

# **The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation**

**Briefing Paper No. 5 (2011)**

**By Maria Suchkova**

Edited by Dr. Clara Sandoval

**ETJN, Reparations Unit**

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**Reparations Unit, Briefing Paper No.5, Published in August 2011**

## Foreword

It is with great pleasure that the Essex Transitional Justice Network (ETJN) of the University of Essex releases its first six briefing papers on reparations to the International Criminal Court. These briefing papers are the result of multiple talks held over the previous years with staff at the ICC, and specifically with the Victims Participation and Reparations Section (VPRS), about how to carry out its reparations mandate. These reports were possible thanks to the hard work of the staff team at the VPRS.

In the summer 2010, the VPRS of the ICC provided the ETJN with a list of questions on reparations, the answers to which would help the Court to better understand its possibilities and limitations in awarding reparations to victims of crimes under its jurisdiction. Drawing on the expertise in the area of reparations available at the University of Essex, specifically at the ETJN and its Reparations Unit, we endeavour to produce six briefing papers. The University of Essex supported this project as it awarded a Mini Knowledge Transfer Innovation Fund to publish and disseminate the papers.

Different members of the Reparations Unit of the ETJN, the majority of them students or former students of international human rights law at the University, were involved in the research and writing of these briefing papers. They were researched and written under the direction and guidance of Dr. Clara Sandoval, Director of the ETJN and of its Reparations Unit and Senior Lecturer at the School of Law. Different members of the ETJN were also instrumental in the preparation of these papers. In particular, Dr. Fabian Freyenhagen, Co-Convenor of the ETJN and Chair of the Normative Dimensions Unit; Professor Sabine Michalowski, member of the ETJN and Chair of the Economic Dimensions Unit; Diana Morales-Lourido, Programme Manager of the ETJN; and Sofie Johansen, Gil Surfleet and Rafael Charris, frontrunners of the ETJN. The ETJN expresses its gratitude to all of them. The views expressed in the briefing papers are not those of the International Criminal Court.

Each briefing paper complements the others so it is desirable to regard them as a whole. Nevertheless, each briefing paper could be read on its own. All papers are available as PDF files on the ETJN website and in printed version. The titles of the six briefings papers are:

**Briefing paper 1:** Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections (By Octavio Amezcua-Noriega)

**Briefing paper 2:** Collective Reparations and the International Criminal Court (By Sylvain Aubry and María Isabel Henao)

**Briefing paper 3:** Prioritising Victims to Award Reparations: Relevant Experiences (By Paola Limón and Julia von Normann)

**Briefing paper 4:** The International Criminal Court and Reparations for Child Victims of Armed Conflict (By Evie Francq, Elena Birchall and Annick Pijnenburg)

**Briefing paper 5:** The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation (By Maria Suchkova)

**Briefing paper 6:** Adverse Consequences of Reparations (By Fiona Iliff, Fabien Maitre-Muhl and Andrew Sirel)

The VPRS provided us with the following questions: Is there any relevant Jurisprudence of human rights courts; practical experience of transitional justice mechanisms and/or mass claims bodies with respect to victims' involvement in reparations processes and/or

consultation with victims and civil society groups representing victims? Is any of it relevant to the proceedings before the ICC? What level of importance should be given to victim's views on the form of consultation to be followed? And how can/should input from victims be balanced against other factors relevant in criminal proceedings? This briefing paper provides important insights into these questions.

For more information on the ETJN, please visit <http://www.essex.ac.uk/tjn/>

Clara Sandoval

Colchester, July 2011

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# The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation

By Maria Suchkova<sup>1</sup>

## I. Introduction

1. The right to a remedy and reparation is well-established under international human rights law and humanitarian law<sup>2</sup>. For this right to be truly meaningful, victims need to take part in the design and implementation of reparations. A participatory reparations process is important for several reasons. Firstly, as underlined in the *Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law* reparations shall be **effective and adequate**<sup>3</sup>. This can only be achieved if reparations meet the needs of victims, which have materialised as a result of the harms suffered. Therefore, in deciding on reparation awards, it is crucial to consult victims because only they can provide the International Criminal Court (ICC or Court) with in-depth information as to their real needs, the extent of the harm suffered as a result of the crime, and the priorities of individual persons and communities in regard to reparations. Taking these factors into account ensures that the reparations ordered have a positive impact on victims' lives<sup>4</sup>.
2. Secondly, a participatory process creates a **sense of local ownership** of a reparations policy. Involving victims in designing and implementing reparations from the very beginning of the process may assist in managing their expectations<sup>5</sup> of what the International Criminal Court can and cannot do for them.
3. Finally, a well-organised participatory process has a potential **healing effect** on victims and communities<sup>6</sup>. Being consulted and treated as right holders whose dignity is respected<sup>7</sup>, helps victims to move forward and to be better integrated into society. In this respect a participatory process is particularly important for marginalised and

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<sup>1</sup> LL.M in International Human Rights Law (University of Essex, 2010), attorney at Threefold Legal Advisors and a Member of the Reparations Unit of the Essex Transitional Justice Network.

<sup>2</sup> See among other authorities, International Covenant on Civil and Political Rights 1976, Article 2; International Convention on the Elimination of All Forms of Racial Discrimination 1969, Article 6; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1987, Article 14; Convention on the Rights of the Child 1990, Article 39; Additional Protocol I to Geneva Conventions relating to the Protection of Victims of International Armed Conflicts 1977, Article 91; International Convention for the Protection of all Persons from Enforced Disappearances 2010, Preamble and Article 24.

<sup>3</sup> GA res. 60/147, 16 December 2005, paras. 15 and 18.

<sup>4</sup> L. Magarell, 'Reparations in Theory and Practice', ICTJ RJS <[http://www.swisspeace.ch/typo3/fileadmin/user\\_upload/Media/Topics/Dealing\\_with\\_the\\_Past/Resources/ICTJ\\_Reparations\\_in\\_Theory\\_and\\_Practice.pdf](http://www.swisspeace.ch/typo3/fileadmin/user_upload/Media/Topics/Dealing_with_the_Past/Resources/ICTJ_Reparations_in_Theory_and_Practice.pdf)> accessed 6 July 2011, 9.

<sup>5</sup> C. Correa, J. Guillerot, L. Magarell, 'Reparations and Victim Participation: A Look at the Truth Commission Experience' in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Brill Academic Publishers 2009), 6.

<sup>6</sup> REDRESS, 'Collective Reparations: Concepts & Principles' <<http://www.redress.org/downloads/events/CollectiveReparationsMG.pdf>> accessed 6 July 2011, 1-3.

