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Victim's Issues, Multi-Track Diplomacy and the International Criminal Court

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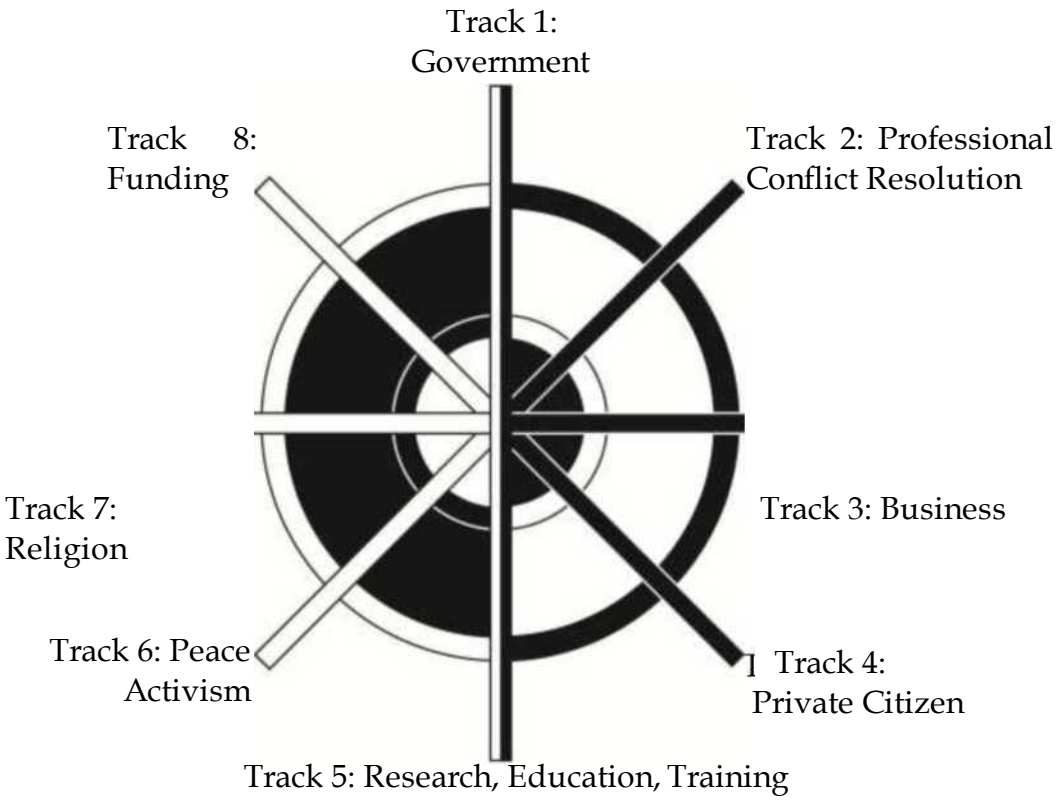

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Reconciliation should be accompanied by justice, otherwise it will not last. While we all hope for peace it shouldn't be peace at any cost but peace based on principle, on justice.

Corazon Aquino

Nothing has plagued the modern era so much as has the question of how to deal with the perpetrators of mass atrocities. Through highly-publicized Nuremberg and Tokyo trials, the world vowed 'never again' to allow militarism and crimes against humanity go unchecked. And yet, the international community has failed to prevent new atrocities from occurring in Europe, Africa, Asia, and South America.

The International Court of Justice and the United Nations were established in 1945 as forums for nations to resolve disputes peacefully and to allow the rule of law to become the paradigm by which grievances between nations were to be settled.

Recent history in Rwanda, Uganda, Cambodia and Yugoslavia has shown us that the international rule of law alone is not sufficient to deter those that would commit atrocities on a mass scale. International mechanisms for justice, dating back to Nuremberg, have always been constrained by time, money, and political will to try only the most visible offenses and often the worst offenders. In some cases, such as Rwanda, this has required that parallel national and traditional mechanisms for justice be instituted.

Advances in global support for universal acceptance of human rights and human dignity have resulted in a greater acknowledgement of the rights and needs of individuals to participate in justice, and a greater political will for nations to seek assistance in providing justice to their citizens. Sierra Leone, Timor-Leste, Liberia and Cambodia have asked for and received international support for trials to address crimes against segments of their respective populations.

The International Criminal Court represents an important step forward from the International Court of Justice in the administration of international justice. Unlike the ICJ, where nations had sole legal standing, individuals are able to indict the worst perpetrators for their crimes.

On April 11, 2002 ten countries -- Bosnia-Herzegovina, Bulgaria, Cambodia, Democratic the Democratic Republic of Congo, Ireland, Jordan, Mongolia, Niger, Romania, and Slovakia -- submitted ratifications, bringing the number of States' Parties to 66.

Having surpassed the required number of 60 signatories, and in accordance with its terms, the Rome Statute of the International Criminal Court entered into force on 1 July 2002. Three years later, there are 103 signatories to the statute, with another 40 countries awaiting ratification. Notably, the United States has not yet ratified the Rome Treaty.

The ICC will focus on the worst crimes and the worst offenders. It will be a Court of last resort, intervening where national courts are unwilling or unable to administer justice within a nation's borders. It will only deal with the gravest of offenses against human life and dignity: crimes against humanity, war crimes, genocide and eventually, aggression (a definition will not likely be forthcoming before the Rome Review Conference in 2009)

Like preceding institutions, the ICC will be limited in its scope to signatory countries and to events that occurred after its entry into force. It will not be, as some have charged, an unchecked institution but will rather work with existing bodies to accomplish its clearly defined mandate as it has in working with the United Nations Security Council on the crisis in the Darfur region of Sudan.

Global political will has reached a tipping point in how justice is administered within and across national boundaries. The idea that states would willingly cede judicial sovereignty to an international body in order to prosecute crimes against humanity within their borders seemed like an elusive dream twenty years ago. But as the cases demonstrate, some nations are willing to cede some measure of sovereignty in the pursuits of peace and justice.

The International Criminal Court creates a forum for the voices of individual and groups to be heard at the international level, and most importantly, allows them a mechanism to receive reparations and redress from their transgressors. As such, it is unlike any previous justice mechanism created by the international community.

