

## SEEKING JUSTICE AT THE INTERNATIONAL CRIMINAL COURT: VICTIMS' REPARATIONS

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### I. INTRODUCTION

The International Criminal Court ("ICC") represents a major achievement in international criminal justice, particularly with regard to victims. Victims of international crimes are, for the first time, recognized as having rights as participants in the process and as recipients of reparations.<sup>1</sup> According to the ICC, reparations are aimed at "relieving the suffering and affording justice to victims not only through the conviction of the perpetrator by this Court, but also by attempting to redress the consequences of genocide, crimes against humanity and war crimes . . . ."<sup>2</sup> The goal of the ICC is to provide a foundation for rebuilding society after mass violence, through prosecution of the perpetrators and reparations for the victims.<sup>3</sup> In this essay, I will focus on victims' reparations, advocating a preference for collective reparations administered through the trust fund for

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1. See, e.g., Claude Jorda and Jerome de Hamptonne, *The Status and Role of the Victim in 2 THE ROME STATUTE: OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1387, 1388 (Antonio Casesse et al, eds., 2002) (discussing ICC as a "new step forward" in according victims "double status" not provided by prior ad hoc international criminal tribunals).

2. International Criminal Court, *The Role of the Trust Fund for Victims and Its Relation with the Registry of the International Criminal Court*, ICC Press Kit No.:pids.008.2004-EN (April 22, 2004), <http://www.icc-cpi.int/library/press/pressreleases/PIDS008.2004-EN.pdf>.

3. *Id.* ("Ultimately, addressing these consequences will provide a more solid basis for re-building societies after mass violence.").

victims of ICC crimes.

In keeping with the goal of restorative justice, the Assembly of States Parties of the ICC expanded the universe of victims eligible for reparations through the Victims Trust Fund (“VTF”).<sup>4</sup> The Court<sup>5</sup> can award reparations to victims of the most responsible perpetrators prosecuted and convicted by the ICC. The VTF’s “other resources” mechanism—voluntary contributions to the fund—can cover victims (and their families) of crimes within the jurisdiction of the Court, not merely crimes of convicted defendants.<sup>6</sup>

The establishment of this fund “reflects a growing international consensus that reparations play an important role in achieving justice for victims.”<sup>7</sup> Reparations are seen as “an essential criterion for the restoration of social harmony between communities which have been at war with each other and a *sine qua non* for the establishment of a deep-rooted and lasting peace.”<sup>8</sup> This type of approach is often referred to as “restorative justice,” as opposed to retributive. Restorative justice tends to be community-oriented, aimed at restoring society through reconciliation. It may take the form of truth commissions and symbolic gestures of atonement and forgiveness between victim and perpetrator as well as amnesty. Retributive justice, by contrast, tends to be narrowly focused on prosecution and punishment of offenders. While the victims are necessary, the retributive process is less attuned to the needs of the victims and the community; it is more concerned with

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4. Although the statute of the ICC refers to the “Trust Fund” and the regulations refer to the “Trust Fund for Victims,” these terms are used interchangeably with the term I adopt: “Victims Trust Fund.” See, e.g., International Criminal Court, Trust Fund for Victims, <http://www.icc-cpi.int/vtf.html> (last visited Feb. 27, 2007) (describing the “Victims Trust Fund”).

5. In this essay I will use “ICC” to refer to the institution as a whole, and “Court” to refer to the judicial organ of the institution. See International Criminal Court, Structure of the Court, <http://www.icc-cpi.int/about/ataglance/structure.html> (last visited Feb. 27, 2007).

6. See *infra*, Part III.B.

7. Marieke Wierda & Pablo de Greiff, *Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims* 1, International Center for Transitional Justice, <http://www.vrwg.org/Publications/02/ICTJ%20Trust%20Fund%20Paper.pdf> (last visited Feb. 27, 2007).

8. Jorda & Hamptinne, *supra* note 1, at 1398.

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traditional notions of justice revolving around trial and punishment. Restorative justice, on the other hand, is more focused on attempting to make the victim and society whole.<sup>9</sup>

The collective nature of restorative justice is consonant with collective or group reparations for victims. The victims of mass atrocities cannot be made whole by compensation alone. Realistically, sufficient individual payments are not feasible. Even if the VTF has millions of dollars to disburse, the sheer scale of international crimes will likely dwarf monetary resources. As a result, I believe the trust fund should typically complement the retributive justice achieved through the prosecution of the worst offenders with restorative justice measures in the form of collective reparations. Thus, I argue that the VTF should consider favoring collective awards to a broader class of victims to further the restorative justice goal of the ICC. If the VTF manages the expectations of these large numbers of potential victims and gives them a voice in the allocation of scarce resources through collective reparations, it can contribute to the healing of victims and society. Prior to discussing the aspects of the ICC relating to victims, I will briefly outline the basics of the ICC. Then I will explore the resources and potential recipients of the VTF. I conclude that the VTF should generally favor collective reparations for a broad range of victims when drawing on voluntary contributions to the VTF.

## II. OVERVIEW OF THE ICC

The ICC is the first permanent international criminal tribunal. While the ICC has a relationship with the United Nations, it is a treaty-based body.<sup>10</sup> The ICC was created by a multilateral treaty, known as the Rome Statute. The statute, and hence the ICC system, entered into force on July 1, 2002—after a sufficient number of countries had ratified the treaty. There are 104 states parties as of January 1, 2007. (The United States

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9. *See, e.g.*, MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 91 (1998).

10. Rome Statute of the International Criminal Court, art. 2, July 1, 2002, 3 *THE ROME STATUTE: OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 4 (Antonio Casesse et al, eds., 2002), *available at* [http://www.un.org/law/icc/statute/english/rome\\_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf) [hereinafter Rome Statute].

is not one of them.)<sup>11</sup>

The ICC has jurisdiction only over crimes committed after the entry of force of the statute, i.e., at the earliest, July, 2002. The ICC covers a narrow range of international crimes, those that are traditionally considered as crimes against the international community: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>12</sup> The rest of my discussion, however, will exclude aggression. Aggression is an undefined crime under the Rome Statute. Because the negotiators of the treaty could not agree on a definition of aggression, there is merely a place-holder for this crime until a provision is adopted<sup>13</sup> (perhaps at the seven-year review conference in 2009).<sup>14</sup>

Although the ICC was created to establish “jurisdiction over the most serious crimes of concern to the international community as a whole,”<sup>15</sup> the ICC does not establish universal jurisdiction. It is complementary to national criminal jurisdictions. The ICC must defer to state jurisdiction over alleged crimes, unless the state is unwilling or unable to genuinely investigate or prosecute.<sup>16</sup>

The Office of the Prosecutor of the ICC is formally investigating three “situations.” States self-referred two situations: Uganda and the Democratic Republic of Congo (DRC). The United Nations Security Council referred the third situation: Darfur, Sudan.<sup>17</sup>

In Northern Uganda, the government has been fighting the rebel group, the Lord’s Republican Army (LRA), since the mid-1980s. The LRA has kidnapped and brutalized an estimated 20,000 children to serve as soldiers or sex slaves. Other children

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11. See International Criminal Court, The States Parties to the Rome Statute, <http://www.icc-cpi.int/asp/statesparties.html> (last visited Feb. 27, 2007). U.S. objections include the ICC’s potential for invading state sovereignty and politicized targeting of U.S. nationals.

12. Rome Statute, *supra* note 10, art. 5, at 4.

13. *Id.*

14. Rome Statute, *supra* note 10, art. 123, at 63.

15. Rome Statute, *supra* note 10, Preamble, at 3.

16. Rome Statute, *supra* note 10, art. 17, at 11-12.

17. International Criminal Court, Situations and Cases, <http://www.icc-cpi.int/cases.html> (last visited Feb. 27, 2007). See Rome Statute, *supra* note 10, art. 11-17, 53, at 11, 28 (dealing with the jurisdiction of the court and admissibility of situations).

