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# THE INTERNATIONAL CRIMINAL COURT:

## Ensuring an effective role for victims - Memorandum for the Paris seminar, April 1999

### INTRODUCTION

On 17 July 1998, a diplomatic conference in Rome adopted the Rome Statute of the International Criminal Court (Rome Statute or Statute).<sup>1</sup> This success came a century and a quarter after it was first proposed by Gustave Moynier of Switzerland, one of the founders of the International Society of the Red Cross,<sup>2</sup> 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.<sup>3</sup> The Rome Statute will enter into force after 60 states ratify the Statute. As of 23 April 1999, 82 states had taken the first step towards ratification by signing the Statute and two, Senegal and Trinidad and Tobago, have ratified it. Other states, including Belgium, Italy and France, as well as 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. 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.

*The Paris seminar.* 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 has three objectives:

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.

“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 has been 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.

***The purpose of this memorandum.*** This memorandum is being provided to the participants and observers at the Paris seminar and is divided into four parts in accordance with the four workshop topics in the seminar. Amnesty International intends to take the discussions and recommendations of the seminar into account in making recommendations on the role of victims in the International Criminal Court (Court) to the Preparatory Commission at its second session in New York, from 26 July to 13 August 1999. 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. Amnesty International intends to develop these recommendations and principles in greater detail in papers to be submitted to the Assembly of States Parties and to the various organs of the Court, when they are established.

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),<sup>4</sup> 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),<sup>5</sup> 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.<sup>6</sup>

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<sup>4</sup> Draft Rules of Procedure and Evidence of the International Criminal Court, U.N. Doc. PCNICC/1999/DP.1, 26 January 1999.

<sup>5</sup> 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.

<sup>6</sup> 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

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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).

**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),<sup>7</sup> the UN Manual on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Victims Declaration Manual),<sup>8</sup> 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,<sup>9</sup> the UN Guidelines on the Role of Prosecutors,<sup>10</sup> 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),<sup>11</sup> 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)<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> UN Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International 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.

<sup>12</sup> 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.

<sup>13</sup> Adopted by the General Assembly in Resolution 53/144 on 9 December 1998.

<sup>14</sup> 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.

**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.<sup>15</sup> 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.”<sup>16</sup>

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<sup>15</sup> See note 14, above.

<sup>16</sup> 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.

***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 and their families 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 the original proposal of Gustave Moynier, 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.

**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.**

## **I. INITIATING AN INVESTIGATION OR PROSECUTION**

### **A. General principles**

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 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 provided in the Statute with respect to investigations by the Prosecutor on his or her own initiative, victims 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 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.



## **B. Preliminary examination and investigation**

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

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.<sup>17</sup> This provision 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.<sup>18</sup>

*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.

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<sup>17</sup> 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).

<sup>18</sup> Principle 18 of the Joint 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.

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.<sup>19</sup>

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 and 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.

***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".

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<sup>19</sup> 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 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.

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.<sup>20</sup> Given that the Prosecutor will be responsible for 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.

**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 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. The Draft Rules do not require notice to victims of their rights or require the Pre-Trial Chamber to examine representations of victims.<sup>21</sup>

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<sup>20</sup> Rule 6 (C) of the ABA Draft Rules, limits 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 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.

<sup>21</sup> The ABA Draft Rules are also silent on these points.

**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. The Draft Rules are silent on these points.<sup>22</sup>

**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”. 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. To the extent that the 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”.<sup>23</sup> 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.<sup>24</sup>

**The functions of receiving, recording, acknowledging, analysing and responding to information provided by victims and other sources should be performed solely by the Prosecutor and his or her staff, not by any other organ of the Court, apart from the Victims and Witnesses Unit, or any outside body.**

**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.**

**The Prosecutor should inform victims of their rights under Article 15 (3) to make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure**

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<sup>22</sup> The ABA Draft Rules also fail to address these matters.

<sup>23</sup> UN Victims Declaration, Principle 6 (a).

<sup>24</sup> 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.