The cases before the ICC are important to establishing confidence in the Court, as will its ability to continue the positive momentum created by countries joining the Court. It is vital that we as a global community begin to discuss the intersection of mass trauma, victims, and international justice at the early stages in order to understand how we, as a global community, can better promote reconciliation, trauma healing, and a more secure, sustainable future for all

Ambassador John W. McDonald
Chairman

November 20, 2006

Introduction

On March 17 2006, Thomas Lumbanga Dyilo earned a dubious place in history as the first person to be brought to The Hague in the Netherlands to stand trial before the International Criminal Court (ICC). He has been charged with war

crimes stemming from the alleged recruitment of child soldiers into the Union of Congolese Patriots (UPC), an armed militia that operates in Ituri, in the northeastern part of The Democratic Republic of the Congo (DRC). Mr. Dyilo's transfer also marked the end of a tumultuous week in The Hague.

The death of the most infamous face of the international criminal tribunal era, Slobodan Milosevic, on March 11, 2006 reminded the world again of the complexities of international justice: Despite the efforts of the International Criminal Tribunal for the former Yugoslavia (ICTY) over the past five years, he died without a verdict being handed down. While there is a sense that some of his alleged victims[1] and some members of the international community have gained a measure of finality from his death, there is a far larger sense that an opportunity for justice has been lost, and that there can never be finality for some victims. The sense of loss reflected in the statements felt by some alleged victims[2] underscores one of the major difficulties in international criminal justice systems which the ICC has attempted to address: the integration of alleged victims and victims' issues more fully into the judicial process to allow for their active participation in the process of trial.

Perspectives on victims' rights have been incorporated in the Court's mandates with regards to victim participation and victim compensation, but the difficult task of reconciling all perspectives is not yet complete, nor is there yet a concrete sense of how and when victims should be involved, how they will be compensated, and how inclusive either effort should be given the size of potentially affected populations.

Perspectives that have influenced, and that continue to influence, the Court's organization and its inclusion and compensation processes include:

1) the amalgamation of varying legal traditions

2) the influence of non-legalistic (i.e. adversarial and punitive) conceptions of justice through the inclusion of external parties such as non-governmental organizations and associations

3) best practices and experiential lessons from predecessor institutions that have impacted conceptions of the needs of victims, which have led to the expansion in the rights and roles envisioned for victims in the

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[1] **There will be some that take exception to the use of 'alleged victims' in this context. The author has used the term to reflect the fact that Milosevic died without the verdict in his case - it should not be construed to reflect partisan leanings of any kind in the case. The term 'alleged victims' is used subsequently as a general term to refer to persons who are considered victims for purposes of trial, but for whom a verdict may not have yet been handed down.**

[2] **"In quotes: Milosevic death" BBC News UK - 12 March, 2006 Accessed online May 8, 2006 at: http://news.bbc.co.uk/1/hi/world/europe/4796704.stm**

processes of the International Criminal Court.

The participation of alleged victims in international and national criminal trials is a complex issue that has inspired debate within the international legal community. This debate has been spurred by a growing trend towards the inclusion of victims' issues within national legal systems in America and Europe in the past 20 years.[3] The ICC represents an evolution in the way in which victims are allowed to access and participate in the functions of the court, allowing for the most expansive role for victims in international tribunal history. Issues surrounding victim involvement and victims' rights with which the Court must contend include: the assignation of 'victim' status; the designation to represent a victim community; the extent of alleged victims' involvement in the trial; victim security and defense need for disclosure; and the timing and extent of victim compensation.

While there is agreement between the various bodies of the ICC over the need for an infrastructure that deals directly with victims' issues, there seems to be far less agreement among the different bodies of the ICC concerning the involvement of victims in all stages of the trial process, particularly at the investigatory stage.[4]

The importance of the ICC's treatment of victims and victim's issues cannot be stressed enough, given that the application of its mandates will determine perceptions and evaluations of the Court's efficacy. Like previous international criminal tribunals in Rwanda and Yugoslavia, the Court may provide the example and standard by which future national and international criminal justice systems are compared and created.

The Court's mandates with regards to victims create unique opportunities to chart a new course in the creation of sustainable peace in the countries in which the Court investigates and prosecutes. The promotion of ***multi-track diplomacy*** among stakeholders to a Court process has the potential to contribute more substantially to long-term generative efforts than funding through the Court can realistically provide. Private citizens, religious and business communities, media, conflict resolution practitioners, non-governmental organizations, advocates and

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[3] Maguire, M. (1991): pg. 364. Accessed online May 8, 2006 through JSTOR

[4] See "Situation on the Democratic Republic of Congo: Public Documents" International Criminal Court Accessed May 8, 2006. The following documents were contemporaneously reviewed: "Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision Of 17 January 2006 On The Applications For Participation In The Proceedings Of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 And VPRS 6"; "Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (with Annex)"; "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6"

activists, and the academic community have a potential role to in expanding the important but limited resources provided by the Court to create peace.

The purpose of this paper is to outline the unique, expansive role of victims and victims' issues as enshrined within the mandates of the Court. Furthermore, this paper seeks to inform the larger community of practitioners in the field of human rights, international law, and conflict resolution of trends in the potential further development of victims' roles within the ICC trial process and in conceptions of international judicial responsibility to victims, emphasizing the role that multi-track diplomacy can play in addressing victims' issues in an international context.

Multi-Track Diplomacy

Joseph Montville (1981) outlined the distinction between official, governmental actions to resolve conflicts (Track I) and unofficial efforts by non-governmental professionals to resolve conflicts within and between states (Track II).[5]

Track II diplomacy was further refined by Louise Diamond as ***multi-track diplomacy*** to promote a more nuanced recognition of the complexity and breadth of unofficial diplomatic efforts. John W. McDonald further expanded second-track diplomacy into four separate tracks: conflict resolution professionals, business, private citizens, and the media. In collaboration with Louise Diamond, John McDonald later expanded his five-track model to nine tracks: government; professional conflict resolution practitioners; the business community; private citizens; research, training and education efforts; activism; religious institutions; funding sources; and public discourse.[6]

Multi-track diplomacy is characterized by a collaborative ethic across traditional sector boundaries. It is best represented by a network of non-governmental entities able to engage communities without the limitations often experienced in the Track I (official diplomatic) international system.

