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THE INTERNATIONAL CRIMINAL COURT:

Ensuring an effective role for victims

INTRODUCTION

On 17 July 1998, a diplomatic conference in Rome adopted the Rome Statute of the International Criminal Court (Rome Statute or Statute).¹ This success came a century and a quarter after it was first proposed in 1872 by Gustave Moynier of Switzerland, one of the founders of the International Society of the Red Cross,² and half a century after the French government representative on the United Nations (UN) Committee on the Progressive Development of International Law and its Codification, Henri Donnedieu de Vabres, asked the UN to establish a permanent international criminal court.³ The Rome Statute will enter into force after 60 states ratify the Statute. As of 23 April 1999, 83 states had taken the first step towards ratification by signing the Statute and three, Senegal, Trinidad and Tobago and San Marino, have ratified it. Many other states have committed themselves to doing so in the near future.⁴ Pending the entry of the Rome Statute into force, a Preparatory Commission has been meeting at the UN Headquarters in New York to prepare drafts of documents, including the Rules of Procedure and Evidence, for adoption by the Assembly of States Parties after the Statute enters into force.

¹ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9*, 17 July 1998, as provisionally corrected pursuant to the letter of Hans Corell, Legal Adviser, dated 25 September 1998.

² Gustave Moynier, "Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève", *Bulletin international des Sociétés de secours aux militaires blessés*, Comité international, No. 11, avril 1872, pp. 122, 127 (English translation by the International Committee of the Red Cross of the proposal, see Christopher Keith Hall, "The first proposal for a Permanent International Criminal Court", *Int'l Rev. Red Cross*, No. 322, p. 62.

³ He made the proposal on 13 May 1947 and submitted a memorandum two days later providing that certain matters would be tried by a special international criminal chamber of the International Court of Justice and others in a permanent international criminal court. Memorandum submitted to the Committee on the Progressive Development of International Law and its Codification by the representative of France, U.N. Doc. A/AC.10/21, 15 May 1947.

⁴ France has amended its Constitution to permit ratification, which is expected this year. Italy has completed all internal steps for ratification and is expected to deposit its instrument of ratification in July 1999. Belgium hopes to be able to ratify later this year and the other EU states hope to do so next year. The 12 members of the Caribbean Community (CARICOM) which have not yet ratified the Rome Statute (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines), are expected to ratify it in the near future. Argentina hopes to ratify this year and in June Brazil urged all other members of the Organization of American States (OAS) to sign and ratify the Statute promptly. Government representatives from the members of the Southern African Development Community (SADC) at a recent meeting in Pretoria, South Africa renewed their commitment to prompt signature and ratification. The *Assemblée Parlementaire de la Francophonie* (Parliamentary Assembly of the Francophonie) requested parliaments in members states to "act with urgency" to start work on ratification "as soon as possible and without delay" and called upon leaders of the Francophonie at the Francophone Summit in Moncton, Canada from 3 to 5 September 1999 "to decide upon a joint and solemn initiative by the Francophonie member states in favor of the ratification of [the Rome Statute]".

This paper is one of a number of papers which Amnesty International is submitting to the delegates at the Preparatory Commission. At the first session, Amnesty International provided delegates with the first of a series of short papers on the Elements of Crimes, *The International Criminal Court: Fundamental principles concerning the elements of the crime of genocide*, February 1999 (AI Index: IOR 40/01/99). At the second session, Amnesty International is planning to submit one other short paper on the Elements of Crimes, and a second paper on the Rules of Procedure and Evidence, *Drafting effective rules on trial, appeal and revision*, July 1999 (AI Index: IOR 40/12/99).

The purpose of this paper. This paper makes recommendations concerning the preparation of draft Rules of Procedure and Evidence concerning the role of victims in the International Criminal Court.⁵

It takes into account the proposed rules adopted at the Paris seminar (Paris draft Rules) makes recommendations for amendment of some of these rules or suggests where additional rules might be necessary.⁶ For the convenience of delegates, the paper is divided into four parts in accordance with the structure of the Paris draft Rules, which reflect the topics addressed by the four seminar workshops.

The memorandum reviews the provisions in the Statute particularly relevant to victims and makes specific recommendations to guide the Preparatory Commission in the preparation of drafts of documents, such as the Rules of Procedure and Evidence, for adoption by the Assembly of States Parties. It also indicates certain fundamental principles which should guide the Court when establishing “principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation” (Article 75 (1)) and in its practice. These recommendations are indicated below in bold type at the end of each section.

⁵ This paper is an updated version of Amnesty International’s memorandum, *The International Criminal Court: Ensuring an effective role for victims - Memorandum for the Paris seminar, April 1999*, April 1999 (AI Index: IOR 40/06/99), which was provided to the participants and observers at the Paris seminar in April (see below).

⁶ At the first session of the Preparatory Commission (16 to 26 February 1999), it was agreed that matters concerning victims should be addressed comprehensively at the second session (26 July to 13 August 1999). The French government decided to organize a seminar, the International Seminar on Victim’s Access to the International Criminal Court, in Paris from 26 to 29 April 1999, involving individual experts as participants, as well as observers from governments, intergovernmental organizations and non-governmental organizations, including Amnesty International. The seminar had three objectives:

- “1. To help in the elaboration of the Rules of Procedure and Evidence of the International Criminal Court by making further progress in the discussions of the rights of victims. . .
2. To promote the interests of victims in criminal proceedings before the International Criminal Court, in accordance with the Statute, taking into account the contributions of each legal tradition.
3. To contribute, with the help of the victims’ intervention in the proceedings, to ensuring remembrance, justice, as well as an increased transparency and clearer understanding of the Court’s actions by the people.”

The Paris seminar was organized in four workshops devoted to the following topics: (1) the role of victims in referring a situation to the Prosecutor and during challenges to admissibility and jurisdiction; (2) participation of victims during the proceedings; (3) protection of victims and witnesses; and (4) reparations, including restitution, compensation and rehabilitation.

This paper takes into account a variety of proposals by governments and non-governmental organizations, including: the draft Rules of Procedure and Evidence prepared by Australia for the Preparatory Commission (Draft Rules),⁷ which are based in large part on the Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia and Rwanda (Yugoslavia and Rwanda Rules),⁸ the proposals submitted by states during the Diplomatic Conference and the first session of the Preparatory Commission, and the recommendations by non-governmental organizations concerning the role of victims.⁹

The central place of the victim in the Statute. The Preamble indicates that ensuring justice for victims lies at the heart of the Rome Statute, by recalling “that during this century millions of children, women and men have been the victims of unimaginable atrocities that deeply shock the conscience of humanity”. Numerous provisions throughout the Rome Statute guarantee an important role for victims, their families or their representatives at every stage of the proceedings, from the initiation of investigations to post-conviction proceedings, and recognize the right of victims and their families to reparations, including compensation, restitution and rehabilitation. In doing so, the Rome Statute echoes Gustave Moynier’s proposal in 1872 for a permanent international criminal court, which required persons convicted of breaches of the Geneva Convention of 1864 concerning the treatment of wounded, to pay compensation to victims and, if the convicted persons could not do so, their governments to do so.

Relevant international standards. These fundamental principles are based upon widely recognized international standards, including: the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Victims Declaration),¹⁰ the UN Manual on the use and

⁷ Draft Rules of Procedure and Evidence of the International Criminal Court, U.N. Doc. PCNICC/1999/DP.1, 26 January 1999.

⁸ International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/14, 17 December 1998; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ICTR/3/Rev.2, 5 July 1996.

⁹ American Bar Association, *Draft Rules of Procedure and Evidence for the International Criminal Court: Prepared by a Working Group of the Section of International Law and Practice* (10 February 1999) (ABA Draft Rules); David Donat-Cattin, *Article 68 - Protection of Victims and Witnesses and their Participation in the Proceedings and Article 75 - Reparations to Victims*, in *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article* (Otto Triffterer ed. 1999) (forthcoming); Human Rights Watch, *Commentary to the Preparatory Commission - Rules of Evidence and Procedure for the International Criminal Court, Part 1* (February 1999); International Criminal Court Society, *ICC rules of procedure and evidence implementing Art. 68 (3) of the Rome Statute: proposals for the ICC Preparatory Commission* (16 January 1999); International Society for Traumatic Stress Studies and the International League for Human Rights, *Suggestions related to victims’ issues for inclusion in the draft rules of procedure and evidence of the International Criminal Court* (1999) (*Suggestions related to victims’ issues*); Redress, *Promoting the right to reparation for survivors of torture: What role for a permanent international criminal court?* (June 1997) and *Reparations for Victims in the International Criminal Court: Principles, Commentary and Recommendations for the Rome Diplomatic Conference (1998)*; Women’s Caucus for Gender Justice, *Victim participation* (February 1999) and *Suggestions Relating to the Rules of Procedures and Evidence - Protective measures* (February 1999).

¹⁰ UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by G.A. Res. 40/34, 29 Nov. 1985.

application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Victims Declaration Manual),¹¹ the UN Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,¹² the UN Guidelines on the Role of Prosecutors,¹³ the UN Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Humanitarian Law (Van Boven Principles),¹⁴ the Report by Mr. Louis Joinet on the question of the impunity of perpetrators of human rights violations (civil and political rights) (Joinet Report), to which are annexed the Set of Principles for the Protection and Promotion of Human Rights through Action to End Impunity (Joinet Principles)¹⁵ and the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.¹⁶ The drafters of the Rome Statute intended that the UN Victims Declaration and the Van Boven Principles have a special place in the interpretation of the Statute.¹⁷

¹¹ UN Manual on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. Doc. E/CN.15/1998/CRP.4/Add.1, 17 April 1998.

¹² UN Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. Doc. E/CN.15/1998/CRP.4, 17 April 1998.

¹³ UN Guidelines on the Role of Prosecutors, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, and welcomed by the General Assembly in G.A. Res. 45/113 on 14 December 1990.

¹⁴ UN Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, U.N. Doc. E/CN.4/1997/104. The Chairman of the UN Commission on Human Rights has appointed an expert, M. Cherif Bassiouni, pursuant to the Commission's Resolution 1998/43, to prepare a revised version of the Van Boven Principles, in consultation with states, intergovernmental organizations and non-governmental organizations, and the expert has submitted an interim report on his work, U.N. Doc. E/CN.4/1999/65, 8 February 1999.

¹⁵ Report by Mr. Louis Joinet on the question of the impunity of perpetrators of human rights violations (civil and political rights), U.N. Doc. E/CN.4/Sub.2/20/1997/Rev.1, 2 October 1997.

¹⁶ Adopted by the General Assembly in Resolution 53/144 on 9 December 1998.

¹⁷ The Working Group on Procedural Matters at the Diplomatic Conference stated in their report to the Drafting Committee, adopted by consensus:

“For the purposes of interpretation of the terms ‘victims’ and ‘reparations’, definitions are contained in the text of article 44, paragraph 4 of the Statute [now Article 44 (3)], article 68, paragraph 1, and its accompanying footnote, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985, annex) and the examples in paragraphs 12 to 15 of the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law (E/CN.4/Sub.2/1996/17).”

Report of Working Group on Procedural Matters, U.N. Doc. A/CONF.183/C.1/WGPM/L.2/Add.7, 13 July 1998, Art. 73 (1), note 5.

I. WORKSHOP 1 - DEFINITION OF VICTIMS, ROLE OF VICTIMS DURING REFERRAL AND ADMISSIBILITY PROCEEDINGS

A. Definition of victim

RULE X [Workshop 1] (Article 15) Definition of victim*

1. "Victim" means any person** or group of persons who individually or collectively, directly or indirectly, suffered harm as a result of crimes within the jurisdiction of the Court.
2. "Harm" includes physical or mental injury, emotional suffering, economic loss or substantial impairment of fundamental rights.
3. Victims, where appropriate, may also be organizations or institutions which have been directly harmed.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (United Nations General Assembly Resolution 40/34, 1985). Views were expressed that mechanisms to address practical difficulties that may arise from the scope of the definition need to be considered. The view was expressed that the definition may be too broad.

** In order to eliminate any ambiguity, "person" means a natural person.

* This definition follows the United Nations

Definition of victim. One of the most important matters for the Rules of Procedure and Evidence and the Court with respect to victims will be to ensure that the definition of victim is as broad as that recognized in international standards. Principle 1 of the UN Victims Declaration defines victims as

"persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power".

Criminal law operative within UN Member States includes, of course, international criminal law which prohibits conduct amounting to crimes within the jurisdiction of the Court. In any event, Principle 18 of the UN Victims Declaration makes clear that the term "substantial impairment of their fundamental rights" is very broad and includes substantial impairment "through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights". Principle 2 of the UN Victims Declaration makes clear that "[a] person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim." This principle further clarifies that the concept of victim "also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization".

The drafters of the Rome Statute intended that the definition of a victim should be consistent with international standards and include the family of the victim.¹⁸ Unfortunately, although the drafters in Workshop 1 intended to follow the definition in the UN Victims Declaration, the failure to use the same

¹⁸ See note 14, above.

wording, subject to the minimal modifications necessary to adapt it to the Statute, could lead to ambiguity over its scope.¹⁹ It appears that the drafters intended by the concept of persons who have suffered harm “directly or indirectly” to be broadly inclusive and to include, as in Principle 2, “where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”, as well as others close to the direct victim. However, it might have been better to make this point clear. The recognition that groups of natural persons, such as organizations or institutions which have been directly harmed, can be victims is an important contribution to the effectiveness of representation of interests of victims from some civil law countries which permit organizations to participate as *parties civiles*.

The Rules of Procedure and Evidence should include a definition of victim which is as comprehensive as the definitions in Principles 1 and 2 of the UN Victims Declaration.

B. General principles concerning referral and admissibility proceedings

RULE E [WORKSHOP 1] (common)

If a person, organization or institution claims to be a victim and intends to make submissions pursuant to Articles 15 (3) and 19 (3), the Court shall determine the right to do so under the applicable

provisions of the Statute and the Rules of Procedure and Evidence.

RULE F [WORKSHOP 1] (common)*

Prior to any contact with the Court that requires his or her physical presence, a victim shall be informed of the existence, functions and availability of the Victims and Witnesses Unit.