**and Evidence, concerning requests for authority to investigate and of their other rights under the Statute.**

**The Rules of Procedure and Evidence should make clear that the Pre-Trial Chamber must examine the representations of victims when determining whether there is a reasonable basis to proceed, and not base its examination solely on the Prosecutor's request and supporting material collected by the Prosecutor.**

**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 Pre-Trial Chamber not to authorize an investigation by an effective method which does not endanger the safety of those who provided the information or the ability to investigate other cases. Such notice should be made in a manner which is sensitive to the needs of victims and ensure that the reasons for the decision are made clear and should inform the sources that they can provide further information to the Prosecutor pursuant to Article 15 (6).**

**The Rules of Procedure and Evidence should make clear that victims have the same rights to make representations with respect to a Prosecutor's subsequent requests to authorize an investigation pursuant to Article 15 (5) as with the initial request.**

## **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 Draft Rules 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.<sup>25</sup>

**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.**

<sup>25</sup> The ABA Draft Rules also do not require such notice to victims, their families or their representatives.

### **3. Resolutions by the Security Council requesting a delay in the investigation**

Although Article 16 does not expressly provide that victims should be informed of a resolution by the Security Council adopted under Chapter VII of the UN Charter 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 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”.<sup>26</sup> 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.

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<sup>26</sup> UN Victims Declaration, Principle 6 (b).

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 Draft Rules do not provide for the views and concerns of victims to be presented and considered at this stage of proceedings.<sup>27</sup> 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 when the Prosecutor is acting pursuant to a state referral or proprio moto.* Victims, their families and 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.

Article 18 governs challenges by states to 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*.<sup>28</sup> 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

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<sup>27</sup> The ABA Draft Rules also do not require such notice to victims, their families or their representatives.

<sup>28</sup> 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).

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 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 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 and 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 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.

***Challenges to the jurisdiction of the Court or to the admissibility of a case.*** Victims, their families and 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.<sup>29</sup>

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<sup>29</sup> 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).



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 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)).

*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.

<p><b>The Rules of Procedure and Evidence should provide for notice to victims, their families and their representatives concerning challenges to admissibility and to jurisdiction and their opportunities to make oral or written representations on these issues, to the extent permitted by the Statute and the Court.</b></p>
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### **C. 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”. Although the Statute does not expressly require that the Prosecutor provide such notice to victims 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 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”. 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.<sup>30</sup>

**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. PARTICIPATION IN THE PROCEEDINGS

***“The responsiveness of judicial and administrative processes to the needs of victims should***

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30 The ABA Draft Rules also do not require such notice to victims, their families or their representatives.

*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**

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”. 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.” 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. 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.”<sup>31</sup>

*The responsibilities of the Pre-Trial Chamber and the Prosecutor.* 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

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31 The ABA Draft Rules are silent on this question.

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

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.

**The Court should determine the stages of the proceedings it is appropriate for the views and concerns of the victims to be presented and considered.**

**The Rules of Procedure and Evidence should leave the Court with sufficient flexibility to regulate the presentation and consideration of the views and concerns of victims through their representatives in a manner most suited to a particular case.**

## **B. Initial proceedings before the Court**

Although there will generally be no need to notify a victim, family of a victim or their representative before an arrest or for the victim to be present at an arrest (apart from assisting in an identification of the accused to facilitate the arrest), victims, their families and 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 and 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).

**Victims, their families and their representatives should be informed of the initial proceedings and of their opportunities to make oral or written submissions, as determined appropriate by the Court.**

### C. The trial, sentencing and award of reparations

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 the award of reparations is made. 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.<sup>32</sup> Similarly, in complex civil class actions in countries such as the United States where there are millions 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

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<sup>32</sup> 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 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).

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”.

*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, 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”.<sup>33</sup> 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. The 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.<sup>34</sup>

**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.**

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33 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).

34 The ABA Draft Rules are also silent on these matters.

#### **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. Draft Rule 124 spells out the requirement to give notice of an appeal against an order of reparations, including appeals by victims, and Draft Rule 125 requires that such appeals be heard expeditiously.<sup>35</sup>

**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.**

### **III. 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**

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**

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35 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.

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. As Article 68 (1) makes clear, however, such measures must never be at the expense of the right of an accused – who faces possible imprisonment for the rest of his or her life – to a fair trial. The right of the accused, as recognized in Article 14 (3) (e) of the ICCPR, “[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”, is an essential aspect of the right to a fair trial.

***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.<sup>36</sup> 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.<sup>37</sup> Principle 4 of the UN Victims Declaration emphasizes that “victims should be treated with compassion and respect for their dignity”.