Multi-track diplomacy offers the best recourse to address these limitations. The ability to be aware of and yet not be beholden to political considerations empowers multi-track diplomatic efforts to take greater financial and political risk. In addition, multi-track diplomacy potentially contributes to sustainable peace-building and development efforts without compromising the necessary relationships that form the foundation of Track I efforts.

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[5] **Davidson, W. and Montville, J:**

[6] **The Institute for Multi-Track Diplomacy, (1992) For a full review of multi-track diplomacy, see Diamond & McDonald (1996)** ***Multi-Track Diplomacy:*** **A** ***Systems Approach to Peace:*** **Kumarian Press**

Despite the best efforts of State Parties[7] to limit the politicizing of the Court, past experience with tribunals and international ***realpolitik*** implies that the ICC will be subject to political decision-making. The ICC, like previous international tribunals, will have limits imposed by the structure of the Court and the funding levels provided by its State Parties. These limitations are a direct result of and impacted by Track I considerations. The impact of these Track I limitations on the needs and interests of victims can only be assessed in light of the unique role that victims have been afforded in functions and operations of the Court through the Rome Statute.

The potential applicability of multi-track diplomacy to the Court should be assessed within the larger context provided by the lessons learned and best practices of the ICC's predecessor courts, such as the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).

Limits on Victims' Narratives and Reconciliation within the ICTY and ICTR

As Romano (1997) notes, both the ICTY and the ICTR are subsidiary organs of the Security Council within the meaning of Article 29 of the UN Charter. As such they are dependent in administrative and financial matters on various United Nations organs. However, as judicial institutions they are independent of any one State or group of States, including their parent body, the Security Council. Romano also explains how the pre-existence of the ICTY at the time of the creation of the ICTR influenced the establishment of statues that governed the ICTR. What is more, UN oversight can have a limiting effect on the timeline of the tribunals. Since both tribunals are ad hoc in nature, the life span of each is linked to the restoration and maintenance of international peace and security in the territories of former Yugoslavia and Rwanda. A decision as to what constitutes international peace and security is left to the discretion of the UN. Once the Security Council decides that 'peace and security have been reestablished' in each respective country it is obligated by the terms of the mandate of each tribunal to defer the initiation and investigation of new cases.[8]

Galabru (2006) explains that the institutional orientation of the ICTY and ICTR precluded the involvement of multi-track efforts within the trial structure of the tribunals. The ICTY and ICTR were developed within a retributive justice framework wherein national reconciliation was a secondary purpose. Nonetheless, the ICTR and ICTY aimed to provide reconciliation by giving victims a sense of justice by claiming that the main perpetrators of the crimes would be

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[7] ***States Parties*** **refers to those countries that have signed and ratified the Rome Statute, and are members of the Assembly of States' Parties**

[8] **Romano, pg. 8**

punished.[9]

The role of witnesses and victims in the ICTY and ICTR was limited to giving testimonies that were clearly linked to the prosecutions at hand. Galabru relates that witnesses were mystified when directed by judges not to tell their stories, or when much of their personal experience was dismissed as irrelevant.[10]

In the case or Rwanda, where culpability rested with such a large portion of the population, it soon became apparent that the ICTR would only be able to handle cases involving allegations against the most senior facilitators of the genocide. The overwhelming need for victims to have a voice against Rwandan ***genocidaires*** led to the passing of the Organic Law of 1996, which allowed for the creation of the customary ***gacaca*** courts which have proven instrumental in addressing the high volume of potential cases to be heard.

Gacaca Courts involve a community process wherein alleged victims, the community, and the accused are brought together in a process that "not only aim at the punishment of infringements but it does also aim at the re-establishment of concord and at making the simple citizens who have been manipulated and have perpetrated the crimes to take a good start again."[11]

While ***gacaca*** courts may have been cathartic for many of the victims, they were not designed with the intention of rebuilding Rwandan society to the extent necessary after a society rose up to kill 800,000 people in the space of three months. Nor were the ***gacaca*** courts equipped to deal with the trauma of perpetrators and victims returning to their homes to live side by side.

The ***gacaca*** courts provide one example of how individuals found culpable under community justice systems can be held responsible to the larger community for their transgressions. Previous international tribunals and legal frameworks have traditionally left the responsibility of repairing relationships and rebuilding societies to state and non-state actors. Non-governmental organizations have stepped in to help rebuild societies when governments have or cannot.

Lessons Learned from Multi-Track Interventions in the former Yugoslavia

Gagnon (2002) discusses the impact that international NGOs that are working toward the broad goal of building civil society in Bosnia-Herzegovina have had independent of the ICTY. He outlines a typology of four kinds of strategies that they employ in encouraging structural change in Bosnian civil

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[9] **Galabru, pg. 155**

[10] **Ibid**

[11] **"National Service of Gacaca Jurisdictions" Accessed online May 30, 2006**

society. NGOs are trying to directly change the political structures and institutions of postwar Bosnia-Herzegovina by building political parties, conducting civic education, building local non-political-party-affiliated NGO capacity, and using reconstruction and development to strengthen community and civil society.[12]

Gagnon suggests that the most effective international NGOs are those that see their work as a two-way process, wherein the international agencies help local NGOs to determine their priorities, and personnel of the international agencies see locals as equal partners. He has found that the most effective strategies are those that integrate concrete projects and an inclusive decisionmaking process to build community and civil society locally. An integrative strategy allows local actors, communities, and NGOs to determine priorities, projects, and directions.

Gagnon asserts that these efforts are important for international NGOs that are seeking to strengthen local actors and networks as participants in civil society. International NGOs which focus on "nonpolitical" elements such as housing, infrastructure repair, and economic revitalization [rather than on formal politics] help create alternative sources of stable employment and resources in post-conflict societies, thereby lessening the economic dominance of existing political parties and power structures. Gagnon further outlines that strategies that combine construction projects and the local community's participation in identifying and executing them contribute in crucial ways to rebuilding communities and civil society.

The growth in both prominence and influence of nongovernmental, multi-track actors has supplemented has had a direct impact on the perceived responsibility of both states and the international system to address the needs of victims.

How Legal Frameworks Differ: Definition of Victims for Purposes of ICC Trials

The ICC has benefited from the experiences of its predecessors, the ICTY and the ICTR, in assessing the identity and needs of victims. Inherent in its definition of victims is a broader recognition of transnational non-governmental organizations, cultural institutions, and community structures that expands on the prior narrow focus of victim status as either government, ethnic, or religious groups.

