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Redressing victims of international crimes: the International Criminal Court and the Trust Fund for Victims

La reparación de las víctimas de crímenes internacionales: la Corte Penal Internacional y el Fondo Fiduciario en beneficio de las víctimas

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Abstrac:

This paper deals with victim-reparation schemes adopted by the International Criminal Court (ICC), analyzing the role of the Trust Fund for Victims of genocide, crimes against humanity and war crimes (TFV). Taking the nature of such crimes and the reality of mass victimization as a starting point, the author dwells on the TFV's dual mandate. Based on the distinction between situations and cases in the ICC system, situation-related reparations and case-related reparations are meant to complement each other. Review of applicable law and existing practice gives an idea of how reparation activities are unfolding and what challenges lie ahead. A decisive turning point for the ICC victim-reparation system will presumably be reached when the Court issues its first sentence.

Keywords: Trust Fund for Victims, Mass Victimization, Reparations, ICC situations, ICC cases.

Resumen:

Este trabajo trata los mecanismos de reparación de las víctimas adoptados por la Corte Penal Internacional (CPI), analizando el papel del Fondo Fiduciario para las Víctimas de genocidio, crímenes contra la humanidad y crímenes de guerra (TFV). Partiendo de la naturaleza de dichos crímenes y de la realidad de la victimización masiva, el autor se detiene en el examen del doble mandato del TFV. Basadas en la distinción entre casos y situaciones en el sistema de la CPI, las reparaciones vinculadas a casos y las vinculadas a situaciones están llamadas a complementarse mutuamente. El examen de las normas aplicables y de la práctica existente da idea de cómo se llevan a cabo las actividades de reparación y de los retos que será preciso afrontar. Un momento decisivo para el sistema de reparación a las víctimas de la CPI llegará, presumiblemente, cuando la Corte emita su primera sentencia.

Palabras clave: Fondo Fiduciario para las Víctimas, Victimización masiva, Reparaciones, Situaciones ante la CPI, Casos ante la CPI.

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1. Introducción

On 17 July 1998 a diplomatic conference held in Rome by 160 States adopted an international treaty, known as the Rome Statute (RS), establishing the International Criminal Court (ICC, or the Court). The RS entered into force on 1 July 2002, and since then the ICC is a functioning Court whose seat is in The Hague. There are currently 115 States Parties to the RS. The ICC is the first ever permanent international criminal court operating in the international community. Created by an international treaty, the powers of the Court rest upon a wide consensus across the international community on the high value of its mission. Such a mission is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, thus contributing to the prevention of such crimes. The history of the 20th century is in part a tale of unspeakable atrocities committed against millions of men, women and children. Such atrocities have gone largely unpunished. The deep shock to human conscience caused by this combination of atrocities and impunity prompted a number of States to create a permanent international court with jurisdiction over the gravest international crimes.

It is important to note some relevant features of the ICC from the start. First, the ICC tries individuals, not States. Under international law, States cannot be found guilty of having committed international crimes. International criminal responsibility is strictly personal in the sense that only individuals, not organizations as such, can be prosecuted, tried and sentenced in court. Secondly, the jurisdiction of the ICC is complementary of that of national courts, which in practice means that the ICC shall only act when States are unwilling or unable to investigate or prosecute. It is a principle of international law that the primary responsibility to exercise criminal jurisdiction over individuals allegedly responsible for international crimes lies with States. The ICC has been designed as a Court of last resort. Finally, as for the crimes themselves, the ICC has jurisdiction to prosecute and try individuals allegedly responsible for genocide, war crimes and crimes against humanity. It is expected to exercise jurisdiction over a fourth crime in the future, the crime of aggression, when certain amendments to the RS enter into force and the jurisdiction of the ICC over this crime is activated¹.

¹ The amendments to the RS were adopted at the Review Conference held in Kampala (Uganda) between 31 May and 11 June 2010. They will enter into force when 30 States Parties ratify them, after which the jurisdiction of the Court over the crime of aggression will have to be activated, an event that can only take place after 1 January 2017.

Genocide is defined in the RS as the commission of certain acts “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”². Among such acts are the killing of members of the group, the subjection of the group to conditions of life calculated to bring about its physical destruction, the infliction of serious bodily or mental harm to members of the group, the imposition of measures aimed at preventing births within the group, or the forcible transfer of children of the group to another group.

Crimes against humanity include acts such as murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, enforced disappearance or the crime of apartheid. Crucially, the commission of such acts must be part of “a widespread or systematic attack directed against any civilian population”³. This means that acts should not be considered in isolation, but as part of a wider scheme intended to harm a “population” rather than a specific person or persons.