<sup>7</sup> OHCHR, 'Rule-of-Law Tools for Post-Conflict States. Reparations Programmes' (2008) United Nations Publication <<http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>> accessed 6 July 2011, 15-16.

discriminated groups, such as women, as it can serve as an empowerment tool<sup>8</sup>. Furthermore, victim participation in defining and implementing reparations contributes to rebuilding social links within communities and safety nets which might have been destroyed as a result of the conflict.

4. The importance of meaningful involvement of victims in designing and implementing reparations was underlined by various international authorities (including the Court itself)<sup>9</sup> as well as at the national level as described below, which suggests that a participatory process has grown to become one of the guiding principles to build a successful reparations programme.
5. Careful consideration of ways to ensure a participatory reparations process should be of particular importance to the ICC. Given the nature of cases that the Court is and will be dealing with, the number of victims of crimes before it may be relatively large. Many of them may live in remote areas with no effective communications infrastructure. Some may face security concerns living in the midst of an on-going conflict or in post-conflict environments. In some situations tensions between various groups of victims or between victims and the authorities may exist. Furthermore, many victims would be living through an on-going traumatic experience or the effects of post-traumatic stress. All these factors suggest that many victims are unlikely to approach the Court under their own initiative to voice their opinions and concerns about modalities of reparations to be ordered by the Court and about ways of implementing them. Thus, the Court cannot take for granted that all persons entitled to reparations will come forward either by participating during the trial or by submitting reparations claims<sup>10</sup>. A proactive and sensitive approach from the Court towards victims is needed at all times.
6. The author acknowledges that the Court, as well as the Trust Fund for Victims (TFV) have already undertaken some consultations with victims. The experience and recommendations outlined in this paper aim to make these efforts more systemic and consistent regarding the design and implementation of reparation measures.
7. After making some preliminary remarks, this paper briefly outlines the challenges faced by participatory reparations processes to-date. It then analyses the strategies adopted to respond to those challenges and makes suggestions to adapt such strategies to allow the possibility of their application by the ICC. In doing that, this briefing paper considers, in particular, the following questions: (1) How to ensure that all those who should be consulted are included in the participatory process? (2) What should be the scope and content of consultations? (3) How should consultations be organised? (4) How to assess the results of consultations? The briefing paper concludes with some recommendations to the ICC.

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<sup>8</sup> K. Muddel, 'Limitations and Opportunities of Reparations for Women's Empowerment' (2009) ICTJ Briefing <<http://ictj.org/publication/limitations-and-opportunities-reparations-womens-empowerment>> accessed 6 July 2011, 3.

<sup>9</sup> See among others, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity 2005 E/CN.4/2005/102/Add.1 Principle 32; Declaration of Basic Principles of Justice for victims of Crime and Abuse of Power 1985 GA Res40/34 para. 6(b); UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (Report, S/2004/616, 2004) para. 16; ICC, *Strategy in relation to Victims* (Report, ICC-ASP/8/45, 2009) <[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/ICC-ASP-8-45-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf)> accessed 6 July 2011, paras.15(a-c), 22(a).

<sup>10</sup> WCL War Crimes Research Office, 'The Case-Based Reparations Scheme at the ICC' (2010) <<http://www.wcl.american.edu/warcrimes/icc/documents/report12.pdf?rd=1>> accessed 6 July 2011, 26.



## II. Ensuring Victim Participation in the Reparations Process: Challenges and Solutions

### *a) Preliminary Remarks*

8. Some preliminary remarks are necessary to ensure that the specific experiences regarding participatory reparations processes (mostly drawn from transitional justice mechanisms) described herein are relevant to the ICC proceedings.
9. First, unlike national transitional justice mechanisms, the modalities of reparations awarded by the ICC in a particular case will be determined within a judicial setting rather than as a result of a political process. This, however, is no reason to exclude victims' participation in its proceedings. At the same time, in ensuring a participatory reparations process the Court will have to take into account factors that are not necessarily present in most transitional justice mechanisms, such as balancing the right of victims to participate in reparations proceedings and the rights of the accused.
10. Secondly, in awarding reparations the Court will be reaching out to a more or less limited number of victims, as compared to some national administrative reparations programmes, intended to redress the harm of all those who suffered from certain human rights violations in a country over a particular period of time. This difference will affect the organisation of the consultation process. Therefore, the Court should give due consideration to factors like the potential impact of its decisions on the society involved and should manage expectations so as not to cause further harm than the one that has already been suffered. Importantly, the consultations held by the Court should, in addition to the victims, include other individuals or communities who might be affected (positively or negatively) by the reparations it will award.
11. Another factor which is unique to the ICC is its ability to benefit from the experience gained by the TFV through the fulfilment of its assistance mandate. The TFV has already gained valuable knowledge about victims' needs and has set up important networks and communication structures in the field to carry out its work<sup>11</sup>.
12. Finally, the ICC, unlike human rights courts, will be awarding reparations against the perpetrator rather than against States, a consequence of which may be the limited nature of the resources available to provide reparations, resulting in a limitation in the applicable forms of reparations. The same applies when comparing the ICC reparations proceedings with national transitional justice mechanisms, where the State is primarily responsible for providing reparations.
13. However, notwithstanding the peculiarities of a reparation process within the ICC, as outlined above, it may still benefit from the experiences of transitional justice mechanisms as the legal regime established under the Rome Statute and the Rules of

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<sup>11</sup> Trust Fund for Victims, *Learning from the TFV's second mandate: From Implementing Rehabilitation Assistance to Reparations* (Fall Programme Progress Report, 2010).  
<<http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Fall%202010.pdf>> accessed 6 July 2011.



Procedure and Evidence provides much flexibility in organising the reparations process<sup>12</sup>.

14. Therefore, in suggesting modalities of victim's participation in the ICC reparations process, this paper mainly draws on experiences of transitional justice mechanisms and mass claims bodies.
15. The research carried out for this paper shows that the practice of regional human rights courts in establishing a participatory reparations process is of limited value. Although the European Court of Human Rights has developed extensive jurisprudence in relation to victim participation in criminal investigations at the national level, particularly, in cases against Turkey and Russia, it has not touched upon victim participation in national proceedings concerning reparations. The Court itself follows a narrow approach to reparations<sup>13</sup>, leaving the determination of the content of restorative measures other than compensation (and occasionally restitution) to the discretion of the respondent State. The procedure of the Committee of Ministers of the Council of Europe, the body in charge of supervising execution of the Court's judgments, incorporates mechanisms for victims, their legal representatives and civil society organisations to participate in the process by making observations regarding the content and implementation of reparation measures. This practice, however, is relatively new and its assessment would be premature.
16. The Inter-American Court of Human Rights, despite its great contribution to the law of state responsibility in relation to various forms of reparations, has limited possibilities for victim participation in the determination of reparation measures or their implementation<sup>14</sup>. However, unlike the European Court, it is in charge of monitoring compliance with judgments and holds proceedings during which victims may express their view as to the implementation of reparation orders<sup>15</sup>.