The ICC has also inherited some of the tensions found within different processes of international justice that must often be negotiated and reconciled when implementing international criminal justice. These tensions are due to different conceptions of legal practice. Moreover, legal practice can be further complicated by non-state legal structures and traditions that can be said to exist in

[12] **Gagnon, pg. 207-209**

parallel or separate from national (state-directed) courts.

In assessing the role of legal tradition on conceptions of international procedure, Schuon (2005) has grouped legal traditions into systems having common characteristics that are based on "their historical development, systematics, ideological background and other criteria." Schuon argues that though multiple systems exist (including Islamic, Far East, and socialist systems), Western jurisprudence is dominated by two systems: civil and common law. Common law traditions and systems are found within many countries that share an anglophile history: the US, UK and British Commonwealth countries such as Australia and India. Civil law traditions and systems are found in countries that can be said to share a continental European history: France, Germany, and Spain. While Schuon agrees that there are several rationales for employing alternate taxonomies of legal systems for comparative research, she rejects them for the compelling reason that . .it is this gulf between common law and civil law that constantly produces dispute and lack of understanding among practitioners."[13]

The ICC has tended to favor civil law systems of justice in the drafting of the Rome Statute and the Rules of Procedure and Evidence -which directly impact how trials are conducted. The participatory rules for victims have been drafted along the principles of the civil system:
rather than being represented solely by the prosecutor (as is the case in the American system), victims are able to secure a legal representative of their own choosing.

It is important to note the reciprocal impact the Court has had on national systems of justice. Accession to the ICC has been accompanied by a further refinement of national law for two reasons. The first is that the Statute requires that laws meet minimum standards of cooperation and legal reciprocity in order for the Court to be able to exercise jurisdiction. Article 88 of the Statute requires States to have provisions within national law for all forms of cooperation with the ICC. The second reason that compels States to strengthen both national law and its supporting institutions is the issue of complementarity, and the desire for many of the States' Parties to minimize the criticism of national jurisdiction that might lead to pre-emption by the Court.

The net result of the amalgamation of these various legal traditions within the Court has been the creation of an expansion category of 'victim'. Victims are afforded unprecedented representative rights under international statute that are reflected in how the Court addresses the most

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[13] **Schuon, Christine (2005) "Trends in the Development of International Criminal Procedure" Unpublished academic paper: pg.5. The author may be contacted at: ChristineSchuon@gmx.de**

salient issues to victims within the trial framework: participation and reparations.

Victim Representation and the International Criminal Court

Stahn, Olasolo, and Gibson (2005) assert that the expansive role afforded to victims by the ICC is a direct result in legal traditions found in many of the States that were involved in the drafting of the Rome Statute. They mention France, for example, where the Code of Criminal Procedure allows for victims' participation in criminal proceedings as a civil party, and affords victims specific participatory rights, such as the right to put questions directly to the defendant and witnesses.[14]

Stahn, Olasolo, and Gibson also discuss Spain's legal system, which recognizes the right of victims to participate in criminal proceedings as a prosecutor, allowing victims to participate with full prosecutorial rights. They acknowledge that other jurisdictions allow victims to serve as a 'subsidiary prosecutor' and submit evidence, suggest questions to be posed to witnesses and the defendant, and comment on statements and evidence submitted in the proceedings. Even in legal systems where the victim does not have such prosecutorial rights, Stahn, Olasolo, and Gibson explain that victims are able to participate in criminal proceedings through the submission of a victim impact statement, or a victim statement of opinion. This mode of victim participation is used in the United States, Canada, Israel, New Zealand, Ireland and parts of Australia. Such an expansive role is unprecedented in an international context, however.[15]

Institutionally, the ICC has taken up victims' inclusion in the trial process through the creation of two bodies that oversee the needs of victims at every stage of the trial: the Office of Public Counsel for Victims (OPCV) and the Victims' Participation and Reparation Section (VPRS).

The Office of Public Counsel for Victims (OPCV) provides support and assistance to the legal representatives of victims and to victims participating in the proceedings.[16]

Under regulation 81 of the Regulations of the Court:, the Office provides legal research and advice to victims and their legal representatives at all stages of the proceedings in accordance with the Rome Statute, the Rules of Procedure and

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[14] **Stahn, Olasolo, and Gibson (2006): pg. 220-221**
[15] **ibid**
[16] **"Office of Public Counsel for Victims" The International Criminal Court. Accessed online November 1, 2006**

Evidence, the Regulations of the Court and the Regulations of the Registry. The Office also appears before a Chamber in respect of specific issues, when required.

The Victims' Participation and Reparation Section is responsible for assisting victims with the organization of their legal representation before the Court. When a victim or a group of victims does not have the means to pay for a shared legal representative appointed by the Court, they may request financial aid from the Court to pay counsel. Counsel may participate in the proceedings before the Court by filing submissions and attending the hearings.[17].

A third body within the ICC that deals with victims is the Victims and Witnesses Unit (VWU) is the office within the Registry charged with the protection of witnesses during the course of a trial. The establishment of such a body reflects the important recognition that the vulnerability of witnesses does not end with the capture of suspected perpetrators, and may in fact, increase. The Rules of Procedure and Evidence set out by the Court outline the functions of the Victims and Witnesses Unit, which is responsible for ensuring "the protection and security of all witnesses and victims that appear before the Court through appropriate measures and establish short and long-term plans for their

[17] **"Victims and Witnesses" The International Criminal Court Accessed online May 8, 2006**

protection." The VWU may also provide victims who appear before the Court, as well as witnesses with medical and psychological care.[18]

The issue of protection allows for victim empowerment through participation in the process. However, psychosocial hurdles usually arise during the course of witness preparation, particularly when one considers the potential trauma for a victim of facing the person who may have become the emotive locus for victims' feelings of fear, anger, vulnerability, and loss. The Court says that it will attempt to provide for some of these concerns by allowing remote victim testimony via closed-circuit television, visual and auditory distortion to protect witnesses' identities, and by expunging witness identities from records.[19]

There are allowances for the involvement of victims at multiple stages in the investigation and trial stages, in some cases before the identification of a suspect, or even before the initiation of an investigation of a situation.[20]

Article 15(3) and Rules 50(1) and (3), 92(2) and 107(5) allow for the involvement of victims before the initiation of an investigation. Article 19 allows for the involvement of victims at the stage where a 'case' has been brought before the Court. Article 61 provides for the participation of victims at the stage of the confirmation of the charges. Finally, Article 68(3) does not prescribe a time frame within which victims are able to be involved in the proceedings.[21]

Victims' Counsel assigned through the OPCV are mandated to meet the standards outlined for defense counsel in Article 22 of the RPE:

A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise.