***It may be more appropriate to include this rule under the rules developed under Article 43 (6) of the Statute or in a general provision.**

Some of the most important provisions in the Rome Statute concerning the role of victims are those permitting the victims to submit information to the Prosecutor so that the Prosecutor can initiate

¹⁹ Australian draft Rule 4 (Definitions) does not contain any definitions and an explanatory note simply states: “Consideration will have to be given to whether an extensive list of definitions needs to be included in the Rules.” It has been suggested that the Rules of Procedure and Evidence include the following definition of victim: “A person against whom a crime over which the Court has jurisdiction has allegedly been committed, his/her immediate family, dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.” Donat-Cattin, *Article 68 - Protection of Victims and Witnesses and their Participation in the Proceedings*, para. 37.

The Yugoslavia and Rwanda Rules adopt a definition of victim which would, in many cases, exclude the victim’s family and, thus, be inconsistent with international standards which must guide the Court. Rule 2 of the Yugoslavia Rules defines a victim as “a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed”. Rule 2 of the Rwanda Rules is identical. Although the crime of enforced disappearances inflicts extreme mental pain and suffering amounting to torture on the family of the “disappeared” person for as long as the case remains unresolved, in most other crimes, the crime is still regarded as being committed only against the person directly suffering the harm, not the person’s family. Rule 2 of the ABA Draft Rules, which reproduces the definition in Rule 2 of the Yugoslavia Rules, is similarly flawed.

investigations on his or her own initiative (*proprio motu*) (Article 15) and to submit information to the Prosecutor to counter challenges by states, suspects or accused to the Court's jurisdiction or the admissibility of a case (Articles 18 and 19). To a large extent, there is no need to implement these provisions in the Rules of Procedure and Evidence, as the Statute is sufficiently clear for them to be implemented by the Prosecutor or the Pre-Trial Chamber with considerable flexibility to address a wide variety of circumstances. To the extent that the Rules of Procedure and Evidence implement these provisions, it is essential that they ensure that these provisions facilitate the role of victims, without detriment to the rights of suspects or accused or to the effectiveness of the Court, rather than restrict that role.

As explained below, in addition to the express role for victims or their representatives provided in the Statute with respect to investigations by the Prosecutor on his or her own initiative, victims or their representatives have a right to play a role at the preliminary stages of proceedings when the Security Council refers a situation to the Prosecutor under Article 13 (b) or decides to request the Court pursuant to Article 16 to defer an investigation and when a state party refers a situation to the Prosecutor under Article 14. They also have a right to be informed of their rights to play a role during the investigation and of the progress of the investigation. Similarly, victims, their families or their representatives have a right to be informed of their rights with respect to a decision after completion of the investigation whether to prosecute and of their role during a prosecution.

As explained below, the Paris draft Rules only partially guarantee these rights.²⁰ In particular, Paris draft Rule E [Workshop 1] is limited to proceedings pursuant to Articles 15 (3) and 19 (3). Paris draft Rule F [Workshop 1], however, which requires that when the presence of victims is required, that victims should be informed of the existence, functions and availability of the Victims and Witnesses Unit, is a positive contribution to ensuring their effective participation in the proceedings.

The Rules of Procedure should provide for notice to victims, their families or their representatives of their right to present their views and concerns at all stages of the proceedings pursuant to Articles 13 to 19, whenever the relevant Chamber considers it appropriate to do so, not simply with respect to proceedings pursuant to Articles 15 (3) and 19 (3).

C. Preliminary examination and investigation

1. Decision by the Prosecutor on whether to investigate, based on information provided by victims

²⁰ Similarly, the Australian draft Rules and the ABA Draft Rules only partially guarantee these rights.

RULE A [WORKSHOP 1] (Article 15 (1) and (2))

In the event of information submitted under Article 15 (1) or of oral and written testimony pursuant to Article 15 (2), the Prosecutor shall preserve the confidentiality of any information or take any other necessary measures pursuant to his

or her duty under Articles 68 (1) and 54 (3) (f) of the Statute. Where appropriate, the Prosecutor shall seek the intervention of the Victims and Witnesses Unit.

Article 15 (1) provides that “[t]he Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.” Such information may come from *any source*, including victims and their families or non-governmental organizations. This provision is very broad and it is essential that the Rules of Procedure and Evidence do not attempt to restrict the powers of the Prosecutor under this provision.²¹ Article 15 (1) does not go as far as international standards, which permit victims and non-governmental organizations to institute criminal proceedings in appropriate circumstances when the prosecutor fails to do so.²²

Analysis by the Prosecutor of the seriousness of the information received. Article 15 (2) expressly assigns the responsibility of analysing the seriousness of the information received concerning crimes to the Prosecutor. The Diplomatic Conference rejected an effort to assign this responsibility to the Assembly of States Parties. Had that proposal been adopted, it would have critically undermined the independence and functions of the Prosecutor, as guaranteed by Article 42 (1) of the Statute and the UN Guidelines on the Role of Prosecutors. Therefore, it is essential that the functions of receiving, recording, acknowledging, analysing and responding to information be performed solely by the Prosecutor and his or her staff, not by any other organ of the Court or any outside body.

The best method for establishing the internal procedures to deal with such information would be to leave this task to the Prosecutor through internal guidelines adopted by the Office of the Prosecutor after widespread consultation, rather than to rigid Rules of Procedure and Evidence adopted by the Assembly of States Parties before the Court has heard any cases and which may be amended only by a two-thirds majority of the Assembly. This approach would not only preserve the Prosecutor’s independence, but also give the Prosecutor sufficient flexibility to modify procedures as the office evolves. It will be difficult before the Court has started to hear cases to anticipate what resources will be needed to handle such information or what the best methods will be to ensure that it is handled effectively.²³

²¹ Rule 6 (A) of the ABA Draft Rules, by modifying the wording of Article 15, appears to restrict the powers of the Prosecutor, by stating that these powers are subject to Article 16. It will be up to the Court to determine the exact relationship between Articles 13 (c), 15 and 16, as well as their relationship to the rest of the Statute; not the Rules of Procedure and Evidence (see discussion below of Article 16).

²² Principle 18 of the Joinet Principles states: “Although the decision to prosecute lies primarily within the competence of the State, supplementary procedural rules should be introduced to enable victims to institute proceedings, on either an individual or a collective basis, where the authorities fail to do so, particularly as civil plaintiffs.. This option should be extended to non-governmental organizations with recognized long-standing activities on behalf of the victims concerned.” Such initiatives must be subject to appropriate judicial review and supervision.

²³ Although the experience of the Yugoslavia and Rwanda Tribunals demonstrates that considerable resources will be needed just to receive, record and classify the information, both Tribunals have faced the problem that most

Thus, the Prosecutor will have to develop over the course of time in the light of experience effective ways to acknowledge information received by victims, their families and their representatives. The Prosecutor will also need to develop effective means to keep victims, their families or their representatives informed of steps taken to investigate the crimes based on the information received, as Principle 6 (a) of the UN Victims Declaration provides that victims should be informed of the “timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved”. However, the Prosecutor will have to balance, case by case, the need of victims and their families for information with other considerations, such as the necessity for confidentiality of investigations, especially where sealed indictments are required in order to avoid the accused evading arrest. It should be left largely to the Prosecutor how best to determine this sensitive question in each case, bearing in mind this fundamental principle.

The Paris draft Rules properly leave the functions of receiving, recording, acknowledging, analysing and responding to information provided by victims and other sources solely to the Prosecutor and his or her staff, apart from matters relevant to the Victims and Witnesses Unit, rather than to another organ of the Court or any outside body.

Receipt of information other than at The Hague. For the purpose of such an analysis, Article 15 (2) provides that the Prosecutor “may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court”. Although Article 3 (1) provides that the seat of the Court is to be established at The Hague in the Netherlands, Article 3 (3) provides that “[t]he Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute”. Therefore, the seat of the Court is not limited to The Hague, when the Court considers it desirable to sit elsewhere, and it can decide to sit elsewhere in order to carry out the functions of one of its organs, such as permitting the Prosecutor to receive written or oral testimony from reliable sources that he or she deems appropriate. In addition, Article 4 (2) states that “[t]he Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State”.

It would be helpful if the Rules of Procedure and Evidence clarified that the Prosecutor, in the exercise of his or her functions under Article 15 (2), may receive written or oral testimony from any reliable source he or she deems appropriate concerning crimes within the jurisdiction of the Court at locations other than The Hague and that the Prosecutor may receive oral testimony at The Hague by audio, video or other links from other locations.²⁴ Given that the Prosecutor will be responsible for

of the national courts, which would otherwise have been best placed to investigate and prosecute the crimes within the Tribunal’s jurisdiction because they have custody of suspects or the crimes occurred on their territory, are unable or unwilling to do so in fair and prompt trials, thus placing this burden on the Tribunals. In contrast, although the Court will have jurisdiction initially over crimes committed in at least 60 states, the primary responsibility for investigation and prosecution of crimes within the Court’s jurisdiction remains with the judicial authorities of states parties. The information which will be relevant will not be related to all crimes, but, as Article 17 makes clear, only to those crimes which states are unable or unwilling genuinely to investigate or prosecute and which are sufficiently grave to justify further action by the Court.

²⁴ Rule 6 (b) of the ABA Draft Rules, would seriously limit the powers of the Prosecutor under Article 15 (2) and other provisions of the Statute, by restricting the Prosecutor to seeking “on a voluntary basis” additional

investigating crimes all over the world and that it will be difficult, if not impossible, for victims, their families, witnesses, national non-governmental organizations and other reliable sources to come to The Hague, it is essential for the Prosecutor to have a great deal of flexibility to receive information which could be crucial for the investigation.

The Paris draft Rules do not clarify this question.

The Rules of Procedure and Evidence should make clear that the Prosecutor, in the exercise of his or her functions under Article 15 (2), may receive written or oral testimony from any source he or she deems appropriate concerning crimes within the jurisdiction of the Court at locations other than The Hague and that the Prosecutor may receive oral testimony at The Hague by audio, video or other links from other locations.

RULE B [WORKSHOP 1] (Article 15 (3))

1. Where the Prosecutor intends to seek authorization of the Pre-Trial Chamber to initiate an investigation pursuant to Article 15 (3), the Prosecutor shall inform victims or their representatives of such intention for the purpose of enabling them to make representations, unless doing so would pose a danger to the integrity of the investigation or to the life and well-being of victims and witnesses. In the event that the Prosecutor decides not to inform victims, he or she shall ensure that the initial submissions made by the victims if any, are presented before the Pre-Trial Chamber. Notice may also be given by way of public announcement.

2 (a) The representations of victims or their representatives under Article 15 (3) may be made in

written form or, with the leave of the Court, in any other form. The Prosecutor may provide victims or their representatives with a summary of his or her request for authorization to initiate an investigation, if this can be done without endangering the integrity of the investigation or the safety of any person.

(b) In deciding, pursuant to Article 15 (4) whether there is a reasonable basis to proceed with an investigation, the Pre-Trial Chamber shall consider any representations made by the victims or their representatives.

3. The procedure described in paragraphs 1 to 2 above shall also apply where the Prosecutor decides to submit a new request pursuant to Article 15 (5).

Requests for authorization to investigate. Article 15 (3) states that if the Prosecutor decides that “there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected”. The same provision expressly states that “[v]ictims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence”. A person can exercise his or her rights effectively only if he or she has notice of those rights and how to exercise them. Principle 13 (d) of the UN Guidelines on the Role of Prosecutors requires prosecutors to “ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”. Article 15 (4) provides that the Pre-Trial Chamber shall authorize the commencement of the investigation if, “upon examination of the request and the supporting material”, it “considers that

information from other reliable sources he or she deems appropriate and, again “on a voluntary basis”, written or oral testimony. This proposed rule would be an unwarranted restriction on the Court’s power to require cooperation of states parties and their officials, either in connection with the preliminary investigation or in connection with a case. In addition, this draft rule states that the Prosecutor may request testimony “at the seat of the Court”, without clarifying that the Prosecutor may receive such testimony by means of audio, video or other links.

there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court". It would be helpful for the Rules of Procedure and Evidence to clarify that the Pre-Trial Chamber must examine the representations of victims in determining whether there is a reasonable basis to proceed, not just on the basis of the Prosecutor's request and supporting material collected, or to treat such representations as part of the supporting material collected. These representations would include those initially made to the Prosecutor and - if it would not endanger the security of the investigation - representations to the Pre-Trial Chamber.²⁵

Paris draft Rule B [Workshop 1] largely satisfies this requirement and should be included in the Rules of Procedure and Evidence, but should also require that the notice informs the victims or their families of all their rights under the Statute and the Rules of Procedure and Evidence.

Subsequent requests for authorization to investigate. If the Pre-Trial Chamber refuses to authorize an investigation, Article 15 (5) provides that this refusal does "not preclude the presentation of a subsequent request by the Prosecutor based upon new facts or evidence regarding the same situation". Since the Prosecutor is under the same obligation to inform victims of their rights to make representations at this stage, the Rules of Procedure and Evidence should clarify that the Prosecutor must provide such notice and that victims have the same rights to make representations as with the initial request.²⁶

Paris draft Rule B [Workshop 1] satisfies this requirement and should be included in the Rules of Procedure and Evidence.

RULE C [WORKSHOP 1] (Article 15 (1))

1. In the event of a decision taken pursuant to Article 15 (6), the Prosecutor shall ensure that notice is provided, along with the reasons for his or her decision, in a manner that prevents any danger to the safety, well-being and privacy of those who provided information to him or her under Article 15 (1) and (2), or the integrity of investigations or proceedings.

2. The notice shall also advise of the possibility of

submitting further information regarding the same situation in the light of new facts and evidence.

3. When the original information has been provided by victims, notice shall be made without unnecessary delay and with compassion and respect for their dignity.

Notice to sources of the decision not to investigate. Article 15 (6) provides that if the Prosecutor decides after a preliminary examination *proprio moto* pursuant to Articles 15 (1) and (2) that "the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information". The Prosecutor should provide such notice promptly by an effective method which does not endanger the safety of those who provided the information or investigations, should ensure that the reasons for the decision are made clear in a manner which is sensitive to the needs of victims and should inform the sources that they can provide further information to the Prosecutor pursuant to Article 15 (6), which permits the Prosecutor to consider "further information submitted to him or her regarding the same situation in the light of new facts or evidence". To the extent that the

²⁵ The Australian draft Rules do not require notice to victims of their rights or require the Pre-Trial Chamber to examine representations of victims. The ABA Draft Rules are also silent on these points.