War crimes are, to be sure, committed in armed conflicts, not in peaceful times. The ICC shall have jurisdiction over war crimes “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes”⁴. War crimes are grave breaches of the Geneva Conventions of 12 August 1949, along with other serious violations of the laws and customs applicable in international armed conflict and in armed conflicts that are not of international character. The RS is very specific in its description of conduct qualifying as war crimes. A detailed enumeration of such acts would go beyond the scope of this work and would, moreover, be tedious. War crimes are committed, for instance, when attacks are intentionally directed against civilians or other protected persons (i.e. medical or religious personnel), when children under the age of fifteen years are conscripted or enlisted into the armed forces or rebel groups, when prohibited methods and means of warfare are employed (i.e. poisoned weapons or asphyxiating gases), or when attacks are directed against historic monuments, hospitals or religious buildings. Conduct qualifying as a crime against humanity can be considered to be a war crime when committed during an armed conflict, as it is the case with torture or sexual violence.

An important conclusion can be derived from the description made above. The crimes under the jurisdiction of the ICC can only be committed by individuals acting as members of groups, that is, by individuals associated within a structure, be it the State, a criminal sub-group within the State, or a rebel armed group. Individuals, acting in isolation, commit murder or serial killings, but cannot commit genocide. Nor

² RS, Article 6.

³ RS, Article 7.

⁴ RS, Article 8. The qualifying words “in particular” imply that ICC jurisdiction is not *exclusively* limited in principle to situations where there is a plan, policy or large-scale commission of war crimes. However, in all crimes under the jurisdiction of the ICC a *threshold of gravity* must be crossed, and appreciated by the judges, for this Court to intervene.

can they commit crimes against humanity “as part of a widespread or systematic attack against a civilian population”: Apartheid has to be implemented by many officials. As for war crimes, individuals do not enter an armed conflict in isolation, but as members of the armed forces or armed non-state actors that provide them with the means for the commission of war crimes. The crimes under the jurisdiction of the ICC are crimes of a scale and gravity that a single individual would never be in a position of committing, due to the lack of the necessary means and resources. It is only when acting through a structure such as a State or an armed group that the most serious crimes of international concern can be perpetrated.

This collective or group requirement, however, in no way affects the *individual* criminal responsibility that emerges once the crime has been committed. At any rate, although the crimes under the jurisdiction of the ICC usually involve a high number of alleged perpetrators, the ICC Prosecutor will normally “focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes”⁵. This implies that where crimes within the jurisdiction of the ICC have been committed not all perpetrators will be prosecuted. Therefore, not all crimes will reach the Court, but only those attributable to that high-level core of State or organization leaders. It is for national courts to prosecute and try lesser alleged perpetrators.

2. Massive victimization: a preliminary approach

The crimes within the jurisdiction of the ICC tend, by their very nature, to produce a large number of victims. Massive victimization is a prominent issue within the context of international criminal justice. Bombing areas populated by civilians is likely to produce a high number of casualties. Enforced disappearances, when practiced widely and systematically, result in many bereaved families. Apartheid affects entire swathes of the population, even the majority of the people living in one country. Genocide, by definition, targets groups, not individuals as such.

The reality of massive victimization has compelled those working in the field of international criminal justice to develop a twofold vision of victims of international crimes. Victims are considered both as individuals and as groups of individuals. Whereas in national criminal law the vision of the victim as an individual is the rule and the collective approach can be said to be the exception, in international criminal law, as things currently stand, the opposite is closer to the truth. Within the ICC system, this twofold vision has developed into a consideration not only of the victims but of the community to which they belong, which has in turn led to the notion of *victims and affected communities*⁶.

⁵ See Paper on some policy issues before the Office of the Prosecutor, p. 7.

⁶ See, for instance, Resolution RC/Res.2, The impact of the Rome Statute system on victims and affected communities.

The above considerations may have paved the way for grasping an important distinction within the ICC system: that between *situations* and *cases*. A situation is a set of circumstances in which a number of crimes within the jurisdiction of the Court may have been committed. It is the wider context out of which emerge the specific cases that will be tried by the Court. A case is an instance of a particular situation. What begins as a situation usually results in one or more cases. The Prosecutor analyzes a given set of circumstances (including relevant incidents, crimes allegedly committed and groups of persons involved) and if the investigation gains the required momentum, and is authorized when appropriate, he ends up shaping and defining one or more concrete cases. In a case the Prosecutor charges one or more specific individuals with the commission of specific crimes. There are currently six situations before the ICC: the situation in Uganda (involving one case), the situation in the Democratic Republic of Congo (four cases), the situation in Darfur, Sudan (four cases), the situation in the Central African Republic (one case), the situation in the Republic of Kenya (two cases) and the situation in Libya (still no cases defined)⁷. As indicated above, not all the crimes committed in a situation will be prosecuted and tried by the Court as part of a case, since limited resources will force the Court to concentrate on a limited number of particularly grave, high-profile cases.