The mandate for professionally qualified counsel is intended to protect and promote the involvement of victim's perspectives in trial. Rule 90 provides that when a large number of victims in a particular case exist, the discretionary powers of the Chamber may come into force to restrict the victims to a single representative. There is some concern that Rule 90 of the RPE will create

[18] Ibid
[19] **RPE 87-88**
[20] **Stahn, Olasolo, and Gibson (2006) pg. 225**
[21] **ibid**

difficulties in selecting legal representation as it grants the Court the power to restrict groups of alleged victims to a single representative in the Case.

There is still some confusion as to the role the OPCV will play with regards to representation. The Victim's Rights Working Group (VRWG) of the Coalition for the International Criminal Court (CICC) has expressed concern over the lack of clarity in the proposed functions of the OPCV and particularly, whether and to what extent it will represent victims in proceedings before the Court, stating that . .it is not clear that the OPCV has the mandate to represent victims or groups of victims. Regulation 81of the Regulations of the Court suggests that staff of the office will undertake subsidiary functions and will not act as legal representatives for victims ***per se,*** yet Regulation 80(2) of these same regulations provide that "the Chamber may appoint counsel from the office of public counsel for victims"[21].

Walleyn (2004) asserts that the issue of selection is made more complex by the fact that ".war crimes and crimes against humanity are mass acts by nature, and there are often numerous victims. If too many people attempt to appear before the Court, the efficiency of proceedings would be affected. [the selection of a victims' legal representative] could prove to be a delicate exercise. Indeed, the victims of a specific crime do not necessarily all have the same interests. They may be divided along political, ethnic or religious lines, and the Court and Registrar will have to take account of such differences when imposing a common representative."[22]

Despite the potential issues in selecting representatives, legal representatives for victims enjoy wider latitudes of freedom in accessing and being involved directly in the trial than previously granted in prior international tribunals and courts[23]. In both the Statute and the RPE, victims' legal representatives are entitled to participate directly in Court hearings under the supervision and control of the judges of the relevant Chamber. Procedures to allow representatives to make timely interventions on behalf of the victims are outlined in Rules 91 and 93, including the possibility of making opening and closing statements and posing questions to witnesses.[24] Perhaps the most important addition to the interactions between the judges and the victims' representation (and by extension, alleged victims) is contained in Rule 93 wherein:

A Chamber may seek the views of victims or their legal

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[21] VRWG (2006) "Fostering Dialogue", pg 3 Accessed online May 9, 2006

[22] Walleyn, 2004

[23] Rules of Procedure and Evidence (hereafter referred to as the RPE) 22 (1); 89(4); 90(1-2) The International Criminal Court Accessed online May 9, 2006

[24] "Victim Participation at the International Criminal Court: Summary of Issues and Recommendations" Victims Rights Working Group of the Coalition for the International Criminal Court (2003) (Hereafter referred to as VRWG) Accessed May 9, 2006

representatives participating pursuant to rules 89 to 91 on any issue, *inter alia*, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139 and 191. In addition, a Chamber may seek the views of other victims, as appropriate.

The Rule, in principle, outlines a procedure by which the Chamber judges themselves may proactively seek out victims' perspectives through their representative, allowing unprecedented access and influence for victims in international judicial decision making.

As the Victims Rights Working Group has noted, the Statute and Rules of Procedure and Evidence do not outline an exact timeframe when victims may apply to participate in proceedings. Furthermore, the stages at which alleged victims may elect to participate will vary; hence it is conceivable that victims will indicate a desire to participate at a very early stage, even before the Prosecutor seeks authorization from the Pre-Trial Chamber to initiate an investigation. Victims may also apply to the Court at much more advanced stages, for instance, after a formal indictment, or when the reparations phase is announced.[25]

The lack of mechanisms governing a timeframe for representation can already be observed in the ICC's first case. Luis Moreno Ocampo, the Chief Prosecutor of the ICC, has in the case of Mr. Dyilo, tried to limit the role of victims' counsel during the investigatory phase. He has appealed the decision allowing victims' inclusion at multiple points in the investigatory phase, reflecting broader concerns surrounding the perceived impartiality of the investigation process when victims are highly involved; at present the decision is still under appeal.[26]

NGO Perspectives in the Discourse of International Criminal Justice and the ICC

The Court's expansive view on victims' rights and needs with regards to representation has been influenced by the perspectives of non-governmental organizations (NGOs). In fact, NGOs have been given unprecedented access and influence in the construction of the ICC through involvement in the Victims' Rights Working Group (VRWG) of the Coalition for the International Criminal Court (CICC)[27].

The CICC occupies an expansive role in the ICC; it directly advises and actively participates in the formulation of ICC policy through an advisory role that it assumes during meetings of the Assembly of States' Parties (ASP). The inclusion of the CICC into policy planning can be viewed as the culmination of a

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[25] **"Victim Participation" VRWG (2003): pg. 10-11**
[26] **See *supra* note 4**
[27] **"Our History" Coalition for the International Criminal Court (Hereafter referred to as CICC) Accessed online May 8, 2006**

decades-long trend in external (non-judicial, non-governmental) evaluation of international and transnational criminal justice efforts in the post-Nuremberg era. The expansive role allotted to the CICC reflects a growing acknowledgment by national governments as to both the capability and role of non-governmental actors to inform governmental actors that are often removed from the conflict and the conditions on the ground.

The inclusion of the perspectives of the CICC in the international criminal justice processes has led to the inclusion and direct involvement of victims and victims' perspectives in cases involving mass atrocities. This is a marked progression in the discourse surrounding forms of justice in the Nuremberg and Tokyo trials where governments, not victims, were the parties represented.