²⁶ The Australian draft Rules are silent on these points. The ABA Draft Rules also fail to address these matters.

information was provided to the Prosecutor by victims, such notice would help to satisfy the needs of victims to be informed of “the scope, timing and progress of the proceedings and of the disposition of their cases”.²⁷ However, any Rules of Procedure and Evidence concerning such notice should leave the Prosecutor some flexibility within these limits, for example, by permitting the Prosecutor to inform counsel for those persons or others acting on their behalf.²⁸

The procedure set forth in Paris draft Rule C appears to satisfy these requirements and that approach should be included in the Rules of Procedure and Evidence.

2. Decision by the Prosecutor whether to investigate, based on referrals by states or the Security Council

Although Articles 13 (a) and 14 (providing for referrals by states parties of situations to the Prosecutor) and Article 13 (b) (referrals by the Security Council) do not expressly provide that victims should be informed of the action taken by the Prosecutor with respect to such referrals, which in many cases would be public referrals, the Rules of Procedure and Evidence could clarify that the Prosecutor may provide notice to victims of the decision taken by the Prosecutor in a manner which does not endanger investigations of particular cases and is not unduly burdensome, such as a press release or notice to counsel for victims. This would not only keep victims informed of the progress of proceedings, as called for by Principle 6 (a) of the UN Victims Declaration, but also permit victims and others to provide information relevant to a decision to investigate or to reconsider a decision not to do so.

The Paris draft Rules are silent on the question of notice to victims with respect to referrals by the Security Council or by states.²⁹

The Rules of Procedure and Evidence should clarify that the Prosecutor should provide notice to victims of the decision taken by the Prosecutor with respect to state or Security Council referrals in a manner which does not endanger investigation of particular cases and is not unduly burdensome.

3. Security Council resolutions requesting a delay in the investigation

Although Article 16 does not expressly provide that victims, their families or their representatives should be informed of a resolution by the Security Council adopted under Chapter VII of the UN Charter

²⁷ UN Victims Declaration, Principle 6 (a).

²⁸ Australian draft Rules 56, 57 and 58 do not address the obligation of the Prosecutor under the Statute to provide notice to sources of information of a decision not to initiate an investigation. ABA Draft Rule 37 (B) would require the Prosecutor to “inform the source of the information and the Victims and Witnesses Unit” of a decision not to investigate.

²⁹ The Australian draft Rules are similarly flawed. They require that the Prosecutor inform the Pre-Trial Chamber of a decision not to investigate after conducting a preliminary examination pursuant to a state or Security Council referral, but they do not require the Prosecutor to inform victims, their families or their representatives. The ABA Draft Rules also do not require such notice to victims, their families or their representatives.

requesting the Court that “[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months”, or of a subsequent resolution renewing that original request, the Rules of Procedure and Evidence should require that the Court inform victims of such a request and any renewal of that request. The Rules of Procedure and Evidence should also provide a judicial mechanism for victims, their families or their representatives and others to object to the Security Council’s request or a renewal of that request. This would address the need to allow “the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected”.³⁰ It would also ensure that the Security Council, which may not have considered the views of victims, or done so adequately, would have an opportunity to reconsider a decision which would delay or obstruct justice.

However, to provide the greatest assistance to the Security Council in considering whether to take a decision to prevent the Prosecutor from investigating genocide, crimes against humanity or war crimes, the Court should develop a format for hearing the victims, through oral and written statements, *before* the Security Council takes such a step. Such a mechanism would not be an investigation, but it would, no doubt, be welcomed by the Security Council, which would not otherwise have such an opportunity for a judicially supervised consideration of the concerns of victims. The Paris draft Rules do not provide for the views and concerns of victims to be presented and considered at this stage of proceedings.³¹ If the Rules of Procedure and Evidence fail to provide for a judicially supervised hearing at which the views and concerns of victims before or after a Security Council request or renewed request can be heard, then, of course, the Pre-Trial Chamber or the Trial Chamber would have the authority under Article 68 (3) to do so since a Security Council request for a delay would necessarily be a stage of the proceedings. The Court should invite the Security Council to inform it of any plans to invoke Article 16 so that it can promptly facilitate the presentation of the views and concerns of victims and, thus, be of the greatest assistance to the Security Council.

The Rules of Procedure and Evidence, or the Pre-Trial Chamber or the Trial Chamber on either’s own initiative, should provide a mechanism for victims and others to present their views before the Security Council requests a delay an investigation or prosecution or a renewal of such a request. That mechanism should permit victims to be heard through oral or written representations so that the Security Council can reach a fully informed decision.

4. Role of victims in challenges to admissibility and to jurisdiction

Preliminary rulings regarding admissibility pursuant to Article 18 when the Prosecutor is acting pursuant to a state referral or proprio moto. Victims, their families or their representatives should have notice of all proceedings concerning preliminary rulings regarding admissibility pursuant to Article 18 and an opportunity to present their views at each stage of these proceedings and to have them considered. Indeed, Article 68 (3) provides that when the personal interests of victims are affected, the Court *shall* permit their views and concerns to be presented at any stage it determines to be appropriate “in accordance with the Rules of Procedure and Evidence” Article 18 governs challenges by states to

³⁰ UN Victims Declaration, Principle 6 (b).

³¹ Similarly, neither Australian draft Rules nor the ABA Draft Rules require such notice to victims, their families or their representatives.

admissibility when a situation has been referred to the Court by a state party and the Prosecutor has determined that there would be a reasonable basis to commence an investigation or when the Prosecutor initiates an investigation *proprio moto*.³² Such notice should be provided, not only by the Prosecutor, who has the duty under Guideline 13 (d) of the UN Guidelines on the Role of Prosecutors to inform victims of their rights, but by the Pre-Trial Chamber. Such notice should be provided in a manner calculated to reach the largest number of victims, such as by a press release, or through their representatives, apart from exceptional circumstances and then only to the extent that such notice would endanger the investigation or individuals.

The Prosecutor and the Pre-Trial Chamber will find the representations by victims on the question of admissibility invaluable as a supplement to the information gathered by investigators in the Office of the Prosecutor concerning the state's willingness or ability genuinely to investigate or prosecute. The Prosecutor's resources will usually be more limited than those of the state concerned and he or she often will not have the same access to information in each state as victims, their families and their representatives.

Thus, the Rules of Procedure and Evidence should require that victims and their families, or their representatives, receive notice of the following stages of the proceedings, at a minimum, whenever the Court considers presentation of their views and concerns appropriate, and of the opportunity to make written or oral representations at each stage, to the extent authorized by the Pre-Trial Chamber, pursuant to Article 68 (3):

- Notification to all states parties and states which would normally be expected to exercise jurisdiction, unless such notice to states is on a confidential basis and notice to victims would endanger the investigation (Article 18 (1)).
- Notification to the Court by a state that it was investigating or had investigated its nationals or others within its jurisdiction and any request by the state to defer to the state's investigation of those persons (Article 18 (2))
- An application by the Prosecutor to authorize the investigation despite a state's request for a deferral and the Pre-Trial Chamber's decision on the matter (Article 18 (2)).
- An appeal by the Prosecutor against a ruling by the Pre-Trial Chamber on admissibility to the Appeals Chamber (Article 18 (4)).

In addition, the Prosecutor should seek the views of victims, their families or their representatives with respect to any review of a deferral, pursuant to Article 18 (3), with respect to information provided by the state concerned in response to a request for periodic reports on the progress of its investigations and any subsequent prosecutions, pursuant to Article 18 (5), with respect to the need at any time to seek authority from the Pre-Trial Chamber pursuant to Article 18 (6) to pursue necessary investigative steps where there is a unique opportunity to obtain important evidence or there is a significant risk that such

³² For an analysis of Article 18, see Daniel Nserko, *Article 18 - Preliminary rulings regarding admissibility in Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article* (Otto Triffterer ed. 1999) (forthcoming).

evidence may not be subsequently available. However, decisions on the nature and extent of contacts with victims concerning these matters probably should be left to the discretion of the Prosecutor, under guidelines developed by the Office of the Prosecutor after widespread consultation, rather than governed by the Rules of Procedure and Evidence.

The Paris draft Rules are silent on the question of notice to victims, their families or their representatives concerning their role in proceedings pursuant to Article 18 related to preliminary rulings concerning admissibility.³³

The Rules of Procedure and Evidence should implement Article 68 (3) by including provisions for notice to victims and their families or their representatives and for their participation in proceedings pursuant to Article 18 whenever the Pre-Trial Chamber considers that presentation of the views and concerns of victims would be appropriate.

RULE D [WORKSHOP 1] (Article 19 (3))

1. For the purposes of Article 19 (3) victims or their representatives, may present written observations or, if the circumstances of the case so require and with leave of the Court, in any other form.

2. Following consultations with the Prosecutor, the Chamber of the Court shall direct the Registrar to make a public announcement of the initiation of proceedings with respect to jurisdiction and admissibility, in order to inform victims for the purposes set forth in paragraph (1), unless such public announcement would endanger the integrity of the proceedings or the life and well-being of

victims and witnesses.

3. The Registrar shall provide the victims who have expressed their intention of submitting observations, or their representatives, with a summary of the grounds on which the admissibility of a case or the jurisdiction of the Court has been challenged, in a manner consistent with the duties of the Court regarding the confidentiality of information, the prosecution of any person and the preservation of evidence.

Challenges pursuant to Article 19 to the jurisdiction of the Court or to the admissibility of a case. Victims and their families or their representatives should have notice of all proceedings concerning challenges to the jurisdiction of the Court or the admissibility of a case pursuant to Article 19. They should also have and an opportunity to present their views at each stage of these proceedings and to have them considered. Article 19 provides for challenges to the admissibility of a case on the grounds referred to in Article 17 (concerning complementarity) by an accused, an investigating or prosecuting state, the state on whose territory the crime occurred or the state of the accused's nationality.³⁴

As with Article 18, such notice should be provided, not only by the Prosecutor, but by the Pre-Trial Chamber. Such notice should be provided in the same manner and under the same conditions. For the same reasons, the input from victims will be invaluable to the Prosecutor and the Pre-Trial Chamber on the question of admissibility, and they will be able to contribute information relevant to some aspects

³³ The Australian draft Rules and the ABA Draft Rules are also silent on these matters.

³⁴ For an analysis of Article 19, see Christopher Keith Hall, *Article 19 - Challenges to the jurisdiction of the Court or the admissibility of a case*, in *Commentary on the Rome Statute of the International Criminal Court* (Otto Triffterer ed. 1999) (forthcoming).

of the question of jurisdiction as well. Moreover, determinations of challenges to admissibility and to jurisdiction are among the most important stages of the proceedings and it is essential for victims to be aware of these challenges and to be able to respond to them.

Thus, the Rules of Procedure and Evidence should require that victims receive notice of the following stages of the proceedings, at a minimum and of the opportunity to make written or oral representations at each stage, to the extent authorized by the Statute and the Pre-Trial Chamber:

- An application by Prosecutor for ruling on admissibility or jurisdiction (Article 19 (3)). The Statute expressly permits victims to “submit observations to the Court” (Article 19 (3)), but fails to require notice to victims.
- A state challenge to admissibility or to jurisdiction prior to the trial, at the commencement of the trial or at a later stage (Article 19 (4)).
- A suspension of an investigation pursuant to a state challenge and the time limit for submissions to the Court for it to consider in making a determination on admissibility (Article 19 (7)).
- A decision by the Pre-Trial Chamber or Trial Chamber that a case is admissible and a request by the Prosecutor for a review of that decision (Article 19 (10)).

Paris draft Rule D [Workshop 1] provides for notice to victims or their representatives and for presentation of their views and concerns with respect to requests by the Prosecutor for a ruling concerning jurisdiction or admissibility, but not with respect to any other proceedings pursuant to Article 19.³⁵

The Rules of Procedure and Evidence should provide for notice to victims, their families or their representatives with respect to proceedings pursuant to all of Article 19's provisions, not just Article 19 (3), and for presentation of their views and concerns.

Resolutions by the Security Council seeking a delay in a prosecution. See discussion above in Part I.B.3 of resolutions of the Security Council seeking a delay in an investigation or prosecution.

D. Decision by the Prosecutor after an investigation not to prosecute

If the Prosecutor decides after an investigation not to prosecute, Article 53 expressly requires the Prosecutor to inform the Pre-Trial Chamber of this decision, and the state making the referral or the Security Council, if it referred the situation to the Prosecutor. That article provides that the Prosecutor must give such notice when he or she decides not to prosecute for any one of the following three reasons: (a) the absence of a sufficient factual basis to seek a warrant or summons, (b) the case is inadmissible under Article 17 or (c) “[a] prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime”.

³⁵ The Australian draft Rules and the ABA Draft Rules are silent on the question of the role of victims or their representatives in proceedings pursuant to Article 19.

Although the Statute does not expressly require that the Prosecutor provide such notice to victims, their families or their representatives in the case of referrals by states or the Security Council, or to those who have provided information to the Prosecutor pursuant to Article 15, the Rules of Procedure and Evidence should require the Prosecutor to do so in a manner which is not unduly burdensome. In any event, even if the Rules of Procedure and Evidence do not require the Prosecutor to provide such notice, he or she should do so.

Victims, their families or their representatives should be notified of requests by states or by the Security Council pursuant to Article 53 (3) (a) which have referred a situation to the Prosecutor for a review by the Pre-Trial Chamber of a decision by the Prosecutor not to prosecute for one of the three reasons specified in Article 53 (2). They should also be notified of a decision by the Pre-Trial Chamber on its own initiative pursuant to Article 53 (3) (b) to review a decision by the Prosecutor not to prosecute under Article 53 (2) (c) "in the interests of justice". In both situations, such notice would permit victims to present their observations to the Pre-Trial Chamber and the Rules of Procedure and Evidence or the Court's Regulations could provide a method for doing so. Such observations will be necessary if the Pre-Trial Chamber is to give proper consideration of a decision by the Prosecutor not to prosecute in the interests of justice, a decision which under Article 53 (2) (c) requires consideration of "the interests of victims".

The Paris draft Rules do not provide for notice of requests for review by states or the Security Council of a decision by the Prosecutor not to prosecute or for notice of a decision by the Pre-Trial Chamber on its own initiative to review of such a decision.³⁶

Aside from exceptional circumstances, such as danger to other investigations, the Rules of Procedure and Evidence should provide for prompt notice to victims of a decision by the Prosecutor after an investigation not to prosecute, by an effective method which does not endanger the safety of those who provided the information and which is sensitive to their needs.

Such notice to victims should ensure that the reasons for the decision are made clear and should inform them that they can provide further information to the Pre-Trial Chamber if a state or the Security Council challenges the decision pursuant to Article 53 (a) or the Pre-Trial Chamber decides to review the decision on its own initiative pursuant to Article 53 (3) (b).