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36 Measures to protect victims and witnesses from the public involve completely different considerations from measures preventing an accused from knowing his or her accusers. See Donat-Cattin, *Article 68 -Protection of Victims and Witnesses and their Participation in the Proceedings*, para. 19 (“... non-disclosure of identity to the public or media is one thing, anonymity of witnesses/victims to the defence is another. The latter is unacceptable, in the light of the right of the defence to cross-examine prosecution witnesses (in fact, it is not possible to respond to arguments presented by someone ‘without identity’).”).

37 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.



*The need to use effective national witness protection programs as models.* In addition to protecting victims and witnesses from unnecessary anguish, the Court, in close cooperation with states parties, must take effective security measures to protect victims, their families and witnesses from reprisals. These measures should encompass protection before, during and after the trial until the security threat ends. In developing an effective protection program, the court and states parties should draw upon the successful witness protection programs in many states, such as Australia, Italy and the United States. The Australian witness protection program permits long-term protection of witnesses who are foreign citizens.<sup>38</sup> The Italian witness protection program has been successful in protecting witnesses in cases involving organized crime.<sup>39</sup> The United States Justice Department has a witness protection program which has successfully protected all of the more than 15,000 witnesses, potential witnesses and immediate family members of witnesses and potential witnesses over more than a quarter of a century.<sup>40</sup> To ensure that an international victim, family and witness protection program is effective, all states parties, not just the court and the host state, will have to share the burden of protecting persons in the program by affording temporary residence until the security threat ends. By sharing the burden equally and by affording victims, families and witnesses protection anywhere in the world, the Court could have in place a more effective witness protection program than the programs of the Yugoslavia and Rwanda Tribunals, which are largely limited to protection in the host state and at the tribunals. Preventing the accused from knowing the identity of his or her accuser has proved an illusory method of protecting victims and witnesses in the Tribunals. It was the failure of the Tribunals to provide effective witness protection programs to ensure that witnesses were protected from the first moment of contact with the Tribunals until their safety and well-being was no longer in danger and the inadvertent disclosure of the names of the accused in public session that led to the murder of several prospective witnesses before the Rwanda Tribunal.

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<sup>38</sup> 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. The act will have to be amended to accommodate protection requests from the Court and the Yugoslavia and Rwanda Tribunals.

<sup>39</sup> Italian witness protection programs provide economic assistance, security and changes of identity, and they permit the witness to be cross-examined through video conferencing facilities. Professor Giulio Illumati, "The International Criminal Court and the Criminal Justice system of Italy", paper submitted to the University of Nottingham Human Rights Law Centre workshop, Toward a Procedural Regime for the International Criminal Court, 6 to 7 June 1997, p. 5.

<sup>40</sup> See 18 U.S.C.A. section 3521 (witness relocation and protection). Persons in this program may be given suitable documents to establish a new identity or otherwise protect the person, housing, transportation to a new secure location, payment of living expenses, help in obtaining employment or other necessary services to assist the person in becoming self-sustaining. Not a single person who remained in this program has been harmed and an overall conviction rate of 89% has been obtained as a result of protected witness testimony. United States Marshals Service, Fact Sheet: Witness Security, USMS Pub. No. 30, 7 July 1995.

*The need to know one's accuser to conduct an effective defence.* The right to examine, or have examined, the witnesses against one is not simply a matter of equality of arms, but a fundamental component of the right to a fair trial. The accused must have an opportunity to conduct an in-depth examination of the background of prosecution witnesses to test the veracity of the testimony of the witness and to identify potential bias. As a leading international human rights organization argued at the Diplomatic Conference, "one of the 'rights of the accused' which must not be compromised in any circumstances, is the right to cross-examination in person".<sup>41</sup> This is particularly important with respect to the grave crimes within the jurisdiction of the Court. In many cases, the objectivity of the prosecution witnesses will have to be thoroughly examined by counsel for the accused in close consultation with the accused, such as former neighbours who may have quarrelled in the past with the accused, members of different ethnic or religious groups or persons now occupying the home of the accused.<sup>42</sup> In such highly charged situations, some may even perjure themselves.<sup>43</sup> The use of written statements of witnesses as a substitute for live testimony at trial when the defence has not had an opportunity to cross-examine the witness before or during the trial may be inconsistent with this right.<sup>44</sup>

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41 Human Rights Watch, *Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court* (120 (1998)).