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have become “night commuters”—forced to flee their villages every night to avoid abduction. There are currently almost a million people displaced due to the conflict. Alleged abuses include summary executions, torture and mutilation, recruitment of child soldiers, child sexual abuse, rape, forcible displacement, and looting and destruction of civilian property. These acts may constitute war crimes, crimes against humanity, or even genocide.<sup>18</sup> While the main perpetrators are members of the LRA, there are accusations of war crimes and other violations against the Ugandan government.<sup>19</sup>

In the DRC, armed conflict (both international and noninternational) has raged since the 1990’s. Millions of civilians have died in this largely forgotten war. Reports of states and organizations allege that there have been thousands of deaths by mass murder and summary execution since 2002, when the ICC would have jurisdiction. These reports also allege widespread rape, torture, forced displacement, and use of child soldiers.<sup>20</sup>

In Darfur, Sudan, the death toll is rising every day despite the presence of African Union troops to supposedly keep the peace between the government and rebel groups. Over 1.5 million people have been internally displaced, with hundreds of thousands fleeing over the border into Chad. The government and its allied militias known as the Janjaweed (and to a lesser extent, rebel groups) have been accused of widespread atrocities. Government forces and militias allegedly conduct indiscriminate attacks against civilians, including mass killings, “torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur.”<sup>21</sup>

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18. For background information on the situation in Uganda, see International Criminal Court, Uganda, <http://www.icc-cpi.int/cases/UGD.html> (last visited Feb. 27, 2007).

19. See, e.g., TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD’S RESISTANCE ARMY 96-100 (1988) (discussing alleged bias of the prosecutor in favor of Ugandan government).

20. Press Release, International Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation, (June 23, 2004), [http://www.icc-cpi.int/pressrelease\\_details&id=26&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=26&l=en.html) (investigation into the Democratic Republic of Congo).

21. The International Commission of Inquiry, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, ¶

The victims of these situations are entitled to a remedy under international law. Specifically, international human rights law generally recognizes a right to a remedy for victims, including:

- Restitution (restoring victim to original position in terms of property, liberty, employment, etc);
- Compensation (for physical or emotional harm, lost opportunities and earnings, harm to reputation, costs for legal or expert assistance, and the like);
- Rehabilitation (medical and psychological care as well as legal and social services);
- Satisfaction (cessation of violations, truth telling, official recognition, and apology); and
- Guarantees of nonrepetition (measures to prevent reoccurrence of violations).<sup>22</sup>

The ICC statute provides that the Court establish principles for reparations to victims, including restitution, compensation, and rehabilitation.<sup>23</sup> The term “victims” includes natural persons who have suffered harm from any crime within the jurisdiction of the Court.<sup>24</sup> Because certain war crimes are usually directed at legal persons,<sup>25</sup> “victims” also includes organizations or institutions that have sustained direct harm to property like a

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8, *delivered to the Secretary-General* (Jan. 25, 2005), [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf)

22. Amnesty International, *The International Criminal Court: Ensuring an Effective Role For Victims* (1999), <http://web.amnesty.org/library/index/engior400101999!opendocument&of=eng-385>; see also Jorda & Hamptinne, *supra* note 1, at 1402-03 (discussing international standards of the right to reparation such as the Basic Principles and Guidelines on the Right to Reparation for Victims of Violations of Human Rights and International Humanitarian Law and the Basic Principles of Justice for Victims of Crime and Abuse of Power).

23. Rome Statute, *supra* note 10, art. 75, at 42.

24. Rules of Procedure and Evidence, Rule 85, July 1, 2003, 3 THE ROME STATUTE: OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 101 (Antonio Casesse et al, eds., 2002), available at [http://www.un.org/law/icc/asp/1stsession/report/english/part\\_ii\\_a\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf) [hereinafter Rules of Procedure and Evidence].

25. See Dinah L. Shelton & Thordis Ingadottir, *The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Article 79) Part One* at 8 (1999), [http://www.pict-pecti.org/publications/PICT\\_articles/REPARATIONS.PDF](http://www.pict-pecti.org/publications/PICT_articles/REPARATIONS.PDF) (describing war crimes whose victims are usually legal persons such as religious institutions or museums).

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building used exclusively for religious purposes.<sup>26</sup>

While the ICC statute does not explicitly exclude traditionally recognized remedies such as satisfaction and nonrepetition, the ICC does not have jurisdiction over states. Therefore, official recognition or apology or other forms of state action are beyond its powers. Collective awards, however, may approximate such forms, as will be discussed below.<sup>27</sup>

The ICC offers two avenues of compensation for victims: payments from convicted defendants or awards from a trust fund for victims. There is an added wrinkle based on the structure of the ICC reparations system. The *Court* can make awards to individual victims against a convicted defendant, either directly or through the VTF. These awards would be funded primarily by fines and forfeitures of the convicted defendant. But the *VTF* can also award reparations based on “other resources” of the VTF, specifically, voluntary contributions to the fund. These voluntary contributions will be the most significant resource for the majority of victims.<sup>28</sup> I will first show that convicted defendants will not be a significant source of reparations. Second, I will explain the establishment of the VTF.

#### *A. Convicted Defendants – Fines & Forfeitures*

The court can order, in addition to imprisonment, a fine or forfeiture against the convicted defendant. Yet most defendants will not have deep pockets.<sup>29</sup> There will undoubtedly be some who amassed a great deal of money or property by looting the state, controlling the black market, trafficking in women, children, narcotics or arms, or other illegal means. But most of

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26. Rules of Procedure and Evidence, *supra* note 24, Rule 85, at 101.

27. *See infra*, Part IV.

28. *Cf.* Redress, *The International Criminal Court’s Trust Fund for Victims: Analysis and Options for the Development of Further Criteria for the Operation of the Trust Fund for Victims* 19-20 (2003), <http://www.redress.org/publications/TFVReport.pdf> (discussing voluntary contributions as most important source of income for general uses of Trust Fund).

29. *See, e.g.*, Jorda & Hamptinne, *supra* note 1, at 1415 (noting that perpetrators will rarely have financial capacity to compensate victims, based on prior experience of ad hoc international tribunals where most defendants could not afford a lawyer); Thordis Ingadottir, *The International Criminal Court: The Trust Fund for Victims: A Discussion Paper* 16 (2001), <http://www.vrwg.org/Publications/02/PICTTrustFundFeb2001.pdf>.

those assets will likely have been spent or well hidden by the time the defendant is turned over to the ICC. Moreover, defendants with assets will likely expend them on their defense. As a result, convicted defendants will not provide sufficient resources for reparations.

First, forfeiture of proceeds, property, and assets<sup>30</sup> of a defendant is only on the table if they are derived (directly or indirectly) from the crime of which the defendant has been convicted.<sup>31</sup> Even if states promptly and effectively give effect to a forfeiture under their national procedural law, bona fide third party rights must be respected.<sup>32</sup> This is, of course, assuming that any property or assets of a defendant remain after trial; Slobodan Milosevic's trial at the International Criminal Tribunal for the Former Yugoslavia, to give one extreme but perhaps prescient example, started in February 2002 and was still in the midst of the defense case when he died on March 11, 2006.<sup>33</sup>

Second, fines are also limited. Assuming that defendants are not able to claim indigency, few assets will remain upon conviction. Again, states must process the fines in accordance with national law.<sup>34</sup> Some states might be reluctant to do so; several states argued at the drafting stage of the statute that fines would not be enforceable.<sup>35</sup> Moreover, the Court must consider whether a fine is warranted on top of a prison sentence.<sup>36</sup> Some judges may agree with the objections made by some negotiators that fines are inappropriate for the core ICC crimes (genocide, war crimes, and crimes against humanity); these judges might be more comfortable restricting fines to procedural offenses, such

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30. See William A. Schabas, *Penalties, in 2 THE ROME STATUTE: OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, *supra* note 1, at 1516 (noting that the instrumentalities of crime were excluded, in part because they often belong to the state and could be enormous, for example, an aircraft carrier or military base).