II. WORKSHOP 2 - PLACE AND RIGHTS OF VICTIMS IN THE PROCEEDINGS

³⁶ Draft Rules 60, 61 and 62 provide for notice to the Pre-Trial Chamber of the Prosecutor's decision not to prosecute after an investigation, but do not require notice of the decision to victims, their families or their representatives or of their right to make representations to the Pre-Trial Chamber concerning a review of that decision. The ABA Draft Rules also do not require such notice to victims, their families or their representatives.

“The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: . . . (a) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused. . . .”

UN Victims Declaration, Principle 6 (a)

A. General principles

RULE A [WORKSHOP 2]

1. Victims shall make written*application to present their views and concerns to a Chamber of the Court.** Subject to provisions of the Statute in particular article 68 par. 1, the written application shall be communicated to the Prosecutor and to the Defence,*** who shall at all times be entitled to reply with a period of time to be set by the Chamber in question.

2. A Chamber of the Court may, on its own initiative or at the application of the Prosecutor or of the Defence, reject the written application of the victims, if it considers that the criteria set forth in article 68 par. 3 are not fulfilled.

3. A victim whose written application has been rejected by a Chamber of the Court under paragraph 2 of this Rule, may file a new application at a later stage in the proceedings. If a Chamber decides that the application is admissible, it shall permit the

participation of the victim in such proceedings and in such manner as are considered appropriate by the relevant Chamber.

*The need to give assistance to victims who are illiterate or who have difficulty in preparing a written application could be developed in the Rules of procedure and evidence.

** Reference to a “Chamber of the Court” does not preclude other communication between the victims and other organs of the Court.

*** “Defence” here refers to persons subject to a warrant for arrest or who have been summonsed to appear, or who have been accused, and to counsel for these persons.

The Statute requires the Court to permit the views and concerns of victims to be presented and considered at appropriate stages in the proceedings when their personal interests are affected. Article 68 (3) provides:

“Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

The primary role of the Court in deciding when victims’ views and concerns can be considered. Article 68 (3) requires the Court, not the Rules of Procedure and Evidence, to determine at which stages of the proceedings it is appropriate for the views and concerns of victims related to their personal interests to be presented and considered. This provision also makes clear that the Court - either in its Regulations or in a particular case - must determine the manner in which such views are to be presented and considered, subject to the fundamental principle that the manner of doing so must not be “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.

RULE B [WORKSHOP 2]

1. Subject to the provisions of Rule A paragraph 1, a victim shall be free to choose a legal representative.*

Where there are a number of victims the Chamber may, for the purpose of ensuring the effectiveness of the proceedings, invite the victims or particular groups of victims, if necessary with the assistance of the Registry to choose a common legal representative or representatives.

If the victims are unable to choose a common representative or representatives, the Chamber may ask the Registry to appoint one or more legal representatives.

2. A person shall be qualified to be a legal representative or a victim if he or she is admitted to the practice of law in a state or is a university professor of law.**

3. In facilitating the co-ordination of victim representation in accordance with rule B paragraph 1, the Registry may also provide assistance including financial assistance.

A victim or group of victims who lack the

necessary means to pay for an appointed legal representative may apply to the Registry for assistance including financial assistance.

4. The Chamber and the Registry shall ensure that, in the selection or appointment of legal representatives, the distinct interests of the victims, particularly as provided in Article 68 (1), are represented, and that any conflict of interest is avoided.

* Reference to a legal representative in this context is a reference to legal counsel. See reference to Rule X of workshop 1 regarding the appointment of other persons to represent the interests of victims.

** This provision, to the extent relevant, should be consistent with the rules for the appointment of defence counsel. This includes keeping of a list of the names of qualified counsel. The qualifications mentioned are minimum requirements and other qualifications may also be considered.

The right to have a legal representative. Article 68 (3) also provides that “[s]uch views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”

Paris draft Rule B [Workshop 2] is an effective way to implement the rights of victims or their families and should be included in the Rules of Procedure and Evidence.

RULE C [WORKSHOP 2]

1. The legal representative shall be entitled to attend and participate in all of the Chambers['] hearings in accordance with the ruling under Rule A, unless the Chamber concerned rules, giving grounds, that the representative's intervention should be confined to the deposition of written observations.

When a hearing is in progress, the Prosecution and the Defence must be able to reply to the oral interventions of the victims['] legal representatives.

If the legal representative of a victim submits a written motion, the Prosecutor and the Defence shall be allowed to reply within a period of time to be set by the Chamber.

2. When a hearing is in progress, the legal

representative of the victims may,* with the permission of the President of the Chamber concerned, question the accused, the witnesses and experts, taking into account the rights of the accused and the need for a fair and impartial trial.**

* The view was expressed that the ability of the victims to question the accused, witnesses and experts may have to be exercised in consultation with the Prosecutor.

** It may be necessary to elaborate rules to provide for the notification of information to victims.

The duty of the Court to ensure that victims can present their views and concerns in a way which does not prejudice the right to a fair trial or the ability of the Prosecutor to present his or her case. The Rules of Procedure and Evidence should leave the Court sufficient flexibility to regulate the presentation of the views and concerns of victims through their representatives in the manner most suited to the particular case. The manner in which these views may be most effectively presented in a way which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial will vary, depending on such matters as the complexity of the issues in the case, the number of victims and the number of accused. It would be better for the Rules of Procedure and Evidence to leave determination of these matters to the Court than to try to anticipate in the Rules all the variations which may occur.³⁷

Paris draft Rule C [Workshop 2] guarantees the right of the legal representative of the victims to attend and participate in hearings before all Chambers, in accordance with the decisions of those Chambers and to that extent it is a positive step. However, it does not expressly provide for the Prosecutor or the accused to object to questioning of the accused, witnesses and experts before the President of the Chamber concerned rules on an application to do so. It also fails to qualify this provision on the right of the accused and witnesses to remain silent and not to incriminate themselves. In addition, the standard for questioning - "taking into account the rights of the accused and the need for a fair and impartial trial" - falls short of the strict standard in the Statute. Article 64 (2) requires the Trial Chamber to "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses".

The Rules of Procedure and Evidence should provide that the legal representative of the victims or their families may attend and participate in all hearings before each of the Chambers, when the relevant Chamber considers that it is appropriate. However, the Prosecution and the accused should have an opportunity to be heard before the President of the relevant Chamber gives permission to the legal representative of the victim to question an accused, witnesses or experts. Any such questioning must fully respect the rights of the accused, as well as of witnesses and experts, to a fair and expeditious trial. In particular, the President should not grant permission to the legal representative to question the accused if the accused has not agreed to testify or make an unsworn statement pursuant to Article 67 (1) (h).

The responsibilities of the Pre-Trial Chamber and the Prosecutor. It was generally accepted during the drafting of the Rome Statute that the basic principle expressed in Article 64 (2), that "[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses", applies with equal force during the pre-trial phase to the Pre-Trial Chamber. During the course of an investigation or a prosecution, the Prosecutor must "[t]ake appropriate measures" to ensure that the investigation or prosecution is effective, and, "in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender . . . , and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children" (Article 54 (1) (b)). Such measures should be taken in close cooperation or consultation with the Victims and Witnesses Unit. At

³⁷ Australian draft Rule 92 (Presentation of the views of victims) has not yet been written, but a note states that "[t]he Rules need to elaborate upon article 68, paragraph 3, particularly in relation to the involvement of the legal representatives of victims." The ABA Draft Rules are silent on this question.

the same time, the Prosecutor must “[f]ully respect the rights of persons arising under this Statute” (Article 54 (1) (c)).

RULE X [WORKSHOP 2]

1. In matters relating to victims the Registry* shall perform, inter alia, the following functions

- a) Inform victims of the rights conferred upon the Statute and the Rules of Procedure and Evidence;**
- b) Inform victims of the progress of proceedings and shall notify them, in a timely manner, of key decisions which may impact upon their interests;**
- c) Notify victims of the relevant decisions of the Court in accordance with the Rules of Procedure and Evidence;**
- d) Assist victims to participate in the different phases of the proceedings in accordance with the**

Rules of Procedure and Evidence;

- e) Assist victims to organize their legal representation before the Court in accordance with the Rules of Procedure and Evidence.**

*** It may be necessary to discuss whether a specialized structure within the Registry is necessary to undertake the functions listed in Rule X.**

Notice and assistance to victims. The Rules of Procedure and Evidence should facilitate the location of qualified legal counsel for victims and their families throughout the proceedings, possibly through a office of legal counsel for victims, to be funded by voluntary contributions from states and organizations concerned with victims’ issues. The Victims and Witnesses Unit could play a role in establishing such an office and in coordinating its work with victims.

Paris draft Rule C [Workshop 2] is one possible acceptable solution. If, however, it is decided to create a separate office to undertake the functions listed in Rule X, that separate office should be linked as closely as possible to the Victims and Witnesses Unit, possibly under the same executive.

B. Initial proceedings before the Court

Although there will generally be no need to notify victims, their families or their representatives before an arrest or for the victims to be present at an arrest (apart from assisting in an identification of the accused to facilitate the arrest), victims, their families or their representatives should be notified of the initial proceedings before the Court and their right to participate in these and later stages. Once the victims have been notified of the initial proceedings and have obtained counsel or other representatives, notice to victims at later stages will be simplified. Victims, their families or their representatives should be informed of the following initial proceedings, at a minimum, and of their opportunities to make oral or written submissions, as determined appropriate by the Court:

- The initial hearing by the Pre-Trial Chamber pursuant to Article 60 (1) upon the surrender of the person arrested or voluntary appearance of a person summoned.
- The application for interim release pursuant to Article 60 (3) and periodic reviews by the Pre-Trial Chamber of the release or detention of the person arrested or summoned.
- Conferences, hearings and motions throughout the proceedings.

- The hearing on confirmation of the charges pursuant to Article 61 (1), which fails to mention the presence of victims at the hearing, and subsequent hearings concerning amendment of or withdrawal of the charges pursuant to Article 61 (9).

Paris draft Rule X [Workshop 2] partly satisfies these requirements, but requires notice only of “key decisions”, thus leaving it entirely to the Registry to decide which decisions should be communicated to the victims, their families or their representatives and does not require notice of conferences, hearings and motions.

The Rules of Procedure and Evidence should require that victims, their families or their representatives should be informed of the initial proceedings, as well as of all other public proceedings, and of their opportunities to make oral or written submissions, as determined appropriate by the Court.

C. The trial and sentencing

The Rules of Procedure and Evidence should facilitate the ability of victims to present their views and concerns during the trial, at time the sentence is determined and at the stage when an award of reparations is made (for a discussion of the role of victims in the procedure for determining reparations, see Part IV below). However, it should be largely up to the Trial Chamber, in the light of experience, to determine the scope of participation by victims and how they can best contribute to the determination of guilt or innocence, the appropriate sentence and the amount and manner of reparations.

National models of participation by victims in criminal proceedings. National courts have been able to develop effective ways to permit representatives of victims to present their views and concerns in criminal cases with large numbers of victims, even when many of the individual victims had separate legal counsel. It may well prove that the best approach is to permit victims to participate at the trial and sentencing in a manner akin to that of *parties civiles*, able to present evidence, including witnesses, and to question witnesses called by the other parties in the case, provided that such participation does not interfere with an effective prosecution, lead to lengthy proceedings or otherwise undermine the right to a fair trial. The Trial Chamber will have to ensure that if counsel for victims are permitted to question witnesses for the prosecution or the accused, that such questioning is not repetitive. It will also have to ensure that when there are more than one victim, that counsel for victims coordinate their efforts as much as possible.

Participation of victims as *parties civiles* has occurred in trials of persons accused of war crimes or crimes against humanity, with some success, but the number of such cases in recent years are limited. For example, in the *Priebke* trial of an SS officer accused of murdering more than 300 hostages in Italy during the Second World War, the Italian court developed with counsel for the victims a system in which one of the legal counsel for each group of victims with similar interests would represent that group and one lawyer would be able to act on behalf of all of the victims as a whole.³⁸ Similarly, in complex civil

³⁸ The drafters of the Rules of Procedure and the Court will also be able to draw on the experience of French courts, which had to develop techniques to deal with numerous *parties civiles* in the trials of Paul Touvier and of Maurice Papon for crimes against humanity. Under French law, a person who has personally suffered direct harm

class actions in countries such as the United States where there are thousands of plaintiffs, courts have been able to develop systems of joint representation, such as class actions, by lawyers of groups of similarly situated victims.

It is essential not to restrict at an this early stage in the Court's development the ability of the Court to experiment with various forms of participation to determine which best ensure the achievement of justice. A too restrictive approach to victim participation in the Rules of Procedure and Evidence could be difficult to undo, whereas it would be possible for the Trial Chamber to prevent any abuses if the Rules left the extent of participation by victims to be decided by the Court. In developing the approach to victim participation, the main principle is set forth in Article 64 (2), that "[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses".

The Rules of Procedure and Evidence should permit victims to participate in the trial, sentencing and hearing to determine the award of reparations, and provide notice to victims of their right to participate, but leave it to the Trial Chamber to determine the scope of such participation in the light of experience.

D. Post-trial proceedings, including appeal, sentence reduction hearings, review and release hearings

The same considerations concerning participation during the trial, sentencing and award of reparations apply to post-trial proceedings, including the appeal of a conviction or sentence, review of a conviction or sentence and hearings to decide whether to reduce a sentence pursuant to Article 110 (4) (b) or to select a state of enforcement of a sentence (Article 103). Article 110 (b) (4) provides for the possible reduction of a sentence for convicted persons who assist in locating assets which could be used for victims. They should be able to comment on this ground. In addition, the Statute expressly provides for appeals by a victim of a reparations award pursuant to Article 82 (4), as provided in the Rules of Procedure and Evidence.

The Paris draft Rules do not address these matters.³⁹

The Rules of Procedure and Evidence should require that victims receive notice of their right to participate in post-trial proceedings, including appeal, selection of a state of enforcement, sentence reduction hearings and post-conviction review.

from a crime can participate as a *partie civile* (*Code de procédure pénale*, Art. 2), but certain non-governmental organizations may also participate as *parties civiles* when the crimes involve specified matters of public interest, such as racism, sexual offences and war crimes and crimes against humanity during the Second World War. See Gaston Stefani, Georges Levasseur & Bernard Bouloc, *Procédure Pénale* 221-230 (4th ed. 1990).