Kritz (2002) outlines the vital role that NGOs have assumed in changing the discourse on transnational and international criminal justice since 1975. He states that "the emergence of nongovernmental human rights organizations like Amnesty International, Human Rights Watch and others made the massive abuses of repressive regimes a focus of international attention and pressure and enabled the advocacy of human rights from within, often contributing to the erosion of these regimes' hold on power."[28]

Kritz further argues that human rights organizations in particular had a tremendous impact in changing the way that government actors viewed and conducted processes of national and international justice by framing approaches to justice in terms of legitimacy, promoting and establishing norms of human rights, and increasing transparency in justice processes. Kritz states that[29]:

> **Put simply, the methods employed to deal with alleged perpetrators and collaborators in much of post-World War II Europe would not be defensible when scrutinized by the human rights standards in effect at the end of the century. The excesses of post-war France's "Great Purge," for example, included summary executions, torture and humiliation of alleged collaborators. By the 1980s, regional and international human rights bodies which had pressed for an end to past abuses would not turn a blind eye to a new round of abuses committed in the name of justice and accountability.**

In practice, the CICC has continued the trend of advocating for higher participation by alleged victims in the processes with the stated belief that higher participation will allow some of them the opportunity for a cathartic transformation of their loss. The VRWG continues to act as an advocate on behalf of victims for the highest degree of inclusion into the process.

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[28] **Kritz, N. (2002) pg.24**
[29] **Ibid**

The perspectives of NGOs will continue to influence how victims interact with the Court, not only in the framing of victims' rights, but within the investigation phase as well. Human Rights First (an NGO member of the CICC) has stated that[30]:

> **NGOs are capable of providing valuable assistance to the ICC Prosecutor. They often have on-the-ground knowledge and direct contact with victims, and may have established relations of trust with victim communities and other civil society groups, including religious groups, unions and other institutions. Human rights NGOs may also be in a good position to provide a broad picture of the context in which violations take place and present a pattern of the events.**
>
> **NGOs may have been able to document violations soon after their occurrence, perhaps before people scatter or evidence is lost. Indeed, NGOs are one of the main sources that draw the attention of the ICC Office of the Prosecutor (OTP) to situations where crimes under the Rome Statute may have been committed in the first place.**
>
> **Already, NGOs around the world are asking how they file information with the ICC, and the ICC has received hundreds of communications from these and other civil society actors.**

This would suggest that NGOs constitute a vital link in providing information to the Prosecutor regarding the pool of available victims, and more fundamentally, as a source of information on violations of the Rome Statute that the Office of the Chief Prosecutor may access in making determinations of who are the victims within a conflict. It is conceivable that, under the guidelines set out in the Rome Statute, NGOs will serve as a resource to the Chambers in making determinations on another important victims' issue: reparations.

Reparations, Victims, and the ICC

Traditionally, reparations to victims have not been part of the normative discourse of international tribunals. States have often been more concerned with prosecuting offenses than compensating victims of atrocities. When the assets of ex-Serbian President, Slobodan Milosevic, for example, were forfeited in Switzerland in June 1999, no victim was entitled to compensation from these funds under the ICTY guidelines.

The ICC represents an important step forward from its predecessors in the recognition of the need for reparations to victims. Once the ICC has completed a

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[30] **"The Role of Human Rights NGOs in Relation to ICC Investigations" CICC website: Accessed online May 11, 2006**

trial and a verdict has been handed down, any awarded compensation and reparation is handed institutionally within the ICC through the Victims' Trust Fund (VTF). Reparations are facilitated by the Victims Participation and Reparations Section (VPRS). The VPRS has focused its primary efforts on developing short- and medium-term projects aimed at improving the capacity of the Court to support the rights of victims as set forth in the Rome Statute and the Rules of Procedure and Evidence. Capacity-building has taken the form of meetings that have been organized at Court level and an inter-organ working group which has been set up with the intention of "allowing constructive exchanges of views and contributing to consensus -building."[31]

The procedure for and scope of reparations established by the Court has been influenced by experiential lessons from the ICTY and ICTR[32] and conceptions of necessary reparations advocated by non-governmental and States' Parties to varying degrees.

Article 75 outlines that the Court shall establish principles relating to reparations to victims, including restitution, compensation and rehabilitation[33]. Article 75 also states that the Court may determine the scope and extent of damage, loss and injury to, or in respect of victims, either upon request or on its own motion.

The procedure for seeking reparations is outlined in the RPE. Rule 94 states that a victim shall request reparations in writing and file with the Registrar. Rule 94 further outlines the necessary elements of such a request. The Registrar is obligated at the commencement of trial to notify those named in the request or identified in charges and any interested persons or states that may also seek reparations. On notification, victims may make representations to the Court under Article 75.[34]

If the Court decides to act ***propio motu,*** the Registry notifies those against whom Court is considering making a determination - victims, interested persons or states. Those notified may again make representations under Article 75. The Court is also mandated to notify victims or their legal representatives of reparation proceedings "insofar as practicable and take all necessary measures to give adequate publicity to reparation proceedings to other victims, interested persons or states" In so doing, the Registrar may seek cooperation of States and

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[31] "Report on participation of and reparations to victims" (October, 16 2004) Assembly of States' Parties. Accessed online May 12, 2006

[32] Taylor, L. "Thoughts on victims' reparation and the role of the Office of the Prosecutor". ICC Website: Accessed May 12, 2006

[33] Rome Statute Article 75(1)

[34] RPE 94(1-2), Rome Statute 75(3)

intergovernmental organizations.[35]

In acknowledging that there are a variety of ways and levels that reparations can be distributed and implemented, the Court has evolved the concept of reparations beyond simple monetary allotment. Moreover, the Court has indicated a willingness to use the Victims Trust Fund to create systemic and transformative changes in the lives of victims while still retaining the option, in theory, of individual compensation.[36]

There may, however, be practical limits to the manner and degree to which reparations are distributed to victims. These limits are acknowledged within the Rules of Procedure and Evidence. Rule 98 outlines that the Court may order that reparations be deposited with the Victims' Trust Fund for forwarding to victims, if it is impossible or impractical to award each victim directly. Furthermore, the Court may order an award to be made through the Trust Fund where the number of victims and the scope, forms and modalities of reparations makes a collective award more appropriate.[37]

In some cases, the Court may order an award to be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund. Other resources of the Trust Fund may be used for the benefit of victims within limits set out by the Assembly of States' Parties in accordance with Article 79 of the Rome Statute.[38]