31. Rome Statute, *supra* note 10, art. 77, at 43.

32. Rome Statute, *supra* note 10, art. 77, 109, at 43, 58.

33. See Marlise Simons & Gregory Crouch, *Death of Milosevic: The Former Leader; Milosevic is Found Dead in Cell, U.N. officials Say*, N.Y. TIMES, March 11, 2006, at A12.

34. Rome Statute, *supra* note 10, art. 109, at 58.

35. See Claus Kress & Goran Sluiter, *Fines and Forfeiture Orders*, in 2 THE ROME STATUTE: OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 1, at 1823, 1826-27.

36. See Rules of Procedure and Evidence, *supra* note 24, Rule 145, 146, at 121-23.



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as contempt or perjury.<sup>37</sup> Even if a fine is imposed, it is restricted. The Court must consider whether the crime was motivated by personal gain as well as the proportion of this gain to the harm inflicted. If the Court does impose a fine, it is capped at 75% of the defendant's identifiable assets and property—after deduction of the money needed to meet the financial needs of both the convicted defendant and his dependants.<sup>38</sup>

No fines can be imposed against states, even if the convicted defendant was acting on behalf of the state. The negotiators of the Rome Statute rejected proposals to impose any kind of responsibility (even financial) on states for their officials' actions.<sup>39</sup> Thus, forfeitures and fines against individual defendants are likely to yield little in the way of reparations for victims.

### *B. Victims Trust Fund*

The Rome Statute directs the Assembly of States Parties (ASP) to establish a trust fund “for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.”<sup>40</sup> The ASP needed to create both the VTF and its management criteria. In doing so, it had to tackle several questions: (1) Does the VTF have any role independent of Court-ordered reparations against convicted defendants?; (2) If so, where does the money come from for these independent efforts?; and (3) Who can be a beneficiary of these efforts—on an individual or collective basis?

The VTF has two main functions<sup>41</sup> under the Rome Statute

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37. See Schabas, *supra* note 30, at 1514.

38. Rules of Procedure and Evidence, *supra* 24, Rule 146, at 122-23.

39. See Amnesty International, *supra* note 22 (arguing that ICC Rules should require states to compensate victims of crimes committed by state agents when the individual agents are unable to do so, as required by international standards); Ingadottir, *supra* note 29, at 21 n.49 (discussing rejection of proposal to include state responsibility for reparations). States might still be responsible under international law, however. For example, the Inter-American Court of Human Rights has a particularly well-developed jurisprudence on reparations. See JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 230-290 (2003).

40. Rome Statute, *supra* note 10, art. 79, at 44.

41. Shelton & Ingadottir, *supra* note 25, at Trust Fund, Part II (discussing the trust fund as a depository versus an intermediary).

and Rules of Procedure and Evidence<sup>42</sup> of the ICC. First, it acts as a depository for the proceeds of fines and forfeitures when it is “impossible or impracticable” to immediately grant awards to individual victims.<sup>43</sup> Second, it acts as an intermediary if the Court determines that: (a) a collective award against a convicted defendant should be made through the VTF; or (b) an award against a convicted defendant should be made to an organization approved by the VTF.<sup>44</sup>

The Rules of Procedure and Evidence also provide that the VTF can use “other resources” for the benefit of victims.<sup>45</sup> The ASP could have interpreted these rules to mean that the awards against convicted defendants could be augmented by other resources. Instead, the ASP has chosen to give the VTF an independent role: providing support for the benefit of victims regardless of Court-ordered reparations.

### III. VICTIM REPARATIONS FROM “OTHER RESOURCES” OF THE VTF

First, some background on the VTF is necessary. The ASP created the fund during its first session in September 2002. Based on the reference to “other resources” for the VTF in the Rules, the ASP established a new funding mechanism. It opened the fund to voluntary contributions from “[g]overnments, international organizations, individuals, corporations and other entities in accordance with relevant criteria” to be adopted by the ASP.<sup>46</sup> The ASP finally adopted such criteria in its December 2005 session.

The ASP initially created a Board of Directors to oversee the VTF. Board duties include:

- Consulting with victims and their families as well as experts regarding potential projects;

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42. See generally Rules of Procedure and Evidence, *supra* note 24.

43. Rules of Procedure and Evidence, *supra* note 24, Rule 98, at 107; see also Rome Statute, *supra* note 10, art. 75(2) & 79(2), at 42, 44.

44. Rules of Procedure and Evidence, *supra* note 24, Rule 98, at 107.

45. *Id.*

46. International Criminal Court, Resolution ICC-ASP/1/Res.6 Establishment of a Fund for the Benefit of Victims of Crimes within the Jurisdiction of the Court, and of the Families of such Victims (September 9, 2002), [http://www.un.org/law/icc/asp/1stsession/report/english/part\\_iv\\_r\\_es\\_6\\_es\\_6.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_iv_r_es_6_es_6.pdf).

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- Establishing and directing the activities and projects of the VTF;
- Establishing and directing the allocation of property and money available to it; and
- Approving voluntary contributions in accordance with the goals of the VTF.<sup>47</sup>

The original members of the Board of Directors were: H.R.H. Queen Rania Al-Abdullah (Jordan); H.E. Dr. Oscar Arias Sanchez (Costa Rica); H.W. Mr. Tadeusz Mazowiecki (Poland); Madame the Minister Simone Veil (France); and H.G. Archbishop Emeritus Desmond Tutu (South Africa).<sup>48</sup> In response to the Board's urging, the ASP created a Secretariat for the VTF in 2004.<sup>49</sup> The Secretariat is the administrative arm of the VTF, a crucial addition given the tasks the Fund is facing—including approval of contributions, identification of victims, distribution of collective awards, and oversight of awards administered by organizations.<sup>50</sup> The Secretariat, with the Board, will also be responsible for the overall management of the VTF, including financial oversight.<sup>51</sup> To preserve voluntary

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47. *Id.*

48. Press Release, International Criminal Court, The Role of the Trust Fund for Victims and Its Relation with the Registry of the International Criminal Court, ICC Press Kit No.:pids.008.2004-EN (April 22, 2004), <http://www.icc-cpi.int/library/press/pressreleases/PIDS008.2004-EN.pdf>. Dr. Oscar Arias Sanchez resigned in September 2005 and was replaced by Former President Mr. Arthur Napoleon Raymond Robinson of Trinidad and Tobago. See International Criminal Court, Election of Mr. Arthur N.R. Robinson to the Board of Directors of the Victims Trust Fund (June 20, 2006), <http://www.icc-cpi.int/press/pressreleases/152.html>. After Queen Rania Al-Abdullah's resignation, the other four members were re-elected on November 30, 2006, with the selection of the fifth member deferred until the ASP's resumed session in January 2007. See Press Release, International Criminal Court, Assembly of States Parties elects four members of the Board of Directors of the Trust Fund for Victims (Nov. 30, 2006), <http://www.icc-cpi.int/press/pressreleases/213.html>.

49. International Criminal Court, Assembly of States Parties, ICC-ASP/3/25, Resolution ICC-ASP/3/Res.7, at 336 (Sept. 20, 2004), [http://www.icc-cpi.int/library/asp/ICC-ASP-3-25-Part\\_III\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-3-25-Part_III_English.pdf).

