive people are women and girls.<sup>9</sup> As the risk of the transmission of HIV/AIDS through sexual violence in times when genocide, crimes against humanity, and war crimes are committed is believed to be high, without proper remedies many women are literally left to die a slow death.

In this article the reparation possibilities for victims of sexual violence at the ICC and at the Trust Fund for Victims and their families will be explored. In order for this to be done, it is first of all important to understand why victims of sexual violence are in urgent need of reparation during and after conflict. For this purpose, the situation

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Rights, 'War-Related Sexual Violence in Sierra Leone: A Population-Based Assessment', 2002. On northern Uganda see, *inter alia*, the Press Release by the Women's Initiatives for Gender Justice, in collaboration with Isis-WICCE and Ugandan Women Activists, 23 Nov. 2004. On the former Yugoslavia see, *inter alia*, Amnesty International, 'Justice Shelved – Impunity for Rape in Bosnia Herzegovina', AI Index: EUR 63/005/2004, 12 Oct. 2004. On the Central African Republic see, *inter alia*, Fédération Internationale des Ligues des Droits de l'Homme, 'Crimes de Guerre en République Centrafricaine: 'Quand les elephants se battent, c'est l'herbe qui souffre'', No. 355, Février 2003; and Amnesty International, 'Central African Republic: Five Months of War Against Women', AI Index: AFR 19/001/2004, 10 Nov. 2004. Note that all situations mentioned here are taken up before such international tribunals such as the ICTY, the ICTR, the Special Court for Sierra Leone and the ICC.

4. It is not at all implied here that other victims of genocide, crimes against humanity, or war crimes are less worthy of reparation. This contribution only wants to highlight the specific consequences with which victims of sexual violence, mostly women, have to deal; consequences which disproportionately affect female survivors of sexual violence. Furthermore, although not necessarily having the same meaning, the words 'victims' and 'survivors' are used interchangeably throughout this contribution.
5. See, *inter alia*, the UN Commission on Human Rights, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Y. Ertürk, 'Integration of the Human Rights of Women and the Gender Perspective: Violence against Women – Intersections of Violence against Women and HIV/AIDS', E/CN.4/2005/72, 17 Jan. 2005; and Amnesty International, 'Women, HIV/AIDS and Human Rights', AI Index: ACT 77/084/2004, 24 Nov. 2004.
6. World Health Organization Press Release, 'Women and Girls Need Access to AIDS Treatment and Protection from Violence', 30 Nov. 2004.
7. UNAIDS/WHO Press Release, 'Number of Women Living with HIV Increases in Each Region of the World', 23 Nov. 2004.
8. Annual Report by the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the World Health Organization (WHO), *AIDS Epidemic Update 2004* (2004), at 7.
9. *Ibid.*

of female survivors of sexual violence in Rwanda will be examined (section 2).<sup>10</sup> After that, the reparation possibilities at the ICTY and the ICTR will be discussed, as well as its impact on victims of sexual violence (section 3). Such a discussion is furthermore relevant in order to see to what extent, in terms of reparation to victims, the ICC was influenced by its predecessors. This section is followed by a discussion of the ICC reparation regime and its possible meaning to victims of sexual violence (section 4). Such a discussion is all the more relevant in the light of the massive amount of sexual violence that has occurred (and is still occurring) in the situations currently examined by the Court, namely in the DRC, Uganda, and Sudan. Questions such as which possibilities exist at supranational criminal law level for victims of sexual violence to receive reparation, what the best forms of reparation for victims of sexual violence are, and at what point will be explored. In the final section some observations, recommendations, and concluding remarks as to the reparation possibilities for victims of sexual violence at the ICC and Trust Fund for Victims and their families will be made (section 5).

## 2. SURVIVORS OF SEXUAL VIOLENCE IN RWANDA

During the hundred days of genocide that ravaged the small central African country of Rwanda from April to June 1994, about 934,000 Tutsis and moderate Hutus were killed.<sup>11</sup> Hundreds of thousands of women and girls were raped and/or experienced other forms of sexual violence. It has been estimated that between 250,000 and 500,000 girls and women were raped at that time; many women were killed following the rape.<sup>12</sup> Pregnancies caused by rape are estimated to amount to between 2,000 and 5,000,<sup>13</sup> but the number has also been estimated to be as high as 15,000.<sup>14</sup> Although the exact number of raped women and pregnancies resulting from these rapes will never be known, it has been held that ‘almost all females who survived the genocide were direct victims of rape or other sexual violence, or were profoundly affected by it’.<sup>15</sup> The victims were mostly Tutsi women, but moderate Hutu women were also targeted. The perpetrators of the sexual violence were largely members of the Hutu militia, the Interahamwe, but rapes were also committed by soldiers of the Rwandan Armed Forces (FAR), including the Presidential Guard, and civilians. The sexual violence took on different cruel forms, such as gang rapes, rapes with objects, sexual slavery (including forced marriage), and sexual mutilations. The rapes were

10. For the purpose of this article the case study of Rwanda has been chosen. It should be stressed, however, that in many other conflicts similar consequences of sexual violence and thus the need for reparation can be found, albeit to various levels and degrees. See also references to country reports, *supra* note 3.

11. This number was given by the Rwandan government on the occasion of the tenth anniversary commemorating the genocide (1994–2004). Older reports cite that the number of persons killed is likely to range between 500,000 and 800,000.

12. UN Commission on Human Rights, Report on the Situation of Human Rights in Rwanda Submitted by Mr René Degni-Ségui Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Resolution S-3/1 of 25 May 1994, E/CN.4/1996/68, 29 January 1996, para. 16.

13. *Ibid.*

14. Save the Children, *HIV and Conflict: A Double Emergency* (2002), at 5.

15. Organization of African Unity (OAU), International Panel of Eminent Personalities Report, *Rwanda: The Preventable Genocide* (2000), para. 16.20.

often repeatedly committed over an extended period of time. Pregnant women were not spared, neither were young girls. Moreover, family members were often forced to watch the rapes of their loved ones. The many resulting unwanted pregnancies caused a large number of children of the ethnicity of the rapist to be born, further adding to the victims' trauma. The sexual violence took place all over the country and was in many cases conducted in plain view.<sup>16</sup>

Despite the terrible physical and psychological consequences of the rapes and other forms of sexual violence, more than twelve years after the 1994 genocide female survivors of sexual violence have received hardly any form of reparation, either at national or international level.<sup>17</sup> While several organizations – such as WE-ACTx (Women's Equity in Access to Care and Treatment), AVEGA-AGAHOZO, and SURF (Survivors Fund) – do everything in their power to support survivors of sexual violence,<sup>18</sup> the problem is so enormous that much more help, in the form of personnel, medicines, and funding, is needed. While reparation could have met these women's needs for medical and psychological care, they are instead still struggling to meet their own and their children's most basic needs, such as food, clothing, housing, and education. Furthermore, besides dealing with their own injuries, traumas, and illnesses, they are faced with the tasks of taking care of orphans and the sick and injured, and of generating an income. These tasks have heavily impacted on women in the years following the genocide, given that most survivors were women.<sup>19</sup> Furthermore, due to the conflict most women had lost not only their husbands but also their homes, which were looted and taken over by others during the conflict, and other property, which was stolen. As a consequence of women's second-class status in Rwanda, they could not inherit property unless

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16. For a more complete account of the sexual violence committed during the Rwandan genocide, see e.g. Human Rights Watch, 'Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath', HRW Index No.: 2084, September 1996; and B. Nowrojee, 'Expert Report: Sexual Violence Crimes During the Rwandan Genocide', Human Rights Watch, June 2004 (filed under the ICTR *Government II* case, Case No. ICTR-99-50-T, 25 October 2004).
  17. In Rwanda, monetary claims have been awarded to victims by national courts, but no enforcement has resulted because those convicted simply did not have the money to pay the victims. See the report prepared by the International Crisis Group, 'International Criminal Tribunal for Rwanda: Justice Delayed', Nairobi/Arusha/Brussels: Africa Report No. 30, 7 June 2001, at 33. Although a statute which is to provide for the creation and governance of a reparations fund for genocide victims has been drafted, the Fonds d'Indemnisation (FIND), it still has not been adopted. Currently, the Fonds d'Assistance aux Rescapés du Génocide (FARG) is in place, but it has been inadequate in meeting the needs of victims. Moreover, although FARG is a reparation mechanism, it is not specifically linked to victims of sexual violence and their needs.
  18. Thanks to initiatives such as WE-ACTx, the Clinton Foundation, Survivors Fund (SURF), Women for Women International and Médecins Sans Frontières, some women (many of whom are members of AVEGA-AGAHOZO, an association of genocide widows) are now receiving treatment. For example, WE-ACTx, an international grassroots non-profit initiative advocating for HIV-positive women, provides free access to comprehensive medical care, including ARVs. Today, WE-ACTx has about 4,000 patients, of whom approximately one-third require ARV treatment and 70 per cent receive prophylaxis HIV treatment (see <http://www.we-actx.org> (last visited September 2006)). Also note the UK's Department for International Development initiative to sponsor an ARV programme for 2,500 HIV+ women survivors and their families to be implemented by SURF at four local centres, including AVEGA and Solace Ministries (SURF Press Release, 'First Lady of Rwanda Launches DFID Sponsored Antiretroviral Programme for Women Survivors', 7 Dec. 2005). See also African Rights, *supra* note 3, ch. 12.
  19. It has been estimated that 60–70 per cent of the Rwandan population is women, of whom 50 per cent are widows. See the AVEGA-AGAHOZO, Association of Genocide Widows, available at <http://www.avega.org.rw> (last visited February 2006).

they were explicitly designated as the beneficiaries.<sup>20</sup> As a result, many widows and daughters had no legal claim to the homes of their murdered husbands or fathers or to their male relatives' land or bank accounts.<sup>21</sup> Although a new law has improved women's rights to inheritance and land ownership, most women are still discriminated against in this respect, continue to live in extreme poverty, and remain vulnerable to (sexual) violence.<sup>22</sup>

In addition to the physical injuries and trauma resulting from the rapes, between 70 and 80 per cent of the surviving women in Rwanda are estimated to have been infected with HIV.<sup>23</sup> Although not all cases of HIV/AIDS among rape survivors can be linked to the sexual violence they suffered during the genocide, it can be assumed that many women were infected with the virus as a result of these rapes. This can be concluded in light of, for instance, the abnormally high incidence of HIV/AIDS infection among women raped during the genocide and the rapists' not using condoms.<sup>24</sup> Thus, as rates of HIV transmission during sexual violence are believed to be high, the mass rapes during the genocide contributed significantly to the spread of the virus in Rwanda.<sup>25</sup> The HIV prevalence rate in Rwandan rural areas dramatically increased, from 1 per cent before the start of the genocide to 11 per cent in 1997.<sup>26</sup> Moreover, many women were raped by men who knew that they were HIV-positive and deliberately tried to transmit the virus to Tutsi women and their families.<sup>27</sup> The number of patients clinically in need of life-prolonging

20. OAU, *supra* note 15, para. 16.11.

21. *Ibid.*

22. Amnesty International, 'Rwanda', *supra* note 3, at 4–5. According to this report, around 60 per cent of Rwandans are believed to live below the poverty line (with reference to the UNDP Human Development Index for 2003, in which it was recorded that 86.4 per cent of the Rwandan lived on less than US\$2.00 per day in 1990–2001).

23. See the AVEGA-AGAHOZO, Association of Genocide Widows, available at <http://www.avega.org.rw> (last visited February 2006); Amnesty International, 'Rwanda', *supra* note 3, at 3; and Save the Children, *supra* note 14, at 5.