The distinction between situations and cases is normally referred to in connection with prosecutorial activities; yet it is highly relevant for victims' issues. Applied to such issues, it gives rise to the notions of situation-related victims and case-related victims. The former will tend to be much more numerous than the latter. Case-related victims are direct and indirect victims that have suffered harm as a result of the commission of a crime that is under investigation or trial by the Court. Situation-related victims include, in addition to case-related victims, victims of crimes not under trial by the Court, and members of the communities that have been negatively affected by the commission of the crimes. As will be explained below, the ICC has been mandated to deal with both kinds of victims.

3. The Mandate of the ICC regarding Victims

Until the adoption of the RS, victims have been largely absent from international criminal justice. Neither the first generation of international tribunals (Nuremberg and Tokyo after the Second World War), nor the second generation (International *Ad Hoc* Tribunals for the former Yugoslavia and Rwanda in 1991 and 1994) counted victims' rights or even issues among their priorities. Regarding the latter generation, the focus of these *ex post facto*, temporary tribunals was on the relation between prosecutor and defense, on the rights of the accused, on evidence, on the judges, on State cooperation, on witness protection, and on other very important issues. Victims were taken into consideration merely as witnesses, normally for the prosecu-

⁷ See <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>

tion, which made them visible in court only as part of the prosecutorial strategy. The *Ad Hoc* Tribunals developed a body of rules providing for the protection of witnesses, which covered victims acting as witnesses in the proceedings. However, there were no rules providing for two crucial victims' rights, namely, the right to participate in the proceedings (otherwise than as witnesses) and the right to obtain reparation.

A wholly new approach to these issues came with the establishment of the ICC, which ushered in an expanded role for victims of international crimes. The RS and its Rules of Procedure and Evidence (RPE) provide for the protection of victims and witnesses, for the participation of victims in the proceedings and for the reparations to be granted to victims. At the jurisdictional level, participation and reparation rights are unprecedented in the history of international criminal justice. With respect to participation in the proceedings, victims can present their views and concerns before the Court when their personal interests are affected, a right victims will ordinarily exercise through legal representatives⁸. Regarding reparation, the Court shall establish principles relating to reparations to victims, including restitution, compensation and rehabilitation. It may also make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including the three mentioned forms of reparation⁹, another novelty in international criminal justice.

Such provisions on reparations introduce an essential change in the nature of the jurisdiction exercised by the ICC, whose judges are not only expected to decide between acquitting individuals (who have not been proven guilty) or imposing penalties (on convicted persons). The mandate given to the ICC is not only to penalize perpetrators, but also to redress victims. A balance between retributive and restorative justice is intended. It is for the Court, through its case-law, to strike the right balance between those two basic forms of justice, a delicate task that is to be faced fairly soon, given that the first ICC sentence is likely to be issued within a year.

Another relevant, and novel, feature of the ICC system should be noted. Victims are defined both as natural and legal persons, since they are those "who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court"; but they may also 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"¹⁰. In addition, *direct* victims are natural or legal persons who have suffered direct harm as a result of the commission of any crime under the jurisdiction of the Court. *Indirect* victims are natural persons or organizations that have suffered harm as a result of the harm suffered by direct vic-

⁸ RS, Article 68.3

⁹ RS, Article 75.1 and 2.

¹⁰ RPE, Rule 85.

tims. In the case of natural persons, indirect victims are members of their families, as established in the Regulations of the Trust Fund for Victims (Regulations TFV)¹¹.

To sum up, the notion of victims in the ICC system is multifaceted, having many aspects from which different criteria for victim classification emerge, such as natural or legal, direct or indirect, case-related or situation-related. The mandate to redress victims given to the ICC covers all victims. The Trust Fund for Victims (TFV), a separate entity set up within the ICC structure, plays a key role in the fulfillment of that redress mandate.

4. The Trust Fund for Victims: structure, resources and mandates

The RS provides for the establishment of a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims¹². The TFV was created in 2002 by the Assembly of States Parties (ASP)¹³ of the ICC through a resolution dealing with the all-important issue of its funding mechanism¹⁴. It is an unprecedented instrument intended to serve restorative justice in the broadest possible terms. No other international criminal tribunal has a reparative instrument like the TFV.

Oversight of the TFV is the responsibility of a Board of Directors, whose members act in their personal capacity on a pro bono basis¹⁵. Its five members, elected by the ASP, must be of high moral character, impartiality and integrity. They are required to have competence in the assistance to victims of serious crimes. Apart from meeting these requirements, it would be natural for the members of the TFV Board of Directors- or at least for some of them- to be high profile, well-connected personalities familiar with international fora, since one of the roles of the Board of Directors is to stimulate fundraising activities, especially regarding voluntary contributions to the TFV¹⁶. More generally, the Board of Directors, in accordance with the relevant ICC rules¹⁷, estab-

¹¹ See RS, Article 79 and RPE, Rule 85, in connection with Regulation 42 of the Regulations TFV.