50. For a discussion of staffing requirements and proposed budget for the Secretariat, see International Criminal Court, Assembly of States Parties, ICC-ASP/4/12, Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the Period 16 July 2004 to 15 August 2005 at 5-10 (Sept. 29, 2005), [http://www.icc-cpi.int/library/asp/ICC-ASP-4-12\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-4-12_English.pdf) [hereinafter Assembly of State Parties].

51. See Redress, *supra* note 28, at 39 (discussing financial oversight and

contributions for victims, the Secretariat will be funded by the regular ICC budget.<sup>52</sup>

*A. Voluntary Contributions to the VTF*

As of January 22, 2007, the VTF had received voluntary contributions in the amount of EUR 2,370,000.<sup>53</sup> The bulk of the contributions recently have come from governments and organizations. Early on, however, contributions were almost exclusively from celebrities like Janeane Garofalo and organizations like Susan Sarandon's charitable foundation; only Namibia contributed in the early years.<sup>54</sup> More recently, Belgium, Finland, and France contributed at least EUR 100,000 each.<sup>55</sup>

The ASP adopted regulations for the VTF in December, 2005.<sup>56</sup> The provisions reflect the difficulties that can arise from voluntary contributions to a reparations fund. At first glance, it would seem that any contribution would be welcome to augment the resources and increase benefits to victims. But open-ended contributions can raise their own problems.

First is the question of earmarking: can a donor earmark funds for a certain class of victims? For example, can an anti-torture organization earmark a contribution exclusively for ICC victims who suffered torture as a predicate act to a war crime or crime against humanity? Similar questions have arisen in other contexts. For example, could a donor who wants to contribute to a fund for slavery reparations restrict the money to direct

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audit principles and practices); *id.* at 20-21 (discussing receipt and management of funds).

52. International Criminal Court, Resolution ICC-ASP-4-32-Res.3, Regulations of the Trust Fund for Victims, at ¶ 3 (Dec. 3, 2005), [http://www.icc-cpi.int/library/about/officialjournal/ICC-ASP-4-32-Res.3\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/ICC-ASP-4-32-Res.3_English.pdf).

53. International Criminal Court, Trust Fund for Victims, Situation of Contributions and Pledges to the Trust Fund for Victims as of 22 January 2007, <http://www.icc-cpi.int/vtf.html> (last visited Jan. 26, 2007).

54. International Criminal Court, Assembly of States Parties, ICC-ASP/3/14/Rev.1, Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims at Annex C (Aug. 26, 2004), <http://www.icc-cpi.int/library/asp/ICC-ASP-3-14-Rev.1-English.pdf>.

55. International Criminal Court, Assembly of States Parties, *supra* note 50.

56. See International Criminal Court, Resolution ICC-ASP-4-32-Res.3, *supra* note 52.

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descendents of slaves, perhaps in a certain geographical area? In addressing this issue, the ASP reached a compromise on earmarking in the regulations of the VTF. First, governments cannot earmark their contributions. Second, other donors can earmark up to a third of the contribution under certain conditions: it must benefit victims and their families; and it must not result in discrimination—for instance, on grounds of race, sex, language, religion, opinion, etc.—unless the targeted group already enjoys specific protection under international law.<sup>57</sup>

Moreover, the VTF Board shall refuse contributions that result in a manifestly inequitable distribution of available funds among different groups of victims.<sup>58</sup> So, for example, if many non-state donors earmarked a third of large donations for victims of rape in Darfur, those donations presumably might be refused if they swamp the amount of money available for other classes of victims. This might be the result if the two-thirds of the otherwise earmarked donations must be spread across not only victims of other crimes in Darfur but also several other situations within the jurisdiction of the Court. In this circumstance, the Board would notify the donor of the problem and encourage it to modify the earmarked contribution.<sup>59</sup>

Another question arises regarding the donors themselves – could one government effectively co-opt the VTF, and the ICC by extension, with a gigantic donation? Could an organization suspected of unsavory or illegal activities donate? For example, could a rebel group suspected of funding its activities by drug trafficking contribute and earmark part of its donation for members of the group who are victims of governmental war crimes? Could a group that discriminates against women donate with a restrictive earmark?

According to the regulations, the Board shall refuse a contribution that would “affect the independence” of the VTF.<sup>60</sup> Presumably, a particularly large donation from a government might be refused if it appeared to undermine the independence of the VTF, for example, if it were from a country whose officials are currently under investigation or sought for arrest by the

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57. *Id.* at ¶ 27.

58. *Id.* at ¶ 30(d).

59. *Id.* at ¶ 30(b).

60. *Id.* at ¶ 30(c).

Court. The Board will also reject contributions deemed inconsistent with the “goals and activities” of the VTF.<sup>61</sup> While there is a lot of room for interpretation of the “goals” of the VTF, it seems the Board would refuse contributions that would undermine the ICC purpose of rebuilding society after (or during) a conflict.<sup>62</sup> The Board must also verify sources of funds,<sup>63</sup> presumably to avoid accepting tainted money. The ASP has therefore reached a compromise on earmarking and laid out guidelines for accepting donations. There are many questions regarding how these donations reach victims, however, that are simply not answered by the regulations.

### *B. Identification of Victims*

Prior to attempting to identify eligible victims, the Board must be activated. The Board expected activation in 2006<sup>64</sup> and has received requests for assistance from alleged victims that have yet to be reviewed.<sup>65</sup> The first defendant did not appear before the Court until March 20, 2006.<sup>66</sup> The hearing for the confirmation of the charges against the defendant, Thomas Lubanga Dyilo, did not take place until November, 2006.<sup>67</sup> Therefore, the Board is unlikely to be dealing with reparations awarded against convicted defendants in the near future. There are two other possibilities:

- First, victims of situations within Uganda, Darfur, and the DRC might come forward seeking awards from voluntary contributions from the fund;
- Second, the Board might determine on its own initiative

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61. *Id.* at ¶ 30(a).

62. *See supra*, text accompanying footnotes 2-3.

63. International Criminal Court, Resolution ICC-ASP-4-32-Res.3, *supra* note 52, at ¶ 26.

64. International Criminal Court, Assembly of States Parties, ICC-ASP/4/12, *supra* note 50, at Annex A ¶ 5.

65. *See* International Criminal Court, Statements, Victims Trust Fund, Fifth Session of the Assembly of States Parties, Address by Simone Veil, Chair of the Board of Directors of the Trust Fund for Victims (Nov. 23, 2006), <http://www.icc-cpi.int/vtf/vsfstatements.html>.

66. *See* International Criminal Court, Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo (March 17, 2006), <http://www.icc-cpi.int/press/pressreleases/133.html>.

67. *See* International Criminal Court, Hearing Schedule and Transcripts, 29.01.2007-ICC-01/04-01/06, The Prosecutor v. Thomas Lubanga Dyilo, [http://www.icc-cpi.int/cases/Hearing\\_Schedule.html](http://www.icc-cpi.int/cases/Hearing_Schedule.html) (last visited Feb. 27, 2007).

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that it should provide rehabilitation or compensation for victims during the early stages of a case, subject to the veto of the Court.<sup>68</sup>

In either scenario, the Board would need to figure out who qualifies as a victim. This is complicated by the structure of the ICC.