24. Nduwimana, *supra* note 3, at 20–6. Nduwimana presents the following factors which strongly indicate that the majority of HIV/AIDS transmission had taken place through the rapes carried out during the genocide: (i) the abnormally high incidence of HIV/AIDS infection among women raped during the genocide; (ii) the incubation period (in 1998 the first cases of HIV/AIDS among raped women became known, which corresponds with the incubation period of three to ten years); (iii) rape-related health complications not experienced before the genocide; (iv) children born before the rapes were healthy; (v) the age of some women raped (some were still virgins, who could not have been affected by HIV/AIDS before the genocide); (vi) rapists did not use condoms; and (vii) the ICTR confirmed that many victims had died before testifying and others were too sick to give testimony.

25. Amnesty International, *supra* note 5.

26. World Health Organization, 'Violence against Women and HIV/AIDS: Critical Intersections, Sexual Violence in Conflict Settings and the Risk of HIV', Information Bulletin Series, Number 2, 2004, at 1.

27. OAU, *supra* note 15, para. 16.19. See also the AVEGA-AGAHOZO, Association of Genocide Widows, website at <http://www.avega.org.rw> (last visited February 2006) ('Testimonies reveal that men who were HIV/AIDS positive deliberately infected women, using the social stigma attached to rape as an effective weapon in undermining the social fabric of these women'); UN Commission on Human Rights, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, R. Coomaraswamy, Addendum, 'Report of the Mission to Rwanda on the Issue of Violence against Women in Situations of Armed Conflict', E/CN.4/1998/54/Add.1, 4 February 1998, para. 31 (one of Jeanne's rapists told her, 'I have AIDS and I want to give it to you'); Nduwimana, *supra* note 3, at 19 ('I was raped by two gendarmes. . . one of the gendarmes was seriously ill, you could see that he had AIDS, his face was covered with spots, his lips were red, almost burned, he had abscesses on his neck. Then he told me "take a good look at me and remember what I look like. I could kill you right now but I don't feel like wasting my bullet. I want you to die slowly like me"'). Paul Kagame, the President of Rwanda, furthermore claimed that during the genocide the former Hutu government released

anti-retroviral (ARV) therapy is estimated at between 50,000 and 100,000, but only about 2,000 Rwandans were treated with ARV drugs as at January 2004.<sup>28</sup> According to SURF, an estimated 25000 women and girls are currently living with AIDS as a consequence of the rapes in 1994.<sup>29</sup> The costs of transport, consultations, medicines, and tests are well beyond the means of most Rwandans.<sup>30</sup> Those few who have access to free ARV drugs are still required to pay their hospitalization and consultation fees.<sup>31</sup> Many find themselves having to decide, if they have any choice at all, between paying for medical expenses and buying food. One of the primary concerns of these women is what will happen to their children when their mothers die of AIDS. Many sick women have no relatives who might take care of their children (since they had often been killed during the genocide) and they have no houses of their own or other property they could leave to their children.<sup>32</sup> As there is generally no aftercare for these children, most of them end up living on the streets or in child-headed households. In both situations, girls are very vulnerable to sexual abuse and many see no alternative other than to prostitute themselves in order to provide for their own and their brothers' and sisters' basic needs.<sup>33</sup> Stigmatization is also a serious problem for survivors of sexual violence and those living with HIV/AIDS. Women often refrain from seeking medical treatment following rape because of the risk that they will be identified as rape victims within their community and be ostracized, often by their own husbands. The stigmatization attached to HIV/AIDS often leads to a denial of the women's property and inheritance rights, employment, and access to finance, which further forces them into a deplorable situation in which they are susceptible to further (sexual) violence.<sup>34</sup>

The lack of reparation possibilities means that women and girls continue to die on a daily basis as a consequence of the diseases, in particular HIV/AIDS, inflicted upon them through sexual violence. According to AVEGA-AGAHOZO,

AIDS has now become deadlier than war and genocide itself, and the social and economic consequences are felt widely among this already vulnerable and fragile population group. Amongst AVEGA's members, the issue of rape and the resulting infection of HIV/AIDS constitute the ultimate violation of human rights.<sup>35</sup>

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- AIDS patients from the hospitals in order to rape and transmit the virus to Tutsi women. See P. Landesman, 'A Woman's Work', *New York Times Magazine*, 15 Sept. 2002.
28. Amnesty International, 'Rwanda', *supra* note 3, at 3.
  29. Annex to SURF (Survivors Fund) Press Release, 'First Lady of Rwanda Launches DFID Sponsored Antiretroviral Programme for Women Survivors', 7 Dec. 2005.
  30. Amnesty International, 'Rwanda', *supra* note 3, at 18.
  31. *Ibid.*
  32. African Rights, *supra* note 3, ch. 8; and Amnesty International, 'Rwanda', *supra* note 3, at 29–30.
  33. Amnesty International, 'Rwanda', *supra* note 3, at 29–30. The report refers to a study undertaken by the Johns Hopkins University in which it is reported that about 93 per cent of girls living on the street have been sexually abused ('Rwanda: Sexual Activity among Street Children in Kigali, UN Integrated Regional Information Network, 13 March 2002'). In post-genocide Rwanda, a real concern has become the many rapes of children that take place. See Hirondelle News Agency, 'Plus de 1.600 cas de viol de janvier à septembre selon la police', 1 Dec. 2004.
  34. Amnesty International, 'Rwanda', *supra* note 3, at 24–8.
  35. See the AVEGA-AGAHOZO, Association of Genocide Widows, website available at <http://www.avega.org.rw> (last visited February 2006).

On 10 December 2004, the UN General Assembly passed a resolution entitled 'Assistance to Survivors of the 1994 Genocide in Rwanda, Particularly Orphans, Widows and Victims of Sexual Violence'. In the resolution it was explicitly recognized that victims of sexual violence are among those who face the greatest hardship in post-conflict Rwanda, since they have often contracted HIV and have since either died or become seriously ill with AIDS.<sup>36</sup> The UN General Assembly called on

agencies, funds and programmes of the United Nations system to ensure that assistance is provided in the specific areas identified as priorities by the Government of Rwanda, notably education for orphans, medical care and treatment for victims of sexual violence, including HIV-positive victims, trauma and psychological counselling for genocide survivors and skills training and microcredit programmes aimed at promoting self-sufficiency and alleviating poverty.<sup>37</sup>

The effect of the resolution continues to be awaited. For now it can be concluded that in the absence of adequate national and international responses to the needs of victims of sexual violence in Rwanda, many of these victims have truly been left to die. Even thirteen years after the genocide ended women are still dying because of the lack of available reparative measures.

### 3. REPARATION POSSIBILITIES AT THE ICTY AND THE ICTR

The ICTY and ICTR regimes provide for three different forms of reparation to victims, namely restitution of property and proceeds, compensation, and rehabilitation (or support).<sup>38</sup> The restitution of property and proceeds is allowed on the basis of Articles 24(3) of the ICTY Statute and 23(3) of the ICTR Statute, as further elaborated by Common Rule 105 of the ICTY and ICTR Rules of Procedure and Evidence (RPE) and Rule 98 *ter* (B) of the ICTY RPE/Rule 88 of the ICTR RPE.<sup>39</sup> According to these provisions three requirements need to be fulfilled in order for there to be restitution of property and proceeds: (i) the accused has been convicted and the unlawful taking of property established; (ii) the property taken is 'associated with' the crime; and (iii) either a request for restitution has been made by the Prosecutor or action has been taken by the Chamber *proprio motu*. A victim thus has no standing before the Chamber to request restitution him- or herself. On the other hand, the rules provide

36. UN General Assembly, Resolution 59/137 of 10 December 2004 on Assistance to Survivors of the 1994 Genocide in Rwanda, Particularly Orphans, Widows and Victims of Sexual Violence, UN Doc. A/RES/59/137, 17 February 2005.

37. *Ibid.*

38. On the Tribunals' reparation regime, see generally S. Malmström, 'Restitution of Property and Compensation to Victims', in R. May et al. (eds.), *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (2001), at 373–84; and P. Chifflet, 'The Role and Status of the Victim', in G. Boas and W. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (2003), at 75–111.

39. The Statute of the International Criminal Tribunal for Rwanda (26 March 2004) is available at <http://65.18.216.88/ENGLISH/basicdocs/statute.html>; the Statute of the International Criminal Tribunal for the former Yugoslavia available at <http://www.un.org/icty/legaldoc-e/index.htm> (February 2006) (last visited September 2006). The latest version of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda is available at <http://65.18.216.88/ENGLISH/rules/070605/070605.pdf> (7 June 2005; first adopted on 29 June 1995); the latest version of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev37e.pdf> (29 March 2006; first adopted on 11 February 1994) (last visited September 2006).



that a determination of ownership by the trial chamber is not restricted to witnesses who testify at the tribunals. Although in some cases either the issue was raised or evidence was brought that property was illegally taken from victims of a crime falling within the jurisdiction of the tribunals for which the accused was found liable, to date no restitution of property or proceeds to the rightful owner has been ordered by the chambers.

The same can be said with regard to compensation for victims: up to the present day, no compensation has been granted through the compensation procedure set out at either tribunal. According to Common Rule 106 of the ICTY/R RPE, matters related to compensation are delegated to the 'national courts' or 'other competent bodies', which decide on compensation pursuant to their relevant national legislation. For this purpose, the judgment of the tribunal is to be considered final and binding as to the criminal responsibility of the convicted person for the injury caused to the victim. Compensation is therefore different from restitution of property and proceeds, since compensation to victims cannot be awarded by the tribunals themselves. The rationale behind Rule 106 not to provide for any direct compensation mechanism within the tribunals can be found in the fear that the tribunals themselves would not be able to handle a potentially high number of compensation claims when, at the same time, they would also have to deal with the prosecution of individuals accused of the most serious crimes.<sup>40</sup> Several attempts by Chief Prosecutor Carla Del Ponte to amend the Statute to include direct ways to compensate victims failed.<sup>41</sup> In particular it was held by the judges of the tribunals that other rights and policy considerations were at stake, including the accused's right to a fair and expeditious trial.<sup>42</sup> Although such a conclusion is not readily tenable,<sup>43</sup> the prospect of a change in the compensation regime of the tribunals before their expected closure in 2008 (trial cases) and 2010 (appeals cases) is no longer a realistic option.

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40. I. Bottigliero, *Redress for Victims of Crimes under International Law* (2004), 201. See also Resolution 827 (1993) of 25 May 1993 establishing the ICTY, where the UN Security Council stated that 'the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law' (emphasis added). According to Morris and Scharf, the UN Security Council thus wanted to exclude the possibility that the tribunals themselves were going to deal with compensation claims of victims. Rather, a claims commission for victims was considered to be a better solution. See V. Morris and M. P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995), Vol. 1, at 167, 286–7.
41. For an overview of the developments to change the compensation regime at the ICTY and the ICTR, see A.-M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005), at 406–9.
42. The ICTY judges based their decision on the 'Victims Compensation and Participation Report', a Report Prepared by the Rules Committee, 2000, Section IV, available at <http://www.un.org/icty/pressreal/tolb-e.htm> (last visited September 2006).
43. Groenhuijsen, for example, stated that 'quite a few jurisdictions have already proven that it is feasible as well as fruitful to transcend the distinction between punishment and court-ordered restitution.' See M. Groenhuijsen, 'Victims' Rights and Restorative Justice: Piecemeal Reform of the Criminal Justice System or a Change of Paradigm?', in H. Kaptein and M. Malsch (eds.), *Crime, Victims and Justice: Essays on Principles and Practice* (2004), 63 at 73. Van Boven summarizes the advantages of the possibility of requesting and being awarded compensation during criminal proceedings as follows: 'First, it makes the criminal offender more aware that not only was a wrong committed against public order and public welfare but, in addition, an injury was inflicted on one or more human beings. Second, it establishes a link between punitive measures and measures of reparation. Third, it tends to facilitate and expedite the process of obtaining civil damages.' See T. van Boven, 'The Perspective of the Victim', in Y. Danieli, E. Stamatopoulou, and C. J. Dias (eds.), *The Universal Declaration of Human Rights* (1999), 13 at 21.