¹² RS, Article 79.

¹³ The Assembly of States Parties (to the Rome Statute) is a political body within the ICC structure charged with the supervision of the management of the Court and the adoption of ICC legislation and other resolutions, including elections and appointments.

¹⁴ 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

¹⁵ Regulations TFV, Regulation 16

¹⁶ Current members of the Board of Directors are Ms. Elisabeth Rehn (Chair), former Minister of Finland, His Excellency Me Bulgaa Altangerei, former Director-General and Ambassador of Mongolia, Ms Betty Kaari Murungi, Kenyan NGO activist and legal advisor, Mr Eduardo Pizarro Leongómez, University Professor (Political Studies and International Relations) and former President of Colombia's national Committee for Reparation and Reconciliation and Her Excellency Ms Vaira Vike-Freiberga, former President of the Republic of Latvia.

¹⁷ Such rules, it will be recalled, are to be found in the RS, the RPE and the criteria established by the ASP.

lishes and directs the activities and projects of the TFV and the allocation of the available resources. In performing such activities, the Board of Directors is to consult, as far as possible, victims and their families (or their legal representatives), and may also consult any competent expert or organization¹⁸.

The Board of Directors meets regularly once a year, so it cannot be in charge of the day-to-day management of the TFV. To fill this gap the ASP established a Secretariat of the TFV, whose task is to provide the necessary assistance to the Board. Interestingly, the Secretariat and its Executive Director operate under the full authority of the Board of Directors in matters concerning its activities but, for administrative purposes, the TFV Secretariat and its staff is attached to the Registry of the Court. This point of structural organization, purely technical as it seems, sheds some light upon the nature of the TFV, its intended relation to the Court and its position in the ICC system. Being part of the ICC Registry, the TFV Secretariat is funded by the regular ICC budget, which leaves the TFV's financial resources unaffected by the operative costs of the Secretariat, so that all the funds collected can be devoted to the reparation of victims. The Board of Directors is thus an organ independent from the Court, whose members are not part of the staff of the Court, yet they exercise full authority over the Secretariat, whose task is to assist the Board and is organically embedded in the Court. This complex solution reflects that the TFV is not merely an instrument for the implementation of the decisions adopted by the Court. Its mission goes beyond Court orders and case-related decisions. For reasons related to its mandate, the TFV is intended to exercise a considerable measure of discretion regarding the projects it supports and the allocation of resources. This functional independence of the TFV from the Court must be reflected institutionally, while at the same time budgetary considerations call for an organic link with the Court structure. The solution adopted is an independent Board with authority over an ICC-funded Secretariat, with the Registrar of the Court assisting the TFV, but mindful of the independence of the Board and the Secretariat.

The TFV shall be funded through four different channels: First it will receive voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with the criteria established by the ASP. Secondly, it may receive money and other property collected through fines or forfeiture transferred to the TFV in compliance with an order issued by the Court. Thirdly, The TFV may obtain resources collected through awards for reparations made by the Court against a convicted person if the Court orders that such an award be deposited with the TFV. Finally, the TFV may receive other resources allocated to it by the ASP.

All the funds currently available to the TFV have come so far from voluntary contributions, governmental or not. Since 2004 the TFV has raised 7.3 million euro from

¹⁸ Resolution ICC-ASP/1/Res.6, Annex, p. 7.

24 countries¹⁹, with 4.5 million euro obligated for projects in Northern Uganda and the Democratic Republic of Congo (DRC). With voluntary contributions as the main source of income, TFV funding is less predictable than it would be desirable, which in turn affects its strategic and operational planning. A partial solution to the problem of fundraising is currently coming through earmarked funding. One of the most notable, and controversial, facts about voluntary contributions is precisely the possibility for donors to earmark their contributions to the TFV, that is, to specify the destination of the contributed funds, attaching them to specific projects or to specific groups of victims. The case for earmarking rests on the basic assumption that potential donors are more likely to become actual donors if earmarking is permitted. This is particularly evident in the case of NGOs, foundations or other institutions whose mission is to support, relieve, assist or work in favor of specific categories of victims, such as victims of sexual violence, tortured persons, disabled persons and amputees, children or child soldiers.