<sup>42</sup> As a leading international law expert has stated,

"the right to examine or cross-examine an adverse witness cannot be effective without the right to know the identity of adverse witnesses. It is an almost impossible task to cross-examine an adverse witness effectively without knowing that witness's name, background, habitual residence or whereabouts at the time to which he testifies - or, indeed, to prepare to conduct such an examination in a professionally responsible manner."

Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 Am. J. Int'l L. 235, 236 (1996).

<sup>43</sup> See *Prosecutor v. Tadić*, Decision on Prosecutor's Motion to Withdraw Protective Measures for Witness "L", Case No. IT-94-I-T, 5 December 1996 (Gabrielle Kirk McDonald, Presiding) (ending protective measures for a prosecution witness after an on-site investigation by the defence demonstrated that the witness had lied).

<sup>44</sup> The use of affidavits in the place of live testimony at the International Military Tribunals at Nuremberg and Tokyo were widely criticized. Rule 71 (A) of the Yugoslavia Rules provides that "[a]t the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial", but Rule 71 (C) ensures that the other party "shall have the right to attend the taking of the deposition and cross-examine the person whose deposition is being taken". Rules 71 (A) and (C) of the Rwanda Rules are identical.

Secret witnesses pose the danger of convicting innocent persons and the equally serious danger that revisionists will attack the validity of all judgments where secret witnesses testified. It is essential that trials in the Court be perceived by the entire international community, including the ethnic, racial, national, religious and political groups of which the convicted person is a member, as scrupulously fair. It is “of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”<sup>45</sup> The international community has no interest in convicting the innocent; it has every interest in ensuring that only the persons responsible for genocide, crimes against humanity and war crimes are convicted in fair trials the integrity of which is beyond reproach.

*International standards disapprove of the use of secret witnesses.* The use of secret witnesses is prohibited by the ICCPR and the American Convention on Human Rights. The Human Rights Committee has stated that the “faceless judges system” in Colombia, in which the names of judges and witnesses in regional public order courts that try cases involving drug trafficking, terrorism, rebellion, rioting and illegal possession of weapons are concealed from the defence, “does not comply with article 14 of the Covenant, particularly paragraph 3 (b) and (e), and the Committee’s General Comment 13 (21)”, and it recommended that the regional judicial system be abolished. Similarly, the Inter-American Commission on Human Rights has strongly criticized the “faceless judges system” in Colombia, saying that it was “disturbed that this was still a part of Colombian law”.<sup>46</sup>

The European Court of Human Rights has strictly restricted the use of anonymous witnesses. Recently, in the *Van Mechelen* case, it found that, under the circumstances, the use of anonymous police witnesses violated Article 6 (1) and (3) (d) of the European Convention on Human Rights, stating that:

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45 *Rex v. Sussex, Justices, Ex parte McCarthy* [1924] K.B. 256, 259 (Howard, J.).

<sup>46</sup> Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993, p. 98. The Constitutional Court found this law unconstitutional in part. Under that law, when the judge believed that the identity of a witness should be kept confidential to guarantee their safety, the judge could “order that any measure o[r] mechanism required to ensure their confidentiality and safety be taken when the evidence is submitted and that the cross-examination, requests for clarification of rulings, or any other similar petition be made and processed in writing.” *Id.* Amnesty International has stated that “[t]he right to a fair trial is severely undermined by the Regional Justice system” and that “[t]he use of secret witnesses by the prosecution whose accusations cannot be cross-examined adequately by the defence violates the right to examine witnesses”. *Colombia: A summary of Amnesty International’s concerns related to the Colombian Government’s implementation of the ICCPR* (AI Index: AMR 23/17/97), pp. 16 to 17. Amnesty International has criticized the use of secret witnesses in inquests, where the family of the victims were unable to learn the identity of the intelligence, police and military witnesses or observe their demeanor, *United Kingdom: Investigating lethal shootings: The Gibraltar inquest* (AI Index: EUR 45/02/89), p. 22, and the use of secret judges in Peru. See, for example, *Peru: Government persists in retaining unfair trial procedures* (AI Index: AMR 46/25/96), p. 7 (calling for the Human Rights Committee recommendation to abolish the system of secret judges to be implemented).

“Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied.”<sup>47</sup>

Article 21 (4) (e) of the Yugoslavia Statute and Article 20 (4) (e) of the Rwanda Statute contain the same unqualified guarantees concerning the examination of witnesses as in Article 14 (3) (e) of the ICCPR. The Rwanda Tribunal has issued orders to protect the identity of victims and prosecution witnesses until they are brought within the tribunal’s protection, but, subject to that requirement, it has ordered the Prosecutor “to disclose to the defence the identity of the said protected victims and witnesses as well as their unredacted statements within 30 days prior to the trial to allow the Defence sufficient time to prepare”.<sup>48</sup>

In contrast, although the Trial Chambers of the Yugoslavia Tribunals have usually issued similar protection orders requiring disclosure to the accused prior to the trial, subject to the witness being within the effective protection of the tribunal, in the *Tadić* case the Trial Chamber issued an order denying the accused the right to know the identity of several witnesses against him.<sup>49</sup> Judge Stephen dissented.<sup>50</sup> However, in the *Blaškić* case, another Trial Chamber, recognizing the dangers of anonymous witnesses, found that the Prosecutor had failed to demonstrate the necessity of the “extreme measure of the anonymity of the witnesses” under the facts of the case.<sup>51</sup> The Trial Chamber explained:

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<sup>47</sup> *Van Mechelen v. The Netherlands*, Case No. 55/1996/674/861-864, Judgment, European Court of Human Rights, 23 April 1997, para. 58. The defence was not only unaware of the identity of the police witnesses, but was “prevented from observing their demeanor under direct questioning, and thus from testing their reliability”. *Id.* para. 59. The trial court had failed to assess the threat of reprisals and had based its decision exclusively on the seriousness of the crimes committed. The judge, who knew the identity of the witnesses, questioned them and made an assessment of their reliability and credibility. The European Court of Human Rights concluded that these “measures cannot be considered a proper substitute for the possibility of the defence to question the witnesses in their presence and make their own judgment as to their demeanor and reliability”. *Id.*, para. 62.

<sup>48</sup> Measures granted to the Prosecutor for the protection of witnesses against Elie Ndayambaje, Press Release, UN Doc. ICTR Info 9-2-039, Arusha, 11 March 1997 (listing cases in which it had issued such protection orders).

<sup>49</sup> *Prosecutor v. Tadić*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, 10 August 1995 (Judges McDonald and Vohrah).

<sup>50</sup> *Id.*, Separate Opinion of Judge Stephen on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses. The decision has been severely criticized, see, for example, Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 Am. J. Int’l L. 235 (1996), and *Witness Anonymity Is Inconsistent with Due Process*, 91 Am. J. Int’l L. (1997), p. 80, and strongly defended by one observer. See Christine M. Chinkin, *Due Process and Witness Anonymity*, 91 Am. J. Int’l L. 75 (1997).

<sup>51</sup> *Prosecutor v. Blaškić*, Decision on the Application of the Prosecutor dated 17 October 1996, Requesting Protective Measures for Victims and Witnesses, Case No. IT-95-14-T, 5 November 1996, paras 40, 44.

“The philosophy which imbues the Statute and the Rules of the Tribunal appears clear: the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media. . . . How can one conceive of the accused being afforded an equitable trial, adequate time for preparation of his defence, and intelligent cross-examination of the Prosecution witnesses if he does not know from where and by whom he is accused?”<sup>52</sup>

The drafters of the Rome Statute expressly rejected proposals which would have, like the Statutes of the Yugoslavia and Rwanda Tribunals, subjected the internationally recognized right of the accused to a fair trial to the interests of victims and witnesses. The two Trial Chamber judges who wrote the majority opinion in the *Tadić* case noted that the guarantee of the right to “a fair and public hearing” in Article 21 (2) of the Yugoslavia Statute was “subject to article 22 of the Statute” concerning protection of a victim’s identity, which they incorrectly interpreted as permitting the Tribunal to deny the accused the right to know his or her accuser, as opposed to permitting it to conceal the identity of the witness from the public.