Thus where compensation and restitution could have provided a means to achieve restorative justice for victims of sexual violence, the tribunals have not addressed victims' needs for compensation or restitution at all. Survivors of sexual violence could have used compensation awards for such purposes as hospitalization, medication including ARV drugs, and counselling, but also, for instance, for food, education, and rent. Restitution of property might have been helpful for those victims of sexual violence who faced constraints in regaining access to their homes, land, or other property taken during conflict. As described above, Rwandese women experienced difficulties in accessing property after the genocide. Not only would proper housing have been helpful for the general state of mind of survivors of sexual violence – as they have to worry about many other things (such as food and health) – for some women it would also have taken away one of their primary concerns, that their children should not be left to live in the streets when their mothers die of AIDS contracted as a result of the sexual violence. As the determination of ownership is not restricted to those victim-witnesses or witnesses who testify at the tribunal proceedings, potentially larger numbers of victims of sexual violence might have been reached by the provision on restitution.

As far as rehabilitation is concerned, the situation of some survivors of sexual violence in Rwanda is more positive than before. In the light of a recent initiative under the supervision of the ICTR's Gender Adviser Elsie Effange-Mbella, rehabilitation to victim-witnesses of sexual violence has become a reality before the ICTR. In 2004 a medical unit was set up in Rwanda to monitor patients. The ICTR thereby accepted a duty on the basis of Rule 34 of its RPE to provide rape victims (including potential witnesses) testifying at the Tribunal with general medical services, counselling, and ARV treatment, throughout the trial process as well as in the pre- and post-trial phases.<sup>44</sup> While the set-up of an earlier Support Programme for Witnesses and Potential Witnesses was abolished shortly after it had been put in place and only some basic general treatment was provided for witnesses during their stay at the tribunal,<sup>45</sup> the ICTR has now increased its support services to victims of sexual violence.

By August 2006 the clinic was caring for 59 confirmed witnesses and 20 potential witnesses with HIV/AIDS, of whom 22 and 20 respectively are on ARV drugs as medically recommended.<sup>46</sup> Yet the clinic is dependent on the resources of the Voluntary Trust Fund, whose resources are used for various projects that support the

44. ICTR Draft Report on Improved Access to Anti-Retroviral Treatment and Psychological Counseling for ICTR Witnesses with HIV/AIDS, prepared by E. Effange-Mbella, 2006, at 2–3. The report reads at 2: 'The ICTR by virtue of its mandate and the provisions of Article 21 of its Statute and Rule 34 of its Rules of Procedure and Evidence, has a fundamental and unique role to play in achieving peace, justice and national reconciliation in Rwanda, by creating inter alia, conducive conditions for the maintenance of an adequate physical and psychological environment enabling the successful participation of witnesses to the process of testifying before the Tribunal particularly for victims of rape and sexual assault.'

45. On these issues, see de Brouwer, *supra* note 41, at 400–3.

46. Information as provided by the ICTR Gender Adviser E. Effange-Mbella. The 79 witnesses (confirmed and potential) being treated for HIV/AIDS were established among a target group of 342 witnesses who accepted voluntary testing for the virus.

activities of the court (and thus not only the Support Programme for Witnesses).<sup>47</sup> In addition resources are being depleted and few new substantive contributions to the Voluntary Trust Fund have been received from member states or individuals for some time.<sup>48</sup> Without new voluntary contributions to the Trust Fund, the Support Programme for Witnesses and Potential Witnesses might be in jeopardy. However, as counselling for voluntary HIV testing is still ongoing, the number of witnesses who are found to be infected with HIV/AIDS will most probably rise.<sup>49</sup> Indeed, based on national statistics (the HIV/AIDS prevalence rate in Rwanda is 11 per cent), out of an estimated total of 2420 (prosecution and defence) witnesses testifying at the ICTR, more than 260 witnesses are presumably infected with HIV/AIDS. It is not clear how many female victim-witnesses have contracted the HIV/AIDS virus as a consequence of the sexual violence inflicted on them in 1994. The ICTR has summoned about 300 female witnesses to testify in various proceedings in Arusha, some of whom were victims of sexual violence.<sup>50</sup> In order to reach infected women, urgent HIV testing of this group of witnesses and funding for the Voluntary Trust Fund is needed.<sup>51</sup>

As regards the ICTY Voluntary Trust Fund, the situation at the ICTY is not much different from the ICTR; only a part of the voluntary contributions are used for victim support.<sup>52</sup> In contrast to the ICTR, however, the ICTY has not taken any direct responsibility at all for providing witness support before or after testimony; only some basic support during their testimony before the Tribunal is offered. Although several conferences with health and welfare professionals from the countries concerned have taken place over the past few years,<sup>53</sup> it seems that the practical application of providing physical and psychological support to witnesses who testified before the Tribunal has been left to health care institutions present in the countries

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47. Note, however, that in October 2003 N. Al Hajjaji, the President of the UN Human Rights Commission, emphasized the need to establish a special trust fund for victims of the Rwandan genocide during her visit to the ICTR. However, negotiations on such a special fund for victims are still ongoing and no substantial progress has been reported. See ICTR Press Release, 'The President of the UN Human Rights Commission to Lead a Campaign to Support Victims', ICTR/INFO-9-2-363.EN, 7 October 2003.
48. Hirondele News Agency, 'ICTR Medical Support Programme Targets 2,300 Witnesses', 28 Jan. 2005. Note that in early 2006 negotiations with the UK government (Department of International Development) on funding the Voluntary Trust Fund to support witnesses with HIV/AIDS were ongoing. See Hirondele News Agency, 'British Government to Support Medical Fund for Tribunal's Witnesses', 17 Feb. 2006. Recently, a grant from the Irish government to the ICTR of US\$317,000 for its HIV/AIDS medical support programme for witnesses was received.
49. Hirondele News Agency, 'British Government', *supra* note 48.
50. Information as provided by the ICTR Gender Adviser E. Effange-Mbella.
51. In the ICTR Draft Report on Improved Access to Anti-Retroviral Treatment and Psychological Counselling for ICTR Witnesses with HIV/AIDS, prepared by E. Effange-Mbella, 2006, it is furthermore noted that 'lack of treatment opportunities where the witnesses live, including fear of accessing voluntary testing and counselling centers due to lack of awareness and fear of cultural stigmatization will continue to inhibit witnesses from accessing ARV treatment therapy' (at 5).
52. ICTY, Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, A/57/379-S/2002/985, 4 September 2002, paras. 331 and 334.
53. ICTY Press Release, 'First Conference between Health Professionals from the Former Yugoslavia and the ICTY on Witness Welfare', CC/P.I.S./805-e, The Hague, 2 Dec. 2003; ICTY Press Release, 'Second Conference between Health Professionals from the Former Yugoslavia and the ICTY on Witness Welfare', WL/P.I.S./850-e, The Hague, 21 May 2004; ICTY Press Release, 'Conference between Health Professionals from Croatia and the ICTY on Witness Welfare', WL/P.I.S./855-e, The Hague, 4 June 2004; and ICTY Press Release, 'Fourth Conference between Health Professionals from the Former Yugoslavia and the ICTY on Witness Welfare', WL/P.I.S./894-e, The Hague, 13 Sept. 2004.

concerned. Thus, whereas the ICTR has significantly increased its support services to victim-witnesses of sexual violence, including by providing ARV drugs, support services to victims of sexual violence appearing before the ICTY are minimal. While the ICTR's initiative is highly commendable, it should also be noted that it is offering its support measures only to victims of sexual violence appearing as witnesses before the ICTR; those not appearing as witnesses do not receive support.<sup>54</sup> The majority of survivors of sexual violence therefore remain dependent on private and humanitarian initiatives in Rwanda itself.

In sum, the ICTY and the ICTR do provide for reparation possibilities for victims. However, with the notable exception of the (recently effective) ICTR Support Programme for Witnesses, the reparation mechanisms have been neither enforced nor adjusted to provide adequate remedies to victims. Victims of sexual violence have therefore largely been left uncompensated, while many have already died.

#### 4. THE INTERNATIONAL CRIMINAL COURT'S REPARATION REGIME

The ICC reparation regime is laid down in Articles 75 and 79 of the ICC Statute and is further elaborated in Rules 94–99 of the ICC RPE.<sup>55</sup> For the first time in the context of supranational criminal law, the ICC gives victims independent status by providing them standing to request and receive reparation from the convicted person. In addition, a trust fund has been set up for the benefit of victims and their families. As mentioned before, the ICC thus aims to achieve not only retributive justice by punishing the perpetrator, but also restorative justice by providing reparation to victims. The drafters of the ICC Statute therefore clearly moved away from the inadequate and ineffective reparation provisions in the ICTY and ICTR Statutes and RPEs. In fact, it was precisely the (unfortunate) overall lack of reparation awards to victims of crimes falling within the jurisdictions of the ICTY and ICTR that sparked the realization by many ICC delegates that reparation to victims is of great importance to achieve the recovery of and justice to victims.<sup>56</sup> This has also been recognized by the Court's Pre-Trial Chamber I in one of its decisions, when it expressly held that 'the reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. . . . [T]he success of the Court is, to some extent, linked to the success of its reparation regime.'<sup>57</sup>

54. Note that, as will be discussed in section 4 below, the ICC Trust Fund for Victims and their families may provide support to all victims within the jurisdiction of the Court and their families; the ICC Trust Fund is therefore not restricted to providing support to victims appearing as witnesses before the Court.

55. The Statute of the ICC (A/CONF.183/9, adopted on 17 July 1998 and entered into force on 1 July 2000) available at [http://www.un.org/law/icc/statute/english/rome\\_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf); the Rules of Procedure and Evidence (RPE) of the ICC (ICC-ASP/1/3 (part II-A); adopted and entered into force on 9 September 2002) are available at [http://www.un.org/law/icc/asp/1stsession/report/english/part\\_ii\\_a\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf) (last visited September 2006).

56. C. Muttukumaru, 'Reparation to Victims', in R. S. Lee (ed.), *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results* (1999), 262 at 263–4. See also T. van Boven, 'The Perspective of the Victim', in Danieli, Stamatopoulou, and Dias, *supra* note 43, 13 at 22.

57. Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecutor's Application for a Warrant of Arrest*, Article 58, ICC-01/04-01/06, 10 February 2006, para. 136 (annexed to ICC-01/04-01/06, 24 February 2006).

To date the Court is investigating the following situations: the DRC, Uganda, and Sudan.<sup>58</sup> In all three conflicts, mass rape and other forms of sexual violence have taken place – and are still taking place.<sup>59</sup> At this point in time, the Prosecutor has charged two of the five Lord's Resistance Army (LRA) commanders in Uganda with rape and sexual enslavement (as a crime against humanity and/or a war crime).<sup>60</sup> Thomas Lubanga Dyilo from the DRC has already been transferred to The Hague and is charged with enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. However, he is not charged with rape or any other form of sexual violence.<sup>61</sup> To what extent the ICC reparation regime can be of benefit to victims of sexual violence is the subject of discussion in this section.