### ***b) Key Challenges to Ensuring that Victims Participate in the Design and Implementation of Reparations: Lessons Learned***

17. Involving victims in designing and implementing reparations may be hindered by some of the following, interrelated, challenges:
  - *Reaching the victims*. This may involve difficulties of physical access to victims living in remote areas, particularly, where infrastructure was destroyed during the conflict. Difficulties may also arise in providing victims with the necessary information about reparations due to, for example, high rates of illiteracy or the fact that regular communications infrastructure does not work.

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<sup>12</sup> M.Henzelin, V. Heiskanen, G. Mettraux, 'Reparations to victims before the International Criminal Court: lessons learned from international mass claims processes' [2006] Crim.L.F. 317, 320.

<sup>13</sup> The Court may award compensation of pecuniary and non-pecuniary damages and, rarely, restorative measures. The collective dimension of reparations is, thus, practically non-existent. The only form of victim participation in determination of the scope of reparations is the right to present the Court with claims for just satisfaction under Article 41 of the European Convention on Human Rights.

<sup>14</sup> The applicants may submit claims for reparations (Article 34 of the Court's Rules of Procedure) and present the Court with their views on this issue if asked to do so (Article 44).

<sup>15</sup> According to Article 63(1) of the Rules of Procedure victims may make observations on the reports of the respondent State in relation to execution of the judgment in their case. Hearings may be convened as appropriate.

- Managing victims' expectations. Some victims may adopt an unrealistic maximalist approach to reparations, others could be ill-informed of what reparations may entail and have a limited understanding of the kinds of benefits they may receive by way of reparations<sup>16</sup>.
- Balancing interests of various victims' groups. Victims' groups may be heterogeneous in terms of ethnicity, culture, gender, types of crimes suffered, living conditions, political sympathy, varied level of negotiating experience and so on<sup>17</sup>. Therefore, it is common to find that they have different priorities in relation to reparations and different ways of articulating their demands.
- Establishing effective communication strategies. In some contexts, lack of organisational structures among victims or marginalisation of particular groups of victims present a challenge to establishing meaningful communication. This may be caused by a lack of recognised leadership, resulting in an inability to express a common view on behalf of the group. This may be coupled with limited skills in negotiating policy questions. These factors would be particularly challenging for efforts to conduct consultations regarding collective reparations.
- Ensuring safety for victims. Victims may face security risks when seeking to participate in designing reparation programmes or in the process of benefiting from reparations ordered.

### ***c) Ensuring that all Relevant Stakeholders are Consulted***

#### ***i. Early Outreach and Sensitisation Efforts in Relation to Reparations***

18. Raising awareness of potential beneficiaries about the possibilities to obtain reparation is one of the major prerequisites for ensuring successful participatory processes in the future. Given the number of potential victims and difficulties in reaching them, sensitisation and outreach activities with a specific focus on reparations should start long before a case enters the reparations phase of the proceedings<sup>18</sup>.
19. Focused outreach efforts in relation to reparations assist in identifying victims eligible for reparations in addition to those who already made themselves known to the Court. The reparations-specific outreach should aim to manage expectations of potential beneficiaries. Moreover, such efforts should also be designed to manage the expectations of those who suffered crimes which are not covered in the ICC

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<sup>16</sup> C. Correa, J. Guillerot, L. Magarrell, 'Reparations and Victim Participation: A Look at the Truth Commission Experience' in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Brill Academic Publishers 2009), 6.

<sup>17</sup> L. Magarrell, 'Outreach to and engagement of victims on reparations. Lessons learned from truth and reconciliation processes'. Speech at the Conference *Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making* (2007) <<http://www.redress.org/downloads/events/OutreachEngagementLM.pdf>> accessed 6 July 2011, 4.

<sup>18</sup> OHCHR, 'Rule-of-Law Tools for Post-Conflict States. Reparations programmes' (2008) United Nation Publication <<http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>> accessed 6 July 2011, 15-16.

proceedings and who may not be able to directly benefit from Court-ordered reparations.

20. In addition to informing victims of their right to reparation and procedures for claiming it, outreach and sensitisation programs should aim to explain what types of benefits reparations may include. This will minimise preconceptions about reparations, for example, some of the victims may come from legal systems and cultures where reparation is understood narrowly and usually denotes financial compensation. Importantly, outreach and sensitisation efforts should provide potential beneficiaries with information about the possibilities of collective reparation,<sup>19</sup> which may not be self-evident to victims.
21. Although this paper does not aim to provide an overview of outreach strategies employed in the past, some interesting examples should be mentioned. The experience of the Extraordinary Chambers in the Courts of Cambodia (ECCC) shows the efficiency of audiovisualised tools in reaching a wide audience while providing a focused message<sup>20</sup>. In Sierra Leone, in an effort to explain the key features of the Special Court's activities in a simple manner, a special booklet with easy-to-understand text and pictures was designed<sup>21</sup>.
22. Furthermore, the knowledge already acquired by the ICC as well as national experience suggests that the involvement of grass roots civil society organisations in outreach activities is valuable because they have local networks which enable them to reach a larger number of victims.

The Special Court Working Group in Sierra Leone, the Court Support Network in Bosnia and the work of civil society groups in Cambodia and Latin America provide some examples of non-governmental organisations' (NGO) involvement.

In Peru, a group of national NGOs engaged extensively in providing information to victims about reparations and conducting consultations with them. Since 2001, 19 capacity building workshops for victims, their families and community leaders were organised at the regional and district levels<sup>22</sup>.

At the ECCC, close cooperation between the Court and NGOs was established. NGOs assisted in informing victims about their right to act as civil parties in the proceedings, in collecting participation forms, in follow up with civil parties and in organising a network of civil parties' representatives<sup>23</sup>.

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<sup>19</sup> REDRESS, 'Victims' Central Role in Fulfilling the ICC Mandate' (2009), <<http://www.redress.org/downloads/publications/ASP%208%20Paper%20FINAL%20Nov%202009.pdf>> accessed 6 July 2011, 9.

<sup>20</sup> Ibid. See also, ICC Focal Points, *The Impact of the Rome Statute System on Victims and Affected Communities* (Final Report, 2010) <[http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/RC-11-Annex.V.a-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.V.a-ENG.pdf)> accessed 6 July 2011, para. 47.

<sup>21</sup> C. Ramirez-Barat, 'Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice' (2011) ICTJ, <<http://ictj.org/sites/default/files/ICTJ-Global-Making-Impact-2011-English.pdf>> accessed 6 July 2011, 14.

<sup>22</sup> Ibid. 23.