The applicable provisions with regard to the earmarking of contributions establish that voluntary contributions from governments shall not be earmarked. Voluntary contributions from other sources may be earmarked for up to one third of the contribution for a TFV activity or project. This is subject to the requirements that the allocation of funds, as requested by the donor, benefits victims and their families and does not result in discrimination on grounds of race, color, sex, language, religion, political or other opinion, national, ethnic or other origin, property, birth or other status²⁰. Contributions aimed at assisting those enjoying specific protection under international law should not be considered discriminatory, with children and victims of sexual violence being obvious categories of specifically protected persons. The one-third restriction may be waived when the funds have been raised at the initiative of the members of the Board of Directors or the Executive Director of the Secretariat²¹. And if a voluntary contribution is earmarked and the related purpose cannot be achieved, it will be allocated in the TFV's General Account if the donor so agrees.

It is the task of the Board of Directors to review the nature and level of voluntary contributions. Such contributions could eventually be refused if they are deemed to be inconsistent with the goals and activities of the TFV, or to be earmarked in a manner inconsistent with the Regulations of the TFV²², or which would affect the independence of the TFV, or which would result in a manifestly inequitable distribution of available funds among the different groups of victims.

¹⁹ See Registry and Trust Fund for Victims Fact Sheet, March 2011, p. 5. Spain has been a traditional donor, with an overall contribution of 289.800 euro since the creation of the TFV.

²⁰ Regulations TFV, Regulation 27

²¹ Resolution ICC-ASP/6/Res.3, Amendment to the Regulations of the Trust Fund for Victims.

²² Regulations TFV, Regulation 30 (b). Before refusing an earmarked contribution on these grounds, the Board may seek a decision by the donor to withdraw the earmarking or to change it in an acceptable manner.

Contributions, voluntary or otherwise, are but a means to fulfill the specific mandate of the TFV. Analysis of the relevant ICC provisions has prompted experts to define it as a dual mandate. The first mandate is to administer reparations awards ordered by the Court against a convicted person. Pursuant to Article 75.2 RS, the Court may make an order directly against a convicted person specifying reparations due to victims. The Court may also order the reparations award to be made through the TFV. The resources needed to repair victims will be collected through fines or forfeiture of money and property, and through reparation awards. They may be complemented with “other resources” of the TFV if the need arises and the Board of Directors so decides²³. The *reparations mandate*²⁴ of the TFV is case-related. It is activated when criminal proceedings have ended and an individual has been convicted and sentenced. It is intended to benefit case-related victims and, when the Court orders its first reparations awards, it is likely to materialize in a combination of the three forms of reparation envisaged by the ICC system, that is, restitution, compensation and rehabilitation, including not only individual, but collective and symbolic reparative measures. The discretion to be exercised by the Board of Directors and the independence of Board and Secretariat diminish when the TFV is fulfilling its reparations mandate, as does the number of victims targeted by reparative measures.

The second role of the TFV is to fulfill a *general assistance mandate*, aimed at providing assistance to victims and their families regardless of a conviction by the Court. The general assistance mandate is situation-related. It is aimed at giving a response to the urgent needs of victims immediately after the commission of the crimes, or at least as soon as possible. In fulfilling this mandate the TFV will normally use resources received in the form of voluntary contributions. The TFV identifies a pressing need to assist victims, and the assistance activities and projects can start as long as the fairness of ongoing trials is not affected²⁵. Reparation to victims is provided in the form of rehabilitation measures, both physical and psychological, as well as material support. The discretionary powers of the Board of Directors and the independence of Board and Secretariat increase, as does the number of targeted victims. To date, the activities of the TFV have been circumscribed to the fulfillment of the general assistance mandate, resulting in 34 approved projects: 18 projects in Northern Uganda, of which 16 are active and 16 projects in the DRC, of which 14 are active.

This cursory sketch of the TFV may suffice to highlight some significant features of this unique institution, such as structural lightness, operational flexibility, varying degree of autonomy from Court decisions, and dual mandate. A more in detail analysis of how the TFV operates when fulfilling each of its mandates can give a precise idea of the unprecedented role the TFV plays in the international community.

²³ Regulations TFV, Regulation 56

²⁴ I take the expression reparations mandate from TFV documents. (Trust Fund for Victims 2010: 46)

²⁵ See Regulations TFV, Regulation 50. More on this issue can be found below.

5. The reparations mandate: case-related action of the TFV

As indicated above, pursuant to Article 75.1 RS the Court shall establish principles relating to reparations to victim. It may also, either upon request or on its own motion, determine the scope and extent of any damage, loss and injury to, or in respect of, victims. Moreover, according to Article 75.2 the Court may make an order directly against a convicted person specifying appropriate reparations to victims, including restitution, compensation and rehabilitation.

Such are the statutory foundations of the victims' reparation scheme, which is further developed by the RPE. To a considerable extent, reparation proceedings amount to a civil claim pursued in a criminal jurisdiction²⁶. Proceedings can start upon request for reparations by a victim, or else on the motion of the Court. In either case, victims pursuing reparations must submit a request in writing indicating, among other things, the injury, loss or harm suffered, the location and date of the incident, as well as the persons deemed responsible. The concrete restitution, compensation and rehabilitation claims must also be specified²⁷.