First, however, it should be noted that in one of the Court's decisions, Pre-Trial Chamber I determined that Article 68(3) of the ICC Statute already makes it possible for victims to participate in the proceedings at the stage of investigation.<sup>62</sup> In this respect it was held *inter alia* that 'the personal interests of victims [as mentioned in Article 68(3)] are affected at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and *to request reparations for the harm suffered*'.<sup>63</sup> Pre-Trial Chamber I continued as follows:

[T]he right to present their views and concerns and to file material pertaining to the ongoing investigation stems from the fact that the victims' personal interests are affected because it is at this stage that the persons allegedly responsible for the crimes from which they suffered must be identified as a first step towards their indictment. *The close link between the personal interests of the victims and the investigation is even more*

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58. Note also that the Central African Republic referred its situation to the Court and that the Prosecutor is currently carrying out an analysis in order to determine whether to initiate an investigation. Mass sexual violence has been reported to have taken place in the Central African Republic as well. For up-to-date information on the status of situations and cases brought before the Court see <http://www.icc-cpi.int/cases.html> (last visited September 2006).
59. In a number of statements made by or attributable to the ICC Prosecutor, it has been affirmed that all three situations involve allegations of rape and other forms of sexual violence. See, *inter alia*, the report of the International Criminal Court submitted to the General Assembly, UN Doc. A/60/177, 1 August 2005. See also the references to country reports, *supra* note 3.
60. Pre-Trial Chamber II, *Situation in Uganda: Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005 (Public Redacted Version)*, ICC-02/04-01/05, 27 September 2005; Pre-Trial Chamber II, *Situation in Uganda: Warrant of Arrest for Vincent Otti (Public Redacted Version)*, ICC-02/04, 8 July 2005.
61. In the light of the absence of gender-based crimes charges in the indictment due to ineffective investigations of the Prosecutor and despite information that such crimes did occur, the Women's Initiatives for Gender Justice filed an application to the Pre-Trial Chamber of the ICC requesting leave to prepare an *amicus curiae* brief. Although the judges ruled that the request had no link with the *Lubanga* case which is solely in relation to the enlistment and conscription of child soldiers, they did invite the Women's Initiatives for Gender Justice to resubmit their request in relation to the situation in the DRC (as opposed to the current case). See Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo: (Public Document) Request Submitted Pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Article 61 Confirmation Proceedings (with Confidential Annex 2)*, ICC-01/04-01/06, 7 September 2006; and Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo: (Public Document) Decision on Request Pursuant to Rule 103(1) of the Statute*, ICC-01/04-01/06, 26 September 2006.
62. Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo: Public Redacted Version, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, ICC-01/04, 17 January 2006. There was discussion as to whether or not Art. 68(3) of the ICC Statute, dealing with participation of victims at stages of the proceedings, also included the investigation stage.
63. *Ibid.*, para. 63 (emphasis added). See also paras. 52–53.

*important in the regime established by the Rome Statute, given the effect that such an investigation can have on future orders for reparations pursuant to article 75 of the Statute.*<sup>64</sup>

#### 4.1. Court orders to award reparation

After an individual has been convicted of one of the crimes under the ICC's jurisdiction, the Court may determine the scope and extent of any damage, losses, and injuries suffered by the victims on the basis of principles relating to reparations, including restitution, compensation, and rehabilitation.<sup>65</sup> The judges of the Court have full discretion in deciding whether or not the victim is to receive reparation<sup>66</sup> and, if it so decides, the Court itself is to determine the principles relating to reparation. A footnote attached to the final report of the Working Group on Procedural Matters of the Rome Conference, however, strongly indicates that the principles for reparations should be inspired by developing international standards on reparations. Reference is in particular made to 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 (the 'Van Boven/Bassiouni Principles').<sup>67</sup> The same footnote also indicates that 'victims'

64. *Ibid.*, para. 72 (emphasis added). In the present Decision, the Pre-Trial Chamber found that there were grounds to believe that the six Congolese victims who applied to participate had suffered emotional and physical suffering as well as economic loss for crimes such as killing of family members, burning of houses, looting of property, abduction, enslavement, torture, and unlawful detention.

65. ICC Statute, *supra* note 55, Arts. 75(1) and 75(2).

66. *Ibid.*, Art. 75(2) ('may').

67. Footnote 5 to Art. 73 on reparations to victims in the Final Report of the Working Group on Procedural Matters, A/CONF.183/C.1/WGPM/L.2/Add.7, 13 July 1998. It should be noted here that the reparation system provided for in the ICC Statute and RPE is largely based on the criminal procedure adopted by numerous judicial systems founded on civil law as well as on the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (annexed to UN General Assembly Resolution 40/34 of 29 November 1985) and 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 (E/CN.4/2005/L.48, 2005) (the '12/29/06 Van Boven/Bassiouni Principles'), which laid the groundwork for reparation in international law. The Van Boven/Bassiouni Principles are the outcome of revisions of earlier drafts, namely UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993 (first version); UN Doc. E/CN.4/Sub.2/1996/17, 24 May 1996 (second version); UN Doc. E/CN.4/1997/104, 16 Jan. 1997 (third version); UN Doc. E/CN.4/2000/62, 18 January 2000 (fourth version). According to 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 (2005), the terms 'restitution', 'compensation', and 'rehabilitation' should be understood as follows.

19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment, and return of property. 20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services. 21. *Rehabilitation* should include medical and psychological care as well as legal and social services.

In addition reparation also includes measures of satisfaction (for example, public apologies and the commemoration of victims) and guarantees of non-repetition. As discussed before, survivors of sexual violence may be in need of all forms of reparation, especially psychological and medical care, including ARVs, on an immediate basis.

should be defined on the basis of the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Van Boven/Bassiouni Principles, which imply that not only those victims who are direct victims of crime should be awarded reparations, but also others, such as victims' families.<sup>68</sup> Along this line the term 'victims' has been defined in Rule 85 of the ICC RPE in a broad manner, as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.<sup>69</sup>

While the type and modalities of reparation will thus be determined by the ICC judges, they may be assisted in this task by experts with knowledge of the needs of victims in a particular situation.<sup>70</sup> In addition, before deciding on an order concerning reparations, the Court may invite and is to take into account representations from or on behalf of the convicted person, victims, other interested persons or interested states.<sup>71</sup> Therefore, where reparation awards to victims of sexual violence are concerned, it is advised that the ICC judges are guided by the situation and special needs of victims of sexual violence of the particular situation at hand.

#### 4.1.1. *Application for reparations and ICC outreach*

An application for reparations can be made by the victim in writing through the Registrar by means of the Victims' Participation and Reparations Section (VPRS).<sup>72</sup> The application needs to contain the following particulars:

- (a) The identity and address of the claimant;
- (b) A description of the injury, loss or harm;
- (c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm;
- (d) Where restitution of assets, property or other tangible items is sought, a description of them;
- (e) Claims for compensation;
- (f) Claims for rehabilitation and other forms of remedy; and

68. Footnote 5 to Art. 73 on reparations to victims in A/CONF.183/C.1/WGPM/L.2/Add.7, 13 July 1998. See also K. Bonneau, 'The Reparation Regime of Victims Before the International Criminal Court', presentation held at the Grotius Centre for International Legal Studies, The Hague, 13 May 2004. The ICC definition of victims departs from the one given for the ICTY and ICTR, which is restricted to 'a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed' (ICTY and ICTR RPE, *supra* note 39, Common Rule 2A).

69. ICC RPE, *supra* note 55, Rule 85(a). Also organizations or institutions may fall within the definition of 'victims'. See *ibid.*, Rule 85(b), which reads, 'victims may include organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'. Although such organizations and institutions can also be considered as 'victims', the wording 'may include' in subparagraph (b) implies that natural persons should be seen as those victims entitled to reparation first of all.

70. *Ibid.*, Rule 97(2).

71. ICC Statute, *supra* note 55, Art. 75(3); ICC RPE, *supra* note 55, Rule 97(3).

72. ICC Statute, *supra* note 55, Art. 75(1); ICC RPE, *supra* note 55, Rule 94 ('Procedure when a Victim Requests Reparation'). See also Reg. 88 of the Regulations of the Court ('Requests for reparations in accordance with rule 94'), adopted by the judges of the Court on 26 May 2004, ICC-BC/01-01-04.

- (g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.<sup>73</sup>

Standard application forms for reparation to facilitate victims to apply for reparations before the Court have now been developed by the ICC.<sup>74</sup> Part F of the reparation form addresses reparations and makes reference to, *inter alia*, sexual/reproductive health problems (under 'physical injuries'); emotional problems, mental problems, physical reactions and behavioural changes and pain, and complaints and/or concerns related to experiences of sexual violence (under 'mental pain and anguish'); and social status (under 'other damage'). In addition, a booklet explaining how the Court works and the rights that victims have at the Court, and giving guidance on how to complete the reparation forms has been developed.<sup>75</sup>

In order to enable victims to make their application, the VPRS conducts outreach to give as much publicity as possible to the reparation possibilities.<sup>76</sup> In addition, an application for reparations can exceptionally be made by the Chamber itself<sup>77</sup> in situations in which victims are unable to apply for reparation themselves. This is the case, for example, where a victim is geographically secluded from the Court and has no access to information on reparation possibilities, and possibly is exposed to pressure from the state complicit in the crimes.<sup>78</sup> Victims' entitlement to reparation is thus not necessarily restricted to their participation in the Court's proceedings.

As has been mentioned, in order to have as many victims as possible assert their reparation claims, the Court – in practice the VPRS – is required to give adequate publicity to the Court's reparation proceedings and may seek the assistance of states parties and intergovernmental organizations for this purpose.<sup>79</sup> Outreach is of fundamental importance to the Court. Not only does it promote understanding and support for the ICC mandate among the populations affected, it also manages victims' expectations of what the Court can mean to them and enables communities to follow and understand the international criminal justice process. In this light, the VPRS has specifically recognized that 'vulnerable groups, including women victims, will be disproportionately underrepresented as participants before the Court if steps are not taken to ensure that they are aware of their rights and granted full access to the Court's procedural regime'.<sup>80</sup> Therefore,

In order to help ensure that women victims are able to benefit equally from the rights afforded them by the Court, the VPRS will reach out to international, national and

73. ICC RPE, *supra* note 55, Rule 94(1).

74. There are two forms, one for individual victims and persons acting on their behalf and one for victims which are organizations or institutions. Similar forms have been developed for victims wishing to participate in the proceedings. For the standard application forms for reparation, see <http://www.icc-cpi.int/victimissues/victimsreparation/victimsreparationForm.html> (last visited September 2006).

75. ICC booklet, 'Victims before the International Criminal Court, a Guide for the Participation of Victims in the Proceedings of the Court', available at [http://www.icc-cpi.int/library/victims/VPRS\\_Booklet\\_En.pdf](http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf) (last visited September 2006).

76. See <http://www.icc-cpi.int/victimissues/victimsreparation.html> (last visited September 2006).

77. ICC Statute, *supra* note 55, Art. 75(1), and ICC RPE, *supra* note 55, Rule 95 ('Procedure when the Court Raises the Issue of Reparations').