<sup>23</sup> ICTJ, 'Outreach Strategies in International and Hybrid Courts' (2010), <[http://www.ictj.org/static/Publications/ICTJ\\_Research\\_Outreach\\_ECCCWorkshop\\_Apr2010.pdf](http://www.ictj.org/static/Publications/ICTJ_Research_Outreach_ECCCWorkshop_Apr2010.pdf)> accessed 6 July 2011, 11-12.

23. However, as it was noted by experts, outreach activities cannot be left to civil society alone as in some instances victims need to hear from the Court directly<sup>24</sup>. In the case of reparations, official information from the ICC would be valuable in addition to that provided by civil society.

24. At the Review Conference of the Rome Statute in 2010, the need for optimisation of outreach activities at different phases of the judicial cycle and the need for further efforts to provide victims with information about their right to claim reparations were recognised<sup>25</sup>. It is, therefore, suggested that the topic of reparations should continue to acquire a more prominent place in the Court's outreach strategy and activities on the ground.

## ***ii. Establishing Communication Strategies***

25. In order for the participatory process to be truly meaningful, outreach activities alone are not sufficient. A dialogue between victims and the Court should be established through consultations with individual victims and communities. However, in view of a relatively large number of potential beneficiaries of Court-ordered reparations it may be difficult or impracticable to consult each and every victim separately. Therefore, manageable and effective communication strategies will need to be developed<sup>26</sup>, specific approaches will depend on the local context.

In some cases, like in Peru, multiple organisations and structures of diverse focus and geographic coverage were established to voice the concerns of various categories of victims. In other contexts, as was the case in Liberia, there were not victim-identified organisations<sup>27</sup>.

26. Whatever the local context may be, experience suggests that victims' heterogeneity should not be ignored<sup>28</sup>. Due regard should be given to it by ensuring that representatives of all relevant victims' groups are invited to discuss reparations<sup>29</sup>. In doing so, it is also necessary to ensure that victims' groups really represent the views of potential beneficiaries of reparations. Sometimes groups which are based in provincial or national capitals do not have daily contact with victims and may represent opinions of a limited group of victims or have a distorted view of victims' needs on a more general level. There is a risk that these groups may dominate the consultation process assuming representation of all victims without having a mandate

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<sup>24</sup> Ibid. 10-11.

<sup>25</sup> The Impact of the Rome Statute System on Victims and Affected Communities 2010, ICC RC/Res.2, para. 3.

<sup>26</sup> This would be especially important if the consultation methodology will focus mainly on qualitative methods.

<sup>27</sup> C. Correa, J. Guillerot, L. Magarrell, 'Reparations and Victim Participation: A Look at the Truth Commission Experience' in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Brill Academic Publishers 2009), 7.

<sup>28</sup> Ibid. 8.

<sup>29</sup> If the position of the Office of the Prosecutor insisting on the wider approach to victim participation at the reparations stage is adopted, not only victims who suffered harm directly linked to the charges should be consulted, but also "other interested persons who suffered harm as a result of crimes other than those included in the charges selected for prosecution". See, ICC OTP, 'Policy Paper on Victim Participation' (2010) <<http://www.icc-cpi.int/NR/rdonlyres/BC21BFDF-88CD-426B-BAC3-D0981E4ABE02/281751/PolicyPaperonVictimsParticipationApril2010.pdf>> accessed 6 July 2011, 9.

to do so<sup>30</sup>. Therefore, the ICC should ensure that the representatives of all relevant victims' groups have indeed been duly consulted, and that all of them are legitimate representatives of victims' claims.

27. In deciding who should participate in consultations, particular attention should be given to the involvement of vulnerable victims. International instruments denote that full participation rights should be granted to women and girls at all stages of the reparations process<sup>31</sup>.

Female victims, especially those who suffered sexual violence, are often ostracised by their own communities, as in Sierra Leone<sup>32</sup>. This contributes to the practice of disregarding their participation in designing and implementing reparations programmes or not ensuring that they are adequately consulted. It was reported that in Peru women were often not included in consultations about the preferred form of collective reparations to be provided to their community<sup>33</sup>. As a result reparation measures that would improve female victims' lives, such as specialised medical facilities may be not prioritised.

28. Therefore, targeted measures are required to involve women and girls in the reparations process. This may include cultural and gender-sensitive strategies for gathering information about victims' reparation needs and securing female victims' participation in consultations about reparations<sup>34</sup>.

For example, in East Timor a special effort was made to include women in The Commission for Reception, Truth and Reconciliations (CAVR's) activities. This was accomplished by, among other things, improving gender balance in all the programmes; CAVR's collaboration with a leading women's organisation in the country; and holding special hearings on gender issues to encourage female victims' participation<sup>35</sup>.

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<sup>30</sup> OHCHR, 'Rule-of-Law Tools for Post-Conflict States, National Consultations on Transitional Justice' (2009) <[http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ\\_EN.pdf](http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf)> accessed 6 July 2011, 22,

<sup>31</sup> Updated Set of Participles for the Protection and Promotion of Human Rights through Action to Combat Impunity 2005 E/CN.4/2005/102/Add.1 Principle 32; Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation 2007 <[http://www.womensrightscoalition.org/site/reparation/signature\\_en.php](http://www.womensrightscoalition.org/site/reparation/signature_en.php)> accessed 6 July 2011, paras. 1D, 2B.

<sup>32</sup> K. Muddel, 'Limitations and Opportunities of Reparations for Women's Empowerment' (2009) ICTJ Briefing <<http://ictj.org/publication/limitations-and-opportunities-reparations-womens-empowerment>> accessed 6 July 2011, 1.

<sup>33</sup> Ibid. 2.

<sup>34</sup> OHCHR, 'Rule-of-Law Tools for Post-Conflict States. Reparations programmes' (2008) United Nation Publication <<http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>> accessed 6 July 2011, 36.

<sup>35</sup> C. Ramirez-Barat, 'Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice' (2011) ICTJ, < <http://ictj.org/sites/default/files/ICTJ-Global-Making-Impact-2011-English.pdf>> accessed 6 July 2011, 25. On the participation of women in articulating reparations see generally R. Rubio-Marin (ed), *What Happened to the Women? Gender and Reparation for Human Rights Violation* (SSRC 2006) <[http://www.ssrc.org/workspace/images/crm/new\\_publication\\_3/%7Bd6d99c02-ea4a-de11-afac-001cc477ec70%7D.pdf](http://www.ssrc.org/workspace/images/crm/new_publication_3/%7Bd6d99c02-ea4a-de11-afac-001cc477ec70%7D.pdf)> accessed 6 July 2011.