³⁹ Australian draft Rule 124 spells out the requirement to give notice of an appeal against an order of reparations, including appeals by victims, and Australian draft Rule 125 requires that such appeals be heard expeditiously. ABA Draft Rule 112 (C) provides that "[a] legal representative of the victims . . . may appeal against the order of reparations. The provisions of this Part shall apply, mutatis mutandis, to such appeals." The wording seems to suggest that only one representative may appeal on behalf of all victims, even if the some of the victims have differing interests.

III. WORKSHOP 3 - PROTECTION OF VICTIMS AND WITNESSES

“The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

Rome Statute, Article 68 (1)

A. General principles

RULE D [WORKSHOP 3]

1. The relevant Chamber on its own initiative may, at the request of the Prosecutor, the victim, the witness or their legal representatives, after having consulted with the Victims and Witnesses Unit, as appropriate, order measures to protect the victims, witnesses and others at risk, pursuant to Article 68-1. All persons seeking protection must freely and fully consent to the protective measures.

For this purpose, the relevant Chamber may hold a hearing in camera to determine if there is a need to order in particular, measures to prevent the release to the public or press and information agencies of the identity or locating of a victim, a witness or others at risk, by including inter alia:

- the expungement of the name of the relevant party and indications allowing for his/her identifications from the Chamber’s public records;
- the prohibition for the prosecution and the defence from releasing such information to a third party;
- during testimony, the use of technical means enabling the alteration of pictures or voice, of audiovisual technology - in particular video-conferencing or the use of close-circuit television or the exclusive use of the sound media;
- the use of a pseudonym;
- the holding of in camera hearings;

2. Specific measures in view of facilitating the testimony of traumatized victims, a child, or a victim of sexual violence, in particular:

- the attendance of a psychologist during the testimony
- in the case of minors, the Court may order, taking into account the age and maturity of the minor and after consultation of the minor, the presence, during the testimony of:
 - a psychologist,
 - a member of his/her family,
 - other legal representative.

3. Taking into consideration that violations of victim’s/witnesses’ privacy may create risk to their security, the Chamber shall, after consultation with the Unit, be vigilant in controlling the manner of questioning to avoid any harassment or intimidation, paying particular attention to attacks on the victim’s right to privacy in cases alleging crimes of sexual violence.

4. All communications between individuals and medical doctors, psychiatrists, psychologists or counselors, including those in the victims and witnesses unit, shall be regarded as privileged and consequently not subject to disclosure at trial unless the victim consents to such disclosure.

RULE E [WORKSHOP 3]

In exceptional circumstances, the Court may order on the request of the parties, victims or their representatives and witnesses, other special measures than those listed above. These measures

must be in accordance with the Statute.

Principle 6 (d) of the UN Victims Declaration provides that the judicial system should “take measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well

as that of their families and witnesses on their behalf, from intimidation and retaliation”. Among the other basic principles which must guide the Assembly of States Parties in adopting Rules of Procedure and Evidence and the Court in the protection of victims and witnesses are that any measures for their protection must “be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial” (Article 68 (5)) and that the measures should be effective, not illusory.

B. The need for effective, not illusory, protection for victims and witnesses

Amnesty International believes that if those responsible for genocide, crimes against humanity and serious violations of humanitarian law, particularly in cases of rape, sexual assault and forced prostitution, are to be brought to justice, effective programs to protect victims, their families and witnesses will have to be developed by the Court in cooperation with states, intergovernmental organizations and non-governmental organizations. The Rules of Procedure and Evidence must facilitate the attendance of victims, their families and witnesses and the court must take effective measures to protect them from reprisals and unnecessary anguish. States parties must assist the Court in protecting victims, their families and witnesses.

The need to protect victims and witnesses from unnecessary anguish. The Court must take certain measures to protect victims, their families and witnesses from unnecessary anguish to which they might be exposed in a public trial, such as closing part of the proceedings to the public when strictly necessary in the interests of justice. Steps consistent with the rights of the accused should also be taken by the Court at every stage of the proceedings to minimize the considerable anguish of witnesses who have repeatedly to relive horrific events before investigators, prosecutors and judges.⁴⁰ Principle 4 of the UN Victims Declaration emphasizes that “victims should be treated with compassion and respect for their dignity”.

RULE F [WORKSHOP 3]

Agreements on relocation and provision of support services on the territory of a State of traumatized or threatened victims, witnesses and others at risk may be negotiated with the States by the Registry on behalf of the Court.

Negotiations and the eventual signing of such agreements may remain confidential at the request

of the State or by the Registry on behalf of the Court.

In determining a relocation environment, the Court should endeavour to ensure meaningful rehabilitation, taking into account the circumstances of the relocation context.

The need for states to assist in protecting prosecution and defense witnesses. In addition to protecting victims and witnesses from unnecessary anguish, the Court, in close cooperation with states

⁴⁰ For example, the team of experts sent by the UN to investigate allegations of rape in the former Yugoslavia from 12 to 23 January 1993 reported that “health care providers were concerned about the effects on women of repeatedly recounting their experiences without adequate psychological and social support systems in place”. Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992, U.N. Doc. E/CN.4/1993/50, 10 February 1993, Annex II, para. 52.

parties, must take effective security measures to protect victims, their families and witnesses - both defense and prosecution - from reprisals and threats of reprisal. These measures should encompass protection before, during and after any proceedings initiated by this Court or the prosecutor, and should be in place until such time as the security threat ends, as determined by the Court. To ensure that an international victim, family and witness protection program is effective, all states parties, not just the court and the host state, must share the burden of protecting persons in the program.⁴¹ At times, such protection will require affording temporary relocation and support to such persons until the security threat ends. As experience at the two ad hoc tribunals has shown, some witnesses do not find it feasible to relocate. In these instances, creative measures, in addition to traditional ones, must be developed and fully funded.⁴²

As for confidentiality of communications, the proposed Paris draft Rule D.4, which provides an absolute privilege for all communications between individuals and medical doctors, psychiatrists, psychologists or counsellors, is addressed in Amnesty International's paper, *The International Criminal Court: Drafting effective Rules of Procedure and Evidence for the trial, appeal and revision*, July 1999 (AI Index: IOR 40/12/99).

The Rules of Procedure and Evidence should permit the relevant Chamber to order the measures listed in Paris draft Rule D to ensure the confidentiality with respect to the press and public of victims, witnesses and others at risk because of their contact with the Court.

The Rules of Procedure and Evidence should make clear that these measures of confidentiality include persons who have been in contact with the Court or cooperated with the Court, whether by defining them as witnesses or as others at risk.

C. The role of the Prosecutor in protecting victims

During the course of an investigation or a prosecution, the Prosecutor must “[t]ake appropriate measures” to ensure that the investigation or prosecution is effective, and, “in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender . . . , and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children” (Article 54 (1) (b)). Such measures should be taken in cooperation with the Victims and Witnesses Unit. At the same time, the Prosecutor must “[f]ully respect the rights of persons arising under this Statute” - such persons include suspects and the accused.

⁴¹ An example is Australia's Witness Protection Act 1994, consolidated to 29 April 1997, Section 10. Section 13 of this act permits assistance to allow the witness to establish a new identity; protection of the witness; relocation, accommodation, transport of property and living expenses for the witness and, if appropriate, the witness's family; assistance in obtaining employment and education; and other assistance with a view to ensuring that the witness becomes self-sustaining.

⁴² Suggestions for such measures have included, for example, hiring security personnel to provide special protection or installing appropriate security devices in the homes of witnesses.

The Statute requires the Prosecutor to ensure, when employing staff, to include persons with legal experience concerning violence against women and children.⁴³ In particular, Article 42 (9) requires the Prosecutor to “appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children”. The Prosecutor should consult with states, the Yugoslavia and Rwanda Tribunals and other intergovernmental organizations, non-governmental organizations and experts on legal and other issues related to victims when developing clear criteria in the form of internal guidelines for the Office of the Prosecutor for appointments and when making appointments.

The Paris draft Rules do not address the criteria for employing staff in the Office of the Prosecutor, although Rules B and C [Workshop 3] provide for training of Office of the Prosecutor staff.⁴⁴ The Paris draft Rules do not address the requirements for translators and interpreters in all parts of the Court, who should not only receive proper training, but should be required to pledge in their solemn declaration that they will respect the needs and dignity of traumatized persons.⁴⁵

The Rules of Procedure and Evidence should require the Prosecutor to consult with states, the Yugoslavia and Rwanda Tribunals and other intergovernmental organizations, non-governmental

⁴³ Article 44 (2) provides that when employing staff, the Prosecutor must “ensure the highest standards of efficiency, competency and integrity, and shall have regard, *mutatis mutandis*, to the criteria set forth in article 36, paragraph 8”. That provision, which governs the selection of judges, states:

“(a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

- (I) The representation of the principal legal systems of the world;
- (ii) Equitable geographical representation; and
- (iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.”

⁴⁴ The International Society for Traumatic Stress Studies and the International League for Human Rights suggested before the Paris seminar that Australian draft Rule 43, which states that “the Prosecutor may enter into arrangements with States governing the provision of resources by States to assist in investigations and prosecutions, including the use of national scientific analysis or forensic facilities”, should be amended to add the use of “investigators appropriately trained to deal with trauma victims”. *Suggestions related to victims’ issues 2*.

⁴⁵ The Australian draft Rules also do not directly address the criteria for employing staff in the Office of the Prosecutor. Australian draft Rule 39, which defines the requirements of the solemn declaration by interpreters and translators, does not include a pledge to respect the needs and dignity of traumatized persons. Prior to the Paris seminar, the International Society for Traumatic Stress Studies and the International League for Human Rights have recommended that Australian draft Rule 39, which states that “[b]efore performing any duties, an interpreter or a translator shall solemnly declare to do so faithfully, impartially and with full respect for the duty of confidentiality”, be amended to add a pledge to perform these duties with full respect “for the needs and dignity of traumatized persons”. *Suggestions related to victim’s issues*, 1. Of course, translators and interpreters will need effective training to be able to fulfil such a pledge.

organizations and experts on legal and other issues related to victims when establishing clear criteria in the form of internal guidelines for the Office of the Prosecutor for appointments and when making appointments of staff.

The Rules of Procedure and Evidence should require interpreters and translators to pledge to respect the needs and dignity of traumatized persons.

The Rules of Procedure and Evidence should require that the Prosecutor should endeavor to ensure that states provide only investigators who are appropriately trained to deal with trauma victims or to arrange for appropriate training for state investigators in consultation with the Victims and Witnesses Unit.

D. The role of the Victims and Witnesses Unit in protecting and assisting victims

RULE A [WORKSHOP 3] (Article 43 (6))

1. Protection should be afforded to all victims, witnesses, and other persons at risk on account of the Court's proceedings, in accordance with their particular needs and circumstances. In this respect, the Victims and Witnesses Unit services the Court and defence.

2. The Victims and Witnesses Unit should include, inter alia, persons with the expertise in the following areas:

- Witness protection and security
- Legal/administrative
- Logistic administration
- Psychological expertise in criminal proceedings
- Trauma, in particular related to crimes of sexual

violence and torture

- Children, in particular traumatized children
- Social work and counseling
- Health care
- Interpretation and translation

3. The Victims and Witnesses Unit must ensure equitable gender representation in its staff.

4. The Victims and Witnesses Unit must ensure representation of people with different cultural perspectives on victimization and with different legal systems.

RULE B [WORKSHOP 3]

To ensure efficiency and effectiveness of its work, the Unit shall:

- ensure that all staff, contract employees, and volunteers in the Victims and Witnesses Unit maintain confidentiality at all times.
- have sufficient, adequate and long term funding.
- recognizing the different interests of the Office of the Prosecutor and the witness, respect the interests of the witness, and act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers.
- have administrative and technical assistance available for victims, witnesses and other persons at

risk on account of the Court's proceedings, during all stages of the proceedings on a 24 hour basis.

- ensure training of its staff with respect to victims['] and witnesses['] security, integrity and dignity.

- where appropriate be able to enter into contracts in order to obtain supplementary assistance in other fields.

- where appropriate, cooperate with inter-governmental and non-governmental organizations.

RULE C [WORKSHOP 3]*

The areas of operation of the Unit are protection and security matters, support, and negotiation and liaison with States.

The Victims and Witnesses Unit shall, inter alia:

- in accordance with article 43 (6) recommend to the organs of the Court and relevant States the adoption of protection measures;
- inform victims and witnesses of their rights under the statute and rules, and the potential consequences of their testimony;
- formulate long and short-term plans for the protection of victims, witnesses and others at risk who have given testimonies, as necessary; in cases of victims of sexual violence, gender sensitive measures may be taken facilitating the participation and testimony at all stages of the court proceedings;
- act in co-operation with the States where the victims, witnesses and others at risk live and States to which they might seek relocation;

- in consultation with the Office of the Prosecutor, provide training emphasizing the vital nature of security and confidentiality to all members of the Prosecution team on the conduct of investigations, in particular in emergency situations;

- in consultation with the Office of the Prosecutor, recommend the elaboration of a code of conduct, emphasizing the vital nature of security and confidentiality for investigators and all organizations, as appropriate;

- in consultation with the Court, provide training to all members of the Prosecution team on the issues of traumatization.

* The provisions adopted in this Rule should take into account the third rule (rule X) adopted by workshop 2.

Article 43 (6) requires the Registrar to “set up a Victims and Witnesses Unit within the Registry”.⁴⁶ This paragraph expressly states that the Victims and Witnesses Unit “shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses”. Article 68 (4) provides that this unit “may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counseling and assistance as referred to in article 43, paragraph 6”.

Paris draft Rules A to F [Workshop 3], which address these matters are discussed below.⁴⁷

Protection, counseling and assistance to victims and witnesses. It will be essential for the Victims and Witnesses Unit to avoid the inadvertent disclosure of the location or identity of victims, witnesses and their families to others who might harm them. One important step for achieving this goal is to set up two separate units, with separate personnel, including separate translators and interpreters, to work with witnesses for the Prosecutor, on the one hand, and with witnesses for the accused and the Court, on the other. The Victims and Witnesses Units must develop, in consultation with states parties, other states, the Yugoslavia and Rwanda Tribunals and other intergovernmental organizations, non-governmental organizations and experts, a comprehensive program of protection and counseling for victims, witnesses and their families from the moment they come into contact with the Court until such

⁴⁶ In the light of the responsibility of the Registrar for the Victims and Witnesses Unit, it might be advisable to amend Draft Rule 25, which lists a number of duties, to include, as the International Society for Traumatic Stress Studies and the International League for Human Rights have suggested, an express statement that the Registrar shall be responsible for organizing and managing the Registry, “including its Victims and Witnesses Unit”. *Suggestions related to victims’ issues* 1.