In contrast, Article 67 (1) of the Rome Statute contains an unqualified guarantee to a *fair* hearing, but subjects the right to a *public* hearing to the other provisions of the Statute. Moreover, each provision in the Rome Statute authorizing protection measures provides that they must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial (see, for example, Article 68 (1), (3) and (5)). Therefore, the Rules of Procedure and Evidence may authorize limitations on public access to certain aspects of the trial and concealment of the identity of certain witnesses from the public to ensure their safety, but not deny the accused the right to know his or her accuser and, thus, the ability to mount an effective cross-examination. The note to Draft Rule 89 (Conduct of proceedings in camera and presentation of evidence by electronic or other special means to protect victims and witnesses) indicates that it will have to address the question of disclosure to the public and the media. It does not suggest that it would involve concealing the identity of witnesses from the accused.<sup>53</sup>

**The Rules of Procedure and Evidence should encourage states parties to cooperate in developing and implementing on an equitable basis an effective international victim and witness protection and support program.**

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<sup>52</sup> *Id.*, paras 24 – 25.

<sup>53</sup> ABA Draft Rules 85 and 86 do not contain any provisions which could be read as authorizing concealment of the identity of a witness from the accused at trial.

The Rules of Procedure and Evidence should provide effective measures to spare victims and witnesses unnecessary anguish in at all stages of the proceedings, which are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

The Rules of Procedure and Evidence should ensure that the identity of prosecution witnesses be made known to the accused sufficiently in advance of the trial to permit an effective cross-examination and after effective measures have been taken to protect the safety of witnesses.

### 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.

The Statute requires the Prosecutor to ensure, when employing staff, to include persons with legal experience concerning violence against women and children.<sup>54</sup> 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 Draft Rules do not directly address the criteria for employing staff in the Office of the Prosecutor, but at least two of these Draft Rules could be amended to reflect the need for staff with appropriate experience concerning

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<sup>54</sup> 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.”

victims. Draft Rule 39, which defines the requirements of the solemn declaration by interpreters and translators, could be amended to include a pledge to respect the needs of and dignity of traumatized persons.<sup>55</sup> Similarly, Draft Rule 43 could be amended to ensure that government investigators cooperating with the Prosecutor can interview victims and witnesses effectively.<sup>56</sup>

**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 establishing clear criteria in the form of internal guidelines for the Office of the Prosecutor for appointments and when making appointments of staff.**

**Interpreters and translators should pledge to respect the needs and dignity of traumatized persons.**

**The Prosecutor should endeavour to ensure that states provide only investigators who are appropriately trained to deal with trauma victims or to arrange for appropriate training.**

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

Article 43 (6) requires the Registrar to “set up a Victims and Witnesses Unit within the Registry”.<sup>57</sup> 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”. The Draft Rules do not address these matters.<sup>58</sup>

<sup>55</sup> International Society for Traumatic Stress Studies and the International League for Human Rights have recommended that 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, they will need effective training to be able to fulfil this pledge.

<sup>56</sup> The International Society for Traumatic Stress Studies and the International League for Human Rights have suggested that 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.

<sup>57</sup> 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.

<sup>58</sup> ABA Draft Rule 24 does not address this point.

***Protection, counselling 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 by taking such steps as setting up clear divisions, 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 Unit 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 counselling for 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. Care will need to be taken in determining the place and manner for relocating victims and witnesses.<sup>59</sup> 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 and this commitment should serve as a model for cooperation by states parties and other states with the Court.

***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 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.

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<sup>59</sup> 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).



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.

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.<sup>60</sup> 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 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.

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<sup>60</sup> 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.

***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.<sup>61</sup> 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.<sup>62</sup> In particular, the Victims and Witnesses Unit 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.<sup>63</sup> The Registry will need to ensure that experts in other areas are recruited, such as experts on the role of children as witnesses

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<sup>61</sup> 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.*

<sup>62</sup> 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.”

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

<sup>63</sup> 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.”

and in protection of victims and witnesses.<sup>64</sup> 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. The Draft Rules do not address these matters.<sup>65</sup>

**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 Victims and Witnesses Unit 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 counselling for such persons from the moment they come into contact with the Court for as long as it is necessary to ensure their safety and well-being. The burden of such protection should be shared by all states parties.**

**The Victims and Witnesses Unit should 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 Unit should also 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 provide that the head of the Victims and Witnesses Unit should have extensive experience in working with victims and witnesses.**

**The Victims and Witnesses Unit should develop criteria for selection of its staff in consultation with states parties, other 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. The criteria should ensure that the Unit’s staff includes social workers, health care practitioners and other relevant experts, such as experts on the role of children as witnesses, on victims of sexual violence and in the protection of**

<sup>64</sup> 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.