29. A similar approach should apply to child-victims in order for reparations to meet their needs. This is reflected in international instruments in Article 12(1) of the Convention on the Rights of the Child and the *UN Guidelines on Justice in Matters involving Child Victims and Witnesses*<sup>36</sup>; which provide that children have the right to express their views in all matters affecting their interests and that such views shall be given due weight. It is, therefore, important to focus on the best interest of the child during consultations processes and to take into account evolving capacities of children. In case of child soldiers and victims of sexual violence special care should be taken in order to avoid re-victimisation and re-traumatising during the participatory process, but at the same time duly take their opinions into account.

Few truth commissions have facilitated child-victims' involvement in their activities. In some countries, like in El Salvador and Haiti, the lack of involvement was the result of the absence of specific focus on the experiences of children as victims of crimes; in others, like in South Africa, it was considered that direct participation in consultations would trigger very high emotional and physical risks for children.

The commissions in Sierra Leone and Liberia are considered to be pioneers in ensuring participatory process for children. In Sierra Leone, children took part in thematic hearings and, with assistance of specialised agencies, prepared an official submission to the TRC and subsequently participated in putting together the first-ever child-friendly TRC report. In Liberia, children were systematically invited to take part in all the TRC's activities both in the capital and in the regions, including statement-taking and hearings on issues relevant to children<sup>37</sup>.

30. Apart from individual victims and representatives of victims' groups, it is also crucial to engage with other civil society organisations during the reparations process. Often civil society organisations close to victims are better informed about their needs and about the existence of various views within heterogeneous groups. Their perspectives may be valuable for the determination of modalities of reparations. Furthermore, the participation of civil society organisations in the design and implementation of symbolic and collective reparations is of particular value.

In Chile, by 2002, 134 symbolic reparation projects (such as monuments, parks and memorials) were constructed. It was reported that most of them had been the initiative of families who received support from civil society organisations<sup>38</sup>. Further, the Valech Commission (established over a decade after the completion of the work of the initial TRC) was created due to the pressure from human rights groups and other NGOs on the government due to the way torture victims had been treated, they met with the NGOs to discuss inter alia

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<sup>36</sup> ECOSOC 2005 Res. 2005/20.

<sup>37</sup> For a comprehensive overview of involvement of children in truth commissions see UNICEF, ICTJ, 'Children and Truth Commissions' (2010).

<[http://www.ictj.org/static/Publications/children\\_truth\\_commissions\\_eng\\_2010.pdf](http://www.ictj.org/static/Publications/children_truth_commissions_eng_2010.pdf)> accessed 6 July 2011

<sup>38</sup> Pablo de Greiff (ed) *The handbook of reparations* (OUP 2006) 65.



their views on reparations<sup>39</sup>.

As to collective reparations, the Moroccan Equity and Reconciliation commission facilitated the participation of civil society organisations in designing the reparations policy by inviting them to the national forum on reparations and conducting special consultations with civil society on this issue. NGOs also participate in implementation and coordination of collective reparations projects in beneficiary regions<sup>40</sup>.

31. Apart from any role that civil society organisations may play during consultations on the ground, they also may represent victims' views by being involved in the reparation proceedings before the Court as experts under Rule 97 of the Rules of Procedure and Evidence.

#### ***d) Scope and Content of Consultations***

32. International experience suggests that it is beneficial to hear the victims and victims' organisations at the stage of considering possible reparations measures, designing a reparation policy and in the course of its implementation.

#### ***i. Participatory Approach to Determination of the Scope of Reparations***

33. At the stage of determination of the scope of reparations the first measure to be undertaken by the Court is to assist victims in applying for reparations. Here again victims' groups and local NGOs may provide help. Moreover, the role of the victims' legal representatives is crucial since they should assist victims in the collection and analysis of evidence in support of reparation claims to be made before the Court<sup>41</sup>.
34. However, a meaningful participatory process cannot be limited only to hearing what victims have to say through application forms about what they believe to be the harm they have suffered and the reparation they should be awarded. A further consultation is essential to ensure that the measures envisaged on the basis of application forms will meet the victims' needs<sup>42</sup> and have a direct causal connection with the crimes under prosecution by the Court. The importance of such exercise is demonstrated by national experiences.

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<sup>39</sup> C. Correa, J. Guillerot, L. Magarrell, 'Reparations and Victim Participation: A Look at the Truth Commission Experience' in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Brill Academic Publishers 2009), 13, 16.

<sup>40</sup> ICTJ, 'The Concept and Challenges of Collective Reparations' (Report, 2010) <[http://www.ictj.org/static/Publications/ICTJ\\_Reparations\\_RabatReport\\_pb2010\\_en.pdf](http://www.ictj.org/static/Publications/ICTJ_Reparations_RabatReport_pb2010_en.pdf)> accessed 6 July 2011, 26-27, 55.

<sup>41</sup> REDRESS, 'Ensuring the Effective Participation of Victims Before the ICC' (2005) <<http://www.redress.org/downloads/publications/REDRESS%20-%20Legal%20Representation%20for%20Victims%2023%20May%202005.pdf>> accessed on 6 July 2011, 7.

<sup>42</sup> C. Correa, J. Guillerot, L. Magarrell, 'Reparations and Victim Participation: A Look at the Truth Commission Experience' in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Brill Academic Publishers 2009), 14.



For example, in Peru victims from various parts of the country participated through local workshops in determining proposals on reparations. However, at the consultative meeting with victims convened by the Comisión de la Verdad y Reconciliación (CVR) to discuss a draft reparations' programme, many disagreements and misunderstandings were discovered. This meeting was extremely valuable in further sensitising the CVR on victims' priorities on the one hand, and informing victims of the difficulties that the CVR experienced on the other. As a result of the meeting, the draft reparation programme was updated to better meet victims' needs (in particular, the need for education for children as well as for adults)<sup>43</sup>.

The Sierra Leone commission did not limit itself to hearing victims' views at the statement-taking and the hearings stage. After completion of these processes, the Truth and Reconciliation Commission (TRC) held a number of further consultative meetings with victims' groups, as well as with civil society organisations to discuss the reparations proposals. One of the results was that the main principles of the reparation programme were developed: feasibility, sustainability and the importance of avoiding stigmatisation<sup>44</sup>.

35. Furthermore, such consultations may help to ensure that reparations do not follow too literally victims' grievances and take a broader picture into account.

It is reported that the recommendations of the National Redemption Council (NRC) in Ghana at times followed to closely what victims said during statement-taking. For example, in a case where victims reported that a market installation was burnt down by soldiers, the NRC recommended to rebuild the installation, notwithstanding that many years had passed after the incident and that the installation might have not had much relevance for the victims in the reparations context<sup>45</sup>.

36. During such consultations both individual and collective reparation measures should be discussed. As to individual measures, experience suggests that it is important to get feedback from the victims about the extent of the harm suffered and their needs as a result of such harm. Consultations should not be overly focused on one form of reparation as it may deter from addressing other needs of victims. During consultations it would be important to find out victims' opinions about the particular measures that would trigger important changes in their living conditions.