⁴⁷ Neither the Australian draft Rules nor the ABA Draft Rule 24 address this point.

time as their safety and well-being are no longer in jeopardy. Care will need to be taken in determining the place and manner for relocating victims and witnesses.⁴⁸

However, the burden of such protection should be shared by all states parties. The United Kingdom and certain other countries have agreed to relocate victims who are witnesses in the International Criminal Tribunals for the former Yugoslavia and Rwanda and their families to ensure their safety. This commitment should serve as a model for cooperation by states parties and other states with the Court.

Paris draft Rule B [Workshop 3] provides that the Victims and Witnesses Unit shall, “where appropriate, cooperate with inter-governmental and non-governmental organizations” and Paris draft Rule C provides for cooperation with states and the Prosecutor in matters of protection. However, they do not expressly require consultation with states parties, other states, the Yugoslavia and Rwanda Tribunals and other intergovernmental organizations, non-governmental organizations and experts in the development of a protection and counseling program. They also do not make clear that the program should apply to victims, witnesses and their families from the moment they come into contact with the Court until such time as their safety and well-being are no longer in jeopardy. These draft Rules do not provide that the burden of protection should be borne by all states parties or that the Court may request the cooperation of a state party or other state to help protect victims, witnesses and others at risk.

The Rules of Procedure and Evidence should expressly provide that the Victims and Witnesses Unit must avoid the inadvertent disclosure of the location or identity of persons to others who might harm them by taking such steps as setting up clear divisions, with separate personnel, to work with witnesses for the Prosecutor, on the one hand, and with witnesses for the accused and the Court, on the other.

The Rules of Procedure and Evidence should require the Victims and Witnesses Unit to consider that any person who provides information to the Prosecutor or to counsel for the accused who might be asked to provide oral or written testimony during proceedings, even if the person does not do so, is a witness within the meaning of Article 43 (3). The Rules of Procedure and Evidence should also state that the Unit provide protection for any person who cooperates with the Office of the Prosecutor or counsel for the accused.

The Rules of Procedure and Evidence should encourage all states parties to share the responsibility of such protection on an equitable basis.

Persons who must be protected. It will also be essential for the Court to provide protection to persons other than those who provide oral or written testimony during proceedings, victims who appear before the Court or persons who are at risk on account of testimony by such witnesses. Similarly, it will be essential for the Victims and Witnesses Unit to consider any person who provides information to the Prosecutor or to defence counsel who might be asked to provide oral or written testimony during

⁴⁸ The International Society for Traumatic Stress Studies plans to propose at the Paris seminar a rule which would state, “In determining a relocation environment, the Court should endeavor to ensure meaningful rehabilitation, taking into account the circumstances particular to the relocation context of the individual victim and his or her family.” (Rule G).

proceedings, even if that testimony is not used during the proceedings, as a witness within the meaning of Article 43 (3). In addition, any person who cooperates with the Office of the Prosecutor or defence counsel, including a person who provides directions to the house of a suspect in a small village and doctor who assists in carrying out forensic examinations, could, in certain cases, face serious threats to his or her safety. This broad interpretation of the persons whom the Victims and Witnesses Unit must protect is fully consistent with the authority of the entire Court under Article 87 (4) in relation to requests for assistance under Part 9 to “take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families”.

It would make sense for the Victims and Witnesses Unit, which will have experience in providing protection to witnesses, to assist in providing protection to any such person to ensure that the Court is able to conduct a fair and impartial trial. Although the Statute assigns certain express responsibilities to the Victims and Witnesses Unit, nothing in the Statute precludes the Court, and the Registrar in particular, from assigning other responsibilities to the Unit. Indeed, the Victims and Witnesses Unit’s experience and the need to economize scarce resources militate in favour of it performing these responsibilities.

Article 68 (1) makes clear that the Court as an institution must assume the responsibility for the protection of victims and witnesses. It states: “The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”. Therefore, to the extent that the Victims and Witnesses Unit does not assume these tasks, they will have to be assumed by the Office of the Prosecutor or by other departments in the Registry, as part of its responsibilities under Article 43 (1) for the “non-judicial aspects of the administration and servicing of the Court”. The Court will have to devote sufficient resources to undertake this duty, in cooperation with states parties and other states. To the extent that the Office of the Prosecutor and organs of the Court other than the Victims and Witnesses Unit assume these responsibilities, they will need to work closely with the Unit in order to ensure that the measures they take are effective. Indeed, Article 68 (4) expressly provides that “[t]he Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance referred to in article 43, paragraph 6”. Such advice, based on the experience of the Victims and Witnesses Unit in working with victims, witnesses and their families, will be necessarily be entitled to great weight.

Additional functions which should be performed by the Victims and Witnesses Unit. The express statutory duties of the Victims and Witnesses Unit, however, are only the minimum required and it will be up to the Registrar, who is the head of the Registry and “the principal administrative officer of the Court” (Article 43 (2)), to ensure that the Victims and Witnesses Unit performs other functions besides those expressly required by the Statute. For example, it has been suggested that the Victims and Witnesses Unit should be involved in assisting the Prosecutor during investigations at the earliest possible stage.⁴⁹ The Victims and Witnesses Unit could assist victims in locating counsel and in helping to coordinate representatives of multiple victims in a single case (see discussion above in Part II.A). Some of the responsibility for implementing reparations awards could be assigned to this Unit, such as ensuring

⁴⁹ The International Society for Traumatic Stress Studies and the International League for Human Rights have suggested that Draft Rules 25 (b) and (c), concerning the functions of the Registrar, and Draft Rule 38, concerning the Victims and Witnesses Unit, be amended to provide that the Unit be involved in any investigation at the earliest possible stage of proceedings. *Suggestions concerning victims’ issues 1.*

that a victim of torture or ill-treatment receives the best possible medical and psychological care. It could also provide training to all Court staff.

Paris draft Rules B and C [Workshop 3] provide, in a non-exhaustive list, that the Victims and Witnesses Unit should perform these and other functions.

Paris draft Rules B and C [Workshop 3] should be incorporated in the Rules of Procedure and Evidence, subject to the amendments indicated below.

The experience needed in the Victims and Witnesses Unit. The head of the Victims and Witnesses Unit should have extensive experience in working with victims and witnesses.⁵⁰ Similarly, the Victims and Witnesses Unit will need to develop criteria for selection of its staff in consultation with states, the Yugoslavia and Rwanda Tribunals and other intergovernmental organizations, non-governmental organizations and experts, which ensure the selection of the most experienced and talented staff in accordance with the requirements of the Statute.⁵¹ In particular, the Victims and Witnesses Unit

⁵⁰ Draft Rule 38 (b) simply states that “[t]he Head of the Unit shall have professional qualifications and extensive experience”, but provides no further details. The International Society for Traumatic Stress Studies and the International League for Human Rights have suggested that the Head have professional qualifications and experience in the following areas:

“(I) witness protection.

(ii) victims and family members reactions in anticipation, during and after exposure to trauma.

(iii) the reactions of different societies and cultures to their members’ victimization, in particular to victims of crimes of sexual violence.

(iv) evaluating the sensitivity of the staff, including interpreters and translators, to the needs and concerns of victims, including victims of crimes of sexual violence and child victims, and of others physically and psychologically affected by or at risk of being affected by victimization and its aftermath.”

Suggestions related to victims’ issues 1.

⁵¹ Article 44 (2) provides that when employing staff, the Registrar must “ensure the highest standards of efficiency, competency and integrity, and shall have regard, *mutatis mutandis*, to the criteria set forth in article 36, paragraph 8”. That provision, which governs the selection of judges, states:

“(a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(I) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.”

has the obligation under Article 43 (2) to “include staff with expertise in trauma, including trauma related to crimes of sexual violence”. Such staff should include social workers and mental health-care practitioners.⁵² The Registry will need to ensure that experts in other areas are recruited, such as experts on the role of children as witnesses and in protection of victims and witnesses.⁵³ The Victims and Witnesses Unit should avail itself of the possibility under Article 44 (4) to employ, “in exceptional circumstances”, “the expertise of gratis personnel offered by States Parties, intergovernmental organizations and non-governmental organizations to assist with the work of any of the organs of the Court”. The use of such gratis personnel was one of the reasons for the success of the Yugoslavia and Rwanda Tribunals in their first years.

Paris draft Rule A provides, in a non-exclusive list, that the Victims and Witnesses Unit should be staffed with people with these and other relevant qualifications, but it does not require that the head of the unit have extensive experience with victims and witnesses.⁵⁴ It also fails to provide for the use of gratis personnel in accordance with Article 44 (4).

Paris draft Rule A [Workshop 3] should be included in the Rules of Procedure and Evidence, subject to amendments (1) to require that the head of the Victims and Witnesses Unit have extensive experience with victims and witnesses, (2) to require that the Victims and Witnesses Unit develop criteria for employment of staff in consultation with states, the Yugoslavia and Rwanda Tribunals and other intergovernmental organizations, non-governmental organizations and experts and (3) to provide for the use of gratis personnel.

E. The role of the Pre-Trial Chamber and Trial Chamber

The Pre-Trial Chamber has the duty pursuant to Article 57 (3) (c), “[w]here necessary, [to] provide for the protection and privacy of victims and witnesses”. Article 87 (4) authorizes the Court, and, thus, the Pre-Trial Chamber and Trial Chamber, as well as the Prosecutor and the Victims and Witnesses Unit,

In addition, interpreters and translators should pledge to perform their duties with respect for the needs and dignity of traumatized persons (see note 45 above) and be properly trained so that they can fulfil this pledge.

⁵² Principle 9 (c) of the Joint Principles states that with respect to victims who testify before investigation commissions, “[a]s far as possible, social workers and mental health care practitioners shall be authorized to assist victims, preferably in their own language, both during and after their testimony, especially in cases of aggression or sexual assault.”

⁵³ In the light of the Registrar’s responsibility for managing the Victims and Witnesses Unit, it would be useful for Draft Rule 24, which identifies some criteria for selecting a Registrar, to add as one factor to consider, as suggested by the International Society for Traumatic Stress Studies and the International League for Human Rights, an understanding of the needs of victims and witnesses. *Suggestions concerning victims’ issues* 1.

⁵⁴ The Australian draft Rules does not address these matters. ABA Draft Rule 24 (B) provides that “[d]ue consideration shall be given, in the appointment of Unit staff, to the employment of qualified women AND INDIVIDUALS WITH EXPERTISE IN DEALING WITH VICTIMS OF TRAUMA, INCLUDING TRAUMA RELATED TO SEXUAL AND GENDER VIOLENCE.” (emphasis in original). ABA Draft Rule 24 (C) provides that “ALL PROFESSIONAL STAFF OF THE UNIT SHALL HAVE OR RECEIVE TRAINING IN DEALING WITH TRAUMA, INCLUDING TRAUMA RELATED TO SEXUAL AND GENDER VIOLENCE.” (emphasis in original).

to take protective measures, “including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families”, in relation to requests for assistance by states under Part 9 (International cooperation and judicial assistance). Therefore, the Court has the authority to request states to take such protective measures. Article 93 (1) (j) reinforces this authority and supplements the general duty of states parties to cooperate with the Court by providing that states parties, shall, in accordance with Part 9 and national procedures, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: . . . (j) The protection of victims and witnesses and the preservation of evidence”.

IV. WORKSHOP 4 - REPARATIONS

“Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility of for the victim to seek redress from the perpetrator.”

Principle 33 of the Joint Principles

A. The right to reparations

RECOMMENDATIONS [WORKSHOP 4]

A. The Workshop believes that the Court, in establishing principles regarding reparations, should be guided, inter alia, by the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, by the draft Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, and by any subsequent revisions to or developments of this instrument as may be adopted by the Commission on Human Rights or other body of the United Nations, and by any other existing standards in international human rights law and in international humanitarian

law.

B. The Workshop was concerned to ensure that national limitation periods and other procedural laws do not defeat an order for reparations. A key difficulty arises from the proper interpretation of Article 109.

C. A question was raised regarding the possible role of national authorities in various regards in applying principles established by the Court relating to reparation.

Article 75 (1) requires the Court to “establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”. These general principles would be applicable in all cases before the Court. In addition, Article 75 (1) provides that, based on these principles, “in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting”. Thus, the development and application of these general principles is a matter for the Court, not the Assembly of States Parties in the Rules of Procedure and Evidence. This provision is a major advance over the Yugoslavia and Rwanda Rules, which require the Tribunals to order

restitution and facilitate compensation by national courts, but do not expressly authorize the Tribunals to order compensation, rehabilitation, satisfaction or guarantees of non-repetition.⁵⁵

The right to reparations under international law and standards. In elaborating such general principles, the Court will need to build upon the extensive international standards defining the right of victims to reparations, including restitution, compensation, rehabilitation, satisfaction or non-repetition. The drafters of the Statute intended that the scope of reparations under Article 75 be defined broadly in accordance with international standards and cited the definitions of reparations in the UN Victims Declaration and Principles 12 to 15 of the Van Boven Principles.⁵⁶ Among the other relevant international standards recognizing the right of all victims human rights violations to an effective remedy are Article 8 of the Universal Declaration of Human Rights, Article 2 (3) (a) of the ICCPR and Article 9 of the UN Human Rights Defenders Declaration.

International law and standards also recognize the right of victims of specific human rights violations to reparations, including victims of extrajudicial executions, “disappearances”, torture, racial discrimination and arbitrary detention. Principle 20 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides that “the families and dependants of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable time”. A similar right is recognized in Article 19 of the UN Declaration on the Protection of All Persons from Enforced Disappearances for victims of “disappearance” and their families. Article 14 (1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires states to ensure victims of torture obtain redress and have “an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible” and, in the event of the death of the victim as a result of torture, compensation to the dependants”.⁵⁷ Victims of racial discrimination⁵⁸ and arbitrary detention⁵⁹ are also entitled to reparations.