The VRWG has raised several issues with regards to reparations and victims' rights. One of the issues that they indicate involves the timing of the seizure of assets. The Court may be faced with is the freezing of assets with a view to victims' reparations. The VRWG stresses that both the Office of the Prosecutor and victims' legal representatives may apply to the Court for such an order with an eye towards securing assets. They raise further concerns given some of the ambiguity in the Rules regarding the role of the Court in overseeing the enforcement of reparations awards and in providing assistance to beneficiaries when there has been a failure to enforce an order of the Court.[39]

It is interesting to note that while there seems to be some disagreement among members of the Assembly of States' Parties as to when victim

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[35] **RPE 95 & 96**

[36] **An important addition to international Tribunal law involving victims' reparations can be found in Rule 97. Under Rule 97, the Court may award reparations on an individualized basis, a collective basis or both. Under Rule 97, the Court may, at the request of victims, their legal representatives, the convicted person or on its own motion, appoint experts to assist in determining the scope or extent of damage, loss or injury, and to suggest options concerning the *appropriate types and modalities of reparations* (emphasis added)**

[37] **RPE 98 (1-3)**

[38] **RPE 98(4); Article 79 of the Rome Statute**

[39] **VRWG (2003) pp. 11-12**

compensation should begin[40], the VRWG has come out strongly on the side of delayed (post-conviction) compensation, stating that "The Trust Fund should not provide assistance to victims appearing before the International Criminal Court until the Court has decided whether or not to convict the accused."[41]

Carla Ferstman, Legal Director of REDRESS, has outlined potential issues that may arise as a result of competing or resultant claims within national Courts. She asserts that . .it is not evident how national courts will deal with competing claims for assets, or how they will assign priorities to adjudicate between these claims. For instance, it is plausible and likely that in the trial of major leaders or government figures, the state in the jurisdiction where the crimes occurred will have a competing claim against the perpetrator for corruption or misappropriation of state funds, or other economic crimes."[42]

She further outlines the need for national courts to begin to take up the task of creating guidelines to deal with domestic claims brought by additional corporate creditors or victims who have not applied for reparations through the ICC and whose claims will need to be addressed by national courts. There are also issues on jurisdictional complementarity with regards to victims' claims: Ferstman states that "jurisdictions will have pre-existing rules on related matters, though they may not be sufficiently precise or appropriate, nor will they necessarily give priority to the orders emanating from the Court. International conventions and agreements have also been developed to address some of these problems, but they may not deal with all possible eventualities."[43]

Some States have taken steps to codify their national procedure on reparations in response to their country's accession the Court. The United Kingdom, for example, passed the International Criminal Court Act of 2001, wherein the procedure for forfeiture, seizure, and liquidation of assets and legal reciprocity between ICC rulings and the national court system are outlined.

Ferstman also notes that the Rome Statute, in focusing on individual responsibility does not go so far as to suggest that states should step in when the individual debtors are beyond the reach of judgment, stating "If the debtor has no traceable assets whatsoever, there is little that can be done to recover the amounts owing to victims. Who will intervene when the perpetrator cannot pay?"[44]

There are divergent perspectives on the issue of who is responsible to

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[40] Institute for Conflict Analysis and Resolution Applied Practice and Theory Project (unpublished, forthcoming)

[41] VRWG (2002) "NGO principles on the establishment of the Trust Fund for Victims" Accessed online May 12, 2006

[42] Ferstman, C. (2003) Asian Resource Legal Center Accessed online May 12, 2006

[43] ibid

[44] ibid

victims among the States' Parties and the CICC, with the States' Parties taking a much limited view of the collective responsibility of the ASP to compensate victims, preferring to place the onus for compensation at the individual and national level.

The Victims Rights Working Group (VRWG) has expressed concerns that some Member and Observer States have tried to limit the scope of reparations in a manner that may adversely impact the Court's ability to fulfill its mandate regarding victims. A compromise proposal has been suggested by Australia, Canada, Croatia, Japan, the Netherlands, New Zealand, Norway and the United Kingdom The proposal suggests that the International Criminal Court should control the allocation and distribution of all of the Trust Fund's resources, including even the voluntary contributions collected independently by the Board.

The VRWG has raised the concern that placing the Court in sole charge of these voluntary contributions may negatively impact both the mandate of the Trust Fund and the independence of the Court. They argue that the proposal goes directly against the decision of the Assembly to elect a Board of Directors, with expertise and experience in victims' issues, which they empowered to "establish and direct the activities and projects of the Trust Fund and the allocation of the property and money available to it.. ."[45]

The second point at issue, according to the VFWG, is that if the proposal was adopted, it would remove an 'earmarking' option by which countries may designate victims for whom their donations could be used. They assert that the adoption of such a condition would contravene the Resolution on the establishment of the Trust Fund, adopted by the ASP, which recognizes the potential for earmarking to the extent that it would not result in "a manifestly inequitable distribution of available funds and property among the different groups of victims."[46]

The ability and responsibility of the States' Parties to compensate victims arises as a matter of extreme importance when one considers that there are serious concerns regarding the ability of the ICC to fund reparations. To date, the ICC has only received 1.3 million Euros from member states and private donors, and at present, can only anticipate 275,000 additional Euros in outstanding commitments.[47]

This sum (1.3 million Euros) seems insufficient when one considers the Court's ongoing investigations in Uganda, Sudan, the DRC, and Cote d'Ivoire where there are potentially millions of victims. While there is hope that over time,

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[45] **VRWG (2005) pp. 1-2**
[46] **ibid**
[47] **"Victims Trust Fund" ICC website Accessed May 10, 2006.**

voluntary contributions and funds seized post-conviction will increase the ability of the Court to pay reparations, the fact that the Trust Fund operates on a separate budget from that of the ICC and is so heavily dependent on voluntary contributions by states, international organizations, NGOs and civil society will most likely result in group allotment, rather than individual awards.

The most likely outcome is that the Court will also rely heavily on non-governmental organizations and independent donor associations that fund international projects to implement independent activities that complement the desired outcomes of the Court, and relieve the burden on the Victim's Trust Fund to fund such activities.

A Way Forward: Multi-Track Diplomacy, Victims' Concerns, and the ICC

International tribunals are a product of the political agreements that generate them, and as such are beholden to Track I considerations, despite the fact that victims concerns and needs often extend beyond the political realm.