The failure of the South African Centre for the Study of Violence and Reconciliation (CSVR) to consult with victims' groups about the final amount of

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<sup>43</sup> Ibid. at p. 15.

<sup>44</sup> REDRESS, 'Victims, Perpetrators or Heroes? Child Soldiers Before the ICC' (2006) <<http://www.redress.org/downloads/publications/childsoldiers.pdf>> accessed 6 July 2011, 58

<sup>45</sup> L. Magarrell, 'Outreach to and engagement of victims on reparations. Lessons learned from truth and reconciliation processes'. Speech at the Conference *Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making* (2007) <<http://www.redress.org/downloads/events/OutreachEngagementLM.pdf>> accessed 6 July 2011, 7

compensation to be paid to victims was criticised and described as a lost opportunity to engage in constructive dialogue and to make the reparations policy more comprehensive and effective<sup>46</sup>. On the other hand, in Chile, the consultations with victims about individual reparations were instrumental in understanding that victims preferred pensions to lump sums as a form of reparation<sup>47</sup>.

As to non-monetary forms of reparations, a consultation process (surveys and focus group discussions) conducted in East Timor by a group of NGOs helped to reveal that victims prioritised education for children, adequate healthcare and housing<sup>48</sup>.

37. Consultations on collective reparations are particularly important, due to the fact that there is no possibility to apply for these and victims may not be aware of them. Here it is suggested that community consultations in addition to individual ones would be appropriate. It should be remembered however, that collective reparations do not fit all groups of victims.

The two most developed collective or community reparation programmes exist in Morocco and Peru. In Morocco, a public consultations process held within the Community Reparations Programme was aimed at establishing the reparation measures to be undertaken. Apart from victims and local community members such consultations included representatives of human rights organisations and development agencies working in the regions affected by violence<sup>49</sup>. The consultations included seminars in various parts of the country as well as a national forum on reparations. As a result, the Instance Équité et Réconciliation (IER) recommended collective reparations (such as socioeconomic development programs and memorialisation projects) for those areas where mass repression, denial of public services and other violations prevailed, as well as for those communities where its members felt that they have suffered collectively from political violence, violations of human rights and marginalisation<sup>50</sup>.

The Peruvian collective reparations programme is aimed at “contributing to the reconstruction of social and institutional capital, material and economic productivity of the families and rural and urban communities” affected by crimes and human rights violations. To that end peasant and native communities were suggested to take part in consultations to identify the form of reparations that

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<sup>46</sup> C. Correa, J. Guillerot, L. Magarrell, ‘Reparations and Victim Participation: A Look at the Truth Commission Experience’ in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Brill Academic Publishers 2009), 10-11.

<sup>47</sup> OHCHR, ‘Rule-of-Law Tools for Post-Conflict States, National Consultations on Transitional Justice’ (2009) <[http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ\\_EN.pdf](http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf)> accessed 6 July 2011, 15.

<sup>48</sup> ICTJ, ‘Unfulfilled Expectations. Victims’ Perceptions of Justice and Reparations in Timor-Leste’ (2010) <<http://www.ictj.org/publication/unfulfilled-expectations-victims-perceptions-justice-and-reparations-timor-leste>> accessed 6 July 2011, 11-13.

<sup>49</sup> C. Ramirez-Barat, ‘Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice’ (2011) ICTJ, < <http://ictj.org/sites/default/files/ICTJ-Global-Making-Impact-2011-English.pdf>> accessed 6 July 2011, 22.

<sup>50</sup> ICTJ, ‘The Concept and Challenges of Collective Reparations’ (Report, 2010) <[http://www.ictj.org/static/Publications/ICTJ\\_Reparations\\_RabatReport\\_pb2010\\_en.pdf](http://www.ictj.org/static/Publications/ICTJ_Reparations_RabatReport_pb2010_en.pdf)> accessed 6 July 2011, 26.

would be most suitable to them. This may include reconstructing infrastructures, skill-development, access to economic opportunities, education and healthcare services, projects aimed at recovery of community heritage and other benefits to the community as a whole. The practical realisation of this process was, however, criticised for insufficient involvement of women in consultations, as well as for the authorities' failure to effectively convey to the communities that the goal of the provision of benefits was to repair the harms suffered during the conflict. It was thus reported that communities tended to link the benefits to development rather than reparation initiatives<sup>51</sup>.

38. Input in relation to the content of reparations measures can be solicited from experts and victims' legal counsel who have first-hand communication with many victims and may be in the position to present more generalised observations on the nature, scope and modalities for reparation<sup>52</sup>.
39. It is, therefore, suggested that where the Court chooses to precisely specify the reparations to be awarded in its decision, some form of consultation should take place before the adoption of such reparations decisions. The consultation should influence the views of the Court.
40. Where the determination of the precise modalities of reparation is entrusted to the TFV, the Fund should also conduct consultations. It is important that the Court and the TFV develop a consistent and harmonic approach to reparations.
41. In deciding on reparations, it is also crucial both for the Court and the TFV to take into account any other reparation programme in place in the country so that the reparations awarded by the Court complement existing forms of reparation.

## ***ii. Participatory Approach to Implementation of Reparations***

42. A participatory reparations process does not end when the Court issues a decision on reparations. It is important to receive victims' feedback about the effectiveness of distribution and quality of services provided within the reparation framework. Although the Court system will likely not have the same flexibility as national reparation programmes to make changes while reparations are being implemented, it is still an important exercise. Having victims' feedback available, could provide the Court with the possibility to make certain, albeit limited adjustments to the implementation of the reparations it has ordered either directly or through the on-going work of the TVF. Furthermore, the constant monitoring of the implementation of reparation measures would shed light into the best way forward for the Court and the TVF in the future.

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<sup>51</sup> Ibid. at p. 31-32.

<sup>52</sup> REDRESS, 'Ensuring the Effective Participation of Victims Before the ICC' (2005) <<http://www.redress.org/downloads/publications/REDRESS%20-%20Legal%20Representation%20for%20Victims%2023%20May%202005.pdf>> accessed on 6 July 2011

### ***e) Organising Consultations with Victims***

43. The experience of consultations on transitional justice at the national level suggests two approaches to consultations: quantitative and qualitative. The main method employed in *quantitative* consultations is a survey.

For example, in South Africa a 2000-2001 nation-wide survey (among 4,000 persons) was undertaken to measure people's satisfaction with the performance of the TRC, the attitudes towards amnesties and the assessment of the level of reconciliation. The survey was conducted by the South African Institute for Justice and Reconciliation.