<sup>65</sup> 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).

**victims and witnesses, and the criteria should facilitate the recruitment of gratis personnel, where appropriate.**

#### **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, 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”.

**The Court should ensure that requests to states parties to take measures to protect victims, potential witnesses and their families are implemented.**

#### **IV. RIGHT TO REPARATIONS (COMPENSATION, RESTITUTION AND REHABILITATION)**

*“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 Joinet Principles**

### **A. The right to reparations**

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.<sup>66</sup>

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<sup>66</sup> 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.

***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.<sup>67</sup> 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”.<sup>68</sup> Victims of racial discrimination<sup>69</sup> and arbitrary detention<sup>70</sup> 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 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.

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<sup>67</sup> See footnote 14, above.

<sup>68</sup> 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.

<sup>69</sup> 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)

<sup>70</sup> UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 35 (1).

The scope of the right to reparation is broad and must “cover all injuries suffered by the victim”.<sup>71</sup> It must be proportionate to the gravity of the violations and damage suffered.<sup>72</sup> 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.<sup>73</sup> 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.”<sup>74</sup>

**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;
- (e) Costs required for legal or expert assistance, *medicines and medical services*.<sup>75</sup>

Compensation for torture must include “the means for as full rehabilitation as possible”.<sup>76</sup>

**3. Rehabilitation.** Rehabilitation includes “medical and psychological care as well as legal and social services”.<sup>77</sup>

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71 Joint Principles, Principle 36.

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

<sup>73</sup> 1996 Van Boven Report, para. XXX.

<sup>74</sup> Van Boven Principles, Principle 12 (emphasis in original).

<sup>75</sup> *Id.*, Principle 13 (emphasis in original).

76 UN Convention against Torture, Art. 14.

**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]

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<sup>77</sup> Van Boven Principles, Principle 14 (emphasis in original).



(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.”<sup>78</sup>

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”.<sup>79</sup>

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

“Preventing the recurrence of violations by such means as:

- (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.”<sup>80</sup>

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]

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<sup>78</sup> *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.

<sup>79</sup> 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.

<sup>80</sup> Van Boven Principles, Principle 15 (h) (emphasis in original).

(c) Removal from office of senior officials implicated in serious violations.”<sup>81</sup>

***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”.

• ***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”.

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<sup>81</sup> 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).

· **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.<sup>82</sup> 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 endeavour 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”.

**The Rules of Procedure and Evidence must not limit the ability of the Court under Article 75 (1) to develop and apply general principles concerning reparations for victims which are consistent with the Statute and international law and standards.**

**The general principles developed and applied by the Court should address all forms of reparations, including restitution, compensation, rehabilitation, satisfaction and non-repetition.**

**Reparations should cover all injuries suffered by the victim and be proportionate to the gravity of the violations and the damage suffered.**

## **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.”

<sup>82</sup> See *In re Federal Office for Police Matters*, Case No. 1A.87/1997/err, 10 December 1997.

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 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.<sup>83</sup> 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 endeavour 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".

**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".<sup>84</sup>

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 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.

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<sup>83</sup> 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.

<sup>84</sup> 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).

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.<sup>85</sup> 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 misperception 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.<sup>86</sup> 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.

***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

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85 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).

86 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.

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.

**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.**

**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.**

**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.**

**The Court's general principles or the Rules of Procedure and Evidence should require public notice which is likely to reach large numbers of victims or their representatives of the opportunity to make representations pursuant to Article 75 (3).**

**In appropriate cases, the Court should conduct hearings pursuant to Article 75 (3) in a manner which will best suit the interests of justice in an individual case.**

**All victims and their families should be treated equally.**

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

*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 *finés 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 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.

*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),<sup>87</sup> 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[.]”

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<sup>87</sup> 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 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.

The Statute does not permit states to avoid compliance with requests on the ground of substantive national law.<sup>88</sup> 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.<sup>89</sup> In particular, periods of limitations must not apply to civil proceedings by victims for reparations<sup>90</sup> and amnesty and clemency measures may not affect the right of victims to reparations.<sup>91</sup>

**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**

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88 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.”

89 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.”

90 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).

91 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”.



**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.

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.**