The types of reparations which may be awarded by the Court. The Court may award any type of reparations against a convicted person which is consistent with due process and the scope of its

⁵⁵ Yugoslavia Rule 88 (B) requires that if the Trial Chamber finds that the convicted person unlawfully took property, it should include this finding in the judgment and to conduct a hearing under Rule 105 to determine whether to order restitution. Rule 106 of the Yugoslavia Rules provides for the transmission of the judgment of conviction to the states concerned, authorizes the victim or persons claiming through the victim to bring an action in a national court or other competent body to obtain compensation and states that with respect to such proceedings the judgment is “final and binding as to the criminal responsibility of the convicted person for such injury”. Rules 88 (b), 105 and 106 of the Rwanda Rules are identical.

⁵⁶ See footnote 14, above.

⁵⁷ Article 11 of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recognizes a right to redress in similar terms.

⁵⁸ Convention on the Elimination of All Forms of Racial Discrimination, Art. 6; the UN Declaration on the Elimination of All Forms of Racial Discrimination, Art. 7 (2); the UN Declaration on Race and Racial Prejudice, Art. 6 (3)

⁵⁹ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 35 (1).

jurisdiction. Article 75 (2), which provides that “[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”, is inclusive, not exclusive. Therefore, the Court may award other forms of reparations against a convicted person. In addition, through the general principles it establishes pursuant to Article 75 (1) or in an individual case under that provision, the Court may influence how other courts, both in states parties and non-states parties, award reparations against state institutions or other persons, such as corporations.

The scope of the right to reparation is broad and must “cover all injuries suffered by the victim”.⁶⁰ It must be proportionate to the gravity of the violations and damage suffered.⁶¹ As described below, the five main forms of reparations are: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Rules of Procedure and Evidence must not limit the creativity of the Court in developing and implementing the wide variety of forms of reparations which it may award under the Statute. Some forms, such as compensation, can be implemented by a monetary award, and will require state cooperation in tracing and seizing assets; other forms, such as rehabilitation, can, in some cases, be implemented by reimbursement for medical and psychological care, which would also require help from states in tracing and seizing assets; and some forms, such as certain types of satisfaction or non-repetition, can only be implemented by state institutions, including those of non-states parties, or by persons other than the convicted person. As outlined below, internationally recognized standards provide an indication of the scope of each of these forms of reparations, but the jurisprudence and interpretation at the international level is still developing.

1. Restitution. Restitution seeks to restore victims to their previous state.⁶² Principle 12 of the Van Boven Principles states that “[r]estitution requires, *inter alia*, restoration of liberty, family life, citizenship, return to one’s place of residence, and restoration of employment or property.”⁶³

2. Compensation. Compensation must “be provided for any economically assessable damage resulting from violations of human rights or international humanitarian law, such as:

- (a) Physical or mental harm, including pain, suffering and emotional distress;
- (b) Lost opportunities including education;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Harm to reputation or dignity;

⁶⁰ Joint Principles, Principle 36.

⁶¹ Principle 7 of the Van Boven Principles states that “[r]eparations shall be proportionate to the gravity of the violations and the resulting damage”.

⁶² 1996 Van Boven Report.

⁶³ see Van Boven Principles, Principle 12 (emphasis in original).

(e) Costs required for legal or expert assistance, *medicines and medical services*.”⁶⁴

Compensation for torture must include “the means for as full rehabilitation as possible”.⁶⁵

3. Rehabilitation. Rehabilitation includes “medical and psychological care as well as legal and social services”.⁶⁶

4. Satisfaction. Satisfaction includes the following:

“(a) Cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth;

(c) An official declaration or a judicial decision restoring the dignity, reputation and legal rights of the victim and/or of persons closely connected with the victim;

(d) Apology, including public acknowledgment of the facts and acceptance of responsibility;

(e) Judicial or administrative sanctions against persons responsible for the violations;

(f) Commemorations and paying tribute to the victims; [and]

(g) Inclusion in human rights training and in history *or school* textbooks of an accurate account of the violations committed in the field of human rights and *international* humanitarian law.”⁶⁷

The right to full and public disclosure of the truth includes “the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim’s fate”.⁶⁸

5. Guarantees of non-repetition. Guarantees of non-repetition include:

“Preventing the recurrence of violations by such means as:

⁶⁴ *Id.*, Principle 13 (emphasis in original).

⁶⁵ UN Convention against Torture, Art. 14.

⁶⁶ Van Boven Principles, Principle 14 (emphasis in original).

⁶⁷ *Id.*, Principle 15 (a) - (g) (emphasis in original). For further explanation of the concept of satisfaction and restorative justice, see the UN Handbook on Justice for Victims on the use and application of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. Doc. E/CN.15/CRP.4/Add.1 (1998), pp. 52-54.

⁶⁸ Joint Principles, Principle 3. In addition, “[i]n the case of forced disappearances, when the fate of the disappeared person has become known, that person’s family has the imprescriptible right to be informed thereof and, in the event of decease, the person’s body must be returned to the family as soon as it has been identified, whether the perpetrators have been identified, prosecuted or tried or not.” *Id.*, Principle 36.

- (i) Ensuring effective civilian control of military and security forces;
- (ii) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces;
- (iii) Strengthening the independence of the judiciary;
- (iv) Protecting *persons in* the legal profession and human rights defenders; [and]
- (v) *Conducting and strengthening*, on a priority *and continued* basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials.⁶⁹

Other guarantees of non-recurrence include:

- “(a) Disbandment of parastatal armed groups . . .
- (b) Repeal of all emergency laws, abolition of emergency courts and recognition of the inviolability of habeas corpus; [and]
- (c) Removal from office of senior officials implicated in serious violations.”⁷⁰

Basic principles concerning the different types of reparations under international law. The basic principles concerning the various forms of reparations under international law include the following, which should be incorporated in the general principles concerning reparations established by the Court:

- ***The right to be informed of rights to reparation.*** Principle 8 of the Van Boven Principles requires every state to “make known, through public and private mechanisms . . . the available procedures for reparations”. Principle 6 (a) of the UN Victims Declaration contains a similar provision. In particular, Article 15 of the UN Victims Declaration states that victims “should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them”.

- ***Prompt redress.*** Principle 4 of the UN Victims Declaration states that “victims are entitled to prompt redress” and Principle 6 (a) calls for “[a]voiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.” Principle 7 of the Van Boven Principles provides that “States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparation” and Principle 11 requires reparations decisions to “be implemented on a diligent and prompt manner”.

⁶⁹ Van Boven Principles, Principle 15 (h) (emphasis in original).

⁷⁰ Joinet Report, para. 43; see also Principle 37 of the Joinet Principles. The Joinet Principles spell out the guarantees of non-recurrence in some detail, including Principle 38 (disbandment of unofficial armed groups directly or indirectly linked to the state and of private groups benefiting from the state’s passivity); Principle 39 (repeal of emergency legislation and abolition of emergency courts); Principle 40 (administrative and other measures relating to state officials implicated in gross human rights violations); Principle 41 (implementation of administrative measures); and Principle 42 (nature of measures that can be taken against state officials).

• **Assistance during the reparations proceedings.** Principle 6 (c) of the UN Victims Declaration calls for the authorities to provide “proper assistance to victims throughout the legal process”.

• **Fair and adequate reparations.** Article 14 of the Convention against Torture requires states to ensure in their legal system that each victim of torture has “an enforceable right to fair and adequate compensation”. The obligation of states parties under the UN Convention against Torture to provide redress extends to victims of other cruel, inhuman or degrading treatment or punishment.⁷¹ Principle 8 of the UN Victims Declaration provides that victims, their families and their dependants should have a right to “fair restitution”, including “the return of property or payment for the harm or loss suffered, reimbursement of expenses occurred as a result of victimization, the provision of services and the restoration of rights”.

• **Reparations by the state when the person responsible is unable to do so.** Principle 12 of the UN Victims Declaration states that “[w]hen compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to: . . . Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes . . . [and their] family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization”.

• **Necessary assistance as part of the right to rehabilitation.** Principle 14 of the UN Victims Declaration provides that “[v]ictims should also receive the necessary material, medical, psychological and social assistance through governmental, voluntary community-based and indigenous means”.

Paris draft Rules A to H [Workshop 4] largely respect the principles outlined above and do not appear to impinge upon the Court’s powers under Article 75, although the terminology used in these draft Rules is not always consistent.

Paris draft Rules A to H [Workshop 4] should be incorporated with only minor amendments into the Rules of Procedure and Evidence.

B. Decisions by the Court awarding reparations

The Court itself may award reparations to victims or determine the principles by which the award should be guided in national courts. However, judicial economy would suggest that the awards should usually be made by the Court, which will have heard the relevant evidence. Determining the award in a single proceeding will minimize the burden and trauma for victims and witnesses as well as the cost of locating them. Article 75 (2) expressly provides that “[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.” In addition, “[w]here appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79.”

Although the Statute does not expressly state that the Court may make an award of reparations against persons other than the convicted person, the general principles it establishes, as well as the principles it establishes in an individual case, will guide states in ensuring that victims receive the

⁷¹ See *In re Federal Office for Police Matters*, Case No. 1A.87/1997/err, 10 December 1997.

reparations to which they are entitled under international and national law. In some cases, states will have an obligation under international or national law to ensure that they themselves provide reparations to the victims, either when the convicted person is unable to make reparations or when the state itself is also responsible for the crime. Indeed, the first proposal for an international criminal court in 1872 by Gustave Moynier provided for payment of compensation to victims by the convicted person's government when the convicted person was unable to do so.⁷² Contemporary international standards recognize that states must compensate victims for the crimes committed by their agents when the agents are unable to do so. Principle 12 of the UN Victims Declaration states that "[w]hen compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to: . . . Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes . . . [and their] family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization".

RULE A [WORKSHOP 4]: Presentation of claims

1. A claim for reparations under Article 75 of the Statute may be made by victims.

2. A claim shall be made in writing or in electronic form and filed with the Registrar.

3. The claim must contain at least the following particulars:

(a) Information regarding the identity and address of the claimant, subject to any protective measures ordered by the Court

(b) A description of the injury, loss or harm caused by the person or persons named in the charges

(c) Where restitution of assets, property or other tangible items is sought, a description of them

(d) Claims for compensation

(e) Claims for other forms of remedy

(f) Any relevant supporting documentation, including names and addresses of witnesses

4. Unless the person is not at the seat of the Court and cannot be located, the claim shall be served on the person or persons named in the claim, any other person whose interests may be adversely affected and on any interested States.

5. Those served under sub-paragraph 4 will have the right to respond to the claim.

RULE B [WORKSHOP 4]: Notifications

1. In cases where the Court decides on its own motion that there exist exceptional circumstances in which to determine the scope and extent of reparations, it shall give notice of what it intends to do.

2. The Registrar shall record any such notice and shall serve it on the person or persons against whom the Court is considering making a determination, on victims to the extent possible, on any interested persons and on any interested states.

3. If, as a result of giving notice to any victim under

2, the victim decides to bring a claim for reparations, the claim will be determined as if the claim had been brought under Rule "A". In such a case, the Court will consider whether to continue to exercise its powers on its own motion.

4. If, once notified under 2, a victim does not bring a claim, the Court shall permit the person against whom it is considering making a determination to put forward a response.

RULE C [WORKSHOP 4]: Publication of proceedings

⁷² Gustave Moynier explained that since "governments are the cause of all the evils of war, . . . they ought to face the consequences. It would not be fair for victims to be deprived of compensation by the personal insolvency of those responsible. And finally, it is no bad thing that governments have a direct and pecuniary interest in the Convention being faithfully observed by their nationals." Moynier, *supra*, n. 2, p. 127.

1. Without prejudice to any other rules requiring notice of proceedings before the Court to be given, the Registrar shall, having regard to any information provided by the prosecutor and insofar as practicable, take such steps as are necessary to give adequate publicity of proceedings before the Court to victims to the extent possible, or their legal representatives, to interested persons and interested States.

2. The Court may take steps to notify States Parties likely to have an interest through the channels provided for in Article 87.

3. The Court may request that any State takes steps to publicize the proceedings before the Court within its territory as widely as possible and by all possible means, in accordance with Part 9 of the Statute.*

4. The Court may also seek the assistance of organs of the United Nations, intergovernmental or non-governmental organizations.

* Only States Parties are bound by this provision.

RULE D [WORKSHOP 4]: Appointment of experts

At the request of victims or their legal representative, or on its own motion, the Court may appoint experts to assist in determining the scope, extent of any damage, loss or injury to, or in respect

of, victims and to suggest the appropriate scope and form of reparation.

RULE E [WORKSHOP 4]: Assessment of reparations

1. The Court shall award reparations, where possible on an individualised basis, taking into account the scope and extent of any damage, loss and injury and the gravity of the harmful act.

2. Where the large number of claimants precludes individualised determination of damage, loss and injury, and of reparations, the Court may appoint a representative to recommend to the Court the

appropriate reparations based on a representative sample of the victims and the damage, loss and injuries they have suffered, utilising accepted scientific methodology.

RULE G [WORKSHOP 4]: Evidence

1. The Court shall award reparation to, or in respect of, victims for damage, loss or injury caused by the convicted person.*

2. The Court may accept representations and evidence on reparations in writing, through oral testimony and in electronic form, including video and audio tapes and computer data.

*In its report, the working group on reparations suggested adding at the end of the paragraph: on the balance of probabilities". The aim was to provide for a lower standard of proof for the purposes of reparation than the standard of proof required to

establish criminal responsibility (article 66, paragraph 3), having regard to the difficulty likely to be experienced by victims in gathering evidence. When the report was introduced, two difficulties were identified: (1) two distinct issues need to be dealt with, namely the issue of causation and the issue of standard of proof, and it was difficult to find a way to address them both in one short sentence; (2) there is no provision in the Statute on either of those two issues. Hence there is a need for further discussion on the subject.

Presenting views concerning reparations. It goes without saying that the personal interests of victims are directly affected when the Court determines the amount and form of reparations (for the

concept and scope of reparations, as well as the procedure for determining reparations, see Part IV below). Therefore, Article 75 (3) not only requires the Court to take into account representations by victims, but permits it to take the initiative to invite such representations. However, international standards require victims to be informed of their role in the proceedings and Principle 13 (d) of the UN Guidelines on the Role of Prosecutor requires the Prosecutor to “ensure that victims are informed of their rights”.⁷³ The Rules of Procedure and Evidence must ensure that the victims are notified of their right to make representations to the Court before it makes an order under Article 75 awarding reparations.

Procedures for determining reparations awards. The Statute provides that the Court shall hear all interested persons before making a reparations award. Article 75 (3) states that, “[b]efore making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States”. This provision does not expressly require that the Court hold a hearing, although the Court should be able to do so in appropriate cases. The Rules of Procedure and Evidence could establish the procedure for such hearings, but, if they do, they should give the Court sufficient flexibility to adapt the procedure in a way which will best serve the interests of justice.