78. Muttukumar, *supra* note 56, at 269.

79. ICC RPE, *supra* note 55, Rule 96.

80. ICC Newsletter, 'Registry: VPRS – Gender Sensitivity', June 2005, #4, at 6.



local women's groups working in situations being analysed or investigated by the Prosecutor. These groups will act as intermediaries with female victim populations, helping to facilitate their participation and reparations rights under the Rome Statute by explaining to them their rights under the Rome Statute and assisting them in applying for participation and reparations in a sensitive and appropriate manner.<sup>81</sup>

However, according to members of the Women's Initiatives for Gender Justice – who made a field mission to northern Uganda in November 2004 to meet women affected by the conflict and to hear their views and experiences as well as to provide them with information about the Court – the majority of the population in Uganda were unaware of the existence of the ICC in general and the possibility of reparation in particular.<sup>82</sup> Moreover, adequate rehabilitation centres that could provide victims of sexual violence with trauma counselling or health facilities were grossly inadequate.<sup>83</sup> By February 2005 this situation was unchanged, and the situation was not much different for the DRC.<sup>84</sup> By the end of 2005 the Court had set up field offices in Uganda (Kampala), the DRC (Kinshasa), and, due to security concerns in Sudan, Chad, to ensure that, among other things, victims would be able to ask for reparation in a safe environment.<sup>85</sup>

Still, despite increased ICC outreach activities in the DRC and Uganda,<sup>86</sup> it seems that these activities still do not reach the majority of the population affected.<sup>87</sup>

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81. Ibid. Mention is also made of 'gender sensitivity education', which the VPRS wants to provide to organizations working with women victims in the field, as well as guidelines on gender sensitivity for Court staff members.
  82. Press Release by the Women's Initiatives for Gender Justice, in collaboration with Isis-WICCE and Ugandan Women Activists, 23 Nov. 2004. According to the Women's Initiatives for Gender Justice, 'it seems that neither the Ugandan state nor the International Criminal Court cared to consult with or raise awareness about the ICC among the people of Northern Uganda. Most of the people had little awareness about the referral of the Northern Uganda situation to the Court, nor had they seen or met any ICC officials in the field.' Note that the Court had been actively investigating the northern Uganda situation since July 2004.
  83. Ibid.
  84. See Victims Rights Working Group, 'Comments on the Draft Regulations of the ICC Trust Fund for Victims', February 2005, at 10. The Court had been actively investigating the DRC situation since June 2004.
  85. Insight on the International Criminal Court, Newsletter of the NGO Coalition for the ICC, 'ICC Establishes Offices in the Field: Stronger Presence Needed on the Ground', Issue 6, ASP Special Edition, October/November 2005, at 3.
  86. See, *inter alia*, ICC Newsletter, 'Outreach: Engaging Communities', November 2005, #06, at 5; ICC Newsletter, 'ICC Participates in Outreach Workshops in Northern Uganda', April 2006, #07, at 11; ICC Newsletter, 'Information Campaign on the ICC in Kinshasa Schools & ICC Participates in Outreach Workshops in Northern Uganda', July 2006, #08, at 6.
  87. For example, the working visit to Uganda by the Centre for Justice and Reconciliation (18–25 Jan. 2006) made clear the following: 'The ICC still seems to have done little outreach and public information. A number of workshops are organized in Kampala and Entebbe, but far away from the affected populations. The ICC Field Office in Kampala could play a crucial role in disseminating general information to public and victims, but it is very difficult to contact as the address and phone numbers are not made public and its staff is very dependent on instructions of superiors in The Hague. Officials from The Hague fly in and out. There is no regular way for people to share their concerns with the ICC. It would be good to make the Field Office much more accessible (within security limits), so people can contact the office with questions or for information materials with greater ease. Continuous accessibility and flow of information is necessary. If the Court wants justice "seen to be done" it also needs to go to the North to enter into an open dialogue with the population. The Prosecutor's staff does travel around the country.' See Aide-Mémoire of the Centre for Justice and Reconciliation, 'Working Visit to Uganda by the Centre for Justice and Reconciliation (CJR)', 18–25 Jan. 2006. See also Victims Rights Working Group, 'Fostering Dialogue on Victims Issues', Discussion Note, January 2006 ('We remain concerned by the dearth of outreach from the Court, in particular towards victims'); Women's Initiatives for Gender Justice Press Release, 'Women's Initiatives for Gender Justice Releases Inaugural Gender Report Card', 29 Nov. 2005; and J. van Wielink and A.-M. de Brouwer, 'Justice without Borders', *International Herald Tribune*, 8 July 2006, 5. It must, however, be noted that the Court seems to be willing to intensify

However, as long as victims are not informed of the possibility of requesting reparation at the Court, they will be denied their right to reparation. Especially in the case of victims of sexual violence, who, in many cases due to stigmatization, shame, and fear, may already be less inclined to come forward in the first place, it is important that information about their rights to request reparation is shared and implemented. Considering the massive sexual violence committed in all the situations currently under examination by the Court, the need for reparation possibilities among victims of sexual violence is high. Victims of sexual violence should therefore be urgently informed about their rights to request and receive reparation, and, as recognized by the VPRS, this should be done in a gender-sensitive way. This requires that staff dealing with victims of sexual violence are trained and educated on gender issues. Furthermore, as mentioned above, in those cases where victims of sexual violence will not be able to make an application for reparation with the Court (because, for instance, information concerning their rights is lacking), the Chamber may do so – or may even need to do so – on their behalf. This option should particularly be considered where it is obvious that in a particular situation or case brought before the Court sexual violence has taken place on a massive scale.

#### 4.1.2. *Legal representation*

Victims may be legally represented in their claim for reparation, and in general are free to choose a legal representative.<sup>88</sup> However, if the number of victims is large, the Chamber may request the victims to choose a common legal representative or representatives.<sup>89</sup> It is very likely that a large number of victims may want to participate in the trial,<sup>90</sup> and a common legal representative may prove helpful in these situations for the effectiveness of the proceedings. The Registrar will provide the victims with a list of counsel or will suggest one or more common legal representatives him- or herself. If victims are unable to choose a common legal representative, the Chamber may request the Registrar to choose one or more. Rule 90(4) stipulates that, in choosing a common legal representative, the Chamber and Registry shall take steps to ensure that the ‘distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented’ and that ‘any conflict of interests is avoided’.

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its outreach policy. Both the Strategic Plan of the ICC and the Strategic Plan for Outreach of the ICC pay attention to the importance of outreach. Although the Strategic Plan of the ICC (remarkably) does not pay any attention to outreach in relation to women who may have experienced sexual violence, the Strategic Plan for Outreach of the ICC does. The latter refers to women as a separate group that will need to be targeted in the light of the Court’s outreach programme by using different communication means, such as, for instance, disseminating information products which emphasize the gender-related provisions of the ICC Statute through existing groups. From the Strategic Plan for Outreach of the ICC it is furthermore apparent that up till now hardly any outreach towards women has been undertaken. See the Strategic Plan for Outreach of the International Criminal Court, ICC-ASP/5/12, 29 September 2006, especially paras. 25, 55, 90, 107, 116; and the Strategic Plan of the International Criminal Court, ICC-ASP/5/6, 4 August 2006.

88. ICC RPE, *supra* note 55, Rule 90(1).

89. *Ibid.*, Rule 90(2). If victims cannot pay for a common legal representative themselves, they may receive assistance, including financial assistance, from the Registry (*ibid.*, Rule 90(5)).

90. In the light thereof, the Office of Public Counsel for Victims (OPCV) was established to provide legal research and advice to the legal representatives of victims and to victims participating in the proceedings as well as asking for reparations. Members of the OPCV may also represent victims before the chambers (Regulations of the Court, *supra* note 72, Regs. 80 and 81). The OPCV is an independent office which falls within the remit of the Registry for administrative purposes only.

Article 68(1) refers in particular to victims of sexual or gender violence and children, since they are victims who might have distinct interests that must be taken into account. This requirement may have an effect on, *inter alia*, the number of representatives who should be chosen and on the particular qualifications that would be desirable when choosing the representative for a certain group.<sup>91</sup>

The qualifications for legal counsel representing victims of sexual violence should include, among other things, experience in working with victims of (mass) sexual violence and/or experience in trauma counselling. Furthermore, female victims in particular may feel more comfortable liaising with a representative who is of the same sex. As victims of sexual violence may require special, gender-sensitive treatment, separate legal counsel for (a group of) victims of sexual violence may be needed.<sup>92</sup> Moreover, for some victims of sexual violence, it may be helpful to appoint a legal representative who comes from their country or region, speaks their language (which may not be any of the official Court languages) and understands the conflict situation from which the victims come. Such a person may also be appointed as an assistant to the legal representative.<sup>93</sup> On the basis of Rule 90(6), a legal representative of a victim must have the same qualifications as a legal counsel for the defence.<sup>94</sup> It was debated whether particular qualifications should be required for legal representatives of victims, in particular for vulnerable victims like victims of sexual violence, but this idea was rejected since the issue was already held to be covered by Rule 90(4).<sup>95</sup>

In November 2005 the Women's Initiatives for Gender Justice announced that there are

alarming trends in the appointments to the ICC List of Legal Counsel (to represent victims and defendants) where only 17 of 109 appointees are women and almost 70% of those on the List are from one region – Western European and Others Group (WEOG). Experience in representing victims of gender based crimes is not a criteria [*sic*] for being

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91. G. Bitti and H. Friman, 'Participation of Victims in the Proceedings', in R. S. Lee et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), 456 at 464.
  92. Victims' Rights Working Group, 'Victims' Participation at the International Criminal Court: Summary of Issues and Recommendations', November 2003. See also Art. 9(2) of the 'Code of Professional Conduct for Counsel', in which it is stated that: 'In his or her relations with the client, counsel shall take into account the client's personal circumstances and specific needs, in particular where counsel is representing victims of torture or of physical, psychological or sexual violence, children, the elderly or the disabled.' The Code of Professional Conduct for Counsel was adopted at the fourth ASP (ICC/ASP/4/Res.1, 2 December 2005).
  93. ICC RPE, *supra* note 55, Rule 22(1). Reg. 124 of the Regulations of the Registry (ICC-BD/03-01-06-Rev.1, 6 March 2006) states that, to be included on the list, interested candidates shall have five years of relevant experience in criminal proceedings, or specific competence in international or criminal law and procedure. This provision may enable women lawyers, especially from countries with situations before the Court, who may lack the ten years of criminal law practice required by the criteria for legal counsel (see next footnote), to be part of the legal team representing victims of sexual violence.
  94. ICC RPE, *supra* note 55, Rule 22, stipulates the qualifications of counsel for the defence, which include competence in international or criminal law and procedure as well as the necessary relevant experience in criminal proceedings (as a judge, prosecutor, advocate, etc.) and excellent knowledge of and fluency in at least one of the working languages of the Court. Reg. 67 of the Regulations of the Court furthermore specifies that the necessary relevant experience for counsel as described in Rule 22 must amount to at least ten years.
  95. Bitti and Friman, *supra* note 91, 456 at 464. Bitti and Friman refer to the proposal submitted by Costa Rica (PCNICC/2000/WGRPE(6)/DP.6, 23 March 2000), in which it was suggested that particular experience should be required of a legal representative of victims of sexual violence, child victims, and victims with disabilities.

appointed to the List, nor does the ICC enquire about this expertise at any stage during the application process.<sup>96</sup>

By September 2006 the number of legal counsel rose to 168 persons, of whom only 27 are women and of whom only three come from a situation currently under investigation by the Court, namely the DRC.<sup>97</sup> This means that, as in 2005, there are more than five times as many men than women on the List of Counsel, with again 70 per cent of those coming from WEOG. Although Rule 22 (qualifications of counsel) does not mention experience in representing victims of gender-based crimes as a criterion for appointment as counsel, as mentioned above Rule 90(4) and Article 68(1) make it perfectly clear that the distinct interests of victims need to be represented when choosing legal counsel, in particular those of victims of sexual or gender violence. If the Court is serious in assisting victims of sexual violence in applying for participation and reparations in a sensitive manner, the Court should therefore seriously address the current imbalance on the list of counsel re gender expertise and gender and geographical presentation of counsel.

#### 4.1.3. *Individual and/or collective reparation awards*

Awards for reparations can be made on an individualized or collective basis or both, taking into account the scope and extent of any damage, loss, and injury.<sup>98</sup> Where the number of victims is very high, the Court may be more inclined to award reparations on a collective basis.<sup>99</sup> For example, where reparations to a victim of sexual violence are concerned, the Court may award a certain amount of money in cash<sup>100</sup> (to compensate for, for example, physical and mental harm, harm to reputation or dignity, and costs required for medicines, including ARV drugs); and/or the restitution of the victim's house or other property; and/or physical, medical (including ARV drugs), and legal assistance. Furthermore, in those cases where the Court establishes the accused's guilt concerning the infection of the survivor of sexual violence with HIV/AIDS, ARV treatment should as a minimum be included in the reparation order. Alternatively or concurrently the Court may decide on a collective award by ordering a school to be built for these women and/or their children and/or ordering that treatment centres be set up to provide psychological

96. Women's Initiatives for Gender Justice Press Release, *supra* note 87. See also the speech of Brigid Inder, Executive Director of the Women's Initiatives for Gender Justice, to the fourth Session of the Assembly of States Parties, 3 Dec. 2005; as well as the Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court*, 2005.