In Northern Uganda, a 2007 survey conducted by the Berkeley-Tulane Initiative on Vulnerable Populations and the International Center for Transitional Justice (ICTJ) explored preferences among various types of reparations, prioritisation of demand for basic services, preferences between traditional and formal justice mechanisms and other issues<sup>53</sup>.

44. Experts indicate that the drawback of the quantitative method is that it usually sets out a limited number of options to which a respondent is expected to react and, therefore, fails to explore any novel ideas that may be suggested by the target group<sup>54</sup>. This, however, may be not a great disadvantage to a survey with a particular focus on reparations, where a number of possible options may be limited more precisely than in surveys exploring public opinion about, for example, institutional reform or other more multidimensional components of social transformation.

In 2010, the TFV carried out surveys in both DRC and Northern Uganda aimed at understanding victims' attitudes towards reparations. The respondents were *inter alia* asked whether they favoured collective or individual reparations. Some conclusions of the survey included: the importance of the gender dimension in reparations; strong interrelation between rehabilitation and reconciliation; the need to take into account the special status and vulnerability of youth and children; and the importance of integrating individual and collective reparations<sup>55</sup>.

45. In contrast, the *qualitative* approach to consultations makes use of such methods as focus groups and in-depth interviews. It allows for a more personalised approach and the gathering of more extensive and diverse information, but will not facilitate the consolidation of a representative picture of the views of the whole population. This method appears to be particularly suitable for consultations on collective reparations.

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<sup>53</sup> OHCHR, 'Rule-of-Law Tools for Post-Conflict States, National Consultations on Transitional Justice' (2009) <[http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ\\_EN.pdf](http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf)> accessed 6 July 2011, 8

<sup>54</sup> Ibid. 7-8

<sup>55</sup> Trust Fund for Victims, *Learning from the TFV's second mandate: From Implementing Rehabilitation Assistance to Reparations* (Fall Programme Progress Report, 2010) <<http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Fall%202010.pdf>> accessed 6 July 2011, 31, 37

46. The combination of the quantitative and qualitative approaches has also proved to be useful.

Along with the surveys mentioned above, the TFV also conducted interviews regarding the need for and the quality of rehabilitation as well as focus groups on the meaning of reconciliation for local communities<sup>56</sup>.

Another example of combining qualitative and quantitative methods is a national consultation held in Afghanistan in 2003-2005. The consultation was intended to, identify expectations of justice, to measure the public opinion on human rights violations and on the role of various transitional justice mechanisms. The consultation included a country-wide survey as well as a large number of focus group discussions. This allowed exploring preferences and priorities through quantitative methods, and receiving a detailed understanding of the relevant issues through qualitative methods<sup>57</sup>.

47. In choosing the form of consultation to be used, victims' opinions will have to be balanced against other factors and constraints of the Court, such as resource and time-related considerations and the pivotal difference, that the Court awards reparations against an individual perpetrator and not the State.

48. In many cases victims and victims' groups may not be able to provide a clear and consistent position as to the forms of consultations they prefer. In any event, the Court should aim at having the most effective consultation possible, using the maximum of available resources. The more victims are consulted and the higher the quality of the consultations are, the more effective and adequate reparations should be.

49. Whichever form of consultation is chosen it should be conducted in a way that respects the dignity of victims and their cultural traditions. Ensuring cultural sensitivity may involve considering such issues as engagement between men and women, children and adults, the position of the elderly and the disabled within the community and religious and cultural traditions. It furthermore entails sensitivity to the societies' communication and decision-making traditions such as: co-existing legal, justice and conflict-resolution systems,<sup>58</sup> as well as prevalence of oral traditions over written ones. This will essentially depend on the local context and may require consulting relevant persons to allow consultations to be organised in a culturally-sensitive manner.

50. At the same time, traditional approaches should not be followed where they are not conducive to ensuring meaningful participation of all victims. For example, when marginalised groups are traditionally excluded from consultations on matters of public importance, ways should be found to include them.

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<sup>56</sup> Ibid. 33.

<sup>57</sup> OHCHR, 'Rule-of-Law Tools for Post-Conflict States, National Consultations on Transitional Justice' (2009) <[http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ\\_EN.pdf](http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf)> accessed 6 July 2011, 10; Afgan Independent Human Rights Commission, *Annual Report (2003-2004)* <[http://www.aihrc.org.af/2010\\_eng/Eng\\_pages/Reports/Annual/Annual2004.pdf](http://www.aihrc.org.af/2010_eng/Eng_pages/Reports/Annual/Annual2004.pdf)> accessed on 6 July 2011, 40.

<sup>58</sup> OHCHR, 'Rule-of-Law Tools for Post-Conflict States, National Consultations on Transitional Justice' (2009) <[http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ\\_EN.pdf](http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf)> accessed 6 July 2011, 24.

51. Furthermore, consultations should be conducted with due regard to local conditions and take into account people's realities. It is important to consider security factors and to ensure that people are not at risk of prosecution or violence for any views expressed during consultations<sup>59</sup>. If security risks exist, special attention should be given to such factors and special measures should be implemented such as confidentiality agreements and the choice of individual consultations over collective ones.
52. It is further crucial to take into account that victims live in difficult conditions and their survival may depend on their day-to-day work. Therefore, consultations should be planned in such a way so as not to unjustifiably distract them from their regular activities (for example, by ensuring that victims do not have to travel long distances to take part in consultations). At the same time, an understanding among victims as to the importance and value of their contribution to consultations and relevance of such exercises to their future should be generated.

In 2008, it was reported that victims in Eastern DRC and in Uganda had an average income of less than 1 USD per day. In order to meet with intermediaries to fill in the necessary forms some had to travel long distances by foot abandoning for at least one day their regular activities on which they and their families were dependent for survival. Therefore, in situations where victims had to undertake several of such trips and where they did not clearly understand the purpose and importance of such meetings, it was reported that victims perceived them (and consequently the Court) as “presque inutile”<sup>60</sup>.

Hence, a practice of organising consultations at the local level close to where victims live, as happened in Peru<sup>61</sup>, should be a priority.

53. Special attention should be given to organising consultations with vulnerable groups, such as women and children. Again cultural sensitivity towards these vulnerable groups is an important factor. For example, women consulted by or in the presence of men or together with other members of their community may feel constrained in expressing their views.

National experience suggests that consultations with female victims should be conducted by women, that special regard should be given to the confidentiality of the opinions expressed during consultations, and that in cases related to sexual crimes, consultations should be organised in such a way as to take into account the stigmatisation that may be associated with this type of

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<sup>59</sup> Ibid. 25.

<sup>60</sup> VRWG, ‘Paper on the need to issue a new integrated participation, reparation and indigence forms as well as decisions on victims’ status without delay’ (2010) <[http://www.redress.org/downloads/publications/VRWG\\_paper\\_on\\_forms\\_and\\_backlog\\_Feb\\_2010.pdf](http://www.redress.org/downloads/publications/VRWG_paper_on_forms_and_backlog_Feb_2010.pdf)> accessed 6 July 2011, 2.