Although the Statute seems to suggest that it is discretionary for the Court to invite victims and others to make representations, possibly because it might be difficult to locate all victims or their families in cases where there are large numbers of victims, the Court’s general principles or the Rules of Procedure and Evidence should provide for some form of public notice which is likely to reach the largest number of victims, or notice through their representatives, of the opportunity to make such representations. As stated above (Part II.C), international standards require the widest possible publicity of procedures for reparations so that victims can exercise their rights to reparations. In the Court’s guidelines for making awards, it will be essential to ensure that all victims and their families are treated equally. Thus, the size of the award should not depend on whether the victim or the victim’s family is articulate, sympathetic or able to obtain expert counsel - or, indeed, any counsel at all.

Paris draft Rules A to E and G to H [Workshop 4] appear to give victims, their families or their representatives adequate opportunities to participate in proceedings concerning reparations.⁷⁴

⁷³ Principle 35 of the Joinet Principles states:

“Ad hoc procedures enabling victims to exercise their right to reparation should be given the widest possible publicity by private as well as public communication media. Such dissemination should take place both within and outside the country, including through consular services, particularly in countries to which large numbers of victims have been forced into exile.”

Principle 8 of the Van Boven Principles requires every state to “make known, through public and private mechanisms, [both at home and where necessary abroad,] the available procedures for reparations.” (square brackets in the original).

⁷⁴ The Australian draft Rules are silent on the question of notice to victims before an order is made awarding reparations and on the procedure for making representations on this matter. The ABA Draft Rules are also silent on these matters.

The procedures concerning the determination of reparations by the Court which are specified in Paris draft Rules A to E and G to H [Workshop 4] should be incorporated in the Rules of Procedure and Evidence.

As a general rule, in the interests of judicial economy and minimizing the trauma of victims, the Court itself should award reparations in each case.

States must provide reparations to victims for the crimes committed by their agents when their agents are unable to implement an award of reparations themselves and states must ensure that reparations which are not included in the Court's award, but which are required to satisfy the general principles and international law, are implemented.

RULE F [WORKSHOP 4]

1. In making an order for reparations to be awarded through the Trust Fund, the Court may make such orders as it sees fit. The Court may order that an award of reparations be made through the Trust Fund to an international or national organization which has agreed to cooperate or assist the Fund.

The Court may also order the Trust Fund to provide funds for legal assistance as well as other appropriate assistance during the trial.

ADDITIONAL QUESTIONS IDENTIFIED BY WORKSHOP 4:

1. Regarding the Trust Fund:

- a) the *locus standi* of the Trust Fund to appear

Awards from the Trust Fund. Article 79 (1) provides that “[a] Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims”. This is consistent with international standards, such as Principle 13 of the UN Victims Declaration, which encourages “[t]he establishment, strengthening and expansion of national funds for compensation to victims”.⁷⁵

The Statute does not limit the sources of funding of the Trust Fund, which, as a trust, would necessarily be independent of the Court's own budget. However, two sources of funding for the trust fund are expressly spelled out in the Statute. Article 79 (2) states that “[t]he Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.” However, the Trust Fund should be able to receive funds from as wide as possible variety of other sources and at least as wide as the Court itself. In addition to funding through assessed contributions by states parties and provided by the UN (Article 115), Article 116 provides that “the Court

before the Court

b) provision of urge[nt] interim relief such as medical attention, for instance of victims such as those who contract AIDs or become pregnant as a result of rape

c) the standard of care afforded to victims and witnesses when under the protection of the Court shall be at least that afforded to accused persons.

....

3. In staffing the Trust Fund and the Court, the experience of the United Nations Compensation Commission and relevant Tribunals with relevant experience should be taken into account.

⁷⁵ A similar trust fund has been proposed for an international criminal tribunal for Cambodia. See Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, U.N. Doc. S/1999/231, 16 March 1999, paras. 212, 219 (Recommendation 9).

may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties". The Statute does not make clear whether the trustees, the Court or the Assembly of States Parties will determine the criteria for accepting such funds, although it would be logical for the Assembly of States Parties to do so as part of its duty under Article 79 (3) to determine the criteria for managing the Trust Fund.

The Assembly of States Parties should develop both the criteria for accepting contributions to the Trust Fund and for its management in close consultation with the various organs of the Court, the UN Voluntary Fund for Victims of Torture, states, the Yugoslavia and Rwanda Tribunals and other intergovernmental organizations and non-governmental organizations and experts concerned with the rights of victims.⁷⁶ It will be essential in developing the criteria governing the sources of funding of the Trust Fund to ensure that such sources do not affect the impartiality of the Court in anyway. For example, the proportion of certain types of sources, such as fines and forfeitures, should be limited to avoid a misconception that the Court has an incentive to convict or to order such fines and forfeitures as a way of increasing the size of the Trust Fund. Similarly, the amount of funding from any one source could be limited, apart from exceptional circumstances, to avoid a suggestion that the independence of the Trust Fund was being compromised in any way.

Although the Assembly of States Parties has the responsibility for developing the criteria for management of the Trust Fund, the Statute makes clear that the Court will decide the amount of the awards of reparations which are to be made from the Trust Fund. Article 75 (2) provides that, "[w]here appropriate, the Court may order that the award for reparations be made through the Trust Fund". Although as a practical matter the total amount of money in the Trust Fund will necessarily limit the amount of an award which can be used to satisfy an award at any one time, it will be important for the Court's guidelines to provide that the Court should not limit the amount of the award based on the current level of assets in the Trust Fund.⁷⁷ The level will vary and, as awards are made, governments, companies, individuals and others are likely to increase their contributions. Therefore, a system for disbursing funds from the Trust Fund in proportion to the monetary equivalent of individual awards should be established when funds are temporarily insufficient to pay all the awards outstanding at a particular time. Special priorities could be accorded to rehabilitation expenses for children and victims of torture, particularly sexual assault.

The general approach set out in Paris draft Rule F [Workshop 4] to the Trust Fund should be incorporated in the Rules of Procedure and Evidence.

The Trust Fund should be able to receive funds and other resources from as wide as possible variety of sources as possible, including voluntary contributions from states, intergovernmental organizations, non-governmental organizations, individuals, corporations and other entities.

⁷⁶ For an excellent overview of the experience of the UN Voluntary Fund for Victims of Torture, see Sir Nigel Rodley, *The Treatment of Prisoners under International Law* 166-176 (2d ed. 1999).

⁷⁷ The UN Voluntary Fund for Victims of Torture has encountered this problem since it was first established. See Report of the Secretary-General on the UN Voluntary Fund for the Victims of Torture, U.N. Doc. E/CN.4/1999/55, 20 January 1999, paras. 16-17.

The criteria for acceptance of funds and other resources by the Trust Fund and its management should be developed in close consultation with the Court, the UN Voluntary Fund for Victims of Torture and non-governmental organizations and experts concerned with the rights of victims. Such criteria should ensure that the sources of funds and other resources should ensure that they are unable to affect the impartiality of the Court in any way, by such methods as limiting the funds and other resources from any one source, apart from exceptional circumstances.

The Court's general principles concerning reparations should not limit the amount of the award based on the current level of assets in the Trust Fund. A system for disbursing funds and other resources from the Trust Fund in proportion to the assets in the Trust Fund should be established to address the situation when the funds are temporarily insufficient to satisfy all the awards outstanding at any one time, with special priorities accorded to rehabilitation expenses for children and victims of torture, particularly sexual assault.

All victims and their families should be treated equally.

C. Pre-conviction measures for enforcing fines and forfeitures and reparations awards

RULE H [WORKSHOP 4]: Protective measures

1. In accordance with the Statute, the Pre-Trial Chamber or the Trial Chamber may, on its own motion or at the request of the Prosecutor or at the request of victims who have filed a claim for reparations or who have given an undertaking to do so, hold proceedings in order to determine whether protective measures should be requested under Article 93.

2. a) The person seeking the measures, or the Registrar in the case of the Court acting on its own motion shall give notice of the proceedings to the person against whom a claim is made or any interested persons or any interested States.

b) If any such notice is given, the person or States shall be entitled to make representations.

3. a) In urgent circumstances, proceedings may be held without giving notice under sub-paragraph 2.

b) If an order is made without notice, the Court shall as soon as practicable hold an *inter partes* hearing to enable any persons against whom a claim is made or any interested persons or any interested States to make representations that the order should be revoked or otherwise modified.

ADDITIONAL QUESTION IDENTIFIED BY WORKSHOP 4:

2) Regarding enforcement: a provision that orders of the Court need to be sent to the competent national authorities.

Measures to ensure that assets will be available in the event of a reparation award. If the Court is to be able to make a meaningful award of reparations in the event of a conviction, it will need to be able to take provisional measures to control assets of the accused as soon as the Court issues a warrant of arrest or a summons to appear pursuant to Article 58. The Statute clearly provides for such measures with a view to enforcing *fines or forfeitures* included in a judgment against a convicted person pursuant to Article 77 (2) as penalties in addition to imprisonment, which can be transferred to the Trust Fund for the benefit of victims, and provides that procedures for enforcing fines and forfeitures apply to enforcing reparation awards against convicted persons. However, the Statute does not make clear that the Court can use provisional measures between an warrant of arrest or summons to appear and a judgment for the purpose of ensuring that there will be sufficient assets available in the event of a conviction to enforce an *award of reparations*. It will be essential for the Rules of Procedure and Evidence to clarify that any assets which are frozen or seized before judgment with a view to enforcing

finances or forfeitures as penalties in the event of a conviction can be used to guarantee that there will be sufficient assets for the payment of reparations awards under Article 75 directly to the victim, instead of indirectly through the Trust Fund for all victims.

Measures which can be taken before judgment with respect to forfeitures. The Pre-Trial Chamber must take steps to take protective measures to ensure that assets of a suspect are preserved pending a determination of guilt or innocence, if the person is accused, so that they can be forfeited, particularly for the benefit of victims. Article 57 (3) (e) states that when an arrest warrant or summons has been issued, the Pre-Trial Chamber

“having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (j),⁷⁸ to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims”.

Article 93 requires states parties to comply with Court requests to provide assistance in locating and taking possession of assets with a view to forfeiture. Article 93 (1) (k) provides:

“1. States Parties shall, in accordance with the provisions of this Part [Part 9] and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties[.]”

The duty of states to comply with requests. Although Article 93 (1) permits states parties to use “procedures of national law”, they must ensure that neither national procedures nor substantive law delay or frustrate compliance with the Court’s request for assistance. Indeed, Article 86 expressly provides that “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.” In particular, Article 75 (5) requires states parties to “give effect to a decision under this article as if the provisions of article 109 [requiring states parties to enforce Court fines and forfeitures] were applicable to this article”. The provisions of Article 109 are discussed below.

Therefore, states parties must review their legislation and practice in the context of state cooperation to ensure that the authorities will comply without delay with requests for cooperation. In the light of the ability to move funds electronically from one account to another around the world, a delay of even a few hours by state authorities in complying with a Court request for assistance in identifying, tracing, freezing or seizing assets when a warrant of arrest or a summons to appear is issued could make it difficult or impossible ever to implement a reparations award. The Rules should clarify that states must comply with Court requests for assistance without delay.

⁷⁸ This appears to be the result of a typographical error, which now appears in the English and French versions, since Article 93 (1) (j) concerns protection of victims and witnesses and the preservation of evidence, while Article 93 (1) (k) concerns identification, tracing, freezing and seizure of assets.

The Statute does not permit states to avoid compliance with requests on the ground of substantive national law.⁷⁹ This is fully consistent with the internationally recognized principle that states must introduce safeguards in their national law, both in civil and criminal law, against impunity.⁸⁰ In particular, periods of limitations must not apply to civil proceedings by victims for reparations⁸¹ and amnesty and clemency measures may not affect the right of victims to reparations.⁸²

The Rules of Procedure and Evidence should clarify that any assets which are frozen or seized before judgment with a view to enforcing fines or forfeitures as penalties in the event of a conviction can be used to guarantee that there will be sufficient assets for the payment of reparations awards under Article 75 directly to the victim, instead of indirectly through the Trust Fund for all victims.

States parties must review their legislation and practice in the context of state cooperation to ensure that the authorities will comply without delay to requests by the Court for cooperation.

The Rules should make clear that states parties must comply with Court requests for assistance without delay.

D. Enforcing fines and forfeitures and reparations awards against convicted persons

Enforcing fines and forfeitures after a conviction. Article 109 spells out the duties of states to enforce fines and forfeitures awarded against a convicted person:

“1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

⁷⁹ Under international law, states may not refuse to implement their solemn treaty obligations on the ground that this would conflict with their national law. Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary international law, states: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

⁸⁰ Principle 23 of the Joint Principles states: “Safeguards must be introduced against any abuse for purposes of impunity of rules pertaining to prescription, amnesty, right to asylum, refusal to extradite, absence of *in absentia* procedure, due obedience, repentance, the jurisdiction of military courts and the irremovability of judges.”

⁸¹ Principle 24 of the Joint Principles provides that “prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injury.” Principle 9 of the Van Boven Principles states:

“Statutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights or *international* humanitarian law. Civil claims relating to reparations for gross violations of human rights and *international* humanitarian law shall not be subject to statutes of limitations.” (emphasis in original).

⁸² Principle 25 (b) of the Joint Principles states that amnesties and clemency “shall be without effect with respect to the victim’s right to reparation”.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgment of the Court shall be transferred to the Court.”

Although states have some discretion to give effect to Court fines and forfeitures “in accordance with the procedure of their national law”, they *must* still give full effect to Court fines and forfeitures regardless what national procedures they use. As stated above, Article 86 requires states parties to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”. Therefore, they must ensure that their authorities comply with Court decisions without delay and will need to review their law and practice so that they do not obstruct the enforcement of reparations awards.

Article 75 (4) permits the Court to make such requests after a conviction, where necessary. It states that when exercising its power under Article 75, “the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1”.

Enforcing reparations awards after a conviction. States parties must also give full effect without delay to a Court decision awarding reparations against a convicted person. Article 75 (5) provides that “[a] State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article”.

States parties must ensure that their authorities comply with Court decisions fully and without delay and will need to review their law and practice so that they do not obstruct the enforcement of fines and forfeitures or reparations awards.

States parties must give full effect without delay to a Court decision awarding reparations against a convicted person.