Management of victims' expectations will be crucial when the reparations scheme is set in motion. This is why a key issue in these proceedings will be the assessment of reparations²⁸. Depending on the gravity of the injury, loss or harm the Court may award individual reparations or, where it deems it appropriate, collective reparations, or even a combination of individual and collective reparations. The fact that collective reparations can be awarded *motu proprio* by the Court somehow questions the civil nature of part of the reparation proceedings, for in a civil claim the Court cannot in principle award what has not been requested, and individual victims may well request individual, not collective, reparations²⁹. Be it as it may, individual reparations are usually thought of in terms of individual compensation, that is, direct cash payments to individual victims. A default position is to consider that individual compensation to each victim is the ideal, with collective reparations as a secondary, complementary approach. This complementary approach would be all the more important when resources do not meet the cash requirements that are necessary to pay each victim a proper compensation award. However, reparations practice shows that direct monetary compensation to victims may not always be the ideal form of

²⁶ (Shelton 1999: 6) For this author reparation proceedings are "in essence" a civil claim heard in a criminal jurisdiction. The obvious implication of the civil nature of the reparation proceedings is that, compared to criminal proceedings, a lower standard of proof is required regarding loss or injury, especially "given the circumstances in which many of the victims will find themselves, including refugee status, homelessness, and lacking medical care where certificates or evidence of injury could be obtained"

²⁷ RPE, Rules 94 and 95.

²⁸ RPE, Rule 97.

²⁹ RPE, Rule 94. Collective reparations can be considered a form of *restorative sanction* rather than a civil award. In awarding *motu proprio* collective reparations the Court would be protecting a public international or community interest going beyond the interest of individual victims. Discussion of these points of legal theory is beyond the scope of this paper.

award. The reasons for this vary. Victims of atrocities that have received such payments often experience little substantial improvements in their lives, especially when the payment is purely nominal. Individual cash payments tend to have little or no impact on future generations. Furthermore, such payments may be a disturbing source of tension within the affected community.

Collective reparations, on the other hand, address victims as a group and focus on certain dimensions of the harm suffered that individual compensation leave untouched. Where villages and communities have been destroyed, collective reparations can help to rebuild community life through assistance and rehabilitation programs, infrastructure-building programs, collective packages including healthcare and education benefits, housing, micro-credit projects, to name but a few possibilities. Collective reparations may also address symbolic or identity-based dimensions of the harm suffered that need to be dealt with if the victims are to be fully redressed. Victims of sexual and gender-based violence, for instance, are likely to benefit greatly from collective healthcare programs specifically set up to meet their reparation needs³⁰. All in all, a combination of different modalities of context-specific reparations, both individual and collective, is likely to be the most adequate solution to the reparation problem in each case.

Success in implementing the case-related reparations scheme will be crucially dependent on the available resources. A fundamental principle of justice is that reparations are to be funded and paid by the convicted person. While this is correct from a purely legal perspective, the reality of the ongoing ICC cases shows that assets traced and funds seized are almost non-existent. In this context, the problem arises as to how the Court is to enforce awards made directly against a convicted person. Enter the TFV. It will be recalled that it shall be funded by voluntary contributions, money and other property collected through fines and forfeiture, resources collected through awards for reparations and resources allocated to it by the ASP. Fines, forfeiture and reparations awards are not likely to yield much money or property unless the Court, the Office of the Prosecutor in particular, develops an effective asset-tracing strategy. Even then, in some cases, awarded reparations may be on a scale that even very wealthy individuals may not be able to fund them. Attention is thus inevitably directed to Rule 98.5 RPE, by virtue of which "other resources" of the TFV may be used for the benefit of the victims. The source of such resources could be a transfer from the ASP, although this possibility is unlikely to materialize as States Parties already cover the entire ICC budget³¹. This leaves voluntary contribu-

³⁰ (War Crimes Research Office 2010: 43-51). This illuminating report refers to the practice concerning reparations in South Africa, Rwanda, Sierra Leona, Chile (among other countries) to support its conclusions on individual versus collective reparations.

³¹ On discussing this issue, one author points to Article 116 RS as a possible source of the financial resources that the ASP might allocate to the TFV. Article 116 RS allows the ICC to receive voluntary contributions from Governments, international organizations, individuals, corporations and other entities. Presumably, these resources would not be needed to fund the core activities of the Court, and could be thus transferred to the TFV. (Garkawe 2003: 365).

tions as the remaining source of funding for otherwise unenforceable reparations awards.