97. See the 'List of Counsel' available at [http://www.icc-cpi.int/library/defence/Defense\\_Counsel\\_List\\_English.pdf](http://www.icc-cpi.int/library/defence/Defense_Counsel_List_English.pdf) (last visited September 2006). Note that on the ICC website (<http://www.icc-cpi.int/defence/defcounsel.html>) it is nevertheless mentioned that 'the Court specifically encourages and welcomes applications from female candidates, as well as from candidates practising in countries a situation in which has been brought before the Court' (last visited September 2006).

98. ICC RPE, *supra* note 55, Rule 97.

99. *Ibid.*, Rule 98(3).

100. With regard to compensation, it is not certain whether the Court will elaborate set scales for compensation to victims of genocide, crimes against humanity, and war crimes. In the light of the many victims who may have suffered harm as a result of the commission of a crime within the jurisdiction of the Court, it may be wise for the Court to establish scales of compensation as well, such scales taking into account the level of income per country. Guidance may be found within other frameworks where scales of compensation have been established, such as by the UN Compensation Commission.

and medical assistance, including ARV treatment. These reparation awards may also reach or affect the children of victims of sexual violence, who often are also affected by the consequences of the sexual violence inflicted upon their mothers.

After the determination of the damages, the Court has two options in awarding victims' reparation: it may make a reparation order directly against the convicted person,<sup>101</sup> or it may order reparation to individual victims (where direct transfer to beneficiaries is 'impossible or impracticable'<sup>102</sup>) or a group of victims (by means of a collective award) through the ICC Trust Fund.<sup>103</sup> From Rule 98 it follows that in the case of individual reparation awards the Court prefers reparations to be transferred to the beneficiaries directly; in the case of collective awards, preference is given to making use of the Trust Fund.<sup>104</sup> In both situations the Trust Fund acts only as an intermediary; any reparation awards to victims ordered by the Court should generally be distributed to victims through the Trust Fund in the manner decided by the Court. However, in those cases where an implementation plan has not already been set out by the Court as to the precise nature of the individual or collective awards and the methods for implementation, the Trust Fund may do so.<sup>105</sup> For this purpose the Board of Directors may consult victims and their families as well as their legal representatives and any competent expert individual or organization.<sup>106</sup> In addition, the Trust Fund may 'identify intermediaries or partners, or invite proposals for the implementation of the award'.<sup>107</sup> In addition, considering that the Trust Fund may not be the perfect body to distribute money or organize, for example, the set-up of a rehabilitation or support programme for women, the Court, after consultations with interested states and the Trust Fund, is allowed to call on intergovernmental, international, or national organizations approved by the Trust Fund to carry out tasks on its behalf.<sup>108</sup> As regards the implementation of individual and collective awards to survivors of sexual violence, the Trust Fund will thus need to establish contacts with women's organizations and other relevant organizations in the countries concerned.

On a final note, it should be stressed that if Court orders concerning reparation are to have any meaning to victims at all, the Court will need the full co-operation of states parties in obtaining money, fines, or forfeiture of the convicted person.<sup>109</sup> In this respect Pre-Trial Chamber I has already stated that

101. ICC Statute, *supra* note 55, Art. 75(2), and ICC RPE, *supra* note 55, Rule 98(1).

102. For instance where every victim of a determined group has not yet been identified or where the youth or mental incapacity of an individual victim makes it more appropriate not to distribute the award until the young person becomes an adult or until a patient recovers from any mental incapacity. See Bonneau, *supra* note 68; and P. Lewis and H. Friman, 'Reparations to Victims', in Lee et al., *supra* note 91, 474 at 478.

103. ICC Statute, *supra* note 55, Art. 75(2), and ICC RPE, *supra* note 55, Rule 98(2) and (3). When individual reparation awards are made through the Trust Fund, such funds 'shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible' (ICC RPE, *supra* note 55, Rule 98(2)). See also Regulations for the Trust Fund for Victims (Resolution ICC-ASP/4/Res.3, 3 December 2005), Regs. 59–72.

104. Compare ICC RPE, *supra* note 55, Rule 98(2) with Rule 98(3) and (4).

105. Regulations for the Trust Fund for Victims, *supra* note 103, Reg. 69 (subject to approval by the Court), and see *ibid.*, Regs. 59 and 60, applying to individual awards.

106. *Ibid.*, Reg. 70, and see *ibid.*, Reg. 61(a), applying to individual awards.

107. *Ibid.*, Reg. 71, and see *ibid.*, Reg. 67, applying to individual awards.

108. ICC RPE, *supra* note 55, Rule 98(4). See also Regulations for the Trust Fund for Victims, *supra* note 103, Regs. 73–75.

109. To obtain money from the convicted person, state co-operation is an essential ingredient for success, though not without its difficulties. In this respect it is interesting to mention Council Directive 2004/80/EC of 29

cooperation requests pursuant to Articles 57(3)(e) and 93(1)(k) of the Statute for the taking of protective measures to secure the enforcement of future reparation awards should be transmitted simultaneously with cooperation requests for arrest and surrender if the warrants of arrest are not issued under seal.<sup>110</sup>

If not, there might not be any property or assets left by the time the reparation award is ordered by the Court. In accordance with the procedures under their national laws, states parties are furthermore obliged to ensure that orders of the Court related to reparation awards and fines or forfeiture are fully enforced.<sup>111</sup>

#### 4.2. The Trust Fund for Victims and their families

The Trust Fund for Victims and their families was officially established on 9 September 2002 under a Resolution of the Assembly of States Parties (ASP) pursuant to Article 79(1).<sup>112</sup> It is managed by a five-member independent Board of Directors,<sup>113</sup> and at the Board's first meeting (The Hague, 20–2 April 2004), the draft Regulations of the Trust Fund for Victims (hereinafter draft Regulations) were developed and approved, and were transmitted to the ASP for consideration at the third ASP session in September 2004.<sup>114</sup> The draft Regulations contained, *inter alia*, criteria for the receipt, management, and use of the funds.

At its third session the ASP established the Trust Fund's secretariat to provide assistance for the proper functioning of the Board of Directors in carrying out

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April 2004, relating to compensation to crime victims, *Official Journal of the European Union*, L 261/15, 6 August 2004. Under the Council Directive an 'assisting authority or authorities' shall be established in every member state to assist in and facilitate access to compensation in cases where the crime was committed in a member state other than that of the victim's residence. An initiative similar to the Council Directive may be helpful with regard to the enforcement of ICC reparation orders as well.

110. Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyllo, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58*, ICC-01/04-01/06, 10 February 2006, para. 139 (annexed to ICC-01/04-01/06, 24 February 2006). In this case, the Chamber, in the absence of an application to this effect by the Prosecutor, did so *proprio motu* (Rule 99(1)). The Chamber, however, noted that, for future applications for a warrant of arrest or a summons to appear, 'the effectiveness of the reparation system would greatly benefit from the Prosecution's due consideration of this matter during the investigation stage' (para. 141).
111. ICC Statute, *supra* note 55, Art. 75(5), together with Art. 109 (reparation). See also ICC RPE, *supra* note 55, Rules 217–22. It is very important that states include in their implementing legislation regulations on reparation. To date, only a few states have done so. For the interplay between the Court and national courts on matters concerning reparation, see C. Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations', (2002) 15 LJIL 667.
112. Resolution ICC-ASP/1/Res.6, Establishment of a Fund for the Benefit of Victims of Crimes within the Jurisdiction of the Court, and of the Families of Such Victims, adopted at the 3rd plenary meeting by consensus, 9 September 2002.
113. *Ibid.*, Annex. The Board was elected by the ASP and is made up of five members, each elected for a three-year term with the possibility of being re-elected once. The members of the Board all work on a voluntary basis. As at September 2006 the Board was composed of Queen Rania Al-Abdullah of Jordan, Arthur Napoleon Raymond Robinson of Trinidad and Tobago (who replaced Dr Oscar Arias Sánchez of Costa Rica), Tadeusz Mazowiecki from Poland, Simone Veil from France (chair), and Archbishop Emeritus Desmond Tutu from South Africa, each of whom represents their respective regions.
114. Assembly of States Parties, Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims, 2003–2004, Third session, The Hague, 6–10 September 2004, Annex A, Draft Regulations of the Trust Fund for Victims, First Meeting of the Board of Directors of the Trust Fund for Victims, 20–22 April 2004, The Hague (The Netherlands), ICC/ASP/3/14/Rev.1. See also ICC Press Release, 'First Meeting of the Board of Directors of the Trust Fund for Victims', The Hague, 22 April 2004.

its tasks.<sup>115</sup> It was further decided that Parts I (Management and Oversight of the Trust Fund) and II (Receipt of Funds) of the draft Regulations were to be applied provisionally.<sup>116</sup> Part III of the draft Regulations (Activities and Projects of the Trust Fund, as well as the scope of victims that might benefit therefrom) was, however, considered to be ‘a reference point for further work’.<sup>117</sup> States parties seemed to be unwilling to accept the draft Regulations at the third ASP session because they had had insufficient time to review the draft Regulations in detail, in particular Part III.<sup>118</sup> Concern was, for example, raised regarding the Trust Fund’s ability to carry out activities and projects during an investigation or trial, several states holding that such activities and projects could be conducted only after a conviction of the accused.<sup>119</sup> Other contentious issues included the earmarking of contributions, the scope of victims, and the independence of the Trust Fund.

Adoption of the Regulations for the Trust Fund for Victims became a reality at the fourth ASP (The Hague, 28 November–3 December 2005) and has made it possible for the Board to start its work properly.<sup>120</sup> Unfortunately, as will be further explained below, the draft Regulations were not adopted verbatim during the fourth ASP.

#### 4.2.1. *Scope of the mandate of the Trust Fund for Victims and their families*

According to Article 79(1) of the ICC Statute, the Trust Fund has been established ‘for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims’.<sup>121</sup> The Trust Fund may thus provide assistance to all victims of crimes under the jurisdiction of the Court and their families; its assistance is not limited to victims of specific crimes being prosecuted by the Court. This means that all victims of sexual violence who fall within the ambit of the Court’s jurisdiction may benefit from reparation measures provided by the Trust Fund; not only those victims of sexual violence whose cases have been taken up by the Court. In addition, Rule 98(5) stipulates that, beyond the Trust Fund’s mandate to implement reparation orders of the Court, ‘other resources of the Trust Fund may be used for the benefit of victims subject to Article 79’.<sup>122</sup> Therefore the Trust Fund may not only need to implement reparation orders from the Court, it may also use voluntary contributions to provide assistance to victims independent from Court orders on

115. Resolution ICC-ASP/3/Res.7, Establishment of the Secretariat of the Trust Fund for Victims, adopted at the 6th plenary meeting by consensus, 10 September 2004, para. 1.

116. *Ibid.*, para. 5.

117. *Ibid.*

118. Victims Rights Working Group, ‘Comments on the Draft Regulations of the ICC Trust Fund for Victims’, February 2005, at 3, 8.

119. *Ibid.*, at 9–12.