The ICC reparations system effectively divides victims into two categories: those who happen to be victims of defendants selected for prosecution by the Court, and those who are victims of the same conflict or situation but whose tormentors are not before the Court. Direct awards against convicted defendants cover only those victims affected directly or indirectly “by the crimes committed by the convicted person.”<sup>69</sup> This is likely to be a small subset of the total number of victims. The remaining victims will have recourse only through the “other resources” of the VTF—i.e., voluntary contributions.<sup>70</sup>

Take the situation in Uganda, for example. First, the ICC can only prosecute for crimes since the entry into force of the statute: i.e., crimes committed after July 1, 2002. Second, the Office of the Prosecutor (OTP) will prosecute only those “who bear the greatest responsibility” for international crimes.<sup>71</sup> Arrest warrants have been issued against five members of the Lord’s Republican Army (LRA). The warrants allege many counts against each of the accused. Tony Kony, the leader of the LRA, is charged with 12 counts of crimes against humanity and

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68. International Criminal Court, Resolution ICC-ASP-4-32-Res.3, *supra* note 52, at ¶ 50.

69. *Id.* at ¶ 46.

70. Technically, other resources would include discretionary funding of the ASP. *See* International Criminal Court, Resolution ICC-ASP/1/Res.6, *supra* note 46, at ¶ 2(d). In reality, States Parties are already in arrears on their required assessments to the ASP, so the chances of additional funding being available for the Trust Fund are slim to none. *Cf.* International Criminal Court, Part III CBF Reports and Financial Statements for the Period of 23 November - 1 December 2006 [Advance Copy] at ¶ 12 (Dec. 13, 2006), [http://www.icc-cpi.int/library/asp/Part\\_III\\_D6InclE2\\_ADVANCE\\_COPY\\_13-12-06\\_English.pdf](http://www.icc-cpi.int/library/asp/Part_III_D6InclE2_ADVANCE_COPY_13-12-06_English.pdf) (noting that only 44% of states parties made timely payments as of April 2006 while only 30 states paid in full).

71. Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor* at 7 (Sept. 2003), [http://www.icc-cpi.int/library/organs/otp/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf) (“[A]s a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.”).

21 counts of war crimes. But it is likely that these counts stem from only a fraction of the many atrocities carried out by the LRA, even taking the truncated time-frame into account. The OTP has stated that he will pursue a “focused prosecutorial strategy”<sup>72</sup> aimed at avoiding long trials with laundry-list indictments that drag on for years. Thus, defendants will not necessarily be charged with all their crimes, excluding some victims from Court-ordered reparations. Third, the OTP has to date completely excluded victims of the Ugandan government. Although the OTP announced it would investigate all international crimes in Northern Uganda, including those allegedly committed by state actors,<sup>73</sup> the OTP has not sought arrest warrants for state actors (at least not publicly).

Those victims excluded from direct awards against the defendant will look to the VTF’s “other resources” for relief. This part of the VTF is not limited to victims of those prosecuted before the ICC. The VTF’s voluntary contributions can cover a broader group of victims: those persons and their families<sup>74</sup> who have suffered physical, psychological and/or material harm as a result of *any crime within the jurisdiction of the Court*.<sup>75</sup>

How does the Board determine who these victims are? Whether a crime within the jurisdiction of the Court has occurred? Whether the victims have suffered the right type or sufficient amount of harm? The regulations, strikingly, do not

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72. Cf. Victims’ Rights Working Group, *Comments on the Draft Regulations of the ICC Trust Fund for Victims* at 9 (Feb. 2005), [http://www.vrwg.org/Publications/01/VRWG\\_Feb2005.pdf](http://www.vrwg.org/Publications/01/VRWG_Feb2005.pdf) (citing the Prosecutor’s statement to the Third Session of the Assembly of States Parties).

73. International Criminal Court, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, ICC-02/04 at Annex 1 (July 5, 2004), [http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/Decision\\_on\\_Assignment\\_Uganda-OTP\\_Annex.pdf](http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/Decision_on_Assignment_Uganda-OTP_Annex.pdf) (explaining that OTP is analyzing all crimes within the situation of northern Uganda “by whomever committed”); see also International Criminal Court, Statement of the Prosecutor to Diplomatic Corps, The Hague, Netherlands (Feb. 12, 2004), [http://www.icc-cpi.int/library/organs/otp/LOM\\_20040212\\_En.pdf](http://www.icc-cpi.int/library/organs/otp/LOM_20040212_En.pdf) (assuring audience that OTP’s investigation will cover all crimes within Northern Uganda); ALLEN, *supra* note 19, at 96-97.

74. Interesting issues might arise from cultural differences in the definition of “family,” but such questions are beyond the scope of this essay.

75. See Rome Statute, *supra* note 10, art. 77, at 43; Rules of Procedure and Evidence, *supra* note 24, Rule 85, at 101; International Criminal Court, Resolution ICC-ASP-4-32-Res.3, *supra* note 52, at ¶ 48 (emphasis added).



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answer these questions. By contrast, they cover (albeit in a vague manner) how to identify victims who should be awarded direct reparations from the convicted defendant. Because the regulations are silent as to victim eligibility for the use of other resources from the VTF, we must look elsewhere: to the Rome Statute on crimes within the jurisdiction of the Court; to the VTF regulations regarding awards made by the Court; and to the mechanisms used by the first Pre-Trial Chamber to determine victim status for the purposes of victim *participation* in the investigation of the situation within the DRC.

### *1. Crimes within the Jurisdiction of the Court*

It is unlikely that the ASP expects the VTF's other resources to compensate victims of *any* crime that the Board determines to be within the jurisdiction of the Court. For example, there are simply too many potential war crimes for the VTF to cover them all regardless of any prior connection to the ICC.<sup>76</sup> It is more likely that the situation in question must be before the ICC in some manner.

For instance, the Statute requires the OTP to determine whether there is a reasonable basis to initiate an investigation of a certain situation based on a state referral, such as the situation in the DRC or Uganda, or a referral by the Security Council, as in Darfur.<sup>77</sup> A recent decision of a Pre-Trial Chamber of the Court adopted this approach.<sup>78</sup> Similarly, if the OTP begins an investigation on its own initiative, a Pre-Trial Chamber must authorize it.<sup>79</sup> Therefore, the Board could decide there is a "crime within the jurisdiction of the Court" based on prior

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76. See Victims' Rights Working Group, *Submission to the Second Meeting of the Bureau's Working Group on Regulations of the Trust Fund for Victims, 3-4 August 2005* at 4-5 (July 2005), <http://www.vrwg.org/Publications/01/VRWG%20Jui05%20Postion%20ENG.pdf> [hereinafter *Submission*] (arguing against unrealistic and overly ambitious mandate for Trust Fund that would cover any and all victims of ICC crimes regardless of link to the Court); see also International Criminal Court, Assembly of States Parties, Report of the Bureau on the draft Regulations of the Trust Fund for Victims at ¶ 51(c) (Nov. 21, 2005), [http://www.icc-cpi.int/library/asp/ICC-ASP-4-29\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-4-29_English.pdf) (suggesting deletion of provision that would allow the Trust Fund to provide aid where a situation is not being investigated due to complementarity or the interests of justice).

77. Rome Statute, *supra* note 10, art. 53, at 28.

78. See *infra*, Part III.B.2.

79. Rome Statute, *supra* note 10, art. 15, at 11.

determinations by the OTP and/or a Pre-Trial Chamber regarding the situation in a particular region or state.<sup>80</sup>

The regulations support this interpretation. They give the Board the power to consider the VTF “seized” or activated during the investigative stage of a particular situation.<sup>81</sup> If the Board deems it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families within that situation, it must formally notify the Court. It apparently must outline the type of activity or project to be carried out based on “other resources” of the VTF. The Court must confirm that the activity does not pre-determine any issues with regard to admissibility, jurisdiction, innocence or the rights of the accused.<sup>82</sup> Thus, whether a certain situation encompasses “crimes within the jurisdiction of the Court” can be determined by the Board with reference to the preliminary determinations of other organs of the ICC.<sup>83</sup> This brings us to the next determination: who should be considered victims of these crimes?