Resorting to voluntary contributions to fund the first Court orders for reparations seems an inevitable decision given the current level of seized funds and potentially available assets. Even staunch advocates of the principle that the payment of reparations is “first and foremost the liability of the convicted person” have accepted this idea³². The TFV itself has made available a reserve of 1 million euro for potential Court-ordered reparations³³. Funding reparations through the TFV’s “other resources” may be acceptable when the convicted person cannot provide the necessary assets; this practice, nevertheless, should always be considered second-best, as opposed to the best practice of funding by the person against whom the order for reparations has been made. If this view is accepted, a more active ICC strategy of asset tracing is a necessary development in the near future, one in which an essential role will be played by cooperation of States Parties with the Court. One final point should be noted. The TFV *may choose* to use funds it has received via voluntary contributions to pay or complement the payment of reparations awards, but from a legal point of view it is not, strictly speaking, obliged to do so³⁴.

Some brief reference is now appropriate to the implementation of the activities and projects of the TFV in the case-related reparations scheme, regardless of the issue of the availability or lack of funds. Pursuant to Rule 98.2 RPE, the Court may order that an award for reparations against a convicted person *be deposited with* the TFV for it to forward *individual* awards directly to each victim. The TFV will then set out an implementation plan, adopt identity verification procedures, determine disbursement modalities and priorities, and verify that awards are received by beneficiaries. It can use intermediaries in the disbursement process. Pursuant to Rule 98.3 RPE, the Court may order that an award for reparations *be made through* the TFV where the number of the victims and the nature of the required reparations make a *collective* award the preferred option. The TFV’s implementation plan will in this case be drafted through a process involving a higher degree of consultation with victims, experts and the Court itself. Intermediaries or partners may work together with the TFV to implement the plan.

6. The general assistance mandate: situation-related activities of the TFV

The essence of the second TFV mandate is to provide immediate assistance to victims and their families before perpetrators are convicted by the Court, while targeting as many victims as possible in a situation over which the Court is exercising its jurisdiction. Characteristically, under this mandate the reparation net is cast wide.

³² (REDRESS 2011: 5)

³³ See <http://www.trustfundforvictims.org/financial-info>.

³⁴ See RPE, Rule 98.5 and, above all, Regulations TFV, Regulation 56.

This is wise for at least two reasons. First, considering that the Prosecutor has adopted the strategy of focusing on a small number of perpetrators (those bearing the gravest responsibility), if reparations were strictly linked to cases and convictions, the likelihood of large numbers of victims receiving no reparations would be high. Secondly, given the pace of proceedings before the Court, if no assistance came to victims until perpetrators were convicted, reparations would probably come too late for a great number of victims of the atrocities. Thence the necessity of dissociating at least one reparations scheme from convictions. The reparations mandate and the general assistance mandate thus complement each other, both serving the same general purpose: that restorative justice be done and seen to be done.

As for the design of this reparations scheme, the TFV Board of Directors may initiate the process by detecting a necessity to provide physical or psychological rehabilitation, or material support for the victims and their families. It will then give notice to the Court of the specific activities it intends to undertake. The Court must satisfy itself that a foreseen activity or project does not pre-determine any issue to be determined by the Court, or violates the presumption of innocence, or is inconsistent with the rights of the accused and fair trial requirements³⁵. Dissociating reparations from convictions clearly implies that no TFV project or activity can be based on the assumption that a specific defendant is guilty prior to the actual conviction. Nor can any project be interpreted as a factor contributing to determine guilt outside criminal proceedings. A fair trial requires conviction to be the result of evidence given, produced, examined and challenged during the proceedings. Assistance provided to victims, an activity that is external and even alien to the proceedings, can in no way pre-establish the result of a truly fair trial. The applicable Regulations of the TFV give the Court a veto power over rehabilitation projects considered to infringe fair trial constraints, which has been interpreted as an overruling of the intended independence of the TFV as far as its assistance mandate is concerned³⁶. At any rate, ICC case-law on this issue may have to establish the proper limits between the Court's veto power and the necessary autonomy of the TFV. The often invoked wisdom of the judges will be crucial in this regard.

Assistance to situation-related victims is provided using "resources other than those collected from awards for reparations, fines and forfeitures," which in practice means that assistance funds will come almost entirely from voluntary contributions. Preserving voluntary contributions as a source of general assistance to victims, rather than as a means to finance court-ordered reparations, becomes therefore important if the TFV is to fulfill its situation-related mandate. As indicated above, the proper form of reparation flowing from projects and activities undertaken by the TFV under this mandate is rehabilitation, regarded in an authoritative source as includ-

³⁵ See Regulations TFV, Regulation 50.

³⁶ (De Brouwer 2007: 233) The author speaks of "independence as far as voluntary contributions [are] concerned", but since the assistance mandate is funded through voluntary contributions, the meaning is the same.

ing “medical and psychological care as well as legal and social services”³⁷. Physical rehabilitation focuses on providing care to victims who have suffered physical injury. Psychological rehabilitation is mainly directed at healing trauma, removing the stigma of victimization and addressing reconciliation issues. TFV rehabilitation projects also provide material support aimed at improving victims’ education and training, an opportunity for local capacities to be built and developed.