120. Regulations for the Trust Fund for Victims, *supra* note 103. Note that the working group met several times in New York between the third and the fourth ASPs to re-discuss the draft Regulations and to amend them where necessary. States, however, failed to reach a compromise on the Regulations prior to the fourth ASP. See also Report of the Bureau on the draft Regulations of the Trust Fund for Victims, ICC-ASP/4/29, 21 November 2005.

121. See also Regulations for the Trust Fund for Victims, *supra* note 103, Reg. 42. The term ‘family’ has not been defined, which, in the context of a Trust Fund with an international scope, allows the Board of Directors to respond in a range of situations involving varying family structures. See, on the latter issue, Victims’ Rights Working Group, *supra* note 118, at 6.

122. See also Regulations for the Trust Fund for Victims, *supra* note 103, Regs. 47 and 48.

reparation.<sup>123</sup> More specifically, the Regulations for the Trust Fund for Victims propose that the funds be used (i) to implement reparation orders of the Court; and (ii) to provide physical or psychological rehabilitation or material support for the benefit of victims and their families.<sup>124</sup> Rehabilitation or support, collected through voluntary contributions, may already be provided to victims and their families once an investigation has been initiated by the Prosecutor (interim relief). On a final note, it should be mentioned here that voluntary contributions for the benefit of victims and their families may be earmarked for up to one-third by the donor, but not by governments. Such a provision allows scope for earmarking voluntary contributions for victims of sexual violence without compromising other victims, since the Trust Fund shall at all times see to, *inter alia*, an equitable distribution of the funds among groups of victims.<sup>125</sup>

#### 4.2.2. *Interim relief for victims of sexual violence*

On the basis of Regulation 50 in particular, victims of sexual violence may receive physical or psychological rehabilitation or material support in the investigative phase of the ICC proceedings. The decision of the Prosecutor to launch an investigation requires that there is 'a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed',<sup>126</sup> which offers a solid legal basis for the Trust Fund to offer rehabilitation or support to victims. The Trust Fund has therefore been given the possibility to intervene before an accused has been convicted.<sup>127</sup> In the light of past experiences before the ICTR, where many victims of sexual violence were left without medical care for the diseases they had contracted through sexual violence, especially HIV/AIDS, the ICC Trust Fund now plays an important role by making interim relief for victims a possibility.<sup>128</sup> Due

123. The Trust Fund will be funded by awards for reparations against convicted persons and money or property collected from fines or forfeiture, but also by means of voluntary contributions by states, international organizations, NGOs, individuals, corporations, and other entities, as well as resources, other than assessed contributions, as the ASP may decide to allocate to the Trust Fund. See ICC Statute, *supra* note 55, Art. 79(2); ICC RPE, *supra* note 55, Rule 98; Establishment of a Fund for the Benefit of Victims of Crimes, *supra* note 112; and Part II of the Regulations for the Trust Fund for Victims, *supra* note 103.

124. Regs. 50 and 56 of the Regulations for the Trust Fund for Victims. Under the draft Regulations these options also existed. However, another option also existed, viz. to provide physical or psychological support in situations where the Prosecutor decides, in the interest of justice, not to investigate, or where an investigation is not commenced by the Court but by a State in accordance with the complementarity principle and reparations are otherwise unavailable. Providing rehabilitation or support in these two situations mentioned could only be done in exceptional circumstances with the approval of the Pre-Trial Chamber. This option allowed for the possibility of addressing also the needs of those victims of sexual violence whose cases have not been dealt with by the Court itself, but whose conditions may not at all be very different from victims of sexual violence whose situations were in fact taken up by the Court. Unfortunately such situations are, as said, not covered under the Regulations for the Trust Fund for Victims; most likely because the link between the situation and the Court is held to be too remote.

125. See, in particular, Regs. 21, 27 and 30 of the Regulations for the Trust Fund for Victims.

126. Art. 53(1) ICC Statute.

127. That intervention by the Trust Fund before an accused's conviction should be allowed can be substantiated on the basis of Art. 79(1) ICC Statute and Rule 98(5) ICC RPE as well.

128. Note that the Report on the International Seminar on 'Access of Victims to the International Criminal Court' stated that 'regarding the Trust Fund . . . provision of urgent interim relief, such as medical attention, for instance for victims such as those who contract AIDS or become pregnant as a result of rape, needed to be dealt with in the Rules of Procedure and Evidence and that standard of care afforded to victims and witnesses when under the protection of the Court shall be at least that afforded to accused



to deteriorating health conditions, victims of sexual violence do not always have the time to await the conviction of the accused, which is an official requirement for reparation to be awarded by the Court. Furthermore, what happens in those cases in which the accused dies during trial? In these circumstances should survivors of sexual violence be left to die or be abandoned without proper health care for themselves and their children born, or yet to be born, of rape? To avoid repetition of the Rwanda experience, the Trust Fund has rightly been given a role in providing medical and psychological assistance to victims of sexual violence early in the process, when assistance is most needed.

That support may be provided to victims in an early stage of the proceedings must be considered a big breakthrough. However, it should be noted that even at the time of the investigative phase the health of survivors of sexual violence may already be in a very poor state, since it might take some time before the decision is taken by the Prosecutor to start to investigate the situation. Moreover, the conflict might have been going on for weeks, months, or years on end. For example, the first three situations under consideration by the Court are replete with testimonies of sexual violence which had been taking place for a very long time. The conflict in the DRC began in 1998, the situation was referred to the Court by the DRC in April 2004, and investigations began in June 2004. The conflict in northern Uganda started in 1987 and was referred to the Court by Uganda itself in December 2003, and investigations began in July 2004. Finally, the situation in the Darfur region in Sudan was referred by the UN Security Council to the Court in March 2005 (the conflict started in 2003) and investigations were opened by the Prosecutor in June 2005.<sup>129</sup> As mentioned above, in northern Uganda there were no adequate rehabilitation centres that could have provided trauma counselling or health facilities for victims of sexual violence, a situation that was not much different for the DRC or Sudan.<sup>130</sup> If rehabilitation and support are to have any meaningful effect on victims' lives, it is imperative that situations are referred to the Court, that investigations are started by the Prosecutor as soon as possible, and that immediate action is taken by the Trust Fund.<sup>131</sup>

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persons' (UN Doc. PCNICC/1999.WGRPE/INF/2, p. 8). A discussion paper proposed by the Coordinator on Rules of Procedure and Evidence related to Part 6 of the Statute also proposed that the 'Court may, at any time before it has made a determination relating to reparations, order the Trust Fund to provide interim relief to victims, such as medical or psychological attention or other humanitarian assistance' (UN Doc. PCNICC/1999/WGRPE/RT.5/Rev.1/Add.3, Rule E).

129. Note that the Court has jurisdiction over genocide, crimes against humanity, and war crimes as of July 2002.

130. See also references to country reports, *supra* note 3.

131. Although the Trust Fund for Victims and their families may provide rehabilitation or support for the benefit of victims and their families as of December 2005 (adoption of the Regulations) in Uganda, DRC, or Sudan, no such proposals had been made by the Board by September 2006. Immediate action to support victims and their families needs, however, to be taken urgently. See also H. V. Stuart, *ICC Victims Trust Fund Still in Limbo*, International Justice Tribune Newsletter No. 51, 24 July 2006, pointing out that the Trust Fund is still not operative as a secretariat is still lacking. According to the 'Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the Period 16 August 2005 to 30 June 2006' (ICC-ASP/5/8, 21 August 2006), the proposed staffing for the Secretariat for 2007 includes five persons, including an executive director. It seems that further action by the Board of Directors/Secretariat may therefore not be commenced before at least mid-2007.

#### 4.2.3. *A Trust Fund (in)dependent of the Court?*

Although the Trust Fund can be seised at an early stage of the proceedings for the benefit of all victims under the jurisdiction of the Court and their families, an unfortunate departure from the draft Regulations was adopted during the fourth ASP, namely the possibility that the Court could block use of the funds by the Trust Fund. In other words, a decision of the Trust Fund to provide rehabilitation or support to victims is dependent on the Court's approval. During the fourth ASP, division existed between those states that felt that the Trust Fund should be independent of the Court and act as soon as possible in order to assist victims (for example Belgium, the DRC, Cyprus, France, Kenya, Sierra Leone, Tanzania, and Uganda) and states that believed that the Trust Fund should be controlled by the Court in order not to compromise the criminal proceedings (for example Australia, Canada, New Zealand, Norway, Peru, Sweden, and the United Kingdom).<sup>132</sup> A compromise proposal requires the Trust Fund to apply to the Court before it uses its voluntary contributions so as to enable the Court to evaluate the impact of the fund's activities on the proceedings. More specifically, on the basis of Regulation 50, the Board of Directors has been empowered to 'provide physical or psychological rehabilitation or material support for the benefit of victims and their families', provided that

(ii) the Board has formally notified the Court of its conclusion to undertake specified activities under (i) [to provide rehabilitation or support] and the relevant Chamber of the Court has responded and has not, within a period of 45 days of receiving such notification, informed the Board in writing that a specific activity or project, pursuant to rule 98, sub-rule 5 of the Rules of Procedure and Evidence, would predetermine any issue to be determined by the Court, including the determination of jurisdiction pursuant to article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>133</sup>

There is also the possibility of extend the period of 45 days if needed by the Chamber in consultation with the Board. Should the Court and the Board not reach such agreement, the period of extension is 30 days. After the expiry of the relevant time period, the Board may proceed with specific activities.

Thus the Regulations as currently adopted leave the ultimate decision of providing rehabilitation or support to victims to the chambers of the Court, which have the power to veto use of the funds. However, the requirement that the Board of Directors

132. For the division of interest among States, see informal and unofficial verbatim notes from the ASP Plenary Session, Working Group on the Victims Trust Fund, 29 Nov. 2005. In August 2005, during the meeting of the Working Group, a 'compromise proposal' was already submitted by Australia, Canada, Croatia, Japan, The Netherlands, New Zealand, Norway and the United Kingdom. In this proposal, the countries held that the ICC should control the allocation and distribution of all of the Trust Fund's resources, including the voluntary contributions. For comments on this proposal, see Victims Rights Working Group, Draft Regulations of the ICC Trust Fund for Victims: Comments on the Proposals Submitted by Australia, Canada, Croatia, Japan, The Netherlands, New Zealand, Norway and the United Kingdom, September 2005. NGOs were generally opposed to some sort of control by the Court over specified activities to be undertaken by the Trust Fund. See, *inter alia*, FIDH, Recommendations to the Fourth Session of the Assembly of States Parties to the International Criminal Court, 28 November–3 December 2005, Position Paper no. 10, International Criminal Court; Amnesty International, *International Criminal Court: Concerns at the Fourth Session of the Assembly of States Parties*, October 2005, at 5.

133. Regulations for the Trust Fund for Victims, *supra* note 103, Reg. 50(a)(i) and (ii).

notify the chamber of its intentions is contrary to an earlier decision of the ASP to elect an eminent Board of Directors tasked to ‘establish and direct the activities and projects of the Trust Fund and the allocation of the property and money available to it’.<sup>134</sup> In her address to the fourth ASP, Simone Veil, chair of the Board of Directors, stated in similar fashion that

The Fund’s independence must be guaranteed. As your Assembly recalled last year in resolution ICC-ASP/3/Res.7 [Establishment of the Secretariat of the Trust Fund for Victims], it has always been accepted that the Fund should be a complementary and independent organ of the Court, and not dependent upon it.<sup>135</sup>

Even though previous decisions thus seemed to indicate that the Trust Fund should operate independently of the Court as far as voluntary contributions were concerned, such decisions have now been overruled by the Regulations for the Trust Fund for Victims.