<sup>61</sup> C. Correa, J. Guillerot, L. Magarrell, ‘Reparations and Victim Participation: A Look at the Truth Commission Experience’ in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Brill Academic Publishers 2009), 15.



harm<sup>62</sup>.

The experience of Morocco and Indonesia (Aceh Province) shows that a separate consultative process for women taking place prior to the communal one may be beneficial to ensure their effective participation. Such consultations should be organised in places where female victims would feel safe and comfortable to speak out (as in many cultures speaking in public is reserved only for men). It was suggested to use traditional “women's spaces” for such consultations, such as markets, field, kitchens and the like<sup>63</sup>.

54. As regards to children, special effort should be made to avoid their re-traumatisation in the course of consultations. The participation of parents and other adults in consultations may be non-conducive. Therefore, special consultations events may be organised exclusively for children. Any consultations with children should have the principle of the best interest of the child at the forefront and should be organised in full compliance with international law in relation to children, including their right to be treated with dignity and compassion, the right to be protected from hardships of the justice process and the right to privacy.

In Uganda during the national consultations about the 2007 Agreement on Accountability and Reconciliation, a special consultation event was organised for children. In creating an appropriate environment for such consultation process, the organisers took into account the special needs of child protection and at the same time the importance of providing for conditions that would encourage children to frankly express their views about transitional justice issues. The Ugandan experience also demonstrated that “children are very effective in catalysing each other to speak out”<sup>64</sup>.

55. The staff participating in consultations with vulnerable groups should receive appropriate training. In this respect, the Court may seek to benefit from assistance of the specialised agencies and other bodies within the United Nations that have relevant expertise working with various marginalised and vulnerable groups such as UNICEF, UNDP, UN Women, UNRISD and WHO.

For example, the TRC in Sierra Leone received assistance from UNICEF during statement-taking from children as well as at the hearings. The statement-taking staff had training on how to deal in a sensitive manner with children victims of sexual abuse and who had been combatants during the conflict<sup>65</sup>.

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<sup>62</sup> OHCHR, ‘Rule-of-Law Tools for Post-Conflict States, National Consultations on Transitional Justice’ (2009) <[http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ\\_EN.pdf](http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf)> accessed 6 July 2011, 20.

<sup>63</sup> ICTJ, ‘The Concept and Challenges of Collective Reparations’ (Report, 2010) <[http://www.ictj.org/static/Publications/ICTJ\\_Reparations\\_RabatReport\\_pb2010\\_en.pdf](http://www.ictj.org/static/Publications/ICTJ_Reparations_RabatReport_pb2010_en.pdf)> accessed 6 July 2011, 54.

<sup>64</sup> Ibid. 21.

<sup>65</sup> REDRESS, ‘Victims, Perpetrators or Heroes? Child Soldiers Before the ICC’ (2006) <<http://www.redress.org/downloads/publications/childsoldiers.pdf>> accessed 6 July 2011, fn. 350.



### ***f) Assessing the Results of Consultations***

56. If the task of managing victims' expectations is effective at all stages of the processes, the results of consultations should not be dramatically different from what the Court is able to award in terms of reparations. However, a balancing exercise may still be required in view of the possibility of insufficient resources and other limitations.
57. In balancing victims' input with other factors, the Court should be guided by the principle of effective and adequate reparations for all victims who are entitled to them. Therefore, the views of the victims should be given serious consideration<sup>66</sup> and should guide and inform every stage of the reparations process. However, the Court cannot be in any way bound by the victims' views. In awarding reparations, it should assess whether the victims' perspective on the scope and manner of delivery of reparations is reasonable and whether the measures suggested are proportionate to the gravity of the crimes committed by the accused and to the harm suffered by the victims<sup>67</sup>.

### **III. Recommendations: Ensuring a Participatory Reparations Process for Victims at the ICC**

58. In view of the considerations outlined in this paper the following is recommended in designing a participatory approach to reparations.
1. Outreach and sensitisation strategies and activities should be optimised to include a particular focus on the right of victims to reparations, procedures for claiming this right and possible forms of reparation.
  2. Victims should receive effective assistance in applying for reparations.
  3. Victims' legal representatives should play a role in the participatory reparations process by *inter alia* assisting victims in collection and analysis of evidence in support of reparation claims and presenting them to the Court and by providing the Court with generalised observations on the nature, scope and modalities for reparations.
  4. Where the Court chooses to precisely specify the reparations to be awarded in its decision, some form of consultation with victims should take place before the decision is issued, and the Court should take the results of such consultations into account. Where the determination of the modalities of reparations is entrusted to the TFV, the Fund in preparing the implementation plan should conduct consultations.

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<sup>66</sup> OHCHR, 'Rule-of-Law Tools for Post-Conflict States, National Consultations on Transitional Justice' (2009) <[http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ\\_EN.pdf](http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf)> accessed 6 July 2011, 24.

<sup>67</sup> GA res. 60/147, 16 December 2005, para. 15.

5. Due regard should be given to victims' heterogeneity by inviting representatives of all relevant victims' groups to discuss reparations. It should be ensured that such representatives have a legitimate mandate to express the views of victims.
6. Special measures should be taken to ensure the effective participation of marginalised groups in consultations, such as women and children. The staff participating in consultations with vulnerable groups should receive appropriate training.
7. Grass roots civil society organisations should be included in the participatory process both by taking part in consultations on the ground and by providing expert opinions to the Court during the reparation proceedings.
8. Consultations about reparations should be conducted in a way that respects the dignity of victims and their traditions and ensures cultural sensitivity.
9. The ways in which consultations may affect victims' security should be carefully considered. Where a security risk exists, precautionary measures should be taken to ensure that victims are not prosecuted or subjected to violence or other forms of mistreatment.
10. Consultations should not, unjustifiably distract victims from their regular activities on which they depend for survival. At the same time, an understanding among victims as to the importance and value of their contribution to consultations should be created.
11. In organising consultations, the Court may seek to benefit from assistance of the specialised UN agencies and efficiently use the experience acquired by the TFV in the course of implementation of its assistance mandate.
12. Victims should be consulted not only about the scope of reparations, but also about the effectiveness of distribution and quality of services provided while reparations are being implemented.
13. In balancing victims' input with other factors, the views of the victims should be given serious consideration.
14. Any reparations awarded by the Court or the TFV should be designed, taking due account of other reparations programmes currently implemented in the State where the crimes took place, so as to secure consistency.
15. The Court and the TFV should review the achievements and failures of the consultations with victims that have been carried out to date and take the results of such evaluation seriously enough so as to inform their future practice.

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