Operationally, the TFV works through partners and intermediaries. Effective rehabilitating action requires using the expertise and local presence of organizations capable of addressing the needs of victims of specific conflicts who are suffering specific harm. Non-Governmental Organizations focused on victims’ issues, faith-related associations, women or youth organizations and even some organizations within the private sector are natural candidates for partnership with the TFV³⁸. Through a system of open tenders, potential partners are encouraged to make project proposals tailored to victims’ needs. Once such proposals have been approved, the implementation phase begins, with the TFV providing oversight and financial and technical support to implementing partners. Choosing the right partners and managing potential conflicts of interest with intermediaries are no doubt some of the challenges of this operational method, but they are part of the prize to be paid for operational flexibility and capillarity. The process tends to maximize the expertise and creativity of those working daily to relieve the suffering of victims of serious crimes, such as social workers, medical personnel, aid workers, psychologists, victims’ rights advocates and others whose work is likely to put them in close contact with victims. Effective rehabilitation projects are likely to have a non-negligible grassroots dimension. Rehabilitation is intended to be, at least in part, a victim-led, bottom-up process that helps victims of atrocities to regain control over their own lives and destiny.

In order to fulfill its general assistance mandate, the TFV is at present “employing two targeting strategies to ensure victims fall within the jurisdiction of the Court”³⁹. The first is to focus on victims of sexual and gender-based violence, as well as on children and youth, including child soldiers. The second is to provide assistance to affected communities, such as villages that have suffered pillage, massacres or displacement of community members. The categories of victims targeted and reached by TFV projects are, among others, child soldiers (many of them previously abducted), victims of sexual violence, disabled persons and amputees, victims of torture and persons in vulnerable situations, such as widows or orphans. Victims in war-torn areas are very often women and girls, which explains why the TFV strives to mainstream a gender perspective in all its activities⁴⁰.

³⁷ Resolution A/RES/60/147, Annex, IV, 21

³⁸ The TFV is currently working with more than 30 partners, both national and international, that are implementing projects in Uganda and the DRC. See <http://www.trustfundforvictims.org/partners>.

³⁹ (Trust Fund for Victims, 2010: 47).

⁴⁰ *Ibid.*, 23-24.

Experience, with its baggage of lessons learned, shows that success of TFV projects often comes from difficulties related to being associated with the TFV and the ICC in areas where crimes within the jurisdiction of the Court are under investigation or trial. Such difficulties may affect both victims and partners. Perpetrators may have relatives or followers in the same areas where victims are to receive assistance. Victims' security, and that of their families, can be jeopardized if they are perceived as cooperating with the ICC. Moreover, victims can be reluctant to receive the benefits of rehabilitation projects due to the stigma often associated with serious human rights abuses, especially in small rural communities. In addition to the traditional reserve of many such victims, the notion of the victim as a disgrace for the community, village or family of origin is at times surprisingly strong. Participating in a TFV activity can also make jealousy and divisive feelings arise. Partners associated with the TFV can put their reputation and security at risk. So far, discretion has been the best policy to avoid having partners intimidated and intermediaries bullied. Disseminating knowledge of the ICC's mission among local population, and defending its legitimacy through outreach activities, will no doubt be necessary to reduce the impact of these problems on TFV activities. So will the realization that the business of redressing victims of atrocities is not an easy one and has to deal with the darker sides of human nature.

7. Conclusions

So far the TFV has directly benefited an estimated 70.000 victims, with an additional estimation of more than 172.000 indirect beneficiaries⁴¹. In the context of international criminal justice, the TFV is becoming the tool for the international community to move from grand proclamations about the plight of victims to actual work in their favor. The TFV and the ICC must therefore be regarded as highly valuable instruments for the promotion of justice and the rule of law in the international legal order.

Victims have often been neglected in justice systems, no less in international criminal justice. The ICC system has brought with it an unprecedented change of perspective based on victims' participation and reparation rights. The inevitable result of this is that the ICC mandate cannot merely revolve around punishing perpetrators, but must incorporate the redressing of victims of genocide, crimes against humanity and war crimes. Victims are defined in terms of the harm suffered, which requires repairing such harm for justice to be done. Criminal justice can be said to have two dimensions: the fight against the impunity of perpetrators and the effort to redress victims, with reparations regarded more as a right of victims, and a corresponding service due to them, than as a penalty for convicted persons. Penalties and reparations: only when both dimensions of criminal justice materialize is the international legal order upheld, and the moral order restored.

⁴¹ *Ibid.*, 15 and 22.

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