It needs to be seen in what kind of situations the Court will rule that providing rehabilitation or support by the Trust Fund may predetermine an issue to be determined by the Court. In this regard, Regulation 50 mentions the determination of jurisdiction or admissibility, violation of the presumption of innocence, or the activity to be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. For the sake of victims of sexual violence, it can only be hoped that the Court will not easily establish that early assistance to victims affects an issue to be pre-determined by the Court.<sup>136</sup> If this were the case, interim relief would only remain a possibility on paper. In addition, it should be noted that the period for the chamber to notify the Board on its decision regarding the proposed action to be taken by the Trust Fund may take a maximum of 75 days.<sup>137</sup> Yet a swift response to victims’ needs for reparation is commonly wanted in the situations at hand.

#### 4.2.4. *Collective reparation to victims of sexual violence*

Efficiency and effectiveness suggest that the Trust Fund should assist victims collectively rather than individually. The advantage of collective assistance is that it will reach unidentified victims who, due to their victimization and/or social situation, cannot easily claim reparation through formal procedures.<sup>138</sup> Due to stigmatization and shame, with which many victims of sexual violence are confronted with in certain societies, collective assistance may thus be of particular importance to them.

In carrying out its activities and projects, the Board of Directors may consult victims and their families, as well as their legal representatives and any competent expert individual or organization on the situation of the potential beneficiaries and

134. Resolution ICC-ASP/1/Res.6, *supra* note 112, Annex, para. 7.

135. Address by Simone Veil, Chair, Board of Directors, Trust Fund for Victims, Assembly of States Parties, fourth Session, 28 Nov. 2005.

136. It is advised that the Court will not interpret Reg. 50 strictly. Another option is to amend Reg. 50 as to the required link to the Court at one of the following ASP meetings.

137. This period may be longer if the extension time is agreed to be more than 30 days (Regulations for the Trust Fund for Victims, *supra* note 103, Reg. 50(a)(iii)).

138. T. Ingadottir, ‘The Trust Fund for Victims (Article 79 of the Rome Statute)’, in T. Ingadottir (ed.), *The International Criminal Court – Recommendations on Policy and Practice: Financing, Victims, Judges, and Immunities* (2003), 111 at 133.

the ways to assist them.<sup>139</sup> The Trust Fund will most probably need the help of international or national organizations which are specifically geared to addressing the enumerated priority activity and project areas. Victims of sexual violence may in this way be helped through collective projects implemented at the national level which provide for, for instance, the establishment of treatment centres where the victims can get physical, psychological, and medical assistance, including ARV drugs. Such assistance should be complementary to and provided in close co-ordination with the assistance provided by the Court's Victims and Witnesses Unit.<sup>140</sup> The Victims and Witnesses Unit is concerned with support services for victims who appear before the Court, whereas the Trust Fund's rehabilitation and support activities involve victims beyond those called to testify at the Court, so that no interference with each other's work is to be expected.

## 5. FINAL REMARKS

Contemporaneous conflicts have made clear that the needs of victims of sexual violence for reparation during and in the aftermath of sexual violence committed as genocide, a crime against humanity, or a war crime are readily apparent and need to be addressed immediately. The combination of physical injuries and disabilities, trauma, stigmatization, poverty, unwanted pregnancies, and sexually transmitted diseases such as HIV/AIDS are typical consequences that many such victims have to face, most of them women. HIV/AIDS has in particular become an issue of major concern, especially as HIV/AIDS and sexual violence in conflict situations are interlinked. In Rwanda, many women who survived sexual violence during the 1994 genocide have since died. Had there been reparation measures, this might have been different. Also many women have been left to die a slow death, especially those who contracted HIV/AIDS. Although the ICTY and the ICTR have reparation mechanisms, reparation has never been awarded to victims. A 2004 ICTR initiative to offer women rehabilitation or support, including ARV drugs, is commendable, but only victims appearing as witnesses in the trial proceedings may benefit from them. To what extent the ICC, with new reparation possibilities at the supranational criminal law level, can be of help to victims of sexual violence has been the main issue addressed in this article.

The ICC has made the progressive move of pursuing restorative justice for victims in addition to punishing the perpetrator. This development was partly inspired by the unfortunate lack of adequate reparation measures for victims offered by the ICTY and the ICTR. At least as of 1998, when the ICC's reparation regime became the benchmark in the field of reparation in the supranational criminal law context, the tribunals could have followed suit. Thus, unlike the tribunals, the ICC gives victims standing to request and receive reparation from the convicted person through an order of the Court. In addition, a Trust Fund has been set up for the benefit of victims and their families.

139. Regulations for the Trust Fund for Victims, *supra* note 103, Reg. 49.

140. Ingadottir, 'Trust Fund', *supra* note 138, 111 at 132.

As regards reparation orders by the Court, it may order such awards in the form of restitution, compensation, or rehabilitation, depending on the victims' needs. Reparation may be awarded either individually or collectively. To fulfil this task, the Court may consult, *inter alia*, experts, victims, and interested parties in order to ascertain the needs of victims. Victims of sexual violence will in most cases be helped with physical, psychological, and medical care, including ARV drugs to treat HIV/AIDS, through either a court order on compensation or a court order on rehabilitation. In practice, the convicted person's money (supplemented with money from the Trust Fund, if needed) will, in most cases, be used by the victim to meet her rehabilitation needs, especially medical and psychological care. If the Court establishes the accused's guilt concerning infection with HIV/AIDS, ARV drugs should as a minimum be included in the reparation order. In addition to compensation and rehabilitation, the restitution of property and proceeds is also essential to victims of sexual violence. In order to be able to start building up their lives again, access to, for example, proper housing is a basic requirement.

A reparation order may, furthermore, be awarded not only individually, but also collectively, whether alternatively or at the same time. If the number of victims is high, the Court may be inclined to order collective awards. In the case of victims of sexual violence, collective care, most probably by setting up treatment centres, will usually have to be implemented by international or national agencies with experience of victims of sexual violence and their needs. However, indirect victims of crime, for example the children of survivors of sexual violence, may benefit from the Court's order on rehabilitation. For example, the Court may decide to build schools for the benefit of these children and/or provide ARV drugs for those infected with AIDS as a result of mother-to-child transmission of HIV.

An application for reparation can be made by the victim in writing through the VPRS. The VPRS is responsible for giving adequate publicity to victims' rights to request reparation at the Court. Outreach is therefore of fundamental importance if victims of sexual violence want to be heard by the Court. However, since victims of sexual violence often suffer from stigmatization, shame, and fear, they may be disproportionately underrepresented at the Court if steps are not taken to make them aware of their rights to reparation. The VPRS needs to contact women's organizations in the countries concerned as well as international women's organizations to help them reach out to victims of sexual violence. Furthermore, the ICC itself should have a strong, gender-sensitive field presence in the countries concerned to which victims of sexual violence can safely turn, something requiring staff trained in dealing with victims of sexual violence. Reparation is furthermore not restricted to victims who participated in the trial proceedings, so that the Chamber may therefore apply for reparation on behalf of victims of sexual violence in situations where they are unable to request reparation themselves. If victims of sexual violence have no access to information on the reparation possibilities existent at the Court, and sexual violence has been so widespread and abhorrent that reparation is clearly needed, the Chamber could (and should) make such a request on their behalf. It should also be noted that victims may be represented by legal counsel in their claim for reparation. When choosing counsel, Rule 90(4) and Article 68(1) make it perfectly clear that

the distinct interests of victims need to be taken into account, in particular those of victims of sexual violence. This may entail, for instance, that victims of sexual violence are represented by counsel of the same sex, from the same region, and with expertise in sexual violence crimes.

However, the main difficulty with reparation awards is that they are only awarded once the accused has been pronounced guilty, while victims of sexual violence may need physical, psychological, and medical support much earlier. Although the Victims and Witnesses Support Section may be able to address some of the needs of victims of sexual violence testifying before the Court, they will not be in a position to meet the needs of victims of sexual violence who are not at the Court to testify. The Trust Fund for Victims and their families may, however, hopefully be capable to address some of their needs.

The Trust Fund for Victims and their families should therefore be considered as complementing the work of the Court rather than only implementing reparation orders by the Court. By enabling collective projects, the Trust Fund can reach many more victims of sexual violence than the Court, in particular because the ICC Prosecutor will primarily be concerned with prosecuting the main perpetrators, focusing on certain crimes, thus leaving aside victims of sexual violence not affected by the Prosecutorial Strategy.<sup>141</sup> Furthermore, the Trust Fund may be able to reach unidentified victims of sexual violence who, for instance, due to stigmatization, shame, or trauma, have not been able to apply for reparation at the Court themselves. Through the establishment of the Trust Fund for Victims and their families it may therefore, to some extent, be possible to address the needs of victims of sexual violence on a broader scale. The Trust Fund is in particular useful for victims of sexual violence as it can, unlike the Court, provide interim relief (on condition that such a decision is not blocked by the Court because interim relief would predetermine any issue to be determined by the Court). The Regulations for the Trust Fund for Victims state that physical or psychological rehabilitation or material support during the investigation phase is possible. It is therefore important that in all situations decisions as to whether or not to initiate investigations are made early, since rehabilitation and support should be made available as soon as possible to have any significant effect on the lives of survivors of sexual violence. In order to implement rehabilitation and support services, the Trust Fund is to negotiate agreements with humanitarian agencies in the field to reach all victims of sexual violence. Collective humanitarian projects may include the setting up of centres with expertise in physical, psychological, and medical care, including ARV treatment, which have the potential to reach a large group of victims of sexual violence. In

141. 'One of the principles guiding the Prosecutorial Strategy is that of focused investigations and prosecutions (the other two principles are those of positive complementarity and maximizing the impact). The Office will select situations and cases taking into consideration their gravity in order to work on *the most serious* crimes. Our focus will be on those who bear the *greatest responsibility* for these crimes, according to, and dependent on, the evidence that emerges in the course of an investigation. The policy of focused investigations and prosecutions also means that we select incidents and as few witnesses as possible are called to testify, reducing the security risks and assisting the Court in operating cost-efficiently' (speech by Luis Moreno-Ocampo, Seventh Diplomatic Briefing of the International Criminal Court, Brussels, 29 June 2006, at 7). See further Office of the Prosecutor, Report on Prosecutorial Strategy, 14 September 2006, at 5–6.

addition, school or income-generating projects may be set up for the victims and/or their children. Children may especially be in need of such support if their mother is disabled, or has died or will die as a result of the diseases she contracted through the sexual violence she endured. Interim relief in the form of physical, psychological, or medical care, including ARV treatment, is thus of particular importance if victims are not to suffer for many years after the crimes were committed against them.

The right to request and to be awarded reparation under the ICC regime as well as the special Trust Fund for Victims and their families acknowledges the international community's responsibility to repair the wrongdoing and gives victims and their families a chance to start rebuilding their lives, which is unprecedented at supranational criminal law level. Despite these new reparation mechanisms at that level, it is clearly an understatement to say that not all victims of crimes within the jurisdiction of the Court, including victims of sexual violence as well as their families, will be fully assisted in their needs. Victims' expectations regarding reparation should therefore be managed beforehand. Most probably they will also need to consult other national and international venues of reparation. For the ICC's reparation regime to be a success, much will depend on the effectuation of court orders on reparation and co-operation with international and national women's organizations, as well as on a strong ICC field presence, the resources that the Trust Fund will receive,<sup>142</sup> and the flexibility that the Trust Fund will be given. Special attention should be given to survivors of sexual violence in order to prevent their reparation needs from not being fully taken up by the Court. If the Court and Trust Fund are truly committed to realizing victims' rights to reparation, they should act accordingly. With the experiences of the Rwandan survivors of sexual violence in mind, one would assume that similar mistakes will not be made again.

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142. According to the ICC website (<http://www.icc-cpi.int/vtf.html>, last visited September 2006), the total amount received by the Trust Fund as at 29 August 2006 was €1,630,237.20; the total amount pledged is €275,000.00.