## 2. “Victims” of Crimes within the Jurisdiction of the Court

Once the VTF has been activated by the Board or by a Court order of reparations, the VTF must do outreach, particularly to outline the basis for its determination and to

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80. See Victims’ Rights Working Group, *Submission*, *supra* note 76, at 5 (advocating for OTP’s ‘reasonable basis’ determination to be the trigger for Trust Fund assistance).

81. International Criminal Court, Resolution ICC-ASP-4-32-Res.3, *supra* note 52, at ¶ 50.

82. *Id.*

83. It could be argued that this position has already been rejected by the ASP because it did not adopt a proposed regulation that specifically referred to the OTP or PTC determination. See International Criminal Court, ICC-ASP/3/14/Rev.1, *supra* note 54, at ¶ 51, 53. It seems more plausible, however, that the focus shifted from what would trigger pre-conviction Trust Fund activity to how to ensure such activities do not interfere with the Court’s work—while maintaining the Trust Fund’s independence. See Coalition for the International Criminal Court, CICC Report on the Fourth Session of the Assembly of States Parties November 28 – December 3, 2005 at ¶ 40–43 (January 28, 2006), <http://www.iccnw.org/documents/CICCASP4FinalReport.pdf>. The approved regulations set out steps for the Board to take that give the Court the opportunity to block incompatible activities without requiring the Board to ask the Court for approval. See International Criminal Court, Resolution ICC-ASP-4-32-Res.3, *supra* note 52, at ¶ 50(a)(ii-iii).

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solicit voluntary contributions.<sup>84</sup> Presumably this outreach would include notice to victims, although this is not required outside the context of awards against convicted defendants.<sup>85</sup>

The regulations establish guidelines for dealing with potential recipients of an award against a convicted defendant. Similar procedures would likely be applied to other VTF activities for victims. If the Court orders an award through the VTF, the Secretariat of the fund must prepare a draft plan for the nature and size of the reparations awards based on the crimes, injuries and supporting evidence, and the size and location of the group of victims.<sup>86</sup> If the Court has identified each victim, the Secretariat will specify the beneficiaries and methods of disbursement.<sup>87</sup> If the Court has not identified the beneficiaries, the Secretariat should list options for doing so, including the use of demographic or statistical data.<sup>88</sup> Options should also include outreach—assisted by interested states and organizations—to potential victims.<sup>89</sup>

Again, these regulations relate to awards against specific defendants. But these steps would likely be taken in the event the Board takes the initiative to cover the broader class of victims, particularly prior to conviction of a defendant within a certain situation. Yet, note how vague these steps are—who exactly qualifies as a victim?

Victims who want to apply to the Court for a direct award of reparations against a convicted defendant must prove eligibility. A request for reparations must include:

- Description of the injury, loss, or harm, with supporting evidence where possible;
- Location and date of the incident and, if possible, identity

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84. International Criminal Court, Resolution ICC-ASP-4-32-Res.3, *supra* note 52, at ¶ 51-53.

85. See Rules of Procedure and Evidence, *supra* note 24, Rule 95, at 106 (requiring notice to potential victims when Court intends to proceed on its own initiative to consider an award of reparation against a convicted defendant); Rules of Procedure and Evidence, *supra* note 24, Rule 96 (publication of reparation proceedings by the Court).

86. International Criminal Court, Resolution ICC-ASP-4-32-Res.3, *supra* note 52, at ¶ 54-55.

87. *Id.* at ¶ 59.

88. *Id.* at ¶ 60-61.

89. *Id.* at ¶ 61.

of the perpetrator(s); and

- Claims for restitution (including description of property or assets sought), compensation, rehabilitation and other forms of remedy.<sup>90</sup>

Similar paperwork would likely be required of victims seeking reparation from the VTF's other resources for crimes within the jurisdiction of the Court that are not prosecuted. These requirements, however, do not explain how to assess the harm, the standard of proof, or the amount or type of remedy. A recent decision of one Pre-Trial Chamber can shed light on the first two questions.

Pre-Trial Chamber I (the PTC), assigned to the situation in the Democratic Republic of Congo, has approved the application of several victims to participate in the proceedings, over the objections of the Prosecutor that victim participation is premature at the investigatory stage.<sup>91</sup> The PTC considered four criteria for the victims under Rule 85(a), covering natural persons: (1) are they natural persons?; (2) have they suffered harm?; (3) do the crimes fall within the jurisdiction of the Court?; and (4) is there a causal link between these crimes and the harm suffered?<sup>92</sup>

The PTC first found the victims to be natural, not legal, persons.<sup>93</sup> This would obviously be an easy determination for the VTF Board to make. Second, the PTC found that the victims had sufficiently shown harm. Harm includes physical injury, emotional suffering including harm to moral integrity, and economic loss including loss of property.<sup>94</sup> The PTC determined that a single instance of harm would suffice, and a definite determination is not required.<sup>95</sup> Likewise, the VTF Board should take a broad view of harm. Third, the PTC relied on the referral of the situation by the DRC and the prosecutor's initiation of an investigation to find that the victims had shown

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90. Rules of Procedure and Evidence, *supra* note 24, Rule 94, at 105-06.

91. International Criminal Court, ICC-01/04, Pre-Trial Chamber I, Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS5 and VPRS 6 (Jan. 23, 2004) (on file with author).

92. *Id.* at ¶ 79.

93. *Id.* at ¶ 80.

94. *Id.* at ¶ 81-82.

95. *Id.* at ¶ 81-82.

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crimes that fall within the jurisdiction of the court.<sup>96</sup> Similarly, the VTF Board can rely on the OTP's initiation of investigation as discussed above. Finally, the PTC held that a causal link is shown where there are grounds to believe the harm suffered is the result of the crimes, without requiring a precise determination of the perpetrator.<sup>97</sup>

The PTC's broad interpretation of "victim," similar to that discussed above, requires only that the crime be allegedly committed within the temporal and territorial limits of a previously recognized situation. Similarly, the Board of the VTF would likely require that victims show they have suffered physical, emotional, or economic harm linked to crimes committed after July 1, 2002<sup>98</sup> that fall within the Court's jurisdiction.

Regarding the burden of proof, the PTC determined the required threshold was low—merely "grounds to believe" at the investigative stage.<sup>99</sup> How would the Board determine whether this burden is met? The PTC suggests a comparison between the victim's account and official U.N. reports.<sup>100</sup> Similarly, the Board should look to U.N. and other reports as well as experts or expert organizations.<sup>101</sup>

The VTF Board would likely follow these examples and take an expansive approach to identification of eligible victims for reparations through voluntary contributions to the VTF. This broad interpretation leads to two potential problems: so-called "unworthy" victims and scarce resources.

### 3. "Unworthy" Victims

The ICC system of reparations has not yet tackled the problem of unworthy victims—victims seen as undeserving of reparations, or at least certain types of reparation. This can come up in many contexts. For example, a wealthy landowner might have been harmed by the looting or burning of property,

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96. *Id.* at ¶ 110-184.

97. *Id.* at ¶ 94.

98. The ICC statute would also have to have entered into force for that particular state party. *See* Rome Statute, *supra* note 10, art. 126, at 64.

99. International Criminal Court, ICC-01/04, *supra* note 86, at ¶ 98.

100. *Id.* at ¶ 101.