Given that the fiduciary responsibility of member nations to such tribunals is typically restricted to the funding of the trial phases and extends only to a commitment to detaining those convicted, a larger question of how to effectively address the disparate needs of a victimized and/or surviving populations remains.

Multi-track diplomacy provides a method to address some of these concerns given the willingness and ability of non-governmental organizations to effect on-the-ground changes on both national and international levels.

The commitment of many non-governmental organizations to a systems approach to structural transformation cannot be discounted. By its nature, however, multi-track diplomatic efforts require large-scale mobilization among non-governmental actors to effect structural change. Non-governmental actors often face resource constraints and limited access to structures of power, but they benefit from the fact that they are unfettered to official diplomatic channels.

NGO networks such as the CICC are best equipped to bridge the gap between the limitations of international justice systems like the ICC and national and customary systems of justice because they lack the institutional and procedural constraints of legal institutions. NGOs can implement programs across a range of disciplines and civil sectors without being branded as operating outside their mandate. Indeed, it is rare to find a non-governmental organization that has not expanded its operations into multiple sectors.

In the context of the International Criminal Court, multi-track diplomatic efforts can assume several forms to supplement the functions of the Court during

and after the Trial phase. If properly implemented, multi-track diplomatic efforts can reduce the administrative and financial burden of implementing reparations at national and community.

Within the pre-trial and trial phases of the Court, non-governmental organizations such as the CICC should continue to engage the Court as activists and advocates for victims' issues and victims' rights by providing informational resources to the Court and to potential victims and supplementing the psychosocial components of the Court.

Multi-track diplomatic efforts outside of the functions of the Court in the trial phases should be encouraged in post-trial settings, particularly as multitrack efforts can bring together various sectors of expertise to create synergistic efforts towards post-conflict reconstruction and reconciliation. Efforts that link multiple tracks with the intention of empowering local parties to conflict should be encouraged whenever possible, as multiple multi-track efforts have the potential to develop into collaborative preventive networks over time.

Given the current funding totals for the Victims' Trust Fund and the ambivalence of the States' Parties as to the post-trial responsibilities of the Court, it is unlikely that funding in the form of reparations will be sufficient to provide for long-term reconstruction or sustainable civil growth.

Innovative engagement of the funding, business and technology communities will be necessary to facilitate efforts undertaken by other tracks, particularly the efforts of conflict resolution professionals, the therapeutic community, and private citizens to promote healing and reconciliation in conflict and post-conflict settings.

This does not abrogate the Assembly of States, Parties and the international assistance communities from their responsibility to fund and promote such endeavors. In fact, the mandate of the Court and its implicit connections to the UN system contained within the Rome Statute imply that the Court should seek to proactively address the needs of victims outside of Track I channels.

The Court must take care in how it funds activities through the Victims' Trust Fund in order to not appear prejudiced against the accused by assigning victim status before the conclusion of the trial. This should not deter actors outside the Court from implementing reconstructive and reconciliation programs with identified populations; these activities can be strengthened if a verdict against the accused is eventually handed down.

Given that the reported and actual needs of victims will vary according to circumstance and, in all likelihood, continue to develop over time, structures

should be put into place to facilitate communication between victims, non-governmental organizations, institutions, programs operating on the ground, internationally-based effort support and resource networks provided by internationally-operational NGOs, and Court organs and institutions.

Multi-track diplomatic efforts should include regular consultation and institutional dialogue between Track I actors (The Office of the Chief Prosecutor, the Registry and the Assembly of States' Parties and the various elements of the Court) and multi-track, non-governmental actors. In the near term, the task of keeping the lines of communications open between the international Track I diplomatic system (which includes UN agencies and international government-sanctioned development agencies) and NGOs will inevitably fall to the CICC, as it already has the organizational linkages to facilitate this type of discourse.

The Court might, by example, lead to the strengthening of national rule of law within at-risk member states. Moreover, it is conceivable that the Court may have the secondary effect of influencing national governments to proactively seek out and foster non-governmental organizations that engage in multi-track diplomacy. By engaging multi-track NGOs, national governments might remove some of the burden on the state to both fund and implement post-conflict reconstruction and reconciliation.

Conclusion

The expansive involvement of victims in the processes of the ICC represents a major turning point in addressing an often-lacking recognition of the needs of victims within international criminal tribunals. The rules and procedures outlined in the Statute and its supporting documents reflect traditions within various legal systems, the efforts by external parties such as non-governmental organizations to promote a more holistic conception of victims and victims' rights, and the various, often progressive, perspectives espoused by the States' Parties themselves

While the structures of the Court have been, in principle, established to address these needs it remains to be seen if the Court will be willing and, in a larger sense, able to fulfill all of its mandates with regards to victims. The current voluntary contribution levels for the Victims' Trust Fund are insufficient to address the potential needs of the victims in all the cases currently in investigative and trial stages before the Court.

The case of Mr. Dyilo will provide a welcome glimpse into the decision-making processes and discretionary capabilities of the Chambers, the Victims' Participation and Reparation Unit, and the Office of the Chief Prosecutor to involve and enlist victims' perspectives and needs into the process, and their

ability to apply such capabilities on a consistent basis.

The case of Mr. Dylio will also provide a mechanism through which the work of the Court with regards to victims will evolve, as it will establish precedents through which future issues may be examined and resolved. Should Mr. Dyilo be convicted, reparations will undoubtedly be assessed. Furthermore, a conviction/reparation allows for an examination of the Victims' Trust Fund in action to assess the process by which its Board of Directors and the Chambers elect to compensate victims, and the willingness of both States' Parties and the international community to contribute to such efforts over the long-term.

Multi-track diplomatic efforts that supplement the functions of the International Criminal Court should be advocated and implemented as early as possible in order to generate the social and financial capital needed to mobilize non-state actors to act in conjunction with the Court. Previous lessons learned, from predecessor tribunals and the development community at large, suggest that early intervention programs offer the best chances of success because they empower local parties, generate opportunities for new growth, and are more sustainable in the long-term.

The future work and capability of the Court to address victims' needs is far from certain. However, uncertainty should in no way detract from the substantive efforts put forth by the States' Parties to envision and create a larger, more inclusive role for victims within the processes of an international system that has to a large degree never acknowledged their concerns.

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