101. International Criminal Court, Resolution ICC-ASP-4-32-Res.3, *supra* note 52, at ¶ 49.

but still maintain a standard of living far above other victims.<sup>102</sup>

The ICC has not faced the issue of whether need should be a criteria for reparations, particularly compensation. And it might well face an even thornier problem: victims might also be perpetrators. For example, the LRA in Uganda is currently made up, at least in part, of those who were kidnapped and coerced into joining, often at a very young age.<sup>103</sup> They are victims, but they are also victimizers. They are exempt from the jurisdiction of the ICC for crimes committed before eighteen years of age.<sup>104</sup> Should they be allowed to benefit as victims under the VTF's broad "other resources" mechanism? Such traumatized child soldiers desperately need psychological counseling and reintegration into society. But the victims of LRA child soldiers, and their families, might be understandably appalled to see the VTF devote scarce resources to those with blood on their hands.

#### 4. Scarce Resources

Assuming the Board and Secretariat of the VTF identify the victims of crimes under the jurisdiction of the Court, what next? Should the VTF attempt individual or collective awards? Monetary compensation or social projects? Infrastructure or education? Physical rehabilitation or psychological counseling? Memorials or hospitals? Or some combination thereof?

The situation in the DRC illustrates the enormity of the victim population. The OTP objected to the participation of victims at the investigatory stage because of the large numbers of potential victims. The OTP noted that due to the "massive scale of alleged criminality in the DRC" tens of thousands—if not hundreds of thousands—of individuals would qualify as victims of crimes within the jurisdiction of the Court.<sup>105</sup> The number

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102. With regard to U.S. reparations for slavery, a similar problem might arise if victims are broadly conceived to include Blacks, all of whom are assumed to suffer the after-effects of slavery—does a very successful Black celebrity like Oprah Winfrey need reparations, or in particular, monetary compensation? If the VTF addresses this issue in the future, its experience might be useful should reparations for slavery go forward.

103. See ALLEN, *supra* note 19, at 60-65 (questioning conventional wisdom the LRA is largely made up of abductees, based on lack of data to support commonly used assertion that LRA is 85% abducted children).

104. Rome Statute, *supra* note 10, art. 26, at 16.

105. International Criminal Court, ICC-01/04, *supra* note 86, at ¶ 5.

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would be much higher if there were no temporal limitations—it is estimated that several million have died as a direct or indirect result of the conflict within the DRC. Even if we choose a lower estimate—100,000 victims including family members—the average monetary compensation might work out to about \$30 each. This is assuming the VTF were to spend almost all of its existing contributions on only one of the three situations currently before the ICC. Even with robust and consistent contributions over the long-term, direct cash payments will not fully compensate all victims for their harm. Surely even those who suffered the least would value their physical and emotional suffering at more than \$30, even in an incredibly poor country. Although individual awards do not have to take the form of monetary compensation, that seems to be the most likely form of individual award from the VTF. Regardless, individual awards would be based, at bottom, on monetary resources—even if they were distributed in the form of material goods or other mechanisms.

Assuming there is sufficient money available to compensate victims in one situation, there are other complications. Ongoing harm and long-term payouts to this class of victims would have to be balanced against other potential claimants. The regulations also provide that the VTF Board should consider using voluntary contributions to augment court-ordered awards against convicted defendants with insufficient means.<sup>106</sup> The Board would have to consider criteria for priority of payments (such as need, type of harm, type of victim) as well as installment payments (such as pro rata payments until more funding becomes available).<sup>107</sup> Thus, individual monetary awards are

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106. International Criminal Court, Resolution ICC-ASP-4-32-Res.3, *supra* note 52, at ¶ 56 (empowering Board to decide whether to complement individual awards with “other resources” and providing Board should manage resources accordingly).

107. *See* Shelton & Ingadottir, *supra* note 25, at Part Two, n. 16-18 and accompanying text; *see also* Redress, *supra* note 28, at 37-39 (discussing methods of disbursing of awards by other funds such as tiered and phased systems). Amnesty International has proposed that the Board prioritize rehabilitation expenses for children and victims of torture. *See* Amnesty International, *supra* note 22, at Part IV B. Amnesty International also suggests the Board should not worry about the level of assets within the Trust Fund when making monetary awards, on the theory that contributions will increase as awards are made. *Id.* This author disagrees and considers this contrary to the need to manage expectations to avoid possible disillusionment with the

likely to be unsatisfactory.

#### IV. COLLECTIVE AWARDS

Due to the sheer numbers of victims likely to exist in any situation giving rise to jurisdiction by the ICC, collective awards should be favored for reparations using “other resources” of the VTF. Indeed, the Court already has the authority to determine that collective awards are more appropriate even for awards against a convicted person. In particular, the Court can choose a collective award to be made through the VTF based on the number of victims as well as “the scope, forms and modalities of reparations.”<sup>108</sup> Thus, collective awards are generally a preferred mechanism to deal with large numbers of victims.<sup>109</sup>

Collective awards seem better-suited to achieving restorative justice than individual awards. First, restorative justice is tied to the society as a whole; collective reparations might facilitate social healing more effectively than individual awards. Second, collective awards might draw more heavily on victim input. The process of developing community priorities based on victims’ needs can be part of the healing process. Collective awards might also benefit the broader society and promote reconciliation between victims and other groups. For example, a memorial or museum to commemorate the victims of atrocities might not only recognize and legitimate the suffering of victims, but also educate others. It might contribute to understanding and discourage divisions across various groups in a way that individual awards are unlikely to do.

This is not to say, however, that individual awards cannot achieve justice—including restorative justice. The VTF could adopt a blend of individual and collective awards for the “other resources” mechanism. Such an approach would provide flexibility and tailoring to each situation. But it might also breed confusion regarding the two types of awards and the recipients of each. As a practical matter, it might be difficult to sustain such a hybrid system requiring administration of both an

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ICC, as discussed *infra*.

108. Rules of Procedure and Evidence, *supra* note 24, Rule 98, at 107.

109. Even with collective awards, oversight, transparency, and efficiency will be crucial to preserve the resources of the Trust Fund. *See generally* Redress, *supra* note 28 (discussing management criteria based on best practices and experience of similar reparations bodies).



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individualized assessment system and collective projects. On balance, it seems collective awards should be favored.

Collective awards can have other advantages as well. Collective awards can reach unidentified victims, particularly those who are unlikely to claim reparations through an individualized award system due to social circumstances or economic situation.<sup>110</sup> Collective assistance can maximize funding by pooling resources and establishing economies of scale, while avoiding the drain of an individualized assessment system.<sup>111</sup> Collective assistance can also take advantage of existing programs and organizations. For example, other U.N. funds provide assistance through existing humanitarian organizations.<sup>112</sup> The VTF is already empowered to seek and approve intergovernmental, international, or national organizations to administer a court-ordered award against a convicted defendant.<sup>113</sup> It should build on such programs and complement, rather than duplicate, current efforts. In addition, such cooperation might help provide for long-term assistance that would be beyond the scope of the VTF's resources.<sup>114</sup>

Collective awards can also avoid many of the dangers of individualized awards. In any reparations scheme, there is the risk that an individualized award system will “disaggregate” victims.<sup>115</sup> First, if victims must prove harm, the neediest victims might be shut out of the system.<sup>116</sup> “Wealthier, better educated, urban victims” tend to have the first and best chance to access the system; they are more likely to have the resources and ability to articulate claims of harm.<sup>117</sup> Second, individual assessments necessarily mean awards of different magnitudes, “undermining an important egalitarian concern and resulting in a hierarchy of victims.”<sup>118</sup> Finally, an individualized approach can divide victims because it requires valuing the loss to individuals.<sup>119</sup> For

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110. Ingadottir, *supra* note 29, at 27.

111. *Id.*

112. *Id.* at 28.

113. Rules of Procedure and Evidence, *supra* note 24, Rule 98, at 106.

114. *See* Redress, *supra* note 28, at 34-35.

115. Wierda & Greiff, *supra* note 7, at 6.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

instance, if loss of employment is considered, some individuals' lost livelihoods will necessarily be valued more highly than others. This can be misinterpreted as valuing some people more highly than others.

In addition, in the context of the ICC, collective awards are less likely to be seen as interfering with the Court's activities. If the VTF provides collective assistance, it cannot be seen as taking a position on the merits of a case against a particular defendant<sup>120</sup> or prejudging the Court's determination on individual claims for reparations from a convicted defendant. Similarly, it could not be accused of inducing individuals to cooperate with the OTP (or to lie) to gain individual awards from voluntary contributions to the VTF.<sup>121</sup>

The type of victims before the ICC might also favor collective awards. Collective awards can be particularly appropriate reparations for crimes involving a perpetrator's desire to wipe out a group or community, as in a crime of genocide.<sup>122</sup> Symbolic reparations can help enable the group to live on, at least in memory.<sup>123</sup> Some symbolic measures that the VTF could accomplish without state support include annual tributes or the building of monuments or museums.<sup>124</sup> Other symbolic measures such as truth-telling or an official apology would require the participation of the state; similarly, state or local governments would have to approve "memory" reparations like official declarations rehabilitating victims or naming roads after them.<sup>125</sup> While the state has no legal responsibility under the Rome Statute, even for the actions of its agents,<sup>126</sup> it might feel a moral responsibility.<sup>127</sup> State support for VTF activities might be forthcoming where the crimes were committed under a previous government,<sup>128</sup> particularly if the new leadership is from

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120. Victims' Rights Working Group, *The Draft Regulations for the Trust Fund for Victims: Questions and Answers* ¶ 8 (2005), <http://www.vrwg.org/Publications/01/VRWG%20Jul05%20TVF%20Q&A%20ENG.pdf>.

121. Victims' Rights Working Group, *supra* note 72, at 11.

122. Jorda & Hamptinne, *supra* note 1, at 1410.

123. *Id.*

124. *Id.*

125. See Wierda & Greiff, *supra* note 7, at 11; *cf.* Jorda & Hamptinne, *supra* note 1, at 1410.

126. See *supra* note 39 and accompanying text.

127. Ingadottir, *supra* note 29, at 21.

128. *Id.* at 28.

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the victimized group. In such circumstances, symbolic reparations such as truth-telling and prevention of future occurrences via state reforms might be achieved by cooperation between the state and the VTF.

Other types of collective assistance would vary based on the needs of victims and the resources available. For example, the VTF might facilitate traditional reconciliation ceremonies in Northern Uganda. Several groups representing victims in Northern Uganda, particularly from the Acholi tribe, objected to the prosecution of LRA leaders. They argued that traditional methods should be used instead.<sup>129</sup> Because only five LRA members have been charged by the ICC, many perpetrators remain. The VTF could bring together villages displaced by LRA attacks; it could literally create the space for perpetrators to perform traditional ceremonies of repentance and reconciliation with the victims. Other possible programs might include community-wide medical assistance training programs, which would benefit victims as well as the community as a whole. Similarly, resources might go to the establishment of orphanages, which would not necessarily be restricted to victims, if warranted by the circumstances.<sup>130</sup> Other possible projects would include schools, job training, community centers, and other activities aimed at rebuilding the society.

Despite the promise of collective awards there are, of course, problems as well. The most significant might be human nature: some victims may not feel vindicated without individual awards. Some might expect reparations to come in the form of a check—as in the Japanese American reparations. More recently, however, there has been a movement toward recognition that collective awards are beneficial. In the campaign for reparations for slavery in the United States, for instance, there has been a change in demands. It started with the broken promise of 40 acres and a mule. In the 1990s, it was a demand for “40 acres & a Lexus.” Now, the reparations sought include group reparations such as economic empowerment and education projects to benefit the broader community.<sup>131</sup>

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129. See ALLEN, *supra* note 19, at 129-38 (discussing not necessarily representative view that Acholi prefer alternative justice mechanisms).

130. Ingadottir, *supra* note 29, at 28.

131. See, e.g., Theodore Kornweibel, *Reparations and Railroads*, 29 T. JEFFERSON L. REV. (forthcoming 2007) (manuscript at 13, on file with author)

Nonetheless, it is possible that some victims will not feel satisfied even if collective reparations are crafted to include individual recognition. But this is simply the reality of reparations: even with unlimited funds, there is no way to truly make victims whole again. In sum, although collective awards are not a panacea, the Secretariat and Board of the VTF should consider making collective awards the preferred method of distribution for voluntary contributions to the VTF.

Particularly if collective awards are used, the VTF should attempt to manage expectations of potential recipients. Victims must be aware of the limited nature of reparations under the ICC and educated as to the positive attributes of collective awards. Direct awards against those prosecuted will cover only a fraction of the total number of victims (assuming that the defendants have assets in the first place). The VTF, while covering a broader class of victims, will not have the resources to fully remedy the harms inflicted by massive international crimes. The legitimacy of the ICC will be undermined if victims see reparations as a false promise. Outreach<sup>132</sup> must include—from day one—the message that many victims will receive symbolic recognition of their suffering, and perhaps an opportunity to benefit from collective measures such as a new school or hospital. Outreach should also include efforts to educate recipients about the benefits of symbolic and collective reparations. Victims should understand the aims of collective awards in relation to reconciliation. Victims might embrace collective projects if they feel they contribute to healing and lay the foundation for a better, more peaceful future for all.

Outreach must shape the types of collective projects undertaken by the VTF. The VTF should consult victims about their needs and priorities. Victims are more likely to “buy in” to the VTF projects if they feel they had a voice in the decision-

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(“Wisely-administered restitution investments in health care, education, and social services, targeting the “bottom stuck,” would be good not only for those particular Black Americans, but for all Americans.”).

132. For a general description of current outreach by the Victims Participation and Reparations Section of the Registry, including materials to “help to manage expectations among victims, to indicate further sources of support and assistance, to address questions and to clear up misconceptions,” see International Criminal Court, Assembly of States Parties, ICC-ASP/3/21, Report on Participation of and Reparations to Victims, ¶ 5 (Aug. 25, 2004), <http://www.icc-cpi.int/library/asp/ICC-ASP-3-21-English.pdf>.

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making process.<sup>133</sup> The outreach effort should enlist the assistance of local organizations to publicize the VTF process, much as the Court can do with regard to reparation proceedings against a convicted defendant.<sup>134</sup> Various methods of publicity should be utilized, keeping in mind the low literacy levels of many victims.<sup>135</sup> With effective outreach leading to victim-driven symbolic and other collective reparations, the VTF could make a lasting contribution despite its inevitable limitations.

## V. CONCLUSION

“The acknowledgement of the rights of victims and the inclusion of a central restorative mandate are key achievements of the Rome Statute . . . . Reparation impacts not only on the individual victim, but on his or her family and community and the wider societies affected by contributing to the rebuilding of war-torn societies, by advancing truth and by acknowledging the gravity of the crimes committed.”<sup>136</sup> For many victims, the only realistic avenue for reparations is through the voluntary contributions to the VTF. The “other resources” of the VTF might contribute toward restorative justice to supplement retributive justice achieved through the prosecution and conviction of those most responsible for international crimes. If the VTF properly manages expectations and brings victims into the process of creating collective awards, it can aid the healing process for victims—and societies—torn apart as a result of genocide, war crimes, and crimes against humanity.

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133. *Cf.* Wierda & Greiff, *supra* note 7, at 11 (discussing using time between conviction and reparations proceedings to give victims realistic sense of outcome and engage them in how they would like to see available resources used).

134. Rules of Procedure and Evidence, *supra* note 24, Rule 96, at 106.

135. Redress, *supra* note 28, at 15 (discussing claims gathering process in the Swiss Banks settlement).

136. *Id.